

# **CAN THE POLICE (IM) PROVE EVIDENCE OF NON-CONSENT?**

A critical investigation into whether the quality of evidence of non-consent, gathered from female victims of acquaintance rape in an East Midlands Police force area in 2010/11, is sufficient for a successful prosecution.

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## **Abstract**

The aim of the research is to explore whether the quality of evidence of non-consent, gathered from female victims of acquaintance rape in an East Midlands Police force area in 2010/11, is sufficient for a successful prosecution. Whilst the numbers of reported rapes has steadily increased, the conviction rate does not reflect this. The offence of Rape has the highest attrition rate of all serious crime and the contention is this is often due to insufficient evidence. This may be due to poor investigative interviewing of victims by the Police, hence the requirement for this research.

This dissertation met the research aim through an extensive study of the relevant literature and the implementation of a multi-method approach, designed to collect empirical data from practitioners with expertise in the research area. The latter was carried out via semi-structured interviews and an evaluation of interviews conducted with rape victims. The findings were analysed in an attempt to assess the current quality of evidence of non-consent.

The research produced a number of key findings; that the current quality of evidence of non-consent is poor; that investigative interviewers fail to probe key evidential topics and that there is a lack of knowledge concerning sexual consent and normative communication regarding sexual refusals.

The main conclusions drawn from this research are that the Police have seemingly adopted a blanket approach to the investigative interviewing of rape victims resulting in the gathering of poor quality evidence of non-consent and this has led to a provision of disservice to rape victims. The research argues for the improvement in a specialist-training package for investigative interviewers.

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### **Confidentiality Clause**

*Due to the sensitive nature of the subject matter, it is not possible to attach transcripts of interviews with rape victims or associated material subject of this research. All documentation has been returned to the originating Police Force, access to this is with permission from the Head of Crime Support for this Police Force, and this may be arranged via the author.*

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## **Introduction**

### **Background and Research Focus**

Rape is a serious and deeply damaging crime. It is unique in the way it strikes at the bodily integrity and self-respect of the victim, in the demands it makes on those public authorities required to respond to it and in the controversy it generates (The Stern Review, 2010:7).

The numbers of reports of rape are on the increase and this crime has a devastating impact on the victim, their family and friends, and society as a whole (Stelfox, 2009). In order to explore such a serious crime and the subsequent investigation, this dissertation will utilise the definition of rape provided by section 1 of the Sexual Offences Act, 2003. Namely, that a person commits rape if he intentionally penetrates the vagina, anus or mouth of another person, with his penis, the victim does not consent to the penetration and the perpetrator does not reasonably believe that the victim consents (Herring, 2009).

The author acknowledges that all rapes are appalling but will focus on female victims throughout this dissertation. This is due to reports such as Hall and Innes (2010), whose findings show that police recorded rapes of females increased by 15% to 13,991 offences from 2009 – 2010. Even though there was an increase in reported male rapes of 22%, the total number of offences was 1,174. Therefore, the author argues that these figures support Walby and Allen's (2004) argument that women are more likely to be victims of rape, and justifies the focus on female victims. Flatley, Kershaw, Smith, Chaplin and Moon (2010) state that the only increase in any of the police recorded crime offence groups was that of sexual offences, which increased by 8 per cent, all the rest remained at the same level. Arguably, the most disturbing statistic is that it "*is estimated that up to 9 in 10 cases of rape go unreported and 38% of serious sexual assault victims tell no one about their experience*" (H.M.Government, 2011:3).

The Stern Review (2010) highlighted that whilst the overall conviction rate for rape is 55%, the attrition rate continues to increase. The attrition rate is an important concept to consider when exploring rape investigations, as this rate is the measure used to show the number of cases initially reported that do not proceed to a successful prosecution (Kelly, 2002). This could be because the complainant decides not to take the case any further; the reasons for these withdrawals are outside the scope of research within this dissertation. However, the author agrees with Daly and Bouhours (2009) who argue that it can be due to a lack of evidence to prosecute, or that the case, once taken to court, resulted in the acquittal of the suspect, possibly due to the quality of evidence.

The increased rate of occurrence and attrition rate demonstrates the necessity to undertake research into the quality of evidence obtained from a victim by the police. If this quality is poor, the Crown Prosecution Service (C.P.S.) will be reticent to prosecute cases (Brown and Horvath, 2009). As a result, confidence in the Criminal Justice System (C.J.S.) regarding rape may remain low; clearly, this is unacceptable especially as this offence affects the lives of so many people in our society today (Walklate, 2007).

As stated in the Sexual Offences Act, 2003, the victim of rape has not consented to penetration and historically, evidence of physical force has predominately supported the

Prosecution's argument of a lack of consent. Without this type of evidence, juries were loath to convict (Lees, 2002). However, many rapists do not resort to physical force, using threats, intoxicants or other methods to facilitate unlawful sexual intercourse (Kelly, Lovett and Regan, 2005). As Harris and Grace (1999:3) explain "*The nature of cases reaching court has changed over the last ten years or so – many more acquaintance and intimate cases means that the issue is increasingly one of consent,*" their findings also show that in over half of the cases "*the main defence relied upon was that of consent*" (Ibid, 1999:20).

Smith, Coleman, Eder and Hall (2011) state that in more than half of the cases studied, the victim and the alleged suspect was a partner or ex partner and this is supported by Temkin and Krahe (2008:31) who argue that the most common form of sexual assault involves some "*degree of previous acquaintanceship*" between the victim and perpetrator. The publication of the thematic report, 'Without Consent', (Her Majesty's Crown Prosecution Service Inspectorate (H.M.C.P.S.I., 2007) provided findings that also support the notion that the majority of rape offences reported to the Police, are ones where the victim knows the defendant prior to the incident. Advances in forensic D.N.A evidence have meant that it is possible to prove that the defendant had sexual intercourse with the victim. Conversely, this has increased the numbers of defendants raising the defence of consensual sexual intercourse as opposed to a complete denial that intercourse occurred (Tiersma, 2007)

Hence, evidence of non-consent is now not just necessary but pivotal to the majority of rape investigations. Therefore, the victim's account must provide information to substantiate that consent was not given (Finch and Munro, 2006). The lack of consent may be explicit and the victim's account will reflect this, however, Kitzinger and Frith (1999) argue that it is unusual to just say no in any context, therefore, the lack of consent may be implicit in nature (Ehrlich, 2001; Cowling and Reynolds, 2004).

Officers must gather evidence regarding the circumstances as a whole, rather than merely whether the victim said yes or no. This change in emphasis supports the need for research into whether the police are gathering evidence of sufficient quality during the victim interview process.

The quality of either explicit or implicit evidence is fundamental to a successful prosecution; due to this, over the last several decades, the investigative interview process has been overhauled. Interviewing is a complex skill and one that requires training and practice to ensure the competency of the interviewer (Shepherd, 2007). Since 1992, PEACE (a mnemonic for the stages of the interview; Planning and preparation, Engage and explain, Account, Closure and Evaluation) was adopted as the current police model of investigative interviewing in England and Wales. This model has helped to develop the professional skills that are necessary to conduct an effective interview with either a victim or a suspect (Walsh and Milne, 2008). There are two types of interviewing models utilised within PEACE, namely the cognitive interview (C.I) model for victims and witnesses, and conversation management for suspects (Fisher and Geiselman, 1992). This dissertation will focus on the C.I. model, as this is the model used to interview rape victims. The model assists memory recall and is based on academic research which "*relied heavily on the theoretical, laboratory research in cognitive psychology [...] conducted over the past thirty years*" (Ibid, 1992:4).

The C.I has been well researched in laboratory settings and findings show that it "*enhances the quantity of information recalled by witnesses without jeopardising its quality*" (Dando, Wilcock, Milne and Henry, 2009:699). However, to date there appears limited extant literature on the quality of evidence defined in any other than terms of quantity of

information elicited. The author argues that an increased quantity of information is generally useful to a police investigation but quantity does not necessarily improve quality in relation to increasing the numbers of successful prosecutions. The author argues that this lack of research justifies this study, exploring quality of evidence in an attempt to identify measures to improve the attrition rate leading to an increase in successful prosecutions.

Fisher, Geiselman, Raymond, Jurkevich and Warhaftig (1987) argued that the extra information gained by using the C.I model was of investigative value. In the first field test of the C.I., officers increased the amount of information gathered from victims by 47% (Fisher, Geiselman and Amador, 1989). It is an accepted fact that the C.I model of interviewing increases the quantity of information elicited (Dando, Wilcock and Milne, 2008) therefore the quality of the resulting information is improved. Due to this, all officers involved in interviewing rape victims are trained to use the C.I model. However, findings presented in the H.M.C.P.S.I. report (2007) discovered via an examination of rape files, examples of inconsistencies and ambiguities that were not fully addressed with the victim during the interview process. At later points within the investigation, this had led to the undermining of the victim's credibility (Ibid, 2007). Findings suggested that this was because officers did not want to discourage the victim from continuing with the investigation, resulting in a reluctance to probe issues and gather evidential points to prove. The report explains, "*this reluctance is not*

*without foundation, as research continues to highlight cases where the conduct of, and questioning during, the interview resulted in loss of victim confidence and early withdrawal*" (Ibid, 2007:65). Arguably, these findings imply that the use of the C.I had not improved the quality of evidence gathered from rape victims.

The 2007 report recognised that this failure to deal with evidential weaknesses was highly likely to reduce the chance of a successful prosecution. Subsequently a rape protocol was implemented to develop the skills of interviewers involved in rape investigations and improve the quality of the evidence gathered (National Police Improvement Agency (N.P.I.A.), 2009a).

This research will examine the current quality of the evidence of non-consent gathered during interviews with rape victims in 2010/11, and endeavour to meet the aim and objectives as set out below.

### **Aim of Research**

The aim of the research is to explore whether the quality of evidence of non-consent, gathered from female victims of acquaintance rape in an East Midlands Police force area in 2010/11, is sufficient for a successful prosecution.

The objectives for the research are:

- To explore practitioner's perceptions of the quality of evidence of non-consent to sexual intercourse in acquaintance rape allegations and interviewing practices within rape investigations
- To assess the current quality of the evidence of non-consent by conducting measurement rating/ranking tasks with practitioners, regarding acquaintance rape allegations
- To identify evidential weakness in non-consent evidence

- To formulate recommendations for ‘best practice’ in interviewing rape victims, regarding acquaintance rape allegations

This research will contribute to the development of best practice regarding the interviewing of rape victims in a variety of ways. Firstly, by providing a benchmark of the current position of the quality of evidence gathered; secondly, by critically assessing the quality of the evidence gathered, evidential weaknesses can be identified; thirdly, by obtaining the views of practitioners on the current quality of evidence gathered and existing practices, a deeper understanding of the current issues can be gained.

This research will then be able to enlighten future learning outcomes on police training courses in relation to interviewing rape victims.

A brief overview of the study will now be provided.

### **Chapter 1- ‘Issues and Review of Related Literature’**

This chapter explores extant literature pertinent to the objectives of this study. Concepts of rape, perceptions of rape myths and evidential issues in resulting rape investigations will be examined. Identification of gaps in the existing literature will justify the need for empirical data relating to the study of the quality of evidence of non-consent.

### **Chapter 2- Methodology**

This chapter provides the reader with a detailed overview of the methodological approach adopted throughout this research. A transparent and comprehensive outline of the research strategy, techniques used for data collection and framework for analysis of the qualitative data all support the rationale for the chosen approach. Furthermore, the limitations of the methodological approach relating to validity and reliability are discussed.

### **Chapter 3 – Interview Findings- Description**

This chapter outlines the empirical findings from interviews with practitioners and the results of the rating and ranking tasks designed to obtain practitioner analysis of evidence of non-consent.

### **Chapter 4 – Discussion - Analysis and Synthesis**

Both analysis and synthesis of the empirical data will take place during the discussion chapter, where findings will be compared and contrasted against the academic arguments identified within the literature review.

### **Chapter 5 – Conclusions and Recommendations**

This chapter returns to the overall aim and objectives of this study. A summary of the findings linked to the objectives will be provided, together with concluding thoughts and recommendations. Limitations of this study will be identified. Finally, a section clarifying the contribution of this research to knowledge is provided.

## **Reference List**

This chapter contains an alphabetical listing of all the sources referred to in this study. The Harvard system of reference is utilised.

## **Chapter One - Issues and Review of Related Literature**

### **1.1 Introduction to Literature Review**

This chapter reviews the wider literature on rape, including the conceptual understandings of rape, sexual consent, the incidence of rape and aspects of the resulting police investigation. This literature includes a large volume of published research and empirical data, all of which are relevant to this study.

However, such is the diversity of perspectives, theoretical paradigms and disciplinary domains in the wide-ranging literature that arguably the body of work has become non-cohesive and fragmented. Therefore, no one theory can provide a sufficiently comprehensive account of rape and rape investigations that satisfactorily characterises the multi-faceted reality and theoretical problems of this important research area.

A comprehensive review of all the potentially relevant literature in the area of rape, sexual consent and interviewing of victims is clearly beyond the range of this dissertation, and given the size and diversity of the field, arguably it would be impossible to provide this in any reasonably sized piece of work. However, whilst acknowledging it is inexorably selective, the included literature provides an extensive overview, offering the theoretical and empirical foundations for this research.

Section 1.2 will focus specifically on conceptualisations of rape, perceptions of rape myths and the resulting issues of attrition in rape investigations.

Section 1.3 provides the legal definition of rape and component parts including a theoretical perspectives most commonly used by previous researchers to frame and analyse sexual consent.

Section 1.4 discusses the processes involved in a rape investigation and evidential issues.

Section 1.5 summarises the emerging issues and need for empirical research into the quality of evidence surrounding non-consent in allegations of rape.

The above areas of literature, will inform the reader of the key issues regarding this serious and complex topic. In addition, the arguments presented provide clear and justified reasons for the necessity of empirical research into the quality of evidence of non-consent.

## 1.2 Conceptualisations of Rape, Rape Myths and Investigative Issues

“What is rape? Is rape the word to describe a violent attack by a stranger in a dark alleyway or is rape any act of sexual intercourse where there is no consent?” (The Stern Review, 2010:23).

Feminists have long argued that the crime of rape requires redefining to empower women who are its chief victims (MacKinnon, 1996; Reitan, 2001) and that due consideration be given to the context in which sexual consent is agreed. Over the last several decades, discussions regarding a concept of ‘date rape’ or acquaintance rape have emerged, defined as non-consensual sex without the use of violence or threats of force (Pineau, 1989). Sternly contested by some academics, Podhoretz, (1992, cited by Reitan, 2001:52) declares that date rape will expose “a whole range

*of sexual relations that have never before in all of [male] human experience been regarded as rape”*. Arguably, Podhoretz is correct and this extension of the concept of rape, has presented challenges to the Criminal Justice System, regarding securing successful prosecutions of such relations. Acquaintance rapes are problematic and consent is at the core of all investigations. Kelly et al., (2005:1) rightly describe it as “*not just a physical assault but also a violation of personal, intimate and psychological boundaries. Most commonly the offender is known which also involves a betrayal of trust.*”

To answer the question ‘what is rape?’ the legal reply would be that rape occurs when a man intentionally penetrates the vagina, anus or mouth of another person with his penis; that the person does not consent to the penetration; and the perpetrator does not reasonably believe that the other person consents (Card,2004).

Though rape has a legal definition, research shows that even some victims of sexual violence are confused in relation to whether they have been raped (Abbey and McAuslan, 2004; Koss, Gidycz and Wisniewski, 1987). They not only fail to report the crime to the police but may also fail to acknowledge that they have been a victim (Greene and Heilbrun, 2011).

Studies conclude that on average 86% of victims do not report rape to the police and cite reasons *inter alia*, that they do not view the assault as rape or believe others would not, fearing others will disbelieve or blame them and a distrust of the police and court process (Kelly and Regan, 2001).

