Law Commission
Reforming the law

Evidence in Sexual Offences Prosecutions

A consultation paper

Consultation Paper 259

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23 May 2023

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines KC. The Chief Executives are Joanna Otterburn and Stephanie Hack.

Topic of this consultation: We are conducting a review of the law, guidance, and practice relating to the trial process in prosecutions of sexual offences and considering the need for reform in order to increase the understanding of consent and sexual harm and improve the treatment of victims while ensuring that accused persons receive a fair trial.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 23 May 2023 to 29 September 2023.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/evidence-in-sexual-offences. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:
By email to evidence.rasso@lawcommission.gov.uk
OR
By post to Evidence in Sexual Offences Prosecutions Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our website at https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/https://www.lawcom.gov.uk/project/weddings/.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email evidence.rasso@lawcommission.gov.uk mailto:weddings@lawcommisison.gov.ukor call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

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Glossary

This is not an exhaustive comprehensive glossary of terms relating to evidence in sexual offence prosecutions, nor is it a glossary of legal terms. It includes only terms related to evidence in sexual offences prosecutions that have been used throughout this consultation paper and defines them as they are commonly understood.

Achieving Best Evidence ("ABE") interview

An ABE interview is a video-recorded interview with a vulnerable and/or intimidated witness, conducted by the police, which follows trauma-informed guidance about the approach adopted. It is intended that this video will be played at trial and will be the witness' evidence in chief.

Acquittal

An acquittal is a formal finding by a court that a person accused of a crime is not guilty.

Adduce (evidence)

To adduce evidence is to present it for consideration by the court. This includes oral testimony from a witness. If a party adduces a document, it means they are using the document in court as evidence.

Admissible (evidence)

Admissible evidence is evidence that may be used in the trial.

Adversarial

The model used for conducting criminal proceedings in England and Wales is referred to as adversarial. This means that the prosecution and defence are opposing parties. They each investigate and present their case, evidence and legal argument to the court and contest each other's case, with the judge overseeing the fairness of the proceedings and the jury deciding whether, on the facts, the defendant is guilty or not guilty.

Advocate

An advocate is a person who is professionally qualified to advise and represent another person in court.

Barrister

A lawyer who generally specialises in advocacy and representing clients in court. Barristers are also called counsel.

Charge

The crime that the defendant is formally accused of committing. Once the defendant has been charged, court proceedings can start.

Complainant

A person who makes a formal complaint that an offence has been committed against them. They will usually act as the prosecution's witness in the trial process.

Conviction

Conviction is a formal finding made by a court that a person accused of a crime is guilty.

Credibility

Credibility refers to an assessment of whether a witness is telling the truth and is honest and whether a witness is reliable and is accurate in their description of an event.

Criminal Cases Review Commission ("CCRC")

The CCRC is the statutory body responsible for investigating alleged miscarriages of justice in England, Wales and Northern Ireland.

Criminal Injuries Compensation Authority ("CICA")

The CICA is a government agency which awards compensation to individuals who have sustained physical or psychological injury directly attributable to them being a victim of a violent crime. The CICA awards compensation to claimants who meet the criteria set out in the Criminal Injuries Compensation Scheme 2012 ("the CIC Scheme").

Criminal Practice Directions ("CrPD")

The CrPD are issued by the Lord Chief Justice and act as a supplement to the Criminal Procedure Rules and govern the practice and procedure in all criminal courts.

Criminal Procedure Rules ("CrPR")

The CrPR, alongside the CrPD, are rules about court procedure in criminal proceedings.

Cross-examination

Cross-examination is the questioning of a witness by another party during a trial, which takes place after examination in chief

Crown Court Compendium

The Compendium provides guidance to judges from the Judicial College on directing the jury and sentencing in Crown Court trials. It also contains some suggestions in relation to practical matters including jury management.

Crown Prosecution Service ("CPS")

The CPS is the body which is generally responsible for prosecuting sexual offences in England and Wales, after an investigation by the police.

Defence

The defence refers to the team of lawyers that represent the defendant in criminal proceedings.

Defendant

A person formally charged with committing a criminal offence.

Directions (see **Judicial directions**)

Discharge (a juror/the jury)

Discharging is the process by which a judge can release one or more jurors or the whole jury from that period of jury duty. It means that the juror(s), or whole jury, no longer hear the rest of the case.

Disclosure

The process by which material held by the prosecution is provided to the defence. Material disclosed to the defence includes evidence the prosecution rely on to prove their case and unused material that meets the test for disclosure. (See also, unused material.)

European Convention on Human Rights ("ECHR")

The ECHR is an international treaty between the states of the Council of Europe which protects the human rights of people in these countries. The UK helped draft the ECHR and was among the first states to ratify it in 1951.

European Court of Human Rights ("ECtHR")

The ECtHR is an international court which rules on individual or state applications regarding possible violations of the rights set out in the ECHR.

Enhanced relevance

An enhanced relevance test for admissibility is one that requires that evidence is more than simply relevant. It may require, for example, that the probative value of the evidence outweighs its prejudicial effect, or that evidence has significant weight, often referred to as substantial probative value.

Examination in chief

Examination in chief is the questioning of a witness by the party that called the witness. The resulting evidence is referred to as the witness' evidence in chief.

Expert evidence

Expert evidence refers to an expert witness giving evidence on any admissible matter which calls for expertise and which they are qualified to provide.

Ground Rules Hearing ("GRH")

A GRH is a pre-trial hearing which takes place so that a judge can make directions to facilitate the appropriate treatment and effective participation of a witness or defendant. They are more commonly used for witnesses and defendants who are considered vulnerable, for example, because they have a communication need. They set ground rules about the manner and lines of questioning to be used at trial.

Independent Sexual Violence Adviser ("ISVA")

An ISVA provides emotional support and guidance for anyone who has experienced sexual violence at any point in their lives. They also provide information and support through the criminal justice process.

Interlocutory

This term refers to a decision, appeal, or hearing which is to be made or conducted before the trial is concluded and the verdict is given.

Intermediary

An intermediary is an independent communications specialist appointed to facilitate communication with a witness or a defendant, including when they give their evidence to the police or the court. An intermediary approved by the Ministry of Justice and instructed to assist a prosecution witness is referred to as a Registered Intermediary ("RI").

Judicial College

The Judicial College provides training for judges and produces the Crown Court Compendium.

Judicial directions

In a Crown Court trial, judges give directions to the jury on matters of law, which the jury must apply to their determination of the facts.

Jurisdiction

Jurisdiction refers to the extent of a court's legal authority or power to hear a case. It also refers to the geographical area in which a legal system operates and its laws are enforced.

Law Commission

The Law Commission is a statutory independent body that is required to keep the law in England and Wales under review and recommend reform where it is needed.

Legal Aid

Legal aid is the provision of state funding for the costs of legal advice, assistance and representation.

Legal Professional Privilege ("LPP")

Legal professional privilege attaches to confidential communications between a client and their lawyer for the purpose of seeking or providing legal advice. It also arises in relation to confidential communications between client, lawyer and third parties for the purpose of seeking information or advice in relation to contemplated litigation. Unless the client expressly agrees to waive privilege, disclosure of communications protected by LPP is generally prohibited.

National Police Chiefs' Council ("NPCC")

Body comprised of leads of UK police forces which develops policy and strategy in policing.

Plea and Trial Preparation Hearing ("PTPH")

The first hearing in the Crown Court is called the PTPH. At this hearing, the defendant is asked if they plead guilty or not guilty. Where a not guilty plea is entered, the court gives directions about various matters including the date of the trial, the service of prosecution and defence evidence and the use of special measures.

Practitioner

A person who has a professional role and participates in the court process. This could include barristers, solicitors, court officials, interpreters, registered intermediaries and other associated professionals.

Prejudicial effect

The prejudicial effect of relevant evidence refers to any undue or disproportionate weight it may carry in influencing a jury's finding of fact.

Preparatory hearing

A pre-trial hearing ordered by the judge in complex, lengthy or serious cases to identify legal issues necessary to manage the trial or to assist jurors with their understanding of the case. With permission, both the prosecution and defence may appeal the judge's decision in a preparatory hearing to the Court of Appeal.

Pre-trial hearing

A hearing that takes place prior to the trial.

Probative value

The probative value of relevant evidence refers to the weight it carries in proving or disproving a fact.

Prosecution

The institution and conducting of legal proceedings, usually on behalf of the state, against the defendant in relation to a criminal charge.

Public Interest Immunity ("PII")

Public interest immunity may be claimed by the prosecution in relation to material which, if disclosed, will give rise to a real risk of serious prejudice to an important public interest. This material may only be disclosed to the defence where the court concludes that the interests of the defence outweigh the public interest in withholding it.

Rape and Serious Sexual Offences ("RASSO")

RASSO is an acronym for Rape and Serious Sexual Offences. It is not a legal category and there is no agreed definition of RASSO across the criminal justice system. However, it is a commonly used practical term.

Re-examination

The further questioning of a witness by the party that called the witness to clarify any matters that arose in cross-examination.

Relevance

Evidence will be relevant if assists in proving or disproving a fact that is in issue in the trial. This is sometimes called simple relevance and is distinct from enhanced relevance. Only relevant evidence is admissible. (See also, admissible, probative value, prejudicial effect.)

Sexual Behaviour Evidence ("SBE")

Evidence that relates to the complainant's sexual behaviour or questioning the complainant about their sexual behaviour. It is also sometimes referred to as sexual history evidence.

Sexual Violence Complainants' Advocate ("SVCA")

Between 2018 and 2020, a pilot Sexual Violence Complainants' Advocate scheme was conducted in Northumbria using local specialist solicitors to provide free legal advice and support to adult rape complainants on certain issues.

Stakeholder

The Law Commission uses this as an umbrella term to refer to any person or entity affected by, or simply interested in, a project. This includes, for example, individuals, charities, campaigning groups, think-tanks, academics, lawyers, and professional associations. It also includes bodies and individuals that are associated with the state, such as government departments, independent statutory bodies or appointees, police, prosecutors, parliamentarians, as well as courts, tribunals and the judiciary.

Suspect

A person suspected by the police of involvement in a criminal offence, who is not yet charged.

Testimony

Testimony refers to a spoken or written statement given by a witness called by one of the parties to give evidence.

Third party

This is a generic legal term used to describe an individual who is not directly related to a legal proceeding and is not a party to the proceeding but is nevertheless affected by it.

Third-party material or records

This refers to materials or personal records that are held by a person, organisation or government department other than the investigator or prosecutor.

Twin myths

The twin myths are the misconceptions that the complainant's sexual experience with the defendant or others makes it more likely that the complainant consented to the alleged assault and makes the complainant a less credible witness.

Unused material

Unused material is material held by police because it may be relevant to their investigation, which is not relied on by the prosecution to prove the case against the defendant. Unused material will meet the test for disclosure to the defence under section 3(1) of the Criminal Procedure and Investigations Act 1996, where it "might reasonably be considered capable of undermining the case for the prosecution … or of assisting the case for the [defendant]." (See also, disclosure.)

VAWG

An acronym for violence against women and girls.

Verdict

A decision at the end of a trial as to whether the defendant is guilty or not guilty.

Victim

A person against whom an offence has been committed.

Witness

A witness is someone who, either voluntarily or when summonsed by a court, provides either a written or oral account of what they claim to have knowledge of.

Witness Care Unit (“WCU”)

Unit generally staffed by police who provide information and assistance to witnesses during criminal proceedings.

Witness Service

Service staffed by volunteers which provides support and assistance to witnesses attending court proceedings.

Chapter 1: Introduction

1.1 Rape is among the most serious of all criminal offences. It is punishable by a maximum sentence of life imprisonment. Every year in England and Wales around 128,000 adults – over 90% of them women – report that they are victims of rape or attempted rape.[1] People with mental health problems are at particularly high risk of being victims, and of repeat victimisation.[2] Over 98% of alleged perpetrators are men.[3] Annually there are around 2,000 convictions for rape, which is around 70% of those charged.[4] Whilst the prevalence of these offences has remained steady in the

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1 HM Government, *The end to end rape review report on findings and actions* (June 2021) ("End-to-End Rape Review") p 3; R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report* (HM Government, June 2021) ("End-to-End Rape Review Research Report") p 29, drawing on data from the Crime Survey for England and Wales ("CSEW") year ending March 2018 to the year ending March 2020. The Research Report also notes (p 29) that the true incidence may be higher as not all victims will disclose to CSEW, police or other bodies. Recent data indicates an increase in reporting sexual offences, including rape, to police. ONS, Crime in England and Wales: year ending September 2022 (26 Jan 2023) found that "In the year ending September 2022, sexual offences recorded by the police were at the highest level recorded within a 12-month period (199,021 offences). This was a 22% increase from the year ending March 2020. Of all sexual offences recorded by the police in the year ending September 2022, 35% (70,633) were rape offences (a subcategory of sexual offences). This was a 20% increase from 59,104 in the year ending March 2020." Estimates of the proportion of male victims vary from around 7% to 10%. For example: in a recent review of 502 case files there were 37 (or 7.3%) male victims (HMICFRS, *A joint thematic inspection into the police and CPS response to rape: Phase one: from report to police or CPS decision to take no further action* (July 2021), p 81; in 2019-20 police recorded 41,746 reports of adult rapes, among which there were 2,666 (or 6.3%) male victims (Office for National Statistics ("ONS"), *Sexual offences prevalence and victim characteristics, England and Wales* (18 March 2021), Table 13); the CSEW estimates that in 2021-22 there were 3,580 (or 7.2%) male victims in a total of 49,774 adult rapes, while across all ages there were 6,941 male victims (or 9.8%) in a total of 70,663 rapes (ONS, *Crime in England and Wales: Appendix Tables* (26 Jan 2023), Table 4A). 'Adults' in the data are people aged 16 to 74 years. Measures vary with some data recording rape and other data rape or assault by penetration.

2 B Pettit et al, *At risk, yet dismissed: The criminal victimisation of people with mental health problems* (2013). For example, this major study found (pp 6, 18-19) that people with severe mental illness ("SMI") were five times more likely to be victims of assault than the general population, and women with SMI ten times more likely to be assaulted than women in the general population. Of women with SMI, 40% reported being a victim of rape of or attempted rape as adults, and 10% reported being a victim of sexual assault in the previous year.

3 ONS, *Nature of sexual assault by rape or penetration, England and Wales* (18 March 2021) Tables 3 and 4. The definitions of rape and assault by penetration are explained at para 1.15 and its accompanying footnote below.

4 In the year to September 2021 police recorded 170,973 sexual offences, of which 37% (63,136) were rape. Charges were laid in 2.9% of sexual offences recorded and 1.3% of rapes: ONS, *Crime in England and Wales: year ending September 2021* (27 January 2022), 7; Home Office, *Crime Outcomes in England and Wales, year to September 2021: Data Tables* (27 January 2022), Table 2.2. We are not aware of data recording or analysing reasons for charging decisions. There were 1,439 convictions in 2019-20; 1,109 in 2020-21; and 1,733 in 2021-22, with a conviction rate ranging from 68.3% to 71.2%. In 2016 there were 2,991 convictions, with the conviction rate being 57.6%: End Violence Against Women (EVAW), "CPS data shows survivors still being failed as record numbers of sexual offences are recorded" (21 July 2022) (based on CPS data summary Q4 2021-22, July 2022), which includes a helpful table tracking the last three years and comparing the data to the 2016 targets set after The End-to-End Rape Review. Based on the CPS data summary for Q2 2022-23, covering the three-month period 1 July 2022 – 30 September 2022, conviction

last five years, there has been a marked decrease in the number of prosecutions since 2016/2017.[5]

1.2 The reasons for the level of crime and the conviction rate are many and complex. In this project, rather than focus on increasing conviction rates or decreasing attrition rates,[6] we are looking at the trial process with three goals in mind – goals that have underpinned much of the work that has preceded this project: improving the understanding of consent and sexual harm that informs the substance, practice and application of the law; improving the treatment of complainants; and ensuring that defendants receive a fair trial. However, the project sits within a wider context of decades of work by campaigners, governments, parliaments, courts, police and many others that has tackled the breadth of those complexities and sought to improve justice outcomes for complainants of rape and serious sexual offences.

1.3 This chapter sets out some aspects of that context to show the landscape of many attempts to change the way the criminal justice system operates in sexual offences over the last 50 years, and to make clear the scale of the challenges. That context helps show why there is a case for asking questions about whether the areas we examine in this project may warrant not just incremental change but potentially radical reforms – and a number of the questions we ask in this consultation paper invite views with that in mind.

Structure of this chapter

1.4 The chapter begins by explaining the background to the consultation, the terms of reference that define the scope of the project, and some of the terminology we use throughout. Next, it sketches the development of the modern law to show how reform in this area has been characterised by attempts to overcome longstanding, systematic disadvantage to complainants, while protecting a defendant's right to a fair trial. The third part then outlines some of the specific context and reform challenges that are the subject of this consultation that inform our provisional proposals and the questions we ask about radical reforms. The fourth part then sets out the structure of the consultation paper, providing a brief summary of each chapter.

BACKGROUND, SCOPE, TERMINOLOGY AND METHODS

1.5 This Law Commission project flows directly from a recommendation made in the Government's End-to-End Rape Review ("The End-to-End Rape Review").

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rates have reduced from 69.1% in Q1 2022-23 (which covers the three-month period 1 April 2022 – 30 June 2022) to 61.9%. The conviction volumes reduced by 25.6% from 430 in Q1 2022-23 to 320 in Q2 2022-23. On jury conviction rates see C Thomas, "Juries, rape and sexual offences in the Crown Court 2007-21" [2023] *Criminal Law Review* 200, discussed further at paras 2.46 to 2.53.

5 End-to-End Rape Review Research Report (2021) p 3.

6 We use attrition to refer to incidents of rape or a serious sexual offence that do not ultimately result in either a guilty plea or a trial for the offence, including in circumstances where the complainant withdraws from the criminal justice process. Attrition points include: a victim may choose not to report the crime to police; when it is reported police may take no further action; police may investigate but not refer a case to the CPS; or the CPS may refuse to charge or proceed with a lesser charge (perhaps obtaining a guilty plea). See generally J Gregory and S Lees, "Attrition in rape and sexual assault cases" (1996) 36 *British Journal of Criminology* 1, 3; L Kelly et al, *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study 293, February 2005), 7.

Responding especially to the decline in prosecution and conviction rates since 2016, the Review

> looked at evidence across the system – from reporting to the police to outcomes in court – in order to understand what is happening in cases of adult rape and serious sexual offences being charged, prosecuted and convicted in England and Wales.[7]

Reporting in June 2021, one of its outcomes and actions was a request to the Law Commission to conduct a review of the law relating to evidence in serious sexual offences prosecutions.[8]

1.6 The scope and limits of the project are defined by the terms of reference, which are set out in full in the following paragraphs.

Terms of reference

1.7 The Law Commission will review law, guidance, and practice relating to the trial process in prosecutions of sexual offences and consider the need for reform in order to increase the understanding of consent and sexual harm and improve the treatment of victims while ensuring that accused persons receive a fair trial. The project will consider, but is not limited to, the following:

(1) current law and guidance designed to counter misconceptions about sexual harm ("rape myths") of jurors in relation to the credibility, behaviour and experience of complainants and defendants in cases involving a sexual offence. In particular, the review will consider mechanisms to counter any such misconceptions including the current use of judicial directions to the jury, whether the prosecution should be permitted to rely on expert evidence and any alternative means of improving juror education;

(2) the need for reform of the provisions restricting the use of evidence of complainants' prior sexual history in section 41 of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), including:

(a) whether any of the individual gateways require reform;

(b) the impact of new forms of sexual history evidence via social media, apps and instant messaging;

(c) whether the complainant should be a party to the application to admit evidence of their sexual history; and

(d) whether a right of appeal should be introduced in relation to decisions under section 41 of the YJCEA 1999;

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7 The End-to-End Rape Review (2021) paras 1, 3-5.

8 Above, p 17 and para 114.

(3) the need for reform of the rules and procedure governing the pre-trial disclosure of complainants' prior medical and counselling records and the admission of such records at trial, including:

(a) whether the complainant should be a party to the application to admit evidence of their prior medical and counselling records;

(b) whether confidential communications between a complainant and a suitably qualified medical or counselling professional for a therapeutic purpose should be subject to privilege;

(4) the need for reform of the rules and procedure governing the admissibility of evidence of the character of the defendant and complainant, and judicial directions about this;

(5) the need for reform of the legislative framework governing the use of special measures for complainants, including alternative arrangements for giving evidence in trials of sexual offences.

1.8 The project will not consider:

(6) the trial process in respect of sexual offences against children;

(7) reform of the law relating to offences under the Sexual Offences (Amendment) Act 1992 or contempt of court where the identity of a complainant or victim of a sexual offence has been disclosed, which will be considered in the Law Commission's upcoming project on contempt of court;

(8) reform of the definition of consent in sections 74-77 of the Sexual Offences Act 2003;

(9) reform of sexual offences themselves, including offences in the Sexual Offences Act 2003;

(10) extraction of evidence from complainants' devices (although the use of such evidence will be considered if it falls into categories (2) or (3) above (sexual history evidence, or medical or counselling records).

1.9 As the terms of reference indicate, our review is limited to the criminal trial process and, within that, focussed significantly on a specific set of issues. Among the points that will have recurring relevance throughout the consultation paper is that the defendant's right to a fair trial can be protected without perpetuating rape myths.[9] It should be noted, however, that whilst changes in the trial process may create positive change elsewhere in the criminal justice process, they cannot and will not resolve all the challenges that have been identified in the raft of reviews that have sought to improve the way that rape and serious sexual offences are handled in the criminal justice system.

[9] See further at paras 1.79 to 1.87 below.

Terminology

1.10 The terminology used throughout this consultation paper has been chosen to reflect and be consistent with the legal process and with the stage of the process we are concerned with, which is the trial. In particular:

- We will generally refer to a "complainant". It is important to note that the use of this terminology is not intended to convey any opinion regarding the truth of an allegation that has been made. It simply means the allegation has not yet been proven in court. In the event that there has been a conviction we will generally use the word "victim".

- We will generally refer to a "defendant". This reflects the fact that a person has been charged with the offence and is to appear in court.[10] This reflects the presumption of innocence of the defendant in criminal cases. If convicted, the term "offender" may be used.

1.11 In making these terminology choices – and especially that of complainant – we do not mean in any way to diminish the trauma that is wrought by rape and serious sexual offences. The term victim (rather than complainant) is often used when referring to complainants, acknowledging that the absence of a conviction does not mean there has not been a rape. It is also common to refer to complainants and victims as survivors or victim-survivors. These are logical and respectful terms that acknowledge that trauma has been suffered, survived and may be ongoing; where we use the term "victim" we have that in mind. It is, very often, plainly right to speak of victims rather than complainants. Rapes occur but go unreported to police and, even when reported, investigation may not result in a prosecution.[11] When we do use the term victim prior to conviction, we do so meaning not that every complainant is a victim, but simply to refer to a person who has been a victim of rape. For example, we might describe criminal trials as posing a risk of causing further trauma to victims of rape. However, we generally align our terminology with the legal process and use the term complainant because it respects the presumption of innocence, and best serves the technical requirements and need for clarity as we consider what might be reformed and how. In doing so we hope that the reforms we will ultimately recommend will better serve all victims.

1.12 The consultation paper uses gender-neutral language, which is a standard style convention in Law Commission publications. In doing so we aim to be inclusive rather than exclusive throughout. We recognise and acknowledge the gendered nature of rape and the vast prevalence of women as victims and men as perpetrators of sexual violence. We also recognise that there are significant numbers of men who are victims of rape and sexual violence.

1.13 The project is concerned with rape and serious sexual offences, or "RASSO" in its acronym form.

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[10] Prior to charge it would be appropriate to use the term "suspect". We do not use the term "the accused" as that could potentially apply to a person before or after charge.

[11] J Molina and S Poppleton, *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020), p 9.

1.14 RASSO is not a legally-defined term and, as the research team for the End-to-End Rape Review pointed out, there is no agreed definition of RASSO across the criminal justice system.[12] It is an important practical term because the Crown Prosecution Service ("CPS") has RASSO units which house specialist expertise and there is specific RASSO prosecution guidance.[13] It is also the framework within which there is joint police and prosecution working to respond most effectively to RASSO with fair investigations and prosecutions, strong case building, and support for victims.[14] Notwithstanding the lack of uniformity in defining RASSO, it is appropriate that we make clear how we are using the term "serious sexual offences" in this consultation paper.

1.15 Throughout the consultation paper we will often refer to rape as the relevant offence in our discussion of the areas we cover. We do so for simplicity and clarity and because that is the term most frequently used in the literature we refer to. However, unless we indicate otherwise, our references to rape should be understood as encompassing rape and other serious sexual offences. Although there are clear and important differences between offences of rape and, for example, assault by penetration, the matters we address throughout this consultation paper generally apply to prosecutions for rape in the same way they apply to other serious sexual offences.[15]

1.16 We generally use "sexual offences" in the same way that the term is defined under section 62 of the YJCEA 1999 to mean any offence under:

(1) Part 1 of the Sexual Offences Act 2003 ("SOA 2003"), or any relevant superseded offence; and

(2) Section 2 of the Modern Slavery Act 2015 (human trafficking) committed with a view to exploitation that consists of or includes behaviour within section 3(3) of that Act (sexual exploitation).

We do not, however, consider any sexual offences against children as our terms of reference exclude consideration of the trial process relating to those offences.

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12 End-to-End Rape Review Research Report (2021) p 6.

13 Crown Prosecution Service ("CPS"), *Rape and Sexual Offences - Overview and index of 2021 updated guidance* (27 May 2022). On the establishment and review of RASSO units, see HMCPSI, *Thematic Review of the CPS Rape and Serious Sexual Offences Units* (February 2016); CPS, *Response to HMCPSI Thematic Review of RASSO units* (February 2016).

14 CPS, *Police-CPS Joint National RASSO (Rape and Serious Sexual Offences) Action Plan 2021* (22 January 2021).

15 Rape and assault by penetration are criminalised and defined under the Sexual Offences Act ("SOA") 2003. A key distinction between the offences is that an element of rape (s 1) is that a person "intentionally penetrates the vagina, anus or mouth of another person with his penis", whereas an element of assault by penetration (s 2) is that the offender "intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else".

1.17 By "serious sexual offences" we mean sexual offences that would be prosecuted in the Crown Court.[16] Serious sexual offences would include, for example, the following offences under the SOA 2003 and attempts to commit these offences:

- assault by penetration, which is an indictable offence under section 2;
- sexual assaults prosecuted as indictable offences under section 3;[17]
- causing a person to engage in sexual activity without consent prosecuted as an indictable offence under section 4;[18]
- voyeurism prosecuted as an indictable offence under sections 67 or 67A;[19] and
- offences against persons with a mental disorder, including offences involving care workers, prosecuted as an indictable offence under sections 30 to 41.[20]

1.18 Our discussion is not limited to consideration only of serious sexual offences as defined above. There may be offences that are not sexual offences under the YJCEA 1999 definition, but which would go to the Crown Court and would engage some of the issues we consider. For example, controlling or coercive behaviour is an offence under section 76 of the Serious Crime Act 2015 and it does not require proof of a sexual element.[21] However, the offence may be committed in circumstances where there is a sexual component to the conduct. Although a defendant may not have been charged with a sexual offence (such as sexual assault), issues we discuss in the consultation paper – such as special measures or the admissibility of sexual behaviour evidence (often referred to as sexual history evidence) – may well be applicable to such an offence in these circumstances.

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16 The most serious sexual offences (including rape) must be tried in the Crown Court as they are indictable only offences. Other sexual offences will be "either way" offences; these may be prosecuted either in the magistrates' court as a summary offence or may be sent to the Crown Court for trial on indictment if the allegations are sufficiently serious that the magistrates' court would not have adequate sentencing powers. The Code for Crown Prosecutors sets out the factors prosecutors must consider when selecting charges: CPS, *Code for Crown Prosecutors* (October 2018), para 6.1.

17 A sexual assault is committed where a person (A) intentionally touches another person (B), the touching is sexual, B does not consent to the touching, and A does not reasonably believe B consents: SOA 2003, s 3(1). On summary conviction the offence is punishable by up to 6 months' imprisonment and/or a fine; on indictment it is punishable by up to ten years' imprisonment: s 3(4).

18 Process and punishment will depend on what the offence involved. In the most serious circumstances this will be an indictable offence punishable by imprisonment for life: s 4(4). In other circumstances, on summary conviction the offence is punishable by up to 6 months' imprisonment and/or a fine; on indictment it is punishable by up to ten years' imprisonment: s 4(5).

19 On indictment voyeurism offences are punishable by up to two years' imprisonment: SOA 2003, ss 67(5)(b), 67A(4)(b). On summary conviction the offence is punishable by up to 6 months' imprisonment and/or a fine: ss 67(5)(a), 67A(4)(a), 67A(5).

20 Most offences in these sections are punishable by a maximum sentence of 10 or 14 years' imprisonment on indictment (SOA 2003, ss 30-39), with some punishable by a maximum sentence of seven years' imprisonment on indictment (ss 40-41). On summary conviction the maximum sentences are six months' imprisonment and/or a fine.

21 Serious Crime Act 2015, s 76.

1.19 Where there are distinctions to be made between terms or specific offences then we will make that clear. Where consultees are of the view that further distinctions should be made or that other offences should also be engaged then responses may draw attention to that.

1.20 The consultation paper also includes a glossary that explains other terms and acronyms we use throughout the consultation paper.

Methods

1.21 In preparing this consultation paper we have reviewed law, procedure, and practice in areas that are covered by our terms of reference. We have been informed by academic research, the reports of reviews and inspections, studies of the law in other jurisdictions, and extensive engagement with stakeholders.

1.22 In preparing this consultation paper we have benefited from being able to receive the views of many individuals and organisations. We have generally identified by name the individuals or organisations or bodies with whom we met. It should be noted that unless a comment is stated as indicating the views of an organisation, the views expressed are those of individuals and may not represent an organisational or institutional view. Throughout the consultation paper we endeavour to show the content and scope of the views and experience reported to us in that pre-consultation engagement.

1.23 We should make clear that when we refer to the view given by a judge, for instance about how a rule works in practice, this is a personal view. We do not assume that this view necessarily reflects the views of other judges. Further, it follows that the view of one judge does not indicate the view of the senior judiciary generally and it is not therefore to be taken as an indication of the official position of the judiciary.

1.24 Where we have examined the law in other jurisdictions, the comparators have been chosen because they have their heritage in the laws of England and Wales (thus there is common ground in approaches). Where we look at legislative reforms in specific chapters then the jurisdictions selected for comparison have attempted in different ways to address problems that are common to all.

1.25 In this paper we present consultation questions across the full range of matters covered in our terms of reference. Some questions include provisional proposals for reform, which may be used at times to focus attention and responses. It should be noted that provisional proposals are not recommendations; rather, they are provisional views we have reached based on the work above. That we have made a provisional proposal does not mean that the Commission will adopt that as a recommendation in our final report. The responses we receive in the consultation process will inform the recommendations we make in the final report after the consultation.

THE MODERN LAW: A PRODUCT OF THE PAST

1.26 The development of the law governing rape is primarily a history of changes in the ways complainants have been viewed and treated.

Historical anchors

1.27 The archetypal starting point is Sir Mathew Hale's injunction first published in 1736 that "it must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[22] There was, continued the Lord Chief Justice, a need to:

> be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily caried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.[23]

1.28 This both reflected and, in its influence on the development of legal principles, entrenched in law beliefs about rape and about women: rape is not like other crimes – due to the nature of the crime and the nature of complainants there should be special caution and scrutiny applied before an allegation is to be believed.[24]

1.29 This endured. In England and Wales, the Court of Appeal in 1968 stated in *Henry* that the trial judge should point out to a jury that:

> Human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.[25]

1.30 It was not until the later part of the 20th century that the special caution began to be dismantled. This was an international phenomenon, with cross-fertilisation between jurisdictions in both analysis and law.

Reform in the 1970s

1.31 Rape law was reformed substantially in the United States in the 1970s. Among many steps taken to tackle rape and support victims, a body of internationally recognised feminist scholarly and campaigning work sought to identify and remedy women's systemic disadvantage in rape laws.[26]

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22 Sir Mathew Hale, *History of Pleas of the Crown* (1736) p 635.

23 Above, p 636.

24 See for example *People v Rincon-Pineda* (1975) 14 Cal 3d 864 at 873-877, where the Supreme Court of California discussed the long and substantial influence of Hale's words on corroboration warnings. In the UK, Hale's influence on the law that rendered rape legal within marriage was documented by the House of Lords in *R v R* [1992] 1 AC 599. The long history and extensive literature on how stereotypes and assumptions about women's sexuality have influenced rape law is outlined by J Conaghan and Y Russell, "Rape myths, law, and feminist research: 'myths about myths'?" (2014) 22 *Feminist Legal Studies* 25, 40-41.

25 (1968) 53 Cr App R 150, 153; see also Corroboration of Evidence in Criminal Trials (1990) Law Commission Working Paper No 115, pp 9-10, 60-62, 88-93 (on history of corroboration warnings in sexual offences cases in England and Wales), 115-118 (on the historical development in the US).

26 These included major works with a broad sweep such as S Brownmiller, *Against Our Will: Men, Women and Rape* (1975) as well as work specifically aimed at law reform, including: C LeGrand, "Rape and Rape Laws:

1.32 Rape, it was clear, had long been treated differently from other crimes. Berger set out some of the differences that were partly historical and partly then contemporary. It was historically a sex-specific crime (by men, against women), with the absence of consent at its core, though husbands were immune from prosecution. Punishments were harsh. Juries were instructed to treat the complainant's evidence with caution. The chastity of the victim was relevant evidence. Corroborative evidence was required, unlike other crimes where – as a leading evidence text explained – "the word of the victim of a robbery, assault, or any other crime may alone … sustain a conviction".[27] As Berger put it, "where rape is involved the rules of the game are simply different."[28]

1.33 In England and Wales, landmark reforms occurred in the same decade. The Home Office established the Advisory Group on the Law of Rape, chaired by The Hon Mrs Justice Heilbron DBE, following the decision in *DPP v Morgan*.[29] The resulting Heilbron Report included recommendations for victim anonymity and limiting the use of sexual behaviour evidence.[30] These recommendations were implemented by the Sexual Offences (Amendment) Act 1976.

1.34 These changes marked the beginning of significant reforms in rape law. During the next ten years work was done to improve policing responses,[31] but, as research would show – over and over again – complainants continued to be treated as unreliable. As our 1990 Working Paper on Corroboration of Evidence in Criminal Trials made clear, more than 20 years after *Henry* (above), directions to juries could still be troubling. The following example from 1988 was not criticised by the Court of Appeal:

> The wisdom of the ages in the courts [has] shown that there are very great difficulties and dangers in regard to sexual crime. The reason is this, that almost invariably there are only two persons involved, no direct witnesses, and complainants can give false or merely mistaken evidence for different reasons. Sometimes they can deliberately invent an occasion, on others they may shield somebody they do not wish to be found a culprit, they may exaggerate or fantasise, and it is not always easy for the defendant to prove, as it were, a negative.[32]

Sexism in Society and Law" (1973) 61 *California Law Review* 919; V Berger, "Man's trial, woman's tribulation: rape cases in the courtroom" (1977) 77 *Columbia Law Review* 1; L Letwin, "Unchaste Character, Ideology, and the California Rape Evidence Laws" (1980) 54 *Southern California Law Review* 35; H Galvin, "Shielding rape victims in the state and federal courts: A proposal for the second decade" (1986) 70 *Minnesota Law Review* 763.

27 V Berger, "Man's trial, woman's tribulation: rape cases in the courtroom" (1977) 77 *Columbia Law Review* 1, 7-10; citing *Wigmore on Evidence*, 3rd ed (1940) at 259.

28 V Berger, "Man's trial, woman's tribulation: rape cases in the courtroom" (1977) 77 *Columbia Law Review* 1, 10.

29 In *Morgan* [1976] AC 182, in particularly shocking circumstances, the defendants had claimed that they had an honest belief the victim had consented and so they could not be guilty of rape. The House of Lords agreed, holding that an honest belief in consent would absolve a defendant from liability, rather than a belief needing to be both honest and reasonable. However, the convictions stood as it was also held that on the evidence a jury would not have accepted that they held an honest belief in consent.

30 Report of the Advisory Group on the Law of Rape (1975) Cmnd 6352 ("The Heilbron Report").

31 For example, Home Office Circular 69/1986.

32 *Willoughby* (1988) Cr App R 91, 93; Corroboration of Evidence in Criminal Trials (1990) Law Commission Working Paper No 115, p 10.

1.35 Key among the challenges was the operation and persistence of what were called "rape myths". Such myths infused not just criminal trials (as some of the above discussion already indicates) but every part of the criminal justice process, from reporting to recording, investigation, charge, trial, and verdict.

Rape myths and misconceptions

1.36 Myths and misconceptions about rape are addressed in detail in Chapter 2 but it will be helpful to outline them here because many attempts at reform have been directed towards combatting or containing them and their deployment in the courts.

1.37 A vast body of work, first emerging in the 1970s, has sought to explore and explain how attitudes and assumptions affect the criminal justice process and its outcomes.[33] LeGrand's 1973 description is short and to the point:

> There exists a great network of laws and attitudes based on the assumptions that false rape complaints are plentiful and that innocent men can easily be convicted of rape. As the facts show, both these assumptions are generally unfounded. An entire legal framework of myths and stereotyped preconceptions unrelated to reality has been constructed.[34]

1.38 There is an extensive literature on what would later be referred to as "rape myths". The term has variously been defined as being used to describe:

- "prejudicial, stereotyped and false beliefs",[35]
- "attitudes and beliefs that are generally false but are widely and persistently held",[36] or
- "descriptive or prescriptive beliefs about sexual aggression (ie about its scope, causes, context, and consequences) that serve to deny, downplay or justify sexually aggressive behavior that men commit against women".[37]

1.39 The content of the myths and their place in legal argument was articulated early on. A good example of this is found in the work of Holmstrom and Burgess, which was first published in 1978 and later cited at length in the Supreme Court of Canada in the

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33 Earlier works include those cited at note 26 above. Subsequent work is cited throughout this chapter.

34 C LeGrand, "Rape and Rape Laws: Sexism in Society and Law" (1973) 61 *California Law Review* 919, 941; see also J R Schwendinger and H Schwendinger, "Rape myths: In legal, theoretical and everyday practice" (1974) 1 *Crime and Social Justice* 18.

35 M Burt, "Cultural myths and support for rape" (1980) 38 *Journal of Personality and Social Psychology* 217, 217.

36 K A Lonsway and L F Fitzgerald, "Rape myths" (1994) 18 *Psychology of Women* 133, 134, cited in J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) p 34.

37 H Gerger et al, "The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and validation in German and English" (2007) 33 *Aggressive Behaviour* 422, cited in J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) p 34.

dissent by L'Heureux-Dubé J in *Seaboyer*.[38] Holmstrom and Burgess described some of the myths and the categories they fell into in the following way:

> *Struggle and force:* … There is a myth that a woman cannot be raped against her will, that if she really wants to prevent a rape she can.
>
> *Knowing the defendant:* … There is a myth that rapists are strangers who leap out of bushes to attack their victims …. the view that interaction between friends or between relatives does not result in rape is prevalent.
>
> *Sexual reputation: …* [Women] are categorized into one-dimensional types. They are good or they are bad. A sexually active man will be perceived as a normal man. A sexually active woman will be perceived as a bad woman. If she consented to sex before, so the argument goes, the chances are high that she consented to sex this time, too.
>
> *General character:* … [A]lmost anything other than completely proper and respectable behaviour can be used [to discredit the rape victim's general character]: food stamps, criminal record, mental problems, psychiatric history, alcohol use, drug use, absence from school, religious views, and vague innuendos.
>
> *Emotionality of females*. … The expectation is that if a woman is raped, she will get hysterical during the event and she will be visibly upset afterward. If she is able to "retain her cool," then people assume that "nothing happened" – that she was not raped.
>
> *Reporting rape.* Two conflicting expectations exist concerning the reporting of rape. One is that if a woman is raped she will be too upset and ashamed to report it, and hence most of the time this crime goes unreported. The other is that if a woman is raped she will be so upset that she will report it. Both expectations exist simultaneously.[39]

1.40 In the years since, there has been extensive research on rape myths and their effects. There is, argue Bohner et al, a "general consensus" about:

> what rape myths usually contain [and that these myths] affect subjective definitions of what constitutes a 'typical rape', contain problematic assumptions about the likely behaviour of perpetrators and victims, and paint a distorted picture of the antecedents and consequences of rape.[40]

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38 L L Holmstrom and A W Burgess, *The victim of rape: institutional reactions* (New Ed 1983; first pub 1978); *R v Seaboyer* [1991] 2 SCR 577 at 651-653.

39 L L Holmstrom and A W Burgess, *The victim of rape: institutional reactions* (New Ed 1983; first pub 1978) pp 175-177, 183-184, 186-188.

40 G Bohner et al, "Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator" in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) pp 17-45, 18-19.

1.41 Rape myths, they argue, break down into four categories or "general types": beliefs that blame the victim for their rape; disbelief in claims of rape; beliefs that tend to exonerate the perpetrator; and beliefs that only certain types of women are raped.[41]

1.42 In Chapter 2 we provide a detailed discussion of rape myths and misconceptions, their effects, and the strategies that have been used to address them.

1.43 The effects that myths have on juries have been the subject of considerable attention. A significant body of empirical literature has found "clear evidence" that rape myths have an impact on juror decision-making.[42] On one view there is "overwhelming evidence."[43] There is disagreement about the extent to which myths have an effect, and some myths may be more influential than others, but certainly the evidence points to some impact.[44] Among the work that has continued to move debates forward is that by Professor Cheryl Thomas, who has been the sole researcher permitted to work with juries in England and Wales in recent years and has argued that myths are less prevalent among juries than previously suggested.[45] Recent work has also sought to examine rape myths that operate in relation to male victims of rape.[46] In Chapter 2 we look in more detail at the evidence in relation to the ways juries are influenced by rape myths, concluding that there are good reasons to think that there is a risk of such influence that should be addressed, and consider the case for reforms to tackle malign effects.[47]

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41 S Dinos, N Burrowes, K Hammond and C Cunliffe, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 37, citing G Bohner et al, "Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator" in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (2009), pp 17-45. More recently see G Bohner et al, "Modern Myths About Sexual Aggression: New Methods and Findings" in M A H Horvath and J M Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (2023), pp 159-171.

42 S Dinos, N Burrowes, K Hammond and C Cunliffe, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 47.

43 F Leverick, "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255, 273.

44 For example: L Ellison and V Munro, "Reacting to rape: Exploring mock jurors' assessments of complainant credibility" (2009) 49 *British Journal of Criminology* 202; C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987; F Leverick, "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255; E Daly et al, "Myths about myths? A comment on Thomas (2020) and the question of jury rape myth acceptance" (2023) 7 *Journal of Gender-Based Violence* 189.

45 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987. This work and the ensuing debates are discussed in more detail at paras 2.37 to 2.53.

46 P Rumney, "Male rape in the courtroom: issues and concerns" [2001] *Criminal Law Review* 205; P Rumney, "Policing Male Rape and Sexual Assault" (2008) 72 *Journal of Criminal Law* 67; C DeJong, S J Morgan and A Cox, "Male rape in context: measures of intolerance and support for male rape myths (MRMs)" (2020) 33 *Criminal Justice Studies* 195; B Hine et al, "Mapping the landscape of male-on-male rape in London: An analysis of cases involving male victims reported between 2005 and 2012" (2021) 22 *Police Practice and Research* 109; B Hine, A Murphy and J Churchyard, "Development and validation of the Male Rape Myth Acceptance Scale (MRMAS)" (2021) 7 *Heliyon* E07421. In pre-consultation meetings Dr Siobhan Weare (Lancaster University) and Dr Dominic Willmott (Loughborough University) spoke to preliminary findings of research that will be published in due course.

47 See paras 2.37 to 2.53.

1.44 As the following sections show, many reforms to law and practice across the past five decades have sought to change the substance and process of the law so that rape myths and misconceptions do not contaminate the criminal justice system, of which criminal trials are a part. As these sections will also show, however, although there has been meaningful change over time, myths and misconceptions are tenacious in their hold.[48] It will also be apparent throughout this consultation paper that such tenacity is broadly based and can be apparent in different ways. For example, when they are tackled in one area (such as in the enactment of rape shield laws to limit irrelevant, intrusive, and prejudicial inquiries into previous sexual behaviour) then their influence or deployment may appear in another (such as in the use of counselling or therapy records).[49]

Modernising criminal justice

1.45 The 1990s saw several major developments in criminal justice, of which rape law reforms were a part. Three are particularly noteworthy.[50]

1.46 First, the Royal Commission on Criminal Justice ("Runciman Commission") published its report in 1993. Much of the focus was on investigation and trial matters with a view to preventing miscarriages of justice but there were significant recommendations that sought to treat victims of rape and domestic abuse with care and respect.[51] The present regime for disclosing personal records also has its genesis in the Runciman Commission, which made recommendations for the statutory disclosure scheme that was implemented by the Criminal Procedure and Investigations Act 1996.[52]

1.47 Notable among the Runciman recommendations was one that went directly to combatting the influence of rape myths. It is an exemplar of the historically different treatment of complainants in rape cases. The Runciman report sets out the position at the time:

> In England and Wales as a general rule the evidence of a single witness is sufficient to prove any issue. Juries and magistrates may convict on the evidence of one competent witness alone.[53]

1.48 The report explained that there were two sets of exceptions to this. First, there was a limited range of cases where corroboration was required, usually under statute. These

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48 We use the phrase "myths and misconceptions" rather than "rape myths". The former is more appropriate because it reflects the premises on which the law has developed and the analytical framework that led to the earlier major reforms, and acknowledges how much has been achieved. It also captures more nuanced ground where it would be clearly wrong to characterise a belief or attitude as a myth, but it may still be based on a misunderstanding or assumption that is not consistent with the evidence.

49 See further paras 3.69 to 3.75.

50 A wider set of developments is discussed by Baroness Vivian Stern CBE, *The Stern Review: Independent review into how rape complaints are handled by public authorities in England and Wales* ("Stern Review") Government Equalities Office and Home Office (2010) p 38.

51 The Royal Commission on Criminal Justice Report (1993) Cm 2263 ("Runciman Commission") Recommendations 196-207.

52 Runciman Commission (1993) pp 91-97, Recommendations 122-131, esp 124-128; Criminal Procedure and Investigations Act 1996, Parts 1 and 2.

