

**VULNERABLE AND INTIMIDATED WITNESSES:  
A REVIEW OF THE LITERATURE**

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*The views expressed in this report are not necessarily the views of the Review Group or the Home Office.*

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## Summary

Defining vulnerable and intimidated witnesses will be an important factor in influencing whether those in most need of special assistance receive it. This is not straightforward, but some jurisdictions have legislation enabling extra help to be given to "special witnesses" which suggest possible criteria. These include:

- the witness's personal characteristics (such as physical or mental condition, age and cultural background);
- the nature of the offence;
- the relationship between the witness and defendant;
- the nature of the evidence the witness is required to give; and
- the defendant's characteristics (particularly dangerousness).

The literature review focuses on three main groups: intimidated witnesses, those with disabilities and illnesses, and victims of special offences.

### Intimidated witnesses

Several authors have suggested there are different types of intimidation. For example, case-specific intimidation involves threats or violence intended to discourage a particular person from helping a particular investigation. Community-wide intimidation covers acts intended to create a general atmosphere of fear and non-cooperation with the criminal justice system, within a particular area or community. These categorisations are useful because they suggest different approaches may be needed to tackle different types of intimidation.

However, information on the scale and nature of the problem is very limited, partly because of the nature of the problem. Despite this, there is some evidence suggesting:

- victim intimidation is more common than non-victim witness intimidation;
- women are at greater risk than men;
- risk of intimidation seems to vary according to the nature of the initial offence;
- intimidation is more likely when the offender is known to the witness; and
- in most cases, intimidation seems to be perpetrated by the initial offender.

Six tasks for the criminal justice system are:

- minimising risks of intimidation associated with involvement in the criminal justice system (including reporting intimidation);
- preparing for the possibility of intimidation;
- recognising intimidation;
- dealing with intimidation where it occurs;
- preventing further intimidation; and
- mounting a case when no witnesses come forward.

Measures can be identified to assist each task: for example surveillance operations and professional witnesses may be used to mount cases where witnesses will not come forward. Such approaches have limitations though: it seems preferable therefore that more attention is given to the other tasks listed above.

### Witnesses with disabilities and illnesses

More literature was found on the experiences of witnesses with learning disabilities in the criminal justice system than for those with physical disabilities or mental illness. However it appears

that at least five areas of personal functioning may be affected by disabilities and illnesses:

- memory;
- communication skills;
- emotional resilience (including response to perceived aggression);
- mobility; and
- social skills.

Some means of distinguishing those who are vulnerable is needed. Three approaches are discussed:

- drawing up a list of groups who qualify as vulnerable;
- detailing one or more tests to determine whether a particular witness qualifies; and
- leaving the decision to the discretion of the various criminal justice agencies: expert assessments could be used to this end.

Seven themes to improve responses to witnesses with disabilities or illnesses can be identified:

- encouraging reporting;
- identifying vulnerability;
- facilitating communication;
- recognising that a crime has occurred;
- increasing understanding;
- providing support; and
- preventing future offences.

A thread which runs through many of these concerns is the role of carers.

## Victims of special offences

Victims of special offences and possibly others who have suffered repeat victimisation may be seen as vulnerable witnesses. Four main groups are considered: victims of sexual offences, domestic

violence, racial incidents and hate crimes against sexual minorities.

It is difficult to estimate the scale of these crimes, for various reasons including under-reporting (particularly in sexual and domestic violence) and the way these offences are recorded by the criminal justice system (particularly domestic violence and racial incidents). Nevertheless, the evidence suggests that these offences are relatively rare. Sexual offences and domestic violence appear to be much less common than property crime for example, and racially motivated crimes much less common than crimes where there was no apparent racial motive.

Against this, the recorded rates of all three offences have increased in recent years and incidents of domestic violence reported to the British Crime Survey have increased. However, increased reporting could at least partly account for this.

A number of areas were found where the literature suggests the criminal justice response to witnesses of special offences could be improved. Some of these are particular to one offence: for example, having a choice of a female doctor to conduct medical examinations for female sex offence complainants. Other concerns were common. For example one common concern is that seeing the alleged offender in court may be upsetting: screens are one possible response. Some efforts have been made to improve the criminal justice response. However, very little research was found evaluating the effect of these changes. Nevertheless it appears that although some improvements may have been made, there is still concern about how these groups fare.

## Conclusions

Numerous possible measures to improve the situation of vulnerable witnesses are identified within the report, requiring varying levels of intervention. Some are specific to a particular type of vulnerable witness, but many could be applied to more than one group. A number of practical issues about using special measures for vulnerable witnesses are identified, such as whether measures should be granted as a right, and who should have responsibility for providing them. More fundamentally, the use of special measures to protect vulnerable witnesses has implications for justice.

# Section 1: Introduction

## Background

This report summarises the findings of a literature review on vulnerable and intimidated witnesses. The literature review was commissioned by the Home Office to feed into and inform an inter-departmental government review of this area (hereafter referred to as "the review"). The review's terms of reference were as follows:

Having regard to the interests of justice: the importance of preventing and detecting crime, the needs of witnesses and cost effectiveness,

and taking into account the National Standards of Witness (in England and Wales,

- to identify measures at all stages of the criminal justice process which will improve the treatment of vulnerable witnesses, including those likely to be subject to intimidation;
- to encourage such witnesses to give evidence of crime and enabling them to give best evidence in court;
- to consider which witnesses should be classified as vulnerable;
- to identify effective procedures for applying appropriate measures in individual cases;
- and to make costed recommendations."

## Definitions

The definition of a vulnerable or intimidated witness is a key concern for the review. Deciding who should be classified as a vulnerable witness has important practical implications. In particular, where special assistance is available to vulnerable witnesses generally, it will be an important factor in determining whether those most in need of assistance receive it. Clearly there are dangers in drawing the definition too broadly or too narrowly: In both cases, the cost effectiveness of

providing any such special measures would be reduced.

Despite the importance of carefully defining vulnerable witnesses, there is little literature on this subject. This is at least partly because most of the literature examines how individual groups of people experience the criminal justice process, rather than considering vulnerable witnesses as whole. This neglect could also perhaps be related to a concern (noted by the Western Australian Law Reform Commission 1990: 64) that singling out certain groups as vulnerable may be experienced as patronizing or discriminatory.

However, failure to recognise and compensate for inequalities between witnesses seems both inhumane (when this results in stress or trauma for the witness) and unjust. There are other problems: although a group of people may be potentially vulnerable, in practice not all members of the group will actually be vulnerable.

Those authors who have looked at vulnerable witnesses as a whole have generally tackled these problems in the same way:

- first, by suggesting certain conditions where a witness may be vulnerable; and
- secondly, by recommending that the courts be given the discretion to decide whether those conditions are met in the individual

Some examples of the definitions which have been suggested are given overleaf.

**Example 1: Queensland Evidence Act 1977 S.21A (quoted in Law Reform Commission of Western Australia Discussion Paper, 1990: 65-6).**

Vulnerable witnesses are described as "special" witnesses. These are defined as a child under 12 years, or:

"a person, who in the court's opinion -

- (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness;
- (ii) would be likely to suffer severe emotional trauma; or
- (iii) would be likely to be so intimidated as to be disadvantaged as a witness,

if required to give evidence in accordance with the usual rules and practice of the court".

**Example 2: Western Australia Law Reform Commission Report (1991:11)**

The Commission begins by defining a vulnerable witness as: "any competent witness (either for the prosecution or for the defence) for whom the giving or evidence is likely to be especially traumatic or even impossible". However, it then goes on to develop the more detailed definition given in Example 3-

There are a number of similarities between these definitions, suggesting some consensus that certain groups of people may be particularly vulnerable. Most commonly, the witness's personal characteristics are identified as a potential source of vulnerability, namely:

- *physical or mental handicaps or illness*
- *age (the elderly and children); and*
- *cultural background.*

The nature of the offence, nature of the evidence the witness is to give and the relationship between the witness and the defendant have also been suggested as possible causes of vulnerability.

**Example 3: Western Australia Law Reform Commission Report (1991: 116, 121).**

The Commission recommends a dual approach, in which some groups face more strenuous tests than others.

For witnesses with an "intellectual handicap or other mental or psychological disorder or physical handicap" the test suggested is whether the witness "is likely to be unable to give evidence in accordance with the traditional rules and practice of the court".

In other cases, "the court should be able to declare any witness a special witness if, taking into account:

- (1) a person's age, cultural background, or relationship to any other party in the proceedings,
- (2) in a criminal case, the nature of the offence, or
- (3) any other relevant factor.

the court is satisfied that the person

- a) *would be likely to suffer unusual emotional trauma, or*
- b) *would be likely to be so intimidated or stressed as to be unable to give evidence*

if required to give evidence in accordance with the traditional rules and practice of the court" (emphasis added)".

These definitions have a number of limitations:

- Most fail to specify whether they apply to both victim and non-victim witnesses (the exception here is example 2, which refers to both prosecution and defence witnesses). It seems likely that most vulnerable witnesses will be victims of crime, but it is possible that other witnesses could be vulnerable.

*A virtually identical definition was subsequently adopted in the Western Australian Acts Amendment (Evidence of Children and Others) Act 1992 (section 106R).*



- Intimidated witnesses are not usually specified, but seem to be covered in most cases by references TO the trauma suffered by vulnerable witnesses<sup>1</sup>, and those concerning ability to give evidence. This accords with the reviews terms of reference (see above, bullet point one), which treats intimidated witnesses as just one class of vulnerable witnesses.
- None of the definitions encountered suggested the witness's *sex or sexual disposition* could be a source of vulnerability. Yet there is some literature suggesting that both female witnesses and lesbian and gay witnesses may encounter prejudice in their contacts with the criminal justice system. The same is also true of *race*, although "cultural background" (examples 1 & C 3) does touch on this. (See section 4 for further discussion of the evidence regarding sex, sexual disposition and race).
- Nor have any of the definitions considered offender characteristics: in some cases witnesses may be vulnerable because the offender is dangerous.

#### Example 4: Scottish Law Commission (1990).

The Scottish Law Commission suggested the following issues should be considered when granting the special measures it recommends for vulnerable adult witnesses (video-taping pre-trial depositions, screens and live closed circuit television links):

- the age of the witness;
- their physical/mental capacity;
- the nature of the offence;
- the relationship between the witness and the defendant;
- the possible effect on the witness if required to give evidence in open court; and
- the probability that the witness would give better evidence if not required to do so in open court.
- Only one (example 5) allows the witness's views to be taken into account. None of the literature found considered whether witnesses' views should be considered. This is a difficult issue. Witnesses may be best placed to judge whether they would benefit

from special measures, so their advice could be useful for the court. However, it is also possible that some witnesses might reject measures which could help them, for example to avoid being labelled as vulnerable.

In addition to these criticisms concerning the groups covered, there are some limitations worth noting about how vulnerability is defined. First, most of the definitions are restricted to vulnerability arising from giving evidence at court. As the reviews terms of reference suggest, witnesses may experience trauma at other stages in the criminal justice system. Trauma can arise as early as the initial report or at any time until after the case is heard in court (if it ever is). This indicates that a broader criteria of vulnerability is needed than having difficulty in giving effective evidence at court.

#### Example 5: Crime and Punishment (Scotland) Act 1997 s29

The definition adopted in Scotland is much more narrow than the Scottish Law Commission recommended (see Example 4). Under the Act, special arrangements for child witnesses (such as screens, live television links and video-recordings) are extended to adult vulnerable witnesses. Vulnerable adult witnesses are defined as people who:

- are sixteen years or older; and
- are subject to a court order under the Mental Health Acts on the grounds of suffering from a mental disorder; and
- appear to the court to have a "significant impairment of intelligence and social functioning" (emphasis added).

The Act also details three issues for the court to take into account when assessing an application for special treatment:

- "the *possible* effect on the vulnerable person if required to give evidence, no such application having been granted;
- whether it is *likely* that the vulnerable person would be better able to give evidence if such an application were granted; and
- *the views of the vulnerable person*' (emphasis added).

### Example 6: Report of the Advisory Group on Video Evidence 1989 (The "Pigot Report")

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The Group suggested a "test of vulnerability" whereby the courts can declare a witness is vulnerable if they are:

"likely to suffer an unusual and unreasonable degree of mental stress if required to give evidence in open court, having regard to:

- the witness's age;
- their physical and mental condition;
- the nature and seriousness of the offence; and
- the nature and seriousness of the evidence they are to give".

For all victims of serious sexual offences, the Group recommended that there should a rebuttable assumption that they were vulnerable witnesses (1989: 3.5).

The examples given also tend to associate vulnerability with trauma. It could be argued that vulnerability should encompass practical problems in dealing with the crime, or contacts with criminal Justice system or both. Another form of vulnerability is the possible risk of future victimisation. There is evidence that past victimisation increases the risk of victimisation in the future (see for example, Hirrell & Pease 1993- and Lloyd Farrell and Pease 1994), suggesting that victim-witnesses may be more vulnerable than non-victim witnesses .

In practice of course, a witness may experience more than one form of vulnerability. Different forms may be mutually reinforcing: practical problems may add to trauma already felt by contacts with the criminal justice system. It may therefore, be worthwhile defining "vulnerability" more loosely.

#### *Definition used for the literature review*

To avoid unduly restricting the scope of this literature review, the definition used in this report is a broad one (see example 7). This definition is not proposed for the review in considering any future legislation: it is however intended to avoid excluding any potential groups of vulnerable witnesses the review team might wish to consider.

### Example 7: Literature review definition

For the purpose of the literature review, a vulnerable witness is any witness (whether a victim or not) who is likely to find:

- witnessing a crime;
- any subsequent contact with the criminal justice system;

unusually stressful, upsetting or problematic, because of:

- their personal characteristics;
- the nature of the offence;
- the nature of any evidence they are called upon to give at any stage to assist the justice process;
- the offenders characteristics;
- any relationship between them and the defendant; or
- intimidation.

## Report Scope and Structure

### *Scope*

The scope of the report has inevitably been limited by practical constraints. The focus of the report has been restricted in two main ways. Firstly, *child witnesses* were excluded because this sizeable area of literature would have been impractical to include given time constraints. This is, however, an area the Review has examined separately.

Secondly, by necessity the report covers only those groups whose experiences of witnessing have been documented. This means that some groups, for whom there is very little or no relevant literature cannot be considered in detail although certain characteristics specific to them will be covered:

- *The elderly*

No literature was found examining the experiences of elderly witnesses. It seems reasonable to assume that, where elderly witnesses are vulnerable, at least in some cases this may stem from mental or physical disabilities/illnesses which become more common in old age (covered by section 3).

- *Repeat victims*

Again it is not clear whether repeat victims tend to find witnessing more upsetting or problematic than other groups. It is possible that they may have special difficulties, for example in receiving an inappropriate police response because they have not been identified as repeat victims. However, there is now significant awareness of this issue, and efforts are being made to give repeat victims special assistance (tackling repeat victimisation is one of the police's key performance indicators). Repeat victims are discussed in section 2 in relation to witness intimidation, and in section 4 regarding some special offences such as domestic violence, where repeat victimisation is common.

- *Lesbian and gay witnesses*

There is a small body of literature examining the law (primarily in relation to the age of sexual consent) and police attitudes to and treatment of this group. This suggests that witnessing may be upsetting or problematic for these groups. Lesbian and gay witnesses are considered under section 4

on special offences, which also discusses issues of sex and race.

Finally, it is worth drawing attention to the possibility of multiple membership of the various groups of vulnerable witnesses (for example, a black disabled rape victim). It is likely that membership of more than one group of vulnerable witness may compound the negative experiences and perceptions involved in witnessing.

#### *Structure*

The report is divided into five sections. Sections 2 - 4 each examine a different group of vulnerable witness. Section 2 examines intimidated witnesses; section 3 looks at those who are vulnerable because of physical and mental disabilities and illnesses; and section 4 cases where the nature of the offence can make a witness vulnerable. Each of these sections begins by examining the nature of vulnerability associated with the group in question, and then discusses possible measures to ameliorate the problem. Finally, section 5 draws some conclusions.



## Section 2: Witness Intimidation

### The Problem

Witness intimidation can discourage some witnesses from reporting crime or coming forward with other evidence, and could cause cases that do go ahead to be lost or abandoned. At a more general level, it is thought to undermine both public confidence in the criminal justice system and its effectiveness. Until recently witness intimidation could only be prosecuted under the common law offence of perverting the course of justice, which also covers other acts such as making false allegations of crime. The 1994 Criminal Justice and Public Order Act created two new offences:

- intimidating a witness; and
- harming or threatening to harm a witness.

### Legal Definition

The legal definitions of witness intimidation and harming or threatening to harm a witness under the Act both cover:

- threats to harm someone and acts to harm them;
- physical and financial harm to the person or the property; and
- acts or threats against a third party (for example a relative of the person they want to intimidate).

in addition:

- The act or threat must be intended to intimidate: so for example, a casual remark that someone should not bother going to the police, intended merely as comment or persuasion would not be counted. In practice of course, it may be difficult to distinguish at what point an effort to persuade becomes intimidation.

- The perpetrator must know or believe that the other person is helping or has helped an investigation, is a witness or potential witness, juror or potential juror<sup>1</sup>.
- The perpetrator must have acted or threatened the person because they believed this, and with the intention of obstructing the course of justice. In many cases it may be difficult to prove that the perpetrator intended to pervert the course of justice. Consequently, the Act says that this intention will be presumed unless the contrary is proven.

The difference between the two offences is that witness intimidation applies to current investigations, but harming or threatening to harm a witness applies only after the trial has ended. So for example, if the intimidation occurred because the perpetrator believed the witness had helped with the investigation of an offence at some point *in the past*, the offence would be harming or threatening to harm a witness<sup>1</sup>.

*Juror intimidation is not specifically examined by this report, but it is worth noting that some of the measures reported in relation to witness intimidation may also be applicable to juror intimidation.*

*No time limits have been set for the prosecution to bring such a case. There are however time limits on the presumption of intent, meaning that intent cannot be presumed in cases where the alleged harm or threat occurred outside the relevant period (usually within a year of the act or within a year of conclusion or the trial or appeal when intimidation occurred during the trial).*

### *Types of intimidation*

Several authors have identified different types of witness intimidation (see examples 1 to 3 below).

#### **Example 1: Case-specific and community-wide intimidation (Healey 1995:1)**

Healey (1995:1) distinguishes two types of intimidation:

- *Case-specific* intimidation involves threats or violence intended to discourage a particular person from helping a particular investigation; whereas
- *Community-wide* intimidation covers acts intended to create a general atmosphere of fear and non-cooperation with the criminal justice system, within a particular area or community.

Two points are worth noting. First, Healey emphasises that community-wide intimidation is potentially as harmful to the criminal justice system as case-specific intimidation. Secondly, the two forms are interrelated: each example of case-specific intimidation reinforces community-wide intimidation.

#### **Example 2: Traditional, cultural and perceived intimidation (ABA 1981:1)**

Another classification has been suggested by the American Bar Association (1981:1):

- *Traditional intimidation* occurs when threats or acts are made against a witness, their property or a member of their family;
- *Cultural* intimidation occurs when friends or family of the witness try to dissuade them from assisting an investigation; and
- *Perceived intimidation* occurs when fear of possible intimidation or retribution is felt by a witness.

It should be noted that neither cultural nor perceived intimidation are covered by the English legal definition of witness intimidation (see above). Most cases of cultural intimidation would also be excluded by the English definition,

probably consisting of attempts to persuade rather than attempts to intimidate. At least some community-wide intimidation, where the behaviour is not directed towards individual witnesses, may also be excluded. These categories are worth considering however, given that they may all produce the same effect in undermining the criminal justice process,

#### **Example 3: Three tiers: small core, middle ring and outer ring (Maynard 1994:1)**

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Maynard (1994: 1) takes a slightly different approach, identifying three tiers:

- The *small inner core* consists of the most serious cases, where intimidation is life-threatening. These witnesses need high level protection such as changes of identity and relocation;
- The *middle ring* comprises those witnesses who have experienced non life-threatening intimidation; and
- The *outer ring* covers people who are discouraged from reporting by the perceived risk of threats or harm, even where they themselves are victims of crime. (There is some overlap between this outer ring and both personal and community-wide intimidation).

There are some similarities between the categories. For example:

- case-specific intimidation (example 1) is much the same as traditional intimidation (example 2);
- community-wide intimidation (example 1) is similar to perceived intimidation (example 2). (The main difference is that the former is deliberately fostered by offenders, whereas the latter is not necessarily intentional); and
- perceived intimidation (example 2) is similar to Maynard's outer ring (example 3).

These categorisations are useful because they suggest that different approaches may be needed to tackle different types of intimidation. For example, Maynard observes that of the three tiers he identifies, the inner core has been given most

attention. However, the high-level protection schemes designed for them are not suitable for most witnesses:

- the schemes are expensive;
- they require major life changes (such as moving to a new area and severing all contacts from the past) by witnesses, which could be viewed as penalising them; and
- most witnesses would not be willing to make such drastic changes to their lives.

This suggests that alternate measures need to be examined for the middle and outer rings (Maynard 1994: 2-3). Other measures would also be desirable for the inner core witnesses who are not prepared to take part in high-level protection schemes. As Maynard notes, this needs to be based on a strong understanding of the problem of witness intimidation affecting these groups, but at present very little is known.

### *Research on the scale and nature of the problem*

The literature review found very little published research on the size and nature of the witness intimidation problem:

#### 1- Criminal Statistics

In 1996, there were almost 300 convictions for witness intimidation and harming or threatening to harm a witness in England and Wales (internal note, 31/10/97). A further 2,000 offenders were found guilty or cautioned for perverting the course of justice (Criminal Statistics England and Wales 1996).

Of course, not all the convictions for perverting the course of justice will have involved witness intimidation. Other forms of interference with justice will have been included, such as bribery and supplying false information to a police officer. Unfortunately it is impossible to say what proportion of these cases were for witness intimidation on the information available<sup>1</sup>.

*It seems likely that bribery of witnesses is less common than intimidation: bribery inevitably costs the perpetrator something, whereas intimidation can be achieved free. However, it is impossible to estimate how common other forms of interference with justice (for example supplying the police with false info: mutton) are in comparison.*

Even when convictions for perverting the course of justice are included, less than 1% of offenders convicted in 1996 were convicted for witness intimidation. This probably greatly underestimates the scale of the problem: witness intimidation may mean that the initial offence is never reported, let alone the offence of witness intimidation.

#### 2. Crown Prosecution Service Survey

Another source of data is the Crown Prosecution Service, which takes decisions on whether to prosecute cases in consultation with the police. Maynard reports the findings of an unpublished survey by the CPS. Crown Prosecutors completed a questionnaire whenever a case was discontinued in the Magistrates' Courts during one month in 1993. In three quarters of cases where the prosecution was unable to proceed, the reason given was that a key witness was missing or refused to give evidence. According to Maynard (1994: 4-6) this accounts for over 1% of the cases dealt with by the CPS each year, although not all these will have been the result of intimidation.

#### 3. Police Research Group Study

The Home Office Police Research Group (PRG) did some research in 1993 to provide more information about the scale of the problem. Insufficient resources were available to conduct a large scale survey to obtain a representative sample. Instead, the upper limits of the problem were measured using a house-to-house survey in five high crime housing estates. This found that 13% of crimes reported by victims and 9% by other witnesses were followed by intimidation. Six per cent of crimes experienced by victims and 22% of those mentioned by other witnesses were not reported to the police because of intimidation (Maynard 1994: 12-14).

These findings should be treated with caution. While it is reasonable to believe that the rates of intimidation found were higher than that in the general population, the research highlighted a potential problem in using small sample surveys to measure crime: sometimes witnesses perceive intimidation where none exists. For example, Maynard found that some of those respondents reporting intimidation were actually repeat victims. In some crimes it can be difficult to decide whether intimidation is real or perceived as the result of repeat victimisation (1994: 17). Occasions where

acts are intended to intimidate but are not perceived as such by the victim are probably fewer, suggesting that this approach truly tends to overestimate the extent of witness intimidation.

#### 4. British Crime Survey

Finally, the British Crime Survey asks people about their experience of crime over the previous year and whether they made a report. The survey does not routinely ask people about their experience of witness intimidation, but does examine victims' reasons for failing to report offences to the police. One of the strengths of this survey is its size: the core sample for the 1996 survey covered 15,000 people. Another advantage is the survey's high response rate (83% in 1996). Both factors give confidence that the survey findings are likely to be typical of the general population.

The 1996 survey found that:

- The most common reasons given were that the offence was too trivial (40%) or that the police could not do anything (29%).
- Fear of reprisals accounted for only 4% of all cases not reported, but 11% for both assault and robbery cases (Mirrlees-Black, Mayhew & Percy 1996: 2).

Maynard (1994:8- discussing the 1992 survey) suggests the high rate for non-reported assault is probably because the victim and defendant are more likely to know each other, so the opportunities for intimidation are greater. Similarly, in robbery the victim is more likely to be able to identify the offender than in other property offences.

Special questions were included on witness intimidation in the 1994 survey (Dowds & Budd 1997: i). These included the extent of intimidation, who was responsible for it, and the nature of the crime witnessed. The main findings were:

- Victim intimidation was much more common than non-victim witness Intimidation.

*Figures taken from the 1996 British Crime Survey Technical Report by J.Hales & N. Stratford, and table from Social and Community Planning Research, London.*

Seventeen percent of victims and 4% of other witnesses reported intimidation (Dowds and Budd 1997: i & ii). This would be expected, given that victims are more likely to know the offender than non-victim witnesses. However, this probably overestimates the size of the difference. The figure for victims is probably higher than in the general population of victims, because the victim sample was restricted to people who had some knowledge of the offender. Dowds and Budd (1997: 5) estimate that at minimum 6% of all crimes reported in the 1994 survey were followed by intimidation of victims.

- Most intimidation involved verbal abuse and then threats, with physical assaults and damage to property less common.

Incidents often involved more than one type of harassment (Figure 1). For victims, 71% of intimidatory incidents involved verbal abuse. 41% involved threats, 16% physical assault and 9% damage to property. A very similar pattern was found for other witnesses (73% reporting verbal abuse, 34% threats, 12% physical assault, and 9% damage to property).

- In most cases the original offenders were thought to have been responsible for the intimidation.

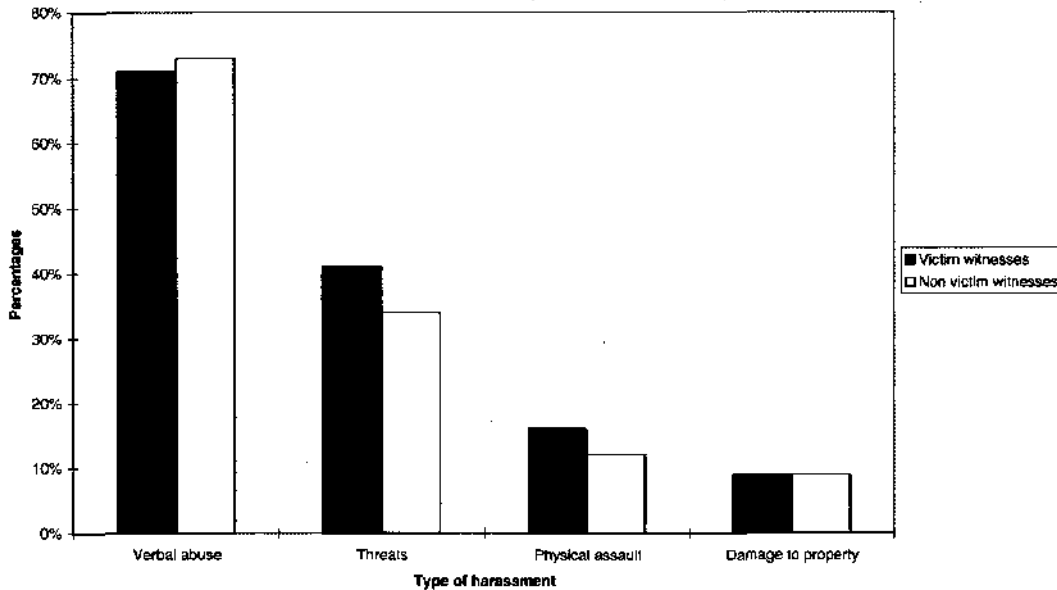
• Questions about the identity of harassers were only asked of respondents who had information about the offender, so - as the researchers state - this finding is not surprising. The relationship between the victim and victimizer is more interesting, i.e. female victims were more likely than men to be intimidated by ex-partners or partners. Men were more likely to be harassed by other relatives or household members, and by work contacts. Similar proportions of men and women were intimidated by friends or neighbours (Dowds & Budd 1997:7).

- Intimidation was more common if the witness reported the initial offence to the police, but failure to report did not guarantee immunity.



**Figure 1: Types of harassment experienced by witnesses**

Source: Dowds, L and Budd, T (1997: From Tables 4 and 10)



**Note:**

1. Percentages do not add up to 100 as witnesses can experience more than one type of harassment

Harassment was almost twice as likely where the initial incident was reported to the police: 20% of those victims who reported were intimidated compared to 14% of those who did not report. The original offence was twice as likely to be reported as intimidation, and the likelihood of reporting intimidation was tied to reporting patterns for the initial offence. Those who had not reported the initial offence were much less likely to report harassment (3%) than those who had reported the initial offence (19%). Non-victim witnesses were more likely to report intimidation (39%) than victims (23%) (Dowds & Budd 1997: 8-9 & 13-14).

Women were more at risk than men.

Female victims were more likely to be intimidated than men (19% as against 14% of men). This difference applied whether or not the initial offence was reported and even though a higher proportion of cases against women were not reported because of fear of reprisals (Dowds & Budd 1997: 4 & 9). This could have been at least partly because women were more likely to know the offender than men.

- Risk of intimidation varied according to the nature of the initial offence.

Victims reported higher rates of intimidation following sexual offences, vandalism and assaults than for other crimes. Similarly, non-victim witnesses were more likely to be intimidated following assaults and vandalism. A possible explanation is that intimidation might be greater in "expressive" offences (directed against a particular victim) than "instrumental" offences (motivated by personal gain). (Dowds & Budd 1997: Tables 2 & 9).

These findings are useful, but the representativeness of the victim sample (as opposed to the witness sample) is questionable.

The sample was restricted to victims who knew something about the offender's identity. Intimidation is less likely in cases where victims do not know the offender's identity, but the prerequisite for intimidation is that the offender can identify the victim in some way. The offender may fear the possibility of a police investigation uncovering his/her identity, not just what the victim could tell the police.

The BCS also reinforced Maynard's finding that repeat victimisation and intimidation are bound up with each other. In repeat victimisation, harassing the victim may be part of the motive and effect of both the initial and subsequent offences. Viewing only second and subsequent victimisations as intimidation may be inappropriate. Dowds and Budd acknowledge that this depends though on what we want to measure, if the concern is to measure intimidation as defined by the law (in other words where the intent is to obstruct the criminal justice system) it is necessary to separate victimisations intended to dissuade the victim from cooperating with the justice system (Dowds and Budd, 1997: 10-11).

From this point of view, including all repeat victims as victims of intimidation may inflate the 'real' level of intimidation as defined by the law. Excluding them may underestimate the problem. This suggests further information is required: Dowds and Budd suggest one measure might be whether victim-witnesses felt the aim was to discourage them from the criminal justice system (1997: 11). However, complicating matters further the law says that intent to obstruct the course of justice can be assumed if the offender believed that the victim was a witness or a potential witness. If intent can be assumed by the courts, a question is raised about whether researchers need to examine intent when trying to measure intimidation. Deciding on the best way to measure intimidation is clearly far from simple.

### *Outstanding questions*

The paucity of information means little or nothing is known on several important questions:

1. What is the trend in the rate of witness intimidation?

Several authors have claimed that the problem of witness intimidation is rising (see for example Clarke 1994, 12; Palmer 1994, 10; Reville 1995, 1775) but hard evidence is lacking. The two most recent sweeps of the British Crime Survey (1994 and 1996) have found that increasing numbers of people attribute their failure to report crimes to the police to fear of reprisals. However, the increase (from 2 to 4%) may not reflect a real rise in fear of reprisals but may simply be due to chance. For example some offences are more likely to be reported than others, so differences in the types of offences reported could explain this.

Sampling error could also account for [the apparent increase.

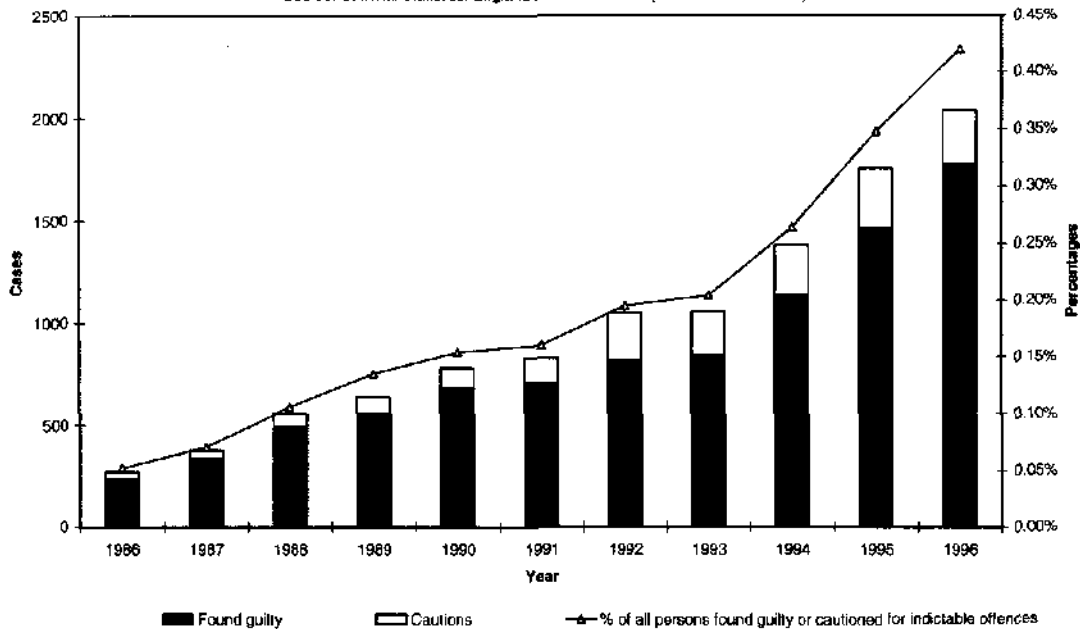
Similarly, the number of convictions for witness intimidation rose more than threefold from almost a hundred convictions in 1995 (internal note, 18/9/97). This may well have been related to increased awareness of the new measures. The number of offenders found guilty or cautioned for perverting the course of justice has also increased sharply, from 275 cases in 1985 to over 2,000 in 1996 (Figure 2). This may indicate that witness intimidation is growing, but it is not certain that cases of intimidation accounted for the increase. Even if cases of intimidation do account for this, the increase may not reflect an increase in witness intimidation in general. Greater convictions might be related to growing awareness of, and harsher attitudes towards, witness intimidation within the criminal justice system. More specifically, police officers and Crown Prosecutors may be more willing to pursue a case of perverting the course of justice now that greater support (from specialised police units) is available to intimidated witnesses.