This is due to a differing in perspectives by women of what constitutes rape and situations that fail to meet the stereotypical ‘rape’ become redefined as unwanted sex (Morgan, Johnson and Sigler, 2006). This may result in women not receiving the help and support they may need. A possible explanation for this difference in perceptions is that individuals have their own rape scripts and these “*are affected by cultural, social, and individual experiences*” (Clark and Carroll, 2007:619). Rape myths influence sexual scripts and still today, many ‘rape myths’ are commonly held, *inter alia*, accepting a drink or having a conversation with the rapist makes victims partly responsible. In fact, 24% of 18–24-year-olds believe this (Opinion Matters, 2010). In addition, 39% of 18–24-year-olds think a victim of rape should accept responsibility for the attack if they go back to the perpetrator’s house for a drink (The Stern Review, 2010). A common myth is that rape is an offence committed by strangers; yet, 54% of perpetrators of serious sexual violence including rape of women are their current or ex-partners (Smith et al., 2011). Findings from mock jury studies also suggest that jurists believe the “normal” reaction to a rape is to fight back (Lea, Lanvers and Shaw, 2003) and

the woman's behaviour prior to the assault such as "*previous intimacy, consenting to kissing was often relied upon to indicate reasonable belief in consent*" (The Stern Review, 2010:31).

Therefore, rape myths are potentially damaging to successful prosecutions but also to rape investigations per se, as a police officer cited in the Stern Review points out:

Society doesn't recognise rape as an offence when it happens between two people who know each other, and this stereotype/myth about rape within relationships also affects the way in which police on the front line respond to rape victims (Ibid, 2010:56).

Brown, Horvath, Kelly and Westmarland (2010) conclude that most rapes occur in the victim or perpetrators home, creating further issues for police investigations in that the crime scenes are in private settings resulting in a lack of independent witness evidence. Thus, evidence of non-consent is pivotal to the investigation and the quality of such evidence will influence how the case proceeds (Stelfox, 2009).

Arguably, rape myths embedded into society's rape scripts influence the quality of the evidence regarding non-consent that is gathered. As Lea (2007:510) asserts since acquaintance rapes usually involve one person's word against another's, "*the decision-making process in terms of whether a rape has taken place will be informed by the common assumptions [...] embedded in social thought*". Therefore, a police interviewer influenced by a rape script that dictates implicit non-consent has a low prosecution rate (Soulliere, 2005) thereby not worth pursuing. They may therefore fail to explore in depth anything other than evidence to support explicit lack of consent.

In a 2009 poll, 49% of people believed that if a woman did not clearly say 'no' to a man she should be held partly responsible for being sexually assaulted (Brown et al., 2010:41-42). On this basis, one could deduce that nearly half of the police interviewers involved in rape investigations may also agree with this myth, which may negatively influence the quality of evidence gathered. As discovered in The Stern Review (2010:44):

Of every 100 cases reported [...] 23 were not proceeded with because the evidence was felt to be not strong enough. This demonstrates [...] attrition due to poor quality evidence.

The high rate of attrition is not a new phenomenon; it has been of concern to academics and practitioners for the last couple of decades (Lea et al., 2003). Attrition, defined as the process where a case drops out of the criminal justice system, can occur during the police investigation stage, when the Crown Prosecution Service makes charging decisions or at court. In any crime, the victim may decide to withdraw their complaint increasing the attrition rate; however, some academics argue that the attrition rate in rape cases is higher than for any other crimes (Daly and Bouhours, 2009).

A possible criticism of attrition rate studies is a failure to explore the influence changes to crime recording practices has, and lack of acknowledgement of the fact that quantifying attrition may not be straightforward. As Horvath, Tong and Williams (2011) accept, official police data does not reflect the true incidence of rape. However, Feist, Ashe, Lawrence, McPhee and Wilson (2007) discovered that 40% of all discontinued offences were because of insufficient evidence. Therefore, it would seem that the quality of evidence gathered from rape victims by the police is a contributing factor. The paucity of extant literature into this

aspect is concerning as attrition may decrease at all other stages if the evidence was high quality. Therefore, this study will undoubtedly increase our understanding of the current quality of such evidence and evidential weaknesses resulting in recommendations for best practice.

### 1.3 Definition of Rape and Sexual Consent

In 2000, the Law Commission led a review on the legislation governing sexual offences. The Home Office (2000:3) document, 'Setting the Boundaries, Reforming the Law on Sex Offences' which reported on the recommendations of the review, acknowledges the challenging situation when commenting on the legislation as a "*patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is a coherence and structure.*"

However, the argument that it worked is questionable, as even though the pivotal

evidential issue in rape is that of consent, the legislation failed to address this by not providing a definition. As Temkin and Krahe (2008) argue, the law's failure to encompass a definition of consent renders it ineffective and inadequate. Card (2004:30) agrees stating, "*this was a major defect*" in the legislation.

Due to this review, the Sexual Offences Act, 2003 (S.O.A.) was implemented in May 2004. Munro (2009:941) concludes that the act:

Seeks to preserve the role of non-consent as the triggering condition for criminality in rape cases, while simultaneously providing a more developed understanding of what consent requires in this context.

Section 1 of the S.O.A. provides the legal definition. Of significance is the fact that within this act, there is a new definition of consent namely Section 74, which states a, "*person consents if he agrees by choice and has the freedom and capacity to make that choice*". The author asserts that at first glance, this may seem a simple definition however; it is arguably one of the most complex definitions within UK legislation.

Perhaps the definition of consent under section 74 finally focuses attention to the context in which agreement to penetration is given or refused (Munro, 2009). The evidence gathered from rape victims should reflect these circumstances, thereby improving the quality of such evidence. However, the extent to which section 74 is capable of producing this result remains uncertain and it appears that there is a gap in extant literature regarding the influence section 74 has on the quality of such evidence. This study will contribute towards the enhancement of the understanding of this, resulting in improvements to police investigations of rape.

It is important to consider the definition of the words 'choice' and 'freedom', which undoubtedly relate to the use of force, and 'capacity' as an indication of a person's state of mind in reference to whether they are capable of providing the necessary consent (Cherkassky, 2010). The data analysed in this study was provided by victims with the capacity to consent, therefore the arguments relating to capacity are not relevant and outside the analytical range of this research. The focus of this study will relate to 'choice' and 'freedom'.

The Concise Oxford Dictionary (C.O.D.) (1991:198) defines choice as “*the act or an instance of choosing [...] the power or opportunity to choose*”. This implies that consent is freely given thus a resulting rape investigation would focus on whether consent was free from “*direct coercion or force*” (Beres, 2007:98). Often, evidential value focuses on whether the woman resisted, or how she verbalised her non-consent (Pineau, 1989). However, this fails to acknowledge the social forces that influence the free communication of sexual consent. Blythe, Fortenberry, Temkit, Tu and Orr (2006:595) argue, “*Consent to sex has to be viewed in the context of the communication and perception of consent*”. It is this communication, which officers need to explore whilst gathering evidence during the interview process.

Cowan (2007:92) asks whether consent is a state of mind and attitudinal or must “*be performed, as act or word, through the body*”, before consent can be verified. Unfortunately defining consent, as an attitudinal concept is not sufficient, as the law demands an objective element as to words and actions so that there is some outward signification of the victim’s state of mind (Card, 2004) and evidence of an explicit lack of consent (Reynolds, 2004; Beres, 2007). The ideal evidence of this is ‘I do not consent to sexual intercourse’, which may be provided in a victim’s complaint statement, particularly regarding a stranger rape. Yet, as the research has shown, the vast majority of rapes are acquaintance rapes, where there is some sort of relationship between the victim and perpetrator (Koss, 1992; Fisher, Cullen, and Turner, 1999; Livingston, Buddie, Testa and VanZile-Tamsen, 2004; Flack, Daubman, Caron, Asadorian, D’Aureli, Gigliotti, Hall, Kiser, and Stine, 2007; Littleton and Breikopf, 2006). Therefore such an explicit non-consensual statement may not be forthcoming, by emphasising that consent is purely performative “*minimises the contextual importance of substantive conditions that drive consent*” (Cowan, 2007: 93). This is the dichotomy faced by the legislators when defining consent and some academics argue that legislation has not gone far enough to address this (Childs, 2001; Cowling, 2002; Cowart, 2004; Anderson, 2005).

Blythe et al. (2006:597) point out, “*women may not clearly say no in response to unwanted sexual activity but may try to communicate their unwillingness in nonverbal and non-assertive ways*”. The author argues that perhaps this lack of recognition of the complexity of implicit consent by officers affects the quality of evidence of non-consent. Debatably, there is a lack of research in this area regarding communication surrounding sexual refusals and even less regarding the quality of evidence.

Cowling and Reynolds (2004:4), contend that there are “*contextual issues to consider when interpreting and understanding sexual consent*”. Yet are these theories entertained in law? Does the definition of consent in section 74 provide for considerations regarding the contextual issues surrounding sexual consent and sexual refusals? The author concludes that the simple answer is ‘no’ and agrees with Calder (2004:59) who discovered that defining sexual consent is “*not simply a semantic issue*”.

Research into conversation analysis discovered that in our daily dialogues people rarely make refusals using a blunt ‘no’. Even in everyday situations refusals are “*complex, finely organised, and nuance*” (Ibid, 2004:60). Furthermore, as Kitlinger and Frith (1999:294) argue, *inter alia*, “*women do indeed find it difficult to ‘just say no’ to unwanted sex.*” Their findings suggest that women have an inherent understanding of culturally acceptable rules for refusals and use normative communicative methods to make refusals in most circumstances. These rules include being polite when making a refusal as explicit refusals violate accepted norms. In an effort to be polite, an explanation as to why you are refusing, or why you are unable to comply are often accompanied with refusals. In addition, people make palliative statements to soften the rejection accompanying a refusal (Jones, 2002).

The author acknowledges that Kitzinger and Frith's study (1999) has limitations viz. small sample size, which may affect the validity of the study. However, as the participants were all young female students their findings are valid to this research as Brown et al. (2010) discovered females 16-24 years are more likely to become victims of rape than older women are. However, Kitzinger and Frith (1999:297) do conclude that an "*inability to say, open, clear and direct 'no' is not specific to age*".

Studies show that most sexual encounters involve few explicit verbal statements (Greer and Buss, 1994; O'Sullivan and Byers, 1992; Sawyer, Desmond and Lucke, 1993). If research is suggesting that it is difficult to say no in any context (Kitzinger and Frith, 1999), then officers should be aware of this and reflect that by in-depth probing of the rape victim's communication relating to all refusals including sexual refusals and any explicit/ implicit non-consent. This would strengthen the evidence of non-consent proving it was rape and not just a case that the perpetrator had misunderstood the communication. This research will analyse evidence containing explicit and implicit non-consent in order to enhance our understanding of this pivotal evidential issue.

Tannen (1990) argues that there is a fundamental gender difference between conversational styles, creating inevitable miscommunication and rape is a result of that miscommunication surrounding sexual refusals. Whilst the concept of this theory is interesting a limitation is the fundamental assumption, that miscommunication and gender is inextricably linked. Consideration should be given to the validity of difference in perspectives that occur between people of the same sex and between cultures. Nevertheless, it is a theory that was worthy of further research due to the impact on sexual consent if the theory of miscommunication is a valid phenomenon. In light of this, O'Byrne, Rapley and Hansen (2006:150) examined Tannen's 1990 theory of miscommunication in an attempt to establish whether men understood normative refusals. Their findings demonstrated that men did in fact; understand the subtleness of sexual refusals, even those that contained only non-verbal methods, as well as those that were explicit. They concluded that:

Date rape does not routinely result from innocent misunderstandings by men of women's supposedly ambiguous refusals, but rather from the witting intention by men to engage in coercive sexual penetration

Limitations to this study include the fact that the only participants were young male students, who may not be representative of the general male population. Nonetheless, their findings do have implications for officers, as it would seem that miscommunication theory perpetuates a rape myth, which may provide an exculpatory defence if the police fail to gather from rape victims, comprehensive evidence of the context and circumstances of the non-consent.

O'Sullivan and Byers (1992) discovered that men initiate sexual activity more frequently than women do; furthermore, research examining sexual scripts used on first dates, indicate that these traditional stereotypes relating to gendered roles continue to persist (Byers, 1996). Research by Humphreys (2004) found that males expected to have sex after a fewer number of dates than females and that men were more willing to express their sexual needs and desire to full sexual intercourse. These findings may be linked with those from O'Byrne et al. (2006) and arguably, a female on a first date or in a new relationship with a man, may be subject to sexual pressure. If this is unwanted pressure, she will respond using normal conversation patterns for refusals, which as studies have shown, can be indirect and non-

verbal (Jones, 2002). Refusals of this kind in any other context are understood as exactly that, a refusal.

Yet within the context of a sexual refusal, it seems that these normative refusal methods are inadequate, unreliable and worryingly “*their male partners’ claims not to understand*” (Kitzinger and Frith, 1999:310). Should the male continue to ignore the refusal and penetration occurs and the female reports this to the police as the rape that it is, how effective is the investigation if the quality of such evidence gathered is poor? Given the dearth of extant literature regarding the quality of evidence relating to sexual refusals, this research will augment our understandings.

Beres (2007:93) argues that “*sexual consent is an understudied and under theorized concept*” which reflects a lack of scholarly attention to this topic. The scarcity of research in relation to evidence of non-consent, and the fact that this lack of consent is the defining criterion of sexual violence, is justification for the proposed research within this dissertation. The empirical data generated during the research will help to answer questions regarding the current state of the quality of evidence of non-consent and help to enhance our understandings of sexual refusals.

Part of the Government’s plan in implementing the S.O.A (2003) was to strengthen the new definition of consent by providing a list of circumstances, which if established, would arguably provide an easier route to proving a lack of consent (Rook, 2011). In section 74, the definition includes whether the person has the freedom to choose. The evidential presumptions in section 75 (2) (see appendix A) outline circumstances where it may be presumed that the victim did not have that freedom (Elvin, 2008). Therefore, evidence relating to any of these circumstances gathered from the victim, forensics or witnesses would shift the evidential burden to the defence to adduce sufficient evidence to discharge this burden. This is a major change from previous legislation and criticism has been levelled that this breaches the presumption of innocence enshrined in Article 6 (2) of the Human Rights Act 1998 (Munday, 2007). Whilst acknowledging the importance of this debate it is outside the analytical range of this study.

Concerns regarding the lack of frequency that presumptions are utilised at trial have been expressed (Finch and Munro, 2004). Carline and Gunby (2010) offer a possible explanation for this, as they discovered that Barristers had little experience with section 75 and avoided using the presumptions, as they believed that they complicated the trial. Barristers also stated that Judges were reticent with section 75 for “*fear of trespassing into the jury’s domain*” (Ibid, 2010:1).

Research has shown that there are issues relating to consent and capacity, in cases where the victim was drunk (Finch and Munro, 2004; Temkin and Krahe, 2008) and section 75 (S.O.A, 2003) was designed to clarify consent in circumstances where the victim is unconscious or stupefied; however, section 75 has failed to alleviate uncertainty (Herring, 2009).

Alcohol and consent is undoubtedly an issue that should cause concern but because the data gathered for this research was from victims deemed to have had capacity to consent, the study will not include any further discussion regarding the impact alcohol has on capacity and freedom to consent.

Legal theorists seem to agree that section 75 lists circumstances in which a victim will be involuntarily at a disadvantage (Ibid, 2009). Debatably, some fall into contexts where a woman would feel pressure to consent and therefore not have the freedom to choose, such as involvement within a volatile relationship. She may believe that failure to consent would result in violence towards her, yet the threat made communicated by nothing more than a mere 'look' from the perpetrator. Such non-verbal communication may appear meaningless to others but conveys a strong message to the victim. The evidence gathered during the interview process would need to reflect all the circumstances, historical and present, as to why she feared violence before proposing a presumption under section 75. Paucity of extant literature regarding this area justifies the intended research into the current quality of evidence of non-consent and evidential presumptions.

#### **1.4 Procedures within Rape Investigations**

Victim accounts are pivotal to an investigation (Milne and Bull, 2006) and provide the central leads for further enquiries to progress the investigatory process (Kebbell and Milne, 1998; Walkate, 2007). When presented at a court of law, research suggests victim testimony can have a considerable impact on jurors (Loftus, 1975; Nunez, McCoy, Clark, and Shaw, 1999). The significance of information from victims and witnesses from the onset of the investigation to the desired outcome of a successful prosecution cannot be underestimated and in light of this, research has focused on methods to ensure the police gather a full and accurate account as possible (Coulthard and Johnson, 2007). The focal point of this study is evidence gathered from victims of rape by officers who have utilised the Cognitive Interview model (C.I.) due to this, the literature review will focus on the C.I. model.