53 Runciman Commission (1993) p 63.

included cases of perjury, procuration offences under the Sexual Offences Act 1956, and treason. Unless there was corroboration, there could be no conviction. Secondly, there were cases where corroboration was not required, but a warning was required. These included rape cases:

> At common law the judge must warn the jury that it is dangerous to convict on the uncorroborated evidence of an accomplice or on the uncorroborated evidence of a complainant in a sexual case. The judge must then go on to direct the jury that if, after hearing the warning, they nevertheless conclude that the witness is speaking the truth, they are entitled to convict even if there is no corroboration.[54]

1.49 Three years earlier, in 1990, the Law Commission had recommended the abolition of the corroboration rules. Our reasoning in relation to rape cases included:

> We do not see why charges of sexual offences should be "significantly more difficult to answer than charges of other offences committed in private and which leave no trace of their occurrence". … The recital by the judge of the reasons for the existence of the rule in sexual cases [as explained in directions such as those in *Henry* and *Willoughby*, above] is insulting to women in general, and to complainants in particular, when those reasons are not based on demonstrated fact, and irrespective of the particular facts of the case.[55]

1.50 The Runciman Commission "readily endorse[d]" the Law Commission's recommendation to abolish the corroboration rules, and made a recommendation to that effect.[56] This was implemented by the Criminal Justice and Public Order Act 1994.[57] However, this did not prevent a corroboration warning being given by a judge; it only stopped it being compulsory. The position changed soon after with further limitations when in 1995 the Court of Appeal held that a corroboration warning cannot be given unless there is an evidential basis for doing so.[58]

1.51 It was still clear at this time, however, that there were serious flaws in rape investigation and prosecution, with high levels of attrition and low levels of prosecution

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54 Runciman Commission (1993) p 63.

55 Corroboration of Evidence in Criminal Trials (1990) Law Commission Working Paper No 115, p 60. The quotation within the report is from I Dennis, "Corroboration Requirements Reconsidered" [1984] *Criminal Law Review* 316, 327.

56 Runciman Commission (1993) pp 63, 66, 127-128, Recommendation 195; Corroboration of Evidence in Criminal Trials (1991) Law Com No 202. The Runciman Commission did not explicitly adopt the Law Commission's specific reasoning on corroboration warnings in sex offence cases but instead referred to the core of the Law Commission's reasons for the overarching change: the existing corroboration laws were "inflexible, complex and productive of anomalies": Runciman Commission, p 127; Law Commission, pp 4-5.

57 Section 32. The recommendation also applied to the procuration rules, which were abolished under s 31.

58 *R v Makanjuola, R v Easton* [1995] 1 WLR 1348. Importantly, the Court held that the mere fact that a defendant gives evidence that disputes a complainant's evidence will not be sufficient to provide the requisite evidential basis. See also P Lewis, "A comparative examination of corroboration and caution warnings in prosecutions of sexual offences" [2006] *Criminal Law Review* 889. Professor Lewis is the Commissioner for Criminal Law at the Law Commission of England and Wales, and lead Commissioner for this project.

and conviction.[59] Academic and government research repeatedly exposed this over several years. Lees' book *Carnal Knowledge: Rape on Trial* was published in 1996. It examined the experience of victims, the consideration of reports by police and the CPS, and trials. It exposed failures at every stage. These included the fact that sexual behaviour evidence was routinely ruled admissible, in spite of the 1976 amendments that sought to limit its introduction.[60] Temkin's *Rape and the Legal Process* made similarly critical findings.[61]

1.52 Secondly, in 1998 the new Labour government's manifesto commitment to review rape laws resulted in the report Speaking Up For Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable Or Intimidated Witnesses in the Criminal Justice System ("Speaking up for Justice"). The recommendations of the report included the provision of special measures for witnesses (including victims of rape), further restrictions on the admissibility of sexual behaviour evidence, and a prohibition on the defendant personally cross-examining a victim. A Home Office study published shortly after this found, like previous research, problems including high attrition rates, harrowing experiences for complainants, and a need for better support for complainants.[62]

1.53 The recommendations of Speaking Up For Justice were implemented by the YJCEA 1999 and broadly set out the law as it still stands.[63] Provisions of this Act are dealt with in detail in this consultation paper.[64]

1.54 Thirdly, the substantive law of sexual offences underwent a major review from 1999 to 2002, resulting in the enactment of the SOA 2003.[65] Smith and Skinner note the significance of the Act for tackling rape myths in its clarification of the meaning of consent and the consideration of the defendant's actions.[66] In particular, the Act introduced a definition of consent as "agree[ment] by choice, and the person has the freedom and capacity to make that choice".[67] This was accompanied by a series of presumptions that in certain circumstances the complainant is to be taken not to have consented, and the defendant is to be taken not to have reasonably believed the complainant consented, unless sufficient evidence is adduced to raise these matters

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59 S Grace, C Lloyd and L J F Smith, *Rape: from recording to conviction,* (Home Office Research and Planning Unit Paper 71, 1992).

60 S Lees, *Carnal Knowledge: Rape on Trial* (1996; revised ed 2002).

61 J Temkin, *Rape and the Legal Process* (1996).

62 J Harris and S Grace, *A question of evidence? Investigating and prosecuting rape in the 1990s* (Home Office Research Study 196, 1999).

63 Youth Justice and Criminal Evidence Act 1999, ss 16 to 33 (special measures), ss 34 to 40 (no cross-examination by the defendant), s 41 (restrictions on use of sexual behaviour evidence).

64 See Chapter 4.

65 Home Office, *Setting the boundaries: reforming the law on sex offences* (2000); Home Office, *Review of Part 1 of the Sex Offenders Act 1997: A Consultation Paper* (2001); Home Office, *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences* (2002) Cm 5668.

66 O Smith and T Skinner, "How rape myths are used and challenged in rape and sexual assault trials" (2017) 26 *Social & Legal Studies* 441, 445.

67 SOA 2003, s 74.

as an issue.[68] The circumstances include, for example, any situation where a complainant was asleep or unconscious, or where a person was using violence against the complainant or another person at the time of the act or immediately before it, or causing the complainant to fear violence would be used against them or another person.[69] Smith and Skinner explain that these provisions aimed to help ensure that the acts of the defendant, and not the victim, were scrutinised, and that the Act "has been largely welcomed". However, drawing on McGlynn's work, they argue it did not result in higher conviction rates or increased accountability and "extralegal factors" – rape myths – were still deployed in trials, sometimes with increased significance.[70]

Law on the books and law in practice

1.55 As the law emerged and then settled into its current form there has been significant attention to whether, as the phrase goes, the law in practice is consistent with the law on the books. Much of this is driven by the ever-present data about the attrition rate from incidence of rape to reporting, recording, prosecution, and conviction.

1.56 A second edition of Temkin's major study, *Rape and the Legal Process*, was published in 2002. On the evidential issues she concluded that there have been improvements, but also reason for caution:

> The last decade has witnessed a sea change in judicial perceptions of sexual offences. As a result of some legislative intervention and the combined efforts of the women's and victims' movements, judicial attitudes appear to have moved forward so that victims of sexual offending are no longer routinely perceived as liars or vindictive trouble-makers. The evidential rules surrounding sexual offences have, in some respects, developed to reflect this. However, the progress must be weighed against [some regressive movement]. It remains to be seen to what extent the YJCEA 1999 has resolved the problem of sexual history evidence, but the early signs are not entirely promising.[71]

1.57 A Home Office study in 2006 (co-authored by Temkin) made clear that she was right to be concerned about the effects of the sexual behaviour provisions contained in section 41 of the YJCEA 1999. An analysis of case files found that a section 41 application to admit sexual history evidence was made in around 25% of trials, and two-thirds of those applications were successful.[72] In trial observations, sexual history

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68 SOA 2003, s 75.

69 SOA 2003, s 75(2)(a)-(c).

70 O Smith and T Skinner, "How rape myths are used and challenged in rape and sexual assault trials" (2017) 26 *Social & Legal Studies* 441, 445, citing C McGlynn, Feminist activism and rape law reform in England Wales: a Sisyphean struggle?" in C McGlynn and V Munro, *Rethinking Rape Law: International and Comparative Perspectives* (2010). They cite McGlynn's argument that a jury's view about whether the defendant's belief in consent was reasonable would be influenced by extralegal factors when looking at the behaviour of the complainant.

71 J Temkin, *Rape and the Legal Process* 2nd ed (2002) p 267.

72 L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office, 2006) pp 23, 28. The authors also state (pp 23-24, 28) that applications being made at trial meant that procedural rules were not being followed. However, we note that, for instance, making an application during the trial due to prosecution late disclosure or in response to

was raised in around three-quarters of cases, including in trials where there was no section 41 application.[73] The authors noted, however, that "there were few examples of the lengthy and humiliating questioning" that had previously been documented.[74]

1.58 There continued to be concerns about the investigation and prosecution of rape, with further research and policy studies and reviews documenting some improvements but an ongoing struggle against the influence of rape myths in policing and prosecution.[75]

1.59 In 2010 *The Stern Review: Independent review into how rape complaints are handled by public authorities in England and Wales* ("Stern Review") undertook a wide-ranging review of how rape complaints were handled by public authorities in England and Wales.[76] The recommendations were largely directed at investigation and prosecution processes, though there were some observations about trial issues. The research report for the review concluded that, though there was some conflicting evidence, section 41 of the YJCEA 1999 had "limited effectiveness", and that this was consistent with the patterns in other jurisdictions not only with regard to provisions that sought to limit sexual history evidence but also more generally in wider rape law reforms.[77] They also noted the research on mock jurors, by Ellison and Munro, which found that some expert evidence may help reduce the effect of rape myths in jury deliberations, though not in all areas.[78]

Is rape treated differently from other crimes?

1.60 There have been longstanding questions about the extent to which rape is treated differently from other crimes, such as robbery. Clearly, it was treated differently historically and many of the reforms have sought to shape the law in ways that bring it

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evidence that emerges from a witness would not amount to a breach of the procedural rules: Criminal Procedure Rules ("CrPR") r 22.4(1)(b).

73 L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office, 2006) p 38.

74 L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office, 2006) p 47. Hoyano has been critical of the methodology of this study, arguing that it was limited to adult females only and allegations of rape only: L Hoyano, *The operation of YJCEA 1999 section 41 in the courts of E&W: views from the barristers' row* (Criminal Bar Association, 2019), p 21. Though part of the 2006 study did consider minors (chps 5 and 6) it did not consider male complainants, and that clearly left a gap in the data. We consider the operation of the statute in more depth in Chapter 4.

75 See for example: Office for Criminal Justice Reform, *Convicting rapists and protecting victims – justice for victims of rape: a consultation paper* (2006); J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008); HM CPS Inspectorate, *Without Consent: A report on the joint review of the investigation and prosecution of rape offences* (2007).

76 Baroness Vivian Stern CBE, *The Stern Review: Independent review into how rape complaints are handled by public authorities in England and Wales* (Government Equalities Office and Home Office, 2010) ("Stern Review").

77 J Brown, M Horvath, L Kelly and N Westmarland, *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* (April 2010) pp 44-45. See also O Smith and T Skinner, "How rape myths are used and challenged in rape and sexual assault trials" (2017) 26 *Social & Legal Studies* 441, reporting on data in 2012.

78 J Brown, M Horvath, L Kelly and N Westmarland, *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* (April 2010) p 46, citing L Ellison and V Munro, "Reacting to rape: Exploring mock jurors' assessments of complainant credibility" (2009) 49 *British Journal of Criminology* 202.

into line with modern expectations about criminal justice protections for complainants and fair trial rights for defendants. However, overcoming entrenched laws and attitudes has proven difficult.[79] Our task in this project is not to look at whether rape is treated differently, and a strict like-for-like comparative exercise is rarely possible because crimes are different and data may not be available or collected or, where it is, then it will often be gathered and measured differently. It is, however, helpful to be alert to comparisons in at least a broad way because they can help identify questions about whether there are shortcomings in the existing law and procedure that should be addressed.

1.61 In our pre-consultation engagement with stakeholders, we heard comparisons made that drew attention to, at the very least, the need for critical reflection on how and why evidence gathering and trials proceed as they do in sexual offences cases. For example, we were told by a recorder[80] that the treatment of complainants in sexual offences involves significant scrutiny of complainants and intrusion into their rights to an extent not found in other comparable criminal contexts. The recorder drew a contrast with assault, where the starting point is not a forensic investigation of the credibility of the complainant but the gathering of evidence to support or refute the case, such as CCTV and witness statements. In rape cases, we were told, the starting point is to physically examine the complainant, require her to hand over her phone, and submit medical and psychiatric records. The difference, it was argued, could not be put down to the fact that the only witnesses were the defendant and the complainant; that may also be the case in other offences, but sexual offences are distinguished by a deep investigation of the complainant's character. In other crimes an investigation might find troubling elements deep in the backgrounds of complainants, but such information is not sought in other offences. In a similar vein, Chief Constable Sarah Crew told us that in sexual offences cases information about a complainant's background or lies told in the past, sometimes many years previously, might be found in personal records and used to cast doubt on their evidence. Her view was that, to address this, a mindset change was required across the criminal justice system.[81] The ongoing work of Operation Soteria suggests both a commitment to and progress towards such change.[82]

1.62 Against this background and, though noting that analogies with other offences are often imperfect, some observations from the literature in this area are helpful in explaining how and why we need to ask whether rape requires distinct legal interventions.

1.63 First, we note Baroness Stern's observations that there are things about rape that make it distinct. Reporting a rape requires a complainant to discuss with strangers

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79 McGlynn has described it as "a Sisyphean struggle", referring to the character of Greek mythology who was eternally destined to push a boulder to the top of a hill, whereupon it would roll down and he would push it up again: "Feminist activism and rape law reform in England Wales: a Sisyphean struggle?" in C McGlynn and V Munro, *Rethinking Rape Law: International and Comparative Perspectives* (2010), ch 10.

80 A recorder is a legal practitioner who sits as a judge for around 30 days each year.

81 See also Victims' Commissioner, *Annual Report 2019-20*, p 17.

82 Operation Soteria is a joint Police and CPS programme to develop new national operating models for the investigation and prosecution of rape: B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022). See further paras 2.10 to 2.13.

very intimate and personal details, and often "feels humiliating", where a robbery report typically does not.[83] She described it as a "unique" crime in ways including the attack on bodily integrity and self-respect of the victim, the trauma it leaves, and the challenges it presents for investigators and prosecutors.[84] Stern noted the experience of re-traumatisation in court, writing of "the ordeal that the trial process can represent; 'being raped all over again' is the description often heard."[85]

1.64 Cossins sets out seven of the challenges that arise in prosecuting rape:

> Typically … there will be:
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> i. No ear- or eyewitnesses;
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> ii. A delayed complaint;
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> iii. No forensic evidence of the alleged sexual act, or the inability of forensic evidence to prove lack of consent;
>
> iv. No confirmatory medical evidence of the sexual act;
>
> v. The consumption of alcohol and/or drugs by the complainant and/or the defendant;
>
> vi. Counter-intuitive responses by the victim during and after the sexual assault; and
>
> vii. Word against word oral evidence.[86]

This means jurors may "fill in the gaps in evidence by relying on their biases and misconceptions in assessing the credibility of the complainant and defendant and in reaching a verdict".[87] As a consequence, sexual offences prosecutions have a particular need for substantive and procedural rules that allow the complainant to give their best evidence and minimise the risk of bias contaminating decision-making.

1.65 Secondly, we have considered whether rape complainants are treated differently in criminal trials. There is variation in the evidence and there appear to be relatively few studies that have examined this.[88] However, the research has provided some useful insights. In Brereton's comparative study of rape and assault trials in Victoria, he

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83 Stern Review (2010) p 60.

84 Stern Review (2010) pp 23, 28, 45.

85 Stern Review (2010) p 79.

86 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 97.

87 Above, p 102.

88 Examples include M A Myers and G D LaFree, "Sexual assault and its prosecution: a comparison with other crimes" (1982) 73 *Journal of Law and Criminology* 1282; S Bieneck and B Krahé, "Blaming the victim and exonerating the perpetrator in cases of rape and robbery: is there a double standard?" (2011) 26 *Journal of Interpersonal Violence* 1785; D Brereton, "How Different are Rape Trials – A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials" (1997) 37 *British Journal of Criminology* 242; R Burgin, "Persistent narratives of force and resistance: affirmative consent as law reform" (2019) 59 *British Journal of Criminology* 296.

concluded that the adversarial nature of the criminal trial, including the laws of evidence and cross-examination, are key drivers of the way that complainants are treated in rape trials – but there are still experiences particular to rape complainants:

> Obviously, the unique features of rape cases are important in shaping how defence lawyers exploit 'commonsense' understandings and prejudices about what constitutes consent, and in how they define who is – and is not – a 'deserving' victim. It is also probable that being a complainant in a rape trial is frequently a more traumatic experience than being a complainant in an assault trial, because of the intimate nature of the matters which are canvassed in rape trials, the length of time which the complainant must spend in the witness box, and the degree of trauma associated with the offence itself.[89]

1.66 We do not cite this 1997 study from Victoria as evidence of the current position in England and Wales. Rather, we cite it because by separating out the effects of the general criminal process it makes visible the links between: the unique nature of the crime of rape; the way that legal arguments and decision-making can be linked to social attitudes (and myths and misconceptions) about consent and sexual harm; and how those can influence the ways that rape complainants experience criminal trials. Those links go directly to our terms of reference: to consider the need for reform in order to increase the understanding of consent and sexual harm and improve the treatment of victims of sexual offences while ensuring that accused persons receive a fair trial.

THIS CONSULTATION

The evidence base

1.67 As we explained at the start of this chapter, this consultation has arisen as a consequence of The End-To-End Rape Review that reported in June 2021. As we explained in our background paper, that Review concluded that "the prevalence of rape and sexual violence offences against adults has remained steady in the last five years, but there has been a marked decrease in the number of prosecutions since 2016/2017".[90]

1.68 As The End-to-End Rape Review made clear, there is a wealth of evidence, especially over the last five years, that suggests there is much that is flawed about the way the criminal justice system handles complaints of rape and serious sexual offences. The Victims' Commissioner wrote in her annual report in 2019-20, "In effect, what we are witnessing is the de-criminalisation of rape."[91] In Appendix 1 of this consultation paper we set out a chronology of major reviews and reports since 1976. This includes from the last five years alone more than 20 reviews, strategies, policies and the like that

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89 D Brereton, "How Different are Rape Trials – A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials" (1997) 37 *British Journal of Criminology* 242, 259.

90 Review of Evidence in Sexual Offences: A Background Paper (February 2022), Law Commission, p 2.

91 Victims' Commissioner, *Annual Report 2019-20*, p 16. This was also the title of a report by four civil society organisations in response to the End to End Rape Review: Centre for Women's Justice, End Violence Against Women, Imkaan and Rape Crisis England & Wales, *The decriminalisation of rape: Why the justice system is failing rape survivors and what needs to change* (November 2020).

have both documented failings in the system and sought to remedy them in some way, with several (including this project) currently continuing.

1.69 There has clearly been very substantial progress made over the decades. Legislative reform has been important and has been accompanied by (among other things) guidance from the Court of Appeal, Criminal Procedure Rules ("CrPR"), training of judges and prosecutors. The evidence suggests that prosecutions of rape and serious sexual offences have come a long way in their treatment of complainants, while retaining careful fair trial protections.[92] Special measures to enable complainants in sexual offences to give video-recorded evidence for cross-examination and re-examination were piloted in three Crown Courts in 2019 and since September 2022 have been available in all Crown Courts in England and Wales.[93] Recent reviews of disclosure and changes to the guidelines have sought to limit routine and speculative requests for material held by third parties. They most notably are concerned with records of the complainant's therapy after the assault but prior to trial, seeking to ensure that there are clear, cogent reasons and a firm basis for requesting such material.[94]

1.70 There have been very substantial moves within the judiciary to ensure that sexual offences cases are managed well by judges who have an understanding of the nature and effects of sexual assault and sexual harm. The Crown Court Compendium provides guidance and example directions that are designed to address myths and misconceptions.[95] There is extensive judicial training. This includes requiring judges to complete specialist training if they are to preside over serious sexual offences cases; they cannot hear such cases unless they are "ticketed" to do so. Much of our work in this consultation paper seeks to build on the work that has come before.

1.71 Nevertheless, despite the progress, many problems remain unresolved. For instance, while a great deal of more recent evidence has been concerned with the sexual behaviour evidence provisions in section 41 of the YJCEA 1999, that section governs just one aspect of the trial process. There have also been procedural developments

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92 See for example: L Hoyano, *The operation of YJCEA 1999 section 41 in the courts of E&W: views from the barristers' row* (Criminal Bar Association, 2018) ("CBA Report"); Ministry of Justice and Attorney-General's Office, *Limiting the use of complainants' sexual history in sex cases – Section 41 of the YJCEA: the law on the admissibility of sexual history evidence in practice* (2017) Cm 9547, p 11.

93 YJCEA 1999, s 28; SI 2019 No 947; SI 2021 No 1036; SI 2022 Nos 456, 536, 623, 713, 773, 951, 992.

94 Attorney-General's Office, *Annual Review of Disclosure* (26 May 2022), pp 19-22; CPS, *Legal Guidance: Pre-Trial Therapy* and *Legal Guidance – Pre-trial Therapy and Accompanying Notes for Therapists* (26 May 2022); Attorney-General's Office, *Attorney-General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (26 May 2022). On the most recent developments see paras 3.168 to 3.169 in Chapter 3.

95 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022). While it "has no mandate to dictate best practice" and has not been considered by the Court of Appeal (Appendix IX, 30-1), the Compendium provides comprehensive guidance to trial judges and, as Fulford LJ (then Vice President of the Court of Appeal (Criminal Division)) has put it, "provides the framework within which the judge can conjure the directions that truly reflect the needs of the trial" (Foreword, p viii).

since, with amendments to the CrPR requiring written applications with proposed questions.[96]

1.72 With respect to the disclosure guidelines and their application to complainants' personal records, civil society organisations have argued that the changed approach:

> increases the likelihood that rape victims' private therapy notes will be accessed … dramatically reduc[ing] protection and rights to privacy for survivors of rape and sexual violence. … Once a victim is aware that any disclosure they make in counselling could make its way into the criminal justice system, it is clear this will discourage them from having therapy or talking freely with a therapist.[97]

1.73 In considering the evidence base we do not limit ourselves to the work of the last five years. As the most recent comprehensive study in the area indicates, there is good reason to think that the problems of the past have not disappeared, that challenges remain and change can take decades.[98] It remains the case that for many victims "the sexual assault trial is an ordeal, sometimes described as [being as] bad or worse than the original abuse, a place where the complainant's behaviour is on trial" and it carries a risk of re-traumatisation.[99] Munro has very recently observed that when revisiting her own research from 2009, "it was hard not to be cognisant of, and disappointed by the extent to which the concerns we raised earlier are still live ones".[100] Accordingly, while we appreciate the achievements that have been made and the myriad ongoing endeavours to make further improvements, we do not assume that the challenges we consider have arisen only over the last five years or that there are not enduring problems.

1.74 The concerns that have been raised over the last five years are reflected in the terms of reference that govern this project, which, in addition to sexual behaviour evidence, include consideration of: pre-trial disclosure and admission into evidence of complainants' personal records; character evidence; special measures; and current law and guidance designed to counter myths and misconceptions. The chapters in this consultation paper deal with those matters in detail.

Why the trial process matters

1.75 We noted above that our review is limited to the criminal trial process and cannot resolve all the challenges that arise in the way that rape and serious sexual offences are handled in the criminal justice system. However, in addition to the obvious need for courts to do justice, the trial process still matters in ways that have wider relevance.

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96 CrPR, r 22.4; Criminal Procedure Rules 2020, SI 2020 No 759.

97 End Violence Against Women, "New CPS guidance will block rape victims from therapy" (26 May 2022).

98 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), pp 12, 468. This Australian work takes England and Wales as its point of comparison and, in doing so, presents and analyses research in this jurisdiction.

99 Above, pp 6, 248.

100 V E Munro, "A Circle That Cannot Be Squared? Survivor Confidence in an Adversarial Justice System" in M A H Horvath and J M Brown (eds), *Rape: Challenging contemporary Thinking – 10 years on* (2023), pp 203-217, 203.

1.76 The End-to-End Rape Review noted that there was an increase in confidence in reporting to police but that, at the same time some stakeholders saw a mismatch between that confidence in reporting and confidence in the courts. As one Independent Sexual Violence Advisor told researchers:

> You've got this public discourse which is saying "you have these rights, you can report, people can't treat you badly" but then actually when women are going forward to have those rights enforced actually the criminal justice system isn't really responding.[101]

1.77 It is important that the law in substance and practice ensures that criminal trials do justice to complainants and defendants, fairly, compassionately, and with a better understanding of consent and sexual harm. The trial process is an integral part of how the justice system is seen to be – and is in fact – responding to sexual violence. This means, for example, ensuring evidence requirements are fair and can be met quickly in investigations, ensuring that the complainant's best evidence is secured and tested in the least traumatic way possible, all while retaining fairness for the defendant. As Cossins explains, the trial process is likely to have a particular effect on police and prosecutors:

> What happens at trial has a fundamental feedback effect on police and prosecutors' decision-making because their assessments of the strength of the evidence in any particular case, along with consideration of relevant public interest factors, is to determine whether or not a case has a reasonable prospect of conviction if sent to trial. … When police and prosecutors are assessing the reasonable prospects of conviction, they do so in light of a trial process that sends the message time and time again that any behaviour on the part of the complainant that could elicit victim-blame from the finder-of-fact will be detrimental to securing a conviction.[102]

1.78 Reforms to the trial process will, we hope, be instrumental not only in doing justice to complainants and defendants, but also in diminishing any mismatch between complainants' expectations of treatment and the reality of treatment in the courts, so that it has a positive effect on other aspects of complainants' engagement with the criminal justice system.

The defendant's right to a fair trial

1.79 The right to a fair trial is "a fundamental constitutional right recognised by the common law and guaranteed by the [European Convention on Human Rights ("ECHR")] and other international human rights instruments".[103] It is protected by the Human Rights Act 1998, which incorporates article 6 of the ECHR into domestic law. Article 6 protections include the following:

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101 End-to-End Rape Review Research Report (2021) p 31. Research by J Molina and S Poppleton, *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020), p 11, found that a reason why victims do not report rape to the police is that they have "heard negative things about the trial process".

102 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) pp 80-81, 76.

103 *R v DPP (Ex parte Kebilene and others)* [2000] 2 AC 326, 342 (Lord Bingham).

(1) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial …[where] the protection of the private life of the parties so require.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(d) examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

1.80 The right to a fair trial is an absolute right.[104] However, "the subsidiary rights comprised within that article are not absolute."[105] This means that in the application of the law in any given case "it is always necessary to consider all the facts and the whole history of the proceedings in a particular case to judge whether or not a defendant's right to a fair trial has been infringed or not."[106] However, it also has implications for the substance and interpretation of laws and, especially, the extent to which other interests or rights may affect what exactly is required for a fair trial, for example the complainant's article 8 right to respect for their private life. As we explained in our 2001 report, Evidence of Bad Character in Criminal Proceedings, the European Court of Human Rights ("ECtHR") has held that states are accorded a considerable margin of appreciation in this area of law:

> Because of the wide variation in systems of criminal procedure and evidence within the member states of the Council of Europe, the [ECtHR] has adopted the principle that it is a matter primarily for the member state to determine questions of admissibility of evidence.[107]

1.81 These matters can be illustrated by the consideration of article 6(3)(d) by the House of Lords in *R v A (No 2)*.[108] There, Lord Hope explained that although the common law "recognises that a defendant has the right to cross-examine the prosecutor's witnesses and to give and lead evidence" and this is reflected in article 6(3)(d), those "are not among the rights which are set out in unqualified terms in article 6 of the Convention. They are open to modification or restriction so long as this is not incompatible with the right to a fair trial."[109] That is, there may be restrictions on what the defence can do in a trial. For example:

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104 *R v Forbes* [2001] 1 AC 473 at [24]; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [90].

105 *R v Forbes* [2001] 1 AC 473 at [24].

106 *R v Forbes* [2001] 1 AC 473 at [24].

107 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 3.4 (references omitted).

108 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45; see also Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, Ch 3.

109 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [51], [58] (Lord Hope).

> Article 6 does not give the accused an absolute and unqualified right to put whatever questions he chooses to the witnesses. As this is not one of the rights which are set out in absolute terms in the article it is open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial in article 6(1). The test of compatibility which is to be applied where it is contended that those rights which are not absolute should be restricted or modified will not be satisfied if the modification or limitation "does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved": *Ashingdane v UK* (1985) 7 EHRR 528, 547 [57]. … The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community and the protection of the individual.
>
> In my opinion the placing of restrictions on evidence or questions about the sexual behaviour of complainants in proceedings for sexual offences serves a legitimate aim. The prevalence of sexual offences, especially those involving rape, which are not reported to the prosecuting authorities indicates a marked reluctance on the part of complainants to submit to the process of giving evidence at any trial. The rule of law requires that those who commit criminal acts should be brought to justice. Its enforcement is impaired if the system which the law provides for bringing such cases to trial does not protect the essential witnesses from unnecessary humiliation or distress.[110]

1.82 The right to a fair trial is, then, one part of a balance to be struck where, in Lord Steyn's words, "in respect of what the concept of a fair trial entails … account may be taken of the familiar triangulation of interests of the accused, the victim and society".[111] Lord Hope positioned the right as one of a number of important public interests:

> To ask oneself whether [provisions] are fair to the defendant is to address one side of the balance only. On the other side there is the public interest in the rule of law. The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case.[112]

1.83 Where a defendant's article 6 rights and a complainant's article 8 rights conflict and so require balancing, the ECtHR has made it clear that in addition to restrictions on the questions asked of a witness, other protections may also be relevant. Importantly, article 8 requires more than merely abstaining from interfering with private life; states have positive obligations to ensure respect for private life. This means that, although a balancing exercise will be fact-specific, and there must be caution to ensure the

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110 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [91]-[92] (Lord Hope).

111 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [38] (Lord Steyn).

112 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [94] (Lord Hope).

protection of a complainant's rights does not undermine the defendant's fair trial rights, measures may be taken to protect complainants:

> In the assessment of the question whether or not in [criminal proceedings concerning sexual offences] an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.[113]

1.84 In sum, remedying shortcomings in the treatment of complainants does not mean neglecting or undermining a defendant's absolute right to a fair trial. That right is integral to the rule of law, criminal process, and justice in the courts where the powers of the state are marshalled against a defendant whose liberty is at stake. However, the right is not protected by a scepticism underpinned by myths and misconceptions about rape that have no evidential foundation. Rather, as the history of reform shows and as will be apparent throughout this consultation paper, the right to a fair trial is protected by rigorous, substantive and procedural safeguards that enable a defendant to adduce and test evidence that is relevant to the facts in issue, without unnecessary trauma to the complainant. The nature of the offences and giving evidence is such that the potential for retraumatisation will never be removed, but that the opportunities to minimise the risk should be taken where they do not undermine fair trial rights.

1.85 In every part of this consultation paper we have considered whether fair trial issues are engaged. Where they are, we have considered whether any potential reforms would negatively affect existing rights and, if so, whether there is a risk that a defendant's trial would not be fair.

1.86 As the chapters that follow will show, quite a number of potential reforms do not raise the possibility that change would diminish any aspects of the right to a fair trial. For example, we make provisional proposals in relation to matters including: improving evidence gathering; recording and case-building; improving communication of information to the complainant; independent legal advice for complainants; more effective and consistent utilisation of existing pathways for the admission of evidence; and technical reforms to remove complexity, overlaps, and uncertainty in the operation of the law. Change in these areas may reduce the trauma experienced by a complainant. Reform may also help to ensure that an appropriate body of evidence is considered and may increase the likelihood that submissions on evidence capture the full spectrum of interests at stake – but they do not diminish the defendant's right to a fair trial.

1.87 Some of our provisional proposals, however, do clearly engage concerns about whether the defendant's right to a fair trial might be affected and raise the possibility that a court may need to balance interests in a case. These include proposals to, for example, raise the threshold for admissibility of evidence regarding the complainant's bad character, or create an automatic entitlement to measures to assist complainants giving evidence. In every instance we have considered whether the defendant's right

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[113] *SN v Sweden* App No 34209/96 at [47]; *Aigner v Austria* App No 28328/03 at [37]. See further Appendix 2, paras A2.24 to A2.32.

to a fair trial would be undermined and have provisionally concluded that it would not be. It is beyond doubt that the right to a fair trial does not entitle a defendant to adduce irrelevant and prejudicial evidence merely in the hope that it would make an acquittal more likely. Moreover, just because a reform may reduce avenues open to a defendant to adduce or test evidence does not mean that the right to a fair trial will be undermined or negated. Rather, provided that reforms keep intact the defendant's ability to adduce or test evidence that is truly relevant to the facts in issue (including, where appropriate, relevant to the credibility of witnesses, including the complainant) then the right to a fair trial is maintained.

The human rights framework and compliance with the ECHR

1.88 We have explained above the balancing involved in determining whether a defendant's right to a fair trial is infringed, and that we have been alert to those rights at every point. While states have a margin of appreciation in determining what will constitute fairness and while determinations will be fact specific, it remains essential that there is compliance with the human rights framework within which determinations are made. To that end, each chapter in this consultation paper will provide a brief sketch of the framework as it applies to the matters arising there. In addition, in Appendix 2 we provide detailed consideration of the relationship between fair trial rights and the protections afforded to complainants under article 8.

1.89 The overarching purpose of that appendix is to explain how, and to what extent, the existing rules of evidence and procedure in sexual offence proceedings in England and Wales comply with the human rights framework. At the same time, the analysis is meant to provide guidance as to the compatibility of our proposals with the human rights framework, as well being the point of reference for our analysis of alternative and other proposals we will receive in consultation responses. We consider the case law that is relevant to the issues we are primarily concerned with in this consultation paper: rape myths and misconceptions, the use of special measures, the disclosure and admissibility of personal records, restrictions on use of sexual behaviour evidence of the complainant, and character evidence. We also discuss some additional issues that arose from our consultation, namely: independent legal advice and representation and trials without juries in sexual offences cases.

The tenacity of beliefs: the critique of incremental change

1.90 It is at times difficult to escape the conclusion that, while much has changed, much remains unchanged. Camille LeGrand wrote in 1973 that rape prosecutions are hindered by "legal and social attitudes about rape [that] have produced a network of formal and informal restraints on the actions of police, prosecutors, judges, and juries".[114] The research, reviews, and inspection reports of the last five years all make it clear that the struggle to combat those attitudes is still a work in progress. Some beliefs are tenacious in their hold and extensive research suggests it is likely that juries include people who believe myths and misconceptions.[115] The End-to-End Rape

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114 C LeGrand, "Rape and Rape Laws: Sexism in Society and Law" (1973) 61 *California Law Review* 919, 927.

115 C McGlynn, "Rape trials and sexual history evidence: reforming the law on third-party evidence" (2017) 81 *Journal of Criminal Law* 367, 370; A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), Ch 3.

Review and many of the documents we set out in Appendix 1 suggest that the progress made over five decades may be more fragile than had been hoped.

1.91 We have found in our pre-consultation engagement that there are instances of what might be called "review fatigue"; some stakeholders told us of their reluctance to engage because it seems pointless to do so as a review will only ever tinker at the edges. This is not a new phenomenon. Academic and activist Kate Cook gave this explanation after the Stern Review:

> Reviews may not be useful for a movement that wants to change the world. The conclusion [of the Stern Review] that ''the policies are right'' is really the starting-point for some of these reviews. They are conceived as a way to appear as if something is happening, when in truth things are plodding along as usual. They help to quieten public pressure to make change with regard to rape and the law; ''we have a review process, we need to follow that through'' is a great way to respond without achieving anything. … Only with shaking the tree at its roots can we expect real change.[116]

1.92 Even where there is weariness of incremental change, it is, however, simultaneously accompanied by an energy and passion for reforms that will see complainants treated better, defendants ensured of fair trial rights, and better criminal justice outcomes. We have seen this care and energy from all stakeholders. But it does not diminish the concerns that incremental change will not deliver justice. Given the decades of reform since the 1970s, the picture painted by the reviews of the last five years makes it clear that any review – including this one – should be open to radical reforms. We have seen radical reforms contemplated in other jurisdictions, including in Scotland where the Dorrian Review explored alternatives to using juries in rape trials and recommended that consideration be given to developing a pilot of judge-alone trials,[117] which is now included in the Victims, Witnesses, and Justice Reform (Scotland) Bill. It is appropriate, of course, that where radical reforms are proposed there is careful consideration of evidence and options, including the rights of defendants.[118] However, England and Wales should not be immune to considering these or other proposals.

The distinctiveness of rape as a crime and questions for reform

1.93 In setting out the landscape there are two main conclusions we draw for our work in this project.

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116 K Cook, "Rape investigation and prosecution: stuck in the mud" (2011) 17 *Journal of Sexual Aggression* 250, 251, 257. The first main conclusion of the Stern Review was that "the policies are right": The Stern Review, p 8. In the phrase, "we have a review process, we need to follow that through'' we understand Cook to be referring to the second main conclusion of the Review (p 9), which was that "[t]he policies are not the problem. The failures are in the implementation."

117 The Rt Hon Lady Dorrian, *Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (Scottish Courts and Tribunals Service, March 2021) ("Dorrian Review"), recommendation 5.

118 For example, Leverick suggests not jumping to conclusions that juryless trials are warranted: "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255, 273-275.

1.94 First, the evidence suggests that the observation in 2008 by Temkin and Krahé is as true today as it was then:

> There is probably no other criminal offence that is as intimately related to broader social attitudes and evaluations of the victim's conduct as sexual assault. When confronted with an account of an alleged rape, individuals tend to respond to it against the backdrop of their personal beliefs and understandings about gender relationships in general, appropriate role behaviours for men and women, and the rules and rituals of consensual sexual interaction.[119]

The distinctiveness of rape as a crime warrants distinct measures to address that relationship between social attitudes and the legal process, while ensuring that fair trial rights are maintained.

1.95 Secondly, in seeking responses to our provisional proposals and open questions we are of the view that more radical reforms may need to be on the table alongside incremental change. We welcome the full spectrum of responses to our consultation paper.

THE STRUCTURE OF THE CONSULTATION PAPER

1.96 The chapters that follow begin by looking at one of the key overarching criminal justice challenges: the influence of myths and misconceptions. The next nine chapters each address discrete issues, moving generally in the order in which aspects of the criminal process are encountered in a sexual offences prosecution: personal records, which are one of the earliest considerations in evidence gathering; the rules governing whether sexual behaviour evidence and character evidence will be admissible at a trial; the cross-examination of complainants with regard to their applications for criminal injuries compensation; special measures and independent legal advice and representation, which go to the conditions under which the complainant will be able to give evidence at a trial, make informed decisions and contest rulings; the role of the jury as a finder of fact; consideration of the ways trials are conducted to present facts to the jury; and rights of appeal. The penultimate chapter takes a holistic look at the ways that provisional proposals and reform options may interact and have cumulative effects. Finally, the last chapter considers more radical reform options, exploring ways of addressing wider structural challenges inherent in a criminal trial by jury in a sexual offences prosecution. We provide a short outline of each in turn.

1.97 **Chapter 2** looks at **myths and misconceptions** about rape and sexual assault. It sets out the ways that they have an influence at all stages of the criminal justice process in this area and how many reforms have sought to address that. Particular attention is paid to the state of the evidence about how much influence myths and misconceptions have in criminal trials. Our conclusion is that the evidence suggests that, in spite of myriad strategies to minimise their effects, it appears likely that myths and misconceptions still contaminate aspects of the trial process and certainly there are risks that happens. As such, there is a case to examine the ways contamination can be countered and risks minimised. With that in mind, chapters three through to

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[119] J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) p 33.

eleven each consider a specific area of law, procedure and practice, and chapter thirteen looks at ideas for radical reforms.

1.98 **Chapter 3** examines law, practice and procedure in relation to **personal records held by third parties** that contain material said by or about the complainant. Our main focus is on medical and counselling records, including records of therapy after an assault, though the law also applies to records held by social services, schools and other third parties. Complainants often fear – with good reason – that, even where those records are not relevant, deeply personal material will be revealed and used against them to traumatic effect and to secure an acquittal. As a result, some complainants will not proceed, or therapy may be compromised or not sought. We address police and prosecution access to these records, disclosure of their contents to the defence where material may undermine the prosecution case or assist the defence, and the admissibility of material at trial. The defendant has an absolute right to a fair trial, but that will not necessarily or automatically require disclosure and admission of records into evidence in every case. The extent to which records are relevant, the complainant's privacy rights, and the public interest in complainants receiving support and treatment all need careful consideration. In this chapter we make provisional proposals for change to the legal framework to take better account of and balance all those factors. Our provisional proposals include establishing a personal records regime that is specific to sexual offences, removes existing inconsistencies in the law, and involves greater judicial scrutiny of requests for access and disclosure decisions. We also set out several further consultation questions in relation to the threshold tests for access, disclosure and admissibility, including asking how relevance should be assessed and how different factors should be balanced.

1.99 In **Chapter 4** we consider the appropriate framework for restricting and admitting **sexual behaviour evidence**. It has long been acknowledged that introducing evidence of the complainant's sexual behaviour at trial risks both subjecting the complainant to unnecessarily intrusive and humiliating questioning and reliance on myths and misconceptions about their credibility, consent and moral worthiness. Currently the admissibility of sexual behaviour evidence in sexual offences prosecutions is managed by section 41 of the YJCEA 1999. In this chapter we discuss the extensive commentary on the current framework which includes criticism that it is too complex and both too broad and too restrictive, provisionally concluding that reform is required. We then set out alternative models and suggest that a structured discretion model with a suitably high threshold may be better placed to address the difficulties inherent with this evidence. We seek views and evidence on whether and how such a model could work in this jurisdiction to limit the misuse of sexual behaviour evidence appropriately while retaining the defendant's right to adduce evidence that is necessary for a fair trial.

1.100 In **Chapter 5** we look at the use of **character evidence** for both the defendant and complainant, examining three issues. First, we consider evidence of the defendant's bad character. We examine the position where there is evidence the defendant has engaged in misconduct – such as controlling or coercive behaviour, domestic abuse, violence or sexual misconduct – but has no convictions in relation to that misconduct. We conclude that the legislative framework can and does accommodate such evidence and so do not make provisional proposals for legislative change. We do, however, ask consultation questions about the extent to which the current law is

sufficiently clear and certain, and about whether training and published guidance are needed in this area. Secondly, we address the admissibility of evidence of the complainant's good character, examining the different positions of a defendant who can adduce good character evidence and a complainant for whom the prosecution rarely can adduce such evidence. We make provisional proposals to address the position of the complainant through jury directions. Finally, the chapter turns to evidence of the complainant's bad character and considers the position where the defendant seeks to adduce evidence that the complainant has on other occasions made false allegations of sexual assault. We conclude that the current position on the test for admissibility of evidence of false allegations is unsatisfactory. Our provisional proposal is that this area of bad character evidence should be governed by sexual behaviour evidence provisions.

1.101 **Chapter 6** explores **compensation for criminal injuries.** It considers cross-examination of complainants regarding their applications to the Criminal Injuries Compensation Authority (CICA). At trial, the suggestion made to the jury is that the complainant's criminal allegation is false and for the purpose of financial gain. We examine views expressed to us that this type of evidence and cross-examination provides a further avenue for the introduction of myths and misconceptions about the prevalence of false complaints and, in terms of potential prejudicial effect, is similar to sexual behaviour evidence. We dismiss the possibility of preventing cross-examination on this topic by amending the CICA's time limits to allow sexual offences complainants to make their compensation claims after the conclusion of the criminal proceedings. Instead, we consider ways to tackle this issue directly, namely via restrictions on the use of cross-examination and evidence. We seek consultees' views on using an enhanced threshold and structured discretion model similar to the one we consider in Chapter 4 for sexual behaviour evidence, to determine admissibility of criminal injuries compensation claims evidence. We also ask consultees for their views on whether the Judicial College should consider the use of judicial directions where evidence of a criminal injuries compensation claim is admitted.

1.102 In **Chapter 7** we review the provision of **special measures** to assist complainants to engage and give evidence in sexual offences prosecutions. First, we discuss the current framework in sections 16 and 17 of the YJCEA 1999 that enables complainants in sexual offences to apply for special measures by virtue of being an "intimidated witness" due to the nature of the offence. This is known as an automatic eligibility framework. Complainants still need to apply and to provide evidence that the measure would enhance the quality of their evidence before the measure is granted. We provisionally propose that an automatic entitlement model is more appropriate. This would mean complainants are entitled to certain standard measures to assist them to give evidence without having to provide further evidence about suitability and impact. We consider which measures in such a framework should be "standard" and therefore available to all complainants. We also consider whether any individual measures need reform, asking for views on possible changes that could enhance certainty and consistency for complainants. Finally, we ask about measures that are available to defendants when attending court and giving evidence.

1.103 In **Chapter 8** we consider whether complainants should be entitled to **independent legal advice ("ILA") and/or independent legal representation ("ILR")** in respect of applications made before or during the trial relating to their sexual behaviour evidence

and personal records. We first describe the current, limited provision for ILA and ILR and then explore the arguments for formalising and extending such provision in relation to applications regarding complainants' personal records and sexual behaviour evidence. We describe the concerns that such extension may cause delays, and the risk to the well-established binary adversarial system. We provisionally conclude that as these applications directly engage the complainant's right to respect for their private life, it is appropriate that they have a right to be heard and access to funded ILA and ILR when considering such applications. This will ensure their right to respect for their private life is advanced to the court. We then consider practicalities including when such ILA and ILR should be available. We then propose that ILA and ILR should be provided by qualified legal professionals. We also propose that complainants should have access to ILA in respect of applications for measures to assist them give evidence.

1.104 In **Chapter 9** we examine **how trials are conducted**. In this chapter we consider ways of reducing the deployment of myths and misconceptions during sexual offences trials. Initially, we invite views on whether all practitioners should be required to undertake mandatory training on myths and misconceptions before conducting a sexual offences case. We analyse the problems inherent in determining what is impermissible reliance on a myth or misconception, and what is permissible on the facts of an individual case. Given this difficulty, we provisionally propose that the test of relevance should remain the threshold for allowing lines of questioning but ask for views on how to ensure that due attention is paid to this issue, such as the use of a Ground Rules Hearing in advance of a trial. We also explore whether the Judicial College should consider giving guidance on addressing generalisations about sexual offending or complainants as a class. Finally, we consider exceptional potential consequences if myths and misconceptions are introduced at trial, such as, professional misconduct proceedings and wasted costs orders.

1.105 In **Chapter 10** we consider several ways of better informing **juries** in order to minimise the influence of myths and misconceptions, thereby assisting them in performing their function as decisionmakers in sexual offences trials. We explore three strategies aimed at addressing myths and misconceptions in turn, each of which could be introduced in isolation or as part of a multi-faceted strategy for educating jurors on victims' responses to sexual trauma. We begin by considering whether there should be a presumption in favour of giving judicial directions addressing myths and misconceptions, as in Scotland, and whether the Judicial College should consider change to any of the existing judicial directions. The use of expert evidence and alternative juror education tools (including informational videos, juror information notices, and online interactive tools) are considered as possible new strategies for addressing myths and misconceptions. We set out the current law and developing evidential bases for these new methods of educating jurors before asking several consultation questions regarding their suitability for tackling myths and misconceptions.

1.106 In **Chapter 11** we consider **rights of appeal**. In this chapter we consider whether the complainant should be given the right to appeal decisions made before verdict relating to the disclosure or admission of their personal records or sexual behaviour evidence. We first describe the limited current availability of rights of appeal against decisions made during the trial process, before the verdict, for the defendant and prosecution.

We provisionally propose that the complainant, where they have the right to be heard on an application, should be extended the same limited appeal rights that are currently available to defendants. We then ask for views on greater use of preparatory hearings and whether there should be any further extension to complainants' rights of appeal.

