

Introduction

In this article we discuss the failure of the criminal justice system to adequately address the problems of sexual assaults perpetrated by female assailants on both male and female victims. We argue that the law as it currently stands (contained in the Sexual Offences Act 2003 – ‘SOA’) is heteronormative and rooted in gender stereotypes and, as such, fails to achieve the policy aims of ‘gender neutrality’ and ‘universality.’ This is due to an attempt to maintain gender neutrality in the language of the legislation, at the expense of explicitly tackling all forms of sexual offending. We shall suggest that to achieve its avowed aims, there is a need for statutory reform.

In 2007, Rumney warned;

‘The idea of labeling or naming abusive acts as rape leads to another issue—the relationship between the lack of societal recognition of male rape and institutional neglect of the problem.’¹

We shall argue that the problems of institutional neglect result in policies which treats the existence of offences committed by women as apocryphal. As a result, the problem is not constructed and labelled appropriately resulting in a deficit of evidence by which practice and decision-making can be scrutinised and improved.

Criticisms of the SOA for being deficient in this respect have been raised before² but merit further discussion as the Act approaches the end of its second decade in force. The growing recognition of the prevalence of sexual offending in day-to-day life has raised awareness of the ways in which male sexual aggression can manifest itself towards women. This recognition is overdue in a move towards a safe and equal society, however it is equally important that the criminal justice system is able to recognise the consequences of sexual assault in every case regardless of the gender of either assailant or victim. As we shall discuss, there is a clear body of evidence that men are

¹ P. Rumney, ‘In defence of gender neutrality within rape.’ (2007) *Seattle Journal for Social Justice* 481 at 485

² See for example P. Rumney, ‘The Review of Sex Offences and Rape Law Reform: Another False Dawn?’ (2001) 64 *M.L.R.* 890.

regularly the victims of serious sexual offences committed by women but that despite this, prosecutions are rare in England and Wales.³

Although our discussion focuses primarily on the experiences of male victims, as we argue that they are underrepresented in discussions about victims of sexual assault, our discussion is primarily directed at the phenomenon of female attackers and as such is equally applicable to female or non-binary victims in these cases.

The typologies and pathologies of women sex offenders are controversial and a detailed analysis is beyond the scope of this paper, however there remains considerable support for the descriptive model first proposed by Mathews which categorises female offenders into three categories; ‘predisposed women,’ who initiate abuse, ‘teacher/lovers’ who engage in relationships with adolescents and ‘male coerced’ who commit offences under the influence of a male.⁴ The latter category is reflected in law under s1 - 3 SOA and the principles of joint enterprise/aiding and abetting. The second category is dealt with, primarily under s.9 SOA (where the victim is below 16), and s16 and 17 where the victim is below 18 and the perpetrator is in a position of trust. These sections negate any ostensible consent by the victim and are best seen as offences reflecting the abuse of power by the abuser. This article focuses primarily on the first of these categories where the female abuser instigates sexual abuse against a victim in a range of different circumstances (although often within the context of an existing relationship).

This article is in 5 parts. We shall begin with a brief review of the background to SOA. We shall then consider how the aims of the SOA in respect of female offending have been diluted through the promulgation of sentencing guidelines which fail encapsulate the behaviours and impact of female sexual offending. In part 3 we shall discuss the victimology of men assaulted by women, the impact it

³ In addressing the question of female offending we fully acknowledge that the vast majority of sexual offences are committed by men against women. The question of gender neutrality in sexual offending is not without controversy. Commentators such as Novotny argue that gender neutrality within law deflects efforts to end victimisation. These arguments are beyond the scope of this paper but have, in any event, been comprehensively addressed and countered by Rumney

⁴ R. Mathews, J.K. Matthews, K. Speltz, (1989). ‘Female sexual offenders: An exploratory study.’ Orwell, VT: Safer Society Press. T.A. Gannon, G. Waugh, K. Taylor, et al. ‘Women Who Sexually Offend Display Three Main Offense Styles: A Reexamination of the Descriptive Model of Female Sexual Offending.’ (2014) 26 Sexual Abuse 207 doi:[10.1177/1079063213486835](https://doi.org/10.1177/1079063213486835)

has upon them and the possible reasons which impact upon reporting. In section 4 we consider whether there may be issues within the policies of prosecuting authorities which contribute to under-prosecution. We conclude with recommendations for improvements to the law.

Part 1 – The development of the Sexual Offences Act 2003

The criminalising of non-consensual sexual activity in England and Wales was historically focused on the notion of male aggressors and female victims. The Home Office commissioned review, *Setting the Boundaries*⁵ paved the way for the SOA and recognised that much of the law at the time was outdated, reflecting 19th century societal attitudes towards men and women.⁶ As one of the principles which underpinned its recommendations, the review stated ‘the criminal law should not discriminate unnecessarily between men and women nor between those of different sexual orientation.’⁷

On the issue of female on male rape, the review’s discussion was cursory and, arguably, dismissive;

‘We did consider whether there was evidence that a woman could force a man to penetrate her against his will but, although we found a little anecdotal evidence, we did not discover sufficient to convince us that this was the equivalent of rape.’⁸

As Rumney observes,⁹ this conclusion is surprising, given that the review had elsewhere referenced Coxell and others’ study of 2474 men which indicated that 2.89% of these had been sexually abused as adults, with a number of these indicating that they had been abused by a female perpetrator.¹⁰ Of those who fell within this category, 32 reported having being forced to penetrate a woman and 13 reported being forced to perform oral sex on a woman. The review suggested that this type of behaviour was better captured in a new offence of ‘compelling sexual behaviour.’ This

⁵ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences*, Vol.1 (chair: Betty Moxon)

⁶ *Ibid* at para 0.2

⁷ *Ibid* at para 1.3.2

⁸ *Ibid* at para 2.8.4.

⁹ Rumney above at n.2.

¹⁰ A. Coxell, M. King, G. Mezey, D. Gordon ‘Lifetime prevalence, characteristics and associated problems of non-consensual sex in men: cross sectional survey’ (1999) 318 *British Medical Journal* 846.

recommendation was the basis for s4 SOA, ‘Causing a Person to Engage in Sexual Activity without Consent.’ This offence exists in an aggravated form, (where penetration arises), punishable with a sentence of life imprisonment and a non-aggravated form, where the maximum sentence is 10 years imprisonment.

The intentions of the review and the Act which followed it were laudable and marked a substantial improvement in how sexual offences were prosecuted. The Act codified an important area of law which had developed in a piecemeal fashion and, in doing so, replaced obvious anomalies in the law.¹¹ However for legislation to be effective, its implementation and administration must also recognise its aims and as we shall argue, in the respect it is found wanting.