Kebbell, Milne and Wagstaff (1999) confirm that the majority of studies relating to police interview techniques in the UK have focused on suspect interviewing. Dando and Milne (2008:62) argue, "*there has been a dearth of research [regarding] investigating witness interviewing.*" This is despite the fact that the importance of victim/ witness evidence is unquestionable (Walkate, 2007, N.P.I.A., 2009). The research that is available has focused on the effectiveness of the training police receive in C.I. and level of skills developed. Dando et al. (2008:66) discovered that 63% of the police officers questioned in the study believed that the investigative interviewing training they had received "*had been far too suspect biased*". A further 33% felt that there was insufficient time spent on learning how to interview witnesses and that after the basic training it, "*is unlikely that any officer would be equipped to effectively interview any victim/witness.*" The officers questioned in this study had a mean length of service of 22.2 months and all employed on front line duties. Arguably, this profile is not one for officers that interview victims of rape. However, officers with this length of service may be the first officers to respond to a rape victim and have to elicit information from them; as such, these findings are relevant.

A limitation of this study is that participants represented only five force areas out of a possible forty-three, and as identified by (Neyroud, 2010) there is a lack of data monitoring standardisation of training throughout forces. Therefore, the findings may not be representative of all basic investigative interviewing courses. Gibson (2009) also argues there will be a range of differing responses to learning and performance within these diverse individuals that may affect validity. Whilst these findings are of a concern, worryingly they are not the only results supporting the notion that police investigative interviewing training is inadequate (Milne and Griffiths, 2005). As a result, officers are failing victims due to a lack of ability to interview. Fisher and Geiselman (2010:321) discovered that:

Officers receive little or no training to conduct interviews with cooperative witnesses, and as a result they conduct interviews poorly, eliciting less information than is available and providing little support to assist victims overcome psychological problems that may have arisen from the crime

The C.I model assists memory recall and is based on academic research, consisting of approximately 100 laboratory tests (Ibid, 2010). Findings consistently show that officers using the C.I. model elicited more information from victims (Davis, McMahon and Greenwood, 2005). In addition, there was an 85% accuracy rate on data provided (Fisher and Geiselman, 2010). Limitations of these studies *inter alia*, participants are usually students who watch a non threatening event or a video of a simulated crime. In either scenario, a participant will not feel victimised nor feel any associated trauma, which may influence memory recall. Therefore, studies not conducted in the field may lack validity.

In an effort to obtain ecological validity two further field studies, one in the United States (Fisher et al., 1989) and the other in London (George, 1991 cited in Milne and Bull 1999) were conducted. Findings supported the fact that there was an increase in quantity of data elicited from victims by officers utilising the C.I. Without doubt these field studies made a significant contribution to the understanding of such an applied area of research however, a limitation of the studies is that only the increase in quantity of information elicited was explored and not the impact that C.I. had on recall of incorrect detail or confabulated details. Whilst any additional details are undoubtedly an increase in quantity, incorrect data will not improve the quality of evidence. It would appear that only two studies have attempted to measure the quality of evidence in other than terms of quantity, one being a study by Fisher, Geiselman and Raymond (1987), who found that the C.I. increased the recall of facts with greater investigative value. Unfortunately, the definition of investigative value lacked clarity therefore limiting the contribution of the research. The other study by Newlands, George, Towell, Kemp and Clifford (1999) who conducted field research, to investigate the quality of evidence elicited from victims and witnesses.

This study acknowledged the difficulties in defining the quality of information elicited from victims by officers using the C.I. This resulted in a definition of quality devised through consultation with police officers, namely the 'practical use to an investigation'. This enhanced the meaningfulness of the analysis of quality and the concept of reliability by defining quality using practitioners, a notion supported by Ginet and Verkampt (2007:461) who argue that the "*most reliable test of the importance of the extra details generated by the C.I. would be an assessment made by police officers themselves in a real investigation*". This dissertation utilises methodology in support of these arguments. The dearth of extant literature regarding the quality of evidence measured by using a meaningful definition to police practitioners, demonstrates the necessity for this research. Utilising police officers to define quality increases the ecological validity of the study and expands the knowledge of this topic.

In 2002, a joint review (Home Office, 2002) stated that an examination of rape files found examples of inconsistencies and ambiguities not fully addressed with the victim during the interview process. At later points within the investigation, this led to the undermining of the victim's credibility. Findings suggested that this was because officers did not want to discourage the victim from continuing with the investigation; consequently, they demonstrated a reluctance to probe issues and gather evidential points to prove. One of the

suggestions made by the review team was to improve the training of specialist rape interviewers and develop their skills and confidence, in order to alleviate this issue.

Due to this, and the overwhelming academic research demonstrating the benefits of the C.I. model, a framework of guidelines was produced in an attempt to improve performance and standardise investigative interviewing of victims. This document, titled 'Achieving Best Evidence in Criminal Proceedings; Guidance on interviewing victims and witnesses and using special measures', (A.B.E.) which has since been updated in 2011 (Ministry of Justice, 2011)

Of interest to this study are findings from Fisher and Geiselman (2010:325) who

state, "*We now believe that victims' greater recall with the C.I. may contribute to their better psychological functioning*". Clearly this is extremely beneficial for rape victims as the greater the recall, the increased psychological benefit and a higher quality of evidence gathered. They also argue that this will make witnesses feel more committed to the investigation and less likely to withdraw their complaint, thereby reducing the attrition rates. The C.I. model has been extensively researched and commented on (Davis et al., 2005; Dando and Milne, 2009). Therefore, there will be no further discussion regarding the C.I. in the literature review.

The A.B.E. describes categories of victims/witness and offers the most effective process to adopt in order to ensure that the victim/witness can provide best evidence (Ministry of Justice, 2011). Section 17 of the Youth Justice and Criminal Evidence Act, 1999 (Y.J.C.E.A. 1999), defines the relevant category for the victims that are focal to this study. Section 17 (4) states that complainants in sexual offence cases will fall into the category of 'Intimidated' witnesses (Ministry of Justice, 2011:5) and are those where the "*quality of evidence is likely to be diminished by reason of fear or distress*". Due to this, rape victims may be eligible for a range of Special Measures, introduced in Y.J.C.E.A. 1999, used to facilitate the gathering of best evidence during the interview and court process. The special measure outlined at section 27 regarding video-recorded interviews is pertinent to this research, as all of the victims studied utilised it (Ibid, 2011). A video-recorded interview allows capture of all the information given by the victim, thereby increasing the amount and quality of information gathered during the process. The process also ensures the integrity of the interview process (Ibid, 2011). They are seen as the most appropriate method for officers to gain full accounts from victims (Milne and Bull, 2006; The Stern Review,

2010). However, there have been criticisms from Judges regarding video-recorded interviews particularly the "*need to use the recording method so widely*" (The Stern Review, 2010:90).

A rape victim may be defined as a 'significant' witness; as such, they can give live evidence-in-chief at court (Ministry of Justice, 2011:88). The initial interview would be video-recorded and a written statement produced as soon as possible after the interview, which is submitted as evidence. This method has support from Judges (The Stern Review, 2010:90) they believed "*that cases might be prosecuted more successfully if some complainants could give their evidence live with the protection of screens*".

Whichever way the victim is defined, an officer must undertake specialist training before interviewing them, as outlined in the *National Investigative Interviewing Strategy* (N.P.I.A.,2009b). The strategy, links into the Professionalising the Investigation Process (P.I.P.) strategy (Ibid, 2009).

P.I.P. introduced an investigative strategy phased in over three years, designed to equip police interviewers with the interviewing skills relevant for the different types of crime and developed the concept of the specialist interviewer (Dando and Milne, 2009). Level 2 of P.I.P. outlined the specialist investigative interviewing knowledge relating to the use of the C.I. including an understanding of the psychological principles of memory (Gartrell, 2010). However Griffiths (2008:176) discovered that regardless of the fact that officers had received [...] advanced suspect interviewers, there was a “*lack of overall competence*” when using the C.I.

In response to the criticisms that officers involved in investigating rapes lacked interview skills and appropriate training (Home Office, 2002), police services began

to introduce specially trained Sexual Offences Liaison Officers (S.O.L.O). These officers, who are subject of this research, have the main responsibilities of supporting the victim and eliciting the best possible evidence during the interview process (Ewing, 2009). A national training programme devised for S.O.L.O.’s (N.P.I.A., 2010) states that all officers selected to perform this role should receive specialist training. Whilst there is not a national recruitment policy, selection criterion advises that applicants are competent at Level 1 P.I.P. priority and volume crime, that they have volunteered and are “*non-probationers with reasonable experience of sexual violence investigations*” (Ibid, 2010:133).

However, due to a lack of definition of reasonable experience the guidance suffers from lack of clarity. In order to interview victims of rape, selected officers will have to first successfully complete the ‘S.O.L.O.’ course and be competent to conduct interviews of victims and witnesses in relation to serious and complex crime at P.I.P. Level 2 (Ibid, 2010). The S.O.L.O. is an integral part of the investigation ensuring a high standard of victim care throughout the entire investigation (The Stern Review, 2010). However, the H.M.C.P.S.I. report in 2007 discovered that in fact S.O.L.O.s were “*used in [only] one-third of rape cases*” Feist et al. (2007:26). This report, suggested that the initial officer to deal with a victim of rape was often a uniform patrol officer and that there was no evidence in the data to identify that they had received specialist S.O.L.O. training. Conversely, the study also discovered that the use of S.O.L.O.s could make a difference to the rate of victims withdrawing from the investigation (H.M.C.P.S.I., 2007).

The Stern Review (2010) found evidence that the introduction of S.O.L.O.s had positively influenced rape victim’s experiences of the investigation process. Nonetheless, the review did express concern regarding the lack of exploration of inconsistencies in the victim’s evidence and when the defence used these at trial, the victims were unprepared for the resulting cross-examination. This concern echoes a study in 2008 of barrister’s perceptions, who stated that “*police officers [...] were failing to probe [victim’s] accounts [...] thereby doing them a disservice since probing might reveal the need for further evidence gathering*” (Temkin and Krahe, 2008:129).

These findings support the necessity for this research, which will attempt to ascertain the quality of the evidence gathered by S.O.L.O.s.

### **1.5 Emerging Issues and the Need for Empirical Research**

The literature regarding rape and police investigations demonstrates how complex and problematic this topic is. The literature review revealed that legislators have made changes to the definition of rape that reflects the desire to educate society regarding responsible sexual

relationships (Temkin, Ashworth, Finch and Munro, 2004). In addition, the definition of consent has been strengthened in an attempt to assist the criminal justice agencies to successfully prosecute perpetrators. However, the definition lacks lucidity (Elvin, 2008; Carline and Gunby, 2010) and the myriad of conflicting theories surrounding the meaning of sexual consent add to the unique evidential issues of this crime (Temkin and Krahe, 2008).

Differing conceptualisations regarding rape, support the notion that individuals have their own rape script influenced by rape myths (Lea, 2007), which will affect all players within the investigation process. Increases in attrition rate can also occur due

to evidence lost during the interview process. This may be due to the interviewer's belief that normative refusals do not influence communication regarding non-consent to sexual intercourse, resulting in a failure to probe the account (Kelly and Regan, 2001).

Evidential presumptions introduced in the S.O.A. (2003) to alleviate issues surrounding non-consent face criticisms due to their lack of clarity (Scottish Law Commission, 2006). There is a dearth of extant literature regarding the effectiveness of the presumptions, which supports the necessity of this research.

Efforts to improve the quality of evidence gathered from rape victims *inter alia*. include the introduction of specially trained police officers (S.O.L.O.). Evidence suggests that they may positively affect the attrition rate by reducing the number of victims that withdraw from the investigation (The Stern Review, 2010). However, there is a paucity of empirical data regarding S.O.L.O.'s influence on the quality of evidence gathered which is a leading attributer to the high attrition rate.

Findings suggest that there have been improvements made to the training provided to officers regarding investigative interviewing. Yet research shows that the training programmes are not effective (Dando et al., 2008).

To ascertain a deeper understanding of the quality of evidence gathered from a rape victim, empirical research will be undertaken. Specifically, this research will assess the current state of the quality of evidence of non-consent, critically analyse the perceptions of practitioners regarding rape investigations and formulate recommendations for best practice. The next chapter will detail the research methods adopted to collect this empirical data.

## **Chapter 2 - Methodology**

This chapter provides a detailed strategy outlining research methods, data collection techniques and sample selection adopted to gather empirical data for this study.

This research study has several inter-related objectives concerning the topic of evidence of non-consent in rape offences. These are:

1. To explore practitioner's perceptions of the quality of evidence of non-consent to sexual intercourse in acquaintance rape allegations and interviewing practices within rape investigations

2. To assess the current quality of the evidence of non-consent by conducting measurement rating/ranking tasks with practitioners, regarding acquaintance rape allegations
3. To identify evidential weakness in non-consent evidence
4. To formulate recommendations for 'best practice' in interviewing rape victims, regarding acquaintance rape allegations

A central facet of this research relates to objective 1: the opportunity to conduct field research into the quality of evidence from a practitioner's perspective and to scrutinize the application of rape investigative procedures are important moves towards gaining ecological validity, which as Newland et al. (1999:146), argue will lead to making "*our greatest steps forward*".

Chapter 1 ('Issues and Review of Related Literature') identified a gap in extant research in that there was an abundance of literature surrounding the issues within the topic of rape and interviewing of rape victims however, a dearth of literature

regarding the quality of evidence of non-consent elicited from rape victims during the interview process. Objectives 1, 2 and 3 will facilitate a meaningful discussion and academic debate ultimately developing our understanding of this subject resulting in recommendations for best practice (objective 4) based on research findings.

This study required a mix of objective (Positivism) and subjective (Relativism) research in order to measure the 'quality of evidence' (Kumar, 1999). The objective test consisted of evaluating full transcripts of video tape recordings of interviews with rape victims and assessing them using a 'rating' scale and 'ranking measurement'. This supported the concept of reliability because other researchers can repeat it. The subjective test involved eight semi-structured interviews with professionals from the Criminal Justice System, with expertise in this field, who commented on their understanding of the concept of quality and evidence of consent. This chapter outlines the research methods employed during the study.

## **2.1 The Definition and Measurement of Quality**

Newlands et al. (1999) argued that to measure quantity of information is relatively simple, however, to either define or measure quality, is more problematic. The author recognised that the 'quality' of information elicited from victims/witnesses had already been adequately measured by using a variety of quantitative research methods (Geiselman, Fisher, Firstenberg, Hutton, Sullivan, Avetissian and Prosk, 1984; Fisher et al., 1987; Memon, Bull and Smith, 1995; Berresheim and Weber, 2003). Measuring quality as the number of critical pieces of information gathered in a police investigation is of value and increases the understandings of the effectiveness of investigative interviewing. However, in relation to evidence of consent, the author argues that quality defined, as the "*degree of excellence of a thing*" (Concise Oxford Dictionary (C.O.D., 1991:977), requires measurement that reflects this and agrees with Newlands et al. (1999) that a field study of quality maximises ecological validity. Consequently, the author will design a measurement of quality that "*would be meaningful to the police officers carrying out the task*" (Ibid, 1999:152) and add to the empirical work, in an attempt to increase the understandings of the quality of evidence gathered during investigations into sexual violence. As a result, the definition used for quality in this study is the 'practical value to the investigation for a successful prosecution' of the evidence of consent gathered.

In order to influence the internal validity of this qualitative research, a multimethod triangulation approach will be adopted, by utilising two different types of measurements of

the quality, namely a rating/ranking measurement process and a separate semi-structured interview to collect data from practitioners.

Gliner, 1994 describes triangulation as a premier method to influence internal validity in qualitative research. Miles and Huberman (1994) argue it is a process, which allows a researcher to gather data using independent measures in an attempt to corroborate findings. This study will focus on multimethod triangulation “*primarily in order to determine if there is a convergence and hence, increased validity in research findings*” (Kopinak, 1999: 171). Thereby, echoing Newlands et al. (1999) who adopted a similar approach. Task one, will consist of police officers rating evidence of non-consent within individual transcripts, by circling the relevant number on a 5-point scale. The number zero represents a ‘no evidence/worst practical value’ rating and the number four a ‘very specific evidence /best practical value’ rating.

Task two will consist of police officers using a ‘ranking measurement’ by arranging the six edited transcripts in rank order, according to their practical use to the investigation for a successful prosecution by “*assigning the best with a rank one, the second best with a rank two and so on*” (Ibid,1999:153) with the worst transcript ranked at six. The instructions and scales are a modified version of that used by Newlands et al. (1999:153) and are described below.