Perhaps less plausibly, reporting rates may also have increased. Rape reporting is said to have increased as police treatment of rape victims improved (through setting up rape suites for example): the creation of specialist units in some forces to deal with witness intimidation might have had a similar effect.

2. How does the scale of the problem in England and Wales compare with other countries?

The lack of research on the scale of witness intimidation exists in other countries, it is likely that some countries have a greater problem with witness intimidation than others, just as crime rates in general vary. For example, it has been suggested that we have a greater problem than the rest of Europe (Clarke, 1994: 12), although no firm evidence was given to support this. Similarly, witness intimidation may be greater in America, where it has been acknowledged as a common problem. Suggestions that the problem is rising have also been made in America. For example Healey (1995: 1) interviewed a number of criminal justice professionals from 20 jurisdictions, and found that most agreed that intimidation was rising. However, she also observed that:

**Figure 2: Offenders found guilty of or cautioned for perverting the course of justice, 1986 - 1996**  
 Source: Criminal Statistics, England and Wales 1996 (London: Home Office)



"A decade ago, commentators no red that only unsuccessful intimidation attempts ever came to the attention of the police and prosecutors. Today, prosecutors report that extremely violent intimidation attempts - which are almost always successful - are coming to their attention with increasing frequency" (Healey, 1995:2).

This suggests that witness intimidation may be becoming more serious in America, but it is also plausible that increased reporting is a factor.

3. Who is at greatest risk or intimidation?

In theory any witness might be a victim of witness intimidarion. The possibility of obtaining a criminal record and being punished may lead to witness intimidarion however trivial the initial offence. In practice, there is some support for the idea that the risk of intimidation is nor equally distributed:

- a. Intimidarion is more prevalent in some types of crime than others.

The types of crime involved may help decide what the most appropriate response is. The BCS and PRG data suggests that intimidation is more likelv for witnesses of

assault than some other crimes: *I* lealey goes further and suggests that a violent initial crime generally increases the chance that a victim or witness will be intimidated. More information could be collected. It seems plausible that intimidation may also be prevalent where the stakes are highest, such as in organised crime where large sums of money are involved. In America, drug crime is thought to be strongly associated with witness intimidation, although again no firm evidence of this was found by the literature review (Healey 1995, 1: Los Angeles Times 14/1/97: Reuters News Sen-ice 12/1/97).

- b. Some groups of witnesses are at greater risk of intimidation than others.

The BCS report suggested that victims were moie vulnerable than non-victim witnesses, and female victims (particularly those aged between 31 and 60) were more vulnerable than men. Victims who knew the offender wete also more likely to be intimidated, although this may be due to bias towards this group in die survey design. Again further information would be useful, it seems plausible that witnesses who are vulnerable for other reasons (such as

learning disabilities) may make easier targets and therefore be more prone to intimidation than "ordinary" witnesses (Healey 1995:3).

- c. Intimidation will be more common when the offender is known to the witness.

The BCS findings give some support to this idea, although (as noted above) the survey design was restricted to victims who knew the offender. For intimidation to occur, the harasser must be able to locate the witness: this is obviously more likely when they were previously known to each other.

It does not follow, however that the victim must know the offenders' identity- Nor does it follow that the original offender necessarily intimidates the witness him/herself. Relatives or friends of the original offender may be the harassers, having learnt the witness's identity from the original offender. For example, a Victim Support study (1996: 12) found that a third of Victim Support schemes reported intimidation of rape victims by family or friends of the defendant, against about a quarter who reported intimidation by the defendant (see below for more discussion of this study).

A related consideration (not examined by the BCS report because the sample size was too small to draw firm conclusions) is whether people who are intimidated by partners, ex-partners or other relations are less likely to report than those intimidated by others. There may be particular pressure when relatives are involved, where there may be concerns about bringing shame on the family and about how other relations would react. Against this, it could be argued that threats or intimidation from people who are known to the victim might be perceived as less real or serious than when strangers are involved.

- d. Geographical proximity to the offender increases risk of intimidation.

Healey (1995: 3) also suggests that risk of intimidation will be greatest when the witness lives, works or studies near to the offender. It is likely that opportunities for intimidation will be higher if the witness

and offender live or work near each other than if they spend their lives miles apart. This does not however, appear to have been covered by any of the research to date.

Sometimes these factors will be interlinked. For example:

- victims of violent and sexual crimes are more likely to be acquainted with the offender than victims of property crime; and
- geographical proximity to the offender may be more common where the witness and offender know each other.

This will clearly increase the risk of intimidation. In addition, victim witnesses of some sexual crimes such as rape may be vulnerable for other reasons. The difficulty of proving rape, and prospects of an internal medical examination, public examination of intimate sexual behaviour in the courtroom and media reporting may all make rape victims particularly vulnerable (see chapter 4).

4. When are witnesses at greatest risk of intimidation?

Research on repeat victimisation has found that risk or subsequent victimisations is greatest immediately after an offence. This has been very useful in deciding when to intervene: preventive efforts will be most effective: when implemented as quickly as possible following an offence. Information on when the risk of intimidation is greatest might also have important implications in determining what the most effective response from the criminal justice system might be. Only the PKG study examined this, but little information was given, just that intimidation occurred at two main points: either "soon after the initial crime" or "at the time of the court appearance".

5. How do intimidated witnesses view the criminal justice process and (where relevant) what are their experiences of it?

Only two pieces of research were found that examined intimidated witnesses' perceptions and experiences of the criminal justice process, and how it could be improved. One was the PRG study which found some dissatisfaction with the police response, including the information and

advice given at the time and is the case proceeded (Maynard 1994: 23). Some of these concerns, such as not being told whether a suspect had been given bail, may be common to other witnesses although they take on special importance in relation to intimidation. (Maynard's findings on this subject are discussed further below).

The second was research on rape victims' experiences of the criminal justice system, based on questionnaires sent to Victim Support schemes. Of those schemes reporting contacts with victims who had been re-assaulted or harassed since the original attack, almost half felt police protection was insufficient. About half of witness services reported rape victims generally were frightened of facing the defendant(s) and supporters in court. Some of this may have been about bringing back bad memories rather than concern about their own safety though. The survey has two main weaknesses: a low response rate (25%) common to this kind of research, and the fact that women's experiences were reported secondhand through Victim Support staff rather than from the women themselves (Victim Support 1996: 13, 16). Further research on how intimidated witnesses view and experience the justice system is clearly needed.

6. What is the extent and nature of community-wide and perceived intimidation?

It should be noted that all of the existing research focuses on case-specific intimidation: that is intimidation against a particular person. Nothing is known about the scale and characteristics of community wide intimidation - intended to create a general atmosphere of intimidation - nor of perceived intimidation, where the possibility of intimidation suffices. This is perhaps partly because these forms of intimidation will be more difficult to measure.

## 2. The Response

The literature review found that very little material has been published on how witness intimidation is being tackled, either here or abroad. This may partly be explained, by the need for security, and fear that details or the approaches used to counter the problem could be used by the perpetrators, it may also be related to the neglect of the issue of witness intimidation more

generally, which is only now beginning to be rectified. Nevertheless, it is possible to identify a number of areas where measures could be implemented to enhance the prevention, detection and prosecution of witness intimidation.

### a. Reporting

As noted earlier, it seems likely that most cases of witness intimidation and many of the initial crimes witnessed are not reported. This suggests that measures are required at an early stage both to prevent witness intimidation, and where it occurs to encourage and support witnesses in reporting. In practice, the earliest point for which measures have been proposed is when a witness reports an offence to the police. These can be divided into:

- minimising the risk of intimidation associated with reporting;
- recognising intimidation; and
- preventing further intimidation.

### Minimising the risks of intimidation

Reporting arrangements can provide opportunities for witness intimidation. For example, Maynard (1994: 18-19) details one case where a witness's identity was inadvertently revealed to the offenders after the crime was reported. In this case, offenders were listening to police radio frequencies to know how quickly they had to escape, when the witness was identified over the radio to officers being dispatched to the scene. The recommendation here was to ensure that as little information as possible be given over the radio to enable officers to respond.

Another case is reported where a witness, who reported a burglary and was visited by police to take a statement, received a brick through her window shortly afterwards. To avoid similar occurrences, Maynard (1994: 19-20) recommends several alternatives be considered:

- delaying visits to take statements and use of plain clothes officers where possible;
- conducting house-to-house calls on neighbouring properties to avoid picking out the witness; and

- inviting the witness by telephone to visit a police station to make the statement.

Maynard recommends that [the choice is left to the witness wherever possible, but clearly views the third option as the most viable. He notes that the first option runs contrary to the Audit Commission's recommendation that only one visit should be required, and could be ineffective if offenders can identify plain clothes police officers as such. The second option would increase demands on patrol officers, but the third option would reduce them. However, asking witnesses to visit a police station to make a statement would require more effort for the witness and for the police: some planning would be required by the latter to ensure that suspects are not being interviewed or held at the station at the same time. To avoid witnesses and suspects meeting, the custody officer and investigating officer will need to liaise.

#### Recognising intimidation

As well as measures designed to avoid intimidation resulting inadvertently from reporting procedures, other measures might be considered to help identify intimidation at this stage. No suggestions were found in the literature on this, but several possibilities can be proposed:

- profile raising: increasing police awareness of the problem through police training, force newspapers, posters and the local policing plan;
- guidance: issuing guidance on how to spot signs of intimidation;
- statement taking and interviewing: requiring officers to ask witnesses if they have received any threats or harm to dissuade them from assisting the police.

Of the three suggestions the first seems the most practical. The second option may be hindered by the limited state of knowledge of witness intimidation at this stage. The third would require some system of checks to ensure that the requirement was adhered to. It also seems plausible that officers will be unwilling to ask witnesses if they are being intimidated without being certain that back-up support was available for those who respond positively. However, the Victim's Charter (1996: 3) does state that victims can expect the police to ask about their fears of

further victimisation and suggests they should have an opportunity to explain how the crime has affected them. Pilot projects looking at how this might work are currently being evaluated by the Home Office.

#### Preventing further intimidation

Once intimidation has come to police attention, various measures can be implemented to prevent further harassment. The traditional approach has been to offer some form of police protection (Maynard 1994: 1) such as:

- increasing police patrols in the witness's neighbourhood;
- police transport to take the witness to and from work, school, shops and so on;
- 24 hour police presence;
- emergency relocation;
- long-term relocation, which may be accompanied by a change of identity; or
- protective custody.

All are expensive, and some might be viewed as penalising the victim. Unsurprisingly, Maynard's (1994: 1) research suggests that such measures are only used in the most serious cases.

Only one suggestion was found for assisting the larger number of witnesses subject to non-life threatening, but potentially deeply upsetting intimidation. Farrell, Jones and Pease (1993: 131-132) suggest that witnesses could be loaned personal alarms, which will notify police if they need help and generate a rapid response. This would have several advantages:

- It would be less expensive than the traditional approaches, removing the need for a constant police presence while still offering protection round the clock.
- Some police forces are already accustomed to using these alarms to protect other vulnerable witnesses, particularly repeat victims.
- As well as reassuring victims and ensuring that further intimidation will receive a fast

and informed response, there is some (albeit limited) evidence that they may deter offenders (Lloyd, Barrell and Pease 1994: 10-20).

- Following on from this, if those witnesses who are most at risk of intimidation can be identified, alarms might also be used to prevent it occurring in the first place.

At present our limited knowledge of witness intimidation could make it difficult to identify who should benefit from such measures. Despite this it may be possible to identify some cases where pre-emptive action would be warranted, for example where:

- the suspect has a record of witness intimidation;
- the witness has a previous relationship with the offender;
- the witness is vulnerable in some other way;
- no other witnesses have come forward, and the witness's testimony is essential in an important case.

#### *b. The Investigation*

Three areas are discussed below concerning investigation:

- reducing opportunities for intimidation;
- preparing for the possibility of intimidation; and
- mounting a case when no witnesses will come forward.

#### Reducing opportunities for intimidation

The manner in which an investigation is conducted can place witnesses at risk, in particular by revealing the witness's identity to a suspect. One point where witnesses can be placed in a vulnerable position is at an identification parade. Maynard (1994:20) reports such two cases. In the first, the police asked a witness to identify the suspects at the scene, following a rapid response to the witness's telephone call. The witness was asked to walk past a bus queue where the suspects were standing along with other members of the public.

A few days after the positive identification the witness's bicycle was damaged and the witness verbally abused. In another case, the suspects were caught trying to get away with stolen goods. The two witnesses were asked to look in the van where the suspects were held in order to identify them: in this case they refused to do so for fear of reprisals.

It is difficult to say whether these were isolated incidents. Recent enquiries by the Home Office found that all police forces in England and Wales now either have their own screens or access to screens for identification parades, some of which are one-way mirrors (internal note, July 1997). An unknown number of forces also have purpose built identification suites or use video-identification. However, the mere existence of these facilities is not enough: they obviously need to be used routinely. It is not known how much use is made of these approaches at present, nor whether there are any obstacles to their use.

Clearly interviews with suspects may also present another occasion when officers can place witnesses at risk by revealing witness's identities. Even if the suspect is held in custody there is no guarantee of the witness's safety: the Victim Support study referred to earlier suggests the suspect's friends or family may decide to act on their behalf (Victim Support 1996: 12). Nevertheless, it seems likely that some officers feel justified in telling suspects the witness's identity on the grounds that it may reveal that a witness has some motive for fabricating claims. In some cases, the suspect may ask officers this question outright. In others, they may declare strong suspicions about the witness's identity, which if left unanswered could be taken as a tacit admission that their suspicions are well founded.

Some possible measures to discourage the practice are:

- raising police awareness of witness intimidation (see section a above on reporting);
- guidance on when it is appropriate to reveal a witness's identities;
- requirements not to reveal witnesses' identities in certain circumstances.

Against this, it should be noted that pressure to identify witnesses before interviews may come

from solicitors. The solicitors' argument is that without knowing all the evidence against their clients, they are unable to give adequate advice. Failure by police to disclose the evidence they have may mean that solicitors advise their clients not to answer questions, frustrating the purpose of the interview'. This is based on the idea that suspects may *need* to know the identity of their accusers to defend themselves (for example, so that they can say if the accuser might have some reason for falsely accusing them). The question of whether police officers should disclose all the evidence against a suspect prior to an interview, including the witnesses identity, is therefore a complicated issue. (The issue of anonymity will be considered again later on).

#### Preparing for the possibility of intimidation

Measures can also be taken at the investigation stage in case a witness is subsequently successfully intimidated from testifying, or into changing their evidence (known as "flipping"). Admitting other evidence, such as signed statements and taped or video-recorded interviews, is one option. In the past this has been problematic: there is a general ban on admitting "hearsay" evidence because the defence has no opportunity to cross-examine to test the evidence. The 1988 Criminal Justice Act moved some way to rectify this: under section 23 of the Act written statements are now admissible if:

- the statement was made to a police officer; and
- the person who gave it is not giving oral evidence "through fear or because he is kept out of the way".

Figures on the use of this provision are kicking, but anecdotal evidence suggests that little use has been made of it. Two main explanations have been suggested:

- concerns about the validity of statements prepared by the police; and

*Preliminary findings from research currently being conducted for the Home Office suggest that this practice of pressuring police officers to reveal evidence before interview has increased since the right to silence provisions were introduced (internal note, 28/10/97)*

- concern that defence counsel will not have an opportunity to cross-examine

The second point is addressed in relation to admission of evidence in section c - "the trial" (below). Of most relevance at the investigation stage is the second point<sup>1</sup>, which refers to claims that witness statements are not a *very* exact record. Statements are prepared by the police, condensing information obtained from interviews into legal jargon which the witnesses may not recognise as their own words. Unlike interviews with suspects, interviews with victims do not have to be tape recorded or written down verbatim. There is therefore, some potential for distortion.

Taping or video-recording interviews might increase the credibility of this evidence (Wolchover & Heaton Armstrong 1997: 855-85~). Of the two, tape recording seems more viable. The police are used to taping other interviews, and already have much of the equipment required. Video-recording would require additional equipment which the police are not used to operating, and also raise greater problems in storing tapes.

Mounting a case when no witnesses come forward

Of course in some cases, no witnesses are prepared to come forward. In these situations, there are at least two options:

#### 1. Surveillance operations

The traditional approach has been for the police to mount surveillance operations. This however, depends on the police having some other source of information about likely suspects. It also requires cooperation from certain members of the public, such as those who allow the police to use their premises. Clearly those people who do assist the police in this way may be at risk of intimidation if their identity or the fact that a surveillance operation is being conducted is revealed. The former may be a particular problem if a home or shop is used for just a few minutes without prior planning.

#### 2. Professional witnesses

A more recent idea has been to employ professional witnesses. At present, their use appears to have been limited to housing authorities wishing to evict problem tenants. The



professional witness is employed to move into a nearby property under the guise of being a normal tenant. They then record anti-social behaviour by the subject until sufficient evidence has been amassed.

The literature review did not reveal any published material on this practice, but was able to draw on information submitted to the review. According to the Department of the Environment (submission June 1997)- the service is usually provided by the authority's own housing; officers, environmental health officers or a private company. The Local Government Association (submission August 1997) also suggests police officers may be used. Together they identify a total of seven authorities thought to have used professional witnesses. Both highlight a number of drawbacks:

- Certain conditions will need to be met for the use of professional witnesses to be feasible. For example, the behaviour causing concern must take place in a restricted geographical area. The area has to be sufficiently open and well-lit for offenders to be identified, and an empty property has to be available nearby. There are unlikely to be many cases meeting all these conditions.
- The courts have, on occasion, been reluctant to make a repossession order without testimony from the victim. As a consequence, the 1996 Housing Act included a provision intended to validate evidence from non-victim witnesses. However this only came into effect in February 1997, so it is too soon to determine whether or not this has had the intended effect.
- Expense: many of the cases involve a number of small incidents spread over a long period. To convince a court of the gravity of the situation evidence will need to be collected over a long period.
- According to the Local Government Association, a "destructive cycle" may develop "in which complainants' expectations are raised by the use of professional witnesses, only to be dashed by the response of the court" (LGA submission, Aug 1997).

These criticisms suggest that there is very limited potential for extending the use of professional witnesses.

### c. *The trial...*

By far the greatest number of measures proposed concern the court. Most are intended to reduce the potential for intimidation at court, or following a court appearance. Others concern how intimidation is dealt with by the courts when it occurs.

#### Preventing intimidation in court

Opportunities for intimidation occur as soon as the witness gets to court. Measures for preventing intimidation within the court buildings include:

##### 1. Structural changes to court design

Some opportunities for intimidation at court arise from the physical layout of the court and court buildings. In most courts, there are common entrances, common waiting and common refreshment areas for defence and prosecution witnesses and ordinary members of the public. The Lord Chancellor's Department recommends in its 1993 design guide that separate waiting facilities be provided in all new and refurbished Crown Courts. The process of refurbishment will however be lengthy, and does not apply to magistrates' courts where the vast majority of criminal cases are heard. In many cases it may be difficult and expensive to adapt existing buildings.

##### 2. Keeping witnesses on "standby"

An alternative and less expensive measure than changing the physical layout of all courts would be to keep witnesses on "standby". Instead of calling all witnesses to the court for the duration of the case, witnesses can be asked to stay close to the court and given pagers to notify them when they are needed. This was experimented with in one area in the PRG study: as Maynard observes, although it would require some initial expenditure, it would be relatively inexpensive.

*All cases currently go through magistrate's courts: a small proportion (the more serious ones with a greater chance of having-in witnesses) are committed to the Crown Court for trial.*

While it might be impractical to call all witnesses in this manner, a would be appropriate where a witness is particularly vulnerable or has suffered intimidation.

### 3. Screens, CCTV and voice distorters

Once the witness is in the court, another raft of measures serve to prevent intimidation by obscuring the witness by screens, closed circuit television (CCTV) and voice distorters. The former measures allow judge, jury and counsel vision of the witness, but obscure that of other people present. These measures serve a dual purpose. On one hand, they enable direct confrontation between witnesses and the defendant and the defendant's supporters in the courtroom to be avoided. On the other, they can enable the witness to maintain some anonymity to prevent intimidation outside the courtroom.

Figures are lacking on how commonly these measures are used, but anecdotal evidence suggests they are rarely employed". This may in part be due to the preparation needed for such measures: in the case of CCTV and voice distorters the equipment needed is not available in every court. In addition, the use of voice distorters for this purpose (as opposed to terrorism cases) is very new: trepidation on the part of the courts is understandable in these circumstances. The Law Commission (1997: 3.35) suggests that there is also a perception that "it is more difficult to tell a lie about a person "to his face" than "behind his back". The Law Commission agrees that it is desirable that the witness can see the defendant, if only because of this perception. However, they also suggest that other factors (such as the likely effect on the witness's ability to give the best evidence they can) can outweigh this.

### 4. Protecting the witness's anonymity

Protecting the witness's anonymity may take two forms:

*Phinikoff and Woolfson (1995: 51) have examined the use of these measures for child witnesses. They found that witness links were used in about two-thirds of the child witnesses in their study and about one in ten had screens. However, a large proportion of applications were unsuccessful; for example applications were made for CCTV in 63 cases but used in only 15.*

- Reporting restrictions (such as banning publication of the witness's name, address, photograph or any other identifying detail)

Reporting restrictions are already available in certain circumstances, such as when the crime is a particularly serious one (eg. murder) or involves a young person. This provision could perhaps be extended to enable reporting restrictions concerning any witness who may be vulnerable to intimidation (The Scotsman 3/1/97).

- Identifying witnesses in court

Under the Statement of National Standards of Witness Care in the Criminal Justice System (1996: para 17.1), witnesses should not be required to state their address in open court unless this is necessary as evidence. Applications can also be made in exceptional circumstances (such as terrorist cases) to avoid the witness's name being used in open court, providing certain guidelines are adhered to. However no research was found examining how frequently such exceptions are granted. The idea of removing this requirement in some cases (in conjunction with using other measures such as screens) runs against the idea that justice should be conducted without secrecy to enable public scrutiny. However, perhaps more fundamentally, it contravenes the principle that the defendant should know the identity of his/her accusers because this may affect his/her ability to defend him/herself. This is a concern for many of the measures discussed, and is considered in greater detail at the end of the chapter.

### 5. Reforming the defendant's right to cross-examine

It has been suggested that the defendant's right to cross-examine witnesses be reconsidered in relation to rape. This followed media reporting of a case where a defendant was allowed to cross-examine a rape victim over several days and in a manner that allegedly would not have been deemed acceptable in prosecuting counsel (see chapter 4). Cross-examination of a witness in such a manner might constitute intimidation, and could be just as upsetting for a witness who has been subjected to serious intimidation. There may be grounds then for considering amending this right regarding other vulnerable witnesses such as intimidated witnesses as well as victims of serious sexual offences.

## 6. "Friend in court" schemes

Finally, as well as measures to discourage and deal with intimidation when it occurs, some authors have suggested "friend in court" schemes. These involve volunteers accompanying witnesses throughout their attendance in court, from sitting in waiting areas with them to sitting in the court itself. The witness service run by Victim Support and other organisations already provides this but exists mainly in the Crown Court rather than in magistrates' courts, where the majority of prosecutions are dealt with.

### Dealing with intimidation

Intimidation can be dealt with by the courts in a number of ways:

#### 1. Admission of evidence

It was suggested earlier that one approach at the investigation stage might be to prepare for the possibility of intimidation, for example in tape-recording interviews and witness statements. This strategy will only be effective however if such evidence is admitted in court. Written statements should now be admissible in some circumstances, but it does not appear that much use is being made of this provision. One reason could be concern about the validity of written witness statements: approaches could include improving witness statements, routine tape recording, and extending the provision to cover other forms of evidence such as video-recordings.

Despite this, perhaps a more important explanation is that admitting written evidence in the absence of the witness denies the defendant the opportunity for cross-examination. This appears to contravene the European Convention on Human Rights (ECHR), which states that "everyone charged with a criminal offence has the minimum right to examine or have examined the witnesses against them" (quoted by Wolchover & Heaton-Armstrong 1997: see also Spencer 1995: 114).

In some jurisdictions such as Holland (Clarke, 1994) this problem is avoided by allowing oral testimony from intimidated witnesses at a pre-trial hearing, where the defence has opportunity to cross-examine. There are some circumstances in which this can already be done in England and Wales, for example, for a child whose life or

health would be seriously endangered by a court appearance (Spencer 1995: 114). In addition, until recently it was possible for a magistrate to receive a deposition from a dangerously ill adult. The Pigot Committee (Advisory Group on Video Evidence, 1989: 5.9) recommended that pre-trial hearings should be extended to both child and vulnerable adult witnesses, from which the defence should be excluded. As yet this has not been implemented.

However, the Law Commission (1997: 194-203) has recently recommended that the law on hearsay should be reformed. Automatic admission of evidence from frightened witnesses was considered, but rejected on the grounds that this might lead to some witnesses feigning fear to avoid cross-examination (1997: para 8.58). Instead, the Commission proposed that although the general ban on hearsay evidence should stay, exceptions to this rule (such as the admission of evidence from frightened witnesses) should be changed. Recommendations included that (1997: 1.40-1.41):

- statements should not have to be made to a police officer or equivalent to be admissible;
- the definition of fear should be clarified, to include fear of injury to others and fear of financial loss: in the past fear has been interpreted more narrowly;
- the courts should have discretion to admit evidence from any frightened witness: at present, evidence can only be admitted from those witnesses who fail to come to court, and not from those who attend court but change their minds about testifying, or change their testimony on the stand; and finally
- the courts should be given discretion to admit evidence which is otherwise inadmissible but where it would be in the interests of justice to allow it.

The Law Commission argues that if implemented, these proposals would enable the

*Under s42 and s43 of the Children and Young Persons Act 1933.*

*Under s105 of the Magistrates Court Act 1980. According to Spencer (1995: 114) this was repealed by the Criminal Justice and Public Order Act 1994 for no apparent reason.*

evidence of frightened witnesses to be admitted more frequently. The Commission maintains that this does not contravene the European Convention for the Protection of Human Rights (ECHR), which allows evidence to be admitted where the witness is unavailable for cross-examination. According to this argument, cross-examination is not always necessary although it should still be possible to challenge hearsay evidence. Consequently frightened witnesses would still have to be identified, in addition, judges would have a duty to warn juries of the dangers of convicting on hearsay evidence alone. However, it is debatable whether judges would use their increased discretion to allow more such evidence to be admitted.

2. intervention by judge/magistrates eg. to clear public gallery, warnings

Once a trial is underway. Intervention by the judge or magistrate may be needed in response to intimidation such as the defendant's supporters staring at, gesturing or calling out to the witness, judges and magistrates have powers:

- to Issue warnings about the penalties for witness Intimidation;
- to exclude poorly behaved members of the public from the courtroom.

Again figures are not available on how frequently these measures are used. One limitation is that judges and magistrates may not always be aware that intimidation is occurring, for example, Henley (1995:4) suggests that intimidation could involve a large number of gang members attending court wearing black (to symbolise death) and using coded hand gestures. Some jurisdictions in America use video-cameras filming people coming into the court to discourage this (Healey 1995: 5). However it is not clear how widespread nor how effective this is.

In addition, the courts have powers:

- to clear the court entirely in cases where a child has to give evidence of behaviour "contrary to decency or morality"<sup>11</sup>.

<sup>11</sup>*Children and Young Person; Act 1933, 37, quoted by Spencer (1995: 114).*

However, the English courts do not have equivalent powers to exclude the public when adult witnesses are called. In Scotland the courts do have this power in relation to alleged rape victims (Spencer 1995: 114). This could perhaps be extended to other vulnerable witnesses in England and Wales.

3. Penalties for witness intimidation

Under the 1994 Act, the maximum penalty is five years imprisonment and/or a fine on indictment, and six months imprisonment and/or a fine summarily. In practice, in 1996 of those convicted for either of the two offences, 48% received immediate custody, 32% community sentences and 12% discharges. It is too early to say whether this pattern is set to continue. In 1995, 61% of those convicted received immediate custody and 20% community sentences, but the number convicted the following year was more than three times higher (internal note, 4/3/98). However, it may be worth monitoring sentencing patterns in future. Further research on the characteristics of these offenders and how sentencers view witness intimidation might also be useful.

Penalties for intimidated witnesses

At present judges can and do imprison some witnesses who come to court and then refuse to give evidence for fear of reprisals. Failure to attend court is punishable by up to three months imprisonment. Attending court and then refusing to answer questions can attract up to two years. Evidence of intimidation has to be taken into account, but does not preclude such penalties. It is justified on the grounds that they are necessary to maintain the authority of the courts.

This reasoning is questionable however when applied to intimidated witnesses. It can be argued that cases where scared witnesses are imprisoned and offenders walk free produce the reverse effect: undermining the authority of the courts and public faith in the whole criminal justice system. No figures were found on how frequently these powers are used, but such events appear to be rare. However, the publicity surrounding these cases may discourage some witnesses both from reporting crimes and coming forward to assist police in their enquiries.

Improving prevention, recognition and support to witnesses throughout the criminal justice process

may help reduce the number of cases when witnesses are too scared to attend or answer questions. Despite this, the continued existence and use of such penalties sends out negative messages about the criminal justice system's approach to witness intimidation. Possible responses to this dilemma could include:

- reducing the maximum penalty available for failure to attend court and refusing to answer questions; and
- making both offences non-imprisonable where there is evidence of intimidation.

*d. ... and beyond*

Often the criminal justice system's role is seen to have ended after a trial. However, the potential for intimidation does not end there. Even if the offender is convicted and imprisoned, there may be a risk of retaliation by friends and family or by the offender upon release. The risk to the witness may be even greater than before, with an angry-offender seeking retribution. This stage has however, been neglected by the literature. Only three approaches to deal with post-trial intimidation have been suggested:

- New identities & relocation: some of the "high level" police protection measures discussed earlier (such as new identities and relocation) may be initiated at this stage, particularly if the witness has not been allowed anonymity within the criminal justice process. However, such measures may not be appropriate for the majority of intimidated witnesses.
- Imprisoned offenders' use of telephones: concern has recently been expressed in the media that offenders can telephone victims and harass them from prison (Guardian, 4/9/97J). This suggests that monitoring of outgoing telephone calls from prisons might be tightened.
- Information about offender's release: intimidated witnesses or those at risk of intimidation may find information about offender's release arrangements valuable, especially if this is backed up with other support.

## Conclusion

At present, very little is known about witness intimidation. However, awareness of the problem is growing, fuelled partly no doubt about concerns that the problem maybe increasing. Further information is important if we are to identify cost-effective measures to prevent intimidation and support those who suffer from it.

Despite the paucity of literature on the subject, a number of possible measures can be identified. These measures are summarised in Table 1. It seems unlikely that any one measure would suffice: different measures are needed at different stages of the justice system. To achieve maximum benefit, a package of complementary measures tackling witness intimidation at all stages of the criminal justice process may be needed. In addition, responsibility for dealing with witness intimidation could be clarified. Some police forces already have specialist units or officers to perform this function. This approach could perhaps be taken further, by giving one agency responsibility for coordinating measures throughout the criminal justice process.

In deciding the response, consideration will have to be given to the common concern running throughout the above examples: the preservation of witnesses anonymity. In some cases the witness's identity is known to the offender before the offence, and fewer protections will be available. However, in many cases, the witness's identity only becomes known to the offender through contacts with the criminal justice system.

The issue of anonymity raises a dilemma: denying witnesses anonymity can place witnesses in danger, but granting anonymity may also make it more difficult for defendants to prove their innocence. There are at least two possible responses to this dilemma:

- Option 1: accept the dilemma and identify ways to cope with it

The first approach is to ask at what point should the witness's identity be revealed. The aim here is to delay the revelation until as late as possible to minimise the risks to the witness but still allow the defendant to use the information to assist their defence.

- Option 2: seek to resolve the dilemma

The second approach is to agree that the defendant has the right to know the evidence against them, but to deny that it is always in the interests of justice that the witness's identity be revealed. In some cases the witness's identity may be important to the defence, if, for example, it can be shown that they have a grudge against the defendant and might therefore have reason to perjure themselves. The argument is that if a witness is intimidated against testifying, or changes their testimony because of intimidation, then justice has also failed to be done. There may then, be grounds for creating exceptions to allow witness's anonymity to be preserved throughout.

This is a difficult area. It is worth therefore evaluating the importance of the issue of

anonymity. This clearly depends on how many cases of intimidation involve witnesses who are not known so the offender, if this group is in the minority then focusing on protecting anonymity may not be the most effective way of [addressing the] problem. Although existing research supports this, the evidence is limited: further information is needed to ensure that any resources devoted to witness intimidation are used as effectively as possible.

It seems likely that whatever measures are implemented to encourage reporting and identification of witness intimidation, some cases will always fall through the net. Nevertheless, efforts can be made to ensure that the holes in the net are as small as possible.