Part 2 – The implementation of SOA

Perhaps the most significant consideration in assessing how the law treats an offence is the sentence which is passed on a convicted offender. The passing of a sentence upon a defendant is normally the last stage of the criminal justice process, however decision-making by participants in the process is informed by an assessment of what the likely sentence will be. Types of decision which require consideration of the likely sentence include assessment by the C.P.S. as to whether it is in the public interest to prosecute an offence,¹² decisions by defendants as to whether to enter a plea and decisions by courts on preliminary issues such as Bail¹³ and Mode of Trial.¹⁴

The sentence which is passed is determined with reference to Sentencing Guidelines produced by the Sentencing Council, an independent, non-departmental public body¹⁵ whose function is to develop guidelines and monitor their use. Judges are required by law to follow guidelines when

¹¹ For example, prior to the act a penetrative assault which was not rape could only be treated as an indecent assault.

¹² Code for Crown Prosecutors at f) <https://www.cps.gov.uk/publication/code-crown-prosecutors> [Last accessed 09 September 2020]

¹³ Section 1A, schedule 1, part 1, Bail Act 1976.

¹⁴ Sentencing Council, ‘Allocation Guideline.’ <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/allocation/> [Last accessed 09 September 2020].

¹⁵ Sentencing Council, ‘About Us.’ <https://www.sentencingcouncil.org.uk/about-us/> [Last accessed 09 September 2020]

passing sentence.¹⁶ The guidelines identify those factors which, in the view of the Council, justify a sentence being increased or decreased and indicate appropriate sentences based upon the presence or absence of those factors. The guidelines promote consistency, transparency, and accountability by providing a uniform framework to be applied by the judiciary when passing sentence. Working on the presumption that a longer sentence equates to a more serious offence in terms of harm and culpability, the guidelines can be used as a framework to assess how seriously offences will be treated. Those factors which are identified within the guidelines are those which are considered of enough importance to merit directing sentencers to take into consideration and therefore, by default, those things which are omitted are not.

The guidelines for rape¹⁷ and assault by penetration¹⁸ identify similar factors to be considered in assessing the level of harm caused to a victim. The guidelines differ in that the guidelines for rape refer to pregnancy or an STI being caused by the offence, and the guidelines for assault by penetration refer to penetration with a large or dangerous object. Culpability is assessed using the same criteria for both offences. For the most serious (category 1) offences the starting point and sentencing range is identical, however further down the scale that the guidelines differ. A category 3 b (low harm, low culpability) offence of rape has a starting point of 5 years imprisonment and a sentencing range of 4 – 7 years custody.¹⁹ An offence of assault by penetration has a starting point of 2 years and a sentencing range of 4 years to a community order.²⁰ The aggravating and mitigating features which determine where an offence falls in the sentencing range are very similar between the two offences save for the inclusion of ejaculation as an aggravating feature in rape. Whilst there is therefore a substantial degree of similarity, there is therefore also a baseline of harm which is factored into the sentencing of rapists which elevates sentences at the lower end of the guidelines.

¹⁶ Section 125, Coroners and Justice Act 2009.

¹⁷ Section 1, Sexual Offences Act 2003.

¹⁸ Section 2, Sexual Offences Act 2003.

¹⁹ Sentencing Council, ‘Sentencing Guidelines – Rape.’ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> [Last accessed 09 September 2020]

²⁰ Sentencing Council ‘Sentencing Guidelines – Assault by Penetration’ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-by-penetration/> [Last accessed 09 September 2020]

SOA creates in s1 an offence which can only be committed by males as a primary offender. This could be argued as being contrary to the principle of gender neutrality however when looked at in conjunction with s2 and the sentencing guidelines for both offences, it is perhaps easier to view them holistically, incorporating all forms of violation through penetration of the victim and representing the most serious form of sexual violation. Neither of these offences however capture a male victim being forced to engage in penetrative or vaginal oral sex against their will. Nor does this behaviour fall under the umbrella of ‘sexual assault,’ the touching often not being committed by the perpetrator. Female rape therefore, as intended in the review, falls under s4 SOA but as shall be discussed later, this offence seldom results in either prosecution or conviction.

The s4 offence is framed to capture a breadth of offending, covering touching of the defendant, sexual activity with a third party and forced masturbation. It is perhaps unsurprising that it is described by Blackstones as ‘complicated.’²¹ Whilst the offence may have been intended to capture forced sexual intercourse and oral sex committed by a female assailant, this is not reflected in the guidelines. The guidelines for the offence identify a number of factors to be taken into account in assessing the seriousness of the offence, many of which resemble those for the more serious offences. (the most serious offences having the same starting part and sentencing range as category 1 offences in rape). In determining the seriousness of the offence, the factors which are identified as being relevant to harm include causing pregnancy/STI and penetration with a large or dangerous object.²² There is, however, no reference to being forced to penetrate or forced to perform oral sex on a female. Some of the other indicators of a high level of harm may arise in the individual circumstances of cases of female rape (for example ‘severe psychological harm’) but if this is not evidenced the court cannot take it into account. Internal and external factors which inhibit the reporting of offences (as we shall discuss later) may also inhibit victims from discussing the extent of the impact upon them. The offence is aggravated if the Acts are ‘humiliating’ and ‘degrading.’ As by definition, all sexual

²¹ David Ormerod QC, David Perry QC. Blackstone’s Criminal Practice 2020. At B3.73

²² Sentencing Council. ‘Sentencing Guidelines – Causing a Person to engage in Sexual Activity without Consent.’ <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/causing-a-person-to-engage-in-sexual-activity-without-consent/> [Last accessed 09 September 2020]

offences fall within this definition, the reference to this as a factor which increases the seriousness of the offence is that it must be ‘additional,’ i.e. extraneous to the Act which constitutes the offence.

The omission of any factors which might ordinarily be present in rape or forced oral sex by a female offender are significant. An offence can only be categorised within category 1 or 2 if the harm factors listed in the guidelines are present;²³ judges have no residual discretion to identify additional factors present which might justify categorising an offence differently. In cases which lack these features, judges will have no choice but to categorise them as category 3 offences. Having categorised the offence, the sentencer will consider factors relevant to the culpability of the offender. Once again, individual circumstances may permit a judge to treat this as falling within in category ‘A’ but if these are absent, the offence will fall within category ‘B’ where there is a sentencing point of 2 years imprisonment and a sentencing range of a high level community order and an upper limit of 4 years. In determining where that offence falls on the threshold, the court must then take into account factors from a non-exhaustive list of factors within the sentencing guidelines, which again makes no reference to those factors which might arise in a rape perpetrated by a female. Whilst an individual sentencer may take this into account, there is no reason to assume that, without direction, this will be so. There is no baseline harm assumed for female instigated rape.