## **2.2 Procedure**

Following the methods used by Newlands et al. (1999), police officers will receive six edited transcripts, each only containing evidence of non-consent. Instructions relating to both tasks will be on a separate task sheet. Officers will be instructed to complete task one first. They will then grade the transcripts in rank order, circling the corresponding rank number on the ranking scale provided. The final part of the task is to provide brief clarification of reasons for ranking the worst and best transcripts in such a way.

Officers will return the transcripts and completed task sheet to the author (see appendix B).

## **2.3 Coding of Information Used in Tasks One and Two**

The information used in this study originates from evidence gathered from victims of acquaintance rapes in 2010-11 by Police officers from an East Midlands Police force.

The victims were video-interviewed and, subsequently, a transcript of that interview was compiled by text processors trained to identify information relevant to the evidential points to prove the offence of rape, including evidence of non-consent. The Police provided the author with anonymised versions of these transcripts. Using a modified version of the coding system developed by Newlands et al., (1999)

The author identified three categories of data.

The C.O.D. (1991:244) defines ‘consent’ as a “*voluntary agreement, permission and compliance*”. The author argues that this definition of consent implies a hierarchical order for consent, which is supported in legal debates (Beres, 2007) subsequently the coding framework to be adopted will reflect this (Attride-Sterling, 2001). As the offence of rape requires evidence of non-consent, the first layer of coding identified any information relating to explicit non-consent. As Calder (2004:64) states, “*Language is a crucial dimension of*

*analysis of rape*” and as Reynolds (2004: 96) argues, this “*provides a basis for codifications that demand speech acts as proofs of consent.*” These academic arguments support the validity of categorising and dissecting data referring to explicit consent from the original transcripts.

In Malone [1998] 2 CR App R 447, it was made clear that there is no requirement for the victim to have communicated their non-consent. “*The actus reus is complete if there is sexual intercourse without consent and the demonstration or communication of the lack of consent is not part of the actus reus*” (Rumney and Morgan-Taylor, 2004:143). Kitzinger and Frith (1999) support this argument, pointing out that it should not be necessary for a woman to have to say ‘no’ in order for it to be understood that she has not consented to sex.

In acknowledgment that the word ‘no’ is not a necessary “*semantic component of refusals*” (Calder, 2004:69), the second layer of coding will identify information that relates to section 74 of the S.O.A. (2003) which states that a person must have the “*capacity to consent*” (Card, 2004:31). In addition, text will be dissected which relates to section 75, as an evidential presumption of the absence of consent is made without the requirement of evidence of explicit non-consent (Ibid, 2004).

This study pays particular attention to evidence of non-consent within acquaintance rapes, Kelly (1996:200) argues, “*women find it difficult to say no to sex*”, and especially once a sexual relationship is established. Saying ‘no’ becomes even harder if previous experience reinforces the negative consequences of sexual refusal (Ehrlich, 2001). Together with the fact that the C.O.D.(1991) definition of consent included ‘compliance’ which can be achieved by mere “*obedience to a command*” (Ibid 1991:233) and arguments from Hickman and Muehlenhard (1999:3) who state consent may be defined as “*non-verbal communication of a feeling of willingness*”, a third layer of coding is necessary. This will consist of any information that implied a lack of consent, even if “*not plainly expressed*”, merely “*hinted*” (C.O.D., 1991: 592). O’Byrne, Hansen and Rapley (2007:177) provided further validation for this layer, arguing that effective sexual refusals do not need to contain the word ‘no’ and are “*normatively accomplished by fine-tuned nuances*”.

Having dissected the text using the coding framework, this information will be utilised to create a separate, anonymised transcript identified with a unique reference number indicative of the original rape interview transcript. This study will only utilise this coded information.

The author acknowledges that the nature of coding information is subjective and this results in limitations to the validity of the study. However, by reporting the procedure in full including the explicit boundaries of the coding framework, it will enhance the objectivity of the methodological process. In addition, this transparency attempts to “*add value [to] the interpretations, as well as aid other researchers wishing to carry out similar projects*” (Attride-Stirling, 2001:386).

## 2.4 The Interview

A primary objective of this study is the exploration of a definition of quality, in relation to evidence of non-consent gathered during a rape investigation. Maxwell (2005) explains that the research question, the participants and methods to maximise ecological validity will direct the selection of the most appropriate research methods. For this study to be effective, a

collection of descriptive, textual information will be collected in order to discover concepts, understand meanings and examine thoughts. As Marshall and Rossman (2006:55) argue:

The most compelling argument [for qualitative research] emphasises the unique strengths of the genre for research that is exploratory [...] that accepts value of context and setting, and searches for a deeper understanding of the participants' lived experiences of the phenomenon under study.

Therefore, a qualitative approach will be adopted in this study, and in-depth, face-to-face, semi-structured interviews with experienced practitioners are an appropriate method to collect rich data (Denscombe, 2007).

However, there are limitations in the use of in-depth interviews as a research method in social science. Potter and Hepburn (2005) argue that interviewing, as a method; can influence data collection and the reliability of that data. The participant has to be willing and able to convey the authentic insight (Silverman, 2001) that the researcher hopes to elicit when adopting this method. In an attempt to combat this, the

interviewer, will focus on building rapport at the commencement of an interview, creating an atmosphere conducive to disclosure of personal information (Blaxter, Hughes, and Tight (2010).

A semi-structured interview is one where the researcher has a definite purpose and

a number of essential questions will be created, highlighting the key issues for exploration, based on the research question and extant empirical and theoretical knowledge. This follows the advice of Morse and Richards (2002). The wording of the questions is of paramount importance. The use of closed questions may be conducive to quantitative data but will not provide data for qualitative research and failure to understand this may lead to a loss of information. Data will also be lost if poorly constructed questions leads to ambiguities or confusion and a pilot interview will be conducted to alleviate the possibility of this (Jupp, 2002).

Interviews will be conducted at the participant's place of work; each interview will be tape-recorded and transcribed with the written consent of all participants and their employers. In part, practitioners will be interviewed to triangulate the validity of the data as well as providing a unique insight into the quality of evidence gathered from the practitioners' perspective.

## **2.5 Sampling Process**

Contacts with practitioners already exist through the author's work with police officers in a crime training and research context. In total ten practitioners will be selected to participate in the study, using a set criterion, namely being employed by an organisation/agency within the Criminal Justice System and/or having practical experience of specialist investigative interviewing and the investigation of rapes. No payment or inducement will be offered and the participants will be volunteers. Eight will be interviewed (due to working commitments two of the practitioners were unable to be interviewed within the time scale available for this study) and eight officers (four Detectives and four S.O.L.O.s) will be asked to complete the

rating/ranking measurements tasks. The author decided that participants must have a working knowledge of evidence of non-consent in order to be able to complete the tasks.

Arguably, a degree of bias will be shown during the selection of the participants nonetheless, this study will be essentially exploratory; therefore, generalizability is not the principle aim (Egan, 2002). Furthermore, Bryman (2008) argues that the use of methodological triangulation enhances confidence in the ensuing findings minimising the influence of sample bias.

A further limitation of the sample is the size; however, Patton (1990) argues that sampling in qualitative research usually relies on small numbers of participants aiming to study a topic in depth and in detail to obtain rich data. To achieve this, the sample is “*derived purposefully rather than randomly.*” Purposeful/theoretical sampling ensured selection of research participants that met criteria determined by the research aim (Tuckett, 2004:49).

## **2.6 Ethical Considerations**

The British Society of Criminology’s code of ethics (2006) will be followed whilst interviewing the participants. Prior to the interview potential participants received a letter of consent, making them aware of the purpose of the research, the institution the researcher represents and their supervisor, thereby allowing them to make an informed decision regarding their participation.

Discussions occurred prior to the interviews regarding issues of confidentiality and anonymity. The interviews were tape-recorded and the data transferred to a computer file. Transcripts were created of the practitioners’ interviews but names were removed in order to maintain confidentiality and stored electronically using a password protected file.

The transcripts of the rape victim’s statements will be kept inside a locked cabinet at a Police station, and not removed from Police premises during the research. All rape transcripts, electronic copies of the practitioners’ interviews and respective transcripts will be returned to the police administration department upon completion of the research. Only police personnel will be allowed to access the rape victims’ transcripts. The anonymised transcripts containing evidence of non-consent will be kept in a password protected computer file and data protection regulations adhered to. After using these transcripts during the rating/ranking tasks, and upon completion of the thematic data analysis, they will be returned to the Police administration department. Permission regarding access of these transcripts, transcripts of the practitioners’ interviews and other documentation has been authorised by a senior Police officer (please see ethics application form for further details) and further access for authorised persons will be allowed if requested. The completed task sheets will be kept in a locked cabinet throughout the study (See appendix B).

Protecting one’s self is equally as important as protecting the participants (Noaks and Wincup, 2004). The author feels personal security will not be under threat due to the sample group chosen, however due to the nature of the topic, the interviews will be conducted at the participant’s place of employment. The researcher will carry ID in the form of the University of Derby student card so that she can be identified.

## **2.7 Analytical Plan**

“*Grounded theory [research] perspective is the most widely used qualitative interpretive framework in the social sciences today*” (Denzin (1994:508). Cutcliffe and McKenna

(2004:130) argue that by using grounded theory it allows; “*the most illuminating qualitative findings [that] go far further than description: they interpret, they explain; they solve problems.*” This research attempts to explore and explain issues with the quality of evidence gathered during rape investigations, ultimately making recommendations to improve the quality of such evidence in an attempt to increase the rate of successful prosecutions, thus a grounded theory approach will be adopted for this study. However, it can be argued that a researcher is not an ‘*empty vessel*’, if they already have a limited knowledge of the topic and as such cannot approach an area of study with an entirely a-theoretical stance. Cutcliffe, (2005:424). Therefore, the author acknowledges that a modified grounded theory approach will be adopted.

Using a modified grounded theory approach allows the study to commence without the researcher having a preconceived theoretical idea and the analysis of the data can be conducted as soon as it has been collected (Glaser and Strauss, 1967). It also allows the researcher to be “*open to discovering new factors of relevance*” in relation to this topic (Denscombe, 2007:91).

At the discretion of the researcher, once the data collection no longer contributes to the elaboration of the topic, it thereby reaches the point of data saturation and grounded theory research is concluded (Glaser and Strauss, 1967).

Drawing on qualitative research tools, a thematic analysis of participants’ data gathered from in-depth interviews and document analysis will be employed. An inductive approach as described by (Braun and Clarke, 2006) will be adopted due to limited extant qualitative research into the quality of evidence of non-consent. Having coded the data using an inductive approach, themes will be identified at a semantic level “*and summarized, to interpretation*”, by [...] *an attempt to theorize the significance of the patterns and their broader meanings and implications*” (Braun and Clarke, 2006:84). Glaser & Strauss (1967) argue that a theory built from the grounded theory research approach will prove its value in practical applications; this study hopes to replicate this argument.

### **Chapter Three – Interview Findings: Description**

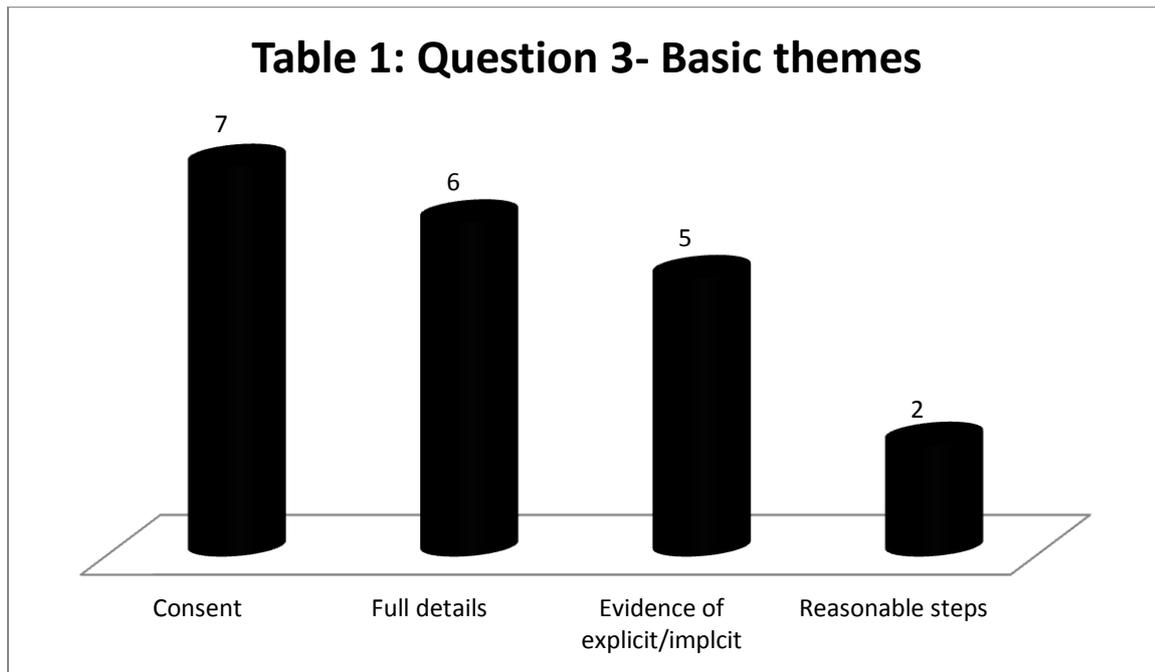
The semi-structured interview plan was designed to incorporate questions to elicit the perceptions from eight practitioners regarding the current quality of investigative interviews with rape victims, with particular focus on the quality of evidence of non-consent.

#### **3.1 Questions One and Two**

Relate to the practitioners’ roles and responsibilities and are therefore not relevant to this discussion.

#### **3.2 Question Three**

*What should be included in a rape victim’s statement regarding evidence of non-consent?*



As shown in Table 1: seven out of eight practitioners stressed the importance of covering consent in the statement and that this was the main evidential issue. One practitioner commented that *“it’s the consent that is the lynch pin of the offence”* (T6, Line 2). Munro (2009:941) agrees that consent is the *“triggering condition for criminality in rape cases.”* Yet whilst this was a widely held view one practitioner felt that *“Consent should always be covered in detail but often it’s just skirted over”* (T5, Line 118).

Six practitioners cited that full details of all surrounding circumstances relating to the incident should also be included as they felt that this would support why the victim had not freely consented. When asked to provide examples of the necessary details one practitioner said, *“It’s not just as simple as a straight case of yes or no [...] we need lots of details”* (T1, Line 15) and cited evidence of violence and alcohol use as examples.

Five practitioners acknowledged the difference between explicit and implicit consent, as one practitioner pointed out:

you obviously get people that say ‘no, I was trying to push him off; I said no several times not just at the beginning kept telling him no.’ or they say ‘I have tried to push him off but I froze; didn’t say anything, didn’t do anything, just laid there, but I didn’t consent.’ Well, did you do anything so he would know that? [...] sometimes they will say no so you need details of why it wasn’t consent (T3, Lines 11-16).

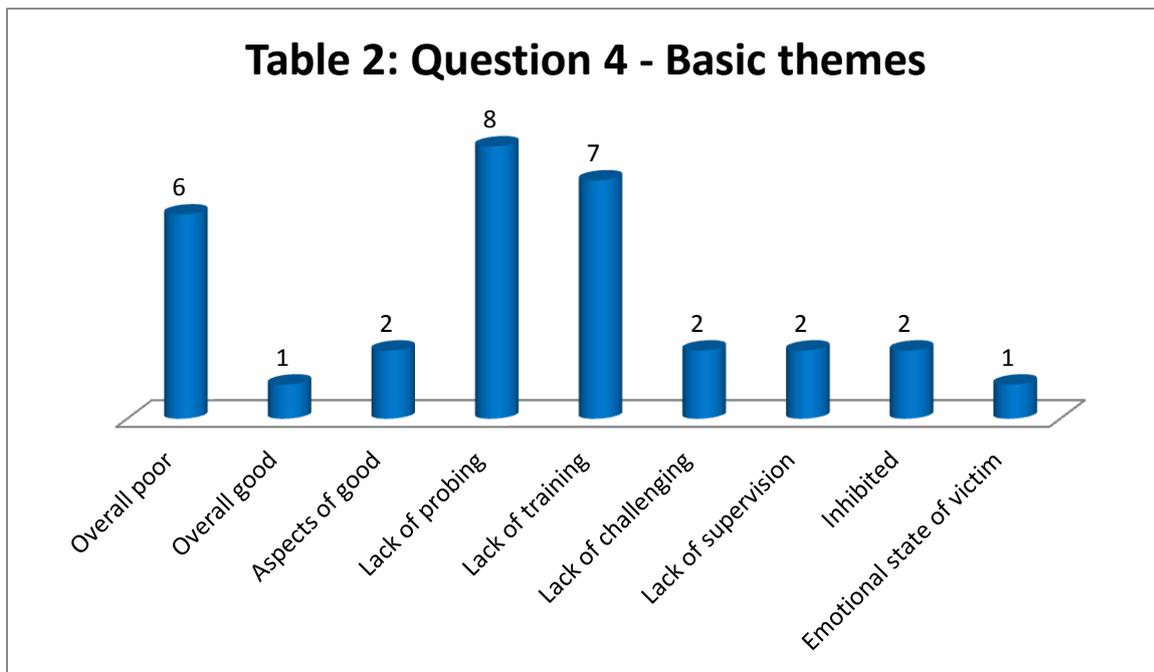
This empirical data supports the views of Kitzinger and Frith, 1999 who discovered non-consent can be indirect.