**Table 1: Possible measures to prevent and deal with witness intimidation**

Measures	Stage of Criminal Justice System				
	Reporting	Investigation	Decision to Prosecute	Trial	Beyond
Minimising information given over radio identifying witnesses	✓				
House-to-house calls on neighbours	✓				
Inviting witness by phone to attend station to make statement	✓				
Requiring officers to ask witnesses if they have been intimidated	✓	✓			
Taping/videocing interviews	✓	✓			
Screens/mirrors/video for identification parade		✓			
Surveillance operations		✓			
Employing professional witnesses		✓			
Guidance on spotting signs of intimidation	✓	✓	✓	✓	
Raising awareness of witness intimidation	✓	✓	✓	✓	
Protective custody	✓	✓	✓	✓	
Keeping witness on standby for appearance				✓	
Screens, CCTV and voice distorters				✓	
Press reporting restrictions				✓	
Not identifying the witness in court				✓	
Clearing the public gallery/issuing warnings to public in gallery				✓	
Friend in court schemes				✓	
Structural changes to court design, eg separate waiting facilities				✓	
Reforming defendant's right to cross-examine				✓	
Reviewing admissibility of evidence of frightened witnesses				✓	
Reviewing penalties for witness intimidation				✓	✓
Reviewing penalties for frightened witnesses				✓	✓
Loan of a personal alarm	✓	✓	✓	✓	✓
Emergency relocation	✓	✓	✓	✓	✓
Increasing police patrols in witness's area	✓	✓	✓	✓	✓
Providing transport to and from work, shops etc.	✓	✓	✓	✓	✓
24 hour police protection (Reporting to Beyond)	✓	✓	✓	✓	✓
Long-term relocation and possibly changing identity	✓	✓	✓	✓	✓





## Section 3: Disabilities and Illnesses

### The Problem

It is widely agreed that a person's physical and mental health and abilities may influence their experience as a witness. The literature encountered focuses almost exclusively on *intellectual (In)abilities*, and the discussion below reflects this. However, *mental illness and physical disabilities* may also make some people particularly vulnerable witnesses, and are considered wherever possible. Many of the issues discussed are relevant to all three groups, whereas others are distinct. In addition, it is worth noting that they are not mutually exclusive. Physical and intellectual disabilities can be associated, although they do not always accompany each other. Less commonly recognised, intellectual disabilities and physical disabilities may at some point be accompanied by mental illness. When a witness has more than one of these conditions, they may be especially vulnerable.

### Definitions

The definition used (or the literature review was a broad one: any physical or mental condition that could render a witness particularly vulnerable. Both disabilities (normally permanent) and illnesses (usually temporary and treatable) fall within this definition.

*The term intellectual disability are used loosely. There are numerous names for such conditions, including mental handicap and retardation, learning disability, developmental disability, and intellectual impairment (which may be used to cover both mental disability and illness). A variety of names are used throughout the report. However, the terms can carry political connotations: mental handicap and retardation are both very old-fashioned and now seen as stigmatising; these are therefore avoided. Mental disability is similarly a little old-fashioned, but is used here to enable discussion of "mental disabilities, and illnesses" as opposed to the more long-winded "intellectual disability and mental illness". It should also be noted that although some of the terms may imply more serious conditions than other. For example learning disability might be thought to cover dyslexia, whereas mental handicap may conjure up image of much more serious handicap. They are used here broadly and are not intended to refer simply to one end of the scale.*

### Box 1: The number of mentally and physically vulnerable people in the UK

Learning disabilities: according to Mencap, there are over a million people with learning disabilities in the UK, of whom about a fifth have severe learning disability (submission to Review, 27/8/97).

Physical disabilities: according to the 1988 OPCS (Office of Population Censuses and Surveys) Survey of Disability, there are 6.2 million people in England and Wales with physical disabilities.

Mental illnesses: according to the Psychiatric Morbidity Survey (Report 1 1995. Table 6.1), about one in five of the population living in private households reported suffering some psychiatric disorder. These included phobias and depressive episodes, and drug and alcohol dependence<sup>2</sup>.

The definition that the Review and any subsequent legislation adopts will be important in influencing which groups receive special assistance. There are several possible approaches:

1. Listing the conditions eligible for special treatment.

This would have the advantage of clarity: criminal justice practitioners would be left in no doubt about whether a particular witness qualified under these terms as vulnerable. It might also be possible to say which measures would be helpful for each group. However, diagnoses may differ between practitioners and change over time. Listing all eligible conditions could also be cumbersome. A very long list of eligible conditions could be envisaged, and it would need occasional updating to reflect developments in medical science (such

*About 16% reported "neurotic disorders" such as depressive episodes within the past week. A further 2% reported "functional psychoses" such as drug or alcohol dependence within the past year. (OPCS Psychiatric Morbidity Survey Table 6.1).*

as the identification or new conditions, or improvements in understanding that might alter what is considered an appropriate response). In addition, some criteria would be needed to decide which conditions to include and which to exclude.

2. Derailing one or more tests to determine whether witnesses qualify.

An alternate approach is to specify one or more tests to decide a particular witness's eligibility for special treatment, such as tests of mental age, memory, and reliability. Assessing individuals could be fairer than deciding eligibility on the basis of group membership: individuals with the same disability or illness may be very different in terms of memory skills and the like. This approach has been recommended by the New South Wales Law Reform Commission (1996) in relation to intellectual disability - see Box 2.

**Box 2: New South Wales Law Reform Commission (1996, paras 3.2 & 3.20)**

" 'Intellectual disability' means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour".

Three possible "adaptive deficits" are listed:

- level of communication;
- social skills; and
- ability to live independently.

This does have the advantage of being concise. The Commission also claims it is specific enough to prevent someone feigning a disability to gain an advantage (although it does not provide any evidence that this actually occurs with other definitions). There are however, some problems with such an approach. For example, the cut-off point where functioning becomes "significantly below average" is vague and can be drawn differently by different people. The inclusion of two or more deficits in adaptive behaviour also seems problematic: the number seems arbitrary, and the definition of an adaptive deficit also seems to suffer from the cut-off point problem.

3- Assessment of individual needs.

The third approach also involves assessing individual cases, but leaves the criteria of vulnerability open. For example, Sanders et al suggest that the individual's needs should be assessed, preferably by experts. This approach again recognises that the impact of disabilities and illnesses varies greatly between individuals, but it would be more useful for identifying appropriate measures for each case. It would, also enable witnesses with disabilities/illnesses to be assisted without singling them out from other groups needing special help. It is not without problems though. If the assessment is not based on clear, common criteria or guidance, people with similar needs could be treated very differently. (This approach is discussed further in part 2 - "the response").

A final consideration is what definitions have been used by past legislation. There is an argument for consistency: however, it may also be argued that different areas of social policy and different contexts can require different approaches.

*The impact of disabilities and illness*

Disabilities and illnesses can create two kinds of vulnerability:

- first, vulnerability to crime as victims: and
- secondly, vulnerability as witnesses assisting the criminal justice process.

1. Vulnerability to crime.

The precise extent of these groups\* vulnerability to crime is not known. Official statistics on criminal proceedings and convictions do not contain details of whether witnesses (or for that matter suspects and defendants) have disabilities or illnesses. Even the British Crime Survey, which covers unreported crime, does not cover people in residential homes, psychiatric wards or care.

However there is some Australian evidence (Wilson 1990, cited by NSW Law Reform Commission 1996 para 2.23) that people with an intellectual disability are twice as likely to be victims of a personal crime (eg. assault), and one and a half times more likely to experience a property offence. It seems reasonable to assume that this greater vulnerability to crime exists here as well as in

Australia. Similarly Sayce (1995: 141) suggests that mentally ill people in this country are particularly vulnerable. Temkin (1994: 402-403) lists a number of reasons why people with disabilities may be particularly vulnerable. Although she focuses on disabled (both physically and mentally) *children* some of these factors will also apply to disabled *adults* and some people with mental illnesses:

- Unable to run away, easy to overpower.

People with physical disabilities may be physically less able to resist and fight off an attacker, making them easier targets than the able-bodied.

- The numbers of those involved in care.

Temkin argues that the sheer numbers of people involved in caring for the disabled increases the risk of abuse, whether they live with their family or in a residential home.

- Dependence.

People with disabilities may depend on other people more than usual, creating 'learned helplessness' which makes it more difficult to resist psychologically.

- Recognition of abuse as such by the victim.

When people are physically dependent on others, ideas about bodily integrity (for example that other people do not have the right to touch them) may be alien to them. Similarly, Temkin suggests that disabled people are sometimes poorly informed about sexual matters and are not aware of ideas of sexual choice.

- Difficulties communicating offence to carers and/or the police.

Physical problems, language problems and lack of knowledge of where to complain or how *to* report may hinder communicating victimisation to others. In addition, some (eg deaf children) may lack self confidence and self esteem, and may therefore be more open to efforts to dissuade them from reporting.

- Recognition of abuse as such by carers and the police.

Even if an offence is reported to carers and/or the police, it may be met with scepticism or may not be perceived as criminal. Temkin argues there are several myths which contribute to this. For example:

- that "no adult would be so callous as to abuse a disabled child";
- that abuse is committed by strangers and not carers;
- that they may have misunderstood or invited the offence;
- that they could not be the object of sexual attention; and
- that people with learning disabilities commonly tell lies or fabricate stories.

Sayce (1995: 143) says that people with mental illness may have their allegations explained away as delusions.

- Societal attitudes.

Finally, Temkin argues that disabled people are treated as second-class citizens by society, and may be singled out as soft targets as a result. Sayce (1995: 141) argues that the same problem afflicts psychiatric patients. On the former, it has been suggested that such prejudices tend not to be challenged because the people who hold them rarely meet those with disabilities (see Cohen 1994: 21).

It has also been suggested that deinstitutionalisation under the "care in the community" policy has led to over-representation of mentally ill people among the homeless, thus increasing their vulnerability to crime. Walker (1992: 177-200, 124-135) supplies some evidence that deinstitutionalisation has increased the numbers of mentally ill people among the homeless in America, and some limited evidence that police contact with mentally ill people in England may have increased in recent years (see also Palmer 1996: 635). However more research is needed to ascertain whether mentally ill people really have become more vulnerable to crime as a result of deinstitutionalisation.

## 2. Vulnerability as witnesses assisting the criminal justice process.

Health and abilities also affect people's experience of contacts with criminal justice process and their

performance as witnesses. Sanders et al (1996a: 2; 1996b: 7-9) identify three main areas of personal functioning which can be affected by learning disabilities:

- i. *Memory*- some people with learning disabilities can take longer to absorb, comprehend and recall information. Recall of details may be particularly affected. Greater time and patience than usual will help.
- ii. *Communication skills*- they may have a limited vocabulary and remember things in pictures rather than words, leading to difficulties in understanding and answering questions. They may also find it difficult to explain things in a way other people find easy to follow.
- iii. *Response to perceived aggression* - Sanders et al suggest some people with learning disabilities are especially sensitive to negative emotion, and may be suggestible. They may respond to tough questioning by trying to please the questioner. For responses to be reliable questions should be kept simple and non-threatening.

Sanders et al (1996a, 2; 1996b, 9) observed that few learning disabled people have all these problems, and some may be advantaged in some respects. For example although many people with autism have communication problems, they may also have better than average memories.

The third of these areas could be expanded to cover *emotional resilience* more generally. Sanders et al (1996a: 9) suggest that witnesses with learning disabilities can find being a victim of a crime and contact with the criminal justice system particularly stressful, and that one reason for this could be learned helplessness (see above), it seems plausible that this may be exacerbated by lack of confidence, and low self-esteem coupled with problems with the three areas listed by Sanders et al which may cause frustration. This suggests that it is particularly important that the criminal justice system responds sensitively and appropriately to their needs.

No similar research was found by the literature review for people with mental illnesses or physical disabilities. Despite this, it seems plausible that some similar problems may affect people with mental illnesses such as clinical depression. These

areas of personal functioning may also be an issue for people with physical disadvantages. For example, people who lack or have partial hearing, speech, or sight may suffer communication problems. Even people whose physical disabilities are not an obvious impediment to the four areas of personal functioning identified may be affected by medication or pain, in addition, some people with physical disabilities may be affected in a fourth area: *mobility*.

A fifth and final area which can be identified is *social skills*. People with learning disabilities may have more limited life experiences: for example some may lack experience of paid employment, or of financial responsibility. They may not therefore have the same level of social skills as other people. On the other hand, social skills may be more developed than other areas of personal functioning which may lead strangers to over-estimate their other capabilities.

Of the five areas, communication skills are probably the most important in a legal culture which 'takes oral communication for granted and relies heavily upon it' (Temkin, 1994: 402). Temkin distinguishes two categories of (both physically and mentally) disabled people according to their communication skills (see box 3).

### Box 3: Categorisation of disabled children (Temkin 1994: 405)

#### Category 1:

- "those able to communicate orally, albeit with some difficulty",
- "those who can do so with assistance from other complementary systems", and
- "those who may be described as alternative communicators who can communicate effectively using some system other than oral communication".

Examples given include: these with spina bifida and with learning disability, deaf people fluent in sign language, and the partially deaf who are able to speak.

#### Category 2:

- "those who are unable to communicate effectively, either orally or by using some alternative system".

Examples given include: most deaf blind, some with language disorders, and some with cerebral palsy who cannot speak, use computers or communication boards.

Although her focus is on children, the categories seem equally applicable to disabled and mentally ill adults. As Temkin comments, whatever changes are introduced, the criminal justice system is unlikely to be able to offer much to those in the second category. She suggests that the best way to help these people is to improve alternative communication systems, for example by teaching British Sign Language more widely. However, there is also a small group for whom "effective communication will never be a realistic possibility" (Temkin 1994: 406). Equally it seems likely that there are some sufferers of mental illness who may never be able to give effective testimony, either because of communication problems or because of deficits in some other area of personal functioning.

In the discussion that follows the focus is on the first of Temkin's two categories. Although Temkin focuses on communication difficulties, disadvantages in any of the five areas of personal functioning (memory, communication, emotional

resilience, mobility and social skills) can affect the criminal justice process. These problems are discussed for each stage of the criminal justice process in the next section.

## The Response

### *a. Reporting*

Several studies suggest that a large proportion of sexual crimes against people with intellectual disabilities are unreported to the police (see Sanders et al 1996: 15). It seems plausible that this also applies to property offences, and to some people with physical disabilities or mental illness. Four issues are discussed below:

- recognising that an offence has occurred;
- encouraging reporting;
- facilitating reporting: and
- identifying vulnerability.

#### Recognising that an offence has occurred

Clearly before an offence is reported it has to be recognised as such by the victim or witness. It was noted earlier that this may be problematic for people in positions of physical or emotional dependence, or if they have not been educated about such matters. This suggests several possible measures:

- improved "crime education" to cover reporting crime as well as teaching right from wrong';
- informing service professionals about basic law: for example that staff confining people to their rooms against their will may be guilty of false imprisonment, and that unwanted touching may be assault'; and
- writing formal policies for professional carers and care institutions to respect the

*Williams (1995a: 2) quotes a victim of racial harassment who had learning disabilities: "At special school I was taught not to pinch other children's sweets and money. I was not taught, if I am in trouble, to tell the police".*

*See Williams (1995b: 2) for further examples.*

bodily integrity or the people "they have care of, for example by asking permission before moving or touching someone.

These are not measures that the criminal justice system can institute alone: To gain the cooperation of other agencies, for example in encouraging disabled/ill people to report, it may be necessary to convince them that they will be treated sympathetically and their special needs catered for. Nor are all these measures straightforward in themselves: sex education for example may be controversial for some people with severe intellectual disabilities.

The perceptions of carers (who may be the first contact) and the police, particularly scepticism that the incident occurred or was criminal, also need to be tackled. Williams (1995a, 1995b) conducted a two-year study of victims with learning disabilities, involving interviews with victims, carers and police officers. He suggests that the language used by social service professionals can disguise the criminal nature of incidents:

"Women with learning disabilities are more likely to be described as being 'sexually abused' than raped; men with learning difficulties are 'physically abused' not assaulted; stealing something from someone with learning difficulties is 'financial abuse'<sup>1</sup>, not theft. Offenders against the general community are criminals, those who victimise people with learning disabilities are 'abusers'; victims with learning difficulties are 'survivors' and 'sufferers'; 'sufferers' do not report crimes to the police, they 'disclose abuse' to professionals." (Williams, 1995:2).

Again, this might be dealt with through education to raise awareness of the increased vulnerability of these groups and to tackle the myths discussed earlier: this could be approached in the through training, guidance, newsletters, leaflets and posters.

#### Encouraging reporting

It was noted above that when people in institutional care do report a crime, in the first instance many may make the report to a carer rather than to the police. Wilson and Brewer (1992) found that 56% of personal crimes and 63% of property crimes against people with learning disabilities were

reported by a third party" (cited by Sanders et al 1996b: 17). Sanders et al (1996b: 17) found figures of 78% for personal crimes and 66% for property-crimes. The decision of the carer (or other third party) on whether to report to the police is therefore extremely important.

However it has been suggested that a non-reporting ethos exists in Britain (see for example Williams 1995b: 55). There are numerous reasons why offences may not be reported to the police. Some of these concern the perceptions and beliefs held by the person who initially learns of the offence:

- failure to define an incident as criminal/scepticism that it occurred;
- the ethos that all discussions with clients should be treated confidentially;
- belief that the victim does not want the offence to be reported to the police;
- belief that the offence is too trivial or that the police could *do* little;
- concern that the police and the rest of the criminal justice system will be unsympathetic, not meet the victims/witnesses needs for special care and not produce a conviction (ie that it wouldn't be worth the trouble); and
- concern about the offender: in some cases the offender may be a colleague or another client, creating (misplaced) conflicts of loyalties.

Other reasons for not reporting concern the organisation:

- lack of formal reporting procedures, creating uncertainty about whose responsibility this is;
- complex reporting procedures: Williams (1995b: 66) found that there are often long linear reporting chains, whereby one person refers the matter to his/her superior, who refers it to his/her superior and so on, each person perhaps consulting others along the way. This may deter or delay reporting, and if one link fails the case may fall by the wayside; and

- internal investigative procedures: in some organisations, an internal review may be carried out to determine whether a criminal or (if a staff member is involved) disciplinary offence has occurred before reporting to police. This may hinder collection of vital evidence, as well as increasing the number of occasions on which victims and other witnesses will be required to tell their stories.

Some of these reasons may be legitimate. For example if the victim was aware that the incident was criminal, that recourse could be available through the criminal justice system and that the person they reported to (or someone else) could report this to the police on their behalf, but did not want to pursue the matter. Sanders et al (1996b: 23) quote the policy of Cumbria social services: "In most situations the rights of the individual would be respected but there will be situations in which agency staff will be bound by their professional ethics or agency contract to disregard the individual's wishes". Deciding whether to report may not always be a simple matter.

Some measures were discussed above concerning the definition of incidents as criminal. Possible approaches to combat the other problems listed include:

- Creating/reviewing formal policies for investigating and reporting incidents.

Ideally, an internal investigation should not delay reporting an offence to the police. A policy of joint investigation by the police and the organisation concerned might overcome such problems and also limit the number of times the victim and other witnesses have to be questioned. Formal policies could also contain a presumption in favour of reporting and specify what might constitute a legitimate reason not to report. This could perhaps be backed up by disciplinary sanctions. Responsibility for reporting should be clearly defined. In addition, MENCAP (1997: 3) recommends that "web-like" structures be used instead of linear structures to maximise opportunities for offences to be reported.

There are advantages in drafting formal policies for the organisation as well as for the victim and the criminal justice system:

"policy guidelines are useful for reassuring clients and their carers that claims of ill-treatment will be taken seriously, and for establishing a base-line of good practice against which complaints or allegations or negligence by staff can be measured" (Sanders et al: 1996,21).

Although such an approach cannot guarantee good practice it might encourage it.

- Creating a legal requirement on service professionals to report all alleged cases of sexual abuse.

A legal requirement on professionals to report all alleged cases of sexual abuse has been suggested by Cervi (1992: 15). This could perhaps be extended to cover other offences such as crimes of violence and property crime, framed, to take into account the victim's wishes. The key question is whether such a requirement would work. Some system of monitoring reporting practices and sanctions to impose for failing to observe the requirement would be needed to ensure adherence. However, it is difficult to envisage an effective monitoring system: service professionals would hardly have an incentive to keep records of disclosed crimes they did not report. It might be necessary to ask the people in their care whether they had been victims of crime over a set period and whether they disclosed this to staff, and then to check that it was reported.

- National guidelines for professional carers and care agencies on reporting.

A less radical alternative would be to create non-statutory national guidelines on institutional reporting. This might encourage consistency in reporting policies, and would not require the monitoring and enforcement arrangements of a non-statutory system.

Finally, there is some evidence that even minor crime can be traumatic for some vulnerable victims (Sanders et al 1996b: 9). Sanders et al

found that this can create a disjunction between the expectations and perceptions of the victim (who sees the crime as serious and expects the police response to reflect this) and those of the police (who see the offence as minor and treat it as such). People with learning disabilities are taught to trust people in authority to act in their best interests: if they find this trust misplaced, they may be deeply upset. Sanders et al argue that this disjunction in attitudes undermines confidence in the police, and discourages future reporting. This suggests that sympathetic treatment (in which time is taken to acknowledge the victim's feelings and to explain the processes) may be particularly important not only by the police but *throughout the criminal justice system*.

#### Facilitating reporting

Even if people with disabilities/illness want to report an offence, there may be obstacles which prevent or deter them from doing so, or mean that they have to rely on third-parties to report for them. Crimes are usually reported to the police by telephone or in person at a police station. In some cases the obstacles are physical. For example people with impaired mobility and wheelchair users may find physical access to some police stations difficult. These kind of obstacles may be remedied by changes in the physical design of police stations (such as the installation of ramps and lifts) and provision of suitable transport to and from stations where necessary.

Other problems are less straightforward. Some disabled people (such as many people with cerebral palsy) may have no or limited speech (Temkin 1994: 404), which could make reporting by telephone impossible and reporting in person at a police station difficult. Various alternative communication methods have been developed to deal with some of these problems of communication. The most well-known are probably sign language and lip reading and are used by some deaf people. Other methods include picture cards, communication boards (which contain pictures and symbols the person can point to) and computers.

However, even when they do attend a police station to report, the police may not have

*There is more than one type -for example British Sign Language and Sign Supported Language are quite different (Temkin 1994; 404).*

equivalent skills to enable communication. I here are two ways of tackling this:

- using interpreters, either volunteers or paid for by the police: and
- training police officers in alternative communication systems.

The first option would appear to be the easiest. However, it may be difficult to find interpreters for even the most common alternative communication methods. Temkin's research (1994: 40) suggested that there were only:

- 12 lip-speakers in England trained to appropriate level for this type of interviewing, 1 in Wales, 1 in Scotland, and none in Northern Ireland; and
- 39 fully-qualified sign freelance language interpreters in England, four in Wales, 1 in Scotland, and 1 in Northern Ireland.

As a consequence of the scarcity of interpreters, it could take some time to arrange one. They may then need specialist advice about the person's particular disability/illness, and might also need specialist equipment. No figures were found on the use of interpreters and lip-speakers by the police or any other part of the criminal justice system. It seems likely that these additional requirements may discourage the recording and investigation of cases involving disabled victims, and also discourage the use of disabled witnesses.

The second option would help overcome these "availability" problems, even if only a handful of officers were trained in alternative communication systems. Again, this would need to be backed up by information about how to interview people with disabilities/illnesses.

#### Identifying vulnerability

Of course, to communicate effectively with the witness, the police may need to identify that the witness has a disability or illness that might be relevant. This can be a difficult task. Physical disability can be immediately obvious, but this is not always the case: for example arthritis can be severely disabling, but is not usually apparent from the sufferer's appearance. Similarly the New South Wales Law Commission (1996: 55) states, intellectual disability is "not., necessarily obvious



from a person's appearance", and the same is true of mental illness. However with mental illness there are some additional complications. The illness could develop during the criminal justice process. In addition, treatment could mean that the witness is fine when the crime is first reported, but that their condition deteriorates later on.

Studies of police contacts with learning disabled suspects suggest that police are not very good at identifying them as such. As Sanders et al argue, it seems likely that the same is true of victims and non-victim witnesses. However, Walker studied police reported contacts with mentally disordered people, and suggests "police officers in the United Kingdom receive virtually no training in the recognition and management of mental disorder" (1992:226).

Under the Police and Criminal Evidence Act 1984, the police have to call a police surgeon if they think a *suspect may* have a mental illness (although officers may call one out when the suspect has a learning disability because of difficulties in distinguishing symptoms). One measure might be to extend this requirement to witnesses, but there are also problems with this approach:

- police surgeons are not always easily available, which may cause delay (DeLoirre and Louche 1996: 3-3: 4.1);
- according to Palmer (1996: 637) not all will have experience in mental health and they may only have had basic training in the area during their medical qualification; and finally
- most police surgeons see their primary role as deciding whether the suspect is fit to be detained or charged.

Walker (1992: 201) found some evidence that the police, the medical profession and people with mental disorders believe improved training is needed. He argues that improved training should be given to all new and serving police officers, but recognises that a more practical approach would be to start by targeting supervisors (usually sergeants). Similarly, MF.XCAI<sup>1</sup> (1997: 4-5) have suggested there is some desire among the police for greater training. They recommend that training should be introduced for all new recruits, with compulsory refresher courses, and that

contacts between the police and groups involving the learning disabled should be increased.

Another approach is suggested by Sanders et al (1996b: 25-27). Their study included a survey of police forces and found that none of those who responded had guidelines to help officers tell whether victims had learning disabilities. Some referred to guidelines on the treatment of mentally disordered offenders (under the Police and Criminal Evidence Act 1981), but as Sanders et al point out, these only outline what should be done once the disability has been identified and not how to identify this in the first place. Some efforts have been made to resolve this problem in other countries such as America and Australia. However, Sanders et al argue that (as Gudjonsson et al 1993 observed regarding suspects), whatever tests are used there will always be some people who are not identified. They argue that some people with learning disabilities can cope with the criminal justice system as it is. Instead of trying to identify people with learning disabilities, they suggest:

"the aim should be to identify those characteristics which tend to be associated with learning disability (poor memory, communication, increased trauma etc.), but which may be present in other people too. This would enable criminal justice agencies to focus on the identification of these characteristics, rather than to allocate people to categories...It is the communication problem that should be identified and addressed. Identification should be seen as an end in itself" (Sanders et al. 1997:16).

Hence instead of focusing on recognition of particular disabilities, they advocate that guidance and training should focus on identifying characteristics associated with vulnerability and how to handle them. This approach is supported by the Law Society's Sub-Committee on Mental Health and Disability (submission to the Review. 11/9/97).

#### *b. Investigation*

Once a complaint has been reported officers have to decide whether to investigate. Sanders et al (1997, 17) suggest that communication difficulties can be used as a reason not to pursue the case further. In their study many of the cases reported to the police were either "no crime" (ie

not recorded as crimes) or led to *no* further action (Sanders et al 1997: 6). This research was based on case studies, so it is important to note that it might not be representative. However it does accord with Williams (1995a: 3) research in this area. Some ways of overcoming communication problems were considered earlier in relation to reporting, but apply equally here.

When complaints are investigated important considerations include:

- the location;
- who else should be present; and
- how the interview should be conducted (including responsibility for interviewing and whether the interview should be recorded).

#### I. The location

The location where interviews are conducted is important for both mentally and physically vulnerable witnesses. There are two main issues: accessibility and comfort.

- *accessibility*: the location for the interview needs to be accessible for people with mobility problems. This needs to be built into the design of police buildings- including special interview suites built in some police forces for children and victims of sexual offences such as rape. Regarding the latter, Temkin (1994: 416) claims that "all too often they are situated in locations where access for the disabled is hard or impossible".
- *comfort*: one of the aims of special interview suites is to help particular groups of vulnerable witness at ease in a stressful situation. Of course, providing similar facilities or adapting existing facilities for mentally vulnerable witnesses may be expensive and time-consuming. One means of bridging the gap may be to interview learning disabled witnesses in their own homes or (if the offence happened there) in another similarly familiar and comfortable environment. However, any cost-savings accrued by such an approach would have to be balanced against problems in identifying

suitable locations and a greater likelihood of interruptions.

The literature review did not uncover any information on police practices or policy in this area.

#### 2. Who else should be present

An associated issue is whether mentally vulnerable witnesses should be accompanied during an interview. Under the Police and Criminal Evidence Act 1984, police must arrange an "appropriate adult" to accompany any *suspect* who they believe may have a mental illness or handicap. The role of the appropriate adult under this scheme is threefold:

- to advise the suspect;
- to assist communication with the suspect; and
- to ensure that interview is carried out fairly.

This can be carried out by a parent, guardian, other carer or someone with experience in mental health (eg. an approved social worker). Under the revised Codes of Practice issued in 1995, this excludes a solicitor representing the suspect.

It has been suggested that this scheme should be extended to mentally vulnerable witnesses (for example by the Law Society Sub-Committee on Mental Health and Disability report, para 10). However, there are problems with the current scheme. First, it relies on officers to identify vulnerability. As observed earlier, this may be a difficult task. Adults with learning disabilities or mental illness may be reluctant to make this known to the police, and symptoms of mental disability/illness may be lacking or attributed to consumption of alcohol or drugs. To encourage the use of appropriate adults in cases where there is some uncertainty about the suspects' vulnerability, and as a safeguard, any confession made without the presence of an appropriate adult may be excluded from court. Nevertheless, there is some evidence that appropriate adults

*Juveniles are also covered by the provision. In this case, the appropriate adult can be a parent, guardian or social worker. If none of these are available, a responsible adult aged 18 or over who is not employed by the police may perform the role.*

are not always called for mentally vulnerable adults, even in cases where custody officers are aware of the disability/illness (Palmer 1996: 640-641).

In addition it has been argued that appropriate adults do not gain enough experience to develop real expertise (Sandell 1992: 18). There is also concern about the confidentiality of any comments made by the suspect to the appropriate adult. It is unclear whether an appropriate adult has a duty to inform police of any potentially useful or important information the suspect tells them or whether they should keep this confidential (Littlechild 1993: 15-16). Finally, it may be difficult to find an appropriate adult, causing delay. Parents and guardians may not be willing to perform the role, and other carers and social workers may have other commitments for their time (Palmer 1996: 641).

If the appropriate adult scheme is extended to mentally vulnerable witnesses, these problems need to be taken into account. Palmer (1996: 635) suggests several measures to improve the scheme for suspects, which might equally be of benefit if extended to witnesses:

- specifically asking the witness if they need help;
- asking the witness which school they attended (to help determine whether they have special needs);
- familiarity with common medication and the conditions they are used for;
- greater use of civilian custody officers or regular custody officers to improve experience;
- basic training for all police officers in identifying special needs.

These measures all apply to the first problem - identification. The expertise and role of appropriate adults are also important considerations. For example, appropriate adults for witnesses could perhaps have an additional role in giving the witness emotional support.

### 3- Responsibility for interviewing

There is some evidence that special interviewing skills may be needed for some mentally vulnerable witnesses. The importance of treating witnesses sympathetically was mentioned earlier, particularly of recognising the potential importance of apparently minor incidents to vulnerable witnesses. Repetitive questioning may give mentally vulnerable witnesses the impression that they are not believed by the investigating officers, or that they are not listened to properly and given the attention they deserve.

The use of props (such as toys) is well established in interviewing child witnesses, particularly suspected victims of sexual abuse. Using leading questions and prompting carefully have also been raised as a possible interview technique for child witnesses. Such approaches may be appropriate in interviews with some mentally vulnerable witnesses, but could be a source of problems in court. The need for special interview approaches may also be difficult to reconcile with the need to gather evidence. For example, although a single interview might limit the stress the witness undergoes, it might also fail to reveal evidence that will only be fully disclosed over a period of time (Temkin 1994: 416).

Despite the apparent need for specialist skills, the evidence suggests interviewing officers usually lack them. Sanders et al (1997: 20) found that interviews for sex offences were usually conducted by officers from force family/child protection units: these officers will not necessarily have appropriate skills for interviewing mentally vulnerable adults. Non-sex offences were usually dealt with by officers without specialist training in working with any vulnerable witnesses. Set against this, social workers who have expertise in working with these groups tend not to have investigative skills.

The Law Society (submission op cit para 16) recommends that interviews should always be conducted by officers with appropriate training who should have access to communication aids and specialist advice and support. To meet this recommendation, specialist training will be needed for some officers, and consideration will have to be given to how specialist support can best be organised.

Another approach would be to conduct joint investigations, using a team or both police officers and others with expertise in mental health. To be effective, such an approach would need to be supported by information about the advice and support available from other organisations: for example, lists of qualified sign language interpreters (Tenikin 1994: 407).

Special skills are also needed in taking witness statements. Statements are usually drawn up by the police once the interview has been conducted and signed by the witness. Statements are useful

- to help witnesses refresh their memories at a later date (they are usually given to witnesses outside the courtroom), and
- to check consistency with oral testimony at trial, as evidence of the witness's reliability.

However, it was noted in chapter 2 that the statement is not a verbatim record of an interview. The information included is selected by the investigating officer who may inadvertently omit information that subsequently proves important or introduce errors or distortions (Wolchover & Armstrong Jones 1997: 855-856). If it is difficult for ordinary adults to recognise the account created as their own, this may be an even greater problem for witnesses with disabilities or mental illness. Furthermore, some people with disabilities or illnesses may have communication problems: some people with learning disability may have limited or no literacy skills (Mencap submission to the Review 27/8/97). This may make it difficult or impossible for them to read and check the witness statement or use it in court, but this may not always be drawn to the officers' attention.

Several measures can be envisaged to help overcome such problems, in particular increased tape-recording or video-recording of interviews with mentally or physically vulnerable witnesses (the latter is recommended by Law Society, *op cit*). These measures were discussed in chapter 2 on witness intimidation, but the main arguments apply equally here. Nevertheless, additional issues are raised by video-recording for people with disabilities. Special Techniques may be needed where alternative communication methods are used: for example split screen filming to show simultaneously the interviewees' face and the communication board the interviewer is pointing

to (Temkin 1994: 408). Tenikin suggests that special guidance on video-techniques for interviews with disabled people is needed. In addition, it might be useful to improve training and guidance on writing statements, perhaps incorporating advice from experts on learning disabilities.

### c. *The decision to prosecute*

It has been suggested that an excessive number of cases involving witnesses with disabilities are lost at this stage. This is given some support by research in one health region by Hillary Brown (cited by Cetvi, 1992:14; Cohen 1994: 167). Of 167 cases of alleged sexual abuse against people with learning disabilities reported between 1989-90 only 10-15% resulted in a court appearance despite three-quarters being accompanied by corroborative evidence. One factor may have been that half were allegedly carried out by people with learning disabilities. Williams (1995a:2) suggests that the CPS is discouraged from prosecuting offenders with learning disabilities, whose victims are often people with learning disabilities.

Other reasons for deciding not to prosecute include:

- lack of evidence following delayed reporting or internal investigations by care organisations (a number of measures to tackle these problems have been considered above);
- credibility: similarly, people with disabilities may not be seen as credible witnesses (several myths which may contribute to this were discussed earlier: training and guidance may help tackle them.); and
- competence: it has been suggested that people with learning disabilities are automatically regarded as incompetent.

Sanders et al (1997: 35-36) found that although the police often liaised with the CPS before this stage, the CPS and the police rarely consulted experts about learning disabilities. This also seems to apply to illness. Most cases do not reach the prosecution stage, particularly when it may not be in the public interest to prosecute cases involving vulnerable witnesses (for example, because the proceedings would be too traumatic).