The sentencing guidelines which are produced by the Sentencing Council are drafted and revised following public consultation. In the December 2013, ‘Response to Consultation’ which resulted in the 2014 Sentencing Guideline, the s4 offence received only a brief discussion noting that it was ‘rarely charged.’²⁴ The authors noted that it covered a range of sexual activities, including forced sexual activity with the offender and therefore proposed that the sentencing guidelines aligned to both assault by penetration and sexual assault; these proposals being universally accepted by respondents who answered this question. There is no evidence of a discussion as to whether forced sexual intercourse committed by a female should merit a higher penalty; it seems the question was

²³ Sentencing Council. ‘Sexual Offences – Response to Consultation.’ https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Response_to_Consultation_web1.pdf at page 26 [Last accessed 09/09/2020].

²⁴ Ibid. at page 23

never asked. In terms of rape where the victim is female, the Council was clear to ensure that the language of the sentencing guidelines did not perpetuate rape myths. The consultation found that the causing of an STI/pregnancy to be an aggravating feature which merited specific mention in the rape guidelines (a factor which originally justified the ring-fencing of rape in the drafting of SOA) but that this is not discussed in the context of intercourse being forced upon a male. Sexually transmitted diseases can however be passed from females to males. A male victim cannot become pregnant but the possibility of having caused a pregnancy as a result of an act they did not consensually participate has the potential to cause significant psychological trauma. There may, of course, be arguments to justify distinguishing between these two acts in terms of sentencing policy, but this needs to be an informed decision which is advised upon by specialists and subjected to public consultation in accordance with the statutory objectives of the Sentencing Council. If the question is not asked and debated, the policy cannot be formulated and implemented properly.

It is worth noting that the analysis above proceeds on the basis that a female defendant who has caused a victim to penetrate her, or perform oral sex on her will fall to be sentenced under the aggravated version of s4. Arguably the broad framing of the current legislation leaves this open to doubt. s4 is drafted so that in describing the offence, the defendant is referred to as A and the victim as B. This is perhaps inevitable as a 'catchall' offence designed to capture a wide range of activity united only in the fact the behaviour is 'sexual.' In describing the aggravated form of the offence, subsection 4 (a) and (b) refer directly to penetration of B. Parts (c) and (d) of that section refer to the penetration being by B of a person. What is not explicit from the drafting is whether A can be the person referred to. Whilst it was clearly the intention of the Act that the person could be either A or another party, the drafting lacks clarity in this respect. The absence of a clause which specifies this lays open the argument that had parliament intended the offence to have been committed via penetration of A, as well as penetration of a third party, it would have specified it. This point never appears to have been litigated (indeed there are very few Court of Appeal judgments on the definition of this section) and were it to be the Court of Appeal might just as easily conclude that it would have been an absurdity for Parliament to have omitted it. It is however an unnecessary lacuna and one

which could easily be rectified and reflects a lack of consideration of the details of the offences. If the specifics of the offence are not explicit, the chances of them being recognised by those who implement the legislation are limited.

An indication of the extent to which female defendants appear within the criminal justice system can be seen within Ministry of Justice criminal statistics for the period 2008 – 2018.²⁵ Unsurprisingly, the data shows that the substantial majority of offenders are male. The presence of female offenders in the statistics for the offence of rape indicate that women are prosecuted and convicted under the Act as accessories to male offenders.²⁶ For those offences where the data shows both the gender of the assailant and the gender of the victim (assault by penetration and sexual assault) it would appear that convictions of women occur with greater frequency when the victim is male. Approximately 1 in every 14 defendants convicted of assault by penetration on a male over the age of 13²⁷ is female compared to approximately 1 in every 76 when the victim is female. For sexual assault, approximately 1 in every 12 defendants convicted of assault on a male over the age of 13 is female, whereas for female victims it is approximately 1 in every 113.

It is difficult to conclude too much from these statistics on their own. It is not possible to see whether these offences were committed as principals or secondary offenders. The disparity between victims no doubt reflects the prevalence of sexual offending by men, against women. The number of actual convictions of women in some of the groups is very small, and therefore difficult to draw conclusions from. What the data does show is that there was evidence to justify proceeding against a significant number of female defendants and a number of these resulted in conviction.

Perhaps the most significant data is that relating to prosecutions brought under s4 SOA. In the 10-year period covered by the statistics, 78 males and 3 females were convicted of the aggravated

²⁵ <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018>.
[Last accessed 05 May 2020]

²⁶ 125 females were prosecuted resulting in 91 convictions for rape on a female.

²⁷ 57 males convicted, 7 females.

form of this offence and 115 males and 2 females convicted of the non-aggravated form.²⁸ This deletion is described as being likely to have only a small impact on the figures.

This suggests that s4 of the Act is rarely being used to prosecute female offenders. It is perhaps noteworthy that for the aggravated version of the offence, the 3 convictions were the result of 4 prosecutions and for the non-aggravated version of the offence the 2 convictions were the result of 3 prosecutions.

One explanation for the low conviction rate for causing sexual activity without consent is that it reflects reality and that commission of this offence by women is exceptionally rare. Whilst this may be the case, there is evidence which suggests it is more common than these figures suggest and that there are number of factors which are inhibiting victims from pursuing criminal allegations.

Part 3 - Male experiences of sexual assault

In order to fully understand some of the problematic issues around categorising, and attributing seriousness to non-consensual sexual acts it is necessary to consider how sexual acts are perceived by different groups and individuals. In this section we discuss how the notion of ‘having sex’ is perceived differently in different communities, the stereotypical assumptions about female and male sexualities which exist, the experiences of male rape victims and the impact may have on reporting rates. If the Act is truly going to act as a code which punishes offenders for the trauma they inflict on their victims, it needs to reflect a broader understanding of how ‘sex’ is perceived by individual victims.

The SOA recognises that acts of penetration are likely to cause the most serious psychological and physical harm and therefore, required the highest level of punishment. The justification for distinguishing penile and non-penile penetration was twofold; namely that the public regarded rape as being an act committed by a man and a woman, and that the risks of pregnancy and sexually transmitted diseases were factors which justified the categorisation of rape in a particular

²⁸ It is important to note that the Ministry of Justice accidentally deleted any records of females being convicted of this offence prior to 2015, and so these statistics may not be entirely accurate. Ministry of Justice, ‘A Guide to Criminal Statistics’ last updated May 2019 at page 12.

way.²⁹ Rumney argued these arguments were weak; the former because public opinion is a poor basis to formulate law reform, the latter because of the broadening of the definition of rape to include penetration of the mouth.³⁰

Whilst it is undoubtedly the case that assault by penetration results in the highest level of physical and psychological harm, this does not mean that other forms of offending do not produce similar traumas. Chivers – Wilson established that victims of non-penetrative assaults often suffer the same level of post-traumatic stress disorder as victims of penetrative assaults.³¹ Masters established that males who had been forced to have non-consensual sexual intercourse with a female were likely to suffer long term psychosexual harm.³² In part, the psychological damage, which is inflicted on an individual is a reflection of the extent to which an individual feels violated and the degree to which they believe they have been forced to engage in sexual activity.