1.107 **Chapter 12** takes a **holistic view** of the preceding chapters, discussing the implications, and combined and cumulative effect of the measures that we have presented in those chapters. It seeks views on wider questions of whether some measures should be prioritised or deprioritised and the rationale for doing so. The chapter reflects our view that each chapter and consultation question should not solely be considered in isolation, rather, each needs to be viewed in conjunction with each other, and in the wider context of the criminal process as a whole.

1.108 In **Chapter 13** we consider some ideas for **radical reform**. Some of these reforms were suggested to us by stakeholders frustrated with both the pace of change in this field and the apparent inability of small adjustments to make a substantive difference. We do not make provisional proposals in this chapter, but instead explore the cases for and against some significant changes to the trial process for sexual offences. We ask a series of open questions to seek consultees' views on these possibilities. The possibilities we consider in this chapter are: the introduction of specialist examiners to take the complainant's evidence; the introduction of a specialist court for sexual offences; jury screening based on an assessment of rape myth acceptance; a requirement for jurors to give reasoned verdicts; and the introduction of juryless trials.

References and sources

1.109 Citations for all published sources are provided in footnotes. Where major reports, codes of practice, guidance documents or the like are available from a reliable online source then we have generally provided a link. Where sources are subject to update then we have generally linked to the page where they are published rather than directly to a PDF file. All links were last accessed in May 2023.

ACKNOWLEDGMENTS

1.110 We are grateful to the many individuals and organisations who have very generously given their time to meet and discuss with us the issues that are addressed in this consultation paper. As the comments from stakeholders throughout the consultation paper indicate, their expertise and experience have been invaluable in informing our knowledge and understanding of the way criminal law and procedure is experienced by those who engage with and are part of the criminal justice system.

1.111 We would additionally like to acknowledge the following individuals and bodies who gave their time on numerous occasions and (for example) submitted detailed written comments, provided us with advance copies of research, commented on draft material, and facilitated discussion with and engagement by other stakeholders. Among them were: Professor James Chalmers; David Emanuel KC; Dr Samantha Fairclough; Professor David Harris; Dr Susan Leahy; Hanna Llewellyn-Waters; Paul Jarvis; Dr James Metzger; Professor Vanessa Munro; Matthew Nelson; Martin

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1.112 We would like to extend our particular thanks to the late Professor Philip Rumney, whose research we cite on numerous occasions and who dedicatedly gave up his time to meet with us in August 2022.

1.113 The Commissioners would like to record their thanks to the following members of staff who worked on this consultation paper: David Connolly (team manager); Jessica Skinns (lead lawyer); Lawrence McNamara and Roseanna Peck (team lawyers); and Charlotte Daintith, Abhaya Ganashree, Rachel Hughes, and Dr Andrea Preziosi (research assistants).

Chapter 2: Myths and misconceptions about rape and sexual violence

INTRODUCTION

2.1 In simple terms, misconceptions are beliefs which, although genuinely and sincerely held, are factually incorrect and may be derived from stereotypes. They may be present in well-intentioned and fair-minded people. Misconceptions about rape and sexual assault are often characterised as "rape myths". Rape myths have been described as "attitudes and beliefs that are generally false but are widely and persistently held",[1] or "descriptive or prescriptive beliefs about sexual aggression (ie about its scope, causes, context, and consequences) that serve to deny, downplay or justify sexually aggressive behavior that men commit against women".[2] We adopt the terminology "myths and misconceptions" as it captures the breadth of nuances and complexities that can arise in the ways attitudes and beliefs in society come to operate in the law. For example, a belief or attitude may not be a myth in the general sense of the word and yet still be important for understanding how rape is viewed in our society and in our criminal justice system. The wider terminology also reflects the fact that misconceptions are relevant to prosecutions for not only rape but also serious sexual offences generally, and that there are also misconceptions when men are victims of rape.[3] The term "rape myths", however, is commonly understood as capturing that wider application and it is the term that stakeholders use.[4] In this consultation paper we often use that shorter form. Throughout, our primary concern is not on the existence or prevalence of rape myth acceptance in society generally, but on the manner and extent to which rape myths have an influence on the criminal process and, particularly, criminal trials.

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1 K A Lonsway and L F Fitzgerald, "Rape myths" (1994) 18 *Psychology of Women* 133, 134, cited in J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) p 34.

2 H Gerger et al, "The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and validation in German and English" (2007) 33 *Aggressive Behaviour* 422, cited in J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) p 34.

3 P Rumney, "Male rape in the courtroom: issues and concerns" [2001] *Criminal Law Review* 205; P Rumney, "Policing Male Rape and Sexual Assault" (2008) 72 *Journal of Criminal Law* 67; C DeJong, S J Morgan and A Cox, "Male rape in context: measures of intolerance and support for male rape myths (MRMs)" (2020) 33 *Criminal Justice Studies* 195; B Hine et al, "Mapping the landscape of male-on-male rape in London: An analysis of cases involving male victims reported between 2005 and 2012" (2021) 22 *Police Practice and Research* 109; B Hine, A Murphy and J Churchyard, "Development and validation of the Male Rape Myth Acceptance Scale (MRMAS)" (2021) 7 *Heliyon* E07421; on male victims and female perpetrators, see S Weare, "Forced-to-penetrate cases: deconstructing myths and stereotypes" in R Killean et al (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (2021) pp 97-108.

4 Eg, Judicial College of England and Wales, *Equal Treatment Bench Book* (July 2022) pp 181-182; "Rape Myths and Juries", *Hansard* (HC), 21 November 2018, vol 649, cols 347WH-350WH; Crown Prosecution Service ("CPS"), *Legal Guidance – Rape and Sexual Offences*, "Chapter 4 – Tackling Rape Myths and Stereotypes" (21 May 2021); Harriet Wistrich, "Martyna Ogonowska was failed by a criminal justice system rotten with rape myths" *The Guardian* (9 November 2022).

2.2 In this chapter we set out the ways that myths and misconceptions might influence the criminal justice process in rape and serious sexual offences. Like the consultation paper as a whole, the chapter is structured to reflect the general order in which complainants encounter different parts of the criminal justice system. The first section examines policing, from the point at which the victim of a rape or sexual assault is faced with a decision about reporting the crime. Secondly, we look at prosecution decision-making. Thirdly, we turn to aspects of evidence, procedure and the conduct of the trial. In that section we look at the effects of myths and misconceptions on juries, an area that has been the subject of considerable research in recent years. Our conclusion is that, in spite of myriad strategies to minimise their effects, there are clear risks that myths and misconceptions still contaminate aspects of the trial process, and – while ensuring the defendant's right to a fair trial is protected – those risks can be further addressed by reforms in the areas we discuss in the chapters that follow.

WHAT ARE THE MYTHS AND MISCONCEPTIONS?

2.3 In Chapter 1 we sketched the emergence in the 1970s of the way that rape myths were identified as undermining criminal justice processes in sexual offences. We noted that there has been extensive research on rape myths and their effects, with a general consensus about:

> what rape myths usually contain [and that these myths] affect subjective definitions of what constitutes a "typical rape", contain problematic assumptions about the likely behaviour of perpetrators and victims, and paint a distorted picture of the antecedents and consequences of rape.[5]

2.4 Researchers, we explained, had argued that these fell into four categories or general types: beliefs that blame the victim for their rape; disbelief in claims of rape; beliefs that tend to exonerate the perpetrator; and beliefs that only certain types of women are raped.[6]

2.5 We turn now to the modern articulation of rape myths, looking at the substance of myths and misconceptions and approaches to countering them.

Myths and misconceptions: the reality of rape

2.6 It has been commonplace for some years to identify myths and misconceptions in plain language and to provide evidence-based statements of the contrasting reality. Articulating them in this way helps to counter the views that underpin them; for example, that if there has been a "real" rape then certain features will be evident. In the table below, the first two columns draw on the literature to position commonly held

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5 G Bohner et al, "Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator" in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) pp 17-45, 18-19.

6 S Dinos, N Burrowes, K Hammond and C Cunliffe, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 37, citing G Bohner et al, above. More recently see G Bohner et al, "Modern Myths About Sexual Aggression: New Methods and Findings" in M A H Horvath and J M Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (2023), pp 159-171.

myths and stereotypes alongside what the evidence shows.[7] Our aim in creating the table is not to provide a comprehensive, definitive or exhaustive list; indeed, as societies and the state of knowledge change it might be expected that myths and evidence will evolve.[8] We are not adding to the literature; our task in this project is not to define myths and misconceptions. Rather, our purpose in this short list is illustrative, to show what we have in mind when we refer to myths and misconceptions in the consultation paper and examine ways to combat and contain the risks that they will contaminate jury decision-making. With that in mind, the third and fourth columns identify where guidance for prosecutors and example judicial directions seek to address the myths. The Crown Prosecution Service ("CPS") legal guidance on tackling rape myths and stereotypes considers 40 myths, looking at their implications and how they might be addressed by prosecutors.[9] The Crown Court Compendium provides narrative guidance and authorities, in addition to example judicial directions.[10]

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7 The form of words used for any given myth of misconception varies in the literature, and some formulations have become more widely adopted than others, but the wide agreement about their content is reflected in the consistency of the ways that they are expressed in academic research, government publications, judicial statements, prosecutorial guidance in England and Wales and internationally. In presenting this non-exhaustive list we have drawn particularly on the following: L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office, 2006) ("Kelly et al") p 2; N Burrowes, *Responding to the challenge of rape myths in court. A guide for prosecutors* (March 2013) ("Burrowes"); CPS, *Legal Guidance, Rape and Sexual Offences*, "Annex A - Tackling Rape Myths and Stereotypes" ("CPS Annex A") (May 2021).

8 A Gekoski et al, "'A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health': Rape myths in a large English police force" [2023] *International Review of Victimology* (1 January 2023, ahead of print) 1, 2.

9 CPS Annex A (2021). As we have indicated, our list is illustrative and we do not address all of the CPS material here.

10 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) ("Crown Court Compendium") 20-1, "Sexual offences – The dangers of assumptions". The Compendium provides comprehensive guidance to trial judges and the framework within which judges can devise the directions that reflect the needs of the trial: see para 1.70.

Myth or misconception	What the evidence shows	CPS Legal Guidance	Crown Court Compendium
Rape is most commonly perpetrated by a stranger. It typically occurs outside, at night, in secluded places.[11]	The great majority of rapes are committed by persons known to the victim.[12] Rape happens at any time of day. Most commonly, rape takes place indoors and[13] victims are often raped in their homes.[14]	Myth 2	Example direction 1
Rape always involves physical force.[15]	Rape may or may not involve physical force. Rapists may use threats of force or manipulative techniques to intimidate and coerce their victims.[16]	Myth 1	Example directions 1 and 12

11 CPS Annex A (2021) myth 2; Kelly et al (2006) p 2.

12 ONS, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020* (18 March 2021) p 4: "For the years ending March 2017 and March 2020 combined, victims who experienced sexual assault by rape or penetration since the age of 16 years were most likely to be victimised by their partner or ex-partner (44%). This was closely followed by someone who was known to them other than a partner or family member (37%), which includes friends (12%) and dates (10%) [and] 15% [of women] reported being assaulted by a stranger ….". See also: Kelly et al (2006) p 2, citing S Walby and J Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research Study 276, 2004); Burrowes (2013) p 6, citing B Stanko and E Williams, "Reviewing rape and rape allegations in London: what are the vulnerabilities of the victims who report to the police?" in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) pp 207-228.

13 ONS, above, p 6: "For the years ending March 2017 and March 2020 combined… The assault had taken place in a park, other open public space, car park or on the street for 9% of victims". See also Kelly et al (2006) p 2, citing: J Lovett, L Regan and L Kelly, *Sexual Assault Referral Centres: Developing Good Practice and Maximising Potentials* (Home Office Research Study 285, 2004).

14 Burrowes (2013); ONS, above, p. 6: "For the years ending March 2017 and March 2020 combined, the most common location for rape or assault by penetration to occur was in the victim's home (37%), followed by the perpetrator's home (26%)".

15 CPS Annex A (2021) myth 1.

16 Above; ONS, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020* (18 March 2021) p 8: "For over half (54%) of victims, physical force had been used by the perpetrator to try to make them have sex with them, with 10% reporting the perpetrator had choked or tried to strangle them. Over one-fifth (22%) of victims reported feeling frightened or that the perpetrator had threatened to hurt them, and in 6% of reported cases, threats to kill the victim were made by the perpetrator." See also Kelly et al (2006) p 2, citing S Walby and J Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research Study 276, 2004).

Myth or misconception	What the evidence shows	CPS Legal Guidance	Crown Court Compendium
Rape will always be physically and/or verbally resisted.[17]	Many victims do resist, many freeze through fear or shock, or decide that resistance would be futile and/or dangerous.[18] The victim may be afraid of being killed or seriously injured and so co-operate with the rapist to save their life.[19] Victims may become physically paralysed with terror or shock and are unable to move or fight.[20] Disassociation or freezing can be a means of self-protection or defence – any effort to prevent, stop or limit the event.[21]	Myth 22	Example directions 1 and 12

17 See Kelly et al (2006) p 2.

18 Kelly et al (2006) p 2, citing L Kelly, *Surviving Sexual Violence* (1987); see also A Möller, H P Söndergaard and L Helström, "Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression" (2017) 96 *Acta Obstetricia et Gynecologica Scandinavica* 932.

19 CPS Annex A (2021) myths 20-24, 26; see also K Kozlowska et al, "Fear and the Defense Cascade" (2015) 23(4) *Harvard Review of Psychiatry* 263; P Murphy and F Mason, "Psychological Effects of Rape and Serious Sexual Assault" in P Rook and R Ward, *Sexual Offences Law and Practice* (6th ed 2021), para 23.22: "It is noteworthy that it is the perception of threat, not the actual threat, which governs individuals' responses. Most will be profoundly affected: fearful, disorientated, and helpless. Victims may be constantly re-evaluating their situation during the attack and changing their behaviour accordingly. Others, particularly where repeat victimisation is a factor, may cut off, dissociating from reality. Some women may submit to sexual intercourse from fear of what might happen if they were to resist, or even merely to protest."

20 CPS Annex A (2021) myths 20-24, 26; see also notes 18 and 19 above.

21 CPS Annex A (2021) myth 1; see also notes 18 and 19 above.

Myth or misconception	What the evidence shows	CPS Legal Guidance	Crown Court Compendium
Rape always results in physical injury.[22]	Rape does not always leave visible signs on the body or the genitals of the victim.[23] A minority of reported rapes involve major external or internal injuries.[24]	Myth 24	Example direction 12
Rape will always be reported promptly.[25]	Most rapes are never reported to the police.[26] There are many reasons why victims do not report or delay reporting, including trauma, feelings of shame, confusion, or fear of the consequences.[27]	Myth 25	Example directions 2 and 3

22 Kelly et al (2006) p 2.

23 CPS Annex A (2021) myths 20-24; see also G Walker, "The (in)significance of genital injury in rape and sexual assault" (2015) 34 *Journal of Forensic and Legal Medicine* 173.

24 Kelly et al (2006) p 2, citing S Walby and J Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research Study 276, 2004); ONS, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020* (18 March 2021) p 8: "Nearly two-fifths of victims (36%) reported that they suffered some sort of physical injury. The most common types of injuries were minor bruising or black eye (23%) and scratches (15%)."

25 Burrowes (2013) p 6.

26 ONS, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020* (18 March 2021) p 14: "The Crime Survey for England and Wales (CSEW) for the years ending March 2017 and March 2020 combined showed that fewer than one in six victims (16%) had reported the assault to the police (Appendix Table 13). This figure was similar to that seen in the year ending March 2014 (17%)." R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales Research Report* (HM Government, June 2021) p 29, note that the true incidence may be higher as not all victims will disclose to CSEW, police or other bodies. Earlier estimates were that as many as 90% of rapes went unreported: Burrowes (2013) p 6; Kelly et al (2006) p 2, citing S Walby and J Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research Study 276, 2004).

27 Burrowes (2013) p 6; ONS, above, p 14: "For those that told someone about the abuse, but did not report it to the police, the most common reasons given were: embarrassment (40%), did not think they could help (38%) and thought it would be humiliating (34%). A quarter of victims also thought the police would not believe them (Appendix Table 16)." J Molina and S Poppleton found that the most important reasons given by victims for not reporting to the police were feeling like they would not be believed, and feeling that there would not be a successful investigation or prosecution for reasons relating to the victim's gender, sexuality or lifestyle. The next most important reason was feelings of shame, embarrassment, or not wanting others to know: *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020) p 11.

Myth or misconception	What the evidence shows	CPS Legal Guidance	Crown Court Compendium
After rape, all victims react in the same way.[28] Real rape victims will always be visibly distressed when describing what happened.[29]	Reactions to rape vary greatly. Victims may react with extreme distress, quiet control, shock and denial.[30]	Myths 20-21 and 23	Example directions 1, 6 and 7
Only gay men rape other men. Only gay men get raped.[31]	Men who rape other men are often heterosexual, and their victims are also often heterosexual.[32]	Myth 12	No example direction[33]
Allegations of rape are commonly false.[34]	False allegations are very uncommon. The evidence does not support a generalised suspicion of rape complainants.[35]	Myth 33	No example direction

28 Kelly et al (2006) p 2; Burrowes (2013) p 6.

29 CPS Annex A (2021) myth 21.

30 Burrowes (2013) p 6; Kelly et al (2006) p 2, citing J Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (1994); P Murphy and F Mason, "Psychological Effects of Rape and Serious Sexual Assault" in P Rook and R Ward, Sexual Offences Law and Practice (6th ed 2021) para 23.30: "Emotions will vary following rape and should initially be viewed as a normal reaction to an abnormal event. Individuals may be expressive and tearful, quiet and controlled, distressed, shocked or in denial."

31 CPS Annex A (2021) myth 12; see also Burrowes (2013) p 6.

32 Burrowes (2013) p 6. A UK study found that over half of perpetrators and half of victims were heterosexual, with heterosexual perpetrators being particularly common in "stranger assaults": S Hodge and D Canter, "Victims and perpetrators of male sexual assault" (1998) 13 *Journal of Interpersonal Violence* 222. US studies have found that "both homosexual and heterosexual assailants assault men of either sexual orientation": D Mitchell et al, "Attributions of Victim Responsibility, Pleasure, and Trauma in Male Rape" (1999) 36 *Journal of Sex Research* 369, 369.

33 Example direction 14 addresses circumstances where the defendant is a gay man and the victim is a child of the same gender. See further paras 10.87 to 10.93 below where we present consultation questions about whether the Judicial College should consider including an additional example direction in the Crown Court Compendium.

34 CPS Annex A (2021) myth 33; Burrowes (2013) p 6.

35 The largest UK study concluded that of 2,643 complaints reported to police, 67 (2.5%) were probably or possibly false: L Kelly, J Lovett and L Regan, *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study 293, 2005) p 50. Although police had recorded 216 (8%) of those complaints as false, the authors note that the police designation of complaints as false was not always consistent with the criteria stated in internal rules for recording a complaint as false (pp 47, 50). On definitions and policing classifications, see also D Lisak et al, "False allegations of sexual assault: An analysis of ten years of reported cases" (2010) 16 *Violence Against Women* 1318, 1319-1327 and C Saunders, "The truth, the half-truth, and nothing like the truth: reconceptualizing false allegations of rape" (2012) 52 *British Journal of*

The effects of myths and misconceptions

2.7 Myths and misconceptions about rape and sexual assault do not lie at the root of every problem associated with the prosecution of sexual offences but their effects are pernicious and filter through the breadth and depth of the criminal justice system. They are not peculiar to the criminal justice system but affect it because they are accepted in wider society.[36] They may be accepted by people working in and engaging with the criminal justice system, including by police, lawyers and judges, by defendants, by complainants and by juries. In the following sections of this chapter we look at some of those effects and the strategies that have been used to tackle them. Our project is primarily concerned with the trial process, as our terms of reference indicate, but our discussion begins earlier in the criminal justice process because it underscores the importance of tackling myths and misconceptions in each and every stage, and because earlier stage decision-making by victims and justice professionals is often informed by what they understand of the later trial process.

PRE-TRIAL

2.8 It is beyond doubt that not every victim of rape reports the crime to the police. As researchers for the End-to-End Rape Review noted, the most reliable data – which is the Crime Survey for England and Wales – suggests that 84% of rapes are never reported to police.[37] Of the 491 respondents to a survey for the Office of the Victims' Commissioner, 29% did not report their rape to police.[38] Asked to rank 17 factors that underpinned their decision not to report, the most significant reason was that they did not think they would be believed (74% very important, 21% important).[39] This, the report stated, "seem[s] to suggest that survivors are afraid of the impact of societal rape myths on their credibility".[40] Other factors included having "heard negative things

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Criminology 1152. See further paras 2.10 to 2.13 below on police acceptance of rape myths. More widely, the evidence of the proportion of allegations reported to police that are false has been critically analysed in P Rumney, "False allegations of rape" (2006) 65 *Cambridge Law Journal* 128 and P Rumney and K McCartan, "Purported false allegations of rape, child abuse and non-sexual violence: nature, characteristics and implications" (2017) 81 *Journal of Criminal Law* 497. Noting that how falsity is measured will be important, and noting a wide variation in methodologies, Rumney and McCartan (p 508) do not subscribe to the characterisation of false allegations as "extremely rare" but conclude that most rigorous studies estimate that between 2% and 10% of allegations are false, that there is "no robust body of evidence pointing beyond the high-end estimates of 8-10 per cent", and that "any generalised suspicion of rape complainants is unwarranted". It has also been noted by researchers that an allegation of rape may be false without the complainant having identified a perpetrator; that is, the fact a false allegation of rape has been made does not mean that there is a person who has been falsely accused of rape: see Kelly et al (2006), p 48; and L Kelly, "The (In)credible words of women: false allegations in European rape research" (2010) 16 *Violence Against Women* 1345, 1346.

36 C Lilley et al, "Intimate Partner Rape: A Review of Six Core Myths Surrounding Women's Conduct and the Consequences of Intimate Partner Rape" (2023) 12 *Social Sciences* 34, part 2.

37 R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales Research Report* (HM Government, June 2021) p 29; see above n 26.

38 J Molina and S Poppleton, *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020) p 9.

39 Above, p 11.

40 Above, p 12.

about the trial process", which was ranked fourth (60% very important, 24% important).[41]

2.9 Once a rape is reported and enters the criminal justice system then, long before trial, the evidence suggests that rape myths have significant effects.

Policing

2.10 When a person reports a rape, that first contact with police has been described as a "make or break" moment.[42] In that encounter, a police officer's evaluation of a complainant and their account of events will be crucial to determining what happens next. It will be important with regard to how (if at all) a complaint is investigated and whether a complainant pursues the complaint any further, and the way that a police officer understands rape and sexual assault will be a significant factor.[43]

2.11 Research indicates that police officers will be guided by their "common sense", which can be based on myths and misconceptions about rape.[44] This includes having preconceived ideas about what a genuine victim would look like and believing victims not fitting stereotypes to be less credible and blaming them more.[45] The influences on evaluations include:

- A belief that false allegations are common.[46] The Angiolini Review described this as a "matter of serious concern".[47]

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41 J Molina and S Poppleton, *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020) p 11.

42 Rt Hon Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (April 2015) ("Angiolini Review") para 13.

43 B Hine and A Murphy, "Investigating the Demographic and Attitudinal Predictors of Rape Myth Acceptance in UK Police officers: Developing an Evidence-Base for Training and Professional Development" (2019) 25 *Psychology, Crime and Law* 69, 70 (references omitted); see also E Sleath and R Bull, "Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review" (2017) 34 *Aggression and Violent Behaviour* 102, 109; A Gekoski et al, "'A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health': Rape myths in a large English police force" [2023] *International Review of Victimology* (1 January 2023, ahead of print) 1. Not only may investigatory failures result from police officers' acceptance of rape myths and inadequate training to address that, inadequate investigations may also give rise to a claim for damages under the Human Rights Act 1998 for breach of the article 3 duty to investigate inhuman or degrading treatment, of which rape and serious sexual assault are instances: *DSD and NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 at [211]-[225] (esp [215]), [134], [276].

44 L McMillan, "Police Officers' Perceptions of False Allegations of Rape" (2018) 27 *Journal of Gender Studies* 9, 13.

45 A Gekoski et al, "'A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health': Rape myths in a large English police force" [2023] *International Review of Victimology* (1 January 2023, ahead of print) 1, 8-11; K Parratt and A Pina, "From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs" (2017) 34 *Aggression and Violent Behaviour* 68, 79-80.

46 K Parratt and A Pina, "From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs" (2017) 34 *Aggression and Violent Behaviour* 68, 80; S Lea, U Lanvers and S Shaw, "Attrition in rape cases: developing a profile and identifying relevant factors" (2003) 43 *British Journal of Criminology* 583; Angiolini Review (2015) paras 148, 152.

47 Angiolini Review (2015) para 154.

- A belief that rape is less likely to have occurred where the complainant and suspect have a prior relationship, which plays to the misconception that real rape is committed by strangers: "a previous relationship leads officers to place more blame on the victim and less on the perpetrator, believing the case to be ambiguous or not legitimate".[48]

- A belief that victims should be emotional and, if not, they are not credible.[49]

2.12 It is important to note that not all police officers are influenced by myths and misconceptions.[50] McMillan's qualitative analysis found polarisation on the issue of false allegations, with some officers believing in their prevalence, reverting to the idea that rape is easy to allege and hard to disprove. Other officers, however, strongly disagreed with this.[51] In 2003 Lea noted that 20% of cases in her sample over a five-year period were recorded as being false allegations, often on the grounds that – based on the personal judgment of the officer – the complainant was "unstable" or the complaint "malicious".[52] Yet, in the same study "many police officers wrote poignant comments on the questionnaires which demonstrated a great deal of understanding of the pressures victims of intimate rapes endure, and expressed their frustration at not being able to do more in such cases".[53] More generally, there are indications that rape complainants are perceived more positively by female officers than by male officers, and that more experienced officers are more likely to be aware of rape myths and less likely to subscribe to them than junior officers.[54] It has also been found that while rape myth acceptance is detrimental to investigations, it is not the key determinant in processing cases.[55] As the Angiolini Review observed, this is "an enormously complex area":[56]

> Police officers may simply not be equipped in terms of expertise, let alone time, to unravel the heavy emotional and other baggage and decipher the reality of the complainant's experience. … Police officers may also find it hard to come to terms with repeated acquittals. As one explained to us, "There can be a sense of 'here we

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48 K Parratt and A Pina, "From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs" (2017) 34 *Aggression and Violent Behaviour* 68, 80.

49 Above, 75.

50 Above, 79.

51 L McMillan, "Police Officers' Perceptions of False Allegations of Rape" (2018) 27 *Journal of Gender Studies* 9, 12.

52 S Lea, U Lanvers and S Shaw, "Attrition in rape cases: developing a profile and identifying relevant factors" (2003) 43 *British Journal of Criminology* 583, 593.

53 Above, 594.

54 K Parratt and A Pina, "From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs" (2017) 34 *Aggression and Violent Behaviour* 68, 79; A Gekoski et al, "'A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health': Rape myths in a large English police force" [2023] *International Review of Victimology* (1 January 2023, ahead of print) 1, 7-8.

55 C Dalton et al, "A systematic literature review of specialist policing of rape and serious sexual offences" (2022) 2 *International Criminology* 230, 231; E Sleath and R Bull, "Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review" (2017) 34 *Aggression and Violent Behaviour* 102, 110.

56 Angiolini Review (2015) para 154.

go again' with some investigations as you know from the start that the factors will lead to a not guilty verdict."[57]

2.13 Nevertheless, as a study of the Metropolitan Police found, rape myth acceptance remains important and the greater officers' tendency to accept rape myths, the greater the likelihood that police will allocate higher victim responsibility, lower perpetrator responsibility, and view claims as not genuine.[58] More recently, the Casey Review and Operation Soteria Bluestone researchers have found severe problems in some police responses to rape.[59] The Casey Review, summarising the findings of Operation Soteria Bluestone research, reported an "endemic culture of disbelieving victims" in which researchers "found prejudiced assumptions, stereotypes and rape myths, often unchallenged, expressed openly by officers".[60] Such "problematic understanding, attitudes and judgments underpinned victim credibility assessments, thereby creating a self-perpetuating system".[61] Operation Soteria has set about remedying this, working towards "transformational" initiatives, though the challenges are great.[62]

Prosecution charging decisions

2.14 A suspect cannot be charged with an offence unless the prosecutor is satisfied that there is "a realistic prospect of conviction", based on an objective assessment of the evidence.[63] That requires a consideration of the admissibility, reliability, credibility and

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57 Angiolini Review (2015) paras 154-155.

58 B Hine and A Murphy, "The Influence of 'High' vs 'Low' Rape Myth Acceptance on Police Officers' Judgements of Victim and Perpetrator Responsibility, and Rape Authenticity" (2019) 60 *Journal of Criminal Justice* 100, 104. See also A Gekoski et al, "'A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health': Rape myths in a large English police force" [2023] *International Review of Victimology* (1 January 2023, ahead of print) 1; K Parratt and A Pina, "From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs" (2017) Aggression and Violent Behaviour 34, 68, 80. Policing views can also have a knock-on effect in prosecutions: Hohl and Stanko found the CPS charged in around 2% of the cases where police had expressed doubts: K Hohl and E Stanko, "Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales" (2015) 12 *European Journal of Criminology* 324, 337.

59 *Baroness Casey Review: An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service – Final Report* (2023) ("Casey Review") pp 159-165; B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022) pp 5-8, 23-44. Among the problems are a lack of specialist knowledge and insufficient learning and development: pp 5-6, 23-24, 26-27; see also A Gekoski et al, "'A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health': Rape myths in a large English police force" [2023] *International Review of Victimology* (1 January 2023, ahead of print) 1, 6, 16.

60 Casey Review (2023) p 164.

61 Above, p 164.

62 B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022) pp 10, 17-18, 49-50. Although we do not focus on policing matters given our terms of reference, it would be remiss of us not to note that this consultation paper will be published against a background that includes the sentencing of a Metropolitan Police officer for rape and murder (*R v Couzens* (30 Sept 2021) Crown Court (unreported)), the sentencing of another for multiple serious sexual offences over a period of years (*R v Carrick* (7 Feb 2023) Crown Court (unreported)), and the publication of the Casey Review (2023) that found institutional misogyny (p 331) and that predatory behaviour by some officers has been allowed to flourish in the Metropolitan Police (p 12).

63 Crown Prosecution Service, *Code for Crown Prosecutors* (October 2018) paras 4.6, 4.7.

sufficiency of the evidence.[64] Might myths and misconceptions influence that assessment? There is considerable research that suggests they could.

2.15 Studies in the US have consistently found that prosecutorial evaluations are affected by stereotypes about "genuine victims". On the one hand, prosecutors may be influenced by myths in their own evaluation of the strength of a case and, on the other, they may use them "to predict how judges and juries will react to victims".[65] Factors that have been found to diminish the strength of the case – and especially the complainant's credibility – have included whether the complainant and the suspect know each other, or whether the complainant engaged in "risk-taking" behaviour – which might be walking alone late at night, sitting in a bar alone, using alcohol or drugs, or willingly going to the suspect's house.[66]

2.16 Similarly, prosecutorial focus on credibility and reliability in sexual offences cases has been found in England and Wales. For example, Hester and Lilley's 2017 study reviewing 87 reported rape cases across three police forces in England found various extra-legal factors influenced CPS charging decisions.[67] The relationship between the suspect and the complainant was a "key feature in the pattern of attrition"; allegations concerning suspects who knew the complainant were more likely to be ruled by the police that no crime had occurred, with prosecutors then charging in around three quarters of the cases that were referred by police.[68] Complainants who had mental health issues or had been drinking at the time of the alleged offence "tended not to have their cases progressed to charge", whether before or after referral to the CPS.[69] All these are consistent with the influence of myths in judging complainants and complaints in sexual offences cases, whether on the grounds that credibility and reliability are doubted by the prosecutor, or whether the prosecutor is anticipating the ways that juries and judges will respond to these factors.[70]

2.17 An anticipatory approach creates circularity, as Cossins has argued.

> Low conviction rates produce a feedback effect which influences police investigations and prosecutors' assessments of the evidence, including the believability of the complainant. Thus, when police and prosecutors are assessing the reasonable prospects of conviction, they do so in light of a trial process that sends the message time and time again that any behaviour on the part of the

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64 Crown Prosecution Service, *Code for Crown Prosecutors* (October 2018) paras 4.6, 4.7, para 4.8.

65 J Spears and C Spohn, "The effect of evidence factors and victim characteristics on prosecutors' charging decisions in sexual assault cases" (2006) 14 *Justice Quarterly* 501, 502.

66 J Spears and C Spohn, "The genuine victim and prosecutors' charging decisions in sexual assault cases" (1996) 20 *American Journal of Criminal Justice* 183, 192; above, 502.

67 M Hester and S Lilley, "Rape investigation and attrition in acquaintance, domestic violence and historical rape cases" (2017) 14 *Journal of Investigative Psychology and Offender Profiling* 175.

68 Above, 181.

69 Above, 185. Hester and Lilley also note here that there may be disagreements between police and prosecutors.

70 See for example Angiolini Review (2015) para 655.

complainant that could elicit victim-blame from the [jury] will be detrimental to securing a conviction.[71]

2.18 This effect is not new. Frohman pointed to it in 1991, arguing that, when making a charging decision, prosecutors must look "downstream" towards juries as they will be the decision-makers in the case. If juries are influenced by myths and misconceptions, prosecutors will or even must take into account that there will only be a realistic prospect of conviction where the complainant's behaviours fit such myths and misconceptions.[72] This has also been labelled the "bookmaker's test", which refers to prosecutors attempting to second-guess potential jury prejudices when determining whether there is a realistic prospect of conviction.[73]

2.19 There have been extensive efforts to tackle this problem. The CPS Legal Guidance on Rape and Sexual Offences states explicitly that "rape myths and stereotypes should play no part in the prosecutor's decision-making".[74] Prosecutors must not apply a "bookmaker's test" when deciding whether to charge a suspect.[75] They must "assume that the jury hearing the case will be objective, impartial and reasonable, properly directed and acting in accordance with the law".[76] To assist prosecutors the Guidance includes information about the reality of rape (which we have drawn on in the table above). There is also ongoing work to educate and train prosecutors in key areas linked to tackling myths and misconceptions including the impact of trauma, decision-making, the changing nature of sexual behaviours and encounters, and evidence of psychological injury.[77]

2.20 However, if the threshold used by prosecutors – a "realistic prospect of conviction" – is to exclude the influence of myths and misconceptions on juries, there must be rules of evidence and trial processes that prevent such influence.

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71 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 76.

72 L Frohmann, "Discrediting victims' allegations of sexual assault: prosecutorial accounts of case rejections" (1991) 38 *Social Problems* 213, 224.; see also K Lonsway and J Archambault, "The 'justice gap' for sexual assault cases: Future directions for research and reform" (2012) 18 *Violence Against Women* 145, 163.

73 CPS Annex A (2021); *Regina (B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening)* [2009] HWFC 106 (Admin), 1 WLR 2072 at [50].

74 CPS, *Legal Guidance – Rape and Sexual Offences*, "Chapter 4 – Tackling Rape Myths and Stereotypes" (21 May 2021).

75 CPS Annex A (2021). *R (on the application of End Violence Against Women Coalition) v DPP* [2021] EWCA (Civ) 350, [2021] 1 WLR 5829 considered an application for judicial review of the DPP's decision to remove from RASSO training materials documents and terminology associated with merits-based guidance. The applicant argued that this created a risk that prosecutors would use a bookmaker's approach that factored in rape myths rather than an objective merits-based approach. Both the Divisional Court and the Court of Appeal found that that there was no evidence that the change in language in the guidance changed its effect and the application was dismissed.

76 CPS, *Legal Guidance – Rape and Sexual Offences*, "Chapter 4 – Tackling Rape Myths and Stereotypes" (21 May 2021); see also K Lonsway and J Archambault, "The 'justice gap' for sexual assault cases: Future directions for research and reform" (2012) 18 *Violence Against Women* 145, 163.

77 See CPS, Police-CPS Joint National Rape Action Plan – refresh 2022: Annex on delivery against previous commitments (20 October 2022).

TRIAL

2.21 There is no one, single strategy for countering the influence of myths and misconceptions. On the contrary, they must be tackled on multiple fronts, including by addressing the acceptance of myths and misconceptions in wider society.[78] In this consultation paper our principal focus is on the trial process and so we outline here some of the ways that myths and misconceptions have an influence and can be countered.

Rules of evidence

2.22 There have been significant reforms that have sought to prevent rape myths contaminating the trial process. As we observed in the introductory chapter, these have included, for example, removing requirements for corroboration warnings and, soon after, further limits such that a warning could only be given if there was an evidential basis for it.[79] In this consultation paper we examine a number of areas where it appears that myths and misconceptions may still have an influence, in spite of attempts to prevent that influence. Such concerns are consistent with evidence from other jurisdictions, where research has revealed that legislation and procedure have not had the intended effects.[80] In this section we set out some of the background and examples to illustrate the concerns that underpin the areas on which we focus in this consultation.

2.23 One major reform – arguably *the* major reform – in this jurisdiction and in others has been the enactment of "rape shield" laws, which limit the admissibility of evidence about a complainant's sexual behaviour (or sexual history, as it has often been called).[81] Such laws counter what have been described in the Supreme Court of Canada as the "twin myths" that "unchaste" women are more likely to consent to sex and less worthy of belief. This is explained in a well-known passage from *R v Seaboyer*:

> The main purpose of the legislation is to abolish the old common law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in

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78 Examples include the "Tea and Consent" education video released by Thames Valley Police in 2015 and the Home Office "This is Abuse" campaign from 2010-2014 that aimed to educate teenagers about abusive relationships.

79 See para 1.50.

80 For example: J Quilter and L McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts: Report to the Victorian Law Reform Commission* (August 2021); J Quilter, L McNamara and M Porter, "The most persistent rape myth? A qualitative study of 'delay' in complaint in Victorian rape trials" (2023) 35 *Current Issues in Criminal Justice* 4.

81 In England and Wales, the primary provisions governing sexual behaviour evidence are found in section 41 of the Youth Justice and Criminal Evidence Act 1999.

> any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar. In an effort to rid the criminal law of these outmoded and illegitimate notions, legislatures throughout the United States and in England, Australia and Canada passed "rape-shield" laws. (I note that the term "rape shield" is less than fortunate; the legislation offers protection not against rape, but against the questioning of complainants in trials for sexual offences.)[82]

2.24 Where character evidence is concerned, suggestions that the complainant is a person of bad character can play into myths and misconceptions. Where there is evidence that a complainant has previously lied – especially if they have lied in relation to previous allegations of sexual assault – then this can align with the myth that allegations of rape are commonly false. The risk is that the myth, rather than the evidence, will influence an assessment of the complainant and the account that has been presented.

2.25 It has long been observed that where a third party holds records about a complainant then these have been deployed in ways that engage myths. Records held by a school, doctor, psychiatrist, therapist, immigration facility or employer (among others) may contain things said by or about the complainant in what would ordinarily be highly confidential situations. Some records may be of limited relevance to the incidents that have given rise to the prosecution or – especially where counselling records are concerned – may contain information that suggests inconsistencies in the complainant's account. As we observe in Chapter 3, a particular problem in using therapy records as indicators or evidence of unreliability is that they have come into existence in circumstances of trauma and for purposes that are not concerned with the logic of a criminal trial.[83] Therapy engages a person in:

> a form of dialogue that attempts to make sense of the sexual violence that does not fit legal models of guilt or innocence. … [It] reflects a non-legal conception of rape that describes feelings of violation and is not bound to the nature of the act.[84]

The reality of rape is that survivors of sexual violence experience feelings of guilt and self-blame, even though they are blameless.[85] When therapy records are used in a trial the "ambiguity and uncertainty in accounts of violent sexual experiences" are cast as self-doubt and as giving the jury reason to doubt.[86] If admitted into evidence then the myths that all complainants are lying and deluded are at risk of being exploited in an assessment of the complainant in the trial at hand.

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82 *R v Seaboyer* [1991] 2 SCR 577 at 604 (McLachlin J).

83 See Chapter 3, paras 3.69 to 3.75.

84 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 258-259 (references omitted).

85 J Schwendinger and H Schwendinger, "Rape victims and the false sense of guilt" (1980) 13 *Crime and Social Justice* 4.

86 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 259.

2.26 In the chapters on sexual behaviour evidence, character and personal records we consider in detail whether reforms to the law may serve to counter more effectively the risks that myths and misconceptions will influence criminal trials.

Lawyers and judges

2.27 While evidence-based statements about the reality of rape, prosecutorial awareness of those realities, and rules of evidence that try to limit the influence of myths may all go some way towards countering myths and misconceptions, this will not be enough. Rape myths must be countered by the prosecution both in the application of their decision-making and development of a trial strategy. Prosecutors need to provide evidence that addresses the contested issues and show how that evidence supports the complainant's account. Accordingly, the CPS Legal Guidance on Rape and Sexual Offences directs prosecutors, to identify and address myths and misconceptions where they arise "in order to ensure a proper case-strategy and effective advocacy when presenting a case at trial", noting that "some behaviour may seem counter-intuitive and require explanation as part of the case building strategy".[87]

2.28 The CPS Legal Guidance seeks to aid prosecutors in this regard. It reminds them that:

- There is no typical rape victim or perpetrator and no single response to rape and sexual abuse.
- A person's experience of rape is unique and might be impacted by how it intersects with inequalities they may face in relation to aspects such as sex, age, disability, gender identity, race, ethnicity, religion or belief and class.
- Myths can overlap and [be] deployed subtly.[88]

It then provides a detailed guide that sets out myths and misconceptions about rape, perpetrators of rape and victims of rape. It identifies 40 myths, their implications (including, for example, the assumptions that underpin them, the messages they convey about trust or disbelief of the complainant, and the ways that they disregard a defendant's behaviour), and the factual realities, legal issues and arguments that may warrant consideration in order to counter them. In our table above we contrast some myths and misconceptions with the realities of rape. Here, we set out some examples of the CPS Legal Guidance that focuses particularly on what prosecutors should consider if they are to counter the risk that myths and misconceptions will influence a jury.[89]

- To counter the myth that "the victim had previously consented to sex with the accused a number of times so s/he must have consented on this occasion", prosecutors should consider "the context of the overall allegation including what impact the relationship had on someone's freedom to consent, and the presence

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87 CPS, *Legal Guidance – Rape and Sexual Offences*, "Chapter 4 – Tackling Rape Myths and Stereotypes" (21 May 2021) "Introduction".

88 Above.

89 CPS Annex A (2021). There is further CPS guidance in relation to the impact of sexual assault in the CPS Psychological Evidence Toolkit (11 September 2019) and in the same-sex context there is additional guidance in the CPS, Same Sex Violence Toolkit (20 May 2021).

of domestic abuse and in particularly controlling or coercive behaviour. Focus on steps taken to obtain consent and reasonable belief."[90]

- To counter the myth that "If you send sexual images or messages prior to meeting someone, then having sex is inevitable", prosecutors should "[c]hallenge any implication that sexual images or messages equate to consent, explaining how normalised they are these days" and "the steps taken to obtain consent".[91]

- To counter the myth that "If someone has truly been raped then they would never seek, or want, sex soon afterwards", prosecutors should "challenge any assumption that all victims behave the same way either prior to or following rape, and make clear that trauma affects individuals in a huge range of ways, sometimes causing victims to behave in counter-intuitive ways".[92]

2.29 While prosecution case-building and advocacy is an essential part of countering myths and misconceptions, it is just one component part of the trial, sitting alongside the work of judges, defence counsel and juries.

2.30 Like prosecutors, the courts are acutely aware of the ways that myths and misconceptions can contaminate the trial process and have made efforts to address that. The Crown Court Compendium provides judges with guidance on a range of matters related to myths and misconceptions.[93] It speaks directly to the issues:

> The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice.[94]

2.31 The Crown Court Compendium is especially concerned with judicial directions to juries, which are a critical tool in the trial process. Referring to the Court of Appeal's judgment in *R v D*, it observes that:

> the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is

90 CPS Annex A (2021) myth 5.

91 Above, myth 14.

92 Above, myth 19.

93 Crown Court Compendium (20222) ch 20.

94 Above, 20-1, [3] citing *R v Miller* [2010] EWCA Crim 1578, [2011] *Criminal Law Review* 79.

entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner.[95]

2.32 The Compendium provides an example direction on avoiding assumptions about rape and other sexual offences, where the jury should be told:

> We know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related. We also know there is no typical response to rape. People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation.[96]

2.33 Example directions are also provided on 15 other matters, including: consistent and inconsistent accounts; the display of emotion or distress or lack of it at the time of first complaint or at the time of first providing an account to the police; clothing worn by the complainant which is said to be revealing or provocative; and previous sexual activity.[97]

2.34 Finally, defence counsel represents the defendant and their role is to present and test relevant, admissible evidence and arguments to make the defendant's case. Defence lawyers will – rightly – do that within the bounds of law and professional ethics. It is the rules of evidence that provide the primary constraints on the deployment of rape myths in the defence case. We turn to those in the next section.

2.35 While the defence counsel's argument and advocacy operate within the rules of evidence, we have been told in pre-consultation engagement that the existence of rules is not enough. Professors Julia Quilter and Luke McNamara recently conducted a major study of rape trials for the Victorian Law Reform Commission.[98] They told us they found defence questions and arguments continued to invoke myths in spite of legislation designed to prevent myths being relied on. They argued that this pointed to the importance of prosecutors and judges proactively countering defence questions and arguments:

> That such practices persist despite the clear language of the legislation is, in part, a product of the adversarial system: some defence lawyers will continue to push lines of defence unless they are challenged by the prosecutor and trial judge. So our finding is not that nothing can change [as a result of legislative change]. Rather, legislative change needs to be *activated* in trials – and prosecutors and judges need to be proactive rather than simply expect defence lawyers to change.[99]

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95 Crown Court Compendium (2022) 20-1, [1] citing *R v D* [2008] EWCA Crim 2557, [2009] *Criminal Law Review* 591.

96 Above, 20-4, Example 1.

97 Above, 20-4.

98 J Quilter and L McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts: Report to the Victorian Law Reform Commission* (August 2021).

99 J Quilter and L McNamara, "[Pre-consultation] Comments for Law Commission re Sexual Offences Consultation Paper" (8 December 2022) (emphasis in original).

2.36 In Chapter 9 we consider in detail the way that judges and counsel conduct the trial, and in Chapter 10 we consider the role of judicial directions.

Juries

2.37 Many of the laws and strategies above are designed to counter the possibility that juries may inadvertently deploy myths and misconceptions when evaluating the reliability of the complainant's or defendant's account and reaching a view about the guilt of the defendant. That is, a false but sincere belief held by jurors can contaminate their decision-making process and inadvertently lead a jury into error despite their best intentions, and the law should seek to counter that risk.

2.38 As we explained in the introductory chapter, the effects that myths have on juries have received considerable attention from researchers and there have been contentious debates around findings and methods. The research in this area needs to be seen through a wider prism of research into juries and the views that judges and lawyers hold about juries, which are often inevitably based on the impressions formed from their judicial and professional experience. We say "inevitably" because in England and Wales there have long been strict prohibitions on asking jurors about their experience sitting on a jury.[100] As a result, in spite of the vital role that juries play, and the thousands of jury trials that occur, we know very little from real jurors about how juries experience a trial, interpret and weigh evidence, and deliberate to reach a verdict. We explain more about the research and the debates with an eye to how we might approach these issues in considering reforms. In doing so we focus especially on a small number of recent pieces of research and analysis where the current state of knowledge and the debates are crystallised.