Another issue is what evidence the decision to prosecute is based on. Williams (1997: 72) reports that the CPS can take this decision without meeting the witness. However the validity of witness statements as the witness's own account is questionable. The problems of using witness statements as an indication of the ability to stand up in court, were and the suggestion that video-recordings, audio-taping; or verbatim transcripts be used instead. This is supported by MF.NCAP (1997: 7) who recommend compulsory video-taping of all interviews with learning disabled people.

Other possible measures include:

- a requirement for prosecutors to meet victim before they make a decision (perhaps accompanied by changes to police statement writing);
- guidelines or information for prosecutors to assist their decision-making: the Law Commission reports that the CPS has an internal memorandum providing such guidance that the Law Commission has argued should be published (para 19);
- CPS training (MF.NCAP 1997: 7). A variation on this theme would be to have designated and trained Crown Prosecutors in each CPS office to deal with these cases (Law Commission op cit para 20);
- use of expert advice to identify ways of overcoming problems, to assess reliability and to assess the effect of the decision whether or not to prosecute on the victim (Law Commission op cit para 20);
- pursuing civil cases: parents whose disabled children's cases have not been prosecuted have been encouraged to launch a civil case where the burden of proof is lower (Cervi 1992: 15).

#### d. *The trial*

Measures at trial appear to have two main aims. The first is to reduce the fear and trauma of attending court. The second is to ensure that the quality of evidence suffers as little as possible because of the witness's particular vulnerabilities. In practice, the two aims can be related.

A number of measures originally designed or proposed for other vulnerable witnesses (such as children and victims of sexual offences) may be appropriate for witnesses with disabilities/illnesses. For example:

- pre-trial preparation (a pre-court witness pack has been produced by the campaign group Voice for the Home Office);
- friend in court schemes;
- the removal of wigs and gowns;
- design changes in the architecture of court buildings (for example to make them more accessible wheel-chair users and people with mobility problems);
- screens and CCTV;
- pre-trial hearings and admission of written depositions; and
- clearing the public gallery.

Some of these measures (such as pre-trial information, removing wigs/gowns, screens and CCTV) have been recommended by MF.NCAP (1997: 9). They also suggest some people with learning disabilities may require more frequent breaks during court hearings.

Several points are worth noting:

- These measures will not always be appropriate. Individuals needs vary. For example Sanders et al (1997: 64) report that some witnesses with learning difficulties were disappointed not to see wigs and gowns having seen them on TV. Different witnesses can require different types and amounts of support.
- The content of these measures and/or the way they are used is also important. Sanders et al argue that not all pre-trial preparation is effective. They argue that although effective preparation can contribute towards success for the victim, success is not simply a conviction or removing all stress - both are setting the aims for pre-trial preparation too high. They define success as any case where the witness gave evidence considered by the jury. However they later suggest that the

most successful preparation identified and based on the witnesses particular concerns/weaknesses which helped the witness give better evidence or race giving evidence in court more confidently.

- Ineffective preparation is not necessarily the fault of the agencies involved. Sanders et al (1997: 51) identified one case where a person with a mild learning disability refused offers of assistance but found the trial difficult. Support cannot be forced on people, even when it is felt to be in their best interests.
- Even the best preparation does not guarantee that the witness will not find the trial traumatic. Unforeseen events such as adjournments or a change to another court can arise: it is impossible to prepare for every possible eventuality (Sanders et al 1997:52).

just as many of the measures discussed in relation to other groups of vulnerable witnesses may be applicable to people with disabilities/illnesses, so many of the issues raised are common, albeit with some distinct connotations. For example admission of evidence was discussed in chapter 2 concerning witness intimidation. Pre-trial hearings and, perhaps to a lesser extent, written depositions may also be helpful for people with disabilities/illnesses. Pre-trial hearings could for example, be used for learning disabled witnesses who are likely to find cross-examination in the formality of the courtroom particularly stressful, to help them give more effective evidence. Written depositions could be useful for people with physical disabilities or mental illness who may find it difficult to attend court.

Many of these measures are currently matters at the judges' discretion. However as noted in chapter 2, it is not clear that these measures are routinely considered. Cervi (1992:15) supplies some anecdotal evidence that such measures rarely used for people with learning disabilities. Reducing judicial discretion by creating a legal assumption in favour of such measures might be one means of overcoming this apparent obstacle. This would not however sit comfortably with the idea that measures should be based on an assessment of individuals needs.

In addition, Sanders et al (1997: 53-54) suggest that the problem is not lack of support for such measures - they found widespread support for this pre-trial preparation for example. Instead they suggest the problem is confusion about which agency is responsible for arranging it. If this is correct, a more appropriate response may be to define responsibility for organising needs assessment and appropriate measures more clearly, perhaps through legislation. There are several agencies/organisations who might take on this responsibility:

- \* the police: at present, the National Standards for Witness Care suggest that the police should organise some of these arrangements (eg court visits).
- \* the CPS: this has been recommended by the Law Society (submission op cit), although they acknowledge this may not be ideal.
- \* Victim Support/court witness services: these schemes also provide some assistance: for example, all court witness services arrange court familiarisation visits. However, as noted in chapter 2 they are largely restricted to the Crown Court,

Sanders et al (1997:54) question whether lawyers have the skills to perform this task effectively, and this may apply to the police. However, Victim Support schemes or court witness services are not yet available in all courts. They suggest that assessment of needs of *all* vulnerable witnesses should be assessed by experts.

As well as those measures which have also been suggested for other groups of vulnerable witnesses, there are some distinct to witnesses with disabilities and illnesses. One example is the provision of interpreters: this was discussed earlier in relation to reporting, three main areas are considered below:

- \* cross-examination;
- \* expert evidence; and
- \* summing up.

#### 1. Cross-examination

Competency and credibility are particularly important issues for learning disabled and

mentally ill witnesses who may display an element of suggestibility.

Judges can intervene to assist mentally or physically vulnerable witnesses in two ways, first, by calling for breaks so that witnesses can rest, and secondly to prevent inappropriate questioning. No research was found on the use of breaks to help mentally or physically vulnerable witness adults, but some was found on intervention to prevent inappropriate questioning. Sanders et al (1997: 78) found that many of the learning-disabled witnesses they interviewed felt bullied or pressured, and some felt that their testimony had suffered as a result. However judges had rarely intervened, and some found it difficult to adapt their own language. In some cases the judges themselves were perceived as bullying by the witnesses. Sanders et al observe that this may be the unintentional result of failure to understand the level of learning disability and its relevance.

This suggests that training for the judiciary and magistracy on learning disabilities, as well as for the legal profession more generally, would be useful. MEXCAP (1997: 9) recommends training for all those called to the bar as well as the magistracy and judiciary. It also seems likely that equivalent training about other disabilities and mental illnesses could also be of benefit. This could cover the nature and implications of disabilities and illnesses. It could also look at how to question people with intellectual disabilities (for example to slow the pace or questioning and use more appropriate language) and encourage intervention by judges and magistrates to curb inappropriate questioning.

Some efforts have already been made in this direction: for example the Bar Council has set up a network of barristers who have some experience/knowledge of cases involving learning disabled (Cervi 1992: 15). It is not known how much use is being made of this, nor how effective it is. If it is successful it might be worth considering inviting some members of the judiciary and magistracy in each Petty Sessions Division/Crown court area to specialise to some extent in cases involving mentally disabled/ill witnesses. Such an approach would of course rely on cases involving people with learning disabilities/illnesses being flagged in some way, and appropriate court scheduling.

In addition, Sanders et al (1997: 78) argue for greater use of expert evidence (discussed further below) and advocate the creation of rules on when judges can intervene to prevent questioning which is unfair or, because of the witness's vulnerability, likely to produce unreliable evidence. More radically, they suggest a neutral examiner might be considered. The idea for this comes from Israel, where neutral examiners are used for child witnesses, and provisions based on this idea have been introduced in New Zealand and Ireland. The role of the "child interpreter" in these two jurisdictions is to sit next to the child and translate questions put to them into language that the child can understand. A similar idea was also suggested by the Pigot Committee (Ref to be added).

## 2. Expert evidence

It has been suggested that expert evidence could be used more commonly to help inform the court (including the jury) about the witness's particular learning disability (Sanders et al 1997: 77). This might equally apply to mentally ill witnesses, and to people with physical disabilities: for example sight impairments may prove problematic if the legal profession give less credence to such testimony than is actually warranted. This may however, be easier to tackle (for example through expert advice and training) than prejudice or misconceptions held by juries.

Sanders et al (1997:77) argue that expert evidence may be useful to help deflect attacks on the witness's credibility, if it addresses specific issues raised by the case. However, they also see that the admissibility of expert evidence under current provisions may "need to be reviewed to enable more widespread use."

## 3- Summing up

Finally, in cases which reach the Crown Court, before the jury retire to consider their verdict, the judge usually sums up the case. A careful and sensitive summing up is important. However, at this stage the judge may issue a corroboration warning. There is no general requirement that a witness's testimony has to be corroborated by other evidence. Nevertheless, when a witness's evidence is thought unreliable corroboration is usually desirable, and judges may use their discretion to warn the juries of this.

No figures were found on the use of corroboration warnings in cases involving witnesses with physical or mental disabilities. However Sanders et al (1997: 60) report that only one of the cases they studied involving learning disabled witnesses came to court on the witness's evidence alone. They suggest that the police and CPS may currently filter such cases out. It seems plausible though that if responses to witnesses with learning disabilities improve, the numbers of cases involving uncorroborated evidence from witnesses with learning disabilities will improve. Sanders et al (1997: 60) argue that judges here, as in other jurisdictions, should be prohibited from issuing corroboration warnings when this is based solely on the fact that the witness has a learning disability.

*e. ...and beyond*

After the trial there are two further areas for consideration. The first is that of therapy, and the second of future crime prevention.

Therapy

Although therapy may help witnesses perform in court, at present it may be delayed until after the trial because of fears that their testimony will be undermined by the charge that the witness has been "contaminated" or "coached". Counselling may have very limited value if the incident is not discussed, but discussion might distort the witness's memory of the event, evidence from a witness who has received therapy is admissible but only if they have not been contaminated (Sanders et al 1997: 52). The problem then becomes proving whether or not the witness has been contaminated. To assist this, counsellors may be required to disclose notes and other records which would normally be treated confidentially and would not have been written with this purpose in mind: comments taken out of context might then be used to undermine the witness's credibility<sup>7</sup>.

Proving that contamination did not occur can be difficult. According to Sanders et al (1997: 52) the CPS and police usually discourage therapy until

*The rules governing third-party disclosure have been changed under the Criminal Procedures and Investigations Act 1996, and are due to be implemented in January. One of the intentions of the changes is to make it more difficult for defence barristers to use third-party disclosure for "fishing expeditions" in which possible lines of defence are sought, rather than support for existing lines of defence.*

after the trial. The slow nature of the criminal justice process means that victims are sometimes denied counselling until long after the offence. Therapists are not usually trained to deal with the learning disabled, complicating matters further.

It is difficult to identify measures to overcome these problems. Some possibilities include:

- further investigation of whether and to what extent therapy can contaminate witnesses, and how this weighs against any improvements in performance at court;
- reducing the length of time the criminal justice process takes: the recent Narey review on delay in the criminal justice system made a number of recommendations with this aim. Some of these are to be introduced in the forthcoming Crime and Disorder Bill;
- reviewing police and CPS perspectives and policies on therapy: although the decision may affect the strength of the prosecution case, advice needs to be balanced: the decision about therapy should ultimately rest with the witness and his/her family; and
- training for therapists in working with people with learning disabilities: they could then be listed in a national register available to all interested agencies, with some system of referral to learning disabled people and their carers.

Prevention

In the longer term, improvements in the criminal justice system's treatment of mentally ill or disabled witnesses may reduce their vulnerability to crime by making them less of an easy target. However, some aspects of their increased vulnerability (such as dependence on carers) cannot be addressed by the criminal justice system except through crime prevention efforts.

- Statutory police checks on all professional carers working with disabled or mentally ill people.

John Newing, then chief constable of Derbyshire has called for statutory police checks on carers of vulnerable adults (Cervi 1992: 15), but there seems no reason why such a measure should not also apply to those working with vulnerable



children. The main problem with this proposal is that it might give a false sense of security: given that a large proportion of crime against people with disabilities/ illnesses is probably unreported, the police may only know of a small number of offenders against this group. Against this it can be argued that any protection possible would be desirable. In addition, if this was implemented as part of a general package of measures improving confidence in the criminal justice system, the number of offenders known to the police (and hence the effectiveness of this particular measure) might increase.

## Conclusion

The literature review found a paucity of literature on physical disabilities and mental illnesses- as well as on the impact of multiple health problems. This may partly be a reflection of societal attitudes generally, of the invisibility of some of these constituencies (for example residential care, separate education facilities and discrimination in industry may all serve to hide these groups) and their powerlessness (associated with dependence on others). Whatever the reason, this needs to be addressed: by not adequately meeting the needs of these groups in the criminal justice system, we may be increasing their vulnerability to crime.

Williams' (1995a: 4) conclusion is worth quoting almost in full (see box 4).

### Box 4: Williams' conclusion (1995a:4)

"redressing the stereotyped view of people with learning difficulties, in relation to crime, is the key element in changing the present situation. Justice is frustrated not only because of the response of the separate agencies, but of the effect they have on each other. The police do not record crimes because they believe the CPS will not prosecute, staff do not report to the police because they 'do nothing' and victims do not tell staff because 'they say the police won't help'. Consequently the courts are unpractised at dealing with vulnerable witnesses, and perpetrators see people with learning disabilities as safe targets. Positive action...could break this spiral."

Numerous measures are possible: many of these could also be applied to other groups of vulnerable witnesses. Table 2 summarises the measures discussed. As with witness intimidation, some cases will always fall through the net. The task currently facing the criminal justice system, is to ensure that there is a net which will catch as many of those witnesses who are physically or mentally vulnerable as possible.

Measures	Stage of Criminal Justice System				
	Reporting	Investigation	Decision to Prosecute	Trial	Beyond
Improved education to increase reporting (of both witnesses and service professionals)	✓				
Creating/reviewing policies for care institutions to encourage identification of incidents as criminal, encourage reporting and set our referral process	✓				
Raising awareness of increased vulnerability and tackling myths	✓				
Creating a legal requirement on service professionals to report allegations of crime	✓				
National guidelines for professional carers and care agencies on reporting	✓				
Consideration of accessibility and comfort in deciding location of interviews	✓	✓			
Structural changes to police stations	✓	✓			
Taping or video-recording interviews	✓	✓			
Provision of communication aids - both technical such as induction loops and human such as interpreters	✓	✓	✓	✓	
Improved training to identify communication problems	✓	✓	✓	✓	
Guidelines to assist identification of people with disabilities/illnesses	✓	✓	✓	✓	
Presence of support person	✓	✓	✓	✓	
Use of specialist skills for interviewing/cross-examination, supplied by experts or through training, perhaps involving specialist officers	✓	✓	✓	✓	
Requirement for prosecutors to meet witness before deciding on their competence			✓		
Guidelines or information to assist prosecutors			✓		
Pre-trial preparation				✓	
Pre-trial hearings or written depositions to avoid/reduce time in court				✓	
CCTV and Screens				✓	
Removal of wigs and gowns				✓	
Clearing the public gallery				✓	
Structural changes to courts				✓	

**Table 2: Possible measures to assist witnesses with disabilities and illnesses (continued)**

Measures	Stage of Criminal Justice System				
	Reporting	Investigation	Decision to Prosecute	Trial	Beyond
Use of expert evidence				✓	
Prohibition on issuing corroboration warnings simply on basis that witness has a learning disability				✓	
Reviewing policies on therapy before trial, further investigation of the contamination issue etc.	✓	✓	✓	✓	✓



## Section 4: Special Offences

### The Problem

#### *Definition of "special offences"*

Some of the definitions discussed in section 1 suggest there are certain special offences where witnesses may be vulnerable. The only offences specified by any of these are sexual offences<sup>1</sup>. This is supported by a large literature that suggests that sexual offences are particularly upsetting for the victim. Nevertheless, other possible "special offences" can be identified, including *domestic violence, racially motivated crime and hate crimes against sexual minorities*: all of these are considered below. However, the literature review found more information on some of these subjects than others. In particular, very little information was found on hate crime against sexual minorities: the discussion below reflects this.

#### Other offences

The selection used has some limitations. It could be argued that witnesses of other violent offences should be covered, but it seems inappropriate to label all witnesses of violent crime as vulnerable. For example, much violent crime involves pub brawls or other assaults committed in public by young males, not all of whom will necessarily view themselves as victims of crime. However, it could be argued that witnesses of some specific offences (such as the family of a murder victim) could be seen as vulnerable too.

Against this it can be argued that their vulnerability stems from bereavement, which may affect witnesses of other crimes, suggesting that bereavement should be another criterion of vulnerability. Due to time constraints this issue is

1. It can be argued some victims of sexual offences, such as those who are raped abroad, are especially vulnerable (see Sewnrd (submission to the Review, 29/8/97). This is not considered here because no relevant literature was found, although the Review may wish to consider that some witnesses are vulnerable because the offence was committed in a foreign country.

2. See the Victim Support report by Brown, Chmtie, C" Morn (1990) "Families of Murder Victims Project" for a discussion of the needs of this group

not examined further here, although the Review may consider it when finalising their definition of vulnerable witnesses.

#### Repeat victimisation

Another question is whether repeat victimisation. It may also be argued that some particular offences such as stalking should be covered. This raises the question of whether repeat victimisation generally should be covered. Repeat victimisation is known to be common in domestic violence and racial attacks, but can also occur for victims who would not otherwise be considered vulnerable, such as burglary victims (for a discussion of the distinction between repeat victimisation and intimidation see section 2). The finding that crime is concentrated on a small proportion of the population (see for example Farrell and Pease 1993: 5-15) suggests that repeat victims' experiences of the criminal justice system will be more frequent and different in nature to other victims of crime. However research in this area is relatively new, and has focused on measuring repeat victimisation and identifying ways to prevent revictimisation, rather than on how this affects the victim's emotional vulnerability. Repeat victims are not considered separately below, although many of the measures discussed may be relevant for them.

#### Source of vulnerability

The suggestion that repeat victims should be considered raises another issue: by drawing attention to particular offences the real source of the witness's vulnerability may be obscured. Vulnerability may not stem simply from the qualities of the offence itself. Just as the repeated nature of victimisation may be important, so too may the personal characteristics (such as sex, race or sexual orientation) of the witness and perpetrator(s) and the relationship between them. The significance of these factors may in turn derive at least partly from public attitudes, both outside and reflected within the criminal justice system. More detailed examples are given below.

### Example 1: Sex

It can be argued that power relations between the sexes causes vulnerability for victims of sexual offences and domestic violence. According to this argument; their vulnerability cases stems not from the sexual or violent nature of the offence. Rather, it derives from the fact that most of these cases involve female victims and male defendants, in a society which has traditionally privileged the male over the female, and reflected this in its institutions.

Of course some such offences may involve male victims who may also have unusually negative experiences and perceptions of the criminal justice system. One explanation for the problems that these witnesses experience is that the challenge the victims pose to sexist stereotypes (such as those characterising males as strong, powerful and assertive) and homophobic attitudes.

Thus, instead of labelling witnesses of special offences as vulnerable, other characteristics such as sex, race and sexual orientation could be used as criteria of vulnerability. One difficulty with this approach is that it would label a very large proportion of witnesses as vulnerable. In addition, there is little research examining whether these factors make witnesses vulnerable across the full range of crimes.

### Example 2: Race

It can be argued that vulnerability in racially motivated crimes is just one of a number of vulnerabilities associated with race, in a society which has traditionally privileged whites. Consequently, it may be more useful to examine how witnesses from ethnic minorities fare in general, rather than just those who fall victim to racially motivated crime. Cultural and language barriers can be seen as examples of problems that may apply equally in offences which are not racially motivated. However, such problems may not apply to all people from ethnic minorities.

### Example 3: Sexual orientation

Vulnerability may be associated with sexual orientation: both because public attitudes to sexual minorities may increase their vulnerability to crime (for example, "queer bashing") and because of possible discrimination in the criminal justice system (both in the law and on the part of some criminal justice professionals). The subject has been largely overlooked. This may be because studying discrimination against sexual minorities can be difficult (information about sexual orientation may not be offered as freely as information about racial origin) but may also reflect lack of awareness.

Each of the four special offences identified above (sexual offences, domestic violence, racially motivated crime and hate crimes against sexual minorities) are discussed below in turn. Three final points should be noted about this selection:

- The concern here is primarily about victims: few non-victim witnesses will be vulnerable because of the nature of the offence (as opposed to other factors such as intellectual disabilities).
- The categories of special offences discussed below are not mutually exclusive. For example, sexual offences may be racially motivated, or may be inter-linked with domestic violence.
- The Review may decide that a different selection would be more appropriate (or indeed to employ different criteria of vulnerability than the nature of the offence).

For each "special offence", definitions are examined first, followed by evidence (where applicable) from "Criminal Statistics", the "British (Crime Survey)", and other studies on the scale and nature of the problem. The one exception to this pattern is hate crime against sexual minorities, where research is much more limited.

#### 1. *Sexual offences*

##### Definitions

The range of sexual offences is wide, including both keeping a brothel and rape. The most

common factor defining sexual behaviour as criminal is lack of consent. Where the victim is young, this translates into whether the victim was above or below the age of consent. However, legal definitions include some behaviour between consenting male (but not sexual behaviour between consenting female) partners. This may be addressed following a ruling European Commission on Human Rights, which rejected the idea that the homosexual age of consent should differ from that for heterosexuals. A free vote is now planned on the homosexual age of consent in the House of Commons. However, this will still leave anomalies to the general rule that lack of consent defines sexual behaviour as criminal (eg. soliciting).

Table 3 lists the main offences and the maximum penalty for each: it should be noted that under the Crime (Sentences) Act 1997 a life sentence is now required after a second serious offence such as rape and attempted rape (unless there are exceptional circumstances).

#### Scale and nature of the problem

##### i- Criminal Statistics

Sexual offences account for a very small proportion (less than 1%) of all alleged offences recorded by the police in England and Wales. Most sexual offences appear to be committed by men. In 1996 over eleven thousand men were prosecuted for such crimes and about two-fifths found guilty: about a hundred women were prosecuted for such offences, and less than a third convicted (Criminal Statistics England and Wales 1996 Supplementary Vols 1 & 2, Tables S1.1 & S2.1).

The number of sexual offences recorded has risen at a similar rate to recorded crime as a whole (about 3% a year since 1986). Nevertheless, in recent years, the total number of rapes recorded by the police has increased almost threefold (Criminal Statistics England and Wales 1996 Table 2.16). There are several possible reasons for this increase, including various changes in the law over this period (Harris, 1997: 1). Examples include:

- legal recognition of marital rape (in 1991 in the case of *R v R*, the House of Lords upheld a Court of Appeal ruling on this);

- the widening of the law to include male rape (under the Criminal Justice and Public Order Act 1994); and
- legal recognition that boys under fourteen can commit rape (under the 1993 Sexual Offences Act).

Another explanation for this increase is that more victims are reporting rape. It is widely thought that public attitudes to rape and the way rape victims have been treated by the criminal justice system in the past, discouraged many from reporting. It is also generally accepted that changes in public attitudes and police treatment of rape complainants may have contributed to the increase in reported rapes. However, it is also possible that the actual number of rapes committed might have increased (Lees 1996: 24).

The conviction rate for recorded rapes fell from 24% in 1985 to 9% in 1996 (see Figure 3). Given that many rapes are likely to go unrecorded (either because they are not reported, "no-crimes" or recorded as a lesser offence), and some convictions will be quashed on appeal, the real conviction rate must be even lower. There is some evidence that conviction rates for rape are also low elsewhere in Europe and in America (Lees 1996: xii). Research for the Home Office into the reasons for the increasing attrition rate for rape is due to be completed in June 1998. However, initial findings suggest that this might be related to a larger proportion of rapes involving intimates being reported, where the likelihood of a conviction may be lower (Harris, 1997: 3).

For those convicted of sexual offences, on the face of it sentences seem to have become more severe over the past decade. The proportion of sex offenders given immediate custody rose from 35% in 1986 to 55% in 1996. This apparent increase in severity was encouraged by new sentencing guidelines issued in 1986. Changes were also introduced so that only senior members of the judiciary could hear rape cases. Despite this, the proportion of convicted rapists sentenced to immediate custody fell from 95% to 89% (see figures 4 and 5). Some sentencers do not always

*The number of convictions and cautions for sexual offences as a whole has tended to remain steady, at less than 2% of all convictions/cautions.*

**Table 3 Sentencing maxima for Sexual offences.**

Offence	Maximum sentence at magistrates' court	Maximum sentence at the Crown Court
Rape/ attempted rape	n/a	Life
Conspiracy to commit a listed sexual offence	n/a	Life
Incest with a girl under 13	n/a	Life
Other incest	n/a	7 years
Sexual intercourse with a girl under 13	n/a	Life
Sexual intercourse with a girl under 16	"6 months or £5,000 fine or both"	2 years
Householder permitting girl under 13 years to use premises for intercourse	n/a	Life
Householder permitting girl under 16 years to use premises for intercourse	"6 months or £5,000 fine or both"	2 years
Abduction of female	n/a	14 years
Abduction of unmarried girl or female defective	n/a	2 years
Indecent assault	"6 months or £5,000 fine or both"	10 years
Man having unlawful sexual intercourse with a woman who is a defective	n/a	2 years
Man living on earnings of prostitution or exercising control over prostitute	"6 months or £5,000 fine or both"	7 years
"Woman for purpose of gain, exercising" control over prostitute	"6 months or £5,000 fine or both"	7 years
Man or woman living wholly or in part on the earnings of male prostitution	"6 months or £5,000 fine or both"	7 years
Man soliciting or importuning in a public place for immoral purposes	"6 months or £5,000 fine or both"	2 years
"Procuring, permitting or causing the" prostitution of a female under 16 years or a female defective	n/a	2 years
Procuring a female for immoral purposes or using drugs to obtain or facilitate intercourse	n/a	2 years
Detention of female in brothel or other premises	n/a	2 years
"Keeping a brothel, letting premises for" use or tenant permitting use of premises as brothel for heterosexual/ homosexual practices	"3 months or £1,000 fine or both"	n/a
Kerb-crawling or persistent soliciting of women for the purpose of prostitution	"£1,000 fine"	n/a
Buggery/attempted buggery with boy under 16 or with a woman or animal	n/a	Life
Buggery/attempted buggery by man with male aged 16 or over without consent	n/a	10 years
Buggery/attempted buggery by man aged 21 or over with male under 21 with consent	n/a	5 years
Other buggery/attempted buggery	n/a	2 years
Man procuring an act of buggery by two other men	"6 months or £5,000 fine or both"	2 years

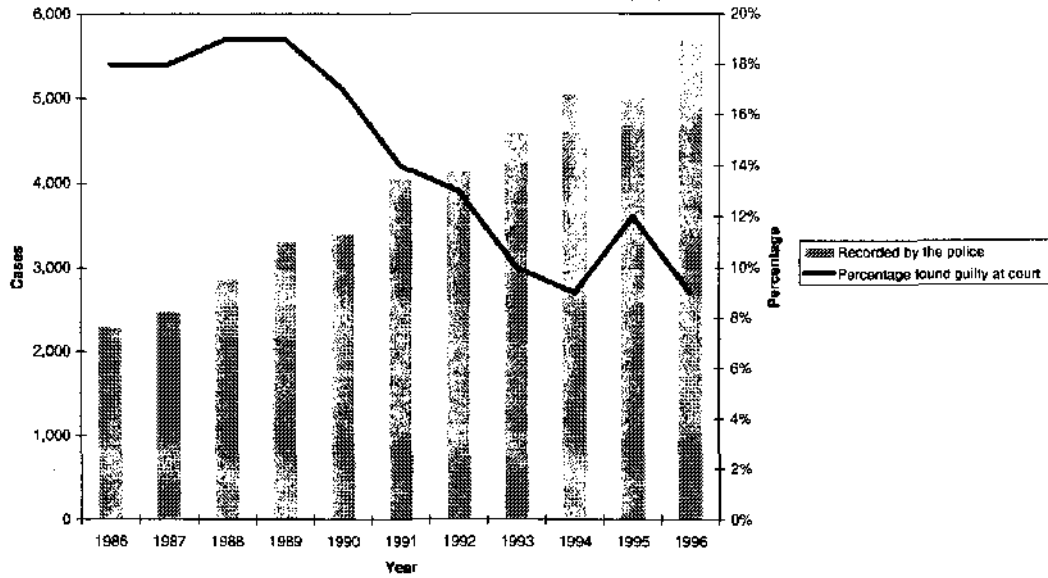


**Table 3 Sentencing maxima for Sexual offences (continued)**

Offence	Maximum sentence at magistrates' court	Maximum sentence at the Crown Court
Gross indecency by a man aged 21 or over with a male aged under 18	"6 months or £5,000" fine or both	5 years
Gross indecency by a man	"6 months or £5,000" fine or both	2 years
Male of or over the age of 21 procuring or attempting to procure or being party to the commission by a male under 18 of an act of Gross Indecency	"6 months or £5,000" fine or both	5 years
Male procuring or attempting to procure or being party to the commission by a male of an act of Gross Indecency	"6 months or £5,000" fine or both	2 years
Unlawful possession of protected material/ giving or showing protected material to someone when not supposed to.	"6 months or £5,000" fine or both	2 years or fine or both

Figure 3: Number of cases recorded as rape and conviction rate, 1986-1996

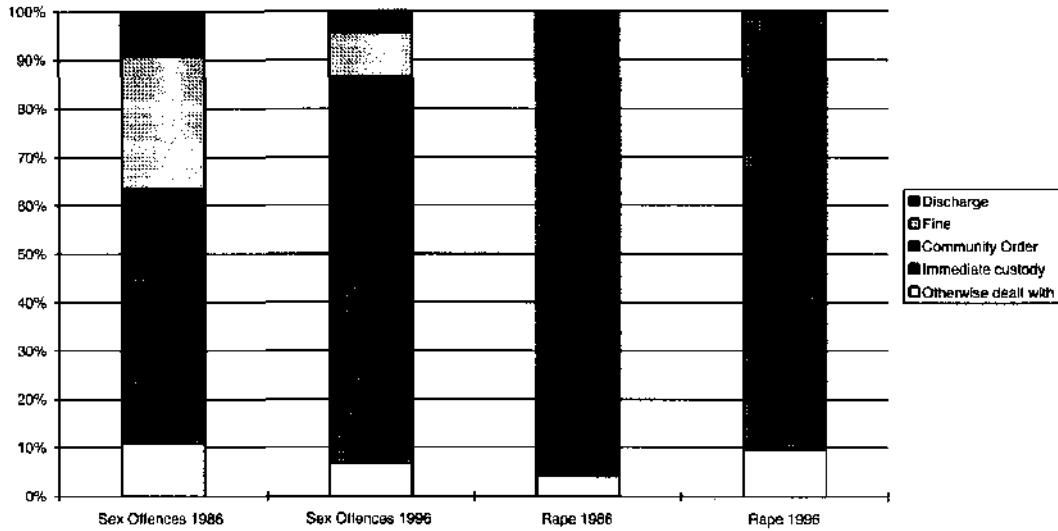
Source: Based on figures taken from J. Harris (1997)



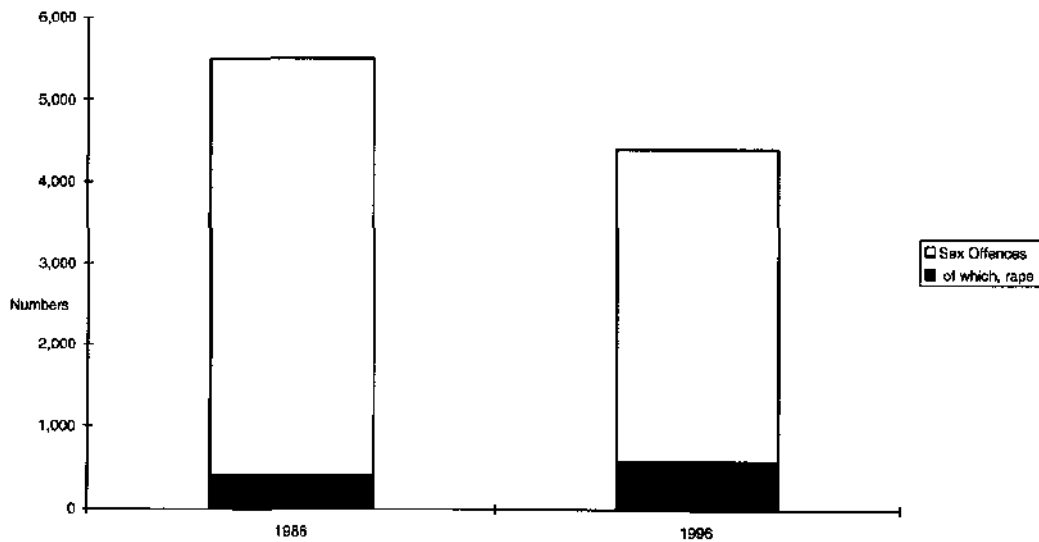
adhere to the guidelines (Robertshaw 1994: 343-345). The new measures requiring a life sentence after A second serious offence such as rape and attempted rape may increase sentencing severity.

It has yet to be seen how frequently judges will use their discretion in "exceptional circumstances" to impose sentences other than life.

**Figure 4 Sentencing for sex offences and rape, 1986 & 1996**  
 Source: Criminal Statistics



**Figure 5 Total number sentenced for sex offences, including rape, 1986 & 1996**  
 Source: Criminal Statistics



i. British Crime Survey

The BCS provides an indication of the amount of crime not reported to the police. However, in practice survey methods have not proven a strong measure of sexual offences. There are several problems:

- people may find answering questions about sexual offences embarrassing;
- some respondents may be reluctant to disclose sexual victimisation because of lack of privacy (concern that someone might overhear, or in some cases fear of retribution if the perpetrator should learn of the disclosure);
- public definitions, may not be the same as legal definitions: for example, legally rape does not include penetration by bottles, fingers, etc.; and
- a respondent may come to label an incident differently over time.