The extent to which perceptions of how ‘having sex’ is categorised differently can be seen in relation to oral sex. Hill and others established that in heterosexual communities the Act of oral sex is frequently not defined as ‘having sex,’ however within LGBT communities however it is perceived differently, with one study sample indicating that 73% of gay men in the USA and 84% of gay men in the UK defining oral-genital contact as ‘having sex.’³³ Research conducted with homosexual women showed that on a scale of 1 - 6, where 6 was defined as ‘definitely sex’, an average score of 5.21 was recorded for the behaviours ‘a person had oral (mouth) contact with your genitals’ and ‘You had oral (mouth) contact with a person’s genitals’. In addition to this, unlike their heterosexual counterparts, penile-vaginal intercourse was not given the full score of 6.³⁴

²⁹ See Home Office above at n.5 at paras 2.8.2. – 2.8.5.

³⁰ Rumney above at n.2.

³¹ K.A. Chivers-Wilson, ‘Sexual assault and posttraumatic stress disorder: A review of the biological, psychological and sociological factors and treatments.’ (2006) *McGill Journal of Medicine* Jul 111.

³² W.H. Masters, ‘Sexual dysfunction as an aftermath of sexual assault of men by women.’ (1986) *12 Journal of Sex & Marital Therapy* 35-45.

³³ B. Hill, Q. Rahman, D. Bright, S. Sanders, ‘The semantics of sexual behavior and their implications for HIV/AIDS research and sexual health: US and UK gay men’s definitions of having “had sex.”’ (2010) *22 AIDS Care* 1245-1251.

³⁴ A. Horowitz, L. Spicer, ‘“Having Sex” as a graded and hierarchical construct: A comparison of sexual definitions among heterosexual and lesbian emerging adults in the U.K.’ (2013) *50 Journal of Sex Research* 139.

This then calls into question the phallogocentric basis for the offence of rape. Whilst the offence is no longer framed around heterosexuality, the fact that only penetrative penile sex is recognised as ‘rape’ is problematic in terms of the boundaries it draws in terms of both offender and victim. Law has both a practical and expressive function.³⁵ In the case of the latter, the aim of SOA was to reflect more broadly the values of the 21st century. Its rationale was, in part, to ensure that individuals should have the autonomy to engage in consensual sexual activity, and when they are compelled to engage in these acts without consent, they should be criminalised. If the law is to achieve either of its functions it therefore needs to recognise the range of sexual activity to be able to appropriately punish those who transgress, whilst making a statement about society’s normative values.

The laws in England and Wales have historically been framed to address male sexualities. As Rumney and Morgan Taylor observed, the law ‘enshrines a view of gender which ascribes particular inherent characteristics to male and female behaviour.’³⁶ It has been argued that the fact that female sexuality is underrepresented in law is rooted in misogynistic stereotypes of traditional gender roles which, not only suggest that some individuals view it being the male role to influence females into participating in sex,³⁷ but also suggest that women do not, or should not, enjoy engaging in sexual activities. For example, female-female sexual relations have never been illegal in the same way that male-male sexual relations have,³⁸ indicative of a lack of acceptance of female sexuality for the sake of pleasure rather than reproduction – it has historically either been unacknowledged or shamed. The lack of understanding of female sex and sexuality have contributed to the framing of law in a way which does not have a language to recognise such behaviours.

Coupled with these assumptions is the belief that men cannot be raped by women. Prevalent myths include that it is physically impossible for intercourse to take place without the male being a

³⁵ C.R. Sunstein, ‘On the Expressive Function of Law.’ (1996) 144 *University of Pennsylvania Law Review* 2021.

³⁶ P. Rumney and M. Morgan Taylor, ‘Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two’ (1997) 26 *Anglo-Am L Rev* 330.

³⁷ K. Vance, M. Sutter, P. Perrin, M. Heesacker. ‘The Media’s Sexual Objectification of Women, Rape Myth Acceptance, and Interpersonal Violence.’ (2015) 24 *Journal of Aggression, Maltreatment & Trauma* 569.

³⁸ M. Waites. ‘Inventing a “Lesbian Age of Consent”? The History of the Minimum Age for Sex between Women in the UK.’ 2002 11 *Social & Legal Studies* 323.

willing participant or that women lack the physical strength to overpower men.³⁹ There is however clear evidence that men can be the victim of female instigated rape.⁴⁰ This can be supplemented by examination of social media which provides anecdotal evidence that female perpetrated assaults exist. The hashtag #MeToo (which began on Twitter),⁴¹ empowered women to share their experiences of previously unreported sexual assaults and thereby exposed the frequency with which violence against women was occurring (especially in the workplace). The movement also empowered male victims to recount their experiences, suggesting female-led rape may be more prevalent than previously thought.⁴² Anonymous social media platform Reddit has been utilised by male victims of female instigated rape to vocalise their experiences. The website has over 330 million monthly active users and generates over 168 billion page-views per year.⁴³ The amount of monthly active users on Reddit is greater than Twitter, reaching 319 million monthly active users in 2017,⁴⁴ and should therefore be considered for use as a source of evidence in the same way that Twitter has been for the #MeToo movement. Whilst the posts are uncorroborated, the anonymous nature of the website potentially makes it easier for users to speak freely about their experiences in a way that they may not have been able to do on other platforms.

On 19th February 2019, Reddit user u/pembunuhUpahan posed the question ‘Men of reddit who got raped by women, what’s your story?’⁴⁵ The question was interacted with by over 32,000 individual users, with over 5,300 individual comments. ‘Parent’ comments were made by men who gave their accounts of experiencing sexual offences instigated by women. Many of these accounts

³⁹ See Rumney and Morgan Taylor above at 36 at page 333 -334.

⁴⁰ P.M. Sarrel, W.H. Masters. ‘Sexual molestation of men by women.’ (1982) 11 Archives of Sexual Behavior. 117. Coxell and others above at n.10

⁴¹ K. Mendes, J. Ringrose, J. Keller. ‘#MeToo and the promise and pitfalls of challenging rape culture through digital feminist activism.’ (2018) 25 European Journal of Women's Studies 236.

⁴² S. Weare, J. Porter, E. Evans. ‘Forced-to-penetrate cases: lived experiences of men.’ (Lancaster:2017).