2.39 There are well-established instruments that researchers can use to survey people and measure the extent to which rape myths are believed – "rape myth acceptance" or "RMA" scales, as they are called.[101] When researchers want to study rape myth acceptance in juries, and its effects, they are faced with legislative constraints and so have generally used "mock juries". This involves "simulat[ing] the experience of sitting on a jury by asking participants to read, listen to, or watch trial materials".[102] In a major Scottish study, for example, actors and barristers played the roles of participants in a trial, and researchers observed deliberations by mock juries.[103]

2.40 A systematic review of the empirical literature in 2015 concluded that the mock jury research shows there is "clear evidence" that rape myths have an impact on juror decision-making.[104] The findings of the Scottish mock jury studies are that there is

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100 Juries Act 1974, s 20D.

101 For an outline of different scales, see F Leverick, "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255, 257.

102 F Leverick, "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255, 258.

103 J Chalmers, F Leverick and V Munro, "Why the jury is, and should still be, out on rape deliberation" [2021] *Criminal Law Review* 753, 756.

104 S Dinos, N Burrowes, K Hammond and C Cunliffe, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 44, 47. A "systematic review" is particularly significant. It is a form of literature review that is

very clear evidence that myths and misconceptions affect the way jurors evaluate evidence in rape cases. Similar findings have been made in mock jury studies in England and Wales.[105] According to Leverick, the quantitative data from these studies indicates that prejudicial attitudes influence "judgments in individual cases" along with "views about what the verdict should be".[106] Moreover, the qualitative mock jury research shows that these prejudicial beliefs are "commonly expressed during jury deliberations and that even jurors who do not score highly on scales that measure attitudes in the abstract can express highly problematic views when discussing a concrete case."[107] Overall, Leverick's review of quantitative and qualitative studies concluded that there is "overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases".[108] Nonetheless, though the methodologies for mock jury research are robust and there is evidence that mock jurors engage "rigorously and conscientiously", it is important to acknowledge the limitations of studies that use these methods; the role playing element, the curtailed materials that are used, limited deliberation times, the voluntary participation, and the fact that ultimately nobody's liberty is at stake all dictate the need for caution.[109]

2.41 There has, however, been some research conducted in England and Wales where researchers have been given permission to engage with jurors and made findings with

designed to avoid bias by using "robust techniques for searching for and identifying primary studies, appraising the quality of these studies, selecting the studies to be included in the review, extracting the data from the studies, and synthesizing the findings": M Dixon-Woods and A Sutton, "Systematic Review" in M Lewisbeck, A Bryman and T Liao (eds) *SAGE Encyclopaedia of Social Science Research Methods* (2011).

105 L Ellison and V Munro, "Reacting to rape: Exploring mock jurors' assessments of complainant credibility" (2009) 49 *British Journal of Criminology* 202.

106 F Leverick, "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255, 256.

107 Above, 256.

108 Above, 273.

109 J Chalmers, F Leverick and V Munro, "The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials" (2021) 48 *Journal of Law and Society* 226, 231-232, 234. This large-scale study involved 863 individuals across 64 mock juries. Participants watched a 60-minute video, filmed in a real courtroom with a retired judge presiding and providing jury directions, took an affirmation as jurors usually would, and were given up to 90 minutes for deliberations. A recent study in England and Wales with 108 participants used a 22-minute video and 30-minute deliberations: C Lilley, D Willmott and D Mojtahedi, "Juror characteristics on trial: Investigating how psychopathic traits, rape attitudes, victimization experiences, and juror demographics influence decision-making in an intimate partner rape trial" (2023) 13 *Frontiers in Psychiatry* 1086026. Ellison and Munro explain that while the volume of evidence is streamlined, the substantive content is not, and that research suggests that constrained deliberation time may not have a significant impact: "Reacting to rape: Exploring mock jurors' assessments of complainant credibility" (2009) 49 *British Journal of Criminology* 202, 205-206. On the seriousness and rigour of engagement: L Ellison and V Munro, "Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial" (2010) 30 *Legal Studies* 74, 84. On participation, 87% of Thomas' respondents reported that if jury service had been voluntary then they would have opted out of jury service when first summoned: C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987, 1006. See further paras 10.193 to 10.205 below for further discussion and consultation questions relating to research with real juries.

regard to sexual offences cases.[110] This work was commissioned by the (then) President of the Queen's Bench Division and conducted by Professor Cheryl Thomas, who is the sole researcher in the last 30 years to have had access to juries in this jurisdiction.[111] Thomas has stated that her research does not support the claim that jurors hold "commonly held rape myths resulting in many incorrect not guilty verdicts" or that "juror bias" is "widespread".[112] However, it did find that there are two areas where "some jurors would benefit from additional guidance", namely, the prevalence of stranger and acquaintance rape and emotion when giving evidence.[113] Her research also found that a potentially significant minority of jurors are unsure about a number of rape myths and a small proportion of jurors hold factually incorrect beliefs.[114]

2.42 Thomas' research has rightly been identified as an important and ground-breaking contribution.[115] The research was done recently, in this jurisdiction, and participants were real jurors rather than mock jurors. The work was favourably cited by one judge in our pre-consultation engagement and researchers have pointed to legal commentators attributing great significance to the findings.[116] There have, however, been vigorous debates about the weight that should be attached to these findings. Critiques of Thomas' work have been advanced by a number of researchers, with the core of the argument being that the methods used were flawed and, consequently, there should be great caution before concluding that rape myths are not a concern in jury decision-making. Among the points made about methodology are: the research did not consider the possibility of "social desirability bias", which may cause respondents to give an answer they see as socially acceptable rather than honest (and that risk may be especially acute where researchers are speaking to jurors with the authorisation of the court); it is not clear how many of the 771 jurors in the study sat on sexual offences trials, though certainly it was not all the jurors; and the research used a "blunt" three-point scale of agree / not sure / disagree, rather than a more broadly accepted five- or seven-point Likert scale that would draw out nuance.[117] It has also been argued that, even if the finding that there was low acceptance of rape myths is accurate, this does not mean one can extrapolate from Thomas' findings and argument to conclude that rape myths do not matter. This is because the research did

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110 In the 1990s Zander and Henderson undertook work for the Royal Commission into Criminal Justice, with 8,338 jurors in 821 cases completing questionnaires: M Zander and P Henderson, *The Crown Court Study* (Royal Commission Research Study No 19) (1993) p 249. The findings in that research did not address sexual offences cases.

111 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987; C Thomas, "A response to 'The Jury is Still Out'" [2021] *Criminal Law Review* 772.

112 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987, 1004.

113 Above, 1005.

114 Above, 1001-1004.

115 J Chalmers, F Leverick and V Munro, "Why the jury is, and should still be, out on rape deliberation" [2021] *Criminal Law* Review 753, 755; E Daly et al, "Myths about myths? A comment on Thomas (2020) and the question of jury rape myth acceptance" (2023) 7 *Journal of Gender-Based Violence* 189, 190.

116 Above, E Daly et al (2020), 190.

117 J Chalmers, F Leverick and V Munro, "Why the jury is, and should still be, out on rape deliberation" [2021] *Criminal Law* Review 753, 763-766; E Daly et al, above, 191-194.

not look at how deliberations were conducted.[118] Thomas was not exempt from the legislative restrictions and so could not ask jurors about "statements made, opinions expressed, arguments advanced or votes cast".[119] Her study also considered rape myths in the abstract and not in concrete situations, and research with mock juries has suggested that "participants reject rape myth statements in attitudinal surveys and then draw on those same ideas during deliberation".[120]

2.43 Recent research with real jurors in New Zealand directly addresses the question of whether rape myths have an influence in jury trials.[121] The researchers interviewed 121 jurors from 18 sexual violence trials. The interviews were conducted soon after the trials and ran for between 45 and 90 minutes. There were more than 50 questions and the main focus was on the deliberation phase. Judges were also interviewed and the researchers had access to "transcripts of the openings, closings, summings-up and notes of evidence of the trials".[122] They concluded that the study "supports the view that at least some significant degree of illegitimate reasoning does occur" in jury decision-making in sexual violence cases.

2.44 The researchers also highlighted some further nuance in the form and function of rape myths, and identified this as a further limit on the extent to which the existing research with real jurors in England and Wales has been able to provide insight into the effects of rape myths:

> First, there are misconceptions based on perceived facts that are wholly without foundation and altogether irrelevant to decision-making. For example, a belief that a complainant's clothing is generally relevant to whether she consented (or indeed whether there was a reasonable belief in consent) has no evidential foundation. If the assessment of a complainant's credibility takes into account evidence of that sort (which ought arguably to be prima facie inadmissible), it will inevitably lead to fallacious reasoning and flawed decision-making.
>
> Secondly, there are misconceptions about the degree of relevance of a particular fact. For example, … while the possibility of a false allegation may be relevant to whether the case is proved beyond reasonable doubt, a belief that [false allegations are] common will likely lead to its being given undue weight in decision-making. Undue weight might then be placed on other misconceptions that flow from the false allegation [mis]conception, including those relating to demeanour, immediate complaint and physical injuries.
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> This distinction between the two forms of misconception is rarely articulated in the literature on rape myths, but it points to the fact that the use of such misconceptions

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118 J Chalmers, F Leverick and V Munro, above, 766-768.

119 Juries Act 1974, s 20D(1).

120 E Daly et al, "Myths about myths? A comment on Thomas (2020) and the question of jury rape myth acceptance" (2023) 7 *Journal of Gender-Based Violence* 189, 194, citing L Ellison and V Munro, "Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial" (2010) 30 *Legal Studies* 74.

121 Y Tinsley, C Baylis and W Young, "'I think she's learnt her lesson': Juror use of cultural misconceptions in sexual violence trials" (2021) 52 *Victoria University of Wellington Law Review* 464.

122 Above, 470.

is more nuanced than the research undertaken by Thomas is capable of uncovering.[123]

2.45 It is clear that without access to jurors – and this is currently prohibited by the law in England and Wales – there will be inescapable constraints on the methods that can be employed by researchers and, consequently, on what we know about how rape myths affect jury trials. We consider this further in Chapter 10.[124]

2.46 We will turn briefly to some further work by Thomas, which is the presentation and exploration of quantitative data about jury verdicts in RASSO trials in England and Wales over the 15 years to 2021.[125] Thomas argues that the data does not support the contention that juries are influenced by rape myths:

> What is clear from this analysis is that when rape charges are put to juries to deliberate on in England and Wales, juries convict defendants of rape more often than they acquit them, this has consistently been the case for 15 years, and the jury rape conviction rate is increasing alongside an increase in prosecutions. These are findings that are not consistent with a widespread belief amongst serving jurors in false assumptions about rape and rape complainants.[126]

2.47 On our reading of the research, there are several reasons why the data does not suggest that our attention to rape myths and ways to combat and contain their influence is unwarranted. We focus on two here.[127]

2.48 First, the data does not shed any light on how juries deliberate. It does not set out to do that and the data does not enable that.

2.49 Secondly, there is considerable variation within the categories of sexual offences. In particular, where the complainant is a female over 16, the conviction rates are 50.05% (charges under the Sexual Offences Act 2003) or 50.4% (charges under the Sexual

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123 Y Tinsley, C Baylis and W Young, "'I think she's learnt her lesson': Juror use of cultural misconceptions in sexual violence trials" (2021) 52 *Victoria University of Wellington Law Review* 464, 469.

124 See paras 10.193 to 10.205 below.

125 C Thomas, "Juries, rape and sexual offences in the Crown Court 2007-21" [2023] *Criminal Law Review* 200.

126 Above, 224.

127 To these it might be added, first, that selection of measure of jury conviction rates may be important. For example, if calculated by the outcome of individual rape charges (the method employed by Thomas) as opposed to calculated by the outcome of trials by defendant (CPS method), then the picture of conviction rates may differ where rape prosecutions feature just one charge as against trials which feature multiple charges. It will make a difference, for example, where there is a decision by a jury to find a defendant guilty of multiple rape counts within a single trial setting, as against acquittals that take place in single count rape trials. It would be helpful to see those comparisons, especially with regard to whether multiple count trials feature more prominently for some categories of complainants (eg, child abuse cases) and single count trials feature more prominently in other categories (eg, adult females, and whether the defendant is in a relationship with the complainant or is an acquaintance). Secondly, while conviction rates are rising, the data cannot explain why that is. For example, it cannot explain whether this is connected to better case building by prosecutors or approaches to charging. Thirdly, the fact that juries convict defendants more often than they acquit them – however marginally that may be for female complainants over 16 – also does not tell us anything about the experiences of complainants or defendants.

Offences Act 1956).[128] This is in contrast to the higher rates in every other category: males over 16 (62.9% and 55.4%), females under 16 (63.2% and 65%), males under 16 (62.1% and 64%), and children under 13 (70.2% for females and 71.6% for males).[129] The data cannot explain why the figures are lowest for female complainants over 16 but, based on the evidence from other jury research, in our view the data by no means discounts the possibility that rape myths may have an effect in these cases. Moreover, females over 16 constitute 44.5% of complainants, with the largest single cohort (of 34.7%) being females over 16 where defendants were charged under the Sexual Offences Act 2003.[130] This is of particular significance to our work as our review focuses on sexual offences against adults.

2.50 None of this is to say that the data is not an important contribution to knowledge about jury trial outcomes – and as Thomas points out, there is no substitute "for what is empirically known about how the criminal justice system operates in rape cases".[131] Rather, the data does not and cannot reveal whether and, if so, how rape myths affect jury trials.

2.51 In this consultation paper it is neither necessary nor wise for us to reach a conclusion that one particular strand of the evidence base and argument is compelling to the exclusion of any and all others. Rather, it is appropriate that we acknowledge that there is a lack of consensus in the academic research and that explain plainly two of the bases on which we proceed. The first of these relates to the evidence base: in that respect the evidence – including some of Thomas' findings as well as the gap in knowledge in relation to deliberations – points to the likelihood that rape myths and misconceptions have some impact on juries.[132] The second relates to the questions of reform. As our terms of reference indicate, and as the introductory chapter explained, we are concerned with improving the trial process to increase the understanding of consent and sexual harm, improve the treatment of complainants, and ensure the defendant's right to a fair trial is respected. In approaching the measures we consider with respect to juries in Chapter 10 and more radical reform options in Chapter 13, a rigorous assessment of the evidence base – which indicates that there is mock jury evidence that juries can be influenced by rape myths and this has not been displaced by the recent study with real jurors – is appropriate in pursuing those objectives. In short, it is right that we consider and propose measures to counter the risks that rape myths will affect sexual offences trials, including considering the risk that juries will be influenced by rape myths and misconceptions.

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128 C Thomas, "Juries, rape and sexual offences in the Crown Court 2007-21" [2023] *Criminal Law Review* 200, 220 (Table 8).

129 Above.

130 Above, 206 (Table 1).

131 Above, 225; see paras 10.193 to 10.205 below on the possibility of further jury research.

132 For example: L Ellison and V Munro, "Reacting to rape: Exploring mock jurors' assessments of complainant credibility" (2009) 49 *British Journal of Criminology* 202; C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987; F Leverick, "What do we know about rape myths and juror decision-making?" (2020) 24 *International Journal of Evidence and Proof* 255; E Daly et al, "Myths about myths? A comment on Thomas (2020) and the question of jury rape myth acceptance" (2023) 7 *Journal of Gender-Based Violence* 189.

2.52 While we move forward on that basis, we note the state of the research around the effects on juries. The Law Commission has previously observed that there are limitations on the conclusions that can be drawn from mock jury research that found a risk of prejudice by juries but that, based on what the mock jury research did reveal and in the absence of research into real juries, we would not be justified in asserting that there is no risk of prejudice to those subject to jury decisions.[133] Twenty years on, that observation remains apposite, and no one study could be sufficient to resolve the important and complex questions that arise when considering juries and rape myths. As Daly et al have argued in this context, research is "best understood as a mosaic [in which many studies together] can build a robust picture of the legal and social world".[134] While Thomas' research is ongoing,[135] and research without real jurors expands (for instance in relation to male victims of rape[136]), there may be a case for opening up the possibility of further research with jurors, including in relation to deliberations, as there are many gaps in what we presently know.

2.53 In Chapter 13 we consider jury research further and ask consultation questions that seek consultees' views on these matters.[137]

CONCLUSION

2.54 Myths and misconceptions about rape and sexual assault have effects across the criminal justice process. They cast a long shadow over the trial process. This chapter has set out some of those myths and misconceptions, some of the ways that they have been addressed, and some of the ways that they are yet to be addressed. The remaining chapters in this consultation paper address many aspects of the trial process and, as will become apparent throughout, many of the issues that arise come back to countering the risks of myths and misconceptions contaminating trials for rape and serious sexual offences.

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133 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 6.39. In that instance the issue was the effects on defendants.

134 E Daly et al, "Myths about myths? A comment on Thomas (2020) and the question of jury rape myth acceptance" (2023) 7 *Journal of Gender-Based Violence* 189, 190.

135 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987, 1005; C Thomas, "A response to 'The Jury is Still Out'" [2021] *Criminal Law Review* 772.

136 In pre-consultation meetings Dr Siobhan Weare (Lancaster University) and Dr Dominic Willmott (Loughborough University) spoke to preliminary findings of their research that will be published in due course.

137 See paras 10.193 to 10.205 below.

Chapter 3: Personal records held by third parties

INTRODUCTION

3.1 Medical or counselling records contain words said by and about us that – whether true or false, whether fact or opinion, whether past or present – are deeply personal and include material we would not want others to see or know about. Yet, in a rape case, there may be a need for such records to be accessed by police and prosecutors, disclosed to the defendant, and used as evidence in a trial. Medical or counselling records, however, are just one species of personal records that fall under the heading of "third-party material" ("TPM"), which is "material held by a person, organisation, or government department other than the investigator and prosecutor".[1] Personal records may include records held by, for example, schools, immigration authorities, child and family services, and employers.[2] Understandably, TPM access, disclosure and admissibility in sexual offences cases is the subject of significant controversy.

3.2 The law and procedure, in its substance and application, has been criticised for, on the one hand, failing defendants when prosecutors have not disclosed records that could have assisted the defence. On the other hand, it has also been criticised for failing complainants, especially due to broad and intrusive requests for personal records. Each arm of these criticisms is underpinned by risk. For the defendant, the complainant's records may contain information that is relevant to the defence and there is a risk that without them a trial would be unfair. For the complainant, there is a risk that the exposure of personal records to others will result in re-traumatisation, especially where those records may be used to cast doubt on the complainant's account and trauma. There is a further risk that some information in records may – if accessed, disclosed or admitted into evidence – result in myths and misconceptions influencing the criminal justice process, potentially affecting police, prosecutors, defence lawyers, judges or juries.

3.3 Against that background, this chapter examines several aspects of law and procedure that we have identified as potentially warranting reform to eliminate or minimise all those risks. Our work has been informed by the published reviews and research, as well as by our engagement with stakeholders. We are mindful that our terms of reference, while not limiting us, direct our attention to pre-trial disclosure and admissibility of medical and counselling records.[3] In this regard, though we are particularly concerned with medical and counselling records, the issues we address may also arise with regard to other records held by third parties (such as schools or social services). In addition, because records are often sought prior to a defendant

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1 Attorney General's Office, *General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (May 2022) para 28.

2 Under our Terms of Reference (stated in ch 1), we do not address extraction of data such as text messages from complainants' devices. In addition, non-professional social media records are not within scope unless they contain a professional record (eg, a counselling report sent by the complainant to a third party).

3 See para 1.7. Under our terms of reference this consultation is not considering the extraction of data from digital devices.

being charged, it is appropriate to consider the investigatory stage. It is also significant that many of the wider concerns we consider in this consultation paper – such as the persistence of rape myths, the re-traumatisation of complainants, or the right to a fair trial – are engaged from investigation onwards.

3.4 The chapter begins by providing an overview of the relevant legal framework. It then addresses a series of disclosure and admissibility issues under five broad headings:

- Whether there is a case for change to the regime that governs access, disclosure and admissibility of TPM, with specific provisions for sexual offences cases.
- Scope, looking at what categories of records should fall within a TPM regime.
- Exemptions, looking at whether there should be prohibitions on access, disclosure or admissibility for some of the categories of records that would fall within a TPM regime.
- Procedure, considering the point in time at which records should be accessible, and who should make determinations about whether TPM can be accessed or disclosed.
- Threshold, examining several questions relating to the threshold tests for the access, disclosure and admissibility of TPM, including how a threshold test should address evidence of inconsistencies in a complainant's account where those inconsistencies are consistent with trauma.

We present 18 consultation questions across the chapter. Throughout the analysis, the questions and the provisional proposals they incorporate, we have been alert to the human rights framework that underpins the way any reformed personal records regime must operate.

The human rights framework

3.5 This area of the law poses clear challenges for the balance which must be struck between the defendant's right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR") and the positive obligations regarding the complainant's right to respect for their private and family life under article 8, which will be engaged when personal records are sought. The European Court of Human Rights ("ECtHR") has made it clear that personal information falls within the scope of article 8, and that it includes medical data, information regarding a person's sexual life, moral integrity, and mental health.[4] The ECtHR has said that the "protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life" that is guaranteed by article 8.[5] Confidentiality is protected out of respect for the person's privacy and to preserve public confidence in the medical and health professions, in turn, encouraging patients to be open and honest so they can receive proper treatment.[6]

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4 *Mockutė v. Lithuania* App No 66490/09 at [93]-[94].

5 *Mockutė v. Lithuania* App No 66490/09 at [93].

6 *Mockutė v. Lithuania* App No 66490/09 at [93].

3.6 We find ourselves, then, working with a delicate balancing exercise. The stakes are high for both the defendant whose liberty is at stake and the complainant whose health and well-being are at risk in the face of potential re-traumatisation, a reluctance to seek or most effectively use treatment, and the exposure of the most personal aspects of their private life. States are afforded a margin of appreciation in respect of what is required for a fair trial and what is required to comply with article 8. As a consequence, different reform options may be compliant with the ECHR and so the critical questions may not be whether an option is compliant, but which compliant option strikes the balance most fairly and effectively.

CURRENT LEGAL FRAMEWORK

3.7 The legal framework governing personal records is derived from statute (with associated codes of practice), common law, government guidance, and rules of procedure. In particular, the processes for investigation and disclosure are governed by the Criminal Procedure and Investigations Act ("CPIA") 1996 and the Code of Practice issued pursuant to the Act ("CPIA Code"), which we refer to together as the "CPIA regime".[7] Additional guidance is contained in the *Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* ("AG's Guidelines") and the Crown Prosecution Service *Disclosure Manual* ("CPS Disclosure Manual").[8] The law is almost always framed with respect to witnesses, and personal records protections for a complainant in rape prosecution arise because of their status as a witness. However, for simplicity and clarity we will usually refer to the complainant, rather than witnesses generally.

3.8 The key legal decision-makers are police, prosecution lawyers, and judges, though decisions by defence lawyers, complainants and third parties can also have significant effects by triggering further legal requirements. The process has multiple stages, some of which will overlap in time and require anticipating what the law will require in subsequent stages. The result is a complex regime. In addressing it, we focus not on the process requirements of (for example) records management or retention of material as an explanatory textbook might but rather on the core components so that the law reform issues are to the fore.[9]

3.9 The legal framework is shaped around three actions that require decisions:

(1) Access (or production): personal records will be accessed by police conducting an investigation. As an investigation progresses, prosecutors may advise police

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7 Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* ("CPIA Code") (September 2020).

8 Attorney General's Office, *Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (May 2022) ("AG's Guidelines"); Crown Prosecution Service, *Disclosure Manual* (July 2022) ("CPS Disclosure Manual"). There is further guidance in other material, including: National Police Chiefs' Council, *Joint Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material* (2018); Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (December 2013) ("Judicial Protocol on Unused Material"); Crown Prosecution Service, *Legal Guidance Rape and Sexual Offences* (27 May 2022 with some chapters subsequently updated) ("CPS Legal Guidance, Rape and Sexual Offences").

9 It is noteworthy though that the process requirements reflect the importance of fair trial rights. For instance, all material relevant to an investigation must be recorded, retained and revealed to the prosecutor for consideration for disclosure: CPIA Code (2020) paras 3.4, 4-6.

whether records need to be sought and obtained. Records may be sought before a person is charged but investigations may continue and access to records may also be sought after charge. We generally use the term "access" where police are able to obtain records by consent, whereas "production" is usually used where consent is refused and records are obtained following a court order.

(2) Disclosure: personal records may need to be disclosed by the prosecution to the defence. This is done pursuant to the pre-trial disclosure regime established by the CPIA 1996. Disclosure will almost always only occur post-charge.[10]

(3) Admissibility: personal records may need to be admitted into evidence at trial.

3.10 We address these matters under four headings. The first deals with access to records during an investigation prior to a defendant being charged. The other three examine the position once proceedings are under way (ie, post-charge) when access, disclosure and admissibility may all be in issue.[11]

Investigation: access to records prior to charge

3.11 Although our primary focus is on pre-trial disclosure and admissibility, attention to pre-charge access is important for several reasons. First, any records accessed should be subject to the disclosure regime. Secondly, attention to pre-charge access helps make visible the extent to which there is (and is not) judicial scrutiny of police and prosecutorial decision-making about obtaining personal records during investigations, noting that those records may later be disclosed to the defence and ultimately become evidence in a prosecution. Thirdly, examining pre-charge access shows how the same fair trial and privacy rights require consideration throughout the process. Finally, it is also important to note that an investigation may continue after a suspect has been charged and there is an ongoing requirement to apply these principles.

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10 There may on occasion be some very limited pre-charge disclosure. Prior to being interviewed, at the discretion of the investigating officer and to the extent that this does not prejudice the investigation, the suspect may be given: "sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it …, in order to allow for the effective exercise of the rights of the defence": Home Office, *Statutory Guidance PACE Code C 2019* (November 2020) para 11.1A. After interview, there may be some limited disclosure in "pre-charge engagement" when the police and the suspect are encouraged to narrow issues in dispute and identify lines of inquiry and the suspect is informed of any charging decision: AG's Guidelines (2022), Annex B – Pre-charge engagement, para 10; disclosure of unused material "must be considered as part of the pre-charge engagement process, to ensure that the discussions are fair and that the suspect is not misled as to the strength of the prosecution case": para 22.

11 An area that we do not explore and falls outside our terms of reference is the relevance of personal records held by third parties when criminal cases are reviewed and miscarriages of justice considered by the Criminal Cases Review Commission ("CCRC") under the Criminal Appeal Act 1995. Since 2016, under s 18A of the Act, the CCRC has had the power to seek a court order to obtain personal records held by non-government bodies and individuals. For an examination of this area see C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019) ch 8. In July 2022 the Law Commission commenced work on a wide-ranging review of the law relating to criminal appeals; the project web page contains information about the terms of reference and project schedule.

3.12 When investigating a crime, police must "approach the investigation with a view to establishing what actually happened" and they should be "fair and objective".[12] Their obligations are stated in the CPIA Code:

> the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. It is a matter for the investigator, with the assistance of the prosecutor if required, to decide what constitutes a reasonable line of inquiry in each case.[13]

3.13 This means police may sometimes need to seek access to personal records of the complainant. That extends to identifying and potentially obtaining and disclosing relevant "third-party material", which is "material held by a person, organisation, or government department other than the investigator and prosecutor".[14] Material will be relevant if it appears to the police "that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case".[15]

3.14 It does not mean, however, that such records can or should be sought in every instance or, where they are sought, that the power to request records is unfettered. This is clear from a range of guidance including, for instance, the AG's Guidelines, which were amended in 2022 to state expressly that accessing TPM should never happen as a matter of course or be assumed to be necessary because of the nature of the alleged offence: "[t]here must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation".[16]

3.15 Under the AG's Guidelines, investigators must make an assessment of reasonableness in determining what constitutes a reasonable line of inquiry. That assessment must have regard to "the prospect of obtaining relevant material" and how that material will be relevant "having regard to the identifiable facts and issues in the individual case".[17] The courts have said that police have "a 'margin of consideration' as to what steps [they regard] as appropriate."[18] However, it will not be reasonable to take a broad or speculative approach to the collection of records. The AG's Guidelines make it clear that investigators must keep in mind that there is a balance to be struck between the right to a fair trial and the right to respect for private and family life.[19] The Judicial Protocol of Disclosure of Unused Material in Criminal Cases is similarly clear in its emphasis: "Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by making a complaint against the

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12 AG's Guidelines (2022) para 15.

13 CPIA Code (2020) para 3.5; AG's Guidelines (2022) para 28; CPIA 1996, s 23(1)(a).

14 AG's Guidelines (2022) para 28.

15 CPIA Code, para 2.1.8.

16 AG's Guidelines (2022) para 30, citing *Bater-James and Mohammed* [2020] EWCA Crim 790, [2021] 1 WLR 725 at [77].

17 AG's Guidelines (2022) para 13(c).

18 *R v Alibhai* [2004] EWCA Crim 681 at [62]-[63].

19 AG's Guidelines (2022) paras 11-13.

accused".[20] If the investigator concludes that a reasonable line of inquiry entails obtaining personal or private information, there must be consideration of (among other things) what is the least intrusive method that can be used to obtain the material, whether it is necessary to view the entirety of the material, and whether the material must be collected or could be viewed without collection.[21]

3.16 Where access to TPM needs to be considered, then the AG's Guidelines set out the principles to be applied.[22] These include a non-exhaustive list of matters for the police and prosecution to consider when determining relevance. These were added to the Guidelines in May 2022:[23]

(i) What relevant information is the material believed to contain?

(ii) Why is it believed that the material contains that relevant information? If it is likely that no relevant information will be contained within the material, a request should not be made.

(iii) Will the request for the material intrude on the complainant's or witness's privacy?

(iv) If the material requested does amount to an invasion of privacy, is it a proportionate and justifiable request to make in the circumstances of the individual case and any known issues? Consider (vi) below or whether the information which may result in access amounting to an invasion of privacy can be redacted to remove anything which does not meet the disclosure test.

(v) Depending on the stage of the case, does the material need to be obtained or would a request to preserve the material suffice until more information is known?

(vi) Is there an alternative way of readily accessing the information such as open-source searches, searches of material obtained from the suspect, or speaking directly to a witness, that does not require a request to a third party?

(vii) Consider the scope of the material required, for example are the entirety of an individual's medical records required or would a particular month or year be sufficient? Ensure the request is focussed so that only relevant information is being sought.

(viii) The process of disclosure and its role in the justice system should be clearly and understandably expressed to the third party. They must be

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20 Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (Dec 2013) para 46.

21 AG's Guidelines (2022) para 13(d).

22 AG's Guidelines (2022) paras 28-34, with further specific guidance on material held by government departments, other domestic bodies, and making international inquiries: paras 35-54.

23 AG's Guidelines (2022) paras 30-32.

kept appraised of any ongoing disclosure decisions that are made with regard to their material.[24]

3.17 If after all these considerations the investigator concludes that a request is needed then they should request the material from the record holder, ordinarily obtaining the complainant's consent first.[25] However, prior to charge, materials can only be accessed with consent; no person has an obligation to provide material to the police and compelled production can only arise in very limited circumstances.[26] That consent will ultimately need to be the consent of the record holder because a third party may provide material to police without the consent of the complainant,[27] or may refuse access to records even if the complainant has consented to access. Where consent is refused then investigators and prosecutors should consider "how the trial process could address the absence of the material".[28] Nevertheless, a complainant who does not provide material may find that their complaint will not be further investigated or not prosecuted but they are under no compulsion to produce records or consent to a third-party producing records relating to them. If material is to be secured against the will of the complainant or the person holding the records, then a court process must be used. That will typically be an application for a witness summons to compel the record holder to produce the records, but this will only be available after a defendant has been charged. Where consent is refused during an investigation then police should

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24 CPS Disclosure Manual, Ch 5 – Reasonable Lines of Enquiry and Third Parties, directs use of the nationally standardised forms and correspondence set out in the National Police Chiefs' Council, *Joint Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material* (January 2019) and where appropriate, any local protocols. For requests to local authorities or the Family Court in relation to children, it also directs consideration of Association of Chief Police Officers et al, *2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings* (October 2013).

25 The defence must also be informed of third-party inquiries that have been made: AG's Guidelines (2022) para 45.

26 There is an alternative prior to charge, which would be an application for a production order under the provisions for accessing "special procedure" material under the Police and Criminal Evidence Act 1984 (PACE) (s 9 and sch 1). CPS guidance states that prosecutors should consider this or a witness summons: CPS Legal Guidance, Rape and Sexual Offences, Chapter 3: Case Building (15 July 2022). It is not clear to us how often this process is used but no instances arose in our pre-consultation stakeholder engagement. A warrant could also be sought under the Bankers' Books Evidence Act 1879 but, again, we are not aware this has been used. See also Search Warrants (2020) Law Com No 396, Ch 12.

27 It is important to note that where a complainant has refused to consent to access, the third party may nevertheless disclose the records to police and prosecution on the grounds that confidence can be breached in the public interest. For example, the British Association of Counselling and Psychotherapy (BACP) provides guidance for its members, which sets out principles and approaches for making decisions, and states that "circumstances that might justify breaching confidentiality" are "real risk of serious harm, and the threat appears imminent, and disclosure is likely to be effective in limiting the harm or preventing the harm occurring": *Sharing records with clients, legal professionals and the courts in the context of the counselling professions* (BACP, Good Practice in Action 069, September 2022) p 21. We are grateful to the BACP for providing us with access to their guidance documents. See also: General Medical Council, *Confidentiality: good practice in handling patient information* (25 May 2018), paras 64-65; British Medical Association, *Access to health records* (2018) p 8; Search Warrants (2020) Law Com No 396, paras 12.77-12.95.

28 AG's Guidelines (2022) para 13(f).

request that any record holder preserve material so that it will still be available if a witness summons is subsequently issued.[29]

Access to records post-charge: witness summons

3.18 After a defendant has been charged, access to personal records may still be obtained by consent but a person in receipt of a request remains under no obligation to allow access. However, police and prosecutors may now seek to compel the production of records. It is noteworthy, though, that while TPM is a matter of significant interest, there is no specific procedure for obtaining it.[30] The witness summons process is used as a matter of common practice, but not by design.[31]

3.19 Under section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965, a witness summons ordering production of documents will only be ordered if the court is satisfied that:

> (a) a person is likely to be able to … produce any document or thing likely to be material evidence … and
>
> (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to … produce the document or thing.

3.20 The application must be served on the proposed witness (such as the counsellor) and, if the court directs, any person to whom the proposed evidence relates (such as the complainant), and each has a right to make representations.[32] The material itself may be examined[33] or a judge may "regard an assurance from an independent and competent member of the Bar as sufficient reason for treating the documents as irrelevant".[34]

3.21 The statute sets a higher threshold for access than where documents are produced by consent. That is, investigators can make a request for a document where they think it will produce relevant material and so is necessary to pursue a reasonable line of inquiry. However, to seek a witness summons they must think that the document will not merely be relevant but that it will be "likely to be material evidence". Any person served with the application may object on the grounds that the document "is not likely to be material evidence".[35]

3.22 The statutory phrase "the interests of justice" engages the types of concerns and balancing that arise from a consideration of articles 6 and 8. This is reflected in the

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29 AG's Guidelines (2022) para 44.

30 Judicial Protocol on Unused Material, para 46.

31 Above.

32 CrPR, r 17.5(3), 17.5(4), following *R (On the application of TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

33 CrPR, r 17.6(2).

34 Rook and Ward, *Rook and Ward on Sexual Offences* (6th Ed. 2021) para 18.90 citing *R v W(G) and W(E)* [1997] 1 Cr App R 166.

35 CrPR, r 17.6(1)(a).

rights of persons served to object also on the grounds that "even if it is likely to be material evidence, the duties or rights, including rights of confidentiality, of the proposed witness or of any person to whom the document or thing relates, outweigh the reasons for issuing a summons".[36]

3.23 Post-charge there are, then, two different processes for access to records – consent and witness summons – but each has a different threshold and only the latter involves judicial scrutiny.

Proceedings: disclosure to the defence

3.24 Once a person has been charged then the prosecution must disclose certain material to the defence. Disclosure is a key component of the criminal process that ensures fairness to the defendant. If disclosure failures are not or cannot be remedied, then they may lead to an application by the defence to stay the proceedings as an abuse of process. Disclosure failures may also give rise to an application against the prosecution for wasted costs; an application to exclude certain evidence; a court finding that a public authority acted incompatibly with the defendant's rights under the ECHR; or where the conviction is considered unsafe, may provide a basis for an appeal.[37] There are also strict confidentiality requirements that apply to disclosed material and breaches will constitute a contempt of court.[38]

The CPIA disclosure regime

3.25 The prosecution must disclose to the defendant not only the evidence they will rely on to prove the case but also any "unused material" that meets the disclosure test. Under the CPIA 1996 this is any material that "might reasonably be considered capable of undermining the case for the prosecution… or of assisting the case for the [defendant]".[39] The CPIA 1996 first places on the prosecution an initial duty of disclosure.[40] There is then a continuing duty of disclosure under which the prosecution must keep under review "whether at any given time (and in particular following the giving of a defence statement) there is prosecution material which [meets the disclosure test] and has not been disclosed to the [defendant]".[41]

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36 CrPR, r 17.6(1)(b).

37 CPS Disclosure Manual, Chapter 1.

38 CPIA 1996, ss 17-18.

39 CPIA 1996, s 3(1). Though disclosure is primarily governed by the CPIA regime, the common law "may require the prosecutor to disclose material to the accused outside the statutory scheme in accordance with the interests of justice and fairness. An example of this is where it would assist the accused in the preparation of the defence case, prior to plea and regardless of anticipated plea. This would include material which would assist in the making of a bail application, material which may enable the accused to make an early application to stay the proceedings as an abuse of process, material which may enable the accused to make representations about the trial venue or a lesser charge, or material which would enable an accused to prepare for trial effectively": CPIA Code, para 6.5; AG's Guidelines (2022) para 79, citing *R v DPP, ex parte Lee* [1999] 1 WLR 1950 at 1962-1963.

40 CPIA 1996, s 3.

41 CPIA 1996, ss 7A(2), 7A(5). After the initial prosecution disclosure, the defendant must provide a defence statement, which must disclose to the court and the prosecution the nature of the case they will present at trial including any facts, defences and points of law relied on and any areas of dispute with the prosecution: in the Crown Court, CPIA 1996, ss 6, 6A; see also AG's Guidelines (2022) paras 123-128.

3.26 The AG's Guidelines list issues the prosecution should consider in deciding whether material meets the disclosure test:

(a) The use that might be made of it in cross-examination;

(b) Its capacity to support submissions that could lead to:

(i) The exclusion of evidence;

(ii) A stay of proceedings, where the material is required to allow a proper application to be made;

(iii) A court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the European Convention of Human Rights;

(c) Its capacity to suggest an explanation or partial explanation of the accused's actions;

(d) Its capacity to undermine the reliability or credibility of a prosecution witness;

(e) The capacity of the material to have a bearing on scientific or medical evidence in the case.[42]

3.27 The CPIA Code gives a non-exhaustive list of unused material which is likely to meet the test for disclosure. It states that the police and prosecution should review any material carefully but should start with a presumption that the listed examples are likely to meet the disclosure test.[43] Examples given include:

- any previous accounts given by a complainant or by any other witnesses;
- any material casting doubt on the reliability of a witness e.g. relevant previous convictions and relevant cautions of any prosecution witnesses and any [co-suspects or co-defendants].[44]

3.28 With respect to sexual offences specifically, there is additional CPS guidance on reviewing TPM and case building. Where prosecutors are considering whether material strengthens the case or meets the test for disclosure, they:

> should guard against looking for "corroboration" of the complainant's account or using the lack of "corroboration" as a reason not to proceed with a case. Instead, the prosecutor should consider:

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42 AG's Guidelines (2022) para 84.

43 CPIA Code (2020) para 6.6. When the schedule of non-sensitive unused material is drafted, the police "may not know exactly what material will form the case against the [defendant]"; they must therefore, where necessary, provide an amended schedule where any material comes to light or in particular, when the defendant serves their defence statement: paras 8.1-8.3.

44 CPIA Code (2020) para 6.6(e), (g).

1. The nature of the case against the accused;

2. The essential elements of the offence alleged;

3. The evidence upon which the prosecution relies;

4. Any explanation offered by the accused, whether in formal interview, defence statement or otherwise; and

5. What material or information has already been disclosed.[45]

3.29 The guidance then gives examples of material that **may** weaken the prosecution case and so may therefore meet the disclosure test, including:

1. Material that casts doubt upon the accuracy of a prosecution witness;

2. Material that casts doubt upon the reliability of a confession;

3. Material that undermines the credibility of a prosecution witness;

4. Material that might assist the accused to cross-examine a prosecution witness;

5. Material that may support a defence that is being raised or that may be apparent from the papers;

6. Material that may support a submission of no case to answer, a submission to stay proceedings as an abuse of process or an application to exclude prosecution evidence.[46]

3.30 Although medical and counselling records are a key type of TPM, other types of personal records may warrant similar consideration. Records obtained from social services have been identified as being of particular concern and particular care must be taken. CPS Legal Guidance states:

> Complainants who are, or have been, in the care of the social services should not be disadvantaged in the criminal process by this fact, and prosecutors should be prepared to address this issue as part of the presentation of the prosecution case.[47]

3.31 It acknowledges that complainants who have a history with social services may have information recorded about them on school, local authority or social services records which would not otherwise have been documented. It sets out that, for example, telling minor lies is not unusual for children from troubled backgrounds and a recorded instance of lying whilst at school does not necessarily indicate that the allegation is fabricated. It recommends a "thinking" and "flexible" approach focussing on whether

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45 CPS Legal Guidance, Rape and Sexual Offences, Chapter 3: Case Building (15 July 2022) "Reviewing Third Party Material".

46 Above (emphasis in original).

47 Above.

material meets the test for disclosure and the "overall credibility of the account", rather than on "a particular aspect or aspects of the lies".[48]

Decisions requiring court orders

3.32 Decisions about what satisfies the disclosure test are made by the prosecutor. The court will only be involved in disclosure decisions in two circumstances:

(1) On an application by the defence for disclosure of material they have reasonable cause to believe is required to have been disclosed but has not been.[49] However, defence requests cannot be speculative; they must be particularised with demonstrated relevance to an unambiguous defence statement.[50]

(2) On an application by the prosecution for permission to withhold material from the defence on the grounds that, though it meets the disclosure test, "it is not in the public interest to disclose it".[51] This is referred to as a public interest immunity ("PII") application.[52] It has considerable importance where medical or counselling records are in issue.

Public interest immunity

3.33 A PII application will be made where the prosecutor has identified material that, if disclosed, would give rise to "a real risk of serious prejudice to an important public interest".[53] This will be "sensitive material".[54] The CPIA Code gives a non-exhaustive list of examples of sensitive material, including "material given in confidence" and "material relating to the private life of a witness."[55] Sensitive material is then only provided to the defendant if the court concludes that "the interests of the defence outweigh the public interest in withholding disclosure".[56]

3.34 In relation to the personal records of complainants, the prosecution will make a PII application where the complainant refuses to consent to disclosure of their medical or

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48 CPS Legal Guidance, Rape and Sexual Offences, Chapter 3: Case Building (15 July 2022) "Reviewing Third Party Material".

49 CPIA 1996, s 8.

50 Judicial Protocol on Unused Material, paras 26, 44; see also CPS Disclosure Manual, Chp 15.

51 CPIA 1996, ss 3(6), 7A(8), 8(5); an application may be made at the initial disclosure stage, or pursuant to the ongoing disclosure duty, or when the defence makes an application for material under s 8. The court has an ongoing duty to keep under review whether withholding disclosure remains in the public interest: s 15.

52 Blackstone's Criminal Practice, D9.50.

53 *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [36]; CPIA Code (2020) para 2.1.9; AG's Guidelines (2022) paras 117-122.

54 CPIA Code (2020) para 2.1(10). Some sensitive material may simply be redacted, such as irrelevant personal, confidential information: AG's Guidelines (2022), Annex D – Redaction. Personal information must only be revealed if absolutely necessary, taking into account the complainant's right to privacy and data protection: AG's Guidelines (2022) paras 33 – 34.

55 CPIA Code (2020) para 6.14.

56 CPIA Code (2020) para 10.9.

counselling records to the defence.[57] Although the complainant will obviously have an article 8 privacy interest, in a PII application that is not what is being balanced against the public interest in the defendant receiving a fair trial. Rather, the public interest in withholding disclosure is "the public interest in patient confidentiality generally".[58] In *Campbell v MGN Ltd*, Baroness Hale cited the ECtHR's articulation of that wider interest in respecting the confidentiality of health data:

> It is crucial to … preserve [a patient's] confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health ….[59]

3.35 When the court considers the application both the complainant and the medical professional or therapist will have a right to be heard.[60] The court should give a statement of reasons for its decision.[61]

3.36 Given the court is being asked to permit the prosecution to withhold from the defence material that may undermine the prosecution case or assist the defence case, the procedural and substantive thresholds are demanding. The application must describe the material, explain why it is information which the prosecutor would have to disclose, were it not for the PII claimed; why it is not in the public interest to disclose it; and why "no measure such as the prosecutor's admission of any fact, or disclosure by summary, extract or edited copy, adequately would protect both the public interest and the defendant's right to a fair trial".[62] These reflect the decision in *R v H*, where the House of Lords set out a series of questions the court must address before there is any derogation from "the golden rule of full disclosure".[63] The AG's Guidelines state that the *R v H* questions should be "scrupulously adhered to" by prosecutors.[64] The questions include:[65]

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57 HM Crown Prosecution Service Inspectorate ("HMCPSI"), *Disclosure of Medical Records and Counselling Notes: A review of CPS compliance with rules and guidance in relation to disclosure of complainants' medical records and counselling notes in rape and sexual offence cases*, (July 2013) ("Disclosure of Medical Records and Counselling Notes") paras 3.2, 3.4.

58 *R (on the application of TB) v The Combined Court at Stafford* [2006] EWHC 1645, [2007] 1 WLR 1524 at [27].

59 *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 AC 457 at [145] (Baroness Hale), citing *Z v Finland* (1997) 25 EHRR 371 (App No 22009/93) at [95].

60 CPIA 1996, s 16; this applies to any person claiming to have an interest in the material and who can show that they were involved in bringing the prosecutor's attention to the material.

61 Judicial Protocol on Unused Material, para 55.

62 CrPR, r 15.3(3).

63 *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [36].

64 AG's Guidelines (2022) para 121.

65 *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [36]. They are preceded by questions that establish the material meets the disclosure test and followed by the need to monitor whether further disclosure may be possible as a trial unfolds.

- Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

- [If there is such a risk] can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence? This question requires the court to consider [alternative measures including: the prosecution admitting into evidence the point the defence wish to establish; preparing summaries or extracts; or even exceptionally the appointment of special counsel who would have access to the documents and could test the contentions of the prosecution, safeguarding the defendant's interests.]