All the practitioners commented on the importance of gathering details of all the circumstances that would help to evidence implicit behaviour that demonstrated non-consent. This finding is consistent with Blythe et al. (2006:597) who argue women *“may try to communicate their unwillingness in nonverbal and non-assertive ways”*. However, only two

practitioners linked details regarding consent and the way this information may be used to negate an explanation of reasonable steps taken by a suspect in relation to consent. ‘Reasonable steps’ is mentioned in section one S.O.A. (2003) but is not defined. In practice, this relates to the measures taken by the defendant in order to ensure consent was given. This suggests a lack of the investigative mindset that two practitioners felt was a necessary skill to be an effective investigative interviewer (T1, T4).

### 3.3 Question Four

*In your opinion, what is the current quality of police interviews regarding the evidence of consent from rape victims?*



Six practitioners admitted that the overall quality was poor whilst two practitioners acknowledge that, in certain aspects such as care and support shown to the victim, the quality was good but even these two agree that in other aspects the quality is poor. Only one practitioner believes that the overall quality is good but this is “*from an International perspective*” (T8, Line 30) yet even he admits that there is a lack of probing in police interviews, which will affect quality.

Practitioners offered several explanations for the lack of quality. All eight believed that officers failed to probe the victim’s account in sufficient depth, leading to inconsistencies and evidential gaps. A belief that is held by Temkin and Krahe, (2008:128) who found that Judges criticised police failures relating to evidence stating gaps “*allows defence lawyers to cash in on general suspicions about the credibility of rape victims*”.

Seven thought that it was due to a lack of training for officers in relation to knowledge of the points to prove and a lack of knowledge regarding both the necessity and the skills to probe the victim’s account during the interview. This is consistent with the research conducted by Dando, Wilcock and Milne (2008) who discovered that officers felt training was insufficient

and Fisher and Geiselman (2010:321) who state “*officers receive little or no training to conduct interviews with cooperative witnesses.*” One practitioner summarised the present situation as “*I think there is a worry [...] in sexual offences that we can’t properly probe the witness and we are in one of the more difficult grey areas*” (T4, Line 24) and agreed that this was a training issue.

This lack of probing creates evidential issues but also means that officers are doing a disservice to the victim. One practitioner expanded on this point when he explained that “*the witness gets a shock when they are challenged by the defence counsel; they are not prepared for the court process*” (T5, Line 113). A view also outlined in The Stern Review, (2010) who agreed that victims are not prepared for the cross-examination process at court. Two practitioners also used the terminology ‘challenge’ whilst explaining a lack of quality, as one practitioner pointed out; “*You can challenge things without implying that you don’t believe somebody... some of it does stem from a training issue and some because they are on video and are frightened of being accused of not believing her*” (T3, Line 30). They then linked this back to a lack of training regarding how to probe the account within the investigative interviewing process. Five of the practitioners felt that if an officer explained that they had to ask the victim numerous questions they would understand the requirement for this and not assume officers disbelieved her account. As one practitioner summed it up, “*If the victim had it explained what the court wants to know, what the points to prove are, they would understand why questions need to be asked and this would improve the depth of probing the specifics*” (T7, Lines 42-44).

Two practitioners concluded that officers seemed inhibited whilst interviewing resulting in a failure to probe victims’ accounts about specific sexual activity. They attributed this to the lack of a robust selection process when recruiting S.O.L.O.s. One practitioner stated that if the victim were upset, this would affect the quality of the evidence gathered from her, as the S.O.L.O. would not be able to probe her account properly. However, another practitioner disagreed, stating that the process of “*talking about specifics can help a person to start to get over traumatic incidents*”

(T8, line 33). Findings from research support the fact that the interview “*may contribute to their better psychological functioning*” (Fisher and Geiselman, 2010:325) and this is due to the victim “*having the opportunity to give voice to their beliefs and to tell their story.*”

Supporting practitioner’s perceptions regarding the quality of evidence, analysis of the rating and ranking tasks shows that practitioners believe the actual evidence gathered was also of a poor quality.

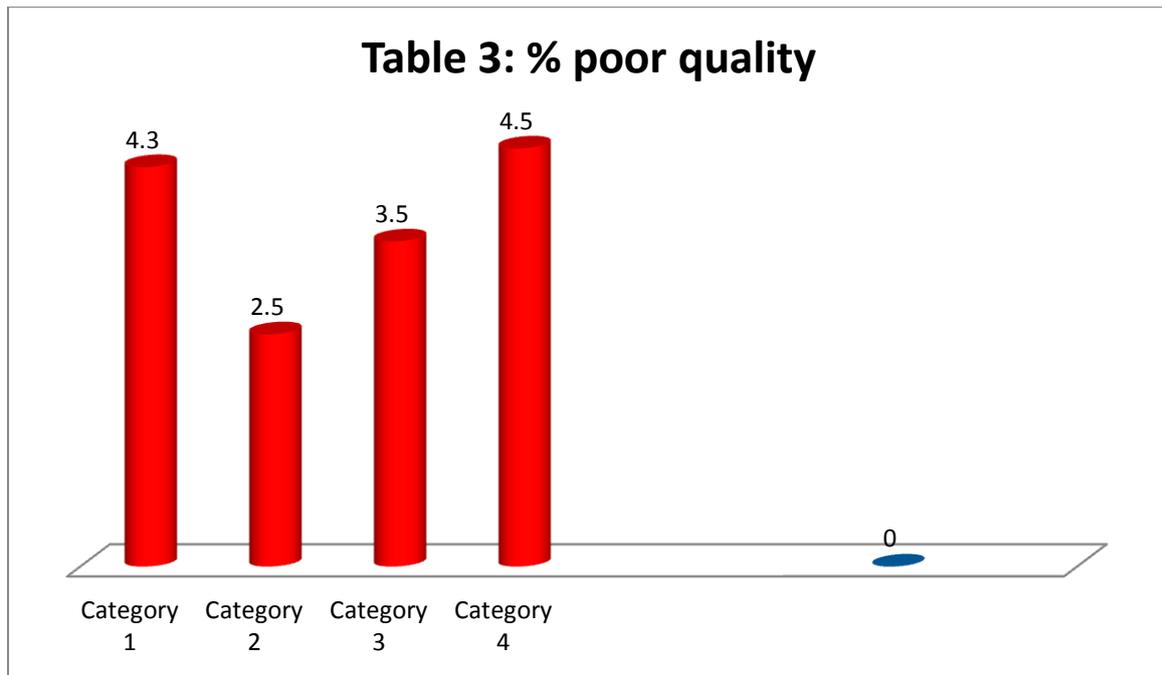


Table 3 represents findings from analysis of interview transcripts of rape victim's evidence of non-consent. (See Appendix B for rating scale task).

In order to complete the tasks, practitioners analysed evidence of non-consent taken from transcripts of rape victims. All participants were police officers and four out of the eight held the rank of Detective (shown in red) and four out of the eight held positions of S.O.L.O.s (shown in blue).

Two of the Detectives believed that the six transcripts (100%) were of a poor quality (defined as no/limited practical use for a successful prosecution). One Detective thought that five of the transcripts (83.3%) were of poor quality, but rated one as containing detailed/specific evidence of non-consent that had a good practical use for a successful prosecution. One Detective thought that four transcripts (66.6%) were poor quality but that two had 'very specific/convincing' evidence of non-consent because they contained numerous references to explicit verbal non-consent.

Two of the S.O.L.O.s stated that three were poor quality (50%) due to a lack of verbal explicit consent. They rated two out of the six transcripts as having 'very specific/convincing' evidence, which would have a very good practical use of a successful prosecution and said that the specific evidence contained explicit non-consent.

Two S.O.L.O.s thought that four (66.6%) were of poor quality, once again due to a lack of verbal explicit consent and two out of the six transcripts contained 'detailed/specific' evidence.

In summary, 8 officers assessed all 6 transcripts resulting in a total of 48 assessments, of which, 75% of those 48 assessments rated the transcripts as poor quality. Therefore, only 25% had a rating of good/very good quality. Out of the 24 assessments completed by Detectives, 87.5% of the 24 were deemed to be of poor quality and 12.5% of good/very good quality.

Out of the 24 assessments conducted by S.O.L.O.s, 62.5% of the 24 were deemed as poor quality (as defined above) and 37.5% as good/very good quality. This discrepancy may suggest that the Detectives recognised the flaws within the transcripts due to advanced training. This leads to a greater understanding of the evidential value of information resulting in an enhanced investigative mindset.

Overall, these findings support the practitioner's perceptions that the current state of the evidence of non-consent is of a poor quality and of limited to no practical use for a successful prosecution, which supports the findings in the Stern Review, (2010) regarding insufficient evidence as a contributory factor to the lack of successful prosecutions.

The predominant explanation for this was a 'lack of probing', which is debatably the epitome of critical arguments relating to the quality of evidence gathered from victims (Temkin and Krahe, 2008; The Stern Review, 2010: Westera, Kebbell and Milne, 2011).

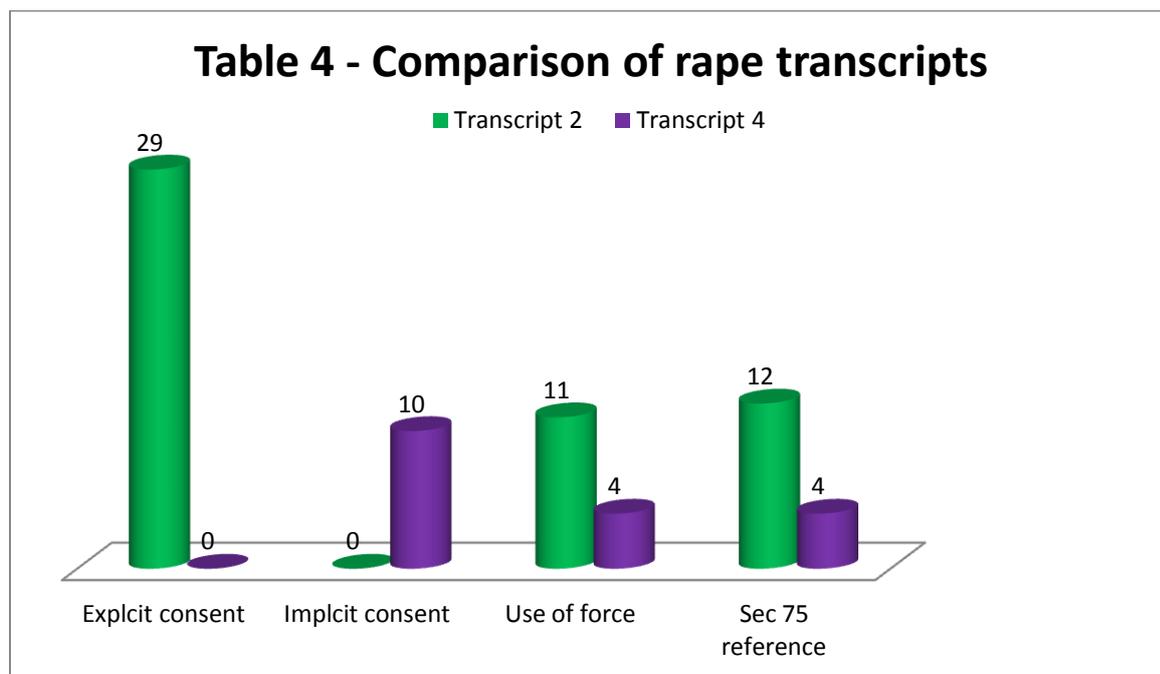


Table 4 is a visual representation of the ranking task and a comparison between

rape transcripts numbered 2 (green columns) and 4 (purple columns). Five out of eight practitioners ranked transcript 2 as being the 'best' practical use in an investigation for a successful prosecution and transcript 4 as the worst, hence the reason for this comparison.

One Detective and two S.O.L.O.s rated transcript 2 as containing 'very specific/convincing' evidence. Analysis of this evidence reveals that the victim referred to 29 occasions where she gave explicit non-consent, in other words when she said "no" to the perpetrator. On 11 occasions, she stated that force was used against her and on 12 occasions reference was made to a section 75 presumption. There were no references to implicit non-consent.

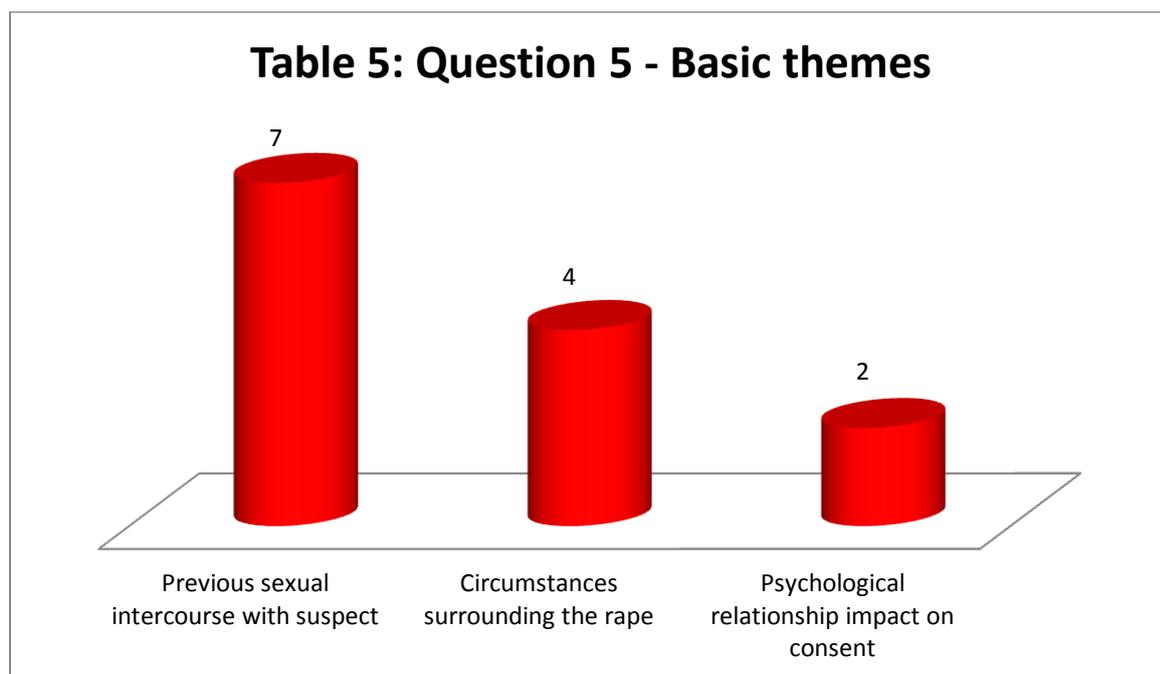
Out of the five practitioners that ranked transcript 4 as the poorest, one was a Detective and four were SOLOs. In transcript 4 no reference was made of explicit non-consent, reference to implicit non-consent was made on 10 occasions. Force was mentioned on 4 occasions and therefore those constituted sec 75 presumptions. All five officers stated that the reason this

transcript was the poorest was due to it not containing any evidence of explicit non-consent. Arguably, this supports the notion that explicit non-consent is the predominant legal evidence of non-consent (Reynolds, 2004; Beres, 2007) and one that these practitioners agree with.