⁴³ Mediakix. THE TOP 8 REDDIT STATISTICS ON USERS, DEMOGRAPHICS & MORE. [Online].; 2018 [cited 2019 March 27. Available from: <http://mediakix.com/2017/09/reddit-statistics-users-demographics/#gs.39g64g>.

⁴⁴ Mediakix. THE TOP 10 TWITTER STATISTICS MARKETERS MUST KNOW. [Online].; 2017 [cited 2019 March 27. Available from: <http://mediakix.com/2017/02/twitter-statistics-earnings-report-revenue-user-growth/#gs.39jno6>.

⁴⁵ u/pembunuhUpahan. AskReddit: [Serious] Men of reddit who got raped by women, what's your story? [Online].; 2019 [cited 2019 March 27. Available from: https://www.reddit.com/r/AskReddit/comments/asbao7/serious_men_of_reddit_who_get_raped_by_women/

included accounts of forced penetration, with this sometimes being compelled through threat, sometimes whilst the victim was unconscious, and sometimes with the use of alcohol and/or drugs. In many ways these mirror the experiences of women who came forward (or were spoken about) during the viral stage of #MeToo on Twitter. Many users described experiences of waking up after blacking out to find themselves either being molested or being forced to penetrate. The use of a sedative as a means to commit an assault is a common feature in rape however, whereas in cases with female victims there is a widespread recognition that this is rape, male victims describe being treated dismissively. One Reddit user described being mocked after telling various people that after losing consciousness and he woke up to a woman 'riding [me] in a dark room.'⁴⁶ This experience for seems to be not uncommon amongst men who have shared their experiences; another user described waking up in a girl's dormitory 'naked with a condom on' after she 'was just feeding [him] drinks' at a party.

Many of the victims of these attacks describe experiencing psychological effects consistent with 'rape trauma syndrome.'⁴⁷ One contributor stated 'It has fucked up every relationship I have ever had and has caused countless sexual issues for me'⁴⁸ whilst another reporting lifelong psychosexual disorders and suicide attempts.'⁴⁹ This thread was not unique. Approximately 5800 individuals commented on the question 'Men of reddit, what is your #MeToo story?'⁵⁰ and approximately 1700 individuals commented on '[Serious] Men who have been raped by women, what's your story?'⁵¹ Whilst there have to be caveats to the unquestioning acceptance of these anonymous accounts, the volume of them is consistent with what has been reported in clinical studies.

⁴⁶ /packhawk2689. AskReddit: [Serious] Men of reddit who got raped by women, what's your story? [Online].; 2019 [cited 2019 March 27. Available from: https://www.reddit.com/r/AskReddit/comments/asbao7/serious_men_of_reddit_who_get_raped_by_women/egt_k9j0

⁴⁷ A. Burgess, 'Rape Trauma Syndrome.' (1983) 1 Behavioral Sciences & The Law 97.

⁴⁸ u/beardedbrad1971. [Serious] Men of reddit who got raped by women, what's your story? [Online].; 2019 [cited 2019 March 27. Available from: https://www.reddit.com/r/AskReddit/comments/asbao7/serious_men_of_reddit_who_get_raped_by_women/egt_d7yc.

⁴⁹ Ibid.

⁵⁰ u/Adster2171. Men of reddit, what is your #MeToo story? [Online].; 2018 [cited 2019 March 27. Available from: https://www.reddit.com/r/AskReddit/comments/9fheug/men_of_reddit_what_is_your_meto_story/

⁵¹ u/PM_ME_MAGICAL_MEMEZ. [Serious} Men who have been raped by women, what's your story? [Online].; 2018 [cited 2018 2019 March. Available from: 27.

If this is correct then there would appear to be significant underreporting of offences, and the reasons for this need considering.

Sarrel and Masters established that 'rape trauma syndrome' (where victims of rape experience a significant amount of 'self-blame and a sense of defilement') is exhibited in both male and female victims of sexual assault,⁵² with evidence that there is a similar psychological impact in male and female adults displaying rape trauma syndrome or rape-related post-traumatic stress disorder (PTSD).⁵³ As with female victims, very few males make criminal complaints⁵⁴ and therefore the issue of male rape is under-recorded. Some estimates suggest that only 14% of victims report being attacked,⁵⁵ whilst other literature puts the reporting rate at as low as 8%.⁵⁶ A number of interrelated factors can explain this. Internalised blame is a common feature of rape trauma syndrome and this of itself acts as a barrier to victims being willing to report their attacks. This is undoubtedly compounded by a number of external factors aligned to public perception of male sexual assault victims⁵⁷

Public portrayals of male rape may provide an explanation as to why male victims are unable to report offences. A clear (albeit not recent) example is that of Joyce McKinney, who chained down and repeatedly raped Kirk Anderson.⁵⁸ This was portrayed as a humorous story in the press (in *The Mirror* it was dubbed 'kinky sex' rather than rape, and Anderson called 'her lover' rather than victim)⁵⁹ as well as being dismissed in feminist literature (where the author felt 'incredible sympathy' not for the victim, but for the aggressor).⁶⁰ It seems unlikely the story would be described 'as lurid as

⁵² See Sarrel and Masters above at n.40.

⁵³ G. Holmes, L. Offen L, G. Waller. 'See no evil, hear no evil, speak no evil: Why do relatively few male victims of childhood sexual abuse receive help for abuse-related issues in adulthood?' (1997) 17 *Clinical Psychology Review* 69.

⁵⁴ A. Javaid. 'Male rape, masculinities, and sexualities.' (2018) 52 *International Journal of Law, Crime and Justice* 199.

⁵⁵ T. Merz. 'Men and boys get raped too'. *The Telegraph*. 24 February 2014

⁵⁶ L.Hammond, M. Ioannou, M. Fewster. 'Perceptions of male rape and sexual assault in a male sample from the United Kingdom: Barriers to reporting and the impacts of victimization.' (2017) 14 *Journal of Investigative Psychology and Offender Profiling* 133.

⁵⁷ A. Javaid. 'Male Rape, Stereotypes, and Unmet Needs: Hindering Recovery, Perpetuating Silence.' (2016) 3 *Violence and Gender* 7.

⁵⁸ R. Greenslade. 'Judge finds for filmmaker in 'manacled Mormon' case.' *The Guardian*. 2013 October 17.

⁵⁹ R. Parry, S. Myall. 'Nude model kidnapped Mormon ex-lover and kept him as handcuffed kinky sex slave in one of Britain's most bizarre crimes.' *The Mirror*. 2018 April 12.