- [If alternative measures are proposed to enable limited disclosure, do those measures] represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

- If limited disclosure is ordered … may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

3.37 The House of Lords also indicated that:

> [t]here will be very few cases indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an … application is to be made [without the presence of the defence]. If even that information is withheld and if the material to be withheld is of significant help to the defendant, there must be a very serious question whether the prosecution should proceed …[66]

3.38 The AG's Guidelines reiterate this:

> If the prosecutor concludes that a fair trial cannot take place because material which satisfies the test for disclosure cannot be disclosed and that this cannot be remedied by an application for non-disclosure in the public interest, through altering the presentation of the case or by any other means, then they should not continue with the case.[67]

3.39 In the end, if the judge concludes that disclosure is required in order that there is a fair trial then the application to withhold disclosure will be refused. HM Crown Prosecution Services Inspectorate ("HMCPSI") stated quite plainly the two alternatives left to the prosecution: they either obtain the complainant's consent to disclose or, if consent is not given, discontinue the prosecution.[68]

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66 *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [37].

67 AG's Guidelines (2022) para 122.

68 HMCPSI, Disclosure of Medical Records and Counselling Notes (2013) para 3.4.

3.40 Having set out the law, it is not clear to us how often PII applications are made, nor how often they succeed. It may be quite rare, given that PII protects against very serious risks, such as exposing the identity of an informant (for example, a person who has provided information about child abuse), and may be most relevant where the record holder is a local authority.[69] We have also had some indication from stakeholders that PII matters can be resolved by the use of agreed facts, though it is not clear whether such agreement overcomes problems of violation of the complainant's right to respect for their private life.[70] We welcome insights into and views on the use of agreed facts.

Consultation Question 1.

3.41 Are agreed facts regularly used as a practical strategy for addressing public interest immunity matters?

3.42 Does the use of agreed facts in this context pose any risks or concerns?

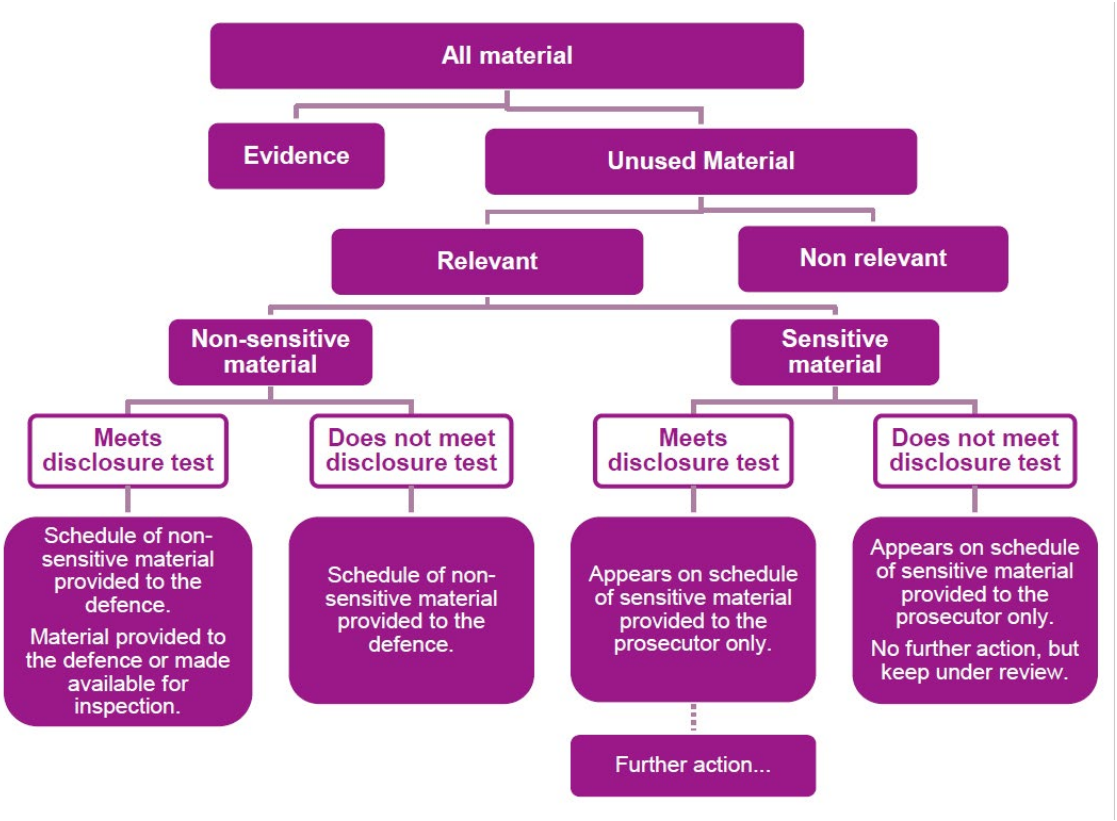
Overview of the process

3.43 The flow chart below is taken from the AG's Guidelines and sets out the different categories of material and how they will be dealt with.[71]

69 See, for example, *A (A Child)* [2012] UKSC 60, [2013] 2 AC 66 at [15]-[16], [29]-[30], which concerned disclosure in family proceedings.

70 See also M Thomason, "Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials" [2021] *Criminal Law Review* 727.

71 AG's Guidelines (2022) para 16.



Proceedings: admissibility

3.44 There are no specific rules for the admission of TPM into evidence. Instead, the general framework for admissibility applies. Accordingly, the starting point for admissibility is relevance. If material is relevant to a fact in issue, it will be admissible unless the law imposes a higher threshold or there is an obligation or discretion to exclude it.

3.45 The most likely potential bases on which personal records evidence might be subject to a higher threshold or excluded are:

(1) If the material is sexual behaviour evidence ("SBE"), then it will not be admissible unless it satisfies the higher threshold requirements for admissibility of SBE.[72]

(2) If the material is to be used as character evidence, then it will only be admissible if it satisfies the higher threshold requirements for admissibility of character evidence.[73]

(3) If the material is subject to PII then it may be excluded. This will be relevant where the court refused the prosecution permission to withhold disclosure and the defence now seeks to bring unused prosecution material into evidence.

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[72] See ch 4.

[73] See ch 5.

3.46 With regard to PII, it seems that the prosecution would be unlikely to resist admissibility on these grounds. The authors of *Halsbury's Laws of England* take the view that once material is disclosed to the defence "there will often be no point in seeking to assert PII in relation to it during the trial".[74] This is explicable on two bases. First, the test would be effectively the same as that applied at the disclosure stage so it seems unlikely that there would be a shift in the public interest balance, though it may be possible to exclude material on the grounds that as the trial has developed it is no longer relevant.[75] Secondly, while a prosecution PII application may make sense in contexts where there is a stronger open justice interest in the material being disclosed in open court and subject to reporting by the media (such as those that engage accountability of government officials) and there are few or no article 8 concerns, in a sexual offences prosecution there will be other avenues available to limit the extent to which confidential information may be disseminated outside the courtroom.[76]

3.47 If none of these exclusions is engaged then the material from personal records will be admissible, provided first that it is relevant to a fact in issue and that no other exclusions apply.

Connecting threads

3.48 As the framework above indicates, there are different stages at which personal records come into play in a RASSO prosecution but there are threads that connect access, disclosure and admissibility. Three, in particular, will arise in the discussions below.

3.49 First, the trajectory of the thresholds generally (if unevenly) moves upwards, though in the context of sexual offences cases the thresholds are not especially high. Police and prosecutors can obtain access to material provided that they are following a reasonable line of inquiry, if there is consent. Compelled production requires that the record will be likely to be material evidence and that production is in the interests of justice. Material will not be disclosed to the defence unless it might reasonably be considered capable of undermining the case for the prosecution or of assisting the defendant's case. The admissibility threshold is slightly higher again, requiring relevance to a fact in issue, but unless the material engages SBE or character then the effective threshold for admissibility will be relevance alone.

3.50 Second, there are different approaches and gaps. These include the position regarding the process and thresholds for access being different depending on whether a complainant consents to access. There are also no specific rules for accessing TPM, and the process is largely governed by guidance rather than primary or secondary legislation or rules of court.

3.51 Third, many significant decisions are made without judicial involvement.

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74 *Halsbury's Laws of England,* 5th ed, Vol 27, para 182, n 3.

75 *R v Governor of Brixton Prison, ex parte Osman (No 1)* [1992] 1 All ER 108.

76 See ch 7.

3.52 We turn now to looking at the case for change and then turn to specific issues regarding the scope, procedure and threshold tests associated with personal records.

IS THERE A CASE FOR CHANGE?

3.53 On one view, the law is satisfactory. It is well-understood and well-established. In relation to Northern Ireland, the Gillen Review commented that the CPIA regime is fit for purpose, and instead concluded that it is its application which is in need of reform, stating:

> It would be a distraction to reinvent the wheel and there is no need to do so. The test is clear and sensible. It is the application of the law that is inadequate and unsatisfactory.[77]

3.54 There is an abundance of guidance, including in the AG's Guidelines, which have recent updates on accessing TPM.

3.55 Nevertheless, as the current legal framework shows, judicial scrutiny does not occur at each stage of the process and, in addition, there is evidence that disproportionate requests are made for the disclosure of complainants' personal records, which carries some considerable risk to complainants and to the objectives of a trial.[78]

3.56 In this section we look at the criticisms in more detail and consider whether there is a case for change.

Disclosure failures

3.57 Disclosure failures have been condemned for their effect on defendants. In 2016, the Criminal Cases Review Commission ("CCRC") observed that the "single most frequent cause" of miscarriages of justice continued to be "failure to disclose to the defence information which could have assisted the defendant."[79] Failures in RASSO prosecutions have been notable, with the Liam Allan case being the highest profile matter.[80] In that case the police found exculpatory material on the complainant's mobile phone but did not disclose it to the defendant's legal team until nearly two years later, after his trial had started. It led to his acquittal of rape in 2017 and triggered a review of the disclosure process.[81] The case and the review highlight the considerable investigatory challenges posed by the large volume of information which is routinely examined in sexual offences cases, such as that found on electronic devices and mobile phones. However, they also underscore the ways that a fair and

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77 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland*, (May 2019) para 10.92.

78 In a recent Home Office consultation, only 3% of the 200 police respondents and 34 CPS respondents agreed that police requests for third party material were "always necessary and proportionate": Home Office, *Police requests for Third Party Material: Consultation Response* (2022) p 19.

79 CCRC, *Annual Report and Accounts 2015/16*, p 7.

80 For example, "Student Liam Allan 'betrayed' after rape trial collapse", BBC News Online, 15 Dec 2017.

81 CPS and Metropolitan Police, *A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London* (January 2018).

consistently applied disclosure regime is critical to doing justice and preventing miscarriages of justice.

3.58 Case reviews conducted as a result of Liam Allan's case led to acquittals or the collapse of prosecutions or investigations in 47 other cases.[82] The case also caused a wider loss of confidence in the justice system and prompted questions about whether there were broader, systemic failings in the disclosure regime and its application. In 2018 the House of Commons Justice Committee noted that disclosure concerns had been live for some years and made a number of recommendations including that the Attorney General, Director of Public Prosecutions ("DPP"), Minister for Policing and the National Police Chiefs' Council ("NPCC") (among others) take an ongoing role in "resolving issues in the disclosure process and rebuilding public confidence in the justice system".[83] It added that the Attorney General should be "fully accountable for the performance of the [CPS]", and "should personally sign off" disclosure guidelines and review them at stated intervals.[84] The Committee noted the need to balance the defendant's absolute right to a fair trial with the complainant's right to privacy and recommended the Attorney General consider providing "greater clarity [in the guidelines] on the handling of sensitive material and personal data".[85]

Intrusive and broad inquiries

3.59 Since then, there have been criticisms that the regime now fails complainants. In *The Decriminalisation of Rape*, a joint report by four civil society organisations that all work with and support complainants and victims, it was argued that the "dominant message" from the *Allan* case was that "women routinely make false complaints of rape" and that there was an institutional response that caused the pendulum to swing the opposite way.[86] The result, they argue, has been a "normalisation of extremely invasive inquiries which go far beyond what is necessary on the facts of the case".[87] The report stated that police routinely ask complainants for access to their digital data

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82 The CPS carried out a review of 3,637 live rape cases; during the period of the review 47 were stopped due to issues with disclosure: CPS, *Rape and serious sexual offence prosecutions: Assessment of disclosure of unused material ahead of trial* (June 2018) pp 3-4.

83 House of Commons Justice Committee, *Disclosure of evidence in criminal cases* (July 2018) p 46. This report cited several other reviews, including: HMCPSI and HM Inspectorate of Constabulary and Fire & Rescue Service ("HMICFRS"), *Making It Fair: A Joint Inspection of Disclosure of Unused Material in Volume Crown Court Cases* (Criminal Justice Joint Inspection, July 2017), which found a "significant failure in the process of disclosure" (para 1.4); CPS and Metropolitan Police, *Joint review of disclosure in the case of R v Allan* (January 2018), which noted that "disclosure problems … were caused by a combination of error, lack of challenge and lack of knowledge" (p 6); and CPS, NPCC and College of Policing, *National Disclosure Improvement Plan*, (January 2018), which made various commitments responding to recommendations made in previous reviews. Subsequent to this, a further review found areas of performance that still required significant improvement: HMCPSI, *Disclosure of unused material in the Crown Court, Inspection of the CPS's handling of the disclosure of unused material in volume in Crown Court cases* (January 2020).

84 House of Commons Justice Committee, *Disclosure of evidence in criminal cases* (July 2018) p 48.

85 Above, p 50.

86 Centre for Women's Justice ("CWJ"), End Violence Against Women Coalition ("EVAW"), Imkaan and Rape Crisis England and Wales ("RCEW"), *Decriminalisation of Rape: Why the justice system is failing rape survivors and what needs to change* ("*Decriminalisation of Rape*") (November 2020) pp 30, 32.

87 Above, p 30. The case appeared to bring about a sharp drop in the number of charges for rape: R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales Research Report* (HM Government, June 2021) pp 53-54.

and to confidential material held by third parties, beyond the period contemporaneous to the allegation, including their medical, counselling or therapy records; adult or child social services records; school or university records; and records from their present or previous workplace.[88] It added that this may deter complainants from reporting or continuing to support an investigation or prosecution, or, conversely, to continuing with the case but avoiding counselling or therapy or seeking more limited forms of it.[89] In a similar vein the End-to-End Rape Review also found that there are pressures on police to obtain complainants' personal records and that complainants may feel pressured into providing access to their personal records because they are fearful that without this, the case may not proceed.[90]

3.60 The findings of the 2021 Joint Inspection of the police and CPS' response to rape has identified ongoing concerns that the disclosure process is not always well managed in sexual offences cases and specific concerns have been identified in relation to personal records.[91] Chief Constable Sarah Crew and a judicial and practitioner stakeholder told us that in sexual offences there is significant scrutiny of complainants' credibility and examination of their personal records to an extent not found in other comparable criminal contexts. Complainants experience requests for their records as being invasive and intrusive. Several told researchers for the Office of the Victims' Commissioner that such requests were comparable to "the violation inflicted by the rape" and that it made them feel that "they were under suspicion".[92]

3.61 A wide range of stakeholders told us of overly broad requests to access personal records and TPM. We were told by several stakeholders, including from policing, that the police adopt a risk-averse attitude to gathering information, which means that more information is requested at an early stage to avoid concerns later that something relevant had been missed. Judges and a police officer expressed the view that far too much material is currently being generated. A senior police officer and an Independent Sexual Violence Adviser (ISVA) noted that this is a source of delay in investigations. There was disagreement about whether it is the police or CPS that push for broad requests, though it seemed that there is some inconsistency among prosecutors in what they require.

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88 CWJ, EVAW, Imkaan and RCEW, *Decriminalisation of Rape* (2020) p 31. The report (p 32) also makes the point that the issue in Mr Allan's case was not that the police had failed to obtain the relevant evidence, but that it had been overlooked. The lesson to be learned, it argued, was not that broad, invasive requests are justifiable, but that "the police and the CPS are not adequately resourced or equipped to meet court deadlines, and backlogs are having an impact on the quality of casework (across all areas of crime)".

89 Above, pp 30-31. We note that the report's findings suggest the experience of complainants has been markedly different from the standards in the current CPS *Legal Guidance: Pre-Trial Therapy* (26 May 2022) ("CPS Legal Guidance: Pre-Trial Therapy") in which the "fundamental principles" are that "[t]he health and well-being of the [complainant] should always be the determinative factor in whether, when and with whom they seek pre-trial therapy" and "[t]here is no requirement to delay therapy on account of an ongoing police investigation or prosecution."

90 R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales Research Report* (HM Government, June 2021) pp 52-53.

91 HMICFRS and HMCPSI, *A Joint Thematic Inspection of the Police and Crown Prosecution Service's Response to Rape: Phase 2 – Post-Charge* (Criminal Justice Joint Inspection, 2021) pp 76-78.

92 J Molina and S Poppleton, *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020) pp 27, 58.

3.62 There is recognition that the sands have shifted over time and there are arguments that they need to shift again. Chief Constable Crew gave evidence to the House of Commons Home Affairs Committee that because of concerns about cases collapsing due to disclosure issues, the police were requesting access to too much TPM, stating that the pendulum needs "to swing back to only when necessary, only when following a reasonable line of enquiry and in a proportionate and least intrusive way."[93]

Consent

3.63 Complainants' consent to access records is sought in circumstances where they are likely to be traumatised, where a failure to consent may result in no further police action, and where there is no judicial scrutiny. As a recorder told us, a "non-cooperative" complainant who refuses to consent to their records being accessed has a right to be heard before a judge if a witness summons is issued, whereas a "cooperative" complainant who accedes to a request has no such right and is effectively being penalised for being cooperative. That said, several stakeholders told us that they have never seen the complainant make their own representations or have representations made on their behalf by a legal representative in a witness summons application. One stakeholder suggested that one reason for that may be the absence of legal aid. However, while "non-cooperation" may help ensure scrutiny of requests, the "non-cooperative" complainant is still vulnerable to their complaint not being investigated any further.

3.64 Many stakeholders raised doubts about whether complainants' consent to access their records is meaningful. We were told by The Survivors Trust and by ISVAs that complainants are concerned that if they do not give permission to share their records then they will be seen as non-cooperative. A psychotherapist said that though complainants are given a choice, refusing consent is seen as suspicious. A criminologist and an ISVA informed us that where consent is refused, it may be implied in communications with the complainant that the case will not proceed. A number of stakeholders suggested that true informed consent requires the complainant to have independent legal advice.[94] It is important, however, as barrister Hanna Llewellyn-Waters told us, that the complainant is told of the potential consequences of refusing access, not to put pressure on them to consent, but so that they are fully informed.

3.65 The process of obtaining consent does not always appear to be well handled. The Survivors Trust have found that often the burden of explaining a records request is put onto a counsellor or an organisation, instead of the police explaining the relevance for the ongoing investigation, how it could be shared, and its implications. The Home Office told us that they had heard anecdotally from victim groups that victims had on occasion been asked by the police to sign blank consent forms – that is, the forms did not include any details about what information the police would request about the

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93 Home Affairs Committee, *Investigation and Prosecution of Rape* (Eighth Report of Session 2021-22, 12 April 2022) HC 193 ("Home Affairs Committee, Investigation and Prosecution of Rape") para 113.

94 See further ch 8.

complainant. ISVAs agreed that this sometimes happens, though police told us that recent case law and guidance mean that this practice no longer occurs.[95]

3.66 None of this is to say that complainants cannot give measured, informed consent to access. However, the circumstances in which consent is given – including that it may be sought and given prior to charging – and the differential in protection when consent is given or refused are far from satisfactory.

Complainants' health and well-being

3.67 The disclosure regime and its operation have potentially negative consequences for complainants' health and well-being. The House of Commons Home Affairs Committee report into the investigation and prosecution of rape expressed concern that complainants may elect – or be advised – to delay seeking therapy due to concerns that it may impact on the investigation or prosecution or that the content of their therapeutic discussions may be disclosed to the defence.[96] A respondent to the Committee's questions for those with lived experience stated:

> Allow victims to access counselling that is exempt from court – you have to choose between delaying counselling for 12-24 months until court is over, or not reporting because it can be used against you.[97]

Third parties' experience

3.68 There is much to suggest that the existing regime does not serve third parties well. Record holders reported to the Home Office that police requests lack clarity, include requests for a lot of material that does not seem to relate to the offence, that they struggle to respond quickly, and that they lack resources, knowledge and training about how to respond.[98] A former director at a Sexual Assault Referral Centre, told us that the record holder is meant to be updated on what will happen to the material after it has been provided to the police, but this does not often happen. A senior police officer told us that one problem faced by police when requesting TPM is that record holders do not have the resources or technology to filter it, resulting in a very labour-intensive job for the police.

Personal records and rape myths

3.69 Little of the above is new in many ways. More than 25 years ago Sedley J observed that it had become "standard practice" in sexual offences cases for the defence to "seek to compel the production of any social services, education, psychiatric, medical

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95 See also *R v Bater-James and Mohammed* [2020] EWCA Crim 790, [2021] 1 WLR 725; Information Commissioner's Office, *Mobile phone data extraction by police forces in England and Wales: Investigation report* (June 2020) pp 41-43.

96 Home Affairs Committee, Investigation and Prosecution of Rape (2022) paras 144-150.

97 Above, INV0037 Respondents to the Home Affairs Committee's questions for those with lived experience, p 8.

98 Home Office, *Police requests for Third Party Material: Consultation Response* (2022) pp 10-11.

or similar records concerning the complainant, in the hope that these will furnish material for cross examination."[99]

3.70 It has been observed that from the early 1990s, once rape shield laws brought in restrictions on the use of sexual behaviour evidence, an alternative path for undermining the credibility of a complainant lay in the pursuit of personal records – "therapeutic records, crisis records, psychiatrists records, hospital, birth control, abortion, residential school, juvenile records, immigration, family court, and school".[100] Some complainants will be especially vulnerable to requests for records, including women with mental health histories, immigrant women, childhood assault survivors, foster children, and women with disabilities.[101] It is also noteworthy that perpetrators target vulnerable victims.[102] Such records are "mined for inconsistencies".[103] They are used, argues Larcombe:

> to create doubts about whether the complainant is a genuine victim. Since the "ideal" victim's conduct and character are always consistent and blameless – not least because, as an imaginary construct, she has no life experience – the defence can discredit a complainant's victim-status by exposing and attaching adverse inferences to any inconsistency, any undesirable fact, even anything surprising or unexpected about her.[104]

3.71 Personal records are used to perpetuate and exploit myths of "the mendacious woman and the deluded complainant", hanging on the "disordered and hysterical character of complainants, and upon the almost ubiquitous defence claim that women's … stories of assault have been suggested and manipulated".[105] Gotell argues that whereas the "ideal victim" was once "characterized by her chastity and sexual morality" she is now "consistent, rational, self-disciplined, and blameless".[106] As Leahy explains, such material "can be used to direct jurors' attention away from the alleged incident and place undue focus on issues such as mental illness or drug use

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99 *H(L)* [1997] 1 Cr App R 176 at 176-177; see also *Reading Justices, ex parte Berkshire County Council* [1996] 1 Cr App R 239 at 246 (Simon Brown LJ); S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 230.

100 W Larcombe, "The 'Ideal' Victim v. Successful Rape Complainants: Not What You Might Expect" (2002) 10 *Feminist Legal Studies* 131, 135-136, citing as one of the earliest to identify this E Sheey, "Legalizing Justice For All Women", in M Heenan (ed), *Legalizing Justice for All Women: National Conference on Sexual Assault and the Law* (1995) pp 8–28; see also L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 254, 259-260.

101 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 262.

102 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 160.

103 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 229.

104 W Larcombe, "The 'Ideal' Victim v. Successful Rape Complainants: Not What You Might Expect" (2002) 10 *Feminist Legal Studies* 131, 138.

105 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 256, 258.

106 Above, 260.

which may prejudice the complainant in the eyes of the jury".[107] There is a likelihood that jurors will "attach exaggerated significance to psychiatric evidence" and "this is likely to have an irrational, distorting influence on juror decision-making to the prejudice of the … complainant and the fact-finding process".[108]

3.72 In the context of counselling and psychiatric records this is especially troubling, depicting complainants as "inherently unreliable and [implying] that the usual methods for testing credibility are insufficient in sexual assault trials".[109] A particular problem in using therapy records as indicators or evidence of unreliability is that they have come into existence in circumstances of trauma and for purposes that are not concerned with the logic of a criminal trial. Therapy engages a person in:

> a form of dialogue that attempts to make sense of the sexual violence that does not fit legal models of guilt or innocence. … [It] reflects a non-legal conception of rape that describes feelings of violation and is not bound to the nature of the act. Sexual violation results in a painful disruption of bodily integrity and also subjectivity, producing ambiguities that need to be negotiated and articulated.[110]

It has long been documented that survivors of sexual violence experience feelings of guilt and self-blame, even though they are blameless.[111] When these accounts are used in a trial the "ambiguity and uncertainty in accounts of violent sexual experiences are appropriated in a field of language that interprets these responses as self-doubt".[112]

3.73 Our engagement with stakeholders suggests that these are live concerns. It was widely acknowledged that trauma impacts on the ability of witnesses to speak about events cogently and trauma responses vary between individuals. Lynda Gibbs KC (Hon) said that the exploitation of inconsistencies is a blunt instrument with which to examine a complainant's account. However, defence practitioner Martin Rackstraw told us that inconsistencies in a complainant's account may be one of the only areas where the defence can properly test and challenge the prosecution case through cross-examination. Judicial stakeholders gave us examples of information in personal records requested or relied on by the defence as follows: inconsistent accounts of the incident and its surrounding facts; retractions by the complainant; and the absence of discussion of the incident with medical professionals.

3.74 Dame Elish Angiolini expressed concern about how personal records are used in court; trained professionals can recognise why there may be inconsistencies, but

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107 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 229.

108 Above, 231, citing L Ellison, "The Use and Abuse of Psychiatric Evidence in Rape Trials" (2009) 13 *International Journal of Evidence and Proof* 28, 36.

109 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 260.

110 Above, 258-259 (references omitted).

111 J Schwendinger and H Schwendinger, "Rape victims and the false sense of guilt" (1980) 13 *Crime and Social Justice* 4.

112 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 259

jurors may be inexperienced and just see inconsistent accounts. A judge similarly said that victims of trauma approach their accounts globally rather than in forensic detail, but then lawyers dissect it for differences and the jury can get too caught up in this. We were also told that prosecutors are not sufficiently trauma-informed to rebut defence assertions drawn from personal records.

3.75 A number of stakeholders told us that therapeutic notes are routinely requested and a clinical psychologist observed that requests have become more frequent. Another clinical psychologist and a psychotherapist gave examples of police requests for therapeutic notes, which they had challenged. We were told that in sexual offences cases, police officers will routinely be asked to ascertain whether there are any social services records for the complainant, while this is not standard for other offences. According to Rape Crisis England and Wales, Centre for Women's Justice and the End Violence Against Women Coalition the fact that complainants in sexual offences are treated with "exceptionalism" is "deeply rooted in the persistent rape myth that women and girls lie about being raped or sexually abused."[113] We consider pre-trial therapy and its place in evidence further below, where stakeholders' comments resonate with the literature.[114]

Consent-based access, compelled production and disclosure: inconsistencies

3.76 The outline of the current legal framework explained that the process for accessing personal records will depend on whether the complainant and the record holder have consented to police and prosecution access to the records. Records will be obtained either by consent-based access or through compelled production using the witness summons process. However, these operate under separate statutes, with different processes (with a witness summons only available post-charge), decision-makers and thresholds. Where access is by consent there will be no judicial scrutiny of a request for records, but where a witness summons is used a court order will be required, with a "more stringent" threshold.[115] A Crown Court may only issue a summons when it is satisfied that a person is likely to produce a document which is likely to be material evidence; and it is in the interests of justice to do so.[116] The complainant and record holder must be notified of the application and may make representations to the court.

3.77 The higher threshold for the witness summons is clearly very significant. Eloise Marshall KC, writing in *Rook and Ward*, describes the threshold in the following terms:[117]

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113 RCEW, CWJ and EVAW, *Keep Counselling Confidential: The Problems and Solutions with Disclosure of Counselling Notes* (October 2022) p 5.

114 See paras 3.112 to 3.129 below.

115 CPS Disclosure Manual, Ch 5 – Reasonable Lines of Enquiry and Third Parties (July 2022), "Obtaining access to third party material".

116 Criminal Procedure (Attendance of Witnesses) Act 1965, s 2(1).

117 E Marshall, "Disclosure" in P Rook and R Ward, *Rook and Ward on Sexual Offences* (6th ed 2021) para 18.85.

> For these purposes "likely" means there is a real possibility, not necessarily a probability.[118]
>
> The test is neither whether the material is relevant (although it would have to be relevant to be admissible) nor whether it is helpful to the person seeking it. The applicant has to show that the document sought is itself admissible in evidence. The material would not fall to be disclosed if:
>
> > It is desired merely for the purposes of cross-examination. Documents used for this purpose are not admissible in evidence and therefore not likely to be material evidence.[119]
> >
> > It would be inadmissible without interpretation by an expert.[120]

3.78 She adds that the interests of justice require the applicant to set out "the reasons why the material sought is of importance to [their] case" and that it is also impermissible for the applicant to make a speculative application "in the hope that something helpful may emerge".[121]

3.79 The witness summons process gives rise to inconsistencies in both access to records and disclosure of records. Regarding the former, the difference between the witness summons and consent-based access is stark when considered in light of the presence or absence of judicial scrutiny. As we noted earlier, a recorder told us that the current system is counterintuitive and a complainant who consents is effectively penalised for being cooperative.[122] That is, if a complainant refuses consent to their records being accessed then a judge will take account of their privacy concerns and assess the records' relevance to the case. However, a complainant who consents is reliant on the unscrutinised evaluation made by police and prosecution and, despite the existence of guidance on these matters, has no guarantee that their rights are being considered and balanced appropriately.

3.80 With the distinguishing trigger being consent or its absence, the concerns about consent discussed above apply with considerable force in this context.[123] Of note, as a complainant's consent to access or disclosure may not always be given in circumstances that can be described as informed and empowered, judicial scrutiny and a right to be heard by the court stand out as being particularly important.

3.81 Inconsistency also arises with respect to disclosure. Here, if the complainant consents to access and disclosure then disclosure decisions are made by the prosecutor. If a

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118 *R v Reading Justices, ex parte Berkshire County Council* [1996] 1 Cr App R 239

119 *R v North* [2011] EWCA Crim 88 at [34]. See also *R v Derby Magistrates' Court, ex parte B* [1996] AC 487 at [500].

120 *R (on the application of Cunliffe) v West London Magistrates Court* [2006] EWHC 2081 (Admin).

121 E Marshall, "Disclosure" in P Rook and R Ward, *Rook and Ward on Sexual Offences* (6th Ed. 2021) paras 18.86-18.87. See also *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] ACD 124 at [14], where Coulson LJ suggested that applications by the CPS are "often made somewhat lazily" and do not pay sufficient attention to whether there was likely to be material evidence.

122 See para 3.63 above.

123 See paras 3.63 to 3.66 above.

complainant does not consent to access and is subject to a witness summons then, given the threshold for production under the witness summons process, the prosecutor will almost certainly need to disclose to the defence any records where production is ordered, but there is judicial scrutiny prior to production. If a complainant consents to access but not disclosure then a PII application may follow and a judicial decision will be made regarding withholding disclosure.

3.82 Leahy presents the Canadian model as an alternative.[124] This model, which we examine in detail below, creates a unified, "bespoke regime" for personal records in sexual offences cases in which the same rules apply regardless of whether the record is held by the prosecution or a third party.[125] She favours the Canadian approach over that in England and Wales because there is evidence that the CPIA 1996 and witness summons processes are inconsistently applied and "unpredictable" for both complainants and defendants and uncertainty is "magnified by the fact that two separate regimes apply".[126] She also argues that the Canadian process is more straightforward.[127]

3.83 In terms of procedures, decision makers, requirements and thresholds, there are clear and significant inconsistencies that give rise to the potential for detriment to both the complainant and defendant in terms of predictability. For the complainant, in particular, there is a risk of over-disclosure of confidential information. There is a strong case for replacing the separate, inconsistent processes with a unified regime.

A bespoke personal records regime for sexual offences

3.84 It is not clear that the regime for access, disclosure and admissibility of personal records held by third parties operates to give effect to this as well as it might. It is clear that there are gaps and inconsistencies in the legal framework, along with thresholds that may set a low threshold for relevance, which risks myths and misconceptions having an effect. It is clear that there are intrusions into complainants' privacy which are not always necessary, proportionate or made with judicial scrutiny. It is also clear that there is a public interest in complainants receiving treatment, and yet it is unclear whether the current regime serves that interest well. Despite the various reviews over the last decade, there has not been substantial change and, according to some stakeholders, the problems have become more acute. The additional guidance in the AG's Guidelines is welcome but it is not clear that it has resolved the problems or that

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124 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 241-243.

125 Above, 244; see below paras 1.228 to 1.241 below.

126 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 234-238. In relation to the CPIA regime, Leahy cites the findings of HMCPSI, Disclosure of Medical Records and Counselling Notes (2013). In relation to the witness summons process, she cites the comments of Coulson J, in *M v Director of Legal Aid Casework* [2014] EWHC 1355 (Admin), [2014] ACD 124 at [12] that it has become increasingly common for the prosecution to issue a witness summons: "somewhat lazily, in the belief that, if there are some records which may have some relevance, the CPS is fulfilling its obligations to the defendant, and to the administration of justice, by issuing the witness summons and then putting the burden of resolving the issues raised onto others (namely the defendant, the complainant and the judge). In my view, considerably greater analysis is required before any such summons is issued."

127 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 241-243.

it will do. The heavy reliance on guidance rather than primary legislation is inappropriate where significant public interests and individual rights are in issue. There is a strong case that steps should be taken to address what are clearly significant concerns.

3.85 While the specifics of possible changes are addressed in the subsequent sections of the chapter, we make some preliminary observations to foreshadow what follows. First, change would not necessarily require wholesale revision of the CPIA regime. It is possible for a bespoke regime for personal records in sexual offences cases to run alongside an existing general disclosure regime. This is the case in some other jurisdictions.[128] Secondly, it is possible to have a unified regime that covers access, disclosure and admissibility, as is the case in Canada and New South Wales ("NSW"). Thirdly, a reformed regime may limit the extent to which records may be obtained prior to a defendant being charged. Fourthly, it is possible to have greater judicial scrutiny of requests to produce and disclose personal records held by third parties.

3.86 Due to the lack of direct supporting evidence or other witnesses, sexual offences cases focus on the relative credibility of the complainant and defendant. This has led to a disproportionate focus on and examination of the background and personal records of the complainant, not found in other comparable criminal contexts. The creation of a personal records regime specific to sexual offences would take account of this and would be consistent with other aspects of the law where there is appropriately differentiated treatment of complainants in sexual offences cases. For example, complainants are given anonymity, automatic eligibility for special measures, and there are prohibitions on the introduction of evidence of sexual behaviour. Such differentiation recognises the uniqueness of sexual offences proceedings due to the intimate nature of the evidence that is given by complainants. Our provisional conclusion is that so too in the case of personal records it should do so in recognition of the highly personal evidence given about them and which is susceptible to misuse.

3.87 Our provisional view is that there should be a bespoke, unified regime that governs access, production, disclosure and admissibility of personal records held by third parties. The remainder of the chapter considers what might be the content of such a regime. Where consultees are of the view that a bespoke regime is not appropriate – for example, the existing framework is satisfactory or any existing shortcomings might be addressed by more minor reform – and so do not agree with our provisional view that a bespoke regime is warranted, then it will be helpful for our analysis if those views are expressed in response to consultation question 2. We place this consultation question here because it logically falls to be answered first but consultees may wish to answer it after reading the full proposals and, especially, those in consultation questions 13, 15 and 16.

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[128] For example, in Canada, their general disclosure regime has many similar features to ours and runs alongside their separate regime for requests for personal records in proceedings for certain specified sexual offences. We consider the Canadian regime in more detail at paras 1.228 to 1.241 below.

Consultation Question 2.

3.88 Our provisional view is that for sexual offences there should be bespoke provisions with a unified regime governing access, production, disclosure and admissibility of personal records held by third parties.

Do consultees agree?

WHAT RECORDS SHOULD BE IN SCOPE?

3.89 As the overview of the legal framework showed, under the present law in England and Wales, any personal records – including records held by third parties – will be subject to the general disclosure regime. Given our provisional view that a bespoke regime for access, production, disclosure and admissibility should be established with respect to personal records in sexual offences cases, the question arises as to what records should fall within the scope of that regime. A further question will then be considered, which is whether records of pre-trial therapy should be treated differently.

Third-party material

3.90 It is clear that counselling and medical records are TPM of concern but the scope of TPM is potentially very wide. Other third parties that could hold relevant material include local authorities, social services departments, hospitals, schools, forensic service providers, CCTV operators, mobile telephone providers, social media companies and internet providers.[129]

3.91 Stakeholders told us that some of these wider records are sought and used. Chief Constable Sarah Crew said she has observed police investigators, prosecutors and the defence relying on other types of records such as medical and school records to question the complainant's credibility. Where complainants are vulnerable a wider scope of materials may come into play. A criminologist was concerned that people with additional needs may have had more contact with various social services than others, so there are likely to be more records which can be used to undermine their credibility as a complainant. She considered this particularly problematic as offenders are known to target vulnerable people. A senior police officer echoed this concern, noting that far more material is kept on children who have come to the attention of social services than on others.

3.92 Faced with a wide range of potential TPM there is a need to look for some principle on which it might be possible to determine whether records should fall within the specialist regime.

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[129] CPS, NPCC, *Joint Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material* (January 2019) para 3.2.

Comparative law

3.93 Some jurisdictions have developed specific rules relating to categories of records, such as counselling.

3.94 In NSW there were concerns that counselling records were being used at trial to demonstrate inconsistency, even though they were written for therapeutic rather than evidence-gathering purposes and had not been verified for accuracy by the complainant. The Attorney General noted that disclosure of counselling records creates wider harms; complainants might limit what they say to a counsellor or not undergo counselling, or might not report an offence or agree to be a witness.[130] He added that counsellors might take only limited notes or none at all, or refuse access to notes with the result that contempt charges could be brought.[131]

3.95 In response, in 1997 the legislature established the sexual assault communications privilege ("SACP"), which is now found in the Criminal Procedure Act 1986 (NSW).[132] The statute uses the vehicle of a "protected confidence" to limit the circumstances in which counselling records can be obtained (which we explain in more detail below).[133] A protected confidence is defined as a counselling communication made by, to or about a complainant.[134] A person "counsels" another if:

> (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm and
>
> (b) the person
>
> (i) listens to and gives verbal or other support or encouragement to the other person, or
>
> (ii) advises, gives therapy to or treats the other person,
>
> whether or not for fee or reward.[135]

3.96 The law has been interpreted broadly. The specialist SACP Service, a unit within Legal Aid NSW, explains that:

> "counselling" has a very broad meaning in SACP law. It includes the ordinary meaning of counselling used in psychology, social work and therapy BUT it also

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130 *Hansard* (NSW Legislative Council), 22 October 1997, p 1121 (Attorney General Hon J W Shaw).

131 Above. Clarification of the law was prompted by a case in which a sexual assault counsellor, who refused to produce her notes, was charged with contempt of court, and briefly imprisoned: *Hansard* (NSW Legislative Council), 22 October 1997, pp 1130-1131 (Hon A G Corbett).

132 Criminal Procedure Act 1986 (NSW), Part 5, Division 2.

133 See paras 3.128 to 3.129, 3.175 to 3.178, 3.239 to 3.243 below.

134 Criminal Procedure Act 1986 (NSW), s 296(1). A "counselling communication" is also defined by the statute to include statements made in confidence by or about the counselled person, by one counsellor to another, or by "a parent, carer or other supportive person who is present to facilitate communication [at counselling] or to otherwise further the counselling process": s 296(4).

135 Criminal Procedure Act 1986 (NSW), s 296(5).

includes treatment for physical harm. This means that all medical treatment information is protected by the privilege.[136]

3.97 The service notes that the courts have found that the privilege attaches to the records of a wide range of service providers, not limited to medical and counselling services but including accommodation services and alternative health practitioners.[137] Examples of protected communications include not only counselling notes but also medical notes, diagnostic medical records including blood tests, ambulance records, mental health records, drug and alcohol records, and financial counsellor records.[138]

3.98 We also note here that in NSW complainants are provided with free legal support which is important given the provisions that limit the access to and use of counselling records:[139]

> [Previously] SACP was argued by the person or service who received the subpoena. Sometimes this was done by a lawyer, but often the person or service represented themselves in court. This has changed since the SACP Service was set up within Legal Aid NSW in late 2011. Free lawyers are now routinely provided to represent the victim directly. This means that there is now far less need for therapeutic services to take up their client's cause in Court.[140]

3.99 In Western Australia, since 2004 there has been a protection for counselling communications, which are defined in the same way as they are in NSW.[141]

3.100 The Irish regime applies only in relation to counselling records. The Criminal Evidence Act 1992 was amended in 2017 to protect counselling records.[142] The definitions are similar to those in NSW. Counselling means "listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)", and must be provided by "a person who has undertaken training or study or has experience relevant to the process of counselling".[143] We are not aware that the Irish provisions have been interpreted as broadly as those in NSW.

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136 SACP Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016) p 28, emphasis in original.

137 SACP Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016) p 28.

138 SACP Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016) p 26, 28.

139 See paras 3.131, 3.178 to 3.181, 3.242 to 3.246 below.

140 SACP Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016) p 34. At the time the *Subpoena Survival Guide* was published, no means or merits test was applied to legal aid for SACP support (p 34) and our understanding is that is still the case. On representation, see further ch 8.

141 Evidence Act 1906 (WA), s 19A; Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004 (WA), s 10. It appears that the provisions were influenced in part by Canadian approaches, with the Canadian Justice Department's work cited by the Attorney General in his second reading speech: *Hansard* (WA Legislative Assembly), 30 June 2004, p 4608 (Mr J McGinty).

142 Criminal Evidence Act 1992 (Ireland), s 19A, inserted by Criminal Law (Sexual Offences) Act 2017 (Ireland), s 39.

143 Criminal Evidence Act 1992 (Ireland), s 19A(1).

3.101 In Scotland, there is also a category-based approach, though the categories are broader. The Crown Office and Procurator Fiscal Service ("COPFS") Sensitive Personal Records Policy says that sensitive personal records include, but are not restricted to medical, psychiatric, psychological, counselling, social work, education or employment records.[144]

3.102 In Canada, however, the regime is not based on categories. Rather, it captures:

> any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.[145]

A reasonable expectation of privacy

3.103 The first observation to be made is that the narrowest of the category-based approaches in NSW, Western Australia and Ireland are too narrow in scope when measured against their rationales. The NSW Attorney General's reasoning seems to apply equally to other types of personal records but the law is limited to counselling records, even though the courts have interpreted the statute broadly. In Ireland, the O'Malley Review recommended extension to medical records, based on there also being "a reasonable expectation of privacy" in relation to those.[146] Dr Leahy's view, however, is that the O'Malley approach would not go far enough. Her research included interviews with legal professionals, who told her that records of counselling after an assault may be written with more limited content in the knowledge that they may be disclosed, even though afforded some protection. Contrastingly, other records such as psychiatric, psychological or medical records prior to the assault may contain much more detailed, deeply personal information and yet fall outside of the protective regime. These professionals commented on the overlapping information which may be contained in psychiatric, medical and psychological records and confusion over whether these amounted to counselling records.[147] Dr Leahy recommended extension in Ireland and that this should be done using the Canadian definition.

3.104 We find the Canadian approach persuasive. An application to produce, disclose or admit a complainant's personal records engages their right to privacy. This right to privacy may arise regardless of where or by whom that private information is recorded. Defining where this right arises according to where the private information is recorded may create an artificial distinction between types of records. For example, if only counselling records were protected, if the same information happened to be recorded on both a complainant's medical records and their counselling records, this

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144 COPFS, *Sensitive Personal Records Policy*, (August 2022) para 2.

145 Criminal Code (Canada), s 278.1.

146 T O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (July 2020) para 6.42.

147 S Leahy, *The Realities of Rape Trials in Ireland: Perspectives from Practice* (June 2021) p 31.

could lead to inconsistent decisions. Therefore, we take the view that the focus of the regime should be the reasonable expectation of privacy and not the type of record.

Consultation Question 3.

3.105 We provisionally propose that any regime regulating the access, production, disclosure and admissibility of professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy.

Do consultees agree?

Potential exclusions: medical records related to physical evidence of the alleged assault

3.106 We consider now whether there may be a case to exclude some categories of records from the scope of a bespoke regime, even where those records would be records in which the complainant has a reasonable expectation of privacy.

3.107 In Scotland, the COPFS Sensitive Personal Records Policy will not apply when police are seeking a discrete portion of medical records as evidence of the fact that a complainer received treatment for a physical injury which arose from the allegation.[148] Similarly, the policy will not apply where police are seeking records of a forensic medical examination that has been carried out to gather evidence.[149]

3.108 The Scottish provisions underscore some potential practical investigatory issues. It may be that there is a case to carve out some specific exceptions. Specifically, there may be an argument to keep within the existing access and CPIA disclosure regimes medical records related to physical evidence associated with the events that are the subject of the complaint. Alternatively, if such records remained within scope in a bespoke framework then the practical considerations might be taken account of by, for instance, including the importance of physical evidence to the case as a consideration to be taken into account when making determinations about access, disclosure and admissibility.

Consultation Question 4.

3.109 Should medical records related to physical evidence associated with the events that are the subject of the complaint fall outside of the scope of a bespoke regime and remain within the existing general framework?

3.110 If so, or if not, for what reason?

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148 COPFS, *Sensitive Personal Records Policy*, (August 2022) para 3.

149 Above, para 13. The policy also notes that the complainant will often have consented for the report to be shared with police and prosecutors.

EXEMPTIONS

3.111 If a bespoke regime were to be established then it provides an opportunity to consider whether some categories of records should be exempt from compelled production, disclosure or admissibility. To put it differently, should there be a prohibition on the access to and use of some categories of records? We consider the position in relation to two categories of records in which a complainant plainly has a reasonable expectation of privacy and so which would fall within the bespoke regime: pre-trial therapy records and complainant support records.

Pre-trial therapy records

3.112 As the overview of the legal framework indicated, there is now considerable guidance on obtaining records of pre-trial therapy (by which we mean therapy undertaken after the events that are the subject of the complaint, but prior to trial).[150] As we have explained, complainants may elect not to have therapy or to have more limited therapy because they fear that the content of their therapeutic discussions may be disclosed to the defence and/or that the fact they have had therapy may prejudice the investigation or prosecution. Conversely, complainants may choose not to report or may not continue to support an investigation or prosecution so that they can undergo therapy.

3.113 We turn here to some of the more detailed legal guidance in this area and consider approaches taken to limiting or prohibiting compelled production, disclosure and admissibility of personal records of this kind.

Legal guidance and an inherent contradiction

3.114 In line with the recommendations of the House of Commons Home Affairs Committee,[151] the CPS recently published legal guidance on pre-trial therapy, which is aligned with the AG's Guidelines.[152] The CPS Guidance acknowledges the psychological difficulties faced by complainants of sexual violence and the particular benefits to them of receiving therapy. The Guidance states that pre-trial therapy should not be delayed due to an ongoing investigation or prosecution:

> The health and wellbeing of the complainant should always be the determinative factor in whether, when and with whom they seek pre-trial therapy.
>
> It is for the [complainant] to make decisions about therapy with their therapist, including what type of therapy is obtained and when that therapy is obtained. Criminal justice practitioners should play no role in the decision-making process…
>
> … There is no requirement to delay therapy on account of an ongoing police investigation or prosecution.[153]

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150 See paras 3.11 to 3.17 above.