All four S.O.L.O.s rated transcript 4 as containing ‘no evidence’ and two Detectives rated it as containing ‘vague evidence’, with the remaining two Detectives rating it as ‘less detailed’. However, this transcript did contain 10 references to implicit non-consent. Perhaps this also supports the notion that implicit consent is rated as low in evidential value and that the participants agree with legal theories that the law demands evidence of a performative action, such as words, to show explicit lack of consent (Reynolds, 2004; Beres, 2007). It is interesting to note that only the S.O.L.O officers rated this transcript as containing no evidence. This may be due to Detectives having received further training that helps them to focus on gathering all relevant evidence, which would support views expressed by Campbell and Camille (1997). Alternatively, through experience of interviewing suspects for rape Detectives have developed an investigative mindset that enables them to foresee the evidential benefit of implicit non-consent in a way that S.O.L.O.s cannot. One practitioner did argue that S.O.L.O.s do not have an investigative mindset and that this affected the quality of evidence they gathered from victims (T1 Line 193).

### 3.4 Question Five

*Research suggests that the most common type of rape is the ‘acquaintance’ rape, what are the implications of this in relation to the gathering of evidence of consent during the interview process?*



Seven out of the eight practitioners argued that it was important to provide details of how sexual consent was negotiated in previous sexual activity between the two parties. They acknowledged the evidential worth of this type of information in relation to differentiating between previous sexual intercourse with consent and the rape. All eight recognised that it was harder for the prosecution to prove a lack of consent in acquaintance rapes. This reflects

concerns previously expressed by (Card, 2004:31) “if *what is relied on is a prior agreement to the act being done at a later time, there will not be consent if the agreement had been withdrawn before the act was done.*” However, there must be evidence negating previous agreements.

Four practitioners agreed that full circumstances should be included and cited that a lack of any other evidence necessitates this as a practitioner pointed out in acquaintance rapes “*the forensic medical becomes less relevant*” (T1, Line 82) and the case will ultimately be one word against another. Two practitioners recognised that having a psychological relationship with the perpetrator would affect the issue of consent due to changes in the contextual situations that influence consent, arguments that are supported by findings of Cowling and Reynolds (2004); Cowan (2007) and Munro (2009).

One practitioner took this further, stating that they believed an acquaintance rape was the hardest type of rape to prosecute. She explained that in her opinion “*Guys need clear succinct instructions, women on the other hand use body language etc, so in her mind, if she shrugs etc almost sending out subliminally messages, she feels she has not consented but he doesn't know this*” (T 6, Lines 15-17). The notion that men require clear messages in order for them to understand a lack of consent supports the miscommunication theory (Tannen, 1990) however, it is contrary to

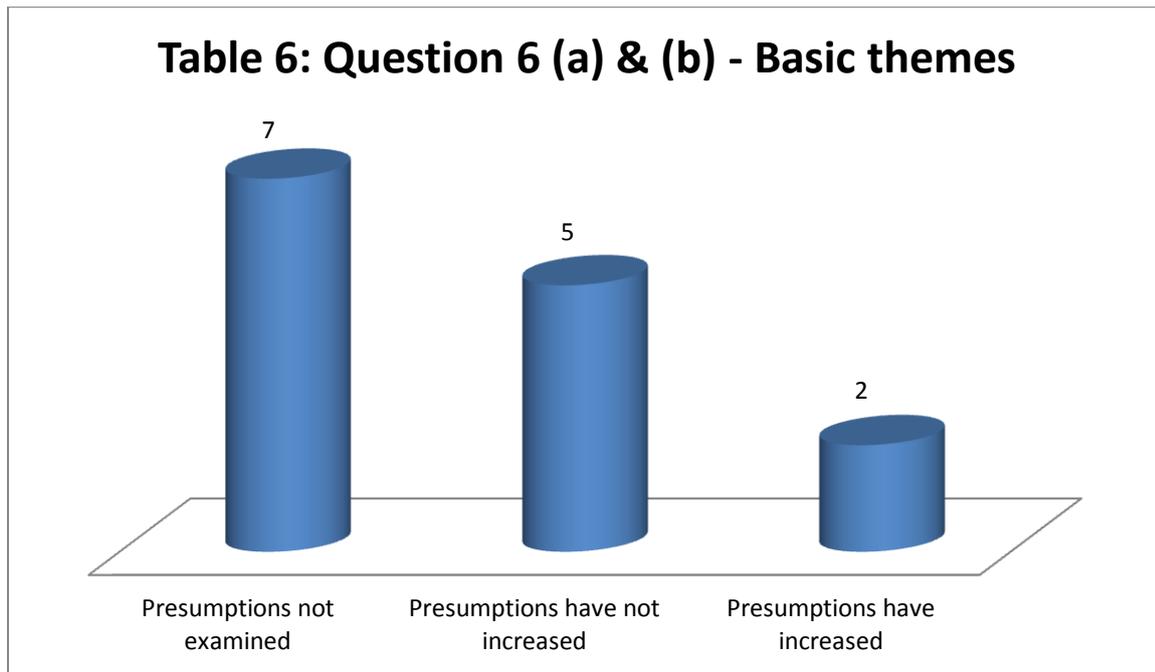
research by O’Byrne et al. (2006) that suggests men do understand the subtleness of sexual refusals, even those that contained only non-verbal communication. It is interesting to note that five out of the six transcripts contained evidence of explicit non-consent with utterances of “I kept saying no”. All the interview transcripts came from allegations of acquaintance rapes demonstrating that women do provide explicit non-consent when making sexual refusals, which is contrary to Greer and Buss (1994); O’Sullivan and Byers (1992); Sawyer, Desmond and Lucke (1993) and Blythe et al. (2006). Conversely, victims fabricate evidence so that the police will believe their account (Jordan, 2001 (cited by Kelly, 2001:21)) or because they are under the belief that the law dictates an allegation of rape must contain evidence of explicit non-consent, which supports findings of Reynolds (2004) and Beres (2007).

However, all of the rapes did occur in either the victim or perpetrator’s home which supports the findings of Brown et al. (2010) but this further confirms the importance of the non-consent evidence as generally there will not be any corroborating evidence.

### 3.5 Question Six

*The Sexual Offences Act 2003 defined consent and evidential presumptions, which set out circumstances that, if proved at the time of the rape, would establish the ‘presumed fact’ that the victim did not consent:*

- A) Are these presumptions examined in sufficient depth?
- B) Have they increased the likelihood of a successful prosecution?

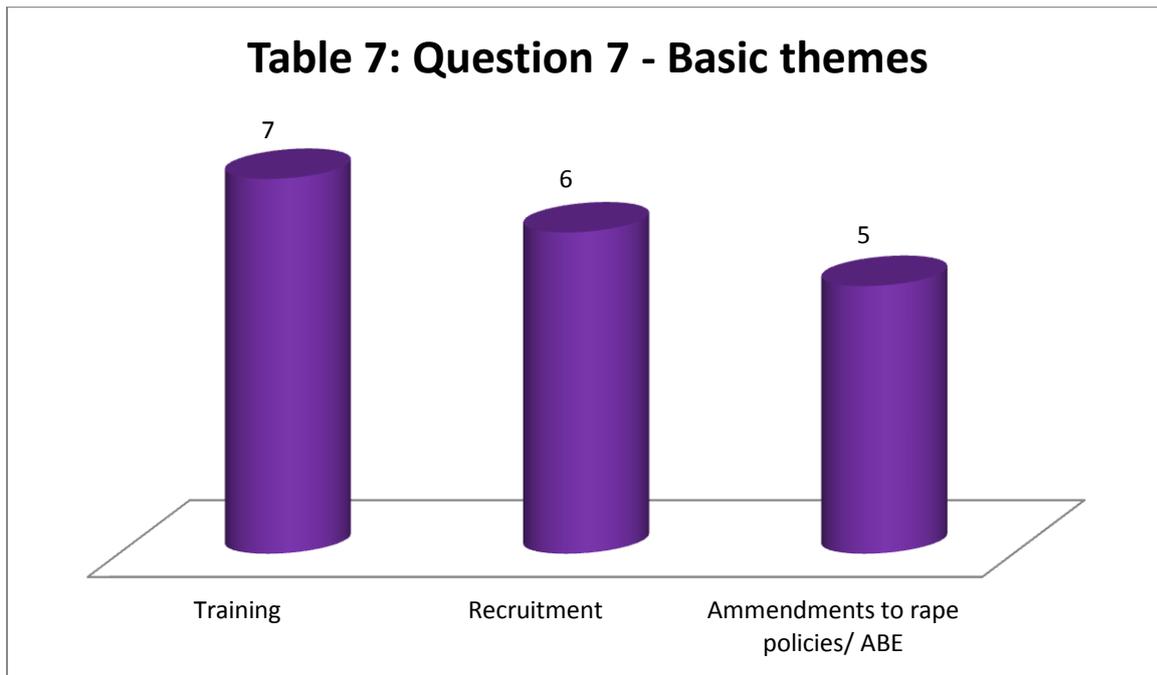


Seven practitioners argued that they did not believe evidential presumptions are examined in any detail during an interview, as one practitioner explains, “*I think it’s a lack of understanding that they’re even there, I think there’s a lack of training in terms of staff, in terms of law about them*” (T1, Line 103). This argument echoes Carline and Gunby’s (2010) findings that Barristers and Judges avoid presumptions for fear of complicating the trial. Other practitioners agreed that officers had no knowledge of them and that it was a training issue. This led five practitioners to state that the presumptions had not increased prosecutions. However, two practitioners agreed that presumptions have made a difference with the proviso that “*only if the officer is aware of them and has the knowledge of how to gain the correct evidence*” (T5, Line 108). Lack of knowledge is cited by Rights of Women (2006:3) who also add, “*the presumptions (both conclusive and rebuttable) are rarely used,*” which echoes findings in a consultation paper by Office for Criminal Justice Reform (2006).

An analysis of the transcripts (see table 4) shows that in transcript 2, the victim made 9 references to the use of force against her which would all fall into section 75, however, on no occasions did the interviewer ask for further detail regarding the force implying a lack of knowledge of how to utilise a section 75 presumption effectively. On one occasion, in transcript 4, the victim refers to being in fear and again this was not explored in any depth. This supports studies that discovered the presumptions are not understood properly and are therefore avoided (Carline and Gunby, 2010; The Stern Review, 2010).

### 3.6 Question 7

*How could the Police improve the quality of the evidence they gather from a rape victim during the interview process?*



Seven practitioners cited that additional training would improve the quality of the evidence. When asked to describe the areas this additional training should cover, they listed knowledge of the points to prove of the offence of rape, in particular, the concept of consent. One practitioner stated that they were “*not aware of the difference between explicit and implicit consent*” (T6 Line 25) and that she had not heard of implicit consent before or had any training related to this or communication surrounding normative sexual refusals. She also stated that there should be more training on rape trauma syndrome for S.O.L.O.s.

One practitioner felt that training courses should incorporate “how to get over [S.O.L.O.’s] inhibitions so that they feel comfortable talking about the specifics of sex” (T7, Line 79). This was supported by the views of other practitioners and led on to the suggestion by six of them that the recruitment policy needs to reflect the characteristics that are appropriate to the role. To date the only criterion is that they are police officers, P.I.P level one trained and have completed their probation period. This echoes the guidance in N.P.I.A. (2009) however, three practitioners questioned whether the divisional S.O.L.O.s had actually freely volunteered to apply for the position or been coerced into it by their line managers. Three of the practitioners felt that applicants should have experience of investigating complex crime in order for them to have developed an investigative mindset (T1, 3, 4). It was felt that without this, S.O.L.O.s did not appreciate how the evidence they gathered would be utilised during the suspect interview. The six practitioners commenting on the recruitment policy agreed that officers applying for the role of S.O.L.O. should have experience of video interviewing and be trained to PIP level 3, which incorporates the use of interviewing victims on video (T1,3, 4,6,7,8).

Research has supported the use of this process. However, the Stern Review (2010) identified issues with the use of video evidence-in-chief and the policy surrounding the interviewing of rape victims. This resonated with five of the practitioners who questioned whether the best way to present the victim’s evidence at court was a video of the interview or actually the victim in person (T1, 3, 4, 5, 7). Three practitioners stated that they believed the Jury preferred to listen to a person relay their account and that the guidance resulting from

'Achieving Best Evidence' had created a blanket approach rather than treating victims as individuals (T1, 4, 5). They questioned the need to treat all victims as vulnerable and, as a result, automatically video interviewing them all. Alternatively, the officer could explain to the rape victim the advantages, disadvantages of video interviews and give them a choice to be dealt with as a significant witness instead. One practitioner summed up their thoughts regarding this blanket approach by saying "*Maybe we haven't done the best we can for the victim, [...] and revert to interviewing the victim on video, treating them as vulnerable without considering whether they really are vulnerable and would like their day in court*"(T4, Lines 66-69).

## **Chapter Four – Discussion - Analysis and Synthesis**

The aim of this research was to explore whether the quality of evidence of non-consent, gathered from female victims of acquaintance rape in an East Midlands Police force area in 2010/11, is sufficient for a successful prosecution. To achieve this, practitioner's perceptions of the quality of evidence of non-consent were collected, together with their assessments of the current quality of evidence of non-consent contained within actual victim interview transcripts. Analysis of this data subsequently identified evidential weakness in non-consent evidence. The basic empirical findings will now be organised into four main themes, namely quality of evidence, sexual consent, the role and training provided for the Sexual Offences Liaison Officer (S.O.L.O.), and Achieving Best Evidence (A.B.E.) guidelines. All are discussed with a view to synthesising theory with practice, to develop our understanding.

### **4.1 Overall Quality of the Evidence**

The empirical findings show that the practitioner's perceptions and assessment of overall quality both conclude that the quality is poor. This echoes studies that found nearly half of all reported rapes are discontinued due to the poor quality of evidence (Feist et al., 2007; H.M.C.P.S.I., 2007; The Stern Review, 2010). The data analysed by the practitioners constituted evidence of non-consent, the pivotal factor in rape cases. Yet they rated this as containing 'poor to no evidence', some would argue this is "*evidence of police slackness, possibly resulting partially from [...] scepticism*" (Temkin and Krahe, 2008:127). Their findings discovered that a cynical attitude,

*"born of an adherence to rape stereotypes"* (Ibid: 2008:127), towards the allegation of rape that an officer is investigating can manifest itself in a less than thorough investigation.

Whilst there was no firm evidence in the empirical data to support rape stereotypical attitudes or rape scripts, the ranking task shows that practitioners awarded implicit consent as having less evidential value, which may imply that practitioners adhere to a rape script that implicit non-consent has a low possibility of successful prosecution (Soulliere, 2005).

However, the author argues that the data suggests the majority of practitioners are conscious of the fact that consent is not just a case of verbally explicit utterances, which is contrary to the theory advocated by Pineau (1995) (cited by Reynolds, 2004) who argues that consent requires an act of communication. They are also sensitive to the fact that some women will not indicate their lack of consent by saying 'no'. One practitioner stated victims may say in their account "*I froze; didn't say anything, didn't do anything, just laid there, but I didn't*

*consent*” (T3, Lines 13-14). This resonates with numerous academic arguments that consent can be explicit and implicit (O’Sullivan and Byers, 1992; Sawyer et al., 1993; Greer and Buss, 1994; Kitzinger and Frith, 1999; Blythe et al., 2006; Calder, 2004; Cowling and Reynolds, 2004).

The same practitioner further explained that full details of all the circumstances were necessary to support that just lying there constituted non-consent. The empirical findings illustrate that the quality of evidence regarding victims’ lack of consent is poor, which begs the question, why is that the case when officers are verbalising the

necessity for gathering full details of implicit consent? The difference between the quality of implicit non-consent evidence that officers state they should gather and the reality is further emphasised when compared with findings from the two tasks. Officers both rated and ranked transcript 4, which contained only implicit non-consent, as the poorest which may imply that the actual police interviewer (S.O.L.O.) responsible for transcript 4, had been influenced by a rape script that dictates non-consent has a low prosecution rate (Soulliere, 2005) and is therefore not worth pursuing. Alternatively, that acquaintance rapes are not real rapes (Lea, 2007). Lea argued that rape scripts negatively affect the performance of officers within rape investigations. Perhaps some S.O.L.O.s’ rape script state that if a woman does not clearly say ‘no’ to a man, she should be held partly responsible for being sexually assaulted (Brown et al., 2010).