⁶⁰ K. Zwick, 'Errol Morris' Tabloid: A study in one-dimensional editorializing.' (2011) *Women's Studies & Gender Studies: Digest Magazine*. September 12.

it was hilarious' if the victim was female.⁶¹ Portrayal of male rape in the media frequently trivialises the offence in a way it does not with female victims.⁶² Female rape is portrayed as shocking, with the victims in vulnerable positions and the Acts being recognised as degrading acts of violence, incorporating physical injury or death.⁶³ Male rape however, is frequently represented comedically in the media. In the case of male rape, it most frequently portrayed in the context of prisons, with the underlying subtext that the victim's status as a prisoner mitigates the seriousness of the Act.⁶⁴ Analysis of the 'internet movie database' with the phrase 'female on male rape', produced a list of 75 titles with the exact subcategory title. Of the top 50 'female on male rape' titles, 24 were categorised as a comedy.⁶⁵ The subcategory under the search of 'female on male rape' with the most titles is 'non-statutory female on male rape', with 119 titles. Of the top 50 in this category, 18 were classified as a comedy.⁶⁶

Societal beliefs about gender specific sexual roles create stereotypes which impact upon how victims are treated. One such stereotype is that men are always sexually available and have an uncontrollable sexual desire.⁶⁷ This leads to the further erroneous assumption, that men who are raped by women secretly enjoy it; this breaks down into receiving sexual pleasure and displaying physical reaction to a stimulus usually associated with pleasure. O'Brien, Keith and Shoemaker's research identified that 47% of men questioned believe that males who are sexually assaulted by women receive sexual gratification from the encounter.⁶⁸ This is coupled with the belief that male sexual offence victims who either maintain an erection or ejaculate during a sexual offence taking place must

⁶¹ P. Tory. 'The Beauty, Sex in Chains and Me.' (2010) 21 *British Journalism Review* 61.

⁶² J. Turchik, K. Edwards. 'Myths About Male Rape: A Literature Review.' (2012) 13 *Psychology of Men & Masculinity* 211.

⁶³ K Custers, J. Van den Bulck. 'The Cultivation of Fear of Sexual Violence in Women: Processes and Moderators of the Relationship Between Television and Fear.' (2013) 40 *Communication Research*. 2013 p. 96.

⁶⁴ S. Thrasher. 'Americans think prison rape is funny because of who gets hurt.' *The Guardian*. 2015 April 27.

⁶⁵ IMDb. Most Popular 'Female On Male Rape' Titles. [Online].; 2019 [cited 2019 March 28. Available from: https://www.imdb.com/search/keyword?keywords=female-on-male-rape&sort=metascore.asc&mode=detail&page=1&ref_=kw_ref_key

⁶⁶ IMDb. Most Popular 'Non-Statutory Female on Male Rape' Titles. [Online].; 2019 [cited 2019 March 28. Available from: https://www.imdb.com/search/keyword?keywords=non-statutory-female-on-male-rape&ref_=fn_kw_kw_12.

⁶⁷ S. Jackson. 'The Social Context of Rape: Sexual Scripts and Motivation' in P. Searles, R. Berger, (eds.) *Rape and Society: Readings on The Problem of Sexual Assault*. (Routledge :New York, 1970) 16.

⁶⁸ C. O'Brien, J. Keith, L. Shoemaker, 'Don't Tell: Military Culture and Male Rape.' (2015) 12 *Psychological Services* 357.

be consenting.⁶⁹ It has been suggested that assailants of male victims use ejaculation to fulfil their own belief in the victim consenting.⁷⁰ Masters established that there was no correlation between consent and maintaining an erection.⁷¹ Erections can be brought about by stimuli such as punishment, anger, and being scared, and can become erect if they are frightened by stimulus scenario. This is achieved in both young males (pre and early adolescent) and adult males.⁷² Despite this, Bullock and Beckson identified cases in which the male victims of sexual assault were disbelieved due to sustaining an erection during their attack.⁷³

The sex of the victim plays a large part in how rape victims are viewed by others. Kessing and others' 2005 study of adult males examined the viewpoints held in relation to scenarios surrounding male rape – 70% of participants agreed that they would 'have a hard time believing a man who told me that he was raped by a woman,' 59% of participants agreed that 'most men who are raped by a woman are somewhat to blame for not escaping or fighting off the woman,' and 56% of participants agreed that 'most men who are raped by a woman are somewhat to blame for not being more careful.'⁷⁴ A 2010 study of British students showed that male students were more likely to see a female assailant more positively than a male perpetrator regardless of victim gender, and male students were more likely to view male victims (both homosexual and heterosexual) of female assailants as being to blame, with more blame being attributed to heterosexual victims.⁷⁵

These negative perceptions also exist in those professions which may be tasked with treating the victims of rape. Davies and others showed that police workers were more negative towards male victims than female victims of rape.⁷⁶ Anderson and Quinn's study of UK medical students showed

⁶⁹ C. Bullock, M. Beckson. 'Male victims of sexual assault: Phenomenology, psychology, physiology.' (2011) 39 *Journal of the American Academy of Psychiatry and the Law Online* 197.

⁷⁰ A. Groth, A. Burgess. 'Male rape: offenders and victims.' (1980) 137 *The American Journal of Psychiatry* 806.

⁷¹ See Masters above at n.32.

⁷² R. Levin, W van Berlo. 'Sexual arousal and orgasm in subjects who experience forced or non-consensual sexual stimulation - a review.' (2004) 11 *Journal of Clinical Forensic Medicine* 82.

⁷³ See Bullock and Beckson above at n.64.

⁷⁴ L. Kassing, D. Beesley, L Frey L., 'Gender Role Conflict, Homophobia, Age, and Education as Predictors of Male Rape Myth Acceptance.' (2005) 27 *Journal of Mental Health Counseling* 311.

⁷⁵ M. Davies, P. Pollard, J. Archer. 'Effects of Perpetrator Gender and Victim Sexuality on Blame Toward Male Victims of Sexual Assault.' (2010) 146 *The Journal of Social Psychology* 275.

⁷⁶ M. Davies, R. Smith, P. Rogers. 'Police Perceptions of Rape as Function of Victim Gender and Sexuality.' (2009) 82 *The Police Journal: Theory, Practice and Principles* 4.

that not only do male medical students view rape victims more negatively than female students do, but also that medical students of both sexes viewed male rape victims more negatively than female rape victims.⁷⁷ This means that male victims of rape are discouraged not only from discussing their experiences with their peers, but also are less likely to be taken seriously by the authorities who are in the professions created to safeguard them.