151 Home Affairs Committee, Investigation and Prosecution of Rape (2022) para 151.

152 CPS Legal Guidance: Pre-Trial Therapy (2022).

153 CPS Legal Guidance: Pre-Trial Therapy (2022), "Fundamental Principles".

3.115 Under the CPS Guidance, police should usually seek early advice from the prosecutor before making a request for therapy notes. A request may only be made where it is a reasonable line of inquiry and must follow the steps outlined in the AG's Guidelines.[154] The police must not pursue "fanciful or inherently speculative inquiries" and the prosecution must not encourage this.[155] The agreement of the complainant, who also understands their right to object at any time, should be recorded.[156] Any request made: should specify what is required and why therapy notes are needed to pursue a reasonable line of inquiry in the circumstances of the case; should be for the minimum amount necessary; and should alert the therapist of the need to preserve relevant material.[157] Once therapy records are provided to the police, subject to PII requirements, they may only be disclosed to the defence where they meet the test for disclosure.[158]

3.116 Notwithstanding the guidance, there was recently a Home Office consultation on the police's obligation to pursue all reasonable lines of inquiry in relation to personal records held by third parties.[159] The scoping work for the consultation found that at present police adopt:

> an inconsistent approach to what, and how, victims are informed in relation to TPM requests. The legal basis relied upon, the precise information required and how the material will be used are particular areas of concern.[160]

3.117 The consultation found requests for TPM are made in the "vast majority" of sexual offences cases and TPM "is more frequently requested about the victim as opposed to the suspect".[161] It also reported that "the majority of respondents indicated that TPM requests about victims of [RASSO] can sometimes be unnecessary and disproportionate, and made to establish victim credibility, that is, whether the victim has a history of being truthful, as opposed to the facts of the case".[162] There is no clear agreement about why requests are made despite that view being held. Police reported that they thought CPS prosecutors want the material; some prosecutors said the police are correct in having that impression, while other prosecutors thought police were seeking material without CPS prompting.[163] The Home Office found no reliable data on response times as the police do not keep a consolidated system of when the

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154 CPS Legal Guidance: Pre-Trial Therapy (2022), "Advising investigators about their responsibilities"; the content of the AG's Guidelines (2022) is outlined at paras 3.11 to 3.17 above.

155 CPS Legal Guidance: Pre-Trial Therapy (2022), "Advising investigators about their responsibilities", citing *R v Bater-James and Mohammed* [2020] EWCA Crim 790, [2021] 1 WLR 725.

156 CPS Legal Guidance: Pre-Trial Therapy (2022), "Speaking to Victims".

157 CPS Legal Guidance: Pre-Trial Therapy (2022), "Reasonable lines of inquiry".

158 CPS Legal Guidance: Pre-Trial Therapy (2022), "Duties and responsibilities of the CPS, Disclosure of material to the defence".

159 Home Office, *Government consultation, Police requests for Third Party Material* (consultation beginning June 2022 and ending August 2022).

160 Above, p 3.

161 Above, p 8.

162 Above, p 4.

163 Above, pp 8-9.

requests were made and when access was granted, but stakeholders reported that it takes "a long time" for third parties to respond to requests.[164] The Home Office was not able to put an average time on responses but found at least one instance where a response took a year. Responses and response times will differ across the "vast" range of third parties, from large NHS trusts to small GP practices. Some third parties provide more information than is requested.[165]

3.118 There is also CPS Guidance for therapists, which explains that therapists must comply with their data protection obligations and notes that this includes them explaining to the complainant at the outset how their therapy notes will be dealt with.[166] Under the CPIA 1996, therapists are not required to retain their records or to provide them to the police. The CPS Guidance sets out that where a therapist refuses to comply with a request, the prosecutor must consider whether the case can proceed and any alternative means of obtaining the material, such as an application to the court post-charge for a witness summons.[167]

3.119 Judicial directions on rape myths recognise that inconsistency in the complainant's accounts does not necessarily mean a complainant's evidence is untrue.[168] The CPS Pre-Trial Therapy Guidance directs the police and prosecution to consider the impact of trauma on the ability of a complainant to give a consistent account:

> Investigators and prosecutors considering material generated in therapy must consider the impact of trauma and the numerous legitimate reasons for the existence of apparent or real inconsistencies between accounts provided by victims. Where appropriate, they must be ready to challenge myths relating to victim credibility during the investigation process.[169]

3.120 When assessing the credibility and consistency of the complainant's account, the Guidance also directs consideration of the limitations of note taking during therapy.

> … prosecutors should note that therapy is not an investigative process and that, as such, there is no expectation that a therapist should take verbatim [word for word] notes in relation to [the complainant's] disclosures of potential criminality for the benefit of criminal justice agencies.[170]

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164 Home Office, *Police requests for Third Party Material: Consultation Response* (2022) pp 24-25.

165 Above, p 9.

166 CPS Legal Guidance: Pre-Trial Therapy (2022), "Fundamental Principles".

167 CPS Legal Guidance: Pre-Trial Therapy (2022), "Duties and responsibilities of the CPS. Where requests for material are refused by a therapist": where a witness summons is sought, the complainant should be given notice of it and the opportunity to make representations to the court; CrPR r 17.5.

168 See Judicial College, *The Crown Court Compendium, Part I: Jury and Trial management and Summing Up* (June 2022) 20-1 Sexual Offences – The dangers of assumptions.

169 CPS Legal Guidance: Pre-Trial Therapy (2022), "Advising investigators about their responsibilities, Key points".

170 CPS Legal Guidance: Pre-Trial Therapy (2022), "Advising investigators about their responsibilities, Tackling victim credibility myths".

3.121 The CPS Guidance goes on to examine in detail the psychological and physiological responses to trauma[171] and their impact on memory and recall. It explains that the police and prosecution should have a shared understanding of the impact of trauma upon memory in order to inform their decision making and case building and to challenge myths regarding complainant credibility.[172] The CPS Guidance nevertheless states that:

> inconsistencies in accounts provided by the victim are likely to meet the disclosure test for the purposes of criminal proceedings and … even taking into account the information above [regarding the impact of trauma on memory], inconsistencies may mean that the Code Test [for deciding to bring a prosecution] is not met. Prosecutors will need to consider this on a case-by-case basis.[173]

3.122 Stakeholders have argued – and in our provisional view, persuasively – that there is an "inherent contradiction" at the heart of the CPS Pre-Trial Therapy Legal Guidance:

> the guidance simultaneously recognises that survivors' access to therapy is vital, yet, in practice, counselling notes remain subject to disclosure. This dissuades many survivors from accessing therapy.[174]

3.123 Wendy Showell Nicholas (a psychotherapist) and a clinical psychologist told us that a fundamental tenet of therapy is that it occurs in confidence. The clinical psychologist explained to us that it is important that they are trusted by their clients, and this trust is difficult if they are second-guessing whether anything will end up being disclosed. Without trust, therapy is limited in its approach. An organisation working with victims told us that concerns are exacerbated for complainants from minority communities, where there may be a pre-existing mistrust of therapy and a perception that discussions in therapy could impact tightknit communities.

3.124 A barrister (Hanna Llewellyn-Waters) and a psychologist told us that they were aware of complainants who had been advised to avoid pre-trial counselling as it would potentially undermine their case. This, it was observed, was very troubling given the delays in cases coming to court.

3.125 Organisations that provide pre-trial counselling to complainants provide information that draws attention to the limits and risks of undergoing therapy before a trial has concluded:

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171 Such as hyper or heightened arousal, hypo or shut-down or freeze responses, self-blame, shame, and avoidance.

172 CPS Legal Guidance: Pre-Trial Therapy (2022), "Particular aspects of psychological trauma that may impact on how a victim presents".

173 CPS Legal Guidance: Pre-Trial Therapy (2022), "Potential impact of therapy on memory, Inconsistencies". The British Association of Counselling and Psychotherapy (BACP) has produced for its members a 48-page guide, *Working with the* Crown Prosecution Service Pre-trial Therapy Guidance (2022) *with adult and child witnesses in criminal courts in England and Wales* (BACP, Good Practice in Action 128, June 2022).

174 RCEW, CWJ and the EVAW, *Keep Counselling Confidential: The Problems and Solutions with Disclosure of Counselling Notes* (October 2022) p 2. We were also told by stakeholders that the potential for notes to be requested discourages complainants from seeking therapy.

What is pre-trial therapy?

> Pre-trial therapy is counselling that is offered to a victim or witness while the criminal justice process is on-going and a trial may be possible.
>
> From the point when you report what happened to the police to the time when all court proceedings are complete we can offer a limited style of counselling to ensure that you feel emotionally supported whilst also trying not [to] influence the evidence you would give in court.

How is it different from other counselling?

> Before you give evidence in court you are requested not to discuss your testimony with anyone in any detail. As a result of this, in pre-trial therapy you should not talk about anything that is in your police statement or may be relevant to the case.
>
> This usually means that you should not talk about the event for which you have come to us for support which can feel like the 'elephant in the room'. …

Why can't I talk about what happened?

> If you go over what has happened in counselling it could be argued that you have been 'coached' about what to say in court. This could have an effect upon the way your evidence is viewed by the Court and the outcome of the trial.

Will my notes be used in court?

> Though it happens very rarely, it is possible that we could receive a request from the prosecutor or a court order saying we must disclose your counselling records. Our counselling notes are very brief and factual and will clearly state that it has been agreed not to discuss your evidence during the counselling. Therefore it is possible but unlikely that they would actually be used as evidence in court.

What about after the trial?

> Once the court process has ended you will be offered up to 12 sessions of counselling where you can talk about and work through the trauma of what has happened to you if you wish.[175]

3.126 Concerns about delays in accessing therapy arose in the recent evaluation of section 28 of the Youth Justice and Criminal Evidence Act 1999, under which complainants may be able to pre-record cross-examination and re-examination.[176] That evaluation

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[175] Rape and Sexual Abuse Support Centre, Cheshire and Merseyside, "Pre-trial therapy FAQs" (2021); Centre for Action on Rape and Abuse, "Pre-trial therapy" (2016).

[176] D Ward et al, "Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses" (April 2023) *Ministry of Justice and Ipsos UK*.

found that section 28 may be valuable in allowing complainants to access full counselling sooner; one ISVA told the researchers:

> So, if you've done your Section 28 and that's been recorded and saved, then you can get on with getting better and getting everything in place to proceed, whereas if you've to wait until the trial, you can't really start any proper counselling and things, because all that could be then requested by the defence to any counselling notes and things to be used against you.[177]

3.127 However, it was not clear that all witnesses were being advised that section 28 would enable this.[178] This must also be viewed in light of practitioners' concerns that juries may view pre-recorded evidence more sceptically, with the result that some complainants may still be reluctant to engage fully with therapy until after they have given evidence at the trial.[179]

3.128 We were also told that the routine seeking of records has affected the ways that therapists work. A psychologist said that many therapists had stopped taking notes, because the prospect of disclosure affected their relationship with their clients. An Irish researcher and a psychologist both pointed to the problems that then flow from this; if counsellors refuse to keep notes to prevent disclosure of information in court then it can compromise client care.

3.129 How is the inherent contradiction to be resolved?

Partial prohibitions

3.130 The counselling records regimes described above are generally characterised by procedures that raise the threshold for accessing, disclosing or admitting personal records into evidence. They do this variously through judicial scrutiny, higher thresholds for relevance, balancing processes, and varying the point in time at which applications may be made. We discuss these in more detail below when we look at thresholds.[180] In NSW, however, there is a partial prohibition.

3.131 Under the Criminal Procedure Act 1986 (NSW), protected confidences receive absolute protection from production to the court and being adduced in any committal or bail proceedings.[181] At trial they may be sought, produced and adduced only with leave of the court.[182] It appears that while police and prosecution may obtain documents by consent (and a complainant may be reassured that disclosure will not

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177 D Ward et al, "Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses" (April 2023) *Ministry of Justice and Ipsos UK*, p 15; see also pp 32, 52.

178 Above, p 15; see also pp 32, 50.

179 See para 7.116.

180 See paras 3.220 to 3.257 below.

181 Criminal Procedure Act 1986 (NSW), ss 295(1), 297.

182 Criminal Procedure Act 1986 (NSW), s 298.

occur except with leave of the court), they cannot compel access to documents except by subpoena under section 298(1), which would occur after committal proceedings.[183]

Should there be a complete prohibition on the use of pre-trial therapy records?

3.132 A different approach is found in Tasmania, where there is a complete prohibition on the use of pre-trial therapy records. In that jurisdiction, counselling communications are afforded absolute protection at all stages of sexual offences proceedings. Unless the complainant consents, a counselling communication, which arises during treatment for harm suffered in connection with the allegation, must not be disclosed, produced or adduced in evidence.[184] This prohibition is narrow in that it has a temporal limitation – it can only arise in relation to communications that take place after the alleged offence. The subject matter which attracts protection is also narrow. It applies to communications about harm arising from the alleged offence (though it would be narrower if it applied only to communications about the allegation itself).

3.133 A complete prohibition on a narrow basis recognises the fact that complainants of sexual offences may need to undergo therapy in order to avoid long-term psychological harm. It takes account of the therapeutic, rather than evidence-gathering purpose of therapy. It is aimed at protecting the confidentiality of the relationship between the complainant and their therapist, and the relationship of trust that is essential for therapy. This is so that the complainant may undergo therapy for harm arising from the alleged offence completely uninhibited by the prospect that their conversations may be disclosed. In addition, it is designed to prevent retraumatisation of the complainant through the disclosure to the defendant of highly personal information, which may be used against them at trial.

3.134 However, stakeholders did not support a complete prohibition. Even of those stakeholders who advocated greater protection of pre-trial therapy records, none suggested a complete prohibition on their use.[185] There may be occasions when a pre-trial therapy record contains relevant information, such as a note of the complainant retracting the allegation against the defendant. To safeguard the defendant's right to a fair trial, the disclosure and admissibility framework should, in certain defined circumstances, permit the production, review, disclosure and admission of a pre-trial therapy record as part of the investigation and trial process. A framework which requires that information of this nature is never obtained, produced or considered for disclosure where it is within pre-trial therapy records, poses a significant risk to the fairness of any subsequent trial. It also conflicts with some of the fundamental principles of the CPIA disclosure framework such as the obligation to pursue reasonable lines of inquiry which point towards or away from the suspect or the obligation to disclose material capable of undermining the prosecution case or assisting the defence case. Further, it would be inconsistent with the established

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183 Dr Matthew Nelson (University of New South Wales) told us that it is conceivable that police could obtain documents by use of a search warrant. It appears, however, that the position is similar to that in England and Wales: such an approach is unlikely.

184 Evidence Act 2001 (Tas), s 127B (1) and (3) to (5).

185 See also RCEW, CWJ and the EVAW, *Keep Counselling Confidential: The Problems and Solutions with Disclosure of Counselling Notes* (October 2022).

principle and practice that a health professional may disclose records without the patient's consent if breaching the confidence is in the public interest.[186]

3.135 Tasmania is distinct in its approach. The regimes in other jurisdictions do not contain an absolute prohibition, including Canada, Ireland, Scotland, NSW and Western Australia and instead rely on qualified protections. During the parliamentary debate about the NSW provisions, it was noted that "groups involved in sexual assault counselling" supported an absolute prohibition on the use of counselling records. Parliamentarians, however, took the view that "it weigh[ted] the scales too much in favour of the victim" and there needed to be fair trial safeguards.[187] The government also rejected absolute protection of confidential counselling records, stating that the new proposed test set a high threshold, significantly more onerous than existing general rules of evidence.[188] The Attorney General added that completely excluding evidence that is of substantial probative value:

> would be inimical to the basic principles of criminal law that an accused person is innocent until proven guilty and that the risk of wrongful convictions should be minimised.[189]

3.136 Having considered the ways that the inherent contradiction might be resolved, we have reached the following provisional views. To be clear, we do not seek to understate or be dismissive of the fact that the mere *potential* for disclosure may affect whether, when and how complainants in rape and serious sexual offences cases may seek and undergo therapy, and consequently may mean complainants do not benefit from therapy as they might. However, given the objections to an absolute prohibition on the use of pre-trial therapy records and the absence of stakeholders' views in favour of it, in our view it follows that there should be no absolute prohibition on such records. Further, there seems no case for an absolute prohibition on other categories or in relation to personal records more generally. We are aware that various concerns have been raised about the use of overly broad requests, the potentially limited evidential value of requested records, the impact of requests on complainants and the use of this material to prejudice the complainant's credibility. In our view these concerns are better addressed through other models, which do not potentially interfere so significantly with the defendant's right to a fair trial.

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186 See note 27 above.

187 *Hansard* (NSW Legislative Council), 22 October 1997, p 1127 (Hon Elisabeth Kirkby).

188 That existing test only permitted evidence to be excluded if it was not relevant, unfairly prejudicial, misleading or confusing, or would cause an undue waste of time, with the result that where "the defence [could] establish the merest likelihood of relevance, access to counselling notes [would often be] granted": *Hansard* (NSW Legislative Council), 22 October 1997, p 1132 (Attorney General Hon J W Shaw).

189 Above.

Consultation Question 5.

3.137 Our provisional view is that that there should not be a complete prohibition on the access, disclosure or admissibility of pre-trial therapy records in sexual offences prosecutions.

Do consultees agree?

Complainant-support records

3.138 ISVAs are considered to be third parties whose records may be requested. Home Office Guidance regarding their role states that ISVA records of disclosures made by the complainant about the allegation will be examined to establish whether they meet the test for disclosure and this could lead to the ISVA being called as a witness at trial and the complainant being cross-examined about this.[190] A witness supporter is expected to explain to the complainant that confidentiality cannot be guaranteed where, for example, the witness discusses the evidence in the case; this information may be disclosable to the defendant and their legal representatives.[191] Intermediaries must keep notes of their assessments and comply with prosecution and defence disclosure obligations.[192]

3.139 Some stakeholders have suggested that there should be a prohibition on accessing by compelled production (and thus disclosing or using in evidence) records held by ISVAs or others who occupy support roles for complainants and potentially other witnesses. Members of the Rape Crisis ISVA Reference Panel told us that their notes have been requested and, for some, these requests were routinely made. One stakeholder told us that notes taken by ISVAs should not be amenable to requests because, according to guidance about their role, ISVAs should not take an account of the alleged offence. This means that any information held by an ISVA would not usually assist in an inquiry or meet the test of disclosure. We do not make a provisional proposal to exempt ISVA records because we cannot discount the possibility that these records may be relevant. For example, they may potentially contain information that would meet the disclosure threshold and be essential for a fair trial, or they may potentially assist the prosecution in rebutting a suggestion that a criminal injuries compensation claim indicates the complaint has been made for financial gain.[193] It may be that rather than prohibiting access to these records, a rebuttable presumption (perhaps limited only to ISVA records) that they should not be available would be appropriate.

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190 Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements*, (September 2017) para 3.5.

191 MoJ and NPCC, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (January 2022) paras 4.24-4.26, 4.75-4.76.

192 MoJ, *Registered Intermediary Procedural Guidance* (September 2020) p 7; CPIA Code (2020) Principle 12.

193 See ch 6.

Consultation Question 6.

3.140 Should there be a complete prohibition on the access by compelled production, disclosure or admissibility of any complainant-support records, such as records held by Independent Sexual Violence Advisers, witness supporters and intermediaries?

3.141 If so, or if not, for what reason?

PROCEDURE

3.142 In the two preceding sections we have looked at the case for a TPM regime that is bespoke to sexual offences and at the scope of personal records that should be governed by that regime. We turn now to questions about the procedure that any such regime should use. These procedural questions only arise in relation to access (whether by consent or compelled production) and disclosure. Admissibility determinations will always be made by judges.

3.143 In considering access, we note that our Terms of Reference specify disclosure and admissibility as areas for review but do not limit us to those two matters alone. We address access because any reformed regime needs to be integrated and, in addition, we are informed by the law in other jurisdictions where access, production, disclosure and admissibility sit within a single framework

3.144 The issues for consideration are:

(1) Who should make determinations about access, production and disclosure?

(2) The procedures that should be used, both pre-charge and post-charge:

(i) When a complainant (and record holder) consents to police and prosecution access to TPM; and

(ii) When a complainant (or record holder) does not consent to police and prosecution access to TPM.

(3) The procedures that should be used when determining whether TPM should be disclosed to the defence.

3.145 The outline of the current legal framework sets out the present position with regard to the above matters in relation to TPM.[194]

Responsibility for determinations

3.146 The central issue in considering who should have responsibility for examining records and making determinations about production and disclosure is whether judicial scrutiny may be appropriate in a wider range of circumstances than at present. Such a change could obviously affect judicial workload and, consequently, the time taken in a

[194] See paras 3.7 to 3.42 above.

case coming to trial. We therefore also consider the possibility of increased roles for other actors.

Third parties

3.147 Currently, before providing material to the police, third parties who hold personal records must satisfy themselves that they have complied with their own duties, such as their data protection obligations and their duty of confidentiality, and may make representations regarding their objections. Stakeholders were generally clear that it would be inappropriate for third parties to have any greater responsibility for examining which personal records are produced. In our view stakeholders are correct that third parties would not be well placed to take on any greater role due to their limited knowledge and understanding of the nature of the prosecution and defence case and of the investigation and trial process.[195] On other possibilities, stakeholders' views were more mixed.

Prosecutors

3.148 Some stakeholders have told us that the prosecution should be trusted to examine records and make disclosure decisions because they are fully apprised of all the evidence, unused material and circumstances of the case. They are also best placed to do so as the proceedings develop, by keeping under review issues raised by the defence and updating their disclosure decisions accordingly throughout the proceedings.

3.149 There is some strength in these arguments and we acknowledge that steps such as improving guidance have been, and continue to be, taken by the CPS to address concerns about the disclosure of personal records.[196] However, there remain difficulties with the current regime, especially with respect to the role and rights of complainants. There is no law or guidance that directs the prosecution to seek the complainant's views about the content of their records and any reasons they have for opposing their disclosure.[197] That appears to be a significant shortcoming. It does not seem to be overcome in practice, with the 2021 Joint Inspection finding that some lawyers within the CPS have expressed reluctance about engaging directly with complainants.[198] We therefore provisionally conclude that there is good reason to introduce external scrutiny to ensure complainants' rights to privacy and confidentiality of their data are protected appropriately in access and disclosure. This does not preclude the prosecution retaining a role in reviewing and identifying relevant

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195 See also Search Warrants (2020) Law Com No 396, para 12.105, where we concluded that judges were better placed than health professionals to weigh up the competing public interests in criminal investigations where the disclosure of personal records is in issue.

196 For example, see CPS Legal Guidance: Pre-Trial Therapy (2022).

197 We can find no reference to consulting with the witness in either CPS Disclosure Manual, Ch 7 The Non-Sensitive Material Schedule or Ch 8 The Sensitive Material Schedule or AG's Guidelines (2022) paras 67-70 or 117-122 regarding sensitive material and PII. However, CPS Disclosure Manual, Ch 5 – Reasonable Lines of Enquiry and Third Parties (July 2022), "Obtaining access to third party material", refers to asking the third-party record holder about any sensitivities contained in the material and any public interest reasons for non-disclosure.

198 HMICFRS and HMCPSI, *A Joint Thematic Inspection of the Police and Crown Prosecution Service's Response to Rape: Phase 2 – Post-Charge* (Criminal Justice Joint Inspection, 2021) pp 55-56.

materials, just as they do when making a PII application. External scrutiny might be provided by independent counsel or the court.

Independent counsel

3.150 Some stakeholders were in favour of using independent counsel to provide external oversight of the disclosure of complainants' personal records. There is a precedent for this approach. When police use their seize and sift powers to obtain material which is subject to legal professional privilege, then independent counsel may be appointed to review the seized material, respond to representations from the suspect or defendant, and determine whether material should be returned.[199]

3.151 Using independent counsel would create timely, independent oversight of production and disclosure of personal records. It would also avoid the judge being burdened with additional responsibilities which might cause delays in the proceedings or elsewhere in the criminal process. However, it would require independent counsel to be fully briefed on the case and may require them to be present throughout the trial to hear the evidence and update disclosure decisions accordingly. This may place them in a role not significantly different to that of the prosecution. There would be very significant legal aid implications. There may be insufficient separation between independent counsel and the parties, and they may have insufficient authority over the parties, in comparison with a judge. Permitting independent counsel to take on this role would also be a step down from the current witness summons procedure, which involves judicial scrutiny.

Judges

3.152 The court taking on a role that includes examination of records and determinations about access and disclosure (especially if the complainant has consented) may be seen as a departure from existing practice and the traditional role of the judge. Some stakeholders raised objections to it, especially on the grounds that examination of a large quantity of personal records may be very time-consuming, and we note that such additions to judicial workload could exacerbate existing delays. They added that without the prosecutor's oversight of all the prosecution case materials, a judge may not recognise the materiality of certain records. Stakeholders suggested that to maintain ongoing oversight of disclosure and admissibility throughout proceedings, this role would need to be undertaken by the allocated trial judge, though that may cause delays.

3.153 There were also views in favour of judges taking on this role. Judges already review material and make determinations in witness summons applications, defence applications for disclosure, and PII applications. Judges must also keep under review throughout proceedings any decision to withhold disclosure.

Comparative law

3.154 Judicial examination of personal records and determination of their production and disclosure is found in other jurisdictions, including Canada, Ireland and NSW. Each requires the court to assess the probative value of the record and to balance the rights

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[199] Criminal Justice and Police Act 2001, ss 50-51; Search Warrants (2020) Law Com No 396, paras 11.5-11.34.

of the complainant and the defendant, setting out criteria against which the assessment is to be made, including public interests in (for example) patient confidentiality and ensuring victims of sexual offences receive appropriate support and treatment. The details of the regimes are set out below in the discussion of thresholds but we summarise them here.

3.155 In Canada, the defence must first persuade the court that it should examine records with a view to disclosure. If that threshold is met then the third party must produce the records to the court. Next, the court will review those materials and decide what must be disclosed to the defence. Both applications are heard by the judge who is allocated to hear the trial.[200] A Canadian Senate committee post-legislative review of the operation of the regime reported that the provisions sought to tackle the patterns of the 1990s where defence requests for disclosure of personal records were made routinely, often granted, and many related to large numbers of documents.[201] It found that the new records production scheme "for the most part [was] working well" and that it struck "an appropriate balance between the competing interests of complainants and defendants in the unique context of sexual offence trials".[202] A review of the case law from 2011-2017 found that of the 91 cases recorded in the reporting databases where an application was made for a record, 46 were granted in part or in full, and 45 were denied.[203] This suggests that the statute does not provide a barrier that uniformly prevents the production and admissibility of personal records, and nor are production and admissibility applications uniformly acceded to by the courts.

3.156 In Ireland, there is no separate preliminary test for production of the records to the court. The court examines the records and determines whether they should be disclosed. The prosecution are obliged to notify the defence of the existence of a counselling record.[204] Where an application is made by the defendant for disclosure of the complainant's personal records, the record holder must produce the counselling records at the hearing for examination by the court.[205]

3.157 In NSW, at the pre-trial, trial, interlocutory hearing and sentencing stage, there is a rolled-up process whereby the court determines not just whether the records should be produced for inspection and disclosed, but also whether they are admissible.[206] In certain circumstances, the court may examine the documents and make orders to facilitate this.[207] During the parliamentary debate regarding the NSW legislation, in response to objections regarding the expansion of privilege more generally, one MP

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200 Criminal Code (Canada), s 278.3 – 278.7.

201 Senate Standing Committee on Legal and Constitutional Affairs Statutory, Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report (December 2012) p 3.

202 Above, p 13.

203 C Jacuk and H Hassan, "Third Party Records: A Review of the Case Law from 2011–2017" (2018) 11 *Victims of Crime Research Digest* 34, 43.

204 Criminal Evidence Act 1992 (Ireland), s 19A(2).

205 Criminal Evidence Act 1992 (Ireland), s 19A(8).

206 Where a record cannot be adduced or given, it is not admissible: see Criminal Procedure Act 1986 (NSW), s 305.

207 Criminal Procedure Act 1986 (NSW), s 299B.

referred to comments made by a Canadian judge, Judge Masse, who said that judicial vetting of records, "as time consuming a task as that may be" is necessary for the balancing of the different rights and interests. [208]

Judicial scrutiny

3.158 On balance, we are of the provisional view that the external scrutiny should be provided by a judge. Although this is not without its challenges, the extent to which problems remain even after many attempts at addressing flaws persuades us that those challenges should be met head on. Potential ways to reduce the burden on the judge include, as stakeholders suggested, using independent counsel or – the approach we find more persuasive – having the police and prosecution filter material to provide only relevant material for judicial examination (as the prosecution already do in PII applications). In addition, a revised threshold for the production of records (which we discuss below) should also reduce the burden on the judge. If the judge making the determination is to be the trial judge, then this should also aid in reducing the time taken in managing access and disclosure material and decision-making.

Consultation Question 7.

3.159 We provisionally propose that where an external person is responsible for deciding whether personal records held by third parties should be produced to police and prosecution, or should be disclosed to the defence, then that external person should be a judge.

Do consultees agree?

3.160 We provisionally propose that the police and prosecution (rather than independent counsel) should filter material before it is examined by a judge.

Do consultees agree?

3.161 Should the judge making the determination be the trial judge (as is the position in Canada)?

Access to records by consent

3.162 At present, where a complainant consents to the police and prosecution having access to TPM then – unless the record holder objects – police will obtain the records. There will be no judicial scrutiny of the request. The position will be the same pre-charge and post-charge.

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208 *Hansard* (NSW Legislative Council), 22 October 1997, pp 11329 (Hon A G Corbett), citing *R v KAD* (29 July 1994) Ontario Court of Justice – Provincial Division (unreported), cited in A Cossins and R Pilkington, "Balancing the scales: the case for the inadmissibility of counselling records in sexual assault trials" (1996) 19 *University of New South Wales Law Journal* 222, 254.

3.163 It appears that requests for production of TPM occur routinely at the investigation stage, prior to a suspect being charged.[209] According to stakeholders, there may be good reasons for this, including so that the police may fully investigate or so the prosecution has sufficient evidence with which to make a charging decision. However, as the literature makes clear, and as many stakeholders told us, there are very significant concerns about the intrusive and broad requests that are made.[210] Moreover, as we noted earlier in this chapter, there are concerns that consent may be given in circumstances where complainants are traumatised and where refusing consent may result in no further action by the police or may result in a witness summons to compel production of the records. Is there a case for judicial involvement when access is sought by consent?

3.164 Some stakeholders said there should be judicial oversight during investigations. Members of the Rape Crisis ISVA Reference Panel expressed the view that judicial oversight at this point was appropriate because this is when most requests are made. Still, there are factors that suggest caution. First, judicial scrutiny during investigation may be onerous and resource intensive for the police, prosecution, defence and courts. Secondly, even allowing for time savings that may be made elsewhere – perhaps reducing police time currently spent reviewing and redacting records, or leading to earlier identification of issues and lines of inquiry – it may increase existing delays in the prosecution of sexual offence cases. Thirdly, it may be difficult for the court to determine the issues in a meaningful way at the investigation stage when inquiries are still ongoing and other evidence is still being gathered.

3.165 The British Association of Counselling and Psychotherapy (BACP) has produced significant guidance for its members in relation to information sharing. Jo Holmes from the BACP Policy Team told us that inquiries about confidentiality and sharing information are among the most common that the organisation receives from its member practitioners. She also told us that the BACP guidance is often referred to by other counselling and therapy bodies that receive similar inquiries. The guidance aims to help counselling professionals to understand the principles underpinning client confidentiality, identify situations where it may need to be breached, identify situations where legal advice should be obtained, make decisions about sharing information, and document information sharing,[211] It addresses how counsellors can and should respond to requests for personal records that might be sought with consent of the complainant, and positions that within the broader framework of providing records pursuant to a court order, providing records in the public interest without the client's consent,[212] and providing records with the client's consent.

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209 Home Office, *Police requests for Third Party Material: Consultation Response* (2022) pp 10-11; O Smith and E Daly, *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme* (December 2020) p 37.

210 See para 3.61 above.

211 *Sharing records with clients, legal professionals and the courts in the context of the counselling professions* (BACP, Good Practice in Action 069, September 2022) p 5.

212 See note 27 above.

3.166 The BACP guide first sets out legal and practice principles relevant to confidentiality and information sharing with clients and with third parties.[213] This includes a discussion about the position of the counsellor when faced with a request from police or lawyers that includes a client's consent. We quote from this at some length because it helps illustrate the way that both counsellors and complainants are faced with navigating legal and practical issues if records are accessed by consent:

> Clients may sign general consent forms agreeing to disclosure of their medical or other personal information to the police or to their lawyer. Often there will have been very little explanation or discussion with them about what will happen to that information, and so the client may not necessarily have a clear understanding of who might see the information disclosed, and that their notes may turn up in a bundle of documents in evidence in the court, or copies provided for others to see.
>
> The court is in charge of its evidence, and so can make orders (or directions) limiting the disclosure of evidence gathered by redacting parts of documents not relevant to the case, or by setting boundaries on the dissemination of evidence, for example, a direction for distribution to solicitors and barristers only, or for documents to be viewed by a party in the lawyer's office but copies not to be taken away.
>
> If a request arrives from a lawyer or the police asking for disclosure (in standard lawyers' letters the wording may ask for "all notes and records" relevant to the work with their client) [sic]. If they have attached a client consent form, the practitioner is legally authorised to disclose the information requested. However, sometimes not all the notes are relevant to the case, and some of the client notes may cause the client emotional pain or anxiety if disclosed. Before responding to the request for disclosure, if there is sufficient time and opportunity to do so, it may be very helpful to take the time to discuss with the client, which parts of the records are relevant to the case, and what might actually happen to the disclosed information, ensuring that the client knows who is likely to see their disclosed records. The informed practitioner might perhaps also discuss how the client might seek advice on obtaining an appropriate direction from the court if the client is concerned about the effect of disclosure. The police or Crown Prosecution Service or the client's lawyer may provide this information if required.
>
> Beware, too of any request for an 'off the record' conversation with anyone about a client, even if you have their consent for disclosure of their information, or disclosure without consent is justified in the public interest. Ethically, conversations disclosing information about a client should not be 'off the record' in the interests of trust, openness and transparency.[214]

3.167 Secondly, in a part entitled "how to share information legally and ethically", the guide provides five checklists: (1) decision making about sharing information; (2) when to share information – the right time; (3) sharing information with the right person/organisation; (4) presenting information in an appropriate way; and (5)

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213 *Sharing records with clients, legal professionals and the courts in the context of the counselling professions* (BACP, Good Practice in Action 069, September 2022) pp 6-22.

214 Above, p 20.

recording information sharing.[215] These are prefaced with a statement about the importance of a careful approach:

> To achieve the best outcome for clients and the public interest, it is necessary to think through information sharing carefully, and preferably – in the case of a concern for client safety or welfare or that of others, if there is time – in consultation with a supervisor, trusted colleague, or the professional body. While disclosure may prove necessary, the way in which it is done, the timing, and the recipient of the information might make all the difference to the client's welfare, or to the safety or welfare of others. Careful consideration of why we feel the need to disclose information, and why now, may reveal alternative ways of averting potential harm, or in some cases, the possibility of constructive delay, if delay would not create or increase the risk of serious harm.[216]

3.168 In England and Wales there has been some consideration of these and related issues. The Home Office consultation on TPM has considered whether a statutory duty may be created in relation to TPM requests and sought input on:

- A statutory duty on policing to seek third party material only when necessary and proportionate.
- A statutory duty on policing to provide full and clear information to both the person about whom the third party material is being requested and the third party who is being asked to provide the information.
- A code of practice to accompany these duties and clarify their use in practice.[217]

In the week prior to publication of this consultation paper, the Government announced that it would introduce an amendment to the Victims and Prisoners Bill to "block unnecessary and intrusive third party material requests in rape and sexual assault investigations".[218] The Secretary of State for Justice told the House of Commons that its effect will be to "make sure that those requests are made only when strictly necessary for the purposes of a fair trial"[219] and "that there will be no routine access to therapy notes; there will be access only when it is absolutely necessary and proportionate, and not by the defence, but principally in the very rare circumstances where a prosecutor needs to look at it."[220] Though there was no detail provided at that

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215 *Sharing records with clients, legal professionals and the courts in the context of the counselling professions* (BACP, Good Practice in Action 069, September 2022) p 22-28.

216 Above, p 23.

217 Home Office, *Government Consultation: Police requests for Third Party Material* (June 2022) p 4. The consultation found that "the majority of respondents, across all groups, either agreed or strongly agreed with the proposals": Home Office, *Police requests for Third Party Material: Consultation Response* (2022) p 11.

218 *Hansard* (HC), 15 May 2023, vol 732, col 587.

219 Above.

220 Above, col 588.

point, other government statements suggest that it will seek to legislate the statutory duties and the code of practice referred to in the Home Office consultation.[221]

3.169 Where police seek to extract information from electronic devices there are now enhanced requirements under the Police, Crime, Sentencing and Courts Act 2022. The statute empowers police to extract data where a user of the device has voluntarily provided the device and agreed to the extraction of the information.[222] The provisions require that, even where agreement is voluntary, investigators reasonably believe that the information is relevant to a reasonable line of inquiry and that exercising the power is both necessary and proportionate. They must take into account factors such as the amount of confidential information likely to be stored on the device, the risk that unnecessary confidential information will be obtained when extracting data, and whether information can be obtained by other means.[223] Section 39 sets out what is meant by and required for voluntary provision of the device and agreement to the extraction of data. The requirements include the following, and the investigator must receive agreement in writing:[224]

> (1) An [investigator] must not have placed undue pressure on [the person] to provide the device or agree to the extraction of information from it.
>
> (2) An [investigator] must have given [the person] notice in writing—
>
> > (a) specifying or describing the information that is sought,
> >
> > (b) specifying the reason why the information is sought,
> >
> > (c) specifying how the information will be dealt with once it has been extracted,
> >
> > (d) stating that [the person] may refuse to provide the device or agree to the extraction of information from it, and
> >
> > (e) stating that the investigation or enquiry for the purposes of which the information is sought will not be brought to an end merely because [the person] refuses to provide the device or agree to the extraction of information from it.

Comparative law

3.170 In other jurisdictions specific approaches vary but consent will be sufficient for access, with no judicial scrutiny applied.

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221 Ministry of Justice, *Press release: End to intrusive fishing expeditions of rape victims' therapy notes* (15 May 2023).

222 Police, Crime, Sentencing and Courts Act 2022, s 37(1). We note that the voluntary agreement here is different from consent under data protection legislation; for a detailed discussion of consent at common law and under data protection laws, see the Information Commissioner's Office, *Mobile phone data extraction by police forces in England and Wales: Investigation report* (June 2020).

223 Police, Crime, Sentencing and Courts Act 2022, s 37.

224 Police, Crime, Sentencing and Courts Act 2022, s 37(4). The section also provides for the situation where the person is unable to provide written agreement: s 37(5), (7).

3.171 In Canada, the Criminal Code permits the accused to seek an order for disclosure of TPM that is in possession of the prosecutor or of any other person, but the provisions are silent on whether police or prosecutors may obtain the record simply with consent of the complainant. However, government information for victims indicates that a complainant may "agree to give a third-party record to the police or the [prosecutor]".[225]

3.172 In Western Australia, the Evidence Act 1906 (WA) provisions do not apply to investigation so do not affect police and prosecution access by consent.[226]

3.173 In Ireland, consent by the complainant will mean there is no judicial scrutiny as the procedures for requesting counselling records do not apply "where a complainant or witness has expressly waived his or her right to non-disclosure of a counselling record without leave of the court".[227] We have been told by Dr Susan Leahy (based on her empirical research involving legal professionals and court workers) and an Irish academic that the disclosure scheme has been used in few cases because complainants have generally consented to the disclosure of their personal records and waived their entitlement to participate in the scheme. In her study of how the Irish sexual offences laws operate in practice, Dr Leahy reported that one legal professional suggested that complainants consent to disclosure "because they don't want anything to derail the trial" and another said that complainants sometimes waive their rights "for the purposes of expedition".[228] It appears that waiver provisions undermine the operation and effectiveness of the judicial scrutiny processes established under the scheme.

3.174 In Scotland, consent will be sufficient for access but it will usually be necessary to get approval from a Senior Legal Manager in COPFS and a series of specified steps must be taken before consent can be requested.[229] These include consideration of:

- whether there are reasonable grounds to believe the TPM would either be part of the prosecution's evidence, could weaken or undermine the prosecution's case, or could assist the defence case;
- exactly what TPM is needed (ie, it may not be necessary to recover all records); and
- whether, mindful that recovery of TPM will engage the complainant's article 8 rights, "the recovery of records serves a proper purpose and is in the interests of justice, i.e. that the records may contain material information in relation to the charges that are in contemplation. Records must not be obtained on frivolous or

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225 Government of Canada, "The Victim's Role in Applications for Third-Party Records", (14 December 2021).

226 The provisions apply only to disclosure: Evidence Act 1906 (WA), s 19C.

227 Criminal Evidence Act 1992 (Ireland), s 19A(17); see also paras 3.99 and 3.153 above.

228 S Leahy, *The Realities of Rape Trials in Ireland: Perspectives from Practice* (2021) p 31.

229 COPFS, *Sensitive Personal Records Policy*, (August 2022) paras 8-10, 14-33.

speculative grounds and only the parts of the records necessary to fulfil the proper purpose should be recovered".[230]

3.175 Particular regard should be paid to what, if anything, of relevance the records may prove. The decision in *McLeod v HM Advocate* is cited where Lord Turnbull, overturning a lower court's decision to allow access, criticised the lack of evidence of a connection between what was in the records and the matter (of credibility) that would be in issue: "The first instance judge was presented with no medical opinion and appears to have been invited to proceed upon the proposition that mental illness of any nature equated to a propensity to lie or fantasise".[231]

3.176 Further, there are a clear set of requirements regarding what the complainant must be told, which include providing comprehensive information about the request, the right to refuse consent, and what may happen if consent is refused.[232]

3.177 In NSW, there is arguably some uncertainty about the position regarding police and prosecution access by consent. Campaigning organisations in England and Wales have pointed to NSW as a model that does not permit any access at all prior to charge and that requires judicial determinations for all requests:

> Under the NSW model, requests are made post-charge to a court which prevents speculative and blanket requests for records that are not evidentially relevant. Furthermore, in requiring requests to be made post-charge and determined at court, the NSW model also allows a survivor to waive the presumption of non-disclosure in instances where they wish for their records to be disclosed.[233]

However, the statutory restrictions appear fewer than that interpretation suggests.

3.178 Part 5 Division 2 of the Criminal Procedure Act 1986 (NSW) establishes the sexual assault communications privilege ("SACP"), which applies only to counselling records and not to TPM generally, but is still very broad in its scope (as discussed above). Under these provisions:

- There are significant limits on access by compelled production by the record holder, whether by subpoena or any other method. Compelled production cannot be pursued pre-charge. Even post-charge there is a complete bar on seeking compelled production in preliminary proceedings.[234] However, the Act does not prevent production and use of a document at any stage of proceedings if the complainant has consented to such production and use.[235]

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230 COPFS, *Sensitive Personal Records Policy*, (August 2022) paras 17-27.

231 Above, para 20, citing *McLeod v HM Advocate* 1998 SLT 233.

232 Above, paras 22-27; COPFS, *Information for Witnesses: Police or Prosecution Recovery of Sensitive Personal Records*.

233 RCEW, CWJ and EVAW, *Keep Counselling Confidential: The Problems and Solutions with Disclosure of Counselling Notes* (October 2022) p 13.

234 Criminal Procedure Act 1986 (NSW), ss 295, 297, 298.

235 Criminal Procedure Act 1986 (NSW), s 300(1)(a).

- For consent to be effective it must be in writing and must expressly relate to the production of a document or adducing of evidence that does or would be subject to the SACP provisions.[236]

3.179 Once a subpoena has been sought (eg, to compel a record holder to produce documents to the court) then it is clear that a complainant may give consent to records being produced. But what if a subpoena has not been sought? While the statute prevents police seeking to *compel* access, it is silent on whether they may *request* access, either pre- or post-charge. As a result, it appears that consent-based access can be sought.

3.180 The specialist SACP Service offered by Legal Aid NSW advises people working in health and welfare roles that they may receive letters from lawyers or informal requests for access to records. The advice includes:

> If your client is helping the Police with an investigation, they may feel that they ought to release all records the Police ask for (to support the prosecution case). Make sure your client knows that there may be other options, and that the information asked for may not help the prosecution case in the long run. Encourage them to talk to a lawyer so that they can make an informed decision.[237]

3.181 Unless a complainant consents to the production of the records, it appears that the legislation presumes that any request for access to counselling records would from the outset be refused by the complainant and/or the record holder. Consequently, police and prosecutors would need to obtain access by compelled production – which, if done post-charge, is regulated by the statute. The Act does not, however, appear to prevent police requesting records prior to charge and obtaining them with consent of the complainant and the record holder, or coming into possession of those records because they are produced to them by the record holder without the complainant's consent. This means the statute does not directly address the position where police and prosecutors may decide that without counselling records they are unable to charge a suspect. Nevertheless, the comprehensive, plain-language information in the SACP Service *Subpoena Survival Guide* for TPM record holders and the provision of free legal support for complainants must surely go a long way to giving effective, informed protection and support to complainants, without putting a suspect's or defendant's rights at risk. The regime may also mean that investigators' attention is more carefully on the strength of the case without a distorting effect of attributing to counselling records a weight and relevance that they do not warrant in the circumstances.

3.182 In summary, in comparator jurisdictions – just as in England and Wales – police and prosecutors may obtain access to TPM if the complainant consents. This may occur

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236 Criminal Procedure Act 1986 (NSW), s 300(2). The word "production" is not defined but it appears to refer to production to the court: *NAR v PPC1* [2013] NSWCCA 25. Under s 299 the Act also requires a court to notify a complainant or record holder of their rights, though this would only come into play post-charge: "If it appears to a court that a witness, party or protected confider may have grounds for making an application under this Division or objecting to the production of a document or the adducing of evidence, the court must satisfy itself … that the person is aware of the relevant provisions of this Division and has been given a reasonable opportunity to seek legal advice."

237 SACP Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016) p 9.

pre-charge or post-charge. There is no judicial scrutiny when access is consent-based. There have been clear attempts to limit the extent to which requests would be made, especially prior to charge. In England and Wales, the AG's Guidelines set out principles.[238] In Scotland, the COPFS Sensitive Personal Records set out processes. In NSW and Canada, the legislative regimes provide disincentives to early requests because they set limits and higher bars for compelled production. In NSW this is accompanied by detailed information for record holders and free legal support for complainants, all provided by a specialist service.