It is difficult to judge what effect these problems have overall, but the "embarrassment factor" and concerns about privacy suggest a bias towards under counting. Although the BCS collects data on sexual offences, this has not been published recently because of doubts about its reliability. To try to improve the 1994 survey (Percy & Mayhew 1997: 6-7) respondents were asked to read and answer questions on a computer, to try to reduce the embarrassment and privacy problems.

More offences were reported with the self-keying method. From the conventional sexual victimisation question asked towards the beginning of the interview, fewer than 1% of women said they had been the victim of one or more sexual incidents in the last year. However, with the self-keying method about 8% admitted sexual victimisation. Similarly, fewer than 1% initially said they had experienced one or more sexual offences since age 16. After follow-up questions in the self-keyed component, up to 22% reported sexual incidents of some sort from age 16.

These findings are difficult to interpret. It is plausible that after further prompting the women remembered more crimes, suggesting that the second measure is more reliable. Another possible

explanation is that whereas initially they only mentioned those incidents they viewed as crimes, further questions revealed some sexual incidents which respondents did not perceive as crimes. For example, 6% of women reported having been forced into sex at least once from age 16, but only 2% described the most serious sexual incident they had experienced as rape. This complicates matters. If only those incidents viewed as crimes by the victims are taken, the second measure over counts, but the first measure may still undercount. Despite these limitations, this method does seem more reliable than previous approaches. Other findings were that (Percy & Mayhew 1997: 10-15, tables 8, 9 & 10):

- Thirty-nine per cent of those reporting some sexual incident viewed them as crimes.
- The proportion of incidents regarded as crimes was highest for rape (74%).
- Incidents were more likely to be considered crimes when the offender was a stranger (49% compared to 23% when the victim knew the offender by name).
- Of all those incidents viewed as crimes, 39% were reported to the police. Only 5% of those incidents viewed differently (for example "wrong but not a crime", "just something that happens", or "not sure") were reported.
- There was strong evidence that rape victims were more reluctant to report to the police than victims of other sexual offences. Only 26% of rapes viewed as crime by the victim were reported to the police, against 47% of attempted rapes and 45% of indecent assaults.

iii. Other studies.

There have been a number of other surveys of victims concerning sexual offences. One of the criticisms of the BCS is that national figures mask local differences in risk. One well-known example of a local survey is the Islington Crime Survey (ICS), in which over one and a half thousand questionnaires were completed (a response rate of over 75%). The survey found 4% of respondents reported some level of sexual assault in the previous year, although three-quarters described it

as low-level pestering rather than assault. Women were more likely than men to describe this experience as assault. About 8% of women reported sexual harassment or assault during the previous year. Eight percent of women and 12% of men reported sexual abuse before aged 16 (Crawford et al 1990: 8, 19-20).

However, comparing crime survey findings is problematic: methodological differences can lead to great variation in results. For example, the BCS suggested offenders were known to 60% of victims 60%, against 23% in the ICS. One explanation for the difference might be that Islington is a high crime area whereas the BCS is a national survey, but there were also major methodological differences between the two. For example, in the ICS male respondents were also asked about women in the household: the BCS excludes male respondents from questions on sexual victimisation, following tests suggesting men were unwilling to answer questions on sexual victimisation or take them seriously (Percy and Mayhew (1997: 21, 5).

Another more recent example is the 1996 International Crime Victimization Survey, which involved mainly telephone interviews of nationally representative samples of between one and two thousand people in each of eleven countries. The 1996 survey found some similarity in risks of sexual assault between the eleven countries. On average, 2.5% of respondents reported one or more sexual incidents over the last year. The highest rates were recorded for Switzerland (4.6%) and Austria (3-8%), with the lowest in France (0.9%). England and Wales fell in the bottom half of the range at 2%: Scotland and Northern Ireland were lower at 1.3% and 1.2% respectively (Mayhew & van Dijk, 1997: Table 1).

Again, these apparent differences should be treated cautiously. The study found evidence of consistency between the countries in how seriously they viewed different behaviours, from which the authors inferred a large degree of consistency between countries in defining certain actions as crimes. However, willingness to report sexual offences to researchers may have differed: although this is partly related to perceptions of seriousness, other factors (such as the "embarrassment" factor) may have affected response differently in different countries. It has also been suggested that the wording of the initial

question was problematic (van Dijk and Mayhew 1992, Travis et al 1995 and Koss 1996 cited by Percy and Mayhew 1997: 23).

### Outstanding questions

The number of sexual offences reported is affected by the research methodology used, and caution has to be exercised in interpreting the results. However, the literature found on sexual offences focuses on offences involving female victims and male offenders.

## 2. *Domestic violence*

### Definitions

The Home Affairs Select Committee in 1993 defined domestic violence as "any form of physical, sexual or emotional abuse that takes place in the context of a close relationship". This definition was adopted by the Home Office in an inter-agency circular in 1995. This said that domestic violence can take a number of forms, not only physical violence but also sexual abuse, rape, and mental and verbal abuse such as threats and systematic criticism (cited in Home Office 1996). The Home Affairs Committee definition is also used by the CPS policy statement on domestic violence which observes that in most cases, the relationship will be between partners (married, cohabiting, or otherwise) or ex-partners'. It further elaborates that although in most cases the offender is male and the victim female, domestic violence can also involve male victims and female offenders, and partners/ex-partners or the same sex (CPS 1995: 2.1-2.2).

This definition is very wide: most studies encountered in the literature review focused more narrowly on physical violence (usually by male offenders against female victims). This appears to be the approach used by the police. However, the CPS definition is useful in highlighting that other incidents can occur in close relationships, and that these relationships affect the nature of the incidents.

Another definition is provided by the British Crime Survey, which focuses on violent incidents "involving partners, ex-partners, household members and other relatives, irrespective of location". The inclusion of non-partners means the definition is quite broad, but has the advantage of matching police measures of

domestic violence (Mirrlees Black, Mayhew & Percy 1996: 2). However, almost all cases reported to the 1992 survey took place in or just outside the victim's home: some occurred at the home of a friend or the offender when the victim and offender were not currently cohabiting (Mayhew, Aye Maung & Mirrlees Black 1993: 82).

#### Scale and nature of the problem

##### i. Criminal Statistics

In law, there is no such offence as domestic violence. Instead domestic violence is prosecuted under a number of different offences, such as assaults and breach of the peace (a public order offence). Nor do Official statistics identify the relationship between the victim and offender. Consequently, it is impossible to examine domestic violence using Criminal Statistics, because it is not separable from, for example, stranger assaults. Some forces keep domestic violence registers, in which such offences are supposed to be recorded, but there are concerns about recording practices (particularly the rate of "no-criming") and statistics from these registers are not published. This makes criminal justice responses to domestic violence difficult to monitor. Both the National Inter-Agency Working Party on Domestic Violence set up by Victim Support in 1990 (Victim Support 1992: 2.8) and Grace (1995: 53-54) recommended improved recording of domestic violence to assist monitoring.

##### ii. British Crime Survey

The BCS provides much more information about domestic violence. The 1992 survey found that 10% of women experienced domestic violence at some point in their lives (Mirrlees Black 1994 cited by Grace 1995). The latest survey (Mirrlees Black, Mayhew & Percy 1996: 5. 28-35) found domestic violence increased 242% between 1981 and 1995. Other evidence from the survey suggests that more domestic violence is being reported to the police, so one reason for this rise may be that respondents are also more willing to disclose domestic violence to interviewers. Domestic incidents accounted for about a quarter of all violent offences reported: the authors suggest that "if domestic violence could be measured better, the proportion might be higher".

On the nature of domestic violence, it was found:

- Approaching half (44%) of all violence reported against women was domestic: men more frequently reported being victims of stranger and acquaintance violence.
- Younger people (those aged between *Hi* and 29) were at greatest risk.
- Weapons were less likely to be used than in other violent crimes, but victims of domestic violence were most likely to be injured. This suggests they only reported the more serious incidents.
- A third of victims were victimised more than once,
- Women found domestic violence more upsetting than men: common reactions included anger, fear, crying and difficulty with sleeping.

These findings should be treated with caution: the BCS probably under counts violent crime, especially domestic violence. It seems plausible that violence between people who know each other is less likely to be perceived as crime. There may also be other reasons for not mentioning domestic violence: as with sexual offences, embarrassment and concerns about privacy and retribution may be important.

##### iii. Other studies

One of the earliest studies on domestic violence (Dobash & Dobash 1979: 164) found that a quarter of all violence is domestic, and only 2% was reported to the police. Other surveys have also suggested that between 10% and 25% of women have been the victim of violence by a male partner at some time in their lives. This seems to fit with the findings of some forthcoming research for the Home Office (Phillip, & Brown 1998: 39) on entry into the criminal justice system: domestic incidents accounted for just over a quarter of all violence against the person arrests'. According to Dobash et al (1996: 2) similar figures have been found in other countries.

*Six per cent of all suspects were arrested for domestic violence related offences (including public order offences and property offences, such as criminal damage, not just violence against the person).*

The literature reviewed has tended to focus on male on female violence, but it seems plausible that some domestic violence may be female on male or occur in a same-sex relationship. Despite this, there have been a few studies of female on male violence recently. These suggest this is far less common than male on female violence. For example, Phillips and Brown (1998: 91) found that 10% of those charged with domestic violence offences were female. Other research in this area suggests that violence committed by women against men is usually against a background of a history of violence by the male: that it tends to be less systematic, and less serious (Dobash et al 1992; 71-91; Dobash et al 1996). However, no studies were found examining domestic violence within same sex relationships.

### Outstanding questions

At least two outstanding questions can be identified:

- to what extent sexual abuse accompanies physical violence; and
- the extent of domestic violence in same-sex relationships.

### 3. *Racially motivated crime*

#### Definitions

A wide range of legislation may be used to prosecute racially motivated crime. For example, racial harassment and racial verbal abuse can be prosecuted under the Criminal Justice and Public Order Act 1994 and Public Order Act 1986. However, at present only a few offences with an explicit racial element exist. For example:

- racial discrimination: the Race Relations Act 1968 first made it unlawful to discriminate on the grounds of ethnic origins in the provision of goods, facilities or services.
- stirring up racial hatred: five offences of this type were created under the Public Order Act 1986, s27(3), including distributing written material. The maximum penalty is

*For example, this created a new offence of intentionally causing harassment, alarm or distress to deal with racial harassment, although it can be used for other forms of harassment.*

currently two years imprisonment on indictment (that is at the Crown Court), a fine up to the statutory maximum or both. For cases tried summarily (in the magistrates courts) the maximum penalty is six months imprisonment, a fine or both.

- possessing racially inflammatory materials: this was also created under the Public Order Act 1986, and carries the same maximum penalties as stirring up racial hatred.

The Association of Chief Police Officers (ACPO) definition of a racial incident is any incident where:

- a. the reporting or investigating officer perceives some racial motivation, or
- b. any other person alleges racial intimidation (Home Office 1997b: 3D)

#### Scale and nature of the problem

The literature review found little published research on hate crimes against ethnic minorities.

#### *i-* Criminal statistics

Criminal statistics on racial incidents are limited. Where racial motivation is not reflected by the offence type, it is not possible to separate it from non-racially motivated offences. Like domestic violence, police forces do record racially motivated incidents, but this has only occurred since 1988.

The number of racial incidents recorded by the police has risen each year, from about 4,400 recorded cases in 1988 to 13,150 for the year ending March 1997 (see Figure 6). This increase is greater than that for recorded crime generally, but it is not clear whether or to what extent this reflects an increase in the real rate of racially motivated crime. It is possible that the increase in recorded racial incidents is partly due to changes in recording: until the early 1980's officers were not required to consider other people's views on whether an incident was racially motivated. Against this, Sibbit (1997: 25) found that in practice most racial incidents recorded by the police were cases where the victim had claimed racial motivation.

Another factor could have been increases in reporting rates. The BCS provides some evidence

that reporting rates increased between 1987 and 1991, but the ethnic minority samples were too small for the increase to be statistically significant: it may have been due to sampling error. A more important factor may have been greater willingness by the police to record offences as racially motivated when racial motivation is alleged even in the absence of other evidence of racial motivation (Aye Maung & Mirrles Black 1994: 20).

Statistics on convictions and sentences are not readily available. However, there is some further information from the CPS racial incident monitoring scheme which began in 1995 (CPS 1997: 3-7). For the year ending March 1997 over 1,300 completed cases were recorded. Although the ACPO definition of racial incidents was used, more were identified as such by the CPS than the police (63% identified by CPS against 37% by the police)". This adds weight to the argument that despite the growth in the police figures, they still under count the number of crimes which are racially motivated. Concerns about the police figures have been expressed by HMIC, who have suggested some police officers may not be clear about the definition of a racial incident (1997: 2.66).

The CPS (1997: 7-9) records also show the charges put by police and some details of the outcomes of those cases which are prosecuted:

- The most common were public order offences (48%) followed by assaults (27%) and criminal damage (14%).
- In two-thirds of cases the charges were unaltered by the CPS. Less than 2% were increased: the remainder were either reduced (11%) or dropped (21%).
- Of those prosecuted, most (79%) pleaded guilty, although some (21%) were initially contested.

Details of conviction rates and sentences were not supplied. However, Government plans (Home Office 1997c: 7-9) for new measures to be

*Although there were variation between areas, only two forces identified more, racial incidents than CPS and even then the margin was negligible (Anglia 53% and Midlands 52%).*

included in the ("Crime, and Disorder Bill should assist assessment of the scale of the problem. The proposals include new offences of *racial violence* (including racial common assault, racial assault occasioning actual bodily harm, and malicious wounding). This would enable racially motivated violence to be treated more seriously!)' than other violence. Both the Commission for Racial Equality and the Home Affairs Select Committee have supported such a measure.

A new offence of *racial harassment* has also been proposed. As mentioned above, although there are existing provisions dealing with harassment, racial harassment has not been dealt with separately. There are also concerns about the adequacy of the provisions for dealing with low-level harassment. At the same time, the new offence would enable the courts to treat racial harassment more seriously than other harassment. The effectiveness of these measures may depend on how easily racial motivation can be proved. In some cases, racial motivation may be obvious: for example, when racist slogans are painted on the property of ethnic minorities. In other cases, proving racial motivation may be more difficult.

#### ii- British Crime Survey

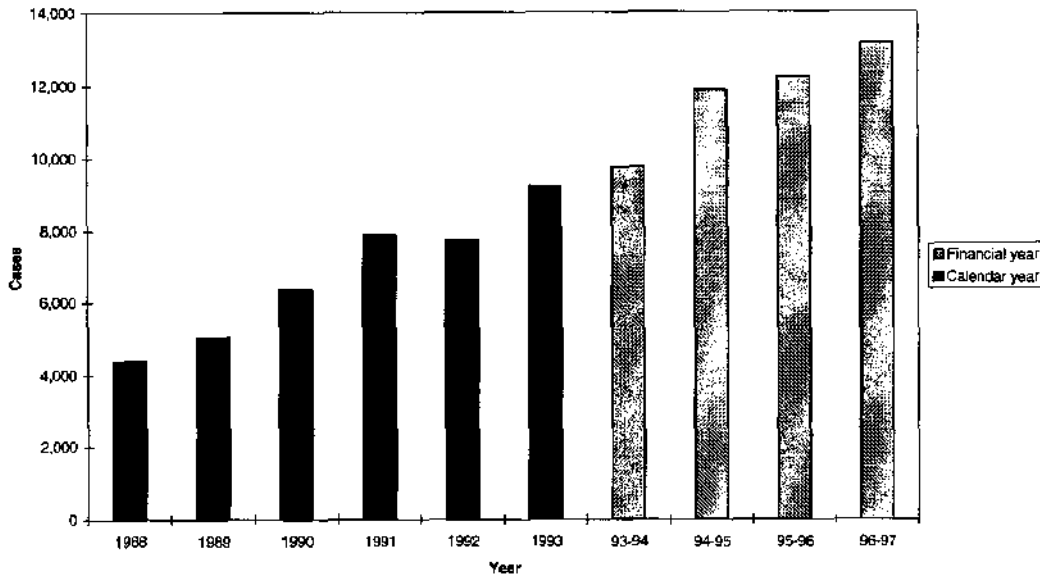
The BCS is broader in approach than the police figures, in that it looks at unreported as well as reported crimes. Against this, the BCS only looks at those crimes where the victim perceived racial motivation: it does not cover any where the police detect racial motivation but none is reported by the victim.

A key finding from the 1996 and previous surveys (Percy 1998: 5-6) was that higher rates of victimisation were found among ethnic minorities. This is partly explained by demographic factors. [For example, ethnic minorities tend to be younger, of lower socio-economic status and to live in rented or public housing, all factors associated with greater risk of crime. Smith (1994:1106) suggests high victimisation rates among Afro-Caribbeans may also be related to their higher recorded offending rates: a large proportion of offences against Afro-Caribbean are committed by Afro-Caribbeans. This fails to explain though why Asians (who have relatively low recorded offending rates given their numbers in the general population) have the highest risk of victimisation.



**Figure 6 Racial incidents reported to the police in England and Wales**

Source: Home Office (1997b: 4)



Note: Year basis changes from calendar to financial in 1993.

However, most crimes against minorities were not perceived by the victim as racially motivated. About 4% of Afro-Caribbeans, 5% of Indians and 8% of Pakistanis reported racially motivated offences, representing about 15% of all crimes committed against them. The number of racially motivated crimes reported was similar to that reported in previous years. Racial motivation was perceived in more personal crimes than property crimes. A larger proportion of those\* where racial motivation was perceived involved white offenders, more of these crimes involved groups, and the perpetrator was less likely to be known to victim. Racial incidents were more likely to be part of a series, suggesting repeat victimisation is a particular feature of racially motivated crime (Percy 1998: 15-20).

Measuring racially motivated crime is not a simple task though. The box below suggests three categories of racially motivated crime. Victim surveys depend on the victims awareness of racial motivation, but racial motivation may not always be perceived when it is present. On the other hand it is possible that racial motivation can be perceived when it is not actually the main motivation for the offence. Victim surveys may therefore under-count racially motivated crime, but it is not known how big the problem is,

However, the perception of racial motivation alone may increase the impact that crimes have on the victim: victims who perceive racial motivation even when it did not exist may still be vulnerable.

### Three-fold categorisation of racially motivated crime (Fitzgerald and Hale, 1996:57)

1. Offences which are solely motivated by racism.
2. Offences which have a racial element, either in motivating the offence or arising during the incident, but which are not entirely racially motivated.
3. Offences which are racially motivated (wholly or partly) but where this motivation is not perceived.

### iii. Other studies

There are a few other studies on racially motivated crime. For example, Maynard and Read (1997: 2-4) conducted a postal survey of all police forces asking for figures on recorded racially motivated incidents for 1996/7. They received returns from thirty four of the forty-two forces: the remaining

eight were able to supply data other data (for example, five gave details for the calendar year 1996). In total over thirteen thousand racially motivated incidents were recorded. The highest numbers were found in the Metropolitan Police (rise 'Met'), at over five and a half thousand offences'.

One explanation for the large proportion of racial incidents recorded for the Met might be the concentration of ethnic minorities in the area, rather than a high rate of (recorded) racial victimisation. Maynard and Read (1997: 5) looked at the number of recorded racial incidents per thousand of the ethnic minority population. According to their figures, the rate in the Met is under four recorded offences per thousand, against an average figure of just under seven. The highest rate was in Northumbria, at almost twenty-three offences per thousand. However, this could at least partly reflect differences in recording practices between police forces.

Maynard and Read (1997: 7) also looked at the nature of the problem. They found verbal harassment was most common (38%), followed by assault (21%) and damage to property (20%). Figures varied between police forces: this could be explained both by differences in the nature of crime in different areas, and by difference in reporting rates. However, the overall pattern is supported by Sibbit (1997: 27-28), who looked at 140 racial incident reports in one area and identified three main types:

- *contact assaults*, where direct contact is made by the perpetrator intended to cause physical injury or pain, were the most rare;
- *indirect assaults*, where contact is indirect, eg. where objects are thrown at the victim, a gun is used or spitting, and
- *intimidatory behaviour*, which included racist verbal abuse, damage to property and threats, was the most common.

There was some overlap between these categories: for example both contact and indirect assaults could be accompanied by intimidatory behaviour.

*Home Office figures for 1996/7 published since the research show about 5,600 offences in the Met and 13,150 in England and Wales as a whole (1997: 31).*

Other research conducted by Love and Kirby (1994: 1-12) looked at racial incidents in council housing. Self-completion questionnaires were sent to all local housing authorities, and a high proportion (82%) responded. However about a third of those responding said that they had very few or no ethnic minority tenants, and three-fifths said that racial violence and harassment was not a problem. The other respondents were asked to provide more detailed information about racial incidents. The responses show an increase in the average number of racial incidents recorded by housing authorities from 35 in 1987/8 to 56 offences recorded in 1989/90. There was great variation between authorities, with some reporting much higher numbers each year: nine authorities reported more than a hundred incidents in 1989/90.

However, most respondents thought their figures underestimated the problem. This is supported by Sampson and Phillips (1992: 4-5) study of racial incidents on an East London estate. During a six-month period over twice as many incidents were reported to the housing authority as to the police, but more than twice as many again were reported to the homeless families campaign/law centre. Although this was a small study, it does suggest that housing authority figures should also be treated with caution. In particular Sibbit (1997: 63) observes the types of offences reported to the police and housing departments differ: only those occurring in or near council housing are likely to be reported to housing authorities.

#### Outstanding questions

Clearly, our evidence of the scale and nature of racially motivated crime is only partial. There are significant limitations to both the official figures and victim surveys. More information on reporting rates would be particularly useful in explaining why recorded racial incidents have increased so dramatically. It is however difficult to survey enough people from ethnic minorities to draw firm conclusions on this. Other potentially useful information would be evidence of the scale of the problem in other countries. Finally, and perhaps most importantly for the Review, little research was found on how victims of racially motivated crime experience the criminal justice system. The literature that was found on this primarily concerns the police. These issues are explored in the following section on "the response".

#### 4. Hate crimes against sexual minorities

Very little literature was found on hate crimes against sexual minorities.

##### Scale and nature of the problem

Hate crimes against sexual minorities are not examined separately from other offences in either Criminal Statistics or the BCS. Contrastingly in America there has been a legal requirement on the Department of Justice to collect and publish annual statistics "on crimes that manifest prejudice based on race, religion, sexual orientation, and ethnic origin" under the Hate Crime Statistics Act since 1990 (Conyers in Ickek & Berrill [Eds] 1992: xiv).

Recording systems within the criminal justice system in England, and Wales have not traditionally collected such data separately. This is beginning to change in some police forces. For example, the Met now separate such offences on their computerised crime recording system, which logged almost 250 such offences in the first 9 months. HMIC has called for all forces to follow this lead (1997: 3.19).

At the same time though HMIC have acknowledged that perceptions of the pervasiveness of homophobia in the police are likely to discourage sexual minorities from reporting crime generally. Concerns about confidentiality are also important: examples have been reported of officers informing family, employers or neighbours about the individual's sexuality. Similarly, there is some anecdotal evidence that reporting may be met with accusations of wasting police time or even violence (Galloway 1983: 106-107). In Manchester anonymous self-report forms are being used to help gauge the extent of homophobic crime (HMIC 1997; 3.24; 3.27), but it is not known how effective this approach is.

Despite these problems, official statistics on prosecutions for sexual offences such as indecency between males can nevertheless provide an indication of attitudes towards sexual minorities within the criminal justice system. "Nationally, prosecutions for gay sex offences have declined year on year throughout the 1990s, and are currently running at less than half the level of 10 years ago" (The Guardian, 26/11/97). Nevertheless, it could be argued that the fact that

such offences are still prosecuted indicates that there is still some room for improvement. In addition, Mason and Palmer (1996: 3) argue that increased tolerance has led to increased visibility of sexual minorities, which may increase opportunities for hate crime against them.

##### *Other sources*

Few alternate sources of information were found:

##### **1. Commission on Discrimination survey**

This three year survey (1977-1980) is now very old. By examining newspapers (including gay papers), evidence of 250 attacks against people thought by their attackers to be gay were found in Great Britain and Northern Ireland. Of these 15% reportedly led to the death or disablement of the victim. However, "it is clear that the cases making the news are only a small and biased sample of what goes on" (Fvleldrum. 1980: 1).

##### **2. Lewisham survey**

More recent research was carried out (in 1992) as part of the Lewisham Safer Cities project to help address lack of research in this area. There were two main elements (Safe Neighbourhood Unit 1992: 1):

- a self completion survey covering gay men only who lived or worked in the borough or were regular visitors; and
- interviews with gay men and key agencies (including the local police).

Key findings from the study (1992: 35, 40-41) were that:

- The vast majority (81%) reported experience of verbal abuse.
- Approaching half (45%) reported being physically attacked because of their sexual orientation, two-fifths of whom required medical attention as a result.
- Multiple victimisation was common.
- Property offences were less common: 13% reported being robbed, 17% damage to property.

- Vulnerability appeared to be lower for those who were in regular relationships, perhaps because less time would be spent in public places frequented by gay men.

Harassers were most commonly reported as unknown groups or individuals, but in a third of cases verbal abuse came from people in close contact with the respondents such as neighbours, colleagues or relatives (1992: 42-43).

The report suggests there is a perception that sexual minorities are targeted because they are thought less likely to report crime. Reporting rates to the police (and to advice agencies - both gay and straight) were low. The highest reporting rate to the police was 16% for violence, followed by 13% for verbal abuse. Attackers were interviewed in only seven cases, and five charged. Most victims (66%) were very dissatisfied with the police response: common complaints including insufficient or no action and not treating complaints seriously. These seem unsurprising given that 21% reported verbal abuse from police officers and 3% being violently assaulted by them (1992:43-45).

Contact with the police was more likely to come from police surveillance of "cottages" and "cruising areas" than reporting crime. About a third of respondents reported being asked to move on, and a quarter being charged. Most respondents thought a more sympathetic police response to attacks and prosecution of perpetrators would have the greatest impact on the safety of gay men. Action by the council (for example by using tenancy agreements) and improved liaison between the police and gay clubs were also strongly supported (1992: 46 & 49). Interviews with the police suggested they had little knowledge of attacks on gay men and did not see it as a priority. However, they also reported difficulty for officers in identifying the motive for an attack as anti-gay. There were particular problems in asking a victim directly whether he was gay (1992: 52).

### 3. Stonewall survey

Stonewall is a national pressure group which campaigns for the civil rights of lesbians, gay men

*The Stonewall report also cite a small but representative survey by Snade, Thomson and Chetwynd (1995), and another small study by Truman et al (1994) in Mariihestei: regrettably there was not time to include these in the literature review.*

and bisexuals. They distributed fifty thousand questionnaires through gay publications and gay mailing lists and received over four thousand completed forms. Although the sample was large and the authors suggest the response rate was high for this type of survey, there is a danger that the sample may not have been representative. In particular those who had been victimised might be over-represented. To try to minimise this risk it was stated at the top of the questionnaire "whether you have experienced violence or not, we need YOU to fill in this questionnaire".

Almost all respondents reported using some kind of avoidance tactic, such as not kissing or holding hands in public or telling people they were gay. Mason and Palmer (1996: 68-72) argue that such strategies reduce the visibility of sexual minorities, helping reinforce the idea that they are a tiny minority or even that they don't exist in some areas. Yet it was found that there was little correlation between these strategies and risks of victimisation. Other key findings (Mason and Palmer 1996: 1-2, 45) were that:

- Just over a third of men and about a quarter of women reported experiencing violence in the last five years because of their sexuality;
- About a third of all respondents reported being harassed (including threats, blackmail, vandalism and hate mail);
- Three quarters reported verbal abuse on at least one occasion: more than a quarter (29%) reported six or more occasions.

The researchers also found that some groups had greater risk of victimisation than others: in particular black, asian and disabled respondents were more likely to report violence than average. Problems were also greater for young people: almost half of those under 18 reported violence, approaching two-thirds reported harassment, and nine out of ten reported verbal abuse within the past five years. Some respondents reported that it was easier to move house than to involve the police: it was commonly reported that most agencies were either indifferent to their problems or sympathetic but took no action (Mason and Palmer 1996:8,54,27).

#### 4. American research

There appears to be more information on hate crimes against sexual minorities in America. For example, -A survey of over 2,000 gay men and lesbians across eight American cities found that almost all had suffered some form of victimisation. More specifically a fifth reported suffering physical violence at least once, and almost half had been threatened with physical violence. Many reported repeat victimisation: 92% of those who reporting verbal abuse, and 47% of those who said they had been physically assaulted (National Gay and Lesbian Task Force cited by Berrill 1992: 19-20). Berrill summarises the findings of a further twenty-three studies. The median figures (Berrill 1992: 20) were:

- Four fifths reported verbally harassment;
- A third reported being chased or followed;
- A quarter reported having objects thrown at them;
- Just under a fifth reported vandalism;
- Seventeen percent reported physical assaults; *and*
- Thirteen percent reported being spat upon.

There is also some evidence suggesting hate crime against sexual minorities is growing.

#### Outstanding questions

Further research would be useful on all aspects of hate crime against sexual minorities in this country. This needs to cover both male and female victims. The Lewisham study did not look at women because it was commissioned by the Lewisham gay Alliance, which had little contact with lesbians in the area. It is also questionable how representative it was of homosexual men in the area. The self-report approach generally has a poor response rate (28% in this case as a proportion of questionnaires sent out). The manner in which the questionnaire was circulated (through gay bars, clubs and networks) may also have meant that the survey did not reach all sections of the local gay population. This is a very difficult area to research though, and the shortcomings of the Lewisham study were recognised in the report. In particular, it suggested

there may have been a bias towards those with experience of violence: those with negative experiences may have been more inclined to respond.

## The Response

### 1. Sexual offences

#### a. Reporting

##### Failure to report

It was noted earlier that there is some evidence that reporting of sexual offences has increased, which has been attributed to improvements in police responses to sexual offences. Nevertheless, the reporting rate is still low compared to that for other offences. There are various possible reasons for failure to report sexual offences including (see for example, Williams 1984):

- shock, in particular Post Traumatic Stress Disorder (PTSD) which covers a variety of symptoms including repressing thoughts, feelings and memories about the offence (see Parkinson 1993; Peterson, Prout and Schwarz 1991 for further discussion of PTSD; Resick 1993 considers PTSD in rape victims);
- fear that the media would publicise their case and blame them;
- fear that family, friends or colleagues would not be sympathetic, that they might be disbelieved or even ostracized;
- a desire to protect family and friends from the knowledge and possible media attention;
- intimidation or fear of reprisals;
- concern about the response from the criminal justice system: for example, that complaints will not be believed, treated sympathetically or as seriously as the victim feels is justified, and lack of confidence in the ability of the system to convict the perpetrator.

Williams (1984: 461-465) looked at 246 rape cases in Seattle and found reporting is more likely

if the rape corresponded to the "classic rape situation", that is if:

- the victim was raped in public, abducted from a public place or raped by an assailant who entered her home by force or without her consent;
- the assailant was a stranger to the victim;
- the victim was threatened with, or subjected to a high degree of force;
- the victim was seriously injured.

The relationship between the victim and offender was the most important factor.

Anecdotal evidence also suggests that the cases most likely to result in a conviction and be treated most sympathetically by the criminal justice system are those which most closely fit this "classic rape situation". Concerns about the criminal justice response to rape victims were highlighted in the 1970s and 1980s, when it was suggested that criminal justice responses tend to be based on a number of rape myths which inform the concept of the "classic rape situation" (see box).

#### Rape myths (London Rape Crisis 1984: 1-7)

The London Rape Crisis Centre identifies a number of rape myths: widely held but misconceived ideas about rape, including:

- women enjoy rape;
- rape is committed by mad strangers (most rapists are known to the victim and few are found to be mentally ill);
- women provoke rape (for example through the way they dress);
- men cannot control their sexual urges (most rapes appear to be wholly or partly planned in advance);
- false and malicious allegations are common (the evidence suggests the rate of false allegations is the same as for other crimes);
- only certain types of women get raped (women from all age groups, classes and races are raped).

#### Encouraging reporting

Changes in the treatment of vulnerable witnesses throughout the criminal justice system may encourage reporting, but this starts with improving experiences at the first point of contact. It is especially important that when an offence is reported the response is sympathetic and supportive. Some measures have already been taken to improve the police response to sexual offences, and to encourage reporting. For example Lees observes that training for officers dealing with rape complainants is now more common "although this is often pretty minimal". Some forces also have a chaperone system where one female officer is assigned to the complainant throughout the investigation (1996: 23).

As discussed in relation to witnesses with disabilities and illnesses in section 3, developing inter-agency cooperation may be another way forward. Other agencies such as Rape Crisis may be the victim's first point of contact and influence decisions about reporting to the police. In addition, they can provide support which may assist complainants through the criminal justice process. However, Rape Crisis schemes coverage is patchy, limited to a few hours a day in some areas: it has been argued that there is a need for more funds to provide nationwide 24 hour support (Lees 1996: 5). Other approaches include a pilot scheme recently announced in Merseyside enabling rape victims visiting hospital to report to the police at the same time. Reporting can be anonymous if the complainant prefers: a unique reference number can be used on records instead of their name until they feel ready to proceed with the case. They need not even see a police officer: forms are supplied and faxed to the police station (Jenkins, 1997: 10).

#### **b. Investigation**

Attrition (the number of offences which are lost, either because they are not reported or because they are dropped at some stage between reporting and conviction) is a particular concern in sexual offences. Attrition before reporting is discussed above. However, less attention has been given to attrition after reporting. Grace, Lloyd and Smith (1992: 7, 25-27) found that of about 300 alleged rapes police recorded in 1985, a quarter were not crimed and only half the original sample were prosecuted or cautioned. Thirty-five percent resulted in a conviction of some kind but only a

quarter were for rape or attempted rape. The three most important attrition points were where:

- the police decided whether to "no-crime" an incident;
- the police decided whether to prosecute (the study was conducted before the introduction of the CPS); and
- the jury decided whether or not to convict the defendant of rape.

Those cases where there was some acquaintance between the complainant and defendant were more likely to be dropped at each stage than those involving strangers.

The finding that some offences were downgraded is supported by Lees and Gregory's examination of police records for rape, attempted rape, buggery and indecent assault at two London police stations between 1988 and 1990. This found that rape and attempted rapes are sometimes downgraded to indecent assault, but more surprisingly in some cases the sexual nature of the offence was removed (for example an indecent assault classed as robbery). As Lees says, it may be in the interests of the complainant to reduce charges where there is not enough evidence for the higher charge. In some cases it may also be difficult to decide where the dividing line between offences lie, for example in deciding whether intention to rape existed. Nevertheless the frequency and nature of some downgrading may be cause for concern. Ironically, one reason for recording a rape as an indecent assault may be to make it easier to no-crime (Lees 1996: 99-101).