This belief would then influence the tenacity of the interviewer to gather all the necessary details supporting why there was a lack of consent, even though it was implicit. In the ranking task all four S.O.L.O.s ranked transcript 4 as the poorest, explaining that it did not contain evidence of verbally explicit non-consent, which suggests that they may all hold prejudicial views regarding rape allegations in which the victim did not say ‘no’. Studies show the majority of reported rapes are acquaintance rapes (Smith et al., 2011) which, due to the psychological relationship, increases the chance that the victim provides implicit non-consent and not explicit non-consent (Kelly et al., (2005).

Therefore, rape scripts can have a highly detrimental affect on officer’s performance within investigative interviewing and subsequently on attrition rates. This echoes numerous academic arguments (Krahe, 1991; Kelly and Regan, 2001; Lea, (2003); Littleton and Axsom, 2003; Lea, (2007; Temkin and Krahe, 2008; Kelly and Lovett, 2009; Brown et al., 2010; The Stern Review, 2010; Government Equalities Office, 2010).

LaFree (1981, cited by Soulliere, 2005:420) further supports the theory that a low prosecution rape script may influence officers, “*the most important determinants of police decisions are based on legal considerations, particularly evidentiary concerns.*” Arguably this mindset will affect the interviewers resolve to obtain full details if the non-consent is implicit, thereby having low evidential value which ultimately contributes to the attrition rate.

Brown, Hamilton and O’Neill, (2007) discovered that officers may be influenced by attempting to anticipate prejudices held at the judicial stage, *inter alia*. low prosecution rate. Once again this may account for the participants rating implicit non-consent as evidentially of low value and therefore of no practical use for a successful prosecution. They also state that officers identified that “*insufficient evidence was a critical issue in the outcome of rape complaints*” (Ibid, 2007:364) particularly if defendants contested consent; this supports empirical findings of this research, as one practitioner explains, “*without good quality evidence in acquaintance rapes, juries will not convict*” (T1 Line 195).

Campbell and Camille (1997:255), whilst conducting a study into perceptions of the police regarding rape, found officers “*expressing doubts of the veracity of acquaintance rape victims' reports*”. This is consistent with earlier findings from a study conducted with police officers from West Berlin, which suggested that officers were dubious about the veracity of acquaintance rapes, particularly where the victim and perpetrator had a prior sexual relationship (Krahe, 1991). The limitations of both of these studies are that they are dated, have relatively small sample sizes and were conducted outside the U.K.; possibly affecting the validity. However, due to the dearth in extant studies relating to police officer’s perceptions of acquaintance rape, the findings are of interest and support this research.

#### 4.2 Sexual Consent

Whilst there was no direct evidence of rape scripts influencing the participants in the empirical data, there was evidence of a lack of knowledge regarding implicit consent, (T6 Line 25). This is arguably the dominant method of communicating non-consent in an acquaintance rape (Kitzinger and Frith, 1999; Humphreys, 2004). Perhaps it is this lack of knowledge regarding sexual refusals, and normative communication relating to all refusals, that is the attributing factor for the lack of probing into such an important issue. One practitioner stated that they felt a man required “*clear succinct instructions, woman, on the other hand, use body language*” (T6 Line 14). She further explained that this could create misunderstandings between the two.

This would suggest the practitioner has a rape script that accepts Tannen’s 1990 miscommunication theory, which has been criticised for lacking a full understanding of sexual refusals (O’Byrne et al., 2006; Humphreys, 2004; Cowling, 2004; Calder, 2004). The author argues that interviewing officers with this belief lack the necessary persistence required when questioning the victim’s account regarding implied non-consent, because officers may accept that a man (and ultimately the Jury) would not understand implicit non-consent. Therefore, this evidence is of a low prosecution value and the perpetrator can justify his actions negating the rape allegation. The empirical data reflected that practitioners were conscious of obtaining quantity of detail regarding consent but few were able to verbalise examples of this, other than all of them stating ‘*the surrounding circumstances*’ (T1,2,3,4,6,7). The author argues that, to gather all possible evidence regarding the sexual refusal and thereby the non-consent, officers must be aware of normative communication regarding all refusals, including the fact that they are often indirect and qualified with a palliative statement (Kitzinger and Frith, 1999; Calder, 2004).

Analysis of the transcripts containing evidence of implicit non-consent showed that there was a distinct lack of probing, implying that the interviewing officers (S.O.L.O.s) were not conscious of the necessity of this line of questioning with victims. Findings from surveys conducted with students regarding sexual refusals show that they believe most communication regarding consent negotiations is non-verbal and that the increased familiarity between actors, the more reliant on this method of communication (Humphreys, 2004). Therefore, in acquaintance rapes, exploration of historic verbal and non-verbal negotiation between the victim and perpetrator should be made as well as the verbal/non-verbal communication relating to the rape. This would help to differentiate between consensual sexual activity and the rape thereby improving the overall quality of the evidence of non-consent.

Exploration of historic negotiation communication was not evident in the transcripts. However, studies of students show that, in a one-night stand situation, both parties would rely

more heavily on non-verbal communication due to being too uncomfortable to seek explicit consent (Ibid, 2004). Once again, the necessity to explore the victim's non-verbal communication in acquaintance rapes is paramount in order to clearly evidence why the perpetrator would have known that the victim had not consented. To conduct an effective suspect interview, the interviewing officer must have full details of non-consent from the victim (Stelfox, 2009). Social and temporal context of the surrounding circumstances regarding whether the victim had the freedom to make choices and give consent or not must also be explored (Munro, 2009).

Analysis of the evidence in the transcripts shows that officers failed to investigate this area, once again creating evidential weaknesses, due to the interviewing officers failing to gather all the circumstances surrounding the non-consent. As (Mackinnon, 1996) points out, emphasis should be placed on the power inequality of the structural context. For example; if a perpetrator had manipulated the situation so that the victim was at his home address when he raped her, officers should explore how the inequality made her feel and utilise this as evidence of the coercive strategy used by the man to pursue his sexual agenda.

The author argues that an officer who fails to understand the complexity of sexual refusals and the influence context has on communication may fail to gather quality evidence. Transcript 1, 2, 4 and 6 arguably demonstrates this as the S.O.L.O.s interviewing the victims failed to explore the inequality created by the environment. Recognising and then subsequently exploring the "*social and cultural contexts of gender inequality in the consent 'transaction'*" (Moore and Reynolds, 2004:41), would ultimately improve the quality of the evidence gathered from a victim. It would also provide greater opportunity for interviewers to challenge a suspect, and to evidence why he believed he had gained the victim's consent. In addition, it would be harder for him to allege that he had taken reasonable steps or simply misunderstood the penetration to be a consensual act. Exploration of the inequality inherent in women's sexual consent under hetero-patriarchy was not evident in any transcript. This further supports the necessity for further specialist training for S.O.L.O.s.

A noteworthy point is that the empirical data shows that five out of the six transcripts contained evidence of declarations of explicit non-consent. This contradicts academic arguments that women find it difficult to say 'no' when making sexual refusals in any relationships; particularly, in circumstances constituting acquaintance rape, (Greer and Buss 1994; O'Sullivan and Byers 1992; Sawyer et al., 1993; Blythe et al., (2006). Either the women are assertive enough to say 'no' in those extremely difficult circumstances or, conversely, victims feel obliged to fabricate this evidence in an effort to make sure the police will believe them. The author argues that this is evidence of rape scripts influencing victims and supports the necessity for specially trained officers dealing with victims from the onset. This would allow officers to dispel rape myths before the victim has fabricated evidence, which ultimately may lead to inconsistencies discrediting the victim and destroying any chance of a successful prosecution. Supporting this claim are findings from a study of rape victims conducted by Jordan, 2001 (cited by Kelly, 2001:21) who discovered that "*fearing disbelief and judgement, victims of rape may try to embellish their accounts, or conceal wrong doing, in order to make themselves appear more 'believable to the police'*".

In an effort to strengthen the definition of sexual consent, the legislation outlined a list of circumstances, which if the prosecution provided evidence as existing at the time of the rape, are section 75 evidential presumptions that the victim had not consented. Seven practitioners felt that the presumptions were not examined in enough depth by interviewing officers and felt that this was because officers had little understanding of them (T1,2,3,4,5,7,8). Similarly,

The Stern Review (2010) and Carline and Gunby (2010) echo this viewpoint and discovered that Barristers failed to utilise the presumptions due to a lack of understanding. Analysis of the rape interview transcripts confirms all the perpetrators used force. Section 75 (a) refers to violence used against victims (Card, 2004) yet no definition of violence is provided. The C.O.D. definition (1991:1370) states violence is “the unlawful exercise of physical force” therefore the author argues that any degree of unlawful force constitutes section 75 (a) (see appendix A) and necessitates the exploration of evidence supporting this. Analysis of the evidence gathered from the victims in this research found that interviewing officers made no such exploration, thereby supporting the practitioners’ perceptions. Without this evidence, a Barrister would not be able to utilise an evidential presumption at court. A practitioner firmly believed that “*the presumptions do make a difference but only if the officer is aware of them and has the knowledge of how to gain the correct evidence*” (T5 Line 108).

It would appear from the empirical findings that officers are not aware and, consequently, gather insufficient evidence. This lack of knowledge perpetuates the disservice provided to victims and emphasises the necessity for improved training for S.O.L.O.s.

#### **4.3 Role and Training of the S.O.L.O.**

The role of the S.O.L.O. has emerged over time and a primary responsibility is that of gathering victim-focused evidence (N.P.I.A., 2010). Guidance from N.P.I.A. states that Forces provide additional training to S.O.L.O.s to ensure that they are aware of the specific issues complex rape investigations may incur. According to the online information at a Sexual Assault Referral Centre in Plymouth (2011) S.O.L.O.s will have received specialist training in Rape Trauma Syndrome, Post Traumatic Stress Disorder, Forensic Medical Examinations and Interviewing. Worryingly, there is no mention of training regarding Rape scripts.

The empirical findings suggest the necessity for further training of S.O.L.O.s in order to eliminate the influence of rape scripts. Campbell and Johnson (1997:255) found that specialist rape training and investigative experience are factors that “*orient officers’ attention on the legal elements of the crime of rape rather than being influenced by their own rape scripts*”. However, according to Page (2010:328) “*Several studies have shown the current level of training and education related to rape and sexual assault to be ineffective in altering negative attitudes about rape*”. Limitations to findings from Page’s study are that they were conducted in the U.S.A and therefore the training curriculum may not be conducive with that of the U.K. Arguably, rape scripts are universally similar (Gruber, 1997) and therefore her findings are valid to this study. Nonetheless, Payne (2009:13) states that officers did believe that more training on the ‘realities’ of rape would be beneficial. She identified as best practice a Home Office pilot specialist-training course where experts from the voluntary sector taught officers about rape trauma, myths and stereotype, yet it would appear that to date, this has not been introduced nationally.

The author argues that this is one of the major flaws with police training in that, even with national guidelines for all areas of training, individual forces implement training in a non-standardised manner (Ibid, 2009). Payne also discovered that officers initially responded to allegations of rape are inadequately trained to deal with rape victims, many of whom reported that “*in trying desperately not to do anything wrong, felt it was better not to do anything at all*” (Ibid, 2009:18). The empirical findings support this. As one practitioner pointed out “*We send uniform officers out to take a first account and they have only a brief knowledge of*

*the law and it appears that these officers are not asking even the right questions to establish that there was a rape in the first place” (T 6, Lines 21-22).*

In light of the fact that officers who have not received specialist training are utilised to initially deal with rape victims, the author suggests that rape scripts influence them, arguably resulting in delivery of a second rate service to the victim (The Stern Review, 2010). This officer will be required to communicate with the victim and such communication is more than a mere verbal process in interpersonal interaction, as Mulder and Winkel, (1996:308) explain, “*Communication also consists of non-verbal messages which can influence impression formation.*” It would seem, that right from the first contact with the police, a rape victim may feel disbelieved and be subjected to secondary victimisation from the very agency responsible for helping her. This may be enough for her to decide to withdraw her complaint or fabricate evidence in an attempt to dispel the disbelief. What other category of victim is subjected to such an approach? It would seem that the empirical findings contradict the C.P.S. Rape Manual, (2010) annex F sec 10: that states, “*Police will ensure that first response officers responding to reports of rape are sufficiently trained to present a supportive attitude to the victim.*” Furthermore, as Kelly (2001) points out, the initial investigation is critical and there is a correlation between the effectiveness of it and numbers of victims withdrawing cases, which attributes to the attrition rate. Payne (2009:19) explains that her discoveries regarding ineffective police investigations left her feeling “*extremely concerned*” and the author echoes these sentiments.

The training for S.O.L.O.s regarding investigative interviewing follows guidance from the National Investigative Interviewing Strategy (N.P.I.A., 2009b). There can be no doubt that “*the gathering of information from a well-prepared victim and witness interview will contribute significantly to the investigation*” (Ibid, 2009b:6) however, the findings from this research suggest that the quality of the information is too poor to fulfil this objective. The guidelines outline the principles of investigative interviewing and advocate that:

Investigative interviewing should be approached with an investigative mindset. Accounts obtained from the person who is being interviewed should always be tested against what the interviewer already knows or what can reasonably be established (N.P.I.A., 2009b:6).

Two practitioners stated that they believed S.O.L.O.s did not have an investigative mindset (T1 & 4) and this was symptomatic of the recruitment policy of allowing officers to apply with only two years service and with arguably no investigative experience. The empirical findings suggest that S.O.L.O.s failed to identify the evidential worth of implicit non-consent whereas the Detectives recognised it. The author argues that this is indicative of an investigative mindset developed through experience of complex investigations and interviewing suspects. S.O.L.O.s are not involved in the suspect interview and do not develop an understanding of the value of evidence of implicit non-consent if used effectively. A deficient investigative mindset may also account for the lack of probing of the key issues surrounding non-consent highlighted by all eight practitioners. Perhaps this supports a requirement for S.O.L.O.s to be employed in both victim and suspect focused investigative activities.

Without both, SOLOs will not appreciate the necessity to probe victim’s accounts, in particular, any inconsistencies. Guidance in the A.B.E. (Ministry of Justice, 2011:82) clearly

states that officers should explore inconsistencies (a notion that the all eight practitioners supported) and sec 3.68 explains that:

Witnesses should only be challenged directly over an inconsistency in exceptional circumstances and even then only when it is essential to do so. Rather, such inconsistencies should be presented in the context of puzzlement by the interviewer and the need to be quite clear what the

witness has said. On no account should the interviewer voice their suspicions to the witness or label a witness as a liar: there may be a perfectly innocuous explanation for any inconsistency.

Findings from this research show that practitioners believe that the present investigative interview training undertaken by S.O.L.O.s does not address sec 3.68 and that S.O.L.O.s have been left in “*one of the more difficult grey areas*” (T4, Line 26) due to this flaw in training.

One reason for the occurrence of inconsistencies in a victim’s account according to A.B.E. (Ibid, 2011) is the failure of the interviewer to ask appropriate questions. All eight Practitioners support this view and a study by Gartrell (2010:50) regarding questioning skills of specialist interviewers trained to use the C.I. model and interview victims on video found “*a proliferation of inappropriate questions*” asked throughout the interviews. Clearly, the empirical data supports that there are flaws in the training provided to a SOLO.

#### **4.4 A.B.E. Guidelines**

In order to improve victim care and the attrition rate, legislation allowing police officers to video the investigative interview and subsequently playing it as evidence-in-chief at court was introduced in order to ease the horrendous experience of telling a complete stranger specific, personal details of the rape (Youth Justice and Criminal Evidence Act,1999; H.M.C.P.S.I., 2007). The empirical findings show that officers acknowledged an issue with a lack of probing of the key issues and attributed this to a lack of knowledge of both points in law, methods that can be utilised within a C.I investigative interview and finally that the interview was on video. Interestingly this contradicts findings by Westera, Kebell and Milne (2011:8) in which officers

perceived the quality of evidence would improve by interviewing victims on video, due to this process enhancing the “*completeness and accuracy of the information provided.*” Admittedly, use of a video enables officers to capture everything that is said in a way that a written statement does not (Ministry of Justice, 2002). However, the author argues if an officer does not probe key points, the quality of evidence will not be enhanced, merely by the fact that it was gathered on video. By seeking to empathise with victims as oppose to appearing to judge them may result in a failure to probe the accounts and this resonates with findings by Temkin and Krahe, (2008).