Regulating access by consent in England and Wales

3.183 We are, first, persuaded that the level of intrusive and broad requests, the circumstances under which consent is given, and evident risk that TPM may be given undue weight are so significant that clear steps are warranted to ensure that complainants who are asked to consent to access are appropriately protected so that TPM requests are justifiable and consent is appropriately informed and voluntary. With no jurisdictions currently applying judicial scrutiny to consent-based access by police and prosecutors, and conscious of the resource demands this could place on courts, we are reluctant to provisionally propose the introduction of judicial scrutiny, though we do not discount the potential value of it. Accordingly, we would welcome consultees' views regarding measures that might be taken to address the concerns, such as, but not limited to:

- judicial scrutiny;
- replacement of existing guidance (such as the principles for TPM access in the AG's Guidelines) with primary legislation, either with the same or a different threshold;
- enhanced procedures in guidance (such as those in Scotland) or in legislation (such as those in the Police, Crime, Sentencing and Courts Act 2022 for extracting information from electronic devices);
- statutory duties (such as those considered by the Home Office and which the Government has indicated will be introduced in an amendment to the Victims and Prisoners Bill);
- legal support for complainants (which we consider further in Chapter 8); or
- public information or support for record holders (such as that in NSW or that provided by the BACP for its members).

3.184 We would encourage consultees when responding to our questions on this issue to consider the extent to which any steps around consent-based access may or may not be needed in light of our provisional proposals in relation to access by compelled production and disclosure to the defence. In that regard we would welcome evidence about the effectiveness of the NSW regime, including in relation to any effects it has had on consent-based access. We would also encourage consultees to take account

[238] AG's Guidelines (2022) paras 28-34; see also paras 3.16 to 3.17 above.

of any developments in relation to the Government's indication that it will bring forward an amendment to the Victims and Prisoners Bill.

Consultation Question 8.

3.185 We provisionally propose that some measures (but not judicial scrutiny) should be put in place to ensure that complainants who are asked to consent to access have greater protection than is presently the case, both pre-charge and post-charge.

Do consultees agree?

3.186 Providing that the record holder also consents to access, if protective measures are to be put in place for complainants who consent to access, what should those measures be? (Although our provisional proposal does not include judicial scrutiny, we do not exclude it from responses to this question.)

Access to records by compelled production

3.187 If police or prosecutors are to obtain access to TPM against the will of a complainant or a record holder, then this will require a court order to compel production of the records.[239] In this section we consider in what circumstances police or prosecutors should be able to seek such an order. In particular, we consider whether an order should be able to be sought pre-charge and post-charge.

3.188 In any instance where police or prosecutors are permitted to seek compelled production it would be imperative that the complainant has a right to be heard. There would also be a particularly strong case for publicly funded legal aid to support legal advice and legal representation.

Pre-charge: when the complainant refuses consent

3.189 In England and Wales, police or prosecutors may use the Police and Criminal Evidence Act 1984 ("PACE") in very limited circumstances to seek compelled access to TPM before a suspect has been charged.[240] Although we are not aware that this happens in practice, the question of whether such a power should be available clearly warrants consideration.

3.190 In other jurisdictions the position varies. In NSW, compelled production is only available post-charge, though not until after preliminary proceedings have been concluded.[241] In Canada, compelled production appears to only be available post-

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239 At present the most common procedure used for this is a witness summons; see paras 3.18 to 3.23 above.

240 See note 26 above. The Law Commission previously recommended that the Government consider whether the law governing access to confidential personal records under PACE warrants reform: Search Warrants (2020) Law Com No 396, para 12.111.

241 Criminal Procedure Act 1986 (NSW), Part 5, Division 2.

charge, when it is initiated by the defendant seeking disclosure.[242] In Scotland, however, compelled production may be sought pre-charge.

3.191 Under Scotland's COPFS Sensitive Personal Records Policy (outlined above), the starting point is a police request for access by consent, which should generally only be made when:

> there is judged to be insufficient evidence to prove a serious offence; there are reasonable grounds to believe that the records may contain information which would cure that deficiency; and all other avenues of investigation have been exhausted.[243]

3.192 The policy then sets out the circumstances in which prosecutors may consider seeking compelled access:

> If the witness refuses to consent to recovery of the records, and it is believed that recovering the records will result in sufficient evidence being established, and all other avenues of investigation have been exhausted, then the police should approach COPFS to seek a warrant to recover the records. COPFS should carefully consider if the recovery of records is likely to result in sufficient evidence being established. Generally, it will only be appropriate to seek to recover records via warrant in cases involving solemn level offending.[244]

3.193 If the prosecutor considers it is appropriate to seek a warrant then the witness will be able to make representations to the court but, as criminal proceedings are not yet underway, the witness would not be entitled to legal aid funding for a lawyer.[245] Accordingly, the policy states that applications to recover records should not be submitted pre-charge "unless absolutely necessary".[246]

3.194 We have not reached a provisional view about whether, when the complainant refuses consent, police and prosecutors should be able to seek compelled access prior to charge. One argument in favour of such a power is that there may be circumstances where, without the personal records, there is insufficient evidence for the investigation to continue or for the prosecution to reach a charging decision and all other avenues of investigation have been exhausted. A pre-charge power would address that. On the other hand, a pre-charge power may result in such applications being made because it would be embedded by design within a bespoke regime. It may encourage requests by police and perpetuate the opportunity for requests without sufficient reason and the possibility that TPM would be given an inappropriate weight in charging decisions. This could be tempered by an access threshold that places a premium on relevance and in a balancing exercise gives considerable weight to a complainant's withholding of consent, but there would still be an expansion of police powers. It could also be that an improved system of consent-based access, with good protections for complainants'

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242 Criminal Code (Canada), ss 278.1-278.3; the disclosure regime is discussed at paras 2.225 to 2.334 below.

243 COPFS, *Sensitive Personal Records Policy* (August 2022) para 9.

244 Above, para 11; a "solemn level" offence is one tried under solemn procedure, which will be a serious criminal offence tried before a judge and jury in the High Court or the Sheriff Court (rather than tried by judge alone in summary proceedings in the Sheriff Court or Justice of the Peace Court).

245 Above, para 12.

246 Above, para 40; the terminology instead of "pre-charge" is "prior to the service of a petition or a complaint".

rights, may reduce the need for compelled access in these circumstances. Nevertheless, as things stand, a complainant who does not want to give access to their records may be faced with police not pursuing an investigation further or not charging a suspect, and have no option at all for an access request to be judicially scrutinised. Changes to consent-based access may potentially improve the position of such a complainant and the inclusion or exclusion of a pre-charge power to compel production should be considered in that context.

3.195 In the event that there were to be a pre-charge power then it would be impractical and potentially unwise simply to establish a general judicial scrutiny regime that would sit on top of the existing powers and guidance. Accordingly, there would be a strong case for limiting any power so that other than in specified, limited circumstances (such as when records are needed for a charging decision), all requests for compelled production of personal records would be made post-charge.

Pre-charge: when the record holder refuses consent

3.196 It is possible that a complainant may consent to TPM access for police and prosecutors, but the record holder will refuse consent. On the one hand, the record holder may have good reason for this, including concerns about the complainant's well-being, the circumstances in which consent has been sought, or a fear that disclosure of records will result in a suspect not being charged when they should be. On the other hand, if evidence may be lost or destroyed and there are reasons for the police to doubt that the record holder would adhere to a request to secure and preserve the record pending any later court application then that would be quite a different circumstance.

3.197 We have not reached a provisional view as to whether police and prosecutors should be able to seek compelled access in these circumstances. There is arguably a stronger case for a power in this instance on the grounds that the complainant has consented and it would be inappropriate to deny police access to the records. In particular, where records may reveal material that may increase the likelihood of a suspect being charged then the record holder's refusal may do an injustice to the complainant.

Consultation Question 9.

3.198 Prior to charge, if the complainant refuses consent to access, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced?

3.199 If so, should this be limited to specific circumstances and, if so, to which special circumstances?

Consultation Question 10.

3.200 Prior to charge, where the complainant consents to access but the record holder does not consent, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced?

3.201 If so, should this be limited to specific circumstances and, if so, to which special circumstances?

Post-charge

3.202 In England and Wales, under the law as it stands, police, prosecutors and the defence may seek compelled access to TPM after a suspect has been charged, ordinarily by using a witness summons.[247] Here, we are concerned with whether such a power should continue to be available. In this discussion we focus on the existence of the power, rather than the witness summons as the process used to exercise that power.

3.203 The rationale for such a power lies essentially in protecting the defendant's rights to a fair trial. We examine in detail below the thresholds that should apply but, in short, once a defendant has been charged then if there is good reason to think that exculpatory evidence may exist then there is an obligation on the state to secure and review that evidence (and subsequently disclose it if appropriate).

3.204 Our provisional view is that such a power is an important part of the criminal justice process and should be retained, whether either the complainant or record holder has refused consent (or both have).

3.205 We note that in NSW this power is not available immediately that a suspect has been charged; compelled production is not available in relation to preliminary proceedings of bail and committal.[248] We see some concerns with this approach. The defence may seek to apply for this material soon after charge to strengthen an application for bail, to make representations to the prosecution seeking discontinuation of the charge, or to make an application to dismiss or stay the case. There may be good reasons why the prosecution may want to apply soon after charge; it will assist in the preparation of the case and serving of prosecution evidence at a Plea and Trial Preparation Hearing.

3.206 The thresholds for making an order are contentious and addressed below. Our consultation question relates solely to the existence of the power and the post-charge point at which it should become available.

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247 See paras 3.18 to 3.23.

248 Criminal Procedure Act 1986 (NSW), ss 297-298.

Consultation Question 11.

3.207 We provisionally propose that after a suspect has been charged, police, prosecutors and defence should continue to be permitted to apply to the court for an order for personal records held by third parties to be produced.

Do consultees agree?

3.208 If so, should there be any restrictions on permission to apply in the early stages of proceedings?

Disclosure to the defence

3.209 The CPIA disclosure regime was explained above in the outline of the current legal framework.[249] At present, decisions about disclosure of TPM will be made by the prosecution with no judicial scrutiny unless the complainant and/or the record holder has refused consent. In those instances, the prosecution will make a PII application, and a judge will determine whether the material can be withheld from the defence. A judge will also make a determination when the defence apply for disclosure.

3.210 There have been no suggestions in the literature or by stakeholders to the effect that there should be any less judicial involvement. The primary procedural issue is whether there should be greater judicial scrutiny of disclosure of TPM to the defence.

3.211 Stakeholders' views on judicial scrutiny for disclosure were discussed above in the consideration of who should have responsibility for determinations, and further views are raised in the discussion below regarding thresholds.

3.212 Other jurisdictions require judicial authorisation before TPM is disclosed. In Canada, judicial authorisation is required, though applications cannot be made at preliminary proceedings.[250] There is also a consent exception, though it is more limited; only where the TPM is in the possession or control of the prosecutor can the complainant waive the application of the Criminal Code procedures.[251] In NSW, the position is somewhat unclear but, because the first step in compelled access to TPM will be production of documents to the court, it appears that leave of the court is effectively required for disclosure.[252] As a consequence, there will also be an effective bar on disclosure in preliminary criminal proceedings.[253] And – again because of the effect of consent on production to the court – it appears that the complainant's consent to production and use of the document will remove the requirement for judicial permission for disclosure.[254] However, if the complainant consented to production and

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249 See paras 3.24 to 3.42 above.

250 Criminal Code (Canada), s 278.3(2).

251 Criminal Code (Canada), s 278.

252 Criminal Procedure Act 1986 (NSW), ss 149F(6), 247X(5), 298.

253 Criminal Procedure Act 1986 (NSW), s 297.

254 Criminal Procedure Act 1986 (NSW), s 300.

use of the records then it seems that, because the SACP provisions will not have applied, there may not be judicial scrutiny of disclosure.[255]

3.213 In Western Australia, judicial authorisation is required for disclosure. Under section 19G(1) of the Evidence At 1906 (WA), the court may grant leave to disclose or require disclosure "if, and only if, the court determines that it is in the public interest to do so". Section 19G(2) sets out the factors that the court is "to have regard to" in determining whether the public interest test has been met:

> (a) The extent to which [disclosure] is necessary to allow the [defendant] to make a full defence;
>
> (b) Whether the evidence … will have substantive probative value;
>
> (c) The likelihood that [disclosure] will affect the outcome of proceedings;
>
> (d) The public interest in ensuring that complainants receive effective counselling and the extent to which failure to preserve the confidentiality of protected communications may dissuade complainants from seeking counselling or diminish the effectiveness of counselling;
>
> (e) The public interest in ensuring that adequate records are kept of counselling communications;
>
> (f) The likelihood that [disclosure] will cause harm to the complainant, and the nature and extent of that harm;
>
> (g) Any other matter that the court considers relevant.

3.214 The judicial process will not apply if the complainant consents to disclosure.[256]

3.215 Our provisional view is that increasing judicial involvement is important if evaluations of relevance and balancing of interests are to be consistent, transparent and appropriate. Further, our provisional view is that consent should not displace the requirement for judicial permission. Judicial authorisation helps limit the risk that TPM will unnecessarily be disclosed to the defence and, in turn, limit the risk that rape myths will be deployed by counsel. Judicial authorisation poses no risk to the defendant's fair trial rights; it ensures that material that meets the disclosure test will be disclosed, but that no other material will be disclosed. The complainant's consent is important but there is also a public interest in confidentiality of patients' records and that is more effectively served by requiring judicial authorisation in all circumstances.

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255 We are grateful to Dr Matthew Nelson for alerting us to the uncertainties that arise in relation to disclosure in NSW in these circumstances. He has told us that there is a particular uncertainty where the prosecution is in possession of material that must be disclosed to ensure the defendant has a fair trial, but may involve material that would fall within the SACP regime. In these circumstances, the prosecution would need to make a decision whether to discontinue the prosecution or use the statutory regime to request that the court grant leave to compel or permit production of the material to the parties, even though the statutory regime does not appear designed t facilitate the prosecution's disclosure obligations. It is not clear what the position would be under the law in NSW where the prosecution is already in possession of the material.

256 Evidence Act 1906 (WA) s 19H.

3.216 As to whether disclosure of TPM should or should not be permitted in the early stages of proceedings, the concerns raised above apply equally here.[257] That is, there are good reasons why the defence might seek disclosure soon after charge.

Consultation Question 12.

3.217 We provisionally propose that disclosure of personal records held by third parties should require judicial permission.

Do consultees agree?

3.218 We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent.

Do consultees agree?

3.219 Should there be any restrictions on disclosure in the early stages of proceedings?

WHAT SHOULD BE THE THRESHOLD TESTS?

3.220 We turn now to the thresholds for: the compelled production of personal records to police and prosecution;[258] disclosure of personal records to the defence; and admissibility of personal records as evidence. We make provisional proposals regarding the thresholds. These include provisional proposals for the use of enhanced relevance and structured discretion.

3.221 We conclude this part with a separate question about how a personal records regime for sexual offences should operate where therapy records reveal inconsistencies in a complainant's account.

Existing thresholds

3.222 In the legal framework outlined above, we explained the thresholds for access by consent, compelled production, disclosure and admissibility.[259] The thresholds at each stage are tempered by balancing of the complainant's article 8 privacy rights and the defendant's article 6 fair trial rights. When PII comes into play at the disclosure stage the balancing engages the wider public interest in the confidentiality of patients' records.

3.223 These thresholds are lower than those in other jurisdictions and lack the structured discretion that is found elsewhere. We begin by considering stakeholders' views in

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257 See para 3.205 above.

258 We do not address the threshold for access by consent here as it is not currently governed by primary legislation in England and Wales nor in comparable jurisdictions. We invite comments on consent-based access at consultation question 8 above.

259 See paras 3.7 to 3.51 above.

relation to relevance and then outline two models that use structured discretion[260] but have different thresholds and different procedural approaches.

Stakeholders' views: the relevance of third-party material

3.224 In exploring the case for change (above) we identified a number of matters in relation to using medical and counselling records. Among the issues of concern was the disjuncture between records created out of and for the purpose of therapy, and the use of those records as evidence in a criminal trial. In short, the probative value of third-party material cannot be presumed. In stakeholder engagement these and other concerns were raised very directly to suggest reasons why records may not be sufficiently relevant to be admissible. These same concerns may also go to disclosure; that is, there may be reasons why, in some circumstances, records may not "reasonably be considered capable of undermining the case for the prosecution… or of assisting the case for the defence".

3.225 First, we were told that third parties do not always make detailed contemporaneous notes, and complainants do not subsequently review them for accuracy. Then, where notes are taken, they may not immediately translate to the trial context. A psychologist commented that therapy notes are for the therapist, and are therefore not designed to be read or understood by others or to gather facts and evidence (including not by lawyers who are not qualified in the field). A former director at a SARC expressed concerns that lawyers lack knowledge of medical terminology and this impacts on their ability to interpret the notes and make case decisions informed by them. Psychologists and counsellors gave concrete examples from their work. A clinical psychologist similarly explained that the notes they make are not concerned with the accuracy or correctness of any account given but are made so that they know what to follow up next time. A psychotherapist gave an example of words used by a therapist to interpret their client's situation being used to discredit the client as a witness in later proceedings.

3.226 We do not rule out the possibility that a complainant's personal records may contain relevant material. A barrister stated that while they accepted that trauma could affect the consistency of accounts, this is not inevitable. In their view, a direction to the jury should be sufficient to ensure that juries take this into account. Further, they explained that often the prosecution adduce counselling records, which must be on the basis that trauma does not inevitably affect the consistency of accounts. They were of the view that if relevant material exists then there is no basis for the defence not having it, given that concerns for the complainant's privacy must always be balanced against the defendant's right to a fair trial.

3.227 These stakeholders' views take account of some of the specific matters of concern in relation to the evidential value of third-party material. A personal records regime must take account of multiple factors, many of which have been set out throughout this chapter. Comparative models are helpful for insights into the thresholds that might be set and the frameworks within which they sit, which are designed to take account of the broad range of matters that arise.

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260 Ireland also has a structured discretion model under the Criminal Evidence Act 1992, s 19A, but it is more limited than the two we will discuss.

Comparative law

Canada

3.228 In Canada, production, disclosure and admissibility are all governed by a unified regime under the Criminal Code. For production and disclosure, the same factors are to be considered. For admissibility the test is different and more demanding.

Canada: production and disclosure

3.229 The prosecution must give the defence a list of the material it holds.[261] Then, the defence may apply to the court for disclosure of material held by the prosecution or a third party.[262] A two-stage process is used. Judicial approval is required at all stages unless a complainant has waived their right to that process.[263]

3.230 First, the accused must persuade the court that the record holder should produce the records to the court for a judge to review them to see if disclosure is warranted. The judge must be satisfied that:

- the application was made in accordance with [the relevant procedural requirements (which include section 278.3(4), discussed below)];
- the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
- the production of the record is necessary in the interests of justice.[264]

3.231 The procedural hurdle is significant. Under the heading "insufficient grounds", section 278.3(4) states:

> Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:
>
> (a) that the record exists;
>
> (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
>
> (c) that the record relates to the incident that is the subject-matter of the proceedings;
>
> (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
>
> (e) that the record may relate to the credibility of the complainant or witness;

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261 Criminal Code (Canada), s 278.2(3).

262 Criminal Code (Canada), s 278.3(1).

263 Criminal Code (Canada), s 278.2(2).

264 Criminal Code (Canada), s 278.5(1).

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(h) that the record relates to the sexual activity of the complainant with any person, including the accused;

(i) that the record relates to the presence or absence of a recent complaint;

(j) that the record relates to the complainant's sexual reputation; or

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

3.232 In saying "this, alone, is not enough", the provisions filter out unmeritorious and speculative requests, and in doing so help avoid the risk that rape myths and misconceptions will influence the jury's reasoning. Although some of these may be matters that could undermine the prosecution case, in the absence of an evidential foundation they are not permissible to support even the first stage of a disclosure application. As the Supreme Court of Canada explained:

> speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences.[265]

3.233 The Court stated that the purpose of these provisions is to prevent myths and misconceptions "forming the entire basis of an otherwise unsubstantiated" request.[266] It explained the defendant is not prevented from relying on the assertions "where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance". It added that conversely, where the defendant does point to an evidentiary or informational foundation to an assertion, this does not necessarily mean "that likely relevance is made out".[267]

3.234 Next, given a satisfactory application, the second two limbs of the test apply. The first component of "likely relevant" has been defined to mean as "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify".[268] The second component – "necessary in the interests of justice" – supplements the first limb so that the disclosure threshold is one of enhanced relevance. This enhanced relevance test was introduced specifically to address

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265 *R v Mills* [1999] 3 SCR 668 at [119].

266 *R v Mills* [1999] 3 SCR 668 at [119].

267 *R v Mills* [1999] 3 SCR 668 at [120].

268 *R v O'Connor* [1995] 4 SCR 411 at [22]. This was the sole test until amended by An Act to amend the Criminal Code (Production of Records in Sexual Offence Proceedings) Act 1997.

routine requests for and production of personal records, which had led to "the recurring violation of the privacy interests of complainants and witnesses".[269]

3.235 The Criminal Code states what is required by the balancing of interests:

> In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account
>
> (a) the extent to which the record is necessary for the accused to make a full answer and defence;
>
> (b) the probative value of the record;
>
> (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
>
> (d) whether production of the record is based on a discriminatory belief or bias;
>
> (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
>
> (f) society's interest in encouraging the reporting of sexual offences;
>
> (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
>
> (h) the effect of the determination on the integrity of the trial process.

3.236 If the court is satisfied that the documents warrant consideration then it will review them and decide whether disclosure to the defendant is required. The test is expressed in the same terms: the record must be likely relevant to an issue at trial or to the competence of a witness to testify, and production must be necessary in the interests of justice. At this stage, however, the term "production" in the section does not refer to production to the court, but to production (ie, disclosure) to the defendant. Accordingly, a court could conclude that documents warrant review by the court to ensure the defendant's fair trial rights are not at risk, but reach the view that they do not warrant disclosure to the defence.

3.237 In the list of factors above, it is not entirely clear how factor (d) – whether production of the record is based on a discriminatory belief or bias – is deployed in reasoning. In the academic literature it was observed that when the Supreme Court in *O'Connor* identified this as a factor to be taken into account, there were "no examples (much less a sustained discussion) to guide trial judges on what a consideration of this factor

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269 *R v Mills* [1999] 3 SCR 668 at [125].

would look like".[270] A review of the reported cases from 2011-2017 found this factor was considered in only two of the 91 cases where an application was made.[271] We note the observation by L'Heureux-Dubé J in *O'Connor* that "an important element of trial fairness is the need to remove discriminatory beliefs and bias from the fact-finding process".[272] We also note Busby's observation that a record may have been created by a person who holds discriminatory beliefs about, for example, women or groups to which victims belong, and so admitting such a record can create or compound unfairness.[273] Though a significant point, and Busby does not link it to the consideration of whether production would be based on discriminatory belief, it appears this concern could be accommodated by a consideration of probative value, under factor (b). We are not aware of any further elaboration with regard to factor (d) and would welcome consultees' views on this factor in responses to the consultation questions below.

Canada: admissibility

3.238 Where material has been disclosed and the defendant wishes to use it in evidence then the test for admissibility must be met. It is structured in a similar way, but with higher thresholds.

3.239 Under section 278.92(2)(b), evidence will be inadmissible unless it "is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice".

3.240 In determining whether evidence is admissible under that test, the court must take into account:

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(e) the need to remove from the fact-finding process any discriminatory belief or bias;[274]

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270 K Busby, "Discriminatory uses of personal records in sexual violence cases" (1997) 9 *Canadian Journal of Women and the Law* 148, 170; *R v O'Connor* [1995] 4 SCR 411 at [31] (Lamer CJ and Sopinka J), [156] (L'Heureux-Dubé J).

271 C Jacuk and H Hassan, "Third Party Records: A Review of the Case Law from 2011–2017" (2018) 11 *Victims of Crime Research Digest* 34, 42.

272 *R v O'Connor* [1995] 4 SCR 411 at [109] (L'Heureux-Dubé J).

273 K Busby, "Discriminatory uses of personal records in sexual violence cases" (1997) 9 *Canadian Journal of Women and the Law* 148, 160.

274 In relation to this factor, see again the discussion at para 3.234 above.

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(i) any other factor that the judge … considers relevant.

3.241 The Canadian admissibility threshold is clearly far more demanding than that in England and Wales. That does not, however, prevent evidence being admissible. Gotell's study indicated that the test was applied in ways that prioritised the right to a fair trial and much evidence from personal records was held to be admissible in trials.[275] Still, Leahy – though clear that this is not a panacea– sees some positives from Gotell's study (such as unmeritorious cases being filtered out) and argues there is considerable merit in adopting the Canadian approach in England and Wales.[276] Among the strengths, "judicial discretion is structured by detailed guidelines which encourage more consistent and predictable results".[277] Though arguing that written decisions will be important and that legally aided representation for complainants would help make the system effective, she takes the view that section 278:

> provides a unified approach with one central application point. This is more straightforward than the English system where there are three alternative routes to disclosure, each with slightly differing procedures. A streamlined process reduces the potential for uncertainty or misapplication of procedures. Further, applying the same rules to all records, whoever controls them, is sensible as similar concerns about unwarranted use of these records apply whether the material is in the hands of the prosecution or a third party. Allowing the complainant to waive the application of the scheme where the prosecution holds the record allows for avoidance of the formal process where the complainant consents. This is similar to the English law where the complainant can consent to disclosure of records. However, the s.278 consent process is much simpler ….[278]

New South Wales

3.242 NSW sets a higher threshold than Canada. This may in part reflect the fact that the provisions are framed as protecting counselling records and not TPM more generally. The NSW laws use a combined production, disclosure and admissibility test.

3.243 The Criminal Procedure Act 1986 (NSW) creates a rebuttable presumption that counselling records will not be produced or admitted. To compel production by subpoena or to admit the records in evidence the court must be satisfied that the

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275 L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251.

276 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 241-244.

277 Above, 241.

278 Above, 241.

document or evidence will "have substantial probative value", that alternative documents or evidence are not available, and that "the public interest in preserving the confidentiality of [counselling communications] and protecting [the complainant] from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value".[279] The statute then sets out a non-exhaustive list of factors that must be taken into account "for the purposes of determining the public interest in preserving the confidentiality of [counselling records] and protecting [the complainant] from harm":

(a) the need to encourage victims of sexual offences to seek counselling,

(b) that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship,

(c) the public interest in ensuring that victims of sexual offences receive effective counselling,

(d) that the disclosure of the [counselling records] is likely to damage or undermine the relationship between the counsellor and the counselled person,

(e) whether the disclosure of the [counselling records] is sought on the basis of a discriminatory belief or bias,

(f) that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.[280]

3.244 The court must give reasons for its decision.[281]

3.245 This approach can be contrasted with the Canadian regime. In Canada the list of factors goes to the content and balance of all parts of the test (ie, relevance, significant probative value and whether those are substantially outweighed by the danger of prejudice to the administration of justice). In NSW the list of factors goes only to determining the public interest.

3.246 In both Canada and NSW the defendant is placed in a difficult position because they will be making submissions about the relevance, value, and relative value of documents they have not seen. The Law Society of NSW also saw challenges for judges: "The court will be in no better position. It will have to decide whether disclosure of the evidence is desirable without being able to consider it in the context of other evidence which may be led at the trial".[282]

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279 Criminal Procedure Act 1986 (NSW), s 299D(1).

280 Criminal Procedure Act 1986 (NSW), s 299D(2).

281 Criminal Procedure Act 1986 (NSW), s 299D(5).

282 *Hansard* (NSW Legislative Council), 22 October 1997, p 1131 (Rev Hon F J Nile).

Reforming the thresholds

3.247 The detailed, structured discretion approaches of Canada and NSW provide examples of thresholds that are higher than those in England and Wales. We note four features in particular:

(1) Both use a form of enhanced relevance at the production, disclosure and admissibility stages. We note in particular that both use a form of enhanced relevance at the admissibility stage, in contrast to the simple relevance used in England and Wales.

(2) Both use primary legislation rather than guidance or codes of practice to set out the interests that must be balanced in production, disclosure and admissibility determinations.

(3) Both use structured discretion models that set out factors to be taken into account when considering the weight of an interest.

(4) Canada (but not NSW) uses a structured discretion model that sets out factors to be taken into account when balancing different interests.

3.248 It remains noteworthy that a revised legislative framework may not be a guarantee of change. Leahy has pointed out that the law in Canada makes decisions discretionary, just as the law in England and Wales provides for discretion, and that "modification of the existing disclosure provisions to provide guidelines for the exercise of judicial discretion could be sufficient" for effective reform in this area.[283] One defence practitioner, Martin Rackstraw, told us that he did not believe the Canadian model is particularly different from the current one, but is more codified. Nevertheless, stakeholders' views on relevance and the evidential value of third-party material may be better served by an enhanced relevance test in a structured discretion model.

3.249 We note also that the Canadian model on which our proposals are based arguably does not resolve concerns that, in production and disclosure applications, the defence may be making submissions about the relevance of materials they have not seen. We would welcome views on this issue in responses to the corresponding consultation questions below.

3.250 The following consultation questions present our provisional proposals for the tests that judges should apply when they make decisions about TPM in relation to compelled production to police and prosecutors, disclosure to the defence, and admissibility as evidence. We also ask one open question about possible preliminary filters for disclosure requests by the defence.

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[283] S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 241-242.

Consultation Question 13.

3.251 For compelled production to police and prosecutors, we provisionally propose adapting the Canadian approach to production to the court (discussed at paras 3.230 and 3.234 to 3.235 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties:

- must be likely relevant to an issue at trial or to the competence of a witness to testify; and
- access or production to the police or prosecution must be necessary in the interests of justice.

Do consultees agree?

3.252 We provisionally propose setting out the Canadian list of factors to be considered when the court decides what is necessary in the interests of justice, which are:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

Do consultees agree?

3.253 Are there factors we should remove, modify or add?

Consultation Question 14.

3.254 For disclosure to the defence, the Canadian regime lists grounds that are, on their own, “insufficient grounds” for a defence application asking the court to require records to be produced to the court for the first stage of review (set out at paras 3.231 to 3.233 above). These are designed to prevent speculative requests.

Is a preliminary filter of this kind valuable and are the grounds appropriate?

3.255 Are there any other grounds we should consider?

Consultation Question 15.

3.256 For disclosure to the defence, we provisionally propose adapting the Canadian approach to disclosure (discussed at paras 3.236 to 3.237 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties:

- must be likely relevant to an issue at trial or to the competence of a witness to testify; and
- disclosure to the defence must be necessary in the interests of justice.

Do consultees agree?

3.257 We provisionally propose setting out the Canadian list of factors to be considered when the court decides what is necessary in the interests of justice, which are:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

Do consultees agree?

3.258 Are there factors we should remove, modify or add?

Consultation Question 16.

3.259 For admissibility as evidence, we provisionally propose adapting the Canadian approach to admissibility (discussed at paras 3.238 to 3.241 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that material in personal records held by third parties is admissible if:

- the evidence is relevant to an issue at trial or to the competence of a witness to testify; and
- it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Do consultees agree?

3.260 We provisionally propose setting out the Canadian list of factors to be considered when the court decides whether the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. These factors are:

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(e) the need to remove from the fact-finding process any discriminatory belief or bias;

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(i) any other factor that the judge …. considers relevant.

Do consultees agree?

3.261 Are there factors we should remove, modify or add?

Personal records and inconsistencies

3.262 We place this question at the end of the chapter because a personal records regime for sexual offences might be able to accommodate in different ways the position where therapy records reveal inconsistencies in a complainant's account.

3.263 The CPS Legal Guidance on Pre-Trial Therapy sets out the well-established evidence base regarding the ways trauma may impact on the ability of a witness to recall and cogently describe an incident.[284] This may lead to inconsistencies which are evident on their personal records. However, as discussed earlier in this chapter, the adversarial process is predicated on the fact that inconsistencies in a complainant's account are indicative that the complainant lacks credibility and that their account is untrue.

3.264 In view of this, it is difficult to see how a person examining the records can easily distinguish between inconsistencies in an account which are the product of trauma (and not relevant to credibility) and inconsistencies which are relevant to credibility. These are matters for the jury to decide. The Crown Court Compendium's example direction on inconsistent accounts in sexual offences notes that trauma may have an effect on memory and juries should keep that in mind in their deliberations but that the jury must decide what is true.[285] The CPS Guidance concludes that inconsistencies in account are "likely" to meet the disclosure test and may result in a decision not to proceed with a case:

> Inconsistencies in accounts provided by the victim are likely to meet the disclosure test for the purposes of criminal proceedings and … even taking into account the information above [regarding the impact of trauma on memory], inconsistencies may mean that the Code Test [for deciding to bring a prosecution] is not met. Prosecutors will need to consider this on a case-by-case basis.[286]

3.265 A disclosure test which focuses on some or all of the factors contained in the models from Canada and NSW, including the probative value of the evidence, may assist in assessing whether inconsistencies are material to the case and therefore should be disclosed.

Consultation Question 17.

3.266 We invite consultees' views on how our provisional proposals for compelled production and disclosure should respond to inconsistencies evident on a complainant's personal records which may be the product of trauma.

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284 CPS Legal Guidance: Pre-Trial Therapy (2022), "Potential impact of therapy on memory, Inconsistencies".

285 Judicial College, *The Crown Court Compendium, Part I: Jury and Trial management and Summing Up* (June 2022) 20-7, Example 4.

286 CPS Legal Guidance: Pre-Trial Therapy (2022), "Potential impact of therapy on memory, Inconsistencies".

CONCLUSION

3.267 In this chapter we have set out the case and made provisional proposals for moving to a bespoke unified regime that is specific to sexual offences and governs access, production, disclosure and admissibility of personal records held by third parties. Our provisional proposals would include increased judicial scrutiny, enhanced relevance thresholds, and structured discretion. We have also asked several open questions, especially with regard to consent-based access to TPM.

3.268 Our provisional proposals would see complainants have the same or more rights to be heard than is presently the case. We are conscious that unless there are accompanying measures that help make that a reality then these rights may not be effective. Some measures could be rules to ensure service on the complaint and an opportunity to make submissions.[287] Others could rely on an onus on the court to satisfy itself that a complainant is aware of their rights and had a reasonable opportunity to obtain advice.[288] However, when engaging with stakeholders, we heard that stronger measures should also be considered, such as an automatic hearing, regardless of whether complainants have signalled that they are content to waive their rights, and the provision of independent legal advice. In this chapter we noted in particular the legal aid that is provided to complainants in NSW so that they are supported and represented in SACP matters. We pursue independent legal advice and representation and representation in Chapter 8 where we make a provisional proposal that complainants should have a right to be heard (and access to legal representation) on applications relating to their personal records, and be provided with legal advice about their entitlements.

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287 Eg, CrPR r 17.5.

288 Eg, Criminal Procedure Act 1986 (NSW), s 299.

Chapter 4: Sexual behaviour evidence

INTRODUCTION

4.1 One tangible way in which the myths and misconceptions explored in Chapter 2 can manifest in sexual offence proceedings is through the use of sexual behaviour evidence.[1] Sexual behaviour evidence ("SBE") has the potential to be highly prejudicial against the complainant. It may be used in trials to evoke and reinforce what have become known as the "twin myths", as Lord Steyn explained in *A (No 2)*:

> it has to be acknowledged that in the criminal courts of our country, as in others, outmoded beliefs about women and sexual matters lingered on. In recent Canadian jurisprudence they have been described as the discredited twin myths, viz "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief": *R v Seaboyer*[2] … per McLachlin J. Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases.[3]

4.2 The admission of SBE in a trial allows or encourages finders of fact to rely on these and similar myths to undermine a complainant's credibility and pollute the issue of consent. In Chapter 2 we explain how these myths are not based on fact. They can obscure the truth. In sexual offence trials, evidence that introduces these myths can therefore distract the finders of fact from establishing the truth and producing a just and reliable outcome: convicting the guilty and acquitting the innocent. As we previously concluded in our review of character evidence (adopting the conclusions of the Australian Law Reform Commission):

> evidence which distorts the fact-finding process and promotes an inaccurate verdict should be subject to restriction, whether the distortion favours the defendant or disadvantages the defendant.[4]

4.3 A further concern with the use of such evidence is its impact on complainants. Some refer to their experience of being questioned about their sexual behaviour at trial as a

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1 We have chosen to use the term "sexual behaviour evidence" rather than "sexual history evidence" or "prior sexual history" to reflect the fact that evidence can arise from sexual behaviour both before and after the alleged sexual offence. Nonetheless all of these terms appear in this chapter, because they are all in common usage.

2 (1991) 83 DLR (4th) 193, 258, 278C.

3 [2001] UKHL 25; [2001] 3 All ER 1 at [27].

4 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273 ("LC 273") at 9.22, citing Australian Law Reform Commission, Evidence [1987] Report 38.

"second rape" or "judicial rape".[5] Introducing a Bill to reform the rules restricting evidence of sexual behaviour, Liz Saville-Roberts MP told Parliament:

> Currently, victims of sexual abuse face the possibility of being humiliated and their credibility undermined by defence lawyers asking questions about their sexual partners, clothing and appearance.[6]

She described this as "intrusive and damaging questioning".[7] As we explain in Chapter 1, it has been reported that fear of this process may discourage complainants from reporting sexual offences to the police, or from engaging with prosecutions.[8]

4.4 The need to address these concerns underpins the historical and current common law and legislative provisions in England and Wales, and other jurisdictions, which restrict this type of evidence. As we have said previously, in relation to

> the panoply of special rules and statutory provisions on limiting cross-examination about the previous sexual experience of complainants in sex cases … it is not merely the question of irrelevance which is to the fore but also the invitation to prejudice which underpins its attractiveness as a tool for the defence.[9]

Such provisions are sometimes described as a "rape shield". The law governing when and how SBE can be adduced aims to exclude evidence that is disproportionately prejudicial while allowing evidence necessary to ensure the defendant has a fair trial. Generally, evidence is prejudicial when it introduces an improper foundation for decision-makers (such as the jury) on which to base their decisions. For example, in a burglary trial, a local GP is called as a witness and tells the jury that the defendant is a "bad guy" who has burgled the GP surgery previously but "got away with it". The defendant has never been charged with burgling a GP surgery. That evidence from the GP may be prejudicial because it may lead the jury to think: (i) that they should find the defendant guilty of the current charge because they appear to have gone unpunished for a previous burglary, (ii) that the defendant must be a bad person if a GP has called them a "bad guy" so are probably more likely to be guilty of the current charge, and (iii) that a GP is more likely to be telling the truth than the defendant so their evidence should be given extra weight. If these thoughts do influence their

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5 C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367, 372.

6 *Hansard* (HC), 8 February 2017, vol 621.

7 *Hansard* (HC), 8 February 2017, vol 621.

8 See for example: C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367, 373: "… many rape cases get nowhere near a court. One reason is the fear of the trial process, with many studies identifying it as a key barrier to both reporting offences to the police and continuing with prosecutions."; Loulla-Mae Eleftheriou-Smith, "Rape victims facing 'humiliating' questions about clothing and sexual history during trials, MP reveals" (8 February 2017) *The Independent*, quoting Alan Robertson of Survivors UK: "Following media coverage of high-profile cases where a survivor's sexual history has been made known and discussed, many men who we support are even more worried about going to court."; and MP Liz Saville-Roberts on first reading of the Sexual Offences (Amendment) Bill quoted Dame Vera Baird KC, then Northumbria Police and Crime Commissioner: "Fear that complainants will be accused of sexual behaviour with other men has historically been a major deterrent to women reporting rape." *Hansard* (HC), 8 February 2017, vol 621.

9 LC 273 9.16.

decision, the evidence from the GP has had a prejudicial effect on the outcome of the trial. Evidence that may have a prejudicial effect can still be permitted at trial. The nature of its prejudicial effect will be an important part of a decision on its admissibility. We discuss this more in the context of character evidence in Chapter 5.

4.5 In this chapter we will first briefly describe the history of the treatment of SBE in criminal trials in England and Wales. We will then set out the operation of the current framework that restricts the use of SBE in sexual offence prosecutions, in section 41 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999. We will refer to the current framework throughout this chapter as "section 41". We describe the issues raised by the current framework, including its compatibility with the defendant's right to a fair trial. We then turn to consider the different approaches in comparative jurisdictions and alternatives proposed by academics and practitioners, and the benefits and risks of each.

4.6 We aim to draw out the key issues for law reform, seek further evidence where required, and propose a practical alternative framework on which we seek consultees' views. In doing so, the following from Professor Clare McGlynn KC (Hon) is a useful reminder:

> The law on sexual history evidence is a highly controversial topic which gives rise to heated debate. It is also an extremely (and unnecessarily) complicated area of law. This unfortunate combination of controversy and complication provides a significant challenge for media reporting and political discussion. In such a context, it is important to open up debate and try to understand the perspectives of others and to learn from those with different professional and personal experiences. Indeed, it may be productive for us all to recognise in the debates to come that we mostly share the same aims; namely to ensure the effective administration of justice, to convict the guilty and to minimise the harm caused to the complainants and witnesses in the process.[10]

DEVELOPMENT OF THE LAW RELATING TO SEXUAL BEHAVIOUR EVIDENCE

4.7 In England and Wales, SBE has been restricted in some form for a long time. Historically, the common law developed rules on the admissibility of SBE. In 1887 in *R v Riley*,[11] Lord Coleridge rejected evidence of the complainant's sexual history with third parties "not only upon the ground that to admit it would be unfair and a hardship to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial." He also noted that "the result of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of this nature."[12]

4.8 The treatment of SBE continued to develop in common law until 1975, when the Government set up an Advisory Group on the Law of Rape, chaired by the Hon Mrs Justice Heilbron DBE. The group was set up in response to widespread criticism of

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10 C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367.

11 (1887) 18 QBD 481.

12 (1887) 18 QBD 481.

the decision of the House of Lords in *DPP v Morgan & Others*.[13] Part of this criticism was directed at intrusive cross-examination of female complainants about their private lives. The Advisory Group (in what is known as the Heilbron Report) concluded that questions and evidence about the complainant's previous relationship with the defendant will often be relevant,[14] but recommended that evidence of the complainant's sexual history with third parties should be excluded, unless it is "strikingly similar" to the events of the offence, and its relevance is such that it would be unfair to exclude it.[15]

4.9 These recommendations led to the introduction of section 2 of the Sexual Offences (Amendment) Act ("SOAA") 1976, which provided that:

> If at trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.[16]

4.10 This exclusion applied only to evidence relating to sexual behaviour with third parties, not with the defendant. The judge could only give leave under section 2 to admit "sexual experience" evidence if they were satisfied it would be unfair to the defendant "to refuse to allow the evidence to be adduced or the question to be asked".[17] There was no specific guidance on how judges should use their discretion to admit such evidence.[18]

4.11 Academic and judicial criticism of section 2 grew.[19] Professor Jennifer Temkin argued that it was not having the intended effect and disproportionate weight was still being given to SBE.[20] Professor Jenny McEwan described section 2 as a "disastrous failure".[21] After it had been replaced, Lord Steyn summarised the "serious mischief" created by section 2 which required correction:

> The statute did not achieve its object of preventing the illegitimate use of prior sexual experience in rape trials. In retrospect one can now see that the structure of this legislation was flawed. In respect of sexual experience between a complainant and

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13 [1976] AC 182. In this case, the House of Lords held that a defendant could not be convicted of rape if he honestly believed that the woman consented, even though he had no reasonable grounds for that belief. See Report of the Advisory Group on the Law of Rape (1975) (Cmnd 6352), p 9 ("Heilbron Report").

14 Only relevant evidence may be admitted: Blackstone's Criminal Practice 2022, F1.11. Relevance "means having some probative value on a matter in issue in the proceedings": LC 273 at 5.7.

15 Heilbron Report (1975) (Cmnd 6352), para 137.

16 Sexual Offences (Amendment) Act 1976, s 2(1).

17 Sexual Offences (Amendment) Act 1976, s 2(2).

18 P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) ("*Rook and Ward*") 26.12.

19 M Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* ("*Archbold*") (2022) 8-289.

20 *Rook and Ward* (2021) 26.16.

21 Jenny McEwan, "Law Commission Dodges the Nettles in Consultation Paper No. 141" [1997] Crim LR 93, 102.

other men, which can only in the rarest cases have any relevance, it created too broad an inclusionary discretion. Moreover, it left wholly unregulated questioning or evidence about previous sexual experience between the complainant and the defendant even if remote in time and context.[22]

4.12 In June 1998, the Home Office published the report of the working group "Speaking up for Justice".[23] Amongst wider recommendations as to the treatment of vulnerable or intimidated witnesses, it found that section 2 was not working effectively to regulate the use of SBE and was being interpreted contrary to its original objectives. The report suggested there was a link between the attrition rate and the "aggressive, humiliating and irrelevant questioning" to which complainants were subjected in court as well as the consequent reputation of the criminal justice system.[24] It also found that SBE was used in up to 75% of cases. The report recommended a new structure for regulating this type of evidence,[25] and that that structure should "extend its application to serious sexual offences",[26] noting that at the time, the restrictions in section 2 of the SOAA only applied to cases of rape.[27] This led to the new provisions in sections 41 to 43 of the YJCEA 1999, which are still in force today.

4.13 Since its introduction, section 41 has attracted a great deal of scrutiny which we explore in the following sections. This includes a number of reviews, including two commissioned by the government,[28] and a number of recent law reform attempts.[29]

SECTION 41 OF THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

4.14 Sections 41 to 43 of the YJCEA create a complete prohibition on the admission of evidence or questioning in cross-examination by or on behalf of the defendant of a complainant's previous sexual history or behaviour, unless the court gives leave to admit such evidence. The restrictions do not apply to anything alleged to have taken place as part of the event which is the subject matter of the charge against the defendant.[30] Conduct which is part of the incident in question is generally therefore

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22 *A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1 at [28], (Lord Steyn).

23 Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* ("*Speaking up for Justice*") (June 1998).

24 Home Office, *Speaking up for Justice*, (June 1998), para 9.58.

25 The report's Recommendation 63 (para 9.72) recommended that "In cases of rape and other serious sexual offences the law should be amended to set out clearly when evidence on a complainant's previous sexual history may be admitted in evidence. Possible models may be found in Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, or the New South Wales legislation. The Scottish approach is preferred but the precise formulation should be the subject of consultation."

26 Above, para 9.71.

27 Contrary to the Scottish provisions at the time which applied to a wider range of sexual offences.

28 Ministry of Justice ("MoJ") and Attorney General's Office ("AGO") *Limiting the use of complainants' sexual history in sex cases* (December 2017), and Liz Kelly, Jennifer Temkin and Sue Griffiths, "Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials" ("Home Office review") (Home Office Online Report 2006).

29 Some of which sought to restrict SBE further, particularly in relation to evidence of sexual behaviour with someone other than the defendant (third-party evidence), and one amounted to a complete ban. None of these reform attempts resulted in changes to section 41. See para 4.103.

30 YJCEA 1999, s 42.

outside the remit of section 41 and may be admissible, subject to the general rules of evidence.[31]

4.15 Section 41 applies only to "sexual offences" which includes: rape, sexual assault, child sexual offences, and trafficking for sexual exploitation offences.[32] The restrictions apply to proceedings for those sexual offences in the Crown Court and the magistrates' courts, as well as committals, applications to dismiss following a notice of transfer, *Newton* hearings[33] and appeal hearings.[34]

4.16 The restrictions apply only to evidence adduced by or on behalf of the defendant. There are no equivalent rules (beyond the ordinary rules of evidence) for evidence adduced by the prosecution.