Home Office circular 1986/69 advised complaints should only be no-crimed if proven false. If the complaint is withdrawn or corroboration lacking, it should still be recorded as a crime. However, Lees and Gregory found over a third of cases were no-crimed: reasons included the complainant deciding not to continue and police perception of lack of corroboration, contrary to the official guidance. In addition, Lees and Gregory (1996: 95-96) found that there were now *four key* attrition points, where:

- the police decide whether to no-crime an incident;

- the police decide whether to refer a case to the CPS;
- the CPS decide whether to proceed or reduce the charge; and
- the jury (or magistrates) decide whether to convict the defendant of rape.

The impact of the CPS on the attrition process, both in making decisions and influencing police decisions, will be one of the areas covered in a new Home Office study on attrition in rape cases due to report in June 1998. However, initial findings from Harris's study suggest that "cases were more often no-crimed for other reasons" than evidence that the complaint was false (1997: 3).

In some cases of course, the complainant may decide not to proceed with the case during the investigation. The manner and content of interviews may be one contributory factor. Although police questioning is now believed less brutal than in the past, Lees suggests interviews may still be more upsetting than necessary, and actually undermine the prosecution case. She argues that "police unwittingly assist" attacks on complainant's reputation in court by "anticipating the defence line of questioning in interviews". For example, questions on the complainant's medical history (eg abortions) may be especially damaging in court. The defence are given records of police interviews, and then use this as ammunition in court. Thus although the police may complain that low conviction rates frustrate their efforts to treat sexual offences more seriously, Lees suggests that they sow the seeds for this poor success rate. In contrast such records are confidential in the US (Lees 1996: 102, 239).

Identification parades may also be upsetting for the victim of a sexual offence coming face to face with the offender. Various measures can be used to minimise this, including the use of screens, mirrored glass (submission from North Staffs & South Cheshire Rape Crisis 11/9/97) or video-identification parades (submission from Jill Saward 29/8/97). The first two options were discussed in section 2 regarding witness intimidation. The third carries the advantage that the victim can progress at his/her own speed thus minimising the possibility of trauma, but may be more expensive.

At the investigation stage much criticism has also been levied at medical examinations. Medicals are routine when the victim has reported within sufficient time for some physical evidence to be collected. Past criticisms have included that examinations have been carried out badly, losing vital evidence: this may be partly due to lack of collaboration between the investigating officers and doctor. It may also be related to another complaint, that police surgeons have formed their own views about the complainant's veracity. One consequence is that doctors have been reported as making insensitive comments to the complainant. Lack of sympathy and even hostility have been reported. Finally concerns were expressed that victims were not being given important advice on pregnancy and sexually transmitted diseases (STDs), or other follow-up support.

These criticisms have been backed up by research with rape victims. In each case, the comments received were mainly negative. For example, in one Scottish study (reported by Temkin), forty-five sexual assault victims who had medicals were interviewed. This yielded 47 negative comments, 15 neutral and 12 positive. The negative comments mostly concerned procedures being painful and unpleasant: others concerned the police surgeons' manner and conduct. Temkin also reports another study (Clare Corbett 1987) with 22 rape victims which confirmed some of these findings. Other concerns raised included that:

- many victims were not asked if they would prefer a female doctor, but being touched by a man so soon after the rape often added to their trauma;
- some were examined in a police cell/ or office;
- in some cases officers walked into room during examination, or even that the door was left ajar; and finally
- no washing facilities were available afterwards.

These complaints led to a number of responses, including a Home Office Circular being issued in 1983 (1983/23) which emphasised the importance of allowing complainants to was and change as soon as possible. The Metropolitan police set up a Working Party, which led to special

arrangements for screening victims for S 1 0% recruitment of more female doctors to conduct the examinations, and the creation of examination suites. Another Home Office Circular followed in 1986 (1986/69), highlighting the need to recruit more female police surgeons, the value of special victim examination suites and need to provide complainants with more information.

Since these developments there are some indications that matters have improved. One is the number of rapes reported to the police (see above). Another example is the widespread creation of rape examination suites, although it is not known how many of these suites exist. A survey by Victim Support of victim support schemes (1996: 12-13) found that 75% thought victims were always or usually seen in a rape suite, 11% "sometimes" and only 1% "never" (the rest were "don't know"). Many schemes also suggested there was little contact from the police after reporting and little information about progress. However, it is not known how representative these findings are.

One of the few studies evaluating progress was undertaken by Temkin (1996: 1-20), who interviewed fourteen women about their experience of medical examinations from 1991 to 1993. This small sample demonstrates the difficulties of finding sufficiently large samples of rape victims to draw reliable generalisations. Originally Temkin aimed to interview between twenty and thirty of the 149 women who had reported rape to the Sussex police in 1992 and 1993. However, most were ruled out, because cases were still pending, or the victims could not be contacted for example. To boost the sample additional cases from 1991 were included. Temkin found no clear distinction between those who agreed to be interviewed and those who did not. Nevertheless, there is no way of knowing whether the experiences of the women interviewed were representative of rape victims across the country.

Temkin found that most victims were more positive about their treatment by the police than by doctors. "The medical examination appears to be experienced by some as a further sexual assault and an ordeal in its own right" (Temkin 1996: 14). More specific findings included that:

- There are still problems in the provision of female doctors. Provision is patchy but this is at least partly because there is a dearth of



female doctors willing to do such work. Police may face a difficult balancing act, between difficulties finding a female doctor and [the time added to the complainant's wait.

- Most complainants were still negative about doctors' attitudes, particularly that they were perceived to have formed their own beliefs about the complainant's honesty. Being believed is very important to victims. However, there was some evidence that the women felt less negative than in some previous studies.
- Overall, the study suggested that there had been some improvements. For example, none of the women were examined in a police cell or office, most were examined by female doctors, and in most cases a leaflet on pregnancy and *S I Da* was provided. However, the vast majority still made negative comments.

Based on these findings, Temkin made a number of recommendations:

- More female doctors should be recruited. Female doctors may not always handle a medical sensitively, but victims should have a choice about who conducts the medical. This may require reconsidering the way such work is funded. At present in most forces, fees are only paid for each examination conducted: paying an additional fee for doctors to be exclusively available over a set period might improve availability of doctors.
- Doctors' training should cover rape trauma syndrome and counselling techniques. Questioning by doctors should also be minimised by greater collaboration with investigating officer. This will help the victim avoid being upset by having to retell their story, and also avoid possible problems at trial presented by having too many accounts of the same events.
- Some procedures could be eliminated. For example routine plucking of pubic hair for DNA tests is unnecessary and upsetting for victims (DNA can be obtained from blood and if a hair sample is needed it could be taken at a later date). There is a precedent for this kind of change: for example, the

Metropolitan police abandoned taking routine samples of head hair in 1990. In addition, recent Home Office research indicates the police routinely take non-intimate samples such as mouth swabs from suspects, and that intimate samples such as blood and pubic hair are rarely needed (Bucke and Brown, 1997: 41-47).

A submission to the review from London Rape Crisis (LRC, 11/9/97) goes even further. They argue that not just doctors but all officers who are likely to come into contact with a survivor, from the reporting stage onwards, should be female. The only exception would be if the victim states that they would prefer a male officer. In addition, LRC argue that all these officers should undergo rape awareness training. These measures could however, present some organisational problems: considerations include whether there would be sufficient female officers willing to do this work, how it would be remunerated and how it would fit into current career structures. Similar issues are raised by the recommendation that victims should be provided with trained chaperones throughout the criminal justice process (ie. with the same person assigned to a particular victim throughout). In addition, it is not clear who would take on this responsibility.

Other suggested measures have included medical follow-ups for victims and providing victim packs as soon as possible after the report (submission from Jill Saward, 29/8/97). The pack could include toiletries, a booklet on legal processes and other sources of support- and other information. Separate packs could be provided for male and female victims.

Finally, Lees argues that HIV raises a number of issues yet to be addressed, such as whether a complainant should be able to demand a suspect is tested for the virus. There are also questions about whether there should be a duty on the police and other agencies to inform the complainant when they know the suspect is HIV-positive. Lees describes a case where the complainant was not informed by the police that the suspect was HIV-positive, even though they knew this for some months (1996: 17-18). Government plans have recently been announced to introduce new laws targeting people who deliberately spread life-threatening infectious diseases such as the AIDS virus (The Independent 8/2/98). However, Lees argues that the various

justice agencies need formal guidelines and procedures to help deal with the special issues that HIV raises (19%: 256).

*c. The decision to prosecute*

The literature found research on the decision to prosecute is lacking, however, the main problem in deciding whether to prosecute sexual offences appears to be proving consent. This is complicated further by the idea of undeserving (acquaintance or date rape) and deserving ("real"; stranger and virgin) victims. Changes in [the legal definition lie outside the Reviews terms of reference, and are not considered further here. However, it is worth noting that it has been suggested that the standard of proof in rape cases should be altered for different types of rapes. For example, that date rape should be distinguished in law from stranger attacks (Jill S award submission to the Review, 29/8/97).

Other measures which have been suggested include:

- establishing a separate unit in the CPS to deal with all cases of sexual violence (submissions from London Rape Crisis and North Staffs and South Cheshire Rape Crisis 11/9/97);
- notification of the victim if the case is dropped, explaining why (Cleveland Rape and Sexual Abuse Counselling Service submission 10/9/97); and
- a right of appeal against CPS decisions (CRSACS submission op cit).

*d. The trial*

The trial has widely been described as equally bad an experience as the original offence for victims of sexual offences. Lees (1996: 36) found that eight out of ten rape complainants felt that they were on trial rather than the defendant. In some respects the trial was actually seen as worse than the rape itself: "more deliberate and systematic, more subtle and dishonest, masquerading under the name of justice". Five areas are discussed below:

- pre-trial preparation;
- anonymity;

- consent;
- cross-examination; and
- corroboration warnings.

Pre-trial preparation

A number of measures have been discussed in previous chapters which might also be considered for victims of sexual offences, including:

- court familiarisation visits;
- access to statements in good time before attending court,
- separate waiting facilities; and
- friend in court schemes.

Other measures which have been suggested specifically for aiding sexual offences include meeting with defence/prosecution before trial (see for example Lees 1996: 253). The scheduling of the court case may also be important. Concerns include that this should take into account how well a witness feels able to face court (London Rape Crisis submission 11/9/97), and also the need for faster court dates to avoid prolonging the victims suffering and aid their recovery (Cleveland Rape and Sexual Abuse Counselling Service submission 10/9/97). The latter is particularly a concern when counselling is postponed until after the trial to avoid possible witness contamination (see chapter 3): this is discussed further in the next section.

Anonymity

Protection of anonymity is also an issue in these cases. The extent to which anonymity can be provided is a complex issue. As noted in earlier chapters, a balance must be struck between protecting the complainant, but also being even handed. Simple measures discussed in more detail elsewhere include:

*It was noted in chapter 3 that the fact that statements are not written by the complainant may cause problems for people with disabilities or illnesses. Lees (1996: 107) found that some rape complainants also complained about this, particularly the assumption in court that the statement was their own words.*

- reporting restrictions and clearing the court;
- not having address or other Identifying information read *out* in court;
- use of screens, cctv and the like to avoid the victim having to see the accused.

However additional issues have been raised concerning sexual offences. For example, it has been argued that even when defendants are acquitted, suspicion may remain among work colleagues, family, friends, and other local people (the "no smoke without fire"<sup>1</sup> factor). To avoid penalising people who may in fact be innocent, it has been suggested that defendants should also be given anonymity in the media until and unless they are convicted. Denying them anonymity conflicts with the principle that a defendant is innocent until proven guilty, which stems from the idea that it is preferable for ten guilty people to go free than for an innocent person to be convicted.

Against this it can be argued that the conviction rate for rape is so low that an acquittal should not necessarily be regarded as proving the defendants' innocence (see for example Lees 1996: 132). According to this line of reasoning, allowing defendants' anonymity could do more harm than good. The balance has swung too far in favour of the guilty: the number of guilty people walking free must now be so great that the assumption of innocence needs to be reconsidered regarding rape. The argument is that although a few innocent men might suffer by having their identities made known, the far greater number of guilty men who are acquitted would pose a greater danger if granted anonymity.

### Consent

It was noted earlier that most sexual offences hinge on consent. Given that the opportunity for consent (or failure to consent) tends to occur in private, this is a very difficult matter to prove beyond a reasonable doubt. Lees (1996: xvii) argues that the onus is usually on the complainant to prove she (or he) did not consent rather than on the defendant to prove she (or he) did consent. This stands in contrast to other offences such as burglary where it is usually assumed that the complainant is telling the truth (Temkin 1997: 116).

One response could be to require defendants to prove that they obtained proper consent, rather than that they did not (CRSACS submission 11/9/97). Again it could be argued that this would conflict with the principle that a defendant is innocent until proven guilty. Another approach would be to change the burden of proof by requiring that a reasonable person should have known the victim was not consenting (Lees 1996: 256).

Other possible measures relate to the doctrine of recent complaint and the admission of sexual history evidence, which both address consent:

#### 1. *The doctrine of recent complaint*

The common law doctrine of recent complaint originated in the middle ages. Under this rule, the fact the alleged victim complained shortly after the offence is admissible as evidence for the prosecution to enhance the complainant's credibility. The details of what was said are also admissible. This doctrine is based on two assumptions:

- that a normal woman would naturally complain quickly after being raped, or sexually assaulted in some way; and
- that women are prone to making up false allegations of rape.

Both of these ideas have been proven false, but judges may continue to warn juries of the danger of convicting when a complaint has been delayed. A recent judgement on this doctrine in New Zealand called this a "perverted survival" (The Queen v11, 1996). Lees (1996: 252) suggests that juries should instead be warned that absence of recent complaint should not be seen as evidence that the complainant is lying, and that there may be good reasons not to complain. This approach is followed in New South Wales, Australia.

Another measure would be to admit evidence on the effect of the offence on the victim. This could be in the form of a victim impact statement. Lees (1996: 31) found victims commonly complained they were not allowed to explain fully what had

<sup>1</sup>Preliminary findings from research currently being conducted for the Home Office suggests that similar issues also arise in child abuse cases (Davis 1997: 7).

happened to them. Alternatively (or in addition) expert evidence could be admitted, in particular on Rape Trauma Syndrome (RTS). Expert evidence on RTS has been used in some American jurisdictions in two main ways: to prove lack or consent and to explain behaviour the jury might otherwise view as evidence that rape did not happen.

In practice, there is some disagreement over whether evidence of RTS should be admissible to prove lack or consent. Where it is admitted, its role is limited. For example, in West Virginia in the case of the *State v McCoy* (1988), it was stated "[t]he expert may testify that the alleged victim exhibits behaviour consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped" (quoted by Myers & Paxson 1992: 3). However, Myers & Paxson suggest that most courts in America allow evidence of RTS to explain the complainants' behaviour where the jury might misunderstand it (eg, delayed reporting). No research was found on admission of RTS evidence by the courts in this country, but it appears that admitting this evidence may be problematic. Once the prosecution admits such evidence, the defence may find their own expert witnesses to contradict them.

## ii. Sexual history evidence

The Sexual Offences (Amendment) Act 1976 was intended to restrict admission of sexual history evidence in rape cases where this (according to the Heilbronn Report upon which the Act was based) "does not advance the cause or justice but effectively puts the woman on trial" (cited by Temkin 1993: 3). The concern was that evidence of past sexual relationships with other partners was used to determine consent to the defendant. This seemed particularly unfair given that evidence of defendant's past convictions is not admitted for fear of prejudicing the jury. It was proposed that evidence of past sexual history should only be admissible when it involved the defendant. The one exception would be if there was a strong similarity between the complainant's sexual behaviour on a previous occasion and that on the occasion when the offence was alleged.

However, the wording of the Act was vague, suggesting that evidence should only be admitted if it was unfair to the defendant not to admit. In

the Court of Appeal case *Viola* (1982), it was ruled that if evidence of past sexual history was relevant to the issue of consent, it was admissible. Deciding relevance has proven problematic though: "there are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth" (Supreme Court of Canada ruling cited by Temkin 1993:5). In practice, it is widely acknowledged that such evidence is frequently allowed, even where this appears to be in contradiction of the spirit of the legislation (for example where it is used to blacken the complainant's character rather than relating to consent). This is supported by some research: for example Adler (1989: 73) found that applications for admission of sexual history evidence were made in 40% of the rape trials she studied, and 75% of these were allowed. More recently, Lees (1996: 31) found that over half of all female acquaintance rape complainants in her study were questioned about their sexual history with men other than the defendant. She found that in some cases questions on sexual history are asked without even requesting the judge's permission (1996: 160).

Similar problems with sexual history evidence have been experienced in other jurisdictions (Temkin 1993; McDonald 1994). Some such as New South Wales, Canada and Scotland have attempted to tighten up the rules, and the Labour Party made a commitment while in opposition to do the same here (cited by Temkin 1993: 20). When in opposition the Labour Party did try to introduce further restrictions on sexual history evidence through an amendment to the Criminal Procedure and Investigations Bill in 1996 based on the New South Wales model (Hansard 12 June 1996: 356-368). This approach has its critics who argue that a more narrow definition of consent is needed to avoid the possibility of sexual history evidence creeping in through the back door. This raises issues about the definition of rape, which are beyond the Review's remit (discussion paper 1? prepared for the Review group).

The problem is how to restrict the use of sexual history evidence effectively. Temkin (1993: 3-20)

*Adler randomly selected 50 rape trials, representing 85% of all rape trials heard in the Old Bailey in one year. Of these, 5 did not go ahead "usually because the victim was unable to give evidence" (Adler 1989:39, 73).*

*See Temkin (1993, 7-20) for a description of the Canadian reforms.*

argues that judges' use of discretion has undermined previous efforts to restrict the use of sexual history evidence in this country, suggesting that any new reform would have to curtail this discretion. Similarly, Lees (1996: 251) recommends that judges' discretion should be reduced. She argues that if the defence raise the complainant's sexual history or criminal record, the defendant's sexual history or criminal record should be introduced.

Unfortunately the literature review found research on the effectiveness of reforms in other jurisdictions is lacking. Only one such research study was found. This examined changes introduced in Scotland in 1986, which listed certain forms of evidence which should not be admitted and specified those which could. The researchers used information from court records, interviews, observation and forms completed by Court Clerks to collect details of the use of sexual history evidence. They found that the reforms seem to have had some success, but there were still three main problems which would need to be addressed if this model is followed in England and Wales (Brown, Burin and Jamieson 1992: 60-78):

- in some cases the rules on sexual history evidence are not being followed;
- the rules are sometimes followed without achieving the aims behind them; and
- the rules failed to address subtle character attacks, which continue to be employed.

### Cross-examination

There have been two *main* concerns about cross-examination in sexual offences: first, that victims of sexual offences are cross-examined more severely than for other crimes, and secondly, that defendants have the right to cross-examine complainants personally.

#### 1. *Severity of cross-examination*

According to this argument, the focus on the issue of consent and the fact that most sexual offences occur in private, results in greater emphasis and closer examination of the complainant's words, character and motives. Defence cross-examination seeks to show that the complainant did not behave as a real victim would, for example in

delaying reporting the offence, however, evidence has tended to be anecdotal, and trial lawyers have argued that the rules on cross-examination are basically the same for sexual offences as other offences.

To redress this Brereton (1997: 242-261) conducted a study of trial transcripts in forty rape cases and forty-four serious assault cases. There are important differences between the two offences, including that there are more likely to be other witnesses of assaults. Despite this, rape has more in common with assault than other offences such as robbery or burglary: for example, in both cases the offender is often known to the victim. Brereton found some significant differences in questioning rape and assault complainants, such as:

- sexual history evidence: sexual history (with the defendant or people other than the defendant) was raised in about a third of the rape cases, but only two of the assault cases.
- the amount of time spent on the witness stand: "on average it took about twice as long to cross-examine complainants in the rape trials as it did in the assault trials" (1997:257).

However, Brereton argues there were also some strong similarities in the strategies used in cross-examination:

- Assault victims were just as likely to have their character and credibility attacked (for example through questions about drinking and mental stability).
- Attempts were made to exploit inconsistencies in the complainant's statements in both cases.
- If assault complainants did not behave as expected (eg. reporting soon after the offence), this was raised in cross-examination, as happened in the rape cases.

Brereton acknowledges that, because of the more intimate subject matter in rape trials, the length of time spent under cross-examination and the

*This was before changes to rules on the admission of sexual history evidence in Australia in 1991.*

nature of the offence itself, rape trials are generally more traumatic for the complainant than assault trials. Brereton concludes that too much attention has been given to improving rape trials in particular, and that more attention should be given to the weaknesses of the trial process generally. It should be noted that the study was conducted in Australia, and it is possible that cross-examination of rape victims there is not typical of that in England and Wales.

Other qualitative differences have also been observed by Lees (1996: xxi), who argues that although both the complainant and defendant's reputations are attacked in rape trials, it is the complainant's sexual reputation but the defendant's *occupation* that are examined. This is of particular concern given that other research suggests *sexual* reputation may not be based on actual sexual activity but on dress, linking independence and having a number of male friendships for example (Lees 1993 cited by Lees 1996: 86). Possessing previous convictions is seen as relevant to the complainant's reputation, but rarely allowed as evidence of the defendant's credibility. Likewise, if the complainant does not have a criminal record this will not count in her (or his) favour, although it may be seen as relevant to the defendant's credibility.

Of course, it is possible for the judge to intervene to halt inappropriate questioning. However, this has to be set against comments made by some members of the judiciary in sex cases which suggest at best lack of sympathy (see Adair 1987 for some examples). Although such comments may not be representative of attitudes among the judiciary, media reports of insensitive remarks may discourage people from reporting. Possible measures might include:

- training for the judiciary (and perhaps also other court staff and the legal profession more broadly) about rape;
- setting up a complaints procedure for complainants who suffer inappropriate cross-examination, which would include penalties for the barristers concerned;
- appointing more women to (currently) male dominated judiciary;
- increasing accountability, for example by instituting a performance appraisal system

for the judiciary as recommended by the Royal Commission and revoking the rule that a judge cannot be sued (Lees 1996: 247-50, 253)-

ii. *The defendant's right to cross-examine personally*

Concerns about the defendant's right to cross-examine the complainant personally have been highlighted by a couple of recent rape cases which were taken up in media. In one case the defendant cross-examined the complainant for six days wearing the same clothes as when he committed the offences. In another example where there were a number of co-defendants, a Japanese student was cross-examined for twelve days (see for example The Guardian, The Daily Telegraph & The Mirror 23/8/96). Such cases are rare. At present almost all defendants receive legal aid, and only 4% are either privately represented or unrepresented (Home Office discussion paper for the Review). Nevertheless, allowing the defendant to cross-examine personally may be extremely upsetting for the victim. In addition, it has been suggested that defendants are allowed to pursue lines of questioning that would not usually be accepted, raising additional questions about whether justice is served in these cases.

The obvious implication is that the right to cross-examine personally should be removed. However, this raises some complex legal issues. The right of the accused to defend him/herself either personally or through a legal representative is protected by the European Convention for the Protection of Human Rights. The only exception to this rule under English law is an automatic prohibition from personally cross-examining child witnesses when the defendant has been charged with an offence involving sex, violence or cruelty. So there is a precedent under English law for limiting the defendant's right to cross-examine personally, and this has not been challenged under the European Convention.

If it is accepted that the defendant's rights should be further curtailed in this area, another issue is what should happen when a defendant refuses legal representation. There is no legislation or guidance governing what should happen if a defendant refuses legal representation in cases involving child witnesses. There is also little information on what actually does happen. In at least one case the judge has conducted cross-

examination for the defendant, but this could call the judge's impartiality into doubt. In another case no cross-examination was conducted (Lome Office discussion paper for the Review). This again is problematic: it seems questionable whether it should be possible to convict in the absence of cross-examination. At the same time though, abandoning such cases could encourage more defendants to reject legal representation.

One option might be to impose legal representation on defendants in these cases (David Pannick, *The Times* 10 Sep 1996). This is followed in some other jurisdictions such as Italy. In *Croissant v Germany*, this approach was ruled as compatible with the European Convention on Human Rights. This raises the issue of whether defendants should have to contribute towards the costs of such representation in the usual manner under the legal aid scheme. To impose this on them seems unfair, but at the same time, it can be argued that not requiring defendants to contribute in these circumstances might encourage others to refuse legal representation. Although prohibiting personal cross-examination by defendants in rape cases seems desirable to protect vulnerable victims, conceiving a scheme to accomplish this is a challenging task.

Defendants' access to victim statements raises similar concerns. The CRSACS submission (Cleveland Rape and Sexual Abuse Counselling Service 10/9/97) suggests there is evidence that these have been given to accused and used as pornography in custody. This again suggests a conflict between providing the accused with all the information they might need to defend themselves, and protecting the witness.

#### Corroboratton warnings

Until 1995, the law required judges to warn juries about the danger of convicting on uncorroborated evidence in sexual offences (Adler 1987: 161-2; Lees 1996, 109). This was again based on misconceptions about the prevalence of false accusations of rape. Although this requirement has been abolished, it is still possible for such warnings to be made. It is not known how frequently this happens. However Lees' research suggests that where the warning is given judges often add comments claiming that allegations are easy to make but difficult to disprove, "when in practice it involves a long, arduous process lasting several days, medical examinations, days of police

questioning and often attending identification parades" (1996: 110-11).

Lees argues that judges' discretion to give a corroboration warning should be removed, which would follow the precedent set in Australia (1996: 251-252). Adler (1987: 161) similarly argues that there are plenty of other safeguards both against false allegations generally (such as police questioning, cross-examination) but also for rape in particular (such as medical examinations). As well as being upsetting for the victim, the comments made may reinforce rape myths in the jurors' minds.

#### *e. ...and beyond*

Beyond the trial, a number of other issues are raised, including:

- therapy;
- compensation; and
- information.

#### Therapy

The issue of when therapy should be allowed was discussed in chapter 3 on disabilities and illnesses. Therapy is a particularly pertinent issue in sexual offences. It should not always be assumed that therapy will be beneficial: for example, Lees (1996: 18 & 20) details two cases in which responses were unsympathetic and argues that counsellors need special training, which should cover HIV/AIDS. However, there is concern that victims who could have benefitted from therapy are discouraged from obtaining it for fear of damaging the prosecution case. It has been argued that therapy should not be discouraged prior to court (South Essex Rape & Incest Crisis Centre submission, 29/8/97). However, to ensure that this happens some reassurance will be needed that this would not be used against the complainant in court.

#### Compensation

After the trial, victims can apply to the Criminal Injuries Compensation Authority for compensation for the harm done by the offence. It has been suggested that the current system should be reviewed. Specific proposals include:

- extension of compensation to include emotional trauma; and
- increasing tariffs for victims or sex offences;
- clearer definitions of sexual assault (South Essex Rape and Incest Crisis Centre submission, 29/8/97).

### In Formation

Finally, providing witnesses with information about the progress of their cases throughout system is important. This includes notification of trial dates in good time: lack of notice has been criticised for adding to victims' anxiety about the trial (Adler 1987: 165). After the trial and following a custodial sentence, witnesses need information about the release of the offender. Under the Victim's Charter (Home Office 1996d: 12) the Probation Service should notify victims of the offender's release from custody, but this only applies to those given life imprisonment or convicted of serious sexual or violent crime. One option would be to extend this to other victims. However there are concerns that the existing scheme does not always work properly, suggesting that the existing arrangements (including the requirement on victims to opt in) should be reviewed.

## **2. Domestic violence**

### *a. Reporting*

#### Failure to report

It is generally accepted that most domestic violence is not reported to the police. The BCS suggests reporting to the police has increased in recent years: 30% of respondents said they had reported domestic violence in 1995 against 20% in 1981 (Mirrlees-Black, Mayhew & Percy 1996: 29). Despite this, it was found that domestic violence is half as likely to be reported to the police as muggings (60%), although the gap was narrower for stranger and acquaintance violence (39% and 37% reported respectively). The 1992 survey suggested that within this, male victims were twice as likely to report as women (40% against 21%, Mayhew, Aye Maung & Mirrlees Black 1993:96).

However, the victims who disclosed domestic violence to interviewers may have been more

likely to report to the police than those who did not. "The 'real' reporting rate, then, may be much lower" (Mayhew, Aye Maung & Mirrlees Black 1993: 96). This suggestion is supported by other research evidence (Dobash & Dobash 1979: 164), suggesting that women may experience many attacks by their partner before calling the police. It is difficult to measure the exact number of incidents which have gone unreported: when a large number of incidents have occurred, the victim may lose count. This finding does suggest though that when a victim of domestic violence contacts the police the response they receive is all the more important.

Against this, Victim Support (1992: 1.5) argue that: "there is a brutal but common misconception that if women *do* not leave, the violence they are enduring cannot be all that intolerable" and that this may colour reactions to them. There are numerous reasons why victims of domestic violence may stay. One is the economic effect: if they are not thrown out or the shared home victims may feel they have to move out to avoid retribution from the offender. The victim may have to face moving to a new area, leaving many of their belongings, uprooting children and having to find a new home, schools and possibly work- Other possible reasons include fear of being pursued by the attacker and post traumatic stress, disorder. Ethnic minority victims may face additional hurdles such as language barriers, concerns about immigration status and cultural pressures against reporting (for example see Choudry 1996: 1-4).

Another factor influencing reporting decisions may be negative experiences when the police were contacted in the past. Numerous criticisms of police responses to domestic violence have been made in the past, including (Buzawa & Buzawa 1996; 37-38; Grace 1995; 1):

- failure to attend or, when they do attend, that they are slow to respond;
- viewing the problem as civil not criminal (reflected in "no-criming" or treating offences as public order offences rather than as violence);
- reluctance to get involved and lack of sympathy for the victim, sometimes reflected in attempts to reconcile the victim and perpetrator or to side with the assailant;



- low arrest rates, even when the victim has been seriously injured;
- failure to recognise that the incident is usually just one in a series. Different officers may respond each time a call is made from any one property, and will often not be aware of previous visits by the police.
- forces should liaise with other statutory and voluntary bodies to ensure a common approach; and that
- there should be a presumption in favour of arrest (Grace 1995: 1).

To some extent the reasons for this poor response have been historical. For example, in some jurisdictions physically punishing your wife was not illegal as long as the rod used was no thicker than the husband's thumb. This was reinforced with ideas of the police function as enforcing public order and the sanctity and privacy of the home, which continue today to some extent. In modern times, this has been translated into views about domestic violence not being "real police work" in a culture which does not value social work, instead focusing on crime fighting. In domestic violence cases, the offender is known, so relatively little or *no* detection or investigative skills are necessary. Consequently Buzawa and Buzawa (1996: 37-40) suggest that arrests for domestic violence are not seen as counting: results are equated with arrests and prosecutions. Added to this is a perception that victims of domestic violence are likely to drop charges. Finally, Buzawa and Buzawa (1996: 40-43) suggest that domestic calls are viewed as dangerous by officers, who fear offenders may turn their aggression on them. This risk, they argue, probably overestimated.

#### Encouraging reporting

In response to these criticisms, a number of efforts have been made to improve police responses to domestic violence. For example, two circulars were issued by the Home Office (69/1986 & 60/1990), which made a number of recommendations. At the reporting stage, these included that:

- procedures used for victims of sexual assault should be applied to domestic violence victims;
- protecting the victim from future risk of violence should be prioritised over attempting reconciliation:

Grace (1995: 53) looked at the impact of this guidance. She found almost all forces had changed their policies in response. There was also evidence of improvements: for example, in increased understanding and sympathy for the victims, and more positive responses including advice and support for the victims. Nevertheless there appeared to be a gap between policy and practice. Despite managers confidence that the new-policies had been successfully filtered down to frontline officers, many operational officers were unaware of the new policies. Few had received any specific training on domestic violence, although other agencies interviewed (such as women's refuges) were willing to help with such training.

One example of the discrepancy between policy and practice is arrest. Although pro-arrest and even mandatory policies have been used in other countries (such as America) to increase arrest rates, past evidence has suggested that the police may be reluctant to arrest even if the complainant asks them to (Smith 1989: 57). One reason given has been the perception that domestic violence victims are likely to withdraw their complaints, and that the work in processing the case will have been wasted. Coupled with this perception was a lack of understanding by the police of victim's reasons for withdrawing complaints, such as fear of retaliation by the offender (Edwards 1989: 100-103). Other research suggests that this becomes a self-fulfilling prophecy: the police may actually discourage complainants from proceeding by repeatedly asking them whether they wish to continue and allowing a cooling off period to think things over (Chambers and Miller 1983 cited by Smith 1989: 57, and Farragher in Pahl [Ed] 1985: 110-124). Grace's (1995: 20-21) research suggests reluctance to arrest still continues. Few operational officers and managers saw arrest as paramount: instead it was typically seen as the third or fourth priority.

There are problems with pro-arrest policies. For example, the National Inter-Agency Working Party on Domestic Violence convened by Victim Support in 1990 (hereafter referred to as "the Victim Support Working Party") was against *automatic*

arrest on the grounds that domestic violence should be treated like other violent crimes. Greater numbers of arrests do not automatically translate into tougher approaches in the rest of the criminal justice system, nor do they necessarily deter re-offending (Polsby 1992: 250-253; Sherman et al 1992: 680-690). Arrest is not therefore a panacea. However, it does send a message to offenders and victims about the seriousness of such incidents. The Victim Support Working Party (1992: 2.15) suggested that pro-arrest guidelines could be useful, and recommended that this be a matter of national policy.

Grace's (1995: 47) interviews with refuge staff suggested one reason for low arrest rates could be lack of knowledge of law in this area, particularly civil law. Possible measures to tackle this again include training. Less than a quarter of the operational officers in Grace's study said they had received specific training on domestic violence, although two-thirds of managers thought that special training was needed. However less than half of the operational officers thought this would help. It is not clear why this difference of opinion existed, but it might perhaps reflect greater awareness of policy changes among management. Another measure would be to issue officers with flash cards about their powers and victims' rights. Less than a third of operational officers in Grace's study had these cards, and only seven managers thought their officers had been given one (Grace 1995:25).