These external factors feed into the internal blame felt by rape victims, and the two categories overlap significantly. Sexual assault victims who have ejaculated during a sexual attack are more likely to view the experience as a confusing one, often professing disgust at themselves,⁷⁸ perpetuated by the myth that erection, frequently accompanied by ejaculation and/or orgasm, signifies sexual consent. Rape myths play a significant role in explaining why the reporting rate is so low.⁷⁹ Victimization as a whole is seen to be a feminine and feminizing experience, however being raped is seen as a more feminine experience when compared to other crimes, including serious crimes such as robbery.⁸⁰ For male rape victims, the emasculation which takes place during a sexual assault is a large part of the experience. It has been seen that male rape victims go on to carry out risk-taking behaviours and deliberately do not report being a victim of sexual assault as a way of re-establishing their 'broken masculinity', to re-establish themselves as self-reliant and competent.⁸¹ This, when accompanied by the heteronormative idea that men are supposed to be the pursuers of sex rather than the pursued,⁸² would contribute to the internalised emasculation of the victim, and a consequent lack of willingness to report the assault. This is further perpetuated by the fact that men accept more rape myths than women, in addition to attributing more blame to victims than women.⁸³

⁷⁷ I. Anderson, A. Quinn, 'Gender differences in medical students' attitudes toward male and female rape victims.' (2009) 14 *Psychology, Health & Medicine* 105.

⁷⁸ G. Mezey, M. King. 'The effects of sexual assault on men: a survey of 22 victims.' (1989) 19 *Psychological Medicine* 205.

⁷⁹ G. Waterhouse, A. Reynolds, V. Egan. 'Myths and legends: The reality of rape offences reported to a UK police force.' (2016) 8 *The European Journal of Psychology Applied to Legal Context* 1.

⁸⁰ J. Howard. 'The "Normal" Victim: The Effects of Gender Stereotypes on Reactions to Victims.' (1984) 47 *American Sociological Association* 270.

⁸¹ A. Javaid. 'Feminism, masculinity and male rape: bringing male rape "out of the closet".' (2016) 25 *Journal of Gender Studies* 283.

⁸² J. Weiss. 'Male Sexual Victimization: Examining Men's Experiences of Rape and Sexual Assault.' (2010) 12 *Men and Masculinities* 275.

⁸³ A. Grubb, E. Turner. 'Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming.' (2012) 17 *Aggression and Violent Behaviour* 443.

In addition to the beliefs which are held about the causes of rape, there are mistaken beliefs held about the circumstances in which male rape can take place. The stereotype that male rape only occurs in prisons suggests male rape is solely stranger rape,⁸⁴ and again that male rape is only committed by other males. A vast proportion of media coverage of male rape perpetuates the myth that stranger rape is the most common type of male rape, wherein the assailant is depicted as a nonhuman serial rapist, however the reality is most male rapes are either acquaintance or date rape.

By being only exposed to the stereotypical portrayals of male rape, there is a possibility that victims will internalise and doubt the validity of their feelings around the experiences. This, when combined with any internalised subscription to the 'just world theorem', may have a profound effect on any male victims. It is therefore crucial that any victim of sexual assault can be assured that if they do report their experiences that the criminal justice system will treat them justly. This requires clear commitment from these agencies to treating cases seriously through policy and action.

Part 4 – Adequacy of response from prosecuting agencies

In this section whether the prosecuting agencies do enough to recognise the phenomenon of men who are raped by women. In order for cases to be progressed through the criminal justice system, they need to be commenced by the police and C.P.S.. Victims are likely to engage with these agencies if they can be confident that consistent and fair decisions are being made in accordance with clearly defined criteria. However once again there is a lack of evidence that this is happening. To be clear, the evidence that it is not happening is limited but, in an area of such sensitivity, the absence of analysis and reflection on this point is itself troubling and prevents proper accountability of these organisations as well as failing to provide victims with the certainty they need..

There are examples of case handling which give the impression that cases are treated less seriously because of the sex of the attacker. An example can be found in the case of Laurie Softley, a

⁸⁴ See Javaid at n.81 above.

secondary school teacher.⁸⁵ Softley admitted engaging in sexual activity (including penetrative sex) with two 17 year old boys. There was clear evidence of grooming and the use of alcohol. One victim required counselling as a result. The second offence took place despite Softley having been formally warned in relation to the first incident. At least two offences of sexual activity with a child in a position of trust were made out contrary to s 16 and 17 SOA. Notwithstanding the presence of a number of aggravating features recognised in the sentencing guidelines, justifying a sentence in the region of two years imprisonment⁸⁶ the offence was not prosecuted.⁸⁷ There was therefore both clear evidence via admissions and a compelling public interest in prosecution. The rationale for a decision not to proceed with this decision has not been made public leading to the conclusion that it was due to the sex of attacker and victim.

C.P.S. policy attempts to reflect gender neutrality however in doing so, it again neglects to address the issue of female defendants. The C.P.S. does overtly recognise the issues of male victimisation and the challenges to prosecution however this is framed in the context of offences perpetrated by males.⁸⁸ The introduction to the 2020 Rape and Serious Sexual Offences Strategy states;

“Rape is a crime that is committed primarily by men against women. However, it is also perpetrated against men and boys, so in this report we refer to the complainant and the suspect as ‘them’ or ‘they’, because penetrative offences are gender neutral.⁸⁹”

Whilst the recognition of males as victims is welcome, the absence of any discussion surrounding female defendants is problematic in challenging the beliefs which exist in relation to female defendants. An example of where an opportunity to discuss this has been missed is in the

⁸⁵ <https://www.bbc.co.uk/news/uk-england-derbyshire-46810417> [Last accessed 07 September 2020].

⁸⁶ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/abuse-of-position-of-trust-sexual-activity-with-a-child/> [Last accessed 07 September 2020]

⁸⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759419/OFFICIAL_SENSITIVE_SoS_decision_Laurie_Softley_16913_web_decision.pdf https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759419/OFFICIAL_SENSITIVE_SoS_decision_Laurie_Softley_16913_web_decision.pdf [Last accessed 07 September 2020]

⁸⁸ <https://www.cps.gov.uk/sites/default/files/documents/publications/public-statement-male-victims-crimes-covered-by-CPS-VAWG-strategy.pdf> [Last accessed 08 September 2020]

⁸⁹ <https://www.cps.gov.uk/publication/rape-and-serious-sexual-offences-rasso-2025> [Last accessed 08 September 2020]

C.P.S. guidance addressing rape myths.⁹⁰ The identification of societal myths around sexual behaviour and offending has played an important part in reframing how sexual offences are treated by those involved in the administration of justice. Whilst the question of myths surrounding male rape victims is addressed at myth 8 (“Only Gay men get Raped/Only Gay Men Rape Men”), the latter proposition is addressed by pointing out that heterosexual men commit rape. The discussion appears to be framed only in the context of anal and oral penile rape with no consideration of any other ways in which serious sexual assault can be committed. At no point, for example, is the myth that only males who consent to sexual activity can maintain an erection addressed. The absence of any mention of this means that there is nothing to ensure that this widely held assumption does not inform decision making and the prejudices which are prevalent within society are overcome,