The ethos of ensuring that a victim feels believed is the key change in rape investigations, adopted by the police after listening to numerous complaints from rape victims (Kelly, 2002; Rights of Women, 2006; N.P.I.A, 2009a). The author agrees with views outlined by Jordan (2004), that a victim should not be subjected to an attitude of disbelief. In addition findings of the study conducted by Payne (2009:11) who discovered, “*It has often been said that a raised eyebrow can be the difference between a rape victim deciding to continue with a case or to*

*withdraw from the process*". However, the author argues that the qualitative data from this study (Practitioner accounts T1, 3, 4 & 5) suggests that this ethos has led to a misunderstanding by S.O.L.O.s of investigative interviewing resulting in the poor quality of evidence gathered. This contributes to the attrition rate and lack of successful prosecutions. As one practitioner explained; S.O.L.O.s "*seem to get it in to their head that they can't challenge, we've got to be seen as this nice person*" (T3 Line 27), and "*sometimes because they are on video they are frightened of being accused of not believing her*" (T3 Line 31).

Guidelines for interviewing victims on video are based on principles outlined in the document *Achieving Best Evidence* (Ministry of Justice, 2002). However, as mentioned by a practitioner (T3) the fact that everything is captured on video seems to hamper interviewers from probing, for fear of being criticised that they appear to not believe the victim's account. This would also be contrary to N.P.I.A. (2009a) guidelines. The Stern Review (2010:63) makes it clear officers should "*always assume victims are telling the truth unless they learn otherwise.*" The author agrees with this, however, it would appear that S.O.L.O.s are confused by this message. This results in the belief that either the victim and /or persons viewing the video tape will misinterpret probing and challenging inconsistencies as disbelief. One practitioner summed it up, stating:

We're in a world of policing where we worry all the time, if we get things wrong, I'm going to get battered and there will be an enquiry, and the I.P.C.C. will do me. It's not the case but people do think that and I think there's a danger with A.B.E. that the environment may not be an easy one to work in because you need to think 'am I doing everything right?' (T4 Lines 57-60).

Other practitioners also voiced concerns about A.B.E. and using video interviews as evidence-in-chief. One pointed out that:

There is rarely a challenge in the video interview. The witness gets a shock when they are challenged by the defence counsel; they are not prepared for the court process. No one has told them that they will be called a liar. Often the first time they are challenged is in the court, they are called liars and it's a big shock (T5 Lines 68-72).

This point of view was echoed by other practitioners (T1, 3, 4 & 8), and analysis of the transcripts found no evidence of any probing of inconsistencies or any challenges, even presented in the "*context of puzzlement*" (Ministry of Justice, 2011:82) by the interviewer. Bearing this in mind, the author agrees with the practitioners that this does a disservice to victims of rape. Officers are not probing victims' accounts to gather good quality evidence and not preparing them for court by explaining about challenges. Challenging inconsistencies does not equate to disbelief of an account. One practitioner stated "*if you explain everything properly to a victim, she will understand that whatever you ask is asked for a reason and that you do believe her and are supportive, just explain*" (T8, Lines 34-35).

The ethos behind A.B.E. and the introduction of video interviews as evidence-in-chief was intended to improve the victim's experience at court, as well as attempting to secure a successful prosecution. Some of the practitioners stated that they did not believe the policies

had achieved this. *“Most judges prefer the witness in the court. There is a bigger impact on the jury. This is the best opportunity to put the case across”* (T5 Line 22). Findings from The Stern Review (2010:19) support the view that playing the video interview as evidence-in-chief has not been entirely successful, *“currently this is a big hindrance to effective trials and action needs to be taken.”*

The author argues that generally, there is a blanket approach to interviewing rape victims and victims are not given a choice regarding how their evidence is presented. By explaining the advantages and disadvantages of playing video interviews at court, the victim would be given some control in the whole process. This would empower them. The option to treat rape victims as significant witnesses, recording the interview on video but producing a written statement for court, allows the victim to give live evidence and may eradicate the issues highlighted within the Stern Review (2010). A practitioner pointed out that the police tend to *“revert to interviewing the victim on video, treating them as vulnerable without considering whether they really are vulnerable and would like their day in court”*(T4, Lines 67-69). Perhaps now is the time to reassess rape policies, empower the victim and give them a voice in the justice process.

## **Chapter 5 - Conclusion and Recommendations**

This section will revisit the overall aim and research objectives for this study; provide a summary of the findings and concluding thoughts. In addition, recommendations for future research in this area together with proposed methods to improve evidence of non-consent to increase the number of successful prosecutions will be proposed. Finally, comment will be made regarding how this research has contributed to the understanding of the current quality of evidence

The overall aim of this research was to explore whether the quality of evidence of non-consent, gathered from female victims of acquaintance rape in an East Midlands Police force area in 2010/11, is sufficient for a successful prosecution. The objectives for the research are:

- To explore practitioner’s perceptions of the quality of evidence of non-consent to sexual intercourse in acquaintance rape allegations and interviewing practices within rape investigations
- To assess the current quality of the evidence of non-consent by conducting measurement rating/ranking tasks with practitioners, regarding acquaintance rape allegations
- To identify evidential weakness in non-consent evidence
- To formulate recommendations for ‘best practice’ in interviewing rape victims, regarding acquaintance rape allegations

### **5.1. Research Objective 1: Perceptions of Practitioners**

In general, the perception of practitioners was that the quality of evidence of non-consent was poor due to a lack of probing of key issues by interviewing officers. All the practitioners recognised that consent was the pivotal element of the offence of rape and evidence-supporting non-consent was even more crucial in an allegation of acquaintance rape. Whilst acknowledging the necessity to gather full details of the surrounding circumstances of the rape, they recognised

this is rarely achieved in practice, resulting in a low conviction rate. They attributed this poor quality to a S.O.L.O.'s lack of knowledge regarding the crucial elements of non-consent and flaws in the investigative interviewing training provided to them. Several practitioners cited the lack of an investigative mindset in S.O.L.O.s and linked this to the practice of accepting applicants that have no previous experience of complex investigations.

Findings confirm a discrepancy between the evidential rating values awarded to the rape transcripts between S.O.L.O.s and Detectives, which the author argues highlights a lack of investigative mindset on behalf of the former. This results in a failure to recognise the evidential value of transcripts containing implicit non-consent. An interesting insight suggests that the experience of utilising evidence during complex suspect interviews is crucial to developing an investigative mindset, which seemingly increases the ability to recognise evidential opportunities. It also suggests that the training provided to Detectives has equipped them to be more effective evidence gatherers.

Similarly, the literature review identified that officers failed to explore victims' accounts, leading to insufficient evidence gathered during the initial investigation. Despite the fact

that academics linked insufficient evidence to 'slack' investigators, unduly influenced by rape scripts, practitioners did not mention rape scripts as a possible reason for the lack of quality. Failing to ask practitioners for their thoughts on rape scripts is a limitation of this study. However, the fact that they did not is a valuable insight as it suggests that they may not be aware of such an influencing factor, which supports the argument that this lack of awareness is common amongst investigators. The author recommends that future research explores the link between the influence of rape scripts and quality of evidence.

Evidential presumptions were included in the definition of rape in the Sexual Offences Act 2003 to strengthen the definition of consent. Practitioners concluded that they are ineffective and fail to deliver the desired outcome, citing a lack of knowledge of the presumptions as the main culprit for this. The literature review also supported the practitioners' viewpoints regarding evidential presumptions. Studies show that practitioners have little understanding of them and consequently they are underused rendering them ineffective. The author recommends further research take place in this area.

The main conclusion drawn from the perceptions of the practitioners is that the S.O.L.O. is failing to probe victim accounts in depth, leading to fundamental evidential weaknesses. To eradicate this, a recommendation is for a more robust recruitment policy and improvements to the specialist investigative interview training provided for S.O.L.O.s.

## **5.2 Research Objective 2: Analysis of the Current Evidential Quality**

Failure to explore the issue of consent in depth resulted in transcripts generally

containing no evidence and having no practical use for a successful prosecution. Analysis found that practitioners rated the evidential value of explicit non-consent higher than implicit consent and there was a distinct lack of evidence indicative of the actual interviewing officers (S.O.L.O.) having any knowledge of the differences between the two. An absence of exploration regarding the context of the circumstances indicates a lack of knowledge relating to sexual refusals and this led to further evidential weaknesses. The inability to develop the evidential value of non-consent by exploring the contextual inequality of the relationship, the

environment, and the fact that force was used against the victim supports the perceptions of the practitioners, that the current quality of evidence of non-consent is poor.

Interestingly there is a no shortage of extant literature regarding sexual consent and sexual refusals; conversely, there is a dearth of literature regarding non-consent. Studies maintain that women are more likely to provide implicit non-consent in an acquaintance rape situation, supporting the necessity for training packages to incorporate this research and provide S.O.L.O.s with specialist knowledge of such a complex topic.

A limitation to this research was the failure to investigate the level of knowledge that S.O.L.O.s had, regarding sexual consent and further research is recommended in this area. However, the findings have identified a lack of tenacious questioning surrounding non-consent, which may be evidence of rape scripts influencing a S.O.L.O.s performance, if their script perceives only explicit non-consent is of evidential value. Once again, the findings provide a valuable insight into the interviewing skills of S.O.L.O.s and suggest that, to ignore the influence of rape scripts, ultimately perpetuates the current situation of poor quality evidence gathered from rape victims.

To conclude, studies confirm that the police have enhanced the service provided to rape victims and the quality of victim care has improved. However, this research demonstrates that changes in policy can only go so far and that, if the evidence elicited from victims is insufficient, then the police will continue to provide a disservice, due to evidential weaknesses. It would appear that there is a lack of knowledge regarding sexual consent and sexual refusals. To improve the situation the author recommends additional training in these areas.

### **5.3 Research Objective 3: Identification of Evidential Weaknesses**

Analysis identified evidential weaknesses in relation to evidence of non-consent. The predominant failure was a lack of probing of any of the key issues, for example; all the victims had force used against them. Officers failed to explore the circumstances surrounding the use of force or how this made the victim feel; yet this evidence could demonstrate the coercive strategy adopted by the perpetrator. In addition, this evidence would support a section 75 evidential presumption that the victim had not consented, thereby strengthening the evidential value of the case.

Over half of the rapes examined occurred at the perpetrator's home address. Once again, officers failed to explore contextual inequality created by the environment and the way this affected the victim in relation to her freedom to consent. Where the victim provided evidence of implicit non-consent, officers failed to explore the exact non-verbal actions used to convey her non-consent to the perpetrator, in particular, how he would have known that she was not consenting. Every aspect of the

communication requires investigation, including exploration of historic communication surrounding previous sexual consent, in order to differentiate between normative communication and the non-consent constituting the allegation of rape. The findings illustrate a deficiency in investigative interviewing of key points indicative of a lack of specialist knowledge and recommendations are made that specialist training incorporates this area.

Based on research by academics the Police have adopted the C.I model of investigative interview, studies have focused on the effectiveness of the model to elicit an increase in

quantity of information. Results from such studies have proven the value of the C.I in achieving quantity. Police training has reflected the desire to utilise the C.I and the aim of training packages have focused on teaching the structure and process of the model to ensure an increase in the quantity of data. Generally, additional information is useful to an investigation however; the findings from this research imply that quantity has not improved quality and indicates the necessity to incorporate knowledge of the law and, specifically, the points to prove, as well as the mechanics of interviewing within investigative interview training.

The Police have adopted practices in a sincere attempt to gather the best evidence possible from victims, yet these findings show the reality of the current situation is that, the police are not achieving this outcome. The practitioners and literature confirm that the A.B.E and resulting policy seem to have created a blanket approach by the Police to rape victims. Contrarily this provides a disservice to victims of a particularly serious crime and arguably victimising them for a second time.

The conclusions drawn from this section of the research are that there are numerous

evidential weaknesses, due to a fundamental lack of knowledge of the evidential elements of non-consent. Although this research has achieved its aim of exploring whether the quality of evidence of non-consent is sufficient for a successful prosecution and can conclude that the evidence is insufficient, the author acknowledges limitations to this study. Namely that the sample size of the rape transcripts was limited in size and geographical location, thereby creating a deficiency, in that the conclusions cannot be generalised to be applicable to any other police force. Nonetheless, the research was exploratory in nature and the findings have provided a unique insight into the quality of evidence of non-consent. It is anticipated that future research will incorporate a larger sample size selected from a range of police forces, thereby increasing the understanding of this complex topic.

To date the findings suggest that the current situation demonstrates that the quality of evidence gathered from rape victims is poor, hence the majority of the transcripts rated as containing no evidence and of being no practical use for a successful prosecution. A final argument is that, a blanket approach to investigative interviewing has resulted in insufficient evidence gathered, a failure to empower rape victims and the provision of a sub-standard service.

#### **5.4 Research Objective 4: Recommendations**

Conclusion 1 stated that a lack of probing is at the heart of the issue of poor quality evidence, and from this, the recommendations made are for a robust recruitment policy for the role of the S.O.L.O and an improvement to the specialist investigative interview training provided for them. Conclusions 2 and 3 also support the necessity to improve the training provided for S.O.L.O.s.

The proposed recruitment policy should include that the applicant has a minimum length of service of 4 years, together with evidence of competency to investigate serious/complex crimes and be a qualified PIP level two (former tier 3) investigative interviewer. The benefits of this are that the applicant has experience of both victim and suspect interviewing, thereby developing an investigative mindset. This will ensure that they are competent and effective investigators and have the confidence to challenge an account in a professional manner.

The specialist S.O.L.O. investigative interviewing course should include training on rape scripts and incorporate a high level of knowledge regarding sexual offences, sexual consent and communication relating to sexual refusals. The benefit of this would be that coupled with the confidence to challenge inconsistencies in a professional manner, S.O.L.O.s would have the specialist knowledge to explore key issues, thereby improving the quality of the evidence gathered. They would also appreciate that, by probing accounts, victims can gain psychological benefits, thereby improving their confidence and ultimately the quality of the evidence.

Improved communication skills developed over the prescribed length of service, an investigative mindset and specialist knowledge would enable S.O.L.O.s to explain to the victim the key areas necessitating exploration, thus empowering victims, by their active involvement in the evidence gathering process. This would also prepare the victim for the court process.

A further recommendation would be that training provided to any officer likely to be the first to communicate with a victim should also incorporate the specialist knowledge outlined above. This would ensure that officers are aware of rape scripts

and the effects of non-verbal communication on a victim. This would minimise the likelihood of officers creating an aura of disbelief and subjecting victims to secondary victimisation.

Conclusion 4 suggests that a blanket approach to investigative interviewing has resulted in insufficient evidence being gathered, a failure to empower rape victims and provision of a sub-standard service. Perhaps it is time to reassess the rape policies adopted by the police to avoid this blanket approach. By providing a thorough explanation of all the options relating to interviewing and presentation of evidence at court, a rape victim will have an opportunity to choose and control the process. Not all rape victims will be vulnerable and the police should pay attention to recent research and allow those that are not, an opportunity to present their evidence in the best possible way for that individual. Giving victims a choice empowers them and acknowledges that they are pivotal to the process not just a small cog in the criminal justice system.

## **5.5 Contribution to Knowledge**

Producing unique valuable research is arguably an impossible task. The review of the literature illustrated a dearth of field research into the quality of evidence from rape victims of non-consent; therefore, this empirical research work is unique. These findings provided a valuable insight into the perceptions of practitioners with expertise in investigating rape; which have developed the understanding of evidence of non-consent, allowing practice to inform theory.

The Criminal Justice System and, in particular the police, have made fundamental changes for the better in the manner rape is investigated and the care afforded to

victims of this crime. This research illustrates the necessity for further improvements to ensure an increase in successful prosecutions and provide justice for the victims of such a horrendous crime.

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## Appendix A

### Evidential Presumptions

Section 75 (2) of the Sexual Offences Act, 2003 states:

The circumstances are that —

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
- (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

## Appendix B

|   |       |         |
|---|-------|---------|
| Rating scale task sheet - Detective one   | ..... | page 1  |
| Rating scale task sheet – Detective two   | ..... | page 4  |
| Rating scale task sheet – Detective three | ..... | page 7  |
| Rating scale task sheet – Detective four  | ..... | page 10 |
| Rating scale task sheet – S.O.L.O. one    | ..... | page 13 |
| Rating scale task sheet – S.O.L.O. two    | ..... | page 16 |
| Rating scale task sheet – S.O.L.O. three  | ..... | page 19 |
| Rating scale task sheet – S.O.L.O. four   | ..... | page 22 |