Part of domestic violence officers' work (where they exist) is to refer victims of domestic violence to Victim Support, refuges and other possible sources of advice. This has two advantages. First, it helps provide victims with support and advice. Secondly, many victims may contact these agencies initially rather than the police. Developing relationships with other statutory and voluntary bodies may encourage referrals from these agencies to the police. For example, the Victim Support Working Party report (1992: 6.28-6.32) highlights the importance of health professionals such as Accident and Emergency Department staff in identifying domestic violence. The report stresses the value of guidelines and training covering issues such as identifying victims of domestic violence and careful documentation of injuries. Similarly local housing authorities have a part to play in assisting victims find accommodation. It may be argued though that unless liaison with other agencies is accompanied

by improved responses to reports, referrals to the police from other agencies will be minimal.

In the past the police have been criticised for rarely referring complainants to other agencies, despite evidence that complainants would appreciate this assistance (Smith 1989: 53). There was some evidence in Grace's study that forces were giving information to victims about other sources of support. For example, some forces had (or were preparing) leaflets, which included contact details for Victim Support and other sources of help and advice. The Victim Support Working Party recommended that all officers should carry a small card or leaflet giving contact details for local support groups, to pass to victims when the attacker is not present. The Victim Support Working Party also recommended that victims should be reminded subsequently that they could contact such agencies or that the police could do this for them, and that posters and leaflets should be available in police stations (1992:2.11-2.12).

Victim Support has police representatives on all its Wai management committees. However, Grace (1995: 47-48) also interviewed representatives of some organisations (such as women's refuges) who suggested that they had very limited contacts with the police. One consequence of this may be that police misperceptions about the support available to victims of domestic violence are not challenged. For example, one respondent suggested that the police tend to think women's refuges only provide emergency accommodation.

More recently, Hague, Males and Dear surveyed multi-agency work on domestic violence in all local authority areas. Their findings suggest that police involvement in inter-agency groups has improved since Grace's study. Police involvement was much higher than that of the probation service, and particularly the CPS and courts. In addition, police representatives tended to be from senior ranks, which may have assisted policy-change and signified to other officers the importance of treating domestic violence seriously. The researchers suggested this work could be built into job specifications for some staff and that commitment from senior staff in these organisations might assist. However, they also say that in some areas the police tend to dominate multi-agency groups and in some areas concerns persisted about the policing of domestic

violence (Hague, Maios and Dear 1996: 17.1-23.3: 52). The research did not examine the reasons for this, but possible explanations might include insufficient feedback to frontline officers and insufficient contacts between frontline officers and the support agencies.

*b. Investigation*

Other recommendations in the Home Office Circulars mentioned above were that:

- forces should establish specialist domestic violence units or officers; and
- domestic violence should be recorded and investigated in the same way as other violent offences.

Specialist domestic violence units/officers

On the first point, Grace (1995: 5) found that just over half of all forces had specialist units dealing with domestic violence, but only 5 were dedicated Domestic Violence Units (DVL's): others were Family or Child Protection Units. This runs contrary to the advice of the Victim Support Working Party, which suggested that "in joint units child abuse tends to consume all the available resources because dealing with it is a statutory responsibility". Although there may be benefits in working with Child Protection Units where children are involved in domestic violence, the Working Party recommended that domestic violence units should be separate from family or child protection units (1992: 2.21-2.23).

A number of problems were found in those areas where domestic violence officers did exist. For example, the role of domestic violence officers includes keeping victims and uniformed officers of case progress. However, Grace found formal procedures to facilitate information exchange tended to be lacking. Other problems included that officers working alone felt their work was not given appropriate priority. Excess workloads were also complained about- In some cases, there was just *one* specialist officer, meaning that there was no cover if the officer was not on shift, took leave or was sick. To combat these problems, Grace (1995: 55) recommended that domestic violence officers should work in pairs.

Establishing specialist units or officers does carry a danger that other officers will compartmentalise

domestic violence as solely the problem of that unit or those officers. However" there are ways of combatting this. For example, in one force in the Graces study, uniformed officers were attached to the DVU for between three and six months.

Recording and investigating as for other violent crime

On the second point, research by Phillips and Brown (1998: 80, 91) found the charging rate for those arrested for domestic violence (58%) was higher than for all offences (52%). Cautioning and NFA ("no further action") rates were similar to the average for all offences (13% cautioned and 20% NFAed, against an average of 17% and 20%). However, for domestic cases of violence against the person, the charging rate was even higher (71% compared to 67% for all violence against the person). By contrast, Grace (1995: 12-13) found a 81% charging rate, but because of poor recording practices suggests caution when considering this finding. The results from another data collection exercise within the same study suggested a rate of 60%, but the sample size was smaller.

As well as the frequency of charges, the nature of the charge is important. Although Phillips and Brown did not examine downgrading, previous research (see for example Edwards 1989: 73, and others - Smith 1989: 43-44) has suggested domestic violence is commonly downgraded to less serious or non-violent offences such as breach of the peace. It was observed above regarding sexual offences that there may be legitimate reasons for downgrading some offences, but the concern is that on many occasions such justification is lacking. More recently Home Office circular 60/1990 has reminded officers of the range of powers they can use for domestic violence. However Grace's interviews with police officers suggest domestic violence was dealt with as breach of the peace in the vast majority of cases, even in some very violent cases. About two-thirds of officers saw policing domestic violence as different to policing other violence, although most other interviewees did not draw any distinction (1995: 19).

Phillips and Brown also examined what happened after charges were laid regarding police bail. In 60% of cases bail was refused, substantially higher than the 22% rate for charged suspects generally, probably because of the potential risk to their

partners if released on bail (internal note, 1997). More research is needed on the use of bail conditions in domestic violence and the extent of enforcement in the light of evidence of police unwillingness to enforce civil injunctions<sup>11</sup>.

**c. The decision to prosecute**

The second phase of Phillips and Brown's (1998: 132, 141-142) research has examined case progress following forwarding to the CPS. Preliminary findings are currently restricted to termination by the CPS. These suggest domestic violence cases were much more likely than cases generally and more likely than other violence to be terminated by the CPS (a termination rate of 37% for domestic violence, against 14% for all offences and 29% for violence).

The main reasons for ending domestic violence cases tended to be different to those for terminating other offences: in half of domestic violence cases refusal of a key witness to give evidence was given as a reason for not proceeding (internal note 1997). The prosecution system relies heavily on the complainant's evidence in domestic violence cases, where there are often no other witnesses. It is possible to proceed without the victim's agreement, by compelling the reluctant witness to give evidence. However, it is questionable whether they would be effective witnesses in such cases, and this approach is difficult to reconcile with the idea that the law should empower victims rather than add to their vulnerability. Consequently it seems that there is some reluctance to use this power. However there is very little research on the role of the CPS in prosecuting domestic violence. As the Victim Support Working Party (1992: 2.44) has suggested more research is needed.

The Victim Support Working Party recommended where witnesses are compelled to give evidence support (such as housing) should be provided to protect them (Victim Support 1992: 2.31). In addition, CPS respondents in Graces (1995: 46) study said it was now standard to require formal written retraction before dropping a case of domestic violence. In the long-run it may be necessary to reduce the emphasis on [he

*The literature review also failed to find any research on the use of bail in sexual offences and hate crimes against ethnic and sexual minorities.*

victim's evidence. A pilot scheme (The Observer 8/2/98) is planned which would attempt to do just that: this will involve developing other forms of evidence such as taping emergency calls and taking photographs of the scene, and retraining police officers and CPS staff to consider new forms of evidence.

**d. The trial**

*i. Civil measures*

Although the civil courts are beyond the remit of the Working Group, some discussion of civil measures may be useful for several reasons. First, civil measures may be taken before or in conjunction with criminal measures and therefore colour the complainant's experiences of the criminal justice process. Similarly, findings about personnel in the civil system (such as the police and legal profession) may be informative about how they behave in the criminal justice context. Another reason is that disillusionment with the criminal justice system has led to suggestions that the civil system has more to offer victims of domestic violence. Important differences are that in the civil system the victim has to initiate proceedings, the civil courts have a lower standard of proof, and civil measures tend to be aimed at protecting and compensating the victim more than punishing the offender. Finally, the Protection from Harassment Act 1997 introduces new measures against harassment that blur the boundaries between civil and criminal measures.

The measures

At present there are three main forms of civil measures (Barron 1990: 14):

- undertakings by the alleged offender not to further assault his/her partner and/or to leave the shared home by a particular date;
- protection (non-molestation) orders aimed at preventing further violence or harassment in an emergency; and
- exclusion (occupation or ouster) orders to remove the offender from the house or to require him (or her) to keep away, usually for a specified period.

Undertakings can be made at county courts and are signed in court. The advantage for the accused

is that no evidence is heard, no admission of guilt is required and the application for an injunction is usually withdrawn or adjourned. This may allow faster action for the abused partner, but no powers of arrest can be attached. In principle undertakings have the same force as court orders, but. Barron argues that this does not occur in practice (Barron 1990:22).

Protection and exclusion orders are available at both the county court and magistrates' courts, whether or not the partners are (or have been) married. Until recently, at the magistrates' courts applicants had to be married to the partner they are applying for an order against. Other differences included that magistrates' courts could not order a partner to keep away from an area around the home. This has been changed under the Family Law Act 1996, so both courts have the same levels of powers (Lord Chancellor's Department 1997: 57-58).

Powers of arrest can be attached to protection and exclusion orders in certain circumstances (eg if the court is satisfied actual bodily harm was caused and it is likely the applicant will reoffend). However, the Victim Support Working Party report on domestic violence (1992: 3-16) suggests powers of arrest are not usually applied for. In addition, Barron argues that courts are reluctant to attach this power (1990: 54). In 1996, 31% of injunctions made had powers of arrest attached (calculated from Lord Chancellor's Department 1997: table 5.9).

The Victim Support Working Party recommended that powers of arrest should be the norm, and cover all clauses of the injunction rather than just some as at present (1992: 3-18). The change in the Family Law Act 1997 requiring powers of arrest to be attached where there has been violence or threats of violence, may go some way to address this, however, the Act does include a caveat allowing exceptions where the court is satisfied that the applicant will be adequately protected without it (Lord Chancellor's Department 1997: 58). As Conway (1998: 142) concludes:

"the full potential of the Act will only be fulfilled if magistrates make it their business to fully acquaint themselves with the true nature and effects of domestic violence and take every opportunity to protect vulnerable victims".

### Deterrents to legal action

Barron interviewed female victims of domestic violence, solicitors dealing with these cases and representatives of the police, probation service, women's refuges, Victim Support and the magistracy in Bristol and Cumbria. Key findings included that solicitors and the courts often expressed the view that women take out injunctions for trivial reasons and have not tried hard enough to make the relationship work. This is obviously at odds with evidence that victims have often experienced numerous acts of violence over a long period before they take legal action. Many solicitors were reportedly reluctant to begin proceedings without also starting divorce proceedings - despite the intention that protection orders should be an emergency measure. This further ensures that those victims who do proceed with legal action tend to be those who have decided that the relationship is over (Barron 1990:31-34).

A number of other deterrents to legal action were also identified. Some women were dissuaded by fear of the cost. This was partly attributable to lack of knowledge of the legal aid system. However, there was evidence that some women who were eligible for legal aid on the basis of their income had problems getting it for other reasons. In some cases, solicitors failed to apply for it. In others, applications for legal aid were rejected: some solicitors questioned suggested a lack of consistency in these decisions. The length of time taken in assessing income was also a factor. Some women had to wait several days or weeks for supposedly emergency action. For those who were not eligible for legal aid, the costs of pursuing a case could be prohibitive (Barron 1990: 34-35). Other reasons included cultural and language barriers. For example, one Sikh woman said that women who used the legal process were stigmatised by her culture. Consequently it could be difficult to find a family member or friend willing to translate for a complainant possessing limited English (Barron 1990:48).

### Seeing a solicitor

Having decided to see a solicitor, Barron reported many women found them intimidating. Although there was recognition that the legal process may be slow, complaints were made that solicitors were slow to start the legal ball rolling. Other problems included lack of explanation about the legal

remedies available: although many victims had heard of injunctions, they were not always aware of the different kinds available. In addition, there were discrepancies between the women's perceptions of the effectiveness of injunctions and those of the legal profession. Some women had applied for injunctions in the past, and complained of a lack of awareness or the ineffectiveness of injunctions among the legal profession. One reason for this may be that injunctions are rarely enforced, and consequently that breaches rarely go to court. This lack of awareness meant some women were misinformed about the effectiveness of such measures (1990: 36-41,; 89-102,; 112-114). To counteract this, the Victim Support Working Party (1992: 3.40) recommended that all solicitors wishing to take on this work should be offered some training, although it is not clear who would provide this training. The report also suggests there is a need for more comprehensive emergency out of hours service, which might be met by a rota system (1992:3.50).

#### Attending court

At court, there were numerous concerns. Lack of separate waiting areas and lack of special areas in which complainants can consult their legal advisers were highlighted. Scheduling was also a matter of complaint: Barton suggests that the domestic violence cases were given a low priority, so that court dates and times were more likely to be changed. In court, most victims felt that they had a fair hearing, although some were upset their story was not given enough weight. In some cases, women who had begun new relationships since the break-up of their marriages were blamed for provoking the violence (1990: 42-51).

In addition, Barron observed that although almost all were able to obtain a non-molestation order or undertaking, "anything more than that could be difficult to obtain" (1990: 50). She argued that the courts appeared overly concerned with not removing a man from his home:

"Even in cases where there has been a long history of violence, many lawyers appeared to believe it would be perfectly possible and safe for the woman to return home once she had an order or an undertaking that her partner would not molest her" (1990: 50).

Where orders were made, they were not always satisfactory: for example, excessive time (several weeks) was given to vacate the home. The criteria for deciding whether to exclude a spouse from the marital home include the financial situation of each partner and the needs of any children. No single criteria is supposed to take precedence. In practice though, Barron suggests there is reluctance to impose injunctions if a custody hearing is planned (1990: 52-53). The Victim Support Working Party recommended that courts should be made aware of the dangers posed to victims of domestic violence, and must take a tougher approach (1992: 3.8, 3.63). In addition, according to the report orders are usually only made for a fixed period, typically three months: the complainant then has to reapply for an extension. The Working Party recommended longer orders or indefinite orders until further notice (1992: 3.10-3-11).

#### Enforcement

Finally, when orders were made Barron found that police were unwilling to enforce them even when they were informed of the injunction and powers of arrest were attached. Despite the fact that the orders were made by a court, they persisted in viewing violence as private matter (Barron 1990: 16). Barron also found some solicitors were reluctant to pursue action when orders were breached (1990:112-114). These findings should be treated cautiously because the samples of people interviewed were very small. Nevertheless there are some other (albeit small) studies which provide further support. For example, Farragher (in Pahl [Ed] 1985: 110-124) observed twenty-six domestic calls to the police and found reluctance by the police to intervene even when an injunction had been breached. The Victim Support Working Party recommended that arrest for breach should be the norm (1992: 3.15).

#### ii. *Criminal measures*

It was noted above that the Protection from Harassment Act 1997 creates some new measures that blur the boundaries between civil and legal measures. For example restraining orders, similar to injunctions, will be available in the criminal courts to prohibit any further harassment. Where injunctions are granted and then breached, the plaintiff will be able to apply for a warrant for the offender's arrest. Breach of an injunction will be a criminal offence, punishable by a maximum of

five years imprisonment tried on indictment and six months tried summarily. This means it will be an arrestable offence: in other words the police will be able to arrest the offender if they know about the injunction and suspect it has been breached without requiring the victim to apply for an arrest warrant.

Two criminal offences of harassment are also created. The first, where the behaviour is so threatening the victim fears violence, is punishable by a maximum of five years imprisonment. The second does not require the fear of violence and is punishable by a maximum of six months imprisonment. In the past harassment has been prosecuted using other criminal laws such as assault occasioning actual bodily harm, but has been difficult because the law requires proof of intent. The new provisions have a lower standard of proof, requiring instead that the conduct must have occurred at least twice and that a reasonable person would have realised their actions would cause a fear of violence or sense of harassment (for further discussion see Jason-Lloyd, L 1995: 787-790; Wells, C 1997: 463-470).'

#### Leniency

It has yet to be seen whether these measures will address concerns about lenient sentences for domestic violence. For example Craig (1992: 568) found that of 500 incident reports studied in 1991, half were non-crimes, half again were prosecuted, and half of those dealt with by a binding order. However, Craig suggests that this apparent leniency was partly explained by the victims' wishes. She suggests there is anecdotal evidence that the younger often unmarried women are more likely to report, support charges and want a custodial sentence. In contrast the older, more dependent and less socially mobile women with children, are more likely to want to maintain ties with the offender and to resume cohabiting, and to therefore want less serious sentences.

This presents something of a contradiction though. If sentencing reflects victims' wishes and younger women are more likely to report and want harsher sentences, this would suggest more severe sentences should be imposed than appears to be the case. Other possible factors which Craig highlights include the principle that the offender should only be sentenced for the present crime rather than for past record. This has to be balanced however, with the risk posed to the victim by a

non-custodial sentence. It seems plausible that lack of knowledge about domestic violence and ideas about [the sanctity of the home continue to have some impact. However, further research is needed both to examine sentencing of domestic violence to see if it is really treated so leniently, and if this is so, to examine to what extent non-legal factors influence sentencers.

#### Implications of sentence for victims

A final concern is the impact of the sentence on the victim. Edwards (1989: 153) describes one case where the offender refused to pay the fine levied: faced with the threat of losing her furniture, the victim paid the fine herself. This suggests that sentencers need to be alert to the possible impact of sentences on victims: financial ties or dependence (such as shared property, maintenance contributions or child support) may continue even where partners split up. The Victim Support Working Party (1992:2.51-253 citing Smith 1989) suggested probation officers' social work training, with emphasis on keeping families together, may lead them to send out wrong messages to offenders. It is important to ensure that safety of women is paramount and the seriousness of offence is not underplayed. This is clearly something training might address: the Victim Support report also suggests that Probation Service management should encourage good practice.

#### *e. ...and beyond*

Beyond the trial, there are numerous other issues or concerns to victims of domestic violence. Not all are of direct concern to the criminal justice system, although they will be very important to the victims of domestic violence. Examples include formally ending the relationship with the abusive partner through divorce, access to an adequate income, and negotiating contact with any children (see Victim Support 1992 5.5-5.20 for a discussion of these issues). Two longer-term issues involving the criminal justice system are briefly considered below: places of safety and information.

#### Places of safety

Securing the victim's safety is a particular concern in domestic violence, when continuing to share a home with the offender could endanger both the victim and the prosecution case. This may also be

a concern in sexual offences where the defendant is or was [the victim's partner or another close relative living in the same home, and also in some racially motivated crimes where the victim's safety is threatened. However, provision of places of safety is patchy, and usually met by the voluntary sector (for example women's refuges)<sup>10</sup>. In chapter 2 it was explained that accommodation may be provided for intimidated witnesses to assist prosecutions against their harassers: it could be argued that there is a need for equivalent assistance for victims of domestic violence.

### Information

Despite the emphasis in Home Office Circular 60/1990 on keeping victims informed about the offenders' whereabouts, Grace (1995: 24-25) found only 15 police forces had developed some means of obtaining all offenders' release dates from prisons in their areas. This was usually the attending officer or domestic violence officer's responsibility. This raises a couple of questions: first, whether this responsibility should be placed on the police, and secondly whether formal procedures or policy could be used to improve information. If the responsibility for informing witnesses rests with any agency other than the Prison Service, procedures will have to be agreed with them.

### 3. *Racially motivated crime*

#### a. *Reporting and investigation*

### Failure to report

Numerous studies have shown that Afro-Caribbeans and to a lesser extent Asians tend to have more negative attitudes towards the police than whites. For example, BCS data suggests a large proportion of Afro-Caribbeans believe the police do not treat everyone fairly, and in particular that they do not treat minorities equally (Fitzgerald and Hale 1996: 29).

This has been explained by ethnic minorities' wider experiences of policing, particularly evidence that Afro-Caribbeans are stopped and arrested by the police more often than whites. For

*Places of safety for victims of racially motivated crimes and male victims appear less common than refuges for female victims of domestic and sexual violence.*

example. Phillips and Brown (1998: xiv-xv) found Afro-Caribbeans were over-represented among those arrested compared to their representation in the local population. They were more likely than expected to have been arrested following a stop/search, and (along with Asians) to have no further action taken against them. This suggests the arrests of Afro-Caribbeans may have been based on less evidence than that of white suspects. However, it might also be related to differences in offence patterns. Phillips and Brown (1998: 29) suggest Afro-Caribbeans tended to be arrested for some more serious crimes (such as robbery and fraud) which might have been more difficult to prove than those white suspects were charged with (such as public order offences).

It would therefore be reasonable to assume that more negative attitudes would be translated into a greater tendency to under-report, particularly for racially motivated crime. However, the BCS suggests ethnic minorities appear more willing to report household offences to the police than whites. The pattern is more complex regarding personal crimes, where racial motivation seems more likely. The BCS suggests only Indians are more likely to report personal crimes than whites, and that under-reporting is particularly marked for Pakistanis. The survey did find that Afro-Caribbeans and Pakistanis were less likely to report racially motivated crimes than other crimes, but also found that Indians were more likely to report racially motivated crimes (Fitzgerald and Hale 1996: 27-35).

According to the BCS the most common reasons for not reporting crime generally are that the police could have done nothing, the police would not have been interested and that the incident was too trivial. These were particularly salient for racial incidents, but dislike or fear of the police was not a strong concern for any victims (Fitzgerald and Hale 1996: 35-36). The latter finding is surprising: as Smith (1994: 1090) observes, it has been well-established that racial prejudice within the police is common, and not simply confined to the junior ranks (see for example Graef 1990: 117-144; Reiner 1991: 204-210).

However racial prejudice is not the only influence on police behaviour. Although allegations are made about individual cases of misconduct, research is needed on whether prejudice routinely influences police treatment of ethnic minority



complainants. Certainly the BCS suggests that minority victims are less satisfied with police response than whites, particularly regarding racially motivated crime (Fitzgerald and Hale 1996:37-38). More specifically, Ilesse & McCilchrist, reporting on a council inquiry in London argue there are six main complaints about police investigations (in Hesse, Rai, Bennett & McGilchrist Eds 1992:70):

- "The police do not treat racial harassment seriously (ie as a crime).
- Where the police do respond there is no follow-up.
- The police do not take action against perpetrators.
- The response of the police is not encouraging.
- The police do not provide support.
- The police treat the victims as the problem".

This is given some support by Sampson and Phillips (1998: 129-132) research on racial incidents on an East London estate. They report that the police and other agencies viewed racial incidents as non-criminal, and were disinclined to intervene:

"Despite the presentation of detailed data on repeat racial victimisation...there was a consistent denial or undermining of the extent of the problem..Attempts were made to challenge victims' accounts of racial incidents, either by suggesting that the incident was not racial, or by shifting the emphasis to blaming the victim for not reporting immediately..Sometimes accusations were made about families fabricating incidents so they could be rehoused quickly."

Sibbit (1997: 25-27) similarly suggests that the police categorised racial harassment and violence reported by victims into as neighbour disputes, "not really racial" incidents, verbal abuse and nuisance behaviour. None were seen as worthy of police attention. Serious attacks where victims perceived racial motivation were forwarded to CID and seen as serious crimes such as attempted murder rather than as racial incidents, and recorded them accordingly. Instead:

"the police perceived another category of incidents as the real racial incidents, even though they were rarely reported (or recorded) as such. These were inter-racial incidents where the victim and the suspect were from different ethnic groups...'blacks on Asians and Asians on blacks' was seen as the main racial problem".

Sampson and Phillips (1998: 129-132) observed a catch-22 situation. What the police and other agencies viewed as minor incidents had a cumulative effect on the victims. Harassment was experienced as a continuous process, and no distinction was made by victims between repeated harassment and "criminal" incidents. This difference in perceptions (and a lack of language interpreting facilities) meant victims were dissatisfied with the police response when they reported. As a result many racial incidents were unreported or not reported immediately afterwards. However, the police in turn complained there was little or nothing they could do unless the incident was reported immediately. Another disincentive to action suggested by some other respondents was the fear of a backlash by the white people on the estate if racial harassment was given a higher profile.

Further research is necessary to show how typical these findings are. Other factors which may discourage reporting in racially motivated crimes (or indeed any crimes where ethnic minorities are involved) include cultural barriers, and concern that their immigration status will be questioned (see Chigwada-Bailey 1997: 37 for an example of a case in which this occurred). This raises a related question of whether the greater risk of victimisation among ethnic minorities is partly due to offenders playing on such fears, but no research was found on this subject.

#### Improving responses and relations

Measures to address some of these problems may be relatively simple, for example in ensuring that a network of interpreters is available to overcome language barriers. Dealing with cultural barriers, for example, in encouraging reporting by Asian women, and challenging racism within the police are more difficult. Six areas are discussed below: pro-arrest policies, investigation, recruitment from ethnic minorities, retention, public consultation and multi-agency cooperation.

- Pro-arrest policies.

As with domestic violence, arrest policies could be considered. There are two aspects to consider: arrest in racially motivated crime, and arrest (as well as stop and searches) of ethnic minorities. Although the Litter is beyond the scope of this report, it seems likely that it will contribute to ethnic minority perceptions or policing. On the former, Sampson & Phillips' study of racial attacks on an East London Estate suggested that arrest in racially motivated crime is low: only about thirty arrests were made for the almost four hundred racial incidents that came to police attention in the borough in 1990 (1992: 12). Phillips & Brown (1998: 38) found only 14 suspects in their sample of over 4,000 detainees were arrested for incidents officers said were perceived as racially motivated. This suggests that pro-arrest policies might be an option for racially motivated crime.

Nevertheless the limitations of this approach in domestic violence cases were noted above. In addition, there may be some problems particular to racial harassment and violence where the identity of the perpetrator may be less obvious. Sibbit (1997: 92, 95-96) found little effort was made to identify suspects in either of the areas she studied. She attributed this in part to lack of information/intelligence and a failure to make effective use of the information that did exist: for example cases were filed by victim rather than perpetrator and information on perpetrators was not collated or linked to other reports. A more general factor was officers' sense that racial harassment was not really a criminal matter. This in turn appeared to be associated with the involvement of a large number of children under the age of criminal responsibility". Sibbit comments "the police appear to be disempowered by the notion that the only action they can take is prosecution". The emphasis on prosecutions in performance targets may contribute towards this.

- Investigation

When arrests are made, it has been suggested that police investigations are sometimes less thorough than when white complainants are involved. The Home Affairs Committee (1989: 13) has suggested the clear-up rate for racial incidents is

*This is not to suggest that children were the only perpetrators identified. Most were between 11 and 18, but ages ranged from 5 to 80 years old (Sibbit 1997: 631)*

low. However more recently Maynard and Read (1997: 7, emphasis added) found "racially motivated incidents are rather more likely to be cleared up than non-racially motivated incidents, but are rather less likely to result in charge or caution". The introduction of ethnic monitoring in police forces from 1996 should provide much more information about how suspects and offenders are treated according to race. Fitzgerald and Sibbit (1997: xiii) suggest monitoring may improve relations between the police and ethnic minorities generally: both by increasing police awareness of how they treat ethnic minorities and by encouraging greater dialogue between them. Nevertheless more information is needed about complainants' and victims experiences.

- \* Recruitment

It has also been suggested that increased recruitment of police officers from ethnic minorities would help improve relations. Yet despite a number of national recruitment campaigns since the mid 1970s and various recommendations on improving recruitment in the 1980s, the number of ethnic minority recruits remains low. In 1996/7 just 2% of new recruits appointed in England and Wales were from ethnic minorities, compared to 3-7% in 1994/5. This compares to 6% of the general population (LiMIC 1997, Appendices 7 & 8).

Research has suggested various reasons for ethnic minorities reluctance to join, including racism from the public, abuse from colleagues and perceptions that to do so would be joining the enemy (see Smith 1994: 1096). Holdaway (1991 cited by Smith 1994: 1096) has suggested that positive action by individual forces to recruit ethnic minorities has actually been limited, and failed to make good use of community or race relations staff. However, he argues the major reason for lack of success in recruiting ethnic minorities has been failure by police management to tackle racism within the police.

- Retention

One reflection of this is that retention of ethnic minority recruits is also a problem. Both the

*This excludes the Metropolitan Police, where 7.4% of those appointed were from ethnic minorities in 1996/7 and 5.4% in 1994/5, compared to an ethnic minority population of 20.2%*

Home Affairs Committee in 1989, and more recently HMIC have emphasised the importance of retention. In one force inspected, the wastage rate for ethnic minority officers was 10% against less than 3% for whites. Reasons suggested for poor retention included feeling unsupported by management, demonstrated by lack of intervention following racist behaviour or language (1997: 272-2.75). "Police officers ...cannot be expected to behave in ways which will enhance relations with minority populations in the public at large if they fail to treat colleagues from the same groups equitably" (1997: 3.73).

HMIC has made a number of recommendations to assist police forces in over-coming these problems, including (1997: 4.1-4.20):

- monitoring recruitment, retention and career development of staff from minority backgrounds;
- considering sensitivity to race (and community) relations in recruitment, promotion, appraisal and staff deployment;
- inclusion of race and community relations in training, focusing on dealing with real-life situations; and
- ensuring that policies and practices make clear that any expression of racial (or other) prejudice is completely unacceptable.

If racism is as deeply embedded within the police as suggested, it seems questionable whether increasing ethnic minority representation in the police will be sufficient to change police culture and relations with members of the public. Adding racism needs to be a central part of any efforts to improve relations with ethnic minorities.

- Improved public consultation.

Other possible measures to improve relations between the police and ethnic minorities include improved public consultation. The importance of consulting the public generally but particularly with ethnic minorities was recognised in the Scarman report which followed inner-city riots in the early 1980s. This led to the creation of a statutory duty on police authorities to consult the public on local policing. Consultation with

minorities (both ethnic and sexual) may help improve relations with them. However, the approach most areas have adopted (Police Community Consultative Groups or PCCGs, which have open meetings at least quarterly) has tended to be poor at reaching these groups. There are alternative ways of trying to reach these groups though. Examples include special consultative groups for minorities, or holding normal PCCG meetings in different locations such as temples or mosques (Elliott & Nicholls 1996: 9-11 & 42-55). HMIC (1997: 38) has recommended the creation of procedures to ensure all decision-making routinely considers the implications for race and community relations: improved public consultation could perhaps be a part of this process.

- Multi-agency cooperation.

Finally, multi-agency cooperation may assist in a number of ways such as encouraging referrals, increasing support to victims and improving responses to prevent further victimisation. Sibbit (1997: 98) found schools could have a greater role to play in preventing and addressing harassment. Housing authorities also have a particular interest in tackling racial harassment. Love and Kirby (1994: 17-20, 25-28) found they used various approaches, including inserting clauses in tenancy agreements forbidding racial harassment and violence (reported by 61% of respondents) and interviewing and warning known perpetrators (80%). Some also reported initiating repossession proceedings and arranging a priority transfer for victims (54% and 75%). Just over half (55%) were involved in multi-agency groups, and almost all of these involved the police.

The main role reported of these multi-agency groups was coordination, with less than half involved in providing support to victims or prevention. A number of benefits were recorded: for example almost all reported increased understanding between agencies. Two-fifths thought cases were being dealt with more effectively and more than a third thought that more cases were coming to light as a result of the group. However, problems such as lack of cooperation of some agencies, lack of resources

*There are a number of possible objections to special consultation fora for minorities. Both these and the counter-arguments are explained in Elliott & Nicholls (1997: Table 8.1).*

and agreeing the roles of each agency were reported (40%). A fifth also reported problems in agreeing a definition of racial harassment.

Sibbit (1997: 100) also looked at multi-agency groups in the two areas studied. A number of problems were observed. In the first group, there included a tendency for discussions to focus on the truthfulness of allegations, failure to identify the perpetrators and a lack of police action. In the second, victim's dissatisfaction with the police and the heavy representation of the police contributed to a strained atmosphere: "it was felt, certainly where the police were present, members of the public would feel reluctant to attend, let alone voice their views". Overcoming such obstacles may be a slow and lengthy process.

#### *b. The decision to prosecute and the trial*

Even less literature was found on the experiences of racial harassment (and other ethnic minority) victims of the subsequent stages in the criminal justice system. Nevertheless two possible areas for action can be identified.

- Highlighting racial motivation as an aggravating factor

At present, guidance issued to the courts recommends that racial motivation should be treated as an aggravating factor (Home Office 1997c: 7-9). However Ruddick (1993: 5) suggests that prosecutors do not always highlight racial motivation as an aggravating factor. This is supported by CPS figures which suggest that this is so in about 15%. The CPS report also suggests that racial motivation does not always result in longer sentences upon conviction. The court stated that sentence had been increased as a result in only a fifth of those cases where prosecutors drew attention to racial motivation. It seems plausible that in some cases the sentence was increased but the court omitted to state this fact or it was not recorded. Nevertheless this suggests racial motivation is not always seen as an aggravating factor in sentencing.

Government plans (Home Office 1997c: 7-9) to require the courts to view evidence of racial motivation as an aggravating factor may address this. Up to an extra two years could be imposed for some offences where there is evidence of racial motivation. For example, malicious wounding usually carries a maximum penalty of five years

imprisonment - under the new provisions this would rise to seven years where there was some racial motive. Under the proposals the standard of proof of racial motivation would be lower in these cases than for the new offences of racial harassment and racial violence.

- Recruiting and retaining ethnic minorities, especially among the judiciary and magistracy

As with the police, there is concern that under-representation of ethnic minorities continues elsewhere in the justice system. For example, there are no ethnic minority Lords of Appeal. Lords Justices of Appeal, High Court judges or Deputy High Court judges. Ethnic minorities are under-represented at every level of the judiciary and magistracy, accounting for less than 1% of circuit judges, less than 2% of recorders, district judges, stipendiary magistrates, and less than 4% of acting stipendiary magistrates for example (The Guardian 25/2/98). Interestingly Home Office figures (1997b: 31-33) suggest that under-representation is not a problem affecting solicitors (6%), barristers (8%), the CPS (8%) or the probation service (8%). However, this does not mean that these groups have no problems. Concerns about career prospects and about bias in pre-sentence reports written by the probation service (see Chigwada-Bailey 1997: 49-61) are two cases in point".

The dominance of whites in the judiciary might be one reason for the apparent failure to routinely treat racial motivation as an aggravating factor. Whether or not this the case, the recruiting more people from ethnic minorities to the bar and appointing more judges from ethnic minorities might help reassure both witnesses and defendants from ethnic minorities about the fairness of the courts. At the same time, though, it has to be acknowledged that some people from ethnic minorities may themselves resent suggestions of positive discrimination. The experience of the police also suggests that retaining people from ethnic minorities is just as important: training could be one element of this (see for example

*Sibbit (1997: 43) says that probation officers have a responsibility to challenge racial motivation, but found that this opportunity was rarely grasped in either of the two areas she studied.*

Chigwada-Bailcy 1997: 63. Maynard and Read 1997:25-27).