Accountability and improvement of criminal investigations is assured by oversight by two inspectorates, Her Majesty’s Crown Prosecution Service Inspectorate⁹¹ and Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services. Assessment of the decision-making and handling of cases within the criminal justice system is undertaken via a joint inspection by these two organisations with the work Rape and Serious Sexual Offences (‘RASSO’) units being the subject of review, most recently in 2019⁹² and 2016.⁹³ The 2019 report uses the same formulation of words in defining rape as the RASSO strategy above.⁹⁴ Whilst recognising the diversity of victims, there seems to be no explicit acknowledgment of the possibility of female defendants as a discrete typology and therefore no specific analysis. The 2019 review was conducted by ‘dip-sampling’ 450 cases of which the report records 5 suspects were female and one non-binary.⁹⁵ Despite having identified these factors, the review did not differentiate between these cases in their overall findings. The review concluded that there was high attrition rate in sexual offending and further work was needed to determine why that was the case. The report noted that in 2% of cases where wholly incorrect advice

⁹⁰ <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths>

⁹¹ s1 Crown Prosecution Service Inspectorate Act 2000

⁹² <https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf> [Last accessed 09 September 2020]

⁹³ <https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/thematic-review-of-the-cps-rape-and-serious-sexual-offences-units/> [Last accessed 09 September 2020]

⁹⁴ Op cit n 89.

⁹⁵ Op.Cit. n.92 at Para 3.16.

had been given at the charging stage (an improvement of the 10% from 2016)⁹⁶ and 5.2% where an inspector would have reached a different conclusion on the evidence. The 2016 review considered 90 cases, 8% of which involved male victims and none of which included female defendants.⁹⁷

These figures are the inevitable consequence of a random sampling methodology in an environment where the preponderance of offending is undoubtedly committed by men against women. Without differentiation of how cases are dealt with taking into account individual factors of defendant and victims, problems of unconscious bias cannot be identified and addressed.

Conclusion and recommendations

There is a case to say that whilst it might have been the intention of SOA to capture all forms of sexual offending, the recognition that is given to offences committed by female offenders against male victims is slight, and as a result the real possibility arises that an act which amounts to forced sexual intercourse with a male may not be treated in a manner which is commensurate with the harm caused. These are not merely superficial definitional issues; the purpose of the criminal law is in part to signify that those acts which are deemed unacceptable by the state and if the law which criminalises an act is opaque then victims may well feel that they are not recognised.

It is difficult to escape the conclusion that the issue of offences committed by female assailants has been institutionally neglected. Throughout the process of consultation on both the Act and the sentencing guidelines it is dismissed as 'rare' and the experiences of victims dismissed as 'anecdotal.' There seems to have been very little reflection on whether that represents the real victimology or rather whether it is a product of the institutional lack of recognition. The fact that an offence may be rare does not excuse it not being properly addressed, indeed the lack of clarity in the law and the perception that the law will trivialise an offence is likely to be causative of under reporting. Arguably it is the less frequently reported offences which need to be most clearly

⁹⁶ Op. Cit n.92 at Para 1.27

⁹⁷ Op.Cit n.92 at Para 4.3

represented in legal terms in order to ensure that when they are reported there is clear guidance for investigators, prosecutors and judges who may be unfamiliar with them.

These difficulties have arisen through an attempt to achieve gender neutrality through the language of the legislation rather than through the outcomes it seeks to achieve. The legislation accepts however that pure neutrality is not always possible or desirable, hence the retention of the specifically gender focused offence of ‘rape.’ Once it is accepted that specific outcomes justify specific offences then the need for homogeneity in the language of the remainder of the legislation disappears. Neutrality should then be assessed with reference to what the legislation seeks to achieve.

We would therefore suggest that SOA would achieve its aim of gender neutrality more effectively if it were to be amended to more clearly by more explicitly capturing offending by female offenders. We would suggest the following amendments;

- (i) *the creation of an alternative form of rape which is expressed in terms of A causing B to penetrate the vagina, anus or mouth of A or another with B’s penis (with the remainder of the section replicating the wording of s 1 on consent).*

The creation of this offence would provide a clear legal statement that behaviour of this kind is a criminal offence and that victims of this offending have suffered a serious violation of their sexual autonomy with the potential to cause serious long term physical and psychological harm. Categorising this offence within the offence of ‘rape’ does not dilute the meaning of the term nor create confusion in the mind of the public and neither is it without precedent: Examples of rape laws which recognise female attacks on male victims can be found in the USA in state laws in Washington⁹⁸ and Michigan.⁹⁹ The creation of a specific offence would require the creation of specific sentencing guidelines. There may well be arguments for a different sentencing ranges between this offence and rape committed by a male offender, if so these can be considered by the Sentencing Council in

⁹⁸ Washington Revised Code § 9A.44.040 (2006).

⁹⁹ Michigan Compiled Laws § 750.520a (2005).

consultation with appropriate experts and the public and therefore be transparent and in accordance with the statutory role of the Sentencing Council.

- (ii) *The creation of a new offence of penetrative assault which is committed when A forces B to penetrate the vagina or anus of another (being either A or a third party) with any part of their body (other than their penis) without B's consent and the reason for that offence is sexual in nature.*

Whilst there has been a focus on the violation caused to a victim when they have been penetrated, we would argue that being forced to penetrate another also poses a significant risk of psychological harm as well as the risk of contracting infection. We would suggest that by keeping this offence distinct, it would again provide a focus for targeted sentencing guidance which addresses the potential harm caused to victims of both genders who have been forced to place part of their body inside another.

We would suggest retaining s4 in its existing form. The aggravated form of the offence would have clearer relevance in dealing cases where the victim was forced to penetrate themselves. The non-aggravated form of the offence would retain a role to make sure that victims who were forced to engage in any behaviour against their will were protected.

Legislative reform can only go so far. For true impact, the bodies who are charged with enforcing that legislation need to do so with an understanding of the societal landscape in which they are operating. Without proper labelling, institutions neglect the problem as they are unable to challenge and improve upon existing practice.

The complexity of human sexuality means that punishing transgression has always proved challenging to legislators. It is important that in creating a criminal code to address sexual offending that as far as possible, gender neutrality is observed. It is however important that this is real gender neutrality, which achieves just outcomes for all victims regardless of their sex and the sex of their attacker. This aim cannot be achieved simply through neutral language; rather it needs to reflect upon the range of behaviours which might arise and cause serious harm and then ensure that these are

clearly recognised in the legislation and sentencing guidelines. The fact that there is only a small amount of evidence of an offending behaviour or victim class should not be a reason to minimise the place of that offence, but should instead should be a red flag that a victim's voice is going unheard.