#### 4. *Hate crimes against sexual minorities*

Again, very little literature was found on sexual minorities experiences of the criminal justice system despite anecdotal evidence or discriminatory treatment. Certainly, formal policies on treating sexual minorities equally appear much less common than those for other groups such as ethnic minorities. As noted above, some behaviour by sexual minorities is criminalised and hostility towards sexual minorities has been dubbed "the last acceptable prejudice". Galloway (1983: 102-124) suggests seduction theory, that young men are seduced by older homosexuals, encourages homosexuality itself to be seen as corrupt. Galloway argues that this contributes towards discrimination in the courts, in six further areas:

- leniency towards queer-bashers (which may sometimes be linked to the gay panic defence, see box);

The gay panic defence (Toolis 1997: 36-

Toolis describes the "gay panic" defence, whereby people accused of (often very brutal) killings claim that they were victims of unwanted sexual advance. He gives several examples of how the defence has been used successfully, and suggests that some lawyers have tried to establish "homosexual panic" as a medical condition, although the medical profession had not previously identified it as such.

Mason and Palmer (1996: 95-7) report that Colin Richardson, from the publication *Gay Times*, has collected information on gay murders from newspapers and information passed to him. These records suggest that the homosexual panic defence was used in 15 of the 137 cases recorded between 1986 and 1996. However the outcome of these cases is not reported, and it is questionable whether this sample is representative.

- discounting homosexual testimony (eg in agent provocateur cases, where the prosecution evidence is based on police testimony);

- denial of anonymity (suggested sensationalist media reporting sometimes encouraged by judges expressions of disgust);
- interpretation of the law - for example, extending the idea implicit in the Sexual Offences Act that homosexuality is unlawful;
- differential sentencing: Galloway argues that prosecution rates, convictions and sentences are all higher for homosexuals than for equivalent offences by heterosexuals. According to Galloway, under half of those convicted of sexual intercourse with a girl of 12, but more than 90% of men convicted for sex with 15 year old boys are imprisoned.
- civil law: for example, Galloway argues that adopting, getting child custody or having access to their children are all more difficult for homosexuals.

Galloway recommends three main approaches to combat discrimination;

#### 1. Educating,

Galloway argues that both Initial training and refresher courses should be used to combat prejudice, particularly for operational officers in Vice Squads. Refresher training may be particularly important: Galloway's studies on race relations training have suggested racial prejudice initially falls but soon returns to a similar level. More specifically Mason and Palmer (1996: 95-99) recommend training for crown prosecutors and judges to tackle homophobia and encourage them to challenge gay panic defences. They argue homophobia should be treated as an aggravating factor not a mitigating one. At a broader level, they recommend that the Department for Education and Employment should issue guidance on the needs of gay, lesbian and bisexual pupils for example on homophobic bullying in schools and colleges<sup>11</sup>.

*They also argue that s28 of the Local Government Act, which prohibits local authorities from intentionally promoting homosexuality be repealed.*

## 2. Monitoring and protesting

Galloway suggests monitoring police action, reporting abuses of police power and lodging formal complaints will be more effective than education in the short-term. Although some groups already do this, Galloway suggests this could be extended further.

## 3. Legislating to end legal discrimination and change policing.

Recent proposals to change the homosexual age of consent were noted above. Mason and Palmer (1996: 99) argue the offence of gross indecency should be reviewed and possibly replaced with a public sex offence for both heterosexuals and homosexuals. They also suggest consideration should be given to creating a test of proportionality requiring a reasonable relationship between the level of provocation and retaliation<sup>8</sup>, and requiring judges to direct juries to consider this. In addition to legislation. Galloway recommends community policing, in which greater contact is made with people being policed, and consultation with local gay groups (see above).

Requiring police forces to follow community policing through legislation seems problematic. At present the *style of* local policing is seen as an operational matter decided by chief constables, and community policing is just *one* of a number of competing approaches (such as problem oriented policing and zero tolerance policing).

Nevertheless, greater consultation and contacts between the police and sexual minorities could perhaps be encouraged either through guidance, or through the national policing objectives set annually by the Home Secretary (on the latter see Mason and Palmer 1996: 99). There is some evidence of efforts to improve consultation, such as lesbian and gay consultative groups (see Elliott & Nicholls 1997: 42-47), national conferences on policing lesbian and gay communities and the creation of a Lesbian and Gay Police Association.

Some forces have also attempted to attract recruits from sexual minorities by placing advertisements in the gay press (The Guardian 26/1 1/97).

*According to Mason and Palmer there was a precedent for this before the 1957 Homicide Act.*

However, this is not common practice and as with recruiting ethnic minority officers, there may be problems with retention. There has been some research on the experiences of sexual minorities who join the police. For example, Burke (1994a, 219-227) interviewed approaching forty police officers from sexual minorities. "The sample was quite small and self-selected, so the representativeness of Burke's findings is open to question. Nevertheless, they are interesting:

- None of those interviewed had mentioned their sexual orientation during the selection process even though the vast majority knew they were gay, lesbian or bisexual when they joined;
- Most (approaching nine out of ten) believed they would not have been selected if they had done so;
- About two-thirds believed that the police were either slightly or much more homophobic than the rest of society;
- Approaching four-fifths, believed an openly homosexual officer would not have the same career prospects as a heterosexual officer;
- A quarter felt they had been discriminated against in some way.

One step towards improving police attitudes towards sexual minorities might then be to start with equal opportunities policies within the police. Burke (1994a: 227) found less than half of all forces in England and Wales had extended their equal opportunities policies to cover sexual minorities, although the number may have increased since then.

Establishing gay liaison officers or specialist units is another approach. For example in one division in Northamptonshire, a specialist unit has been set up to cover homophobic incidents as well as domestic violence and racial incidents (HMIC 1997: 3-25). Although the research on domestic violence suggests there may be problems with specialist units, this development does suggest that more importance is beginning to be attached to protecting sexual minorities from homophobic attacks.

Finally, the creation of force policies on policing homophobic incidents (recommended by HMIC

1997: 4.19) and disseminating good practice could also be considered. The endorsement of a national charter for good practice and consultation to rid the police of anti-gay prejudice by the Association of Chief Police Officers (The Guardian 26/1 1/97) may assist this process: Mason and Palmer (1996: 99) recommend that all forces adopt the charter. Similarly, Mason and Palmer (1996: 100) argue that local authorities and housing associations should develop policies on hate crimes against sexual minorities, covering tenancy agreements, injunctions and repossessions.

## Conclusion

Since the 1970s the rise of feminist criminology has made a major contribution in highlighting problems in criminal justice responses to sexual offences and domestic violence. Efforts have been made to improve responses to both offences as a result, with some effect. For example, police treatment of rape is widely acknowledged to have improved, and has been attributed with contributing to the rise in the number of rapes reported to the police. Despite this, the literature reviewed suggests there is still evidence of room for improvement.

Victims of hate crimes against ethnic and sexual minorities have not received as much attention, although anecdotal evidence suggests criminal justice responses could be improved. Research is needed both to measure the extent of these forms of victimisation and to chart the experiences of these groups when they come into contact with the criminal justice system. Although complaints have led to some efforts to improve responses (eg. widening the definition of racial incidents, and ethnic and sexual minority recruitment drives), concerns continue.

A number of possible measures to improve the position of all four groups have been highlighted by the literature review (summarised in Table 4). In choosing between them their relative costs will need to be considered. It should also be borne in mind that to be confident that any new measures have had the desired results some evaluation of their effectiveness will be needed.

However, rather than simply responding to crime the longer-term aim must be to prevent crime. In

recent years crime prevention has begun to focus on repeat victimisation. The risk of victimisation tends to be highest after an initial offence, so intervention immediately after the initial offence may help reduce the risk of repeat victimisation (see for example Farrd and Pease 1993). A couple of points are worth noting about the impact of this finding to date.

First, although all parts of the criminal justice system have a role to play in repeat crime prevention, the impact has been felt most by the police. Tackling repeat victimisation has been made a priority for the police nationally through the national objectives set annually by the Home Secretary. Systems are being developed to help the police identify repeat victimisation and respond more appropriately. In some areas for example, attending officers will be provided with details about previous calls from the same address. Historically police command and control systems have not been designed to include such features, so progress varies. Since the police are usually the first point of contact with the criminal justice system and the research indicates quick intervention is needed, their contribution is particularly important. However, repeat victims' experiences and contacts with the rest of the criminal justice system have generally been neglected. Topics for further consideration include the recognition of repeat victimisation and whether responses should vary accordingly.

Secondly, most repeat crime prevention programmes have focused on burglary, with the aim of reducing opportunities ("situational" crime prevention as opposed to "social" crime prevention, which seeks to reduce propensities to commit crime through education for example). A few have targeted other crimes such as domestic violence and racial incidents. For example, one of the measures used in domestic violence has been the loan of attack alarms, to notify police if help is needed and enable a rapid response (Lloyd, Farrell & Pease 1994). It seems strange that programmes have not been more common for victims of those offences most commonly associated with repeat victimisation, such as domestic violence. Targeting such vulnerable groups might help maximise the value of such programmes. The implications of repeat victimisation for the criminal justice system may have yet to be fully realised.

Table 4: Possible measures to assist victims of special offences or repeat crimes

Measures	Stage of Criminal Justice System				
	Reporting	Investigation	Decision to Prosecute	Trial	Beyond
Improving availability of female police surgeons	✓				
Training police surgeons eg. on Rape Trauma Syndrome	✓				
Provision of washing facilities	✓				
Removal of some unnecessary procedures eg. routine plucking of pubic hair	✓				
Routine medical follow-ups	✓				
Provision of victim packs giving toiletries, details of support available etc.	✓				
Screens/mirrors/videos for identification parades	✓				
Improving speed of police response to domestic violence calls	✓				
Situational crime prevention	✓				
Training of operational officers on domestic violence, eg. pro-arrest guidance, support available from other sources such as refuges	✓	✓			
Issue police officers with aide memoirs about their powers and victims' rights	✓	✓			
Establishing specialist domestic violence units/officers	✓	✓			
Improving staffing of existing specialist units, improving status/ understanding by short-term attachments of uniformed officers to units	✓	✓			
Provision of support person/chaperone	✓	✓	✓	✓	
Interpreters/translating advice etc. into minority languages	✓	✓	✓	✓	
Increased recruitment of ethnic minorities	✓	✓	✓	✓	
Training to counter discrimination, for eg. covering cultural differences	✓	✓	✓	✓	
Improved public consultation with minority groups	✓	✓	✓	✓	
Creation of formal policies on discrimination against sexual minorities	✓	✓	✓	✓	
Reforming laws relating to sexual minorities, eg. homosexual age of consent.	✓	✓	✓	✓	
Training on interview/cross-examination technique, Rape Trauma Syndrome etc. for all cjs personnel or some specialist personnel at all stages	✓	✓	✓	✓	
Creating a right of appeal against CPS decisions			✓		
Pre-trial preparation eg. court familiarisation visits, witness packs				✓	
Structural changes to courts eg. separate waiting facilities				✓	
Meetings between victims and prosecution before trial				✓	
Press reporting restrictions				✓	
Clearing public gallery				✓	
CCTV and screens to enable victim to avoid having to see the accused				✓	
Use of expert evidence for example on Rape Trauma Syndrome				✓	
Prohibition on issuing corroboration warnings based on the doctrine of recent complaint				✓	
Reviewing law on rape, eg. re. sexual history evidence and types of rape				✓	
Reforming defendant's right to cross-examine personally				✓	
Reviewing policies on therapy before trial, further investigation of the contamination issue etc.	✓	✓	✓	✓	✓
Reviewing policies on compensation					✓
Improving enforcement of civil sanctions (eg. injunctions)					✓
Improving information given to victims	✓	✓	✓	✓	✓



## Section 5: Conclusion

The definition of vulnerable and intimidated witnesses adopted will be important in determining whether those in most need or special assistance and support receive it. The literature review focused on three main groups: intimidated witnesses, those with mental and physical disabilities and illnesses, and victims of special offences. These groups were chosen because there seemed to be some consensus that these three groups should be considered vulnerable. Some others who might also be seen as vulnerable were excluded. For example, child witnesses were not examined because covering this sizeable literature would have been impractical given the time available. The exclusion of some other groups (for example, the elderly) was due to the lack of literature found on their experiences as witnesses. Of course, the Review may identify different groups of vulnerable witnesses to those considered within this report.

*Witness intimidation*, examined in section 2, undermines both public confidence in the criminal justice system and its effectiveness. To recognise how serious it is, witness intimidation became a criminal offence in its own right in 1994. However, very little material was found on how witness intimidation is being tackled, both here and abroad. One reason may be the need for security (that is, to stay one step ahead of [the offenders]). Another reason may be general neglect of the issue of witness intimidation, which is now beginning to be redressed.

There is some evidence that witnesses with *disabilities and illnesses*, examined in section 3, may be more vulnerable to crime than other witnesses, for example because of greater dependence on others. They may also be vulnerable in relation to the criminal justice system. For example, people with disabilities or illnesses may find acting as a witness particularly upsetting or difficult.

Some of the definitions of vulnerable witnesses discussed in section 1 mention *special offences*, but only sex offences have been specified. Other possible special offences were examined in section

4. These included domestic violence and racially motivated crime. Here crimes against sexual minorities could also be included; however, due to the lack of literature on this subject they were not considered in detail.

Numerous possible measures to improve the situation of vulnerable witnesses were identified within the report. These require varying levels of intervention: from simply providing witnesses with leaflets providing useful information to changing the law and redefining the responsibilities of the various criminal justice agencies.

It is also apparent that the different groups of vulnerable witnesses discussed have varying needs. Therefore some measures are specific to particular groups, such as the provision of female doctors for rape victims. Despite this there are also some areas of common ground, so some measures may be of value for more than one category of vulnerable witnesses. For example, pre-trial preparation has been raised for all three groups examined. Table 5 summarises the measures detailed and the groups who might benefit from them.

The cost implications of the various measures discussed will vary greatly. Some measures will be relatively cost neutral, such as clearing the court's public gallery to prevent witness intimidation. In addition, those cases where measures can be used for more than one group may be more cost-effective. However, the costs of special measures may increase over time. If the measures are effective, it seems plausible that reporting rates will increase. This may increase the total costs of the special measures, as more witnesses take advantage of them, it would also increase the workload of the various criminal justice agencies concerned. Nevertheless there may be economies of scale at some point.

A number of other considerations can be identified concerning the use of special measures for vulnerable witnesses. Many of these are largely practical concerns:

- how easy it is to determine vulnerability using the definition;
- whether all witnesses or just some (eg victims) should count as vulnerable;
- who should decide whether the witness meets the definition or vulnerability;
- whether and how the witness's views should be taken into account in defining vulnerability;
- whether particular measures should be granted as a right, whether there should be an assumption in favour of their provision, or whether they should be provided completely at the discretion of the various agencies;
- who should have responsibility for providing each of the measures. This might be given to specialist officers or units in each part of the criminal justice system, building on the specialist units that already exist in police forces for example ;
- whether one agency should be given the task of coordinating the various measures; and
- whether use of the measures recommended will be monitored or evaluated.

Other considerations concern the implications of particular measures for justice. For example, granting witness anonymity has been considered for all three groups examined by the report. The arguments in favour of this approach are that it would reduce trauma for the witness and help prevent intimidation. However, this raises issues about the defendant's ability to defend him/herself, and whether juries might draw adverse inferences.

Similar concerns are raised by the idea that the defendant's right to cross-examine witnesses personally (in the absence of legal representation) should be curtailed in certain cases (eg. in rape cases).

Finally, it has been observed that some of the measures discussed may improve a witness's performance in court, This raises the issue of whether witnesses should have a right of appeal against decisions about whether they are vulnerable, or concerning the provision of particular measures.

*Kent County Constabulary already has a Vulnerable Victim Coordinator (Law Society Mental Health and Disability Subcommittee submission to the Review, 11/9/97).*

**Table 5: Summary of potential measures**

Measures	Category of Vulnerable Witness		
	Intimidated witnesses	Witnesses with disabilities /illnesses	Victims of special offences
Minimising information given over radio identifying witnesses	✓		
House-to-house calls on neighbours	✓		
Inviting witness by phone to attend station to make statement	✓		
Surveillance operations	✓		
Employing professional witnesses	✓		
Raising awareness of witness intimidation	✓		
Protective custody	✓		
Reviewing admissibility of evidence of frightened witnesses	✓		
Reviewing penalties for witness intimidation	✓		
Reviewing penalties for frightened witnesses	✓		
Providing transport to and from work, shops etc.	✓		
24 hour police protection	✓		
Long-term relocation and possibly changing of identity	✓		
Improved education to increase reporting (of both witnesses and service professionals)		✓	
Creating/reviewing formal policies for professional care institutions to encourage identification of incidents as criminal, encourage reporting and set out referral process		✓	
Raising awareness of increased vulnerability and tackling myths		✓	
Creating a legal requirement on service professionals to report allegations of crime		✓	
National guidelines for professional carers and care agencies on reporting		✓	
Structural changes to police stations		✓	
Provision of communication aids - both technical such as induction loops and human such as interpreters		✓	
Improved training to identify communication problems		✓	
Guidelines to assist identification of people with disabilities/illnesses		✓	
Guidelines or information to assist prosecutors		✓	
Removal of wigs and gowns		✓	
Prohibition on issuing corroboration warnings simply on basis that witness has a learning disability		✓	
Prohibition on issuing corroboration warnings based on the doctrine of recent complaint	✓ (sex)		
Reviewing law on rape			✓ (sex)
Reviewing policies on compensation			✓ (sex)
Improving availability of female police surgeons			✓ (sex)
Training police surgeons eg. on Rape Trauma Syndrome			✓ (sex)
Provision of washing facilities			✓ (sex)
Removal of some unnecessary procedures eg. routine plucking of pubic hair			✓ (sex)
Routine medical follow-ups			✓ (sex)
Prohibition on use of corroboration warnings based on doctrine of recent complaint			✓ (sex)

Table 5: Summary of potential measures (continued)

Measures	Category of Vulnerable Witness		
	Intimidated witnesses	Witnesses with disabilities / illnesses	Victims of special offences
Improving speed of police response to domestic violence calls			✓ (dom violence)
Training of operational officers on domestic violence, eg. pro-arrest guidance, support available from other sources such as refuges			✓ (dom violence)
Issue police officers with aide memoirs about their powers and victims' rights			✓ (dom violence)
Establishing specialist units/officers			✓ (dom violence)
Improving staffing of existing specialist units, improving status/understanding by short-term attachments of uniformed officers to units			✓ (dom violence)
Improving enforcement of civil measures			✓ (dom violence)
Interpreters/translating advice etc. into minority languages			✓ (eth minorities)
Increased recruitment of ethnic minorities			✓ (eth minorities)
Training to counter discrimination, for eg. covering cultural differences			✓ (eth minorities)
Improving public consultation			✓ (sex & eth minorities)
Creating formal anti-discrimination policies			✓ (sex minorities)
Reforming laws relating to sexual minorities			✓ (sex minorities)
Situational crime prevention			✓ (repeat esp)
Use of expert evidence		✓	✓
Use of specialist skills for interviewing/cross-examination, supplied by experts or through training, perhaps involving specialist officers etc.		✓	✓
Requirement for prosecutors to meet witness before deciding on their competence		✓	✓
Reviewing policies on therapy before trial, further investigation of the contamination issue etc.			✓
Training on interview/cross-examination technique, Rape Trauma Syndrome etc. for all cjs personnel or some specialist personnel at all stages		✓	✓
Creating a right of appeal against CPS decisions		✓	✓
Meetings between victims and prosecution before trial		✓	✓
Loan of a personal alarm	✓		✓
Increasing police patrols in witness's area	✓		✓ (repeat vics)
Requiring officers to ask witnesses if they have been intimidated/are vulnerable for some reason	✓	✓	✓
Consideration of accessibility and comfort in deciding location of interview	✓	✓	✓
Taping/videoing interviews	✓	✓	✓
Screens/mirrors/video for identification parade	✓	✓	✓
Guidance on spotting signs of intimidation/vulnerability	✓	✓	✓
Pre-trial preparation	✓	✓	✓
Pre-trial hearings or written depositions to avoid/reduce time in court	✓	✓	✓
Keeping witness on standby for appearance	✓	✓	✓
Screens, CCTV and voice distorters	✓	✓	✓
Press reporting restrictions	✓	✓	✓

**Table 5: Summary of potential measures (continued)**

Measures	Category of Vulnerable Witness		
	Intimidated witnesses	Witnesses with disabilities /illnesses	Victims of special offences
Not identifying the witness in court	✓	✓	✓
Clearing the public gallery/issuing warnings to public in gallery	✓	✓	✓
Friend in court schemes	✓	✓	✓
Structural changes to court design, eg. separate waiting facilities	✓	✓	✓
Reforming defendant's right to cross-examine	✓	✓	✓
Emergency relocation	✓	✓	✓
Improving information given to witnesses	✓	✓	✓
Provision of witness packs giving details of support available etc.	✓	✓	✓



## bibliography

- Adler, Z. (1987) Rape on Trial London: Routledge and Kegan Paul
- Adler, Z. (1992) "Male victims of Sexual assault - legal issues" in G.C. Mczey & M.B.King (Eds) Male Victims of Sexual Assault Oxford: Oxrord University Press
- Advisory Group on Video Recorded Evidence (1989) Report of the Advisory Group on Video-Recorded Evidence London: Home Office
- American Bar Association (1981) "How To Do It" Suggestions for Implementing the ABA Victim/Witness Intimidation Recommendations Washington: ABA
- American Bar Association (1981) Reducing Victim/Witness Intimidation: A Package Washington: ABA
- Barron, J. (1990) Not Worth the Paper? The Effectiveness of Legal Protection for Women and Children Experiencing Domestic Violence Bristol: Women's Aid Federation Ltd
- Brereton, D. (1997) "How Different are Rape Trials? A Comparison of the Cross-Examination Of Complainants in Rape and Assault Trials"<sup>1</sup> in British journal of Criminology 37. 2: 242-261
- Brown, B., Burman, M. & Jamieson, L. (1992) Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials Central Research Unit Papers. Edinburgh: Scottish Office
- Brown, D. (1995) RA.C.E. Ten years on: A Review of the Literature Home Office Research Study No 155 London: Home Office Research and Statistics Directorate
- Brown, L., Christie, R. & Morris, D. (1990) Families of Murder Victims Project: Final Report London: Victim Support
- Bucke, T. & Brown, D. (1997) In police custody: police powers and suspects' rights under the revised PACK codes of practice Home Office Research Study 174. London: Home Office
- Burke, M. (1994) "Prejudice and Discrimination: The Case of the Gay Police Officer" in British journal of Criminology 34, 2: 192-203
- Burke, M. (1994b) "Homosexuality as Deviance: The Case of the (Gay) Police Officer" in The Police Journal, July: 219-229
- Burke, R.A. (1996) A Matter of justice: Lesbians and Gay Men in Law Enforcement London/New York: Routledge.
- Burquest, R., Farrell, G. & Pease, K. (1992) "Lessons from Schools" in Policing, 8, 148-155
- Buzawat, E.S. & Buzawa, C.G. (1996) Domestic Violence: The Criminal Justice Response California, USA: Sage
- Casey, C. (1993) "Twist and Shout" in Police Review 28 May 28-29
- Cervi, B. (1992) "The time has come: vulnerable<sup>1</sup> adults disclosing sexual abuse are likely to be rejected by the justice system" in Community Care, 25 June, 921: 14-15
- Chandler, J. & Lait, D. (1996) An analysis of the treatment of children as witnesses in the Crown Court London: Victim Support
- Choudry, S. (1996) Pakistani Women's Experience of Domestic Violence in Great Britain Home Office Research and Statistics Directorate Research Findings No 43 London: Home Office
- Chigwad-Bailey, R. (1997) Black Women's Experiences of Criminal Justice: A Discourse on Disadvantage Winchester: Waterside Press
- Clarke, M. (1994a) "GMP team providing 'lifeline' for witnesses" in Police Review, 1 July, 12-13.

- Clarke, M (1994b) "Witnesses in fear" in Police Review 6 May. 16-17
- Cohen, P (1994) "Bearing Witness" in Community Care, 30 April, 20-21
- Con way, H (1998) "Protecting Victims of Domestic Violence - Part IV Family Law Act 1996" in Justice of the Peace. **162,21** Feb, 139-142
- Craig. Y (1992) "Domestic Violence and Magistrates' Courts" in Justice of the Peace, Sept 5, 568-570
- Crawford, A., Jones, J., Woodhouse, T & Young, J (1990) Second Islington Crime Survey Middlesex: Middlesex Polytechnic Centre for Criminology
- Crown Prosecution Service (1995) CPS Policy for Prosecuting Cases of Domestic Violence London: CPS
- Davies, G & Westcott, H (1992) "Video technology and the Child Witness" in (Eds) Dent, J & Flin, R Children as Witnesses Chichester; John Wiley and Sons
- Davis, G (1997) The Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions: Interim Report Unpublished Report for the Home Office
- Deloitte & Touche (1996) Review of the Use of Medical Specialists by Police Forces London: Home Office Police Research Group
- Dixon, M (1995) "Special Witnesses: What's So Special About Them?" in Brief (Journal of the West Australian Law Society) 22, 5: 5-8
- Dobash, RP & Dobash, RF. (1979) Violence Against Wives New York: Free Press
- Dobash, RP, Dobash, RE, Wilson. M & Daly. M (1992) "The Myth of Sexual Symmetry in Marital Violence" in Social Problems 39, 1, 71-91
- Dobash, RP (1996) Research evaluation of programmes for violent men Central Research Unit Edinburgh: Scottish Office
- Dowds. L & Budd, T (1997) Victim and witness intimidation: findings from the 1994 British Crime Survey Unpublished report for the Home Office Research and Statistics Directorate.
- Elliott. R & Nicholls J (1996) Its Good to Talk: Lessons in Public Consultation and Feedback Police Research Series Paper 22 London: Home Office
- Farrell.G., Jones, G & Pease,K (1993) "Witness and Juror Protection: Using Available Technology" in The Magistrate, September. 131-132.
- Farrell, G & Pease, K (1993) Once Bitten Twice Bitten: Repeat Victimization and Its Implications for Crime Prevention Police Research Group Crime Prevention Series Paper 46 London: Home Office
- Farrell, G, Phillips, C & Pease, K (1995) "Like Faking Candy: Why does Repeat Victimization Occur?" in British Journal of Criminology, 35, 3: 384-399.
- Fennell, P (1993) "Vulnerable Witnesses" in Law Gazette 90/21. 2 June, 21-24
- Fitzgerald.M & Hale, C (1996) Ethnic Minorities: victimisation and racial harassment. Findings from the 1988 and 1992 British Crime Surveys Home Office Research Study 154. London: Home Office Research and Statistics Directorate
- Fitzgerald, M & Sibbi, R (1997) Ethnic monitoring in police forces: a beginning. Home Office Research Study 173. London; Home Office Research and Statistics Directorate.
- Freeman, M (1997) "Violence Against Women: Does the Legal System Provide Solutions or itself Constitute the Problem?" in British Journal of Law and Society 7, 215-263
- Calvin, J. & Polk, K (1983) "Attrition in Case Processing: Is Rape Unique?" in Journal of Research in Crime and Delinquency, 1, 126-154
- Grace, S (1995) Policing Domestic Violence in the 1990s Home Office Research Study 139 London: Home Office Research and Planning Unit
- Grace, S., Lloyd, C & Smith, L (1992) Rape: from recording to conviction Research and Planning Unit Paper 71 London: Home Office



- Graef, R (1990) Talking Blues: The Police in their Own Words London: Collins Harvill
- Graham. Mil (1985) Witness Intimidation: The Law's Response Connecticut, USA: Quorum
- Harris, J. (1997) The Processing of Rape Crises by the Criminal Justice System: Interim Report. Unpublished. London: Home Office.
- Hague, G., Malos, F & Dear, W (1996) Multi-Agency Work and Domestic Violence: A National Study of Inter-Agency Initiatives Bristol: Polity Press
- Healey, KM (1995) Victim and Witness Intimidation: New Developments and Emerging Responses US Department of Justice: National Institute of Justice
- Herck, GM & Berrill, KT [Eds] (1992) Hate Crimes: Confronting Violence Against Lesbians and Gay Men California: Sage
- HMIC (1997) Winning the Race: Policing Plural Communities. IIMIC Thematic Inspection Report on Police and Community Race Relations 1996/97 London: Home Office
- HMSO (1994) Criminal Justice and Public Order Act 1994: Chapter 33 London: HMSO
- Home Office (1987) Criminal Statistics England and Wales 1986 London: Home Office
- Home Office (1989) Home Affairs Committee First Report: Racial Attacks and Harassment London: HMSO
- Home Office (1990) The Government Reply to the First Report from the Home Affairs Committee Session 1989-90 Racial Attacks and Harassment London: HMSO
- Home Office (1996b) Domestic Violence Factsheet Home Office Research and Statistics Directorate Issue 4 November London: Home Office
- Home Office (1996) Statement of National Standards on Witness Care in the Criminal Justice System London: Home Office
- Home Office (1996d) The Victim's Charter: A Statement of Service Standards for Victims of Crime London: Home Office
- Home Office (1997) Criminal Statistics England and Wales 1996 London: Home Office
- Home Office (1997) Race and the Criminal Justice System - A Home Office Publication Under Section 95 of the Criminal Justice Act 1991 London: Home Office Communications Directorate
- Home Office (1997c) Racial Violence and Harassment: A Consultation Document London: Home Office
- Iller, M (1992) "A fair trial for rape victims" in Law Society's Gazette, 89, 9:2
- Jackson, H & Borthwick, S (1993) "Witness Protection" in Community (June), 9 Sept: 20-21
- Jason-Lloyd, L (1995) "The Protection from Harassment Act 1997 - A Commentary" in Justice of the Peace and Local Government Law, Aug 16, 787-790
- Jenkins, C (1997) "Women encouraged to report rapes at hospital" in Police Review, 5/3/97.
- Law Commission (1995) Evidence in Criminal Proceedings: 1. Ilii-say and Related Topics Law Commission Consultation Paper No 138 London: HMSO
- Law Commission (1997) Evidence in Criminal Proceedings: Hearsay and Related Topics Law Commission Report No 245 London: The Stationery Office
- Law Reform Commission of Western Australia (1990) Discussion Paper on Evidence of Children and Other Vulnerable Witnesses Perth: Law Reform Commission of Western Australia
- Law Reform Commission of Western Australia (1991) Report on Evidence of Children and Other Vulnerable Witnesses Project No 87 Perth: Law Reform Commission of Western Australia
- Lees, S (1996) Carnal Knowledge: Rape on Trial London: Penguin

- Levin, J & McDevirr, J (1993) Hate Crimes: The Rising Tide of Bigotry and Bloodshed New York: Plenum
- Lipovsky, J.A. (1994) "The Impact of Court on Children: Research Findings and Practical Recommendations" in Journal of Interpersonal Violence, 9,2; 238-27
- Littlechild, B (1993) "Vulnerable Groups Under P.A.C.E. 1984 - Social Workers as Unwitting Oppressors?" in AJJUST Magazine May, 15-16
- Lloyd, S., Farrell, G & Peasegood, K (1994) Preventing Repeated Domestic Violence: A Demonstration Project on Merseyside Police Research Group Crime Prevention Series Paper 49. London: Home Office
- London Rape Crisis Centre (1984) Sexual Violence: The Reality for Women London: The Women's Press
- Lord Chancellor's Department (1997) Judicial Statistics: Annual Report 1996 London: I LVISO/Government Statistical Service
- Love, A., & Kirby, K (1994) Racial Incidents in Council Housing: The Local Authority Response Department of the Environment. London: UMSO
- Mason, A & Palmer, A (1996) Queerhashing: A national survey of hate crimes against lesbians and gay men London: Stonewall
- Mayhew, P., Ayc-Maung, N & Mirrlees-Black (1993) The 1992 British Crime Survey Home Office Research Study 132 London: Home Office Research and Planning Unit
- Mayhew, P & van Dijk, J (1997) Criminal Victimization In Eleven Industrialised Countries: Key findings from the 1996 International Crime Victims- Survey Netherlands: Ministry of Justice WDOC (Copies also available from London: Home Office)
- Mayhew, P & White, P (1997) The International Crime Victimization Survey Research Findings No.57 Research and Statistics Directorate London: Home Office
- Maynard, W (1994) Witness Intimidation: Strategies for Prevention Police Research Group Crime Detection and Prevention Series Paper 55. London: Home Office
- Maynard, W (1995) "Witness intimidation: strategies for prevention" in Criminal Justice Matters No 22, Winter 1995/6, 17.
- Maynard, W & Read, T (1997) Policing Racially Motivated Incidents Police Research Group Crime Detection and Prevention Series Paper 84. London: Home Office
- McDonald, E (1994) "Her Sexuality as Indicative of his Innocence: The Operation of New Zealand's "Rape Shield" Provision" in Criminal Law journal 18: 321-336
- Meldrum, J (1980) Attacks on Gay People: A Report of the Commission on Discrimination of the Campaign for Homosexual Equality London: CHE
- Mencap (1997) Barriers to Justice: A Mencap study into how the Criminal Justice System treats people with learning disabilities London: Royal Society for Mentally Handicapped Children and Adults
- Miller, GR & Fontes, NT. (1979) Videotape on Trial: A View from the Jury Box California: Sage
- Mirrlees-Black, C, Mayhew, P & Percy, A (1996) The 1996 British Crime Survey: England and Wales Statistical Bulletin Issue 19/96. London: Home Office Research and Statistics Directorate.
- Morley, R & Mullender, A (1994) Preventing Domestic Violence to Women Police Research Group Crime Prevention Series Paper 48 London: Home Office
- Murray, K (1997) Preparing Child Witnesses for Court: A Review of Literature and Research Edinburgh: Scottish Office Home Department Central Research Unit.
- Myers, J & Paxson, M (1992) "Admissibility of Rape Trauma Syndrome in Legal Proceedings" in Violence Update, 2,7: 3-7
- National Schizophrenia Fellowship (1996) 'The Appropriate Adult' and the mentally vulnerable suspect NSE: London