4.17 Under section 41, the court may give leave to admit SBE if it meets one of the four specified "gateways"[35] and the court is satisfied that "a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case".[36] In their practitioner text, Rook and Ward suggest that evidence of marginal relevance, even if it can technically pass through a gateway, will not meet this threshold.[37]

4.18 When the YJCEA 1999 was passing through Parliament, Lord Williams of Mostyn KC stated that the Government's policy was that the evidence of a complainant's sexual history was:

> not material upon which a jury should reasonably rely to conclude that the complainant might indeed have consented on the occasion that is the subject of the complaint. Consensual sex does not mean consent to sex in general – it does not even mean consent to sex with a particular person – it means consent to sex with a particular individual on a particular occasion.[38]

4.19 Some have argued that allowing SBE from another occasion to be evidence of consent to the incident in question, undermines this principle.[39] Evidence that goes to the issue of consent is the most restricted, and is only permitted if it falls within the "similarity" or "contemporaneity" gateways, described below.

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31 *Rook and Ward* (2021) 26.38.

32 YJCEA 1999, s 62.

33 A hearing to establish the material facts for sentencing, after the defendant pleads guilty.

34 YJCEA 1999, s 42(3).

35 In YJCEA 1999, ss 41(3) and 41(5).

36 YJCEA 1999, s 41(2)(b).

37 *Rook and Ward* (2021) 26.168.

38 *Hansard* (HL), 23 March 1999, vol 598, col 1217.

39 C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367, 369. The Women's Parliamentary Labour Party have also recommended that evidence of other sexual behaviour should never be permitted to demonstrate consent to the behaviour alleged in the offence: C McGlynn, "Challenging the Law on Sexual History Evidence: A Response to Dent and Paul" [2018] *Criminal Law Review* 216, 224.

The gateways

4.20 The four gateways are:

(1) "Not an issue of consent" under section 41(3)(a).

(2) "Contemporaneity" under section 41(3)(b).

(3) "Similarity" under section 41(3)(c).

(4) "Rebuttal" under section 41(5).

4.21 We set out the detail of each gateway, along with a summary of the key issues relevant to each, below.

4.22 For all four gateways the evidence must relate to a specific instance of sexual behaviour on the part of the complainant.[40] For the first three gateways, evidence will not be considered to relate to a relevant issue in the case if "it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced (or asked) is to establish or elicit material for impugning the credibility of the complainant as a witness".[41] This is known as the "credibility restriction". The effect of this restriction is that if evidence sought to be adduced under one of those three gateways appears to be primarily aimed at impugning the complainant's credibility, it should not be admitted. This restriction does not apply to the rebuttal gateway. Rook and Ward argue that:

> [h]owever well-intentioned the subsection, problems arise because many serious sex cases turn on the credibility of the complainant and the defendant. As the Court of Appeal said in *Funderburk*,[42] "where the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point".[43]

It was also said in *A (No 2)* that a "fine analysis" would be needed to distinguish issues of consent from issues of credibility.[44]

4.23 Section 41 does not draw a distinction between evidence that relates to sexual behaviour between the complainant and the defendant, and behaviour between the complainant and third parties, or solo behaviour.

Not an issue of consent

4.24 Evidence or questions that relate to a relevant issue in the case which is not an issue of consent, can be admissible.[45] A "relevant issue in the case" is any issue falling to

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40 YJCEA 1999, s 41(6).

41 YJCEA 1999, s 41(4).

42 (1990) 90 Cr App R 466. See also *R v T* [2002] 1 WLR 632 at 638.

43 *Rook and Ward* (2021) 26.182.

44 *A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1.

45 YJCEA 1999, s 41(3)(a).

be proved by the prosecution or defence.[46] Section 42(1)(b) clarifies that evidence that relates to reasonable belief in consent is permitted under this gateway.[47] Other categories of evidence that may be admitted under this gateway include: (i) evidence that the complainant was biased or had a motive to fabricate evidence;[48] (ii) evidence that there is an alternative explanation for the physical conditions on which the Crown relies to establish that intercourse took place;[49] and (iii) evidence of other sexual activity either before or after the event in question, which provides an explanation for the complainant's knowledge of the activity.[50]

4.25 This gateway is one of the most commonly used.[51] Issues in a sexual offence case that are not of consent or reasonable belief in consent can be less controversial or problematic. They are less likely to risk relying on myths and misconceptions as there is often an element of tangibility more typical of criminal cases – physical evidence, a motivation to lie, or knowledge that is said to have come only from being the perpetrator, for example. It is also likely that such issues require less extensive or detailed cross-examination or evidence to make the point.[52] However, it is still possible that myths could be introduced, or relied on with this type of evidence. For example: evidence that the complainant had sexual intercourse with someone other than the defendant said to be an alternative explanation for a sexually transmitted disease otherwise attributed to the defendant could also be used to suggest, implicitly, that the complainant is sexually promiscuous. One misconception is that sexually promiscuous women are both less morally worthy of the protection of the criminal law and are more likely to have consented to sexual intercourse with others (and therefore it is less believable that they did not consent with the defendant). Therefore their credibility is impugned by the suggestion of promiscuity. While this will not be the purpose of the evidence, and evidence is restricted where the purpose is to impugn credibility, the risk is still present that it could be used in such a way by the defence lawyer or understood in such a way by the jury.

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46 YJCEA 1999, s 42(1)(a).

47 *R v Gjoni* [2014] EWCA Crim 691.

48 There must be a "sufficient factual basis" for the motive in order to adduce SBE in relation to it, beyond "pure speculation": *Archbold* (2022) 20.16. See also *Moody* [2019] EWCA Crim 1222.

49 See, for example, *R v L* [2015] EWCA Crim 741, where evidence of a previous rape was admitted on the basis that it provided an alternative explanation for hymenal penetration presented as evidence of the alleged rape at issue.

50 *Love v HM Advocate* [1999] Scottish Criminal Case Reports 783. This may be particularly relevant for child complainants who may not be expected to have the same level of general sexual knowledge as adults.

51 L Hoyano, *The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: view from the barristers' row*", Criminal Bar Association (2018) ("CBA Report") cites this as the most commonly used gateway. In a smaller sample size, the MoJ and AGO review of the use of section 41 found that this was the second most commonly used gateway (being mentioned in 14 out of 40 applications (35%), with the contemporaneity gateway (below) being mentioned in 15 out of 40 applications (38%)): MoJ and AGO, *Limiting the use of complainants' sexual history in sex cases* (December 2017), p 8.

52 For example: the defence want to admit evidence that the complainant had sexual intercourse with another man who could be the source of an infection the prosecution state is evidence of the assault. This could be achieved by admitting only evidence that the complainant had had sexual intercourse with another; the fact of the intercourse is sufficient. While this may still be humiliating or upsetting, it does not require intrusive questions or detail.

"Contemporaneity"

4.26 Evidence or questions that relate to consent, where consent is a relevant issue in the case, can be admissible if they relate to sexual behaviour of the complainant alleged to have taken place at, or about the same time, as the event which is the subject matter of the charge against the defendant.[53]

4.27 The key issue in this gateway is the timing of the events. The Explanatory Notes to section 41 state that "it is expected that "at or about the same time" will generally be interpreted no more widely than 24 hours before or after the offence."[54]

4.28 The House of Lords in *A (No 2)*[55] indicated that the provision should be construed narrowly. Lord Slynn said that though he initially thought hours and perhaps even days might be caught by "about the same time", he eventually concluded this should be confined to what is "really contemporaneous". This has since been interpreted more widely. In *Mukadi*, the Court of Appeal held that evidence of sexual behaviour from earlier in the day had been wrongly excluded.[56]

4.29 This gateway does not require the evidence to have any nexus to the events subject to the charge beyond the temporal link. This, Professor McGlynn has argued, risks the gateway being too wide.[57] Sexual activity that took place in an entirely different context could be introduced under this gateway though it would have little bearing on the complainant's consent. For example: C is a sex worker who has consensual sex with a client on Friday at 3pm. Afterwards, they go to a bar for a drink with friends. C alleges that one of the friends (D) raped them on the way home at 5pm. D's case is that the sex was consensual and that C was "up for sex". D may be permitted to adduce evidence of the previous sexual activity with C's client as contemporaneous evidence that goes to the issue of consent given the temporal link.

"Similarity"

4.30 Evidence or questions that relate to consent, where consent is an issue in the case, may be admissible if they relate to sexual behaviour of the complainant that is alleged to have been, in any respect, so similar—

(1) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

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53 YJCEA 1999, s 41(3)(b).

54 Explanatory Notes, YJCEA 1999, Part II, Chapter III, para 148.

55 [2001] UKHL 25; [2001] 3 All ER 1.

56 *R v Mukadi* (2003) EWCA Crim 3765. In this case, Court of Appeal ruled admissible evidence that related to an incident earlier in the day where the complainant had entered a car with a man she did not appear to know. The issue in the case was whether she had consented to sexual intercourse which took place after the complainant met the defendant, drank wine in a park and then went back to his house.

57 C McGlynn "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81(5) *Journal of Criminal Law* 367-92.

(2) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.[58]

4.31 This gateway is not subject to a temporal requirement, which means evidence of sufficient similarity can be admitted from any length of time before or after the event. The similarity must be a relevant similarity.[59]

4.32 What counts as "so similar … that the similarity cannot reasonably be explained as a coincidence" has been considered in a number of cases, most controversially in the case of *Evans*.[60] In *A (No 2)* it was decided that the threshold is whether or not "the particular factor is of a significance which goes beyond the realm of what could reasonably be explained as a coincidence", but "does not necessitate that the similarity has to be in some rare or bizarre conduct".[61] In *R v Hamadi*, the Court found that the "similarity" evidence must be truly probative of the issue of consent.[62]

4.33 In *Evans*,[63] professional footballer Ched Evans successfully appealed his 2012 conviction for rape of the complainant (X) at a hotel after a night out.[64] X had been drinking and did not remember anything of the night in question. The prosecution case was that sexual intercourse had taken place and that X was incapable of consenting to it. The defence case was that consensual sexual intercourse had taken place, or that the defendant reasonably believed X consented based on X's behaviour. The Criminal Cases Review Commission (CCRC) referred the case to the Court of Appeal based on fresh evidence about sexual behaviour between X and third parties that was argued to be so similar to the account given by Evans that it could not be a coincidence.[65]

4.34 The evidence of the defendant was that X's sexual behaviour involved her adopting a position on her hands and knees and using the words "fuck me harder".[66] The evidence considered admissible by the Court of Appeal included statements from a man who said when he had sexual intercourse with X she said "fuck me, fuck me

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58 YJCEA 1999, s 41(3)(c).

59 *Rook and Ward* (2021) 26.110.

60 *R v Evans* [2016] EWCA Crim 452.

61 [2001] UKHL 25; [2001] 3 All ER 1 at [135]. Lord Slynn also called the similarity gateway, on ordinary statutory reading, "disproportionately restrictive".

62 [2007] EWCA Crim 3048. In this case, it was contended that there were similarities between accounts of sexual intercourse with the complainant given by the defendant and a third party. Both said the complainant instigated the activity which took place outside, in winter, whilst she was in a relationship with someone else. The Court of Appeal did not think these facts were so similar that they could not be a coincidence.

63 *R v Evans* [2016] EWCA Crim 452.

64 A second defendant was acquitted at trial.

65 Submissions on behalf of the appellant focussed primarily on admission under s 41(3)(c)(i) (the similarity gateway), although the CCRC also raised potential admissibility under s 41(3)(a) (the non-consent gateway, in relation to reasonable belief in consent). Some commentators have also described the third-party evidence in Evans as relevant to the defendant's reasonable belief in consent: P Roberts, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 494.

66 [2016] EWCA Crim 452, [2016] 4 WLR 169, [12].

harder" and that X asked him to change positions, during which time she adopted a position on her hands and knees.[67] A second man said he had casual sexual intercourse with X, and on one occasion, when drunk, she instigated the sexual activity and that they had intercourse with her positioned on her hands and knees, and she said "go harder".[68]

4.35 The Court of Appeal in *Evans* held the behaviour described in the new evidence "would have been relevant and admissible evidence at trial" and "is arguably sufficiently similar to come within the terms [of the similarity gateway]".[69] The appeal was allowed, and the case was remitted for retrial. Evans was acquitted of rape at retrial.

4.36 Since *Evans*, the Court of Appeal have again considered the similarity gateway. For example, in *R v Guthrie*,[70] the Court of Appeal explained that:

(1) to fall within the similarity gateway, the similarity does not have to be striking but nonetheless the similarity must be relevant between the previous and current alleged conduct, such that it is necessary to explore the circumstances in order to avoid unfairness to the defendant;[71]

(2) there must be a "sufficient chronological nexus between the events to render the previous behaviour probative";[72] and

(3) the evidence is not admissible if it is tantamount to saying that a person who engaged in casual sex in the past is likely to have done so in the current situation, because this contravenes the prohibition on cross-examination intended to impugn the credibility of the complainant.[73]

4.37 Stakeholders have raised particular concern with the similarity gateway.[74] In the Supreme Court of Canada case *Seaboyer*, L'Heureux-Dubé J argued that similarity evidence is invariably irrelevant, comparing its use to a "prohibited propensity

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67 [2016] EWCA Crim 452, [2016] 4 WLR 169, [24].

68 [2016] EWCA Crim 452, [2016] 4 WLR 169, [35].

69 [2016] EWCA Crim 452, [2016] 4 WLR 169, [72]. The Court of Appeal noted that the evidence "may" have also have been admissible as relevant to the issue of reasonable belief in consent (as raised by the CCRC, see fn 65 above).

70 [2016] EWCA Crim 1633; [2016] 4 WLR 185. In this case the defendant appealed his conviction on the basis that he should have been permitted to cross-examine the complainant on their previous sexual relationship, on the basis that their previous sexual activity was so similar to the event in question that it could not reasonably be explained as a coincidence. The Court of Appeal dismissed the appeal, on the basis that there was insufficient similarity between the events in question to make the evidence admissible.

71 Citing *R v MM* [2011] EWCA Crim 1291.

72 Citing *R v MM* [2011] EWCA Crim 1291.

73 Citing *R v Harris (Wayne)* [2009] EWCA Crim 434.

74 A member of the judiciary and Sharon Cowan.

argument."[75] McGlynn is a vocal critic of this gateway and has called for its removal,[76] citing *Evans* as having "opened the floodgates"[77] for evidence to be admitted as "similar". Dame Vera Baird KC, then Victims' Commissioner, also raised concerns with the similarity gateway following *Evans*, suggesting it is an inappropriate gateway to use to permit SBE.[78] There was significant public sentiment that *Evans* demonstrated a watering down of the protections offered by section 41 and that it sent a dangerous message to victims that their past sexual history would be "raked over" if they reported sexual violence.[79]

4.38 There is debate over the extent to which *Evans* sets a precedent for interpretation of the similarity gateway. Archbold explicitly states that the *Evans* decision "does not represent a lowering of the threshold nor a change in practice."[80] Rook and Ward suggest the decision in *Evans*, though taking a different and wider interpretation, stands on its own special facts, and has not materially altered the interpretation of the similarity gateway.[81] Roberts notes that the Court of Appeal "went out of its way to stress that [third-party SBE] would satisfy section 41 gateways only in rare cases".[82] *Evans* has not been cited in any subsequent cases, even when the same court was considering the application of the same gateway. Brewis and Jackson have argued that it was in fact the media reporting of the case, rather than the application of the law, that gave rise to the public concern that floodgates had been opened. In addition, there is some debate about whether the decision in *Evans* is based on interpretation of the ordinary legislative language of the similarity gateway in section 41, or the "safety valve" added by the House of Lords in *A (No 2)*, that enabled evidence to be admitted where to exclude it would risk an unfair trial.[83] We discuss this safety valve in more detail at paragraph 4.64 below.

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75 *R v Seaboyer* [1991] 2 SCR 577, 685-6.

76 McGlynn has stated "[t]he most suitable reform regarding the current [similarity] exception is to remove it entirely on the dual grounds of the irrelevance of this form of evidence and its prejudicial effects", arguing that any evidence sufficiently relevant to an issue a trial will be admissible under the "rebuttal" gateway: C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367, 389.

77 C McGlynn, "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367-92.

78 See for example, V Baird "We cannot allow the courts to judge rape by sexual history" *The Guardian* (17 October 2016).

79 See for example The Guardian, "Ched Evans: footballer found not guilty of rape in retrial", 14 October 2016. See also the CBA Report (2018) in which many respondents expressed concern that a widespread lack of understanding of section 41 and how it is applied in trial courts, exacerbated by misreporting in the media of cases such as *R v Evans*, could deter complainants from coming forward to report sexual assaults to the police.

80 *Archbold* (2022) 20.16.

81 *Rook and Ward* (2021) 26.124. The particular facts of the case are relevant to the consideration of this evidence. X did not remember what happened to her, she made no allegation herself and was not able to give an account of what did occur on the night. The defendants were the only ones who had given an account of sexual activity occurring.

82 P Roberts, *Roberts & Zuckerman's Criminal Evidence* (3rd edn 2022) pp 493-494.

83 See for example, Blackstone's Criminal Practice 2023, F7.45 and M Thomason, "Previous sexual history evidence: A gloss on relevance and relationship evidence" (2018) 22(4) *The International Journal of Evidence and Proof*, 342, 356.

4.39 In our view the judgment in *Evans* does not help clarify the similarity gateway. It has clearly led to much debate over whether the decision to admit the evidence was correct, and whether the route to admission was correct. The Court of Appeal were faced with the most controversial aspect of SBE: third-party evidence unknown to the defendant at the time. The case is specific to its unique facts. This is clear both in the judgment itself and the fact that subsequent cases considering the same gateway do not make reference to it.[84] It is notable that the concept of what is "so similar … that the similarity cannot reasonably be explained as a coincidence" is fluid enough to produce such different results, and, further, to produce a result so many felt was unjust.[85] It is also important that the public reaction indicated dissatisfaction with the result; whether correct or not, the public perception of sexual assault trials in particular has the potential to influence the decisions of those considering making a complaint of such an offence.[86]

"Rebuttal"

4.40 Evidence or questions which:

(1) relate to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(2) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused[87]

may be admissible. Ormerod and O'Floinn have suggested that modern forms of SBE from social media are most likely to be adduced through this gateway.[88] This may occur, for example, when a social media post describing a sexual encounter can be used to rebut evidence given by the complainant that they had never engaged in such behaviour. This gateway applies only to evidence which rebuts evidence that is adduced by the prosecution; it does not apply to evidence that could rebut an inference drawn from the prosecution case.[89]

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84 Below, from paragraph 4.103, we consider further third-party evidence unknown to the defendant at the time.

85 See for example an article which suggests that the verdict could be used as a precedent to widen section 41, "Ched Evans: footballer found not guilty of rape in retrial", *The Guardian*, 14 October 2016.

86 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law* 49, 50.

87 YJCEA 1999, s 41(5).

88 D Ormerod and M O'Floinn, "Social networking material as criminal evidence" [2012] *Criminal Law Review* 501, 504.

89 *Rook and Ward* (2021) 26.155. Evidence that is "adduced by the prosecution" means evidence presented to the jury either through the evidence in chief of a prosecution witness, or cross-examination by the prosecution of other witnesses. It does not automatically include all evidence provided by prosecution witnesses, although the Court of Appeal have suggested in the interests of a fair trial a more liberal interpretation of "adduced by the prosecution" may be required in some cases. (*R v Hamadi* [2007] EWCA Crim 3048 [20] to [21]).

4.41 Rebuttal evidence has been identified as the second most common gateway used in section 41 applications.[90] It is considered less problematic or controversial than the "consent" gateways. Being able to rebut evidence adduced by the prosecution is a key part of the adversarial process.

4.42 Unlike the other gateways, evidence can be admitted under the rebuttal gateway even if its main or only purpose is to impugn the credibility of the complainant. To apply the credibility restriction to such evidence would be contrary to the purpose of its admission – usually to contradict and undermine the complainant's evidence.

Sexual behaviour

4.43 The YJCEA 1999 defines "sexual behaviour" as:

> Any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.[91]

4.44 Evidence in this context is widely defined and extends to secondary evidence of sexual behaviour such as abortions, pregnancy and paternity disputes. For example, in *Moody*, the Court of Appeal said that pregnancy and sexual behaviour are inextricably linked.[92] In *R v T*, the court determined that sexual orientation can amount to sexual behaviour.[93] However, the boundaries of the definition of sexual behaviour are unclear. The Court of Appeal in *Mukadi* indicated that the complainant getting into a car with a stranger could be sexual behaviour.[94] It was said in this case that there are some examples which are clearly sexual behaviour, and others where it will be a matter of common sense as to whether something comes within the definition.

4.45 Courts have considered the issue of more modern forms of SBE relating to social media. It was found in *R v Ben-Rejab* that sexually provocative posts on Facebook can amount to sexual behaviour, meaning they will engage section 41.[95] In this case, "sexual behaviour or experience" was held to be wide enough to include the activity of viewing pornography or engaging in sexual messaging over a live internet connection. The Court of Appeal found that engaging in a sexually explicit quiz, as per the facts of the case, fell within the definition.

False allegations

4.46 In most cases where the defence want to admit evidence or question the complainant about having previously made an allegedly false sexual allegation, this will be done with a view to impugning the complainant's character. In Chapter 5 we provide a

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90 CBA Report (2018), para 138. However, the MoJ and AGO review found that it was used in only 10% of applications (n = 4): MoJ and AGO, *Limiting the use of complainants' sexual history in sex cases* (December 2017).

91 YJCEA 1999, s 42(1)(c).

92 [2019] EWCA Crim 299.

93 [2021] EWCA Crim 318.

94 [2003] EWCA Crim 3765.

95 [2011] EWCA Crim 1136.

detailed discussion of character evidence and false allegations but it will be helpful to briefly sketch the law here insofar as it is relevant to SBE.

4.47 Under section 100 of the Criminal Justice Act ("CJA") 2003, evidence of bad character may be introduced to undermine the credibility of a non-defendant (including the complainant) or to suggest they have a propensity to behave in a certain way. Evidence of misconduct such as prior convictions or other "reprehensible behaviour" may be evidence of bad character.[96] Making a false complaint of rape or sexual assault would be reprehensible behaviour.

4.48 In general, any evidence that the defence wishes to adduce that includes evidence relating to the complainant's sexual behaviour is subject to the restrictions under section 41. The restrictions may apply to questions and evidence about a complainant's previous false allegations of rape and sexual assault, but they will not automatically or always do so. This is because the law views such evidence as being able to relate solely to the falsity of the statement rather than any sexual behaviour, or relate to the falsity of the statement only, when in fact there was no sexual behaviour at all.[97] The defence must have a proper evidential basis for asserting that a complaint was false; questioning of a complainant about an allegation of a sexual offence where there is no basis for suggesting the complaint is false amounts to questioning the complainant about their sexual behaviour.[98] But in cases where it is decided that questioning or evidence goes solely to the false statement and where there is a proper evidential basis, section 41 will not be engaged. Instead, the defence would only need to apply to admit the evidence under the rules governing bad character evidence under section 100 of the CJA 2003. However. in practice, the distinction between false allegations that should be subject to the bad character provisions only, and those that should be subject to the SBE framework as well or instead, is not sufficiently clear. The CPS guidance advises that the defence should seek a ruling from the trial judge confirming that section 41 does not apply, before they ask questions about alleged false complaints.[99]

4.49 In Chapter 5 we discuss this in further detail and provisionally propose that that where the defendant seeks to adduce evidence that the complainant has made false allegations of sexual assault on previous occasions, the admissibility threshold should be the same as that used for sexual behaviour evidence.

The procedure

4.50 SBE can only be admitted following an application made to the court. At present, section 41 applications should be heard by the court sitting in private. The

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96 Criminal Justice Act ("CJA") 2003, ss 98, 112(1).

97 For example: It is reported in the news that celebrity A has been arrested for rape. B reads this and tells her friend C that B has also been raped by A. C later learns that B made this up as she wanted attention when the story was in the news. B has never met A. Subsequently, B makes an allegation of rape against D which is now at trial. D's defence team wish to adduce evidence of the false statement made by B to C.

98 *R v V* [2006] EWCA Crim 1901 at [21]; *C and B* [2003] 2 Archbold News 2, CA.

99 Crown Prosecution Service ("CPS"), *Rape and Sexual Offences - Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999* (21 May 2021).

complainant cannot attend.[100] This contrasts with the openness of the trial in which this evidence will be used, if it is admitted. After consideration of the application, the judge must state in open court (but without the jury present) their reasons for giving or refusing leave, and if they give leave, the extent to which evidence can be adduced or questions asked.[101]

4.51 The Criminal Procedure Rules (CrPR) provide rules for the application to admit SBE. Part 22 specifies that a defendant who wants to introduce evidence or cross-examine a witness about any sexual behaviour of the complainant must serve an application as soon as reasonably practicable after becoming aware of the grounds for doing so and in any event a maximum of 10 business days[102] after the prosecutor discloses material on which the application is based.[103]

4.52 Rule 22.4 provides that the application must:

(1) Identify the issue to which the defendant says the complainant's sexual behaviour is relevant.

(2) Give particulars of any evidence that the defendant wants to adduce, and any questions the defendant wants to ask.

4.53 The Criminal Practice Directions ("CrPD") 2015 gave further guidance on this. First, they explained that "merely identifying a topic is not sufficient for this type of application."[104] The judge should make clear that the application is granted only for the specific questions posed, and that "no other questions on this topic will be allowed to be asked, unless with the express permission of the court."[105] They also stated that applications should clearly state the issue to which the defendant argues the complainant's sexual history is relevant, and the reasons why the evidence should be admitted.[106] This guidance does not appear in the version of the CrPD handed down in 2023.

4.54 There was also an additional Practice Direction which emphasises the need for compliance with the time limits and format requirements of section 41 applications. Late applications should be considered with "particular scrutiny".[107] Rook and Ward note that the Practice Direction has been criticised for being harsh towards defendants when the cause of late applications is often late disclosure.[108] The 2023 CrPD does not include this. Instead it requires that applications that impact cross-examination

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100 Criminal Procedure Rules ("CrPR"), 22.2(a).

101 YJCEA 1999, s 43(3).

102 CPS guidance suggests this time limit is a maximum of 14 days after the prosecutor discloses material on which the application is based. CPS, Legal Guidance, *Rape and Sexual Offences, Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999*, (21 May 2021).

103 CrPR Rule 22.4(1)(b)(ii).

104 Criminal Practice Directions ("CrPD") 2015 V: Evidence 22A.3.

105 CrPD 2015 V: Evidence, 22A.3.

106 CrPD 2015 V: Evidence, 22A.2.

107 CrPD 2015 V: Evidence, 22A.5.

108 *Rook and Ward* (2021), 26.61.

including under section 41 "must be made promptly" to enable the judge to determine applications at the Ground Rules Hearing.[109]

4.55 The Crown Court Compendium (updated June 2022) reiterates that any section 41 application must be made promptly, and responses must be submitted in time for the judge to rule on the application at a Ground Rules Hearing. In her study of section 41 commissioned by the Criminal Bar Association ("CBA Report"),[110] Professor Laura Hoyano found that 34.72% of applications to admit SBE were not made within the time limit.[111] Hoyano suggested that the study did not find evidence to support the contention that late applications are made as a "tactical" ploy or to "manipulate the court process", quoting the language of the 2015 CrPD.[112] As Thomason has noted, non-compliance with procedural requirements at trial is not limited to applications for SBE.[113]

The role of the prosecution

4.56 While the prosecution are not bound by the requirements of section 41, they are subject to section 78 of the Police and Criminal Evidence Act ("PACE") 1984. This gives the court the power to refuse to admit prosecution evidence where, having regard to all the circumstances, admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. This could apply to evidence the prosecution seek to admit which falls within the remit of section 41.[114]

4.57 In some cases where the defence wishes to adduce SBE, the prosecution may agree to adduce it as part of their case instead. This avoids the need for a section 41 application (and the judicial scrutiny it brings). There may be legitimate and strategic reasons for doing so, such as where the evidence is agreed by all and is not controversial, or where it can be used to advance the prosecution case. It can also have a protective effect for the complainant. For example, the prosecution can agree to lead evidence on an issue to pre-empt questions that would arise in cross-examination, or in agreed facts avoiding the need for cross-examination on that issue.

Duty to inform the complainant

4.58 There is no requirement for a complainant to be told about an application to admit SBE. This is "to avoid incurring unnecessary distress where a section 41 application is made but refused".[115] If an application is successful, the prosecution have

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109 CrPD 6.3.29.

110 She surveyed 140 members of the Criminal Bar Association – barristers who both defend and prosecute. Their responses provided a sample of 377 sexual assault cases and 565 complainants in trials across 105 Crown Court centres in England and Wales.

111 CBA Report (2018), p 63.

112 CBA Report (2018), p 64. CrPD 2015 V: Evidence, 22A.5-22A.6.

113 M Thomason, "Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials" [2021] *Criminal Law Review* 727, 747. Reasons for non-compliance include strained resources in courts and among lawyers working in criminal law, and the change of advocates during the course of proceedings.

114 *R v Soroya* [2006] EWCA Crim 1884.

115 MoJ and AGO, *Limiting the use of complainants' sexual history in sex cases* (December 2017) p 6.

responsibility for informing the complainant of the court's decision about the admission of their SBE as soon as reasonably practicable.[116] They must also explain to the complainant any arrangements that, as a result, will be made for them to give their evidence.[117]

4.59 The CBA Report asked participant barristers whether they knew if the complainant had been notified in advance that a section 41 order had been made. A high proportion of barristers did not know whether the complainant had been informed when acting for the prosecution.[118] Out of a total 114 responses, only 20 prosecutors answered that they knew the complainant had been informed (compared to 10 defence barristers).[119] This could indicate a lack of adherence to the CPS guidance, or confusion about whether the duty only applies where the prosecution seek to admit the relevant evidence. It is also possible the complainant was informed by the CPS before the barrister was instructed.

The defendant's right to a fair trial

4.60 Section 41 places restrictions on a defendant's ability to adduce evidence, or question the complainant, on matters that relate to relevant issues in the case. This arguably interferes with their right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR"). However, article 6 does not guarantee the right to adduce any and all evidence a defendant wishes. In Appendix 2 we explore in further detail how the European Court of Human Rights ("ECtHR") has engaged with the challenges posed by the current framework of sexual offence trials in England and Wales. In this section we consider how section 41 has been interpreted as compliant with article 6.

In England and Wales

4.61 Shortly after the YJCEA 1999 came into force, the role of judicial discretion in section 41 applications was tested in the House of Lords in the case of *A (No 2)*.[120] The court considered the operation of section 41 in light of the defendant's right to a fair trial.

4.62 In *A (No 2)*, the defendant was charged with rape; his case was that the sexual intercourse was consensual, and in the alternative, that he reasonably believed the complainant had consented. The defence sought to adduce evidence of allegedly consensual sexual activity between the defendant and the complainant which had taken place more than one week prior to the event in question. The trial judge ruled that the evidence was not admissible under section 41 but gave leave to appeal. The Court of Appeal ruled that the SBE relating to the defendant was relevant to his belief in consent, meaning it might be admitted under the "not an issue of consent" gateway, but that it was inadmissible on the issue of consent. On appeal, the House of Lords held that in the circumstances of an individual case, evidence of a prior consensual relationship between the complainant and defendant may be relevant to the issue of

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116 See also, CPS, *Legal Guidance, Rape and Sexual Offences, Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999* (21 May 2021) and CPS, *Speaking to witnesses at court* (27 March 2018).

117 CrPR, Rule 22.3.

118 Even when account was taken of the unreliability of the data from the way the question was asked.

119 CBA Report (2018), p 69.

120 *A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1.

consent. The defendant's right to a fair trial, which is absolute and fundamental, might be infringed if denied the admission of relevant evidence, where its exclusion led to an unjust conviction.

4.63 In effect, the House of Lords decision provided a gloss on section 41, using section 3 of the Human Rights Act 1998, which requires the court to interpret legislation in a way which is compatible with Convention rights such as article 6. The Law Lords did not find the rule intrinsically incompatible, it becomes so where it would exclude evidence necessary for a fair trial. In our earlier report on character evidence, we summarised this:

> the crucial point is their Lordships' recognition that the exclusion of relevant defence evidence does not *in itself* render the trial unfair.[121] It depends *how* relevant the excluded evidence is to the crucial issues in the case.[122]

4.64 In respect of the evidence in question, Lord Steyn said that section 3 of the Human Rights Act 1998 required the court to "subordinate the niceties" of the statutory language, in particular the concept of "coincidence" in the similarity gateway, to broader considerations of logical relevance.[123] He argued that the similarity gateway should be construed such that the test of admissibility is whether the evidence is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6. He stressed that part of this test requires having due regard to the importance of protecting the complainant from indignity and humiliating questions, but ultimately that fair trial considerations can sometimes trump this. This is the test which has been called a "safety valve" from the perceived restrictiveness of section 41 generally on relevant evidence.[124]

4.65 It is noted, however, that the implication from this judgment is that such situations will be rare. In this case, the mere fact of a relationship between the defendant and complainant was thought not to meet this standard. Nonetheless, this case is said to have effected a change to the way in which section 41 operates.[125]

At the ECtHR

4.66 The issue of the compliance of restrictions on SBE with article 6 of the ECHR has not yet been examined by the ECtHR. However, on a few occasions, the ECtHR has dealt with questioning regarding the complainant's sexual behaviour during criminal proceedings, and its compliance with the complainant's right to respect for their private life under article 8.

4.67 The ECtHR has accepted that some intrusive questions regarding the complainant's sexual behaviour might be relevant to the facts at issue in a trial, but that it is the duty of the judicial authority to ensure that such questions remain relevant throughout the

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121 [2001] UKHL 25, para [46] (Lord Steyn).

122 LC 273, para 9.32 (emphasis in original).

123 *A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1 at [45].

124 *Rook and Ward* (2021), 26.23.

125 *Rook and Ward* (2021), 26.21.

examination of the complainant.[126] The ECtHR requires courts actively to supervise the examination of the complainant and oversee the nature of the questions asked by the defence.[127] Therefore, such restrictions on evidence are not incompatible with the right to a fair trial. As we have previously explained, "[t]he Strasbourg Court leaves evidential rules to the domestic courts and looks at the totality of the evidence against someone when deciding whether there has been a fair trial".[128] See Appendix 2 for a fuller discussion of the ECtHR jurisprudence on this issue.

COMMENTARY ON SECTION 41

4.68 Since *R v Riley* in 1887 there has been criticism of the way SBE is used and restricted in sexual offence trials. In its turn, section 41 has also attracted a number of critics and commentators. We have already discussed above the issues raised by the individual gateways. In this section we will explore the key themes from the commentary on section 41 more generally, from academics, practitioners, inspections and reviews.

4.69 There is evidence from empirical studies that section 41 is working. Following *Evans*, in 2017 the Ministry of Justice and Attorney General's Office reported on the use and efficacy of section 41 ("the MoJ and AGO review").[129] This review concluded that evidence of the complainant's sexual behaviour is rarely permitted, which the review found to be persuasive evidence that the law is working appropriately.[130] The report argued that its conclusions should be reassuring to society, and in particular, complainants, asserting that the use of SBE by the defence is "exceptional".[131] For the CBA Report in 2018, Professor Laura Hoyano, barrister and academic, conducted an empirical review commissioned by the Criminal Bar Association. She surveyed140 barristers who either prosecuted or defended in sexual offences cases about the operation of section 41. Almost 60% of those responding barristers considered that section 41 was working in the interests of justice, including the majority of those barristers identified as only working for the defence in the case sample. 27% considered that it was not working.[132]

4.70 Rook and Ward welcomed the decision in *A (No 2)* to introduce a form of judicial discretion. They called the decision an opportunity to loosen the legislative "straitjacket" of section 41.[133] They said that with this safety valve for relevant evidence between the complainant and defendant, the regime is "workable".[134]

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126 *JL v Italy* App No 5671/16 (translated from French) para 128.

127 See *Y v Slovenia* App No 41107/10.

128 LC 273, para 9.29.

129 MoJ and AGO, *Limiting the use of complainants' sexual history in sex cases* (December 2017). They commissioned the CPS to conduct a file review of a random sample of concluded rape trials to identify cases where a section 41 application was made, its outcome and rationale.

130 MoJ and AGO, *Limiting the use of complainants' sexual history in sex cases* (December 2017), p 8.

131 MoJ and AGO, *Limiting the use of complainants' sexual history in sex cases* (December 2017), p 3.

132 CBA Report (2018), p 6.

133 *Rook and Ward* (2021), 26.21.

134 *Rook and Ward* (2021), 26.22.

Members of the judiciary have also advised us that *A (No 2)* helped clarify the law and has achieved balance. Lawyers Nick Dent and Sandra Paul also consider the current framework achieves an appropriate balance. They have suggested that the issue with section 41 is the "media furore" around it rather than its application in law.[135]

4.71 In practice, we have also been advised by members of the judiciary and legal practitioners that the law is working relatively well. Many note that the requirement to submit written applications with details of the proposed questions and relevance is an effective way of regulating the process. Rook and Ward have said that in practice, "in 2021 there is significant evidence that the s.41 regime is now being applied with appropriate rigour";[136] that the Criminal Procedure Rules reinforce a sufficiently robust Practice Direction, and that appellate case law suggests there is good compliance among counsel. Some stakeholders reported that where counsel have inadvertently raised SBE outside the gateways, the judge has prevented this with appropriate consideration given to discharging the jury and if the trial continued, directions to the jury.

4.72 Conversely, there is also evidence that suggests section 41 is not working appropriately. The Gillen Review (while considering operation of the equivalent provision in Northern Ireland) concluded that the legal framework is appropriate, but its implementation is problematic.[137] In 2006 the Home Office commissioned a review of the operation of section 41, which was authored by academics Liz Kelly, Jennifer Temkin and Sue Griffiths ("the Home Office review"). The aim of the review was to examine the impact of section 41 on the prosecution of sexual offence cases, and courts' handling of such cases. The review found that there was a perception that there was little control of the type of questioning to which complainants were subject.

4.73 There are notable limitations to the empirical studies on the operation of section 41: both those that concluded the current regime is working well, and those that found the opposite. The methodology in the CBA Report relied on barristers' perceptions. Inevitably these perceptions are subjective and can be biased. In the MoJ and AGO review, the sample size of cases where an application was made was small, at only 40 cases. Caution must therefore be applied when drawing conclusions based on the data. Cases where SBE was introduced without a section 41 application were not counted. The 2006 Home Office review was limited to adult female rape cases, and the study period of 2003-2004 means that the cases reviewed were at trial when section 41 had only just been implemented.[138]

4.74 Some critics have argued that the concerns with section 41 are fatal, and others suggest small changes or further guidance rather than wholesale reform are

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135 N Dent and S Paul, "In Defence of Section 41" [2017] *Criminal Law Review* 613–27. See also, CBA Report (2018) para 138.

136 *Rook and Ward* (2021), 26.05.

137 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* **Part 1** (May 2019) ("Gillen Review").

138 The CBA Report scrutinised the methodology of the 2006 Home Office review, see CBA Report, paras 10-16.

appropriate. Professor McGlynn has called for complete reform from the ground up of the use of SBE.[139]

4.75 Between these extremes there are criticisms that section 41 is both too broad and too restrictive.[140]

Too broad

4.76 Professor McGlynn has argued that section 41 is too permissive.[141] She points to studies that show SBE is used in two-thirds of sexual offence trials, and that there is a correlation between its use and acquittals, stating:

> A range of studies across different jurisdictions have identified potentially distorting impacts of SBE, specifically that SBE makes acquittals more likely as jurors consider complainants less credible and more likely to have consented.[142]

4.77 There is no "right" number of cases in which SBE ought to be admitted. However, critics of section 41 identify three features of the current framework that allow evidence that appears to be contrary to its intention:

(1) Individual gateways are interpreted too broadly, allowing SBE to be admitted that ought not to be.

(2) The "not an issue of consent" gateway is too wide and should not permit evidence that goes to reasonable belief in consent.

(3) SBE is still being admitted without being subject to the section 41 process and restrictions.

Gateways interpreted too broadly

4.78 We have discussed the interpretation of individual gateways above. One frequently criticised case is worthy of further consideration in this respect. In *Mukadi*, the Court of Appeal considered evidence that earlier in the day, the complainant had entered a car with a man other than the defendant and had in mind "that there might follow some

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139 C McGlynn "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81(5) *Journal of Criminal Law* 367-92, 391.

140 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law*, 49, 61, citing D Birch, "Rethinking Sexual History: Proposals for Fairer Trials" [2002] *Criminal Law Review* 531, 532 and J Temkin, "Sexual History Evidence—Beware the Backlash" [2003] *Criminal Law Review* 217, 224.

141 C McGlynn "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367-92, 374.

142 Home Office review (2006) and R Durham et al, "Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16" (2017) *Office of Vera Baird QC Police & Crime Commissioner*. ("the Baird observation trials"). The Baird observation trials used lay observers to watch and report on the use of section 41 in trials. The CBA Report noted that lay observers may have a limited understanding of the legal provisions, and they did not attend pre-trial hearings when the applications to admit the SBE were heard that would have informed the use of SBE observed at trial. See CBA Report (2018) para 20. We also note that the CBA Report reported a much lower percentage of applications, finding that 18.6% of complainants in the sample were the subject of section 41 arrangements or orders, although for female complainants the rate was much higher, at approximately one third: CBA Report (2018), p 7.

form of sexual activity."[143] There was no evidence that any sexual activity did follow. The Court of Appeal ruled that this was admissible as to the issue of consent as it "goes to her state of mind" when going to the flat of the defendant later that day in different circumstances.[144] Critics have argued that, by this reasoning, every dating woman "runs the risk of being assumed to be open to the advances of all and sundry the minute she admits that she is prepared to contemplate the prospect of sex with someone she finds attractive."[145] This is the evidence and the inference section 41 was trying to exclude, permitted through the contemporaneity gateway.

4.79 There is evidence that judges make decisions based on general notions of fairness and relevance and then work out how to use the gateways to admit it. Kibble undertook interviews with the judiciary in this jurisdiction in 2003. Their responses suggested that they apply their own discretion regardless of the framework, by interpreting the gateways in a way that enables the admission of evidence they thought was needed for fairness. One judge stated that they would "be prepared to bend one or two things on timing whether it's contemporaneous, if it's a few days rather than 24 and that sort of thing".[146] Further, one judge stated that they decide whether the evidence is needed then find a way of fitting it in.[147] This suggests that in practice, the gateways are not always used to structure judicial decision making.

4.80 In the 2006 Home Office review, the results relating to the nature of the evidence admitted and the gateways used for admission led the authors to conclude that "sexual history is used both to undermine credibility and to raise a doubt in the jury's mind on the issue of consent… credibility and consent are interwoven in rape cases."[148] The gateways framework is intended to restrict evidence used to undermine credibility.

Reasonable belief in consent

4.81 There is particular concern, as expressed by McGlynn,[149] when evidence of sexual behaviour with third parties is said to be relevant to a defendant's reasonable belief in consent. It could suggest that D can reasonably infer C is consenting to sexual activity with them from the knowledge that C has consented to sexual activity with another person at another time. That is clearly problematic. The 2006 Home Office Review reported a number of practitioners found the admissibility of SBE in relation to the defendant's reasonable belief in consent "too wide" and "illogical". In *A (No 2)*, Lord Clyde questioned whether third-party evidence should ever be allowed in this context, but concluded judicial discretion was a sufficient safeguard. There is a real concern that relying on evidence of consensual sexual activity with another as justification for

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143 [2003] EWCA Crim 3765, [10].

144 [2003] EWCA Crim 3765, [16].

145 F Page and D Birch, "Evidence: Rape-Youth Justice and Criminal Evidence Act 1999, s. 41" [2004] *Criminal Law Review* 373-6, at 375.

146 N Kibble, "Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1" [2005] *Criminal Law Review*, 190, 263.

147 Above.

148 Home Office review (2006), p 71.

149 C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367.

the defendant's belief in consent being reasonable can undermine the principle that consent must be specific to the person and the occasion.[150]

Evidence admitted outside section 41

4.82 There is concern that the restrictions in section 41 are too easily avoided. We have heard from stakeholders of examples where SBE has been introduced by counsel outside of section 41 applications. For example, one Independent Sexual Violence Advisor ("ISVA") reference group raised a case where counsel introduced evidence that the complainant had had sexual relations with the brother of her partner, apparently to impugn her character rather than as evidence relevant to an issue in the case. They told us that once the evidence was introduced, it was difficult to curtail its impact.

4.83 Finally, section 41 has limited application in two respects; it only applies to the defence, and to certain sexual offences. Therefore, SBE is not restricted in the same way outside that narrow application.

4.84 The prosecution can adduce SBE without any specific oversight. The 2006 Home Office review found that it was common for the prosecution to agree to adduce evidence on which the defence could then cross-examine.[151] There may be justifiable reasons for so agreeing, although the lack of oversight makes such reasons difficult to ascertain and evaluate. This has led to calls for section 41 to apply to evidence adduced by the prosecution (which we consider in more detail from paragraph 4.234 below) or a ban on admitting evidence by agreement.[152]

4.85 Section 41 applies only to cases of prescribed sexual offences. It does not apply to cases of other types of offences even where they have a significant sexual component. Evidence of a complainant's sexual behaviour may be adduced in cases of, for example, the transmission of infection under section 20 of the Offences Against the Person Act 1861. Some have argued that SBE is admitted in trials where section 41 does not apply, for the purpose of introducing the same myths and misconceptions it was designed to prohibit. This may be particularly relevant in trials of physical assault caused in the context of sexual activity where the defendant claimed it was consented to as part of "rough sex".[153]

Too restrictive

4.86 The gateways are criticised for being so factually specific that they do not allow for all relevant evidence necessary for a fair trial to be admitted. As Roberts describes,

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150 Summarised by Lady Hale in *R v C* [2009] UKHL 42 at [27]: "It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time in this place."

151 Home Office review (2006), p 55.

152 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law*, 49, 70.

153 S Zaccour, "I'm telling you, she likes it rough: Sexual History Evidence, Consent and the BDSM Defence in Canadian Sexual Assault Trials" (January 2022).

"[p]robative value is too mercurial to be captured by inflexible evidentiary categories and too unpredictable to be defined in advance by legislation".[154]

4.87 When reviewing their legislation, the Scottish Executive chose not to follow the section 41 approach as they found it too inflexible.[155] In the CBA Report it was reported that a number of respondents expressed concern that section 41 was too restrictive, and that exclusion of relevant evidence which could not fit through one of the four statutory gateways could result in serious unfairness to the defendant. They contended that trial judges should have inclusionary discretion in such cases, as a safety valve.

4.88 Some have argued that the gateways are too narrow.[156] It has also been suggested that the gateways do not allow the admission of relevant evidence that cannot always be categorised because of the fact-specific nature of sexual offences.[157]

Relationship evidence

4.89 Relationship evidence is an important category of evidence that may be unduly restricted by section 41. The majority of rapes and sexual assaults are committed by someone known to the complainant.[158] The fact that there is a pre-existing relationship, of any kind, between the complainant and defendant is often important background or explanatory evidence.

4.90 The House of Lords in *A (No 2)* considered the importance of relationship evidence as necessary background evidence.[159] Rook and Ward have noted more cases than ever are being prosecuted within the wider context of a consensual sexual relationship between the defendant and complainant. They argue it could be misleading to juries to recast the defendant and complainant as people who have never had consensual sex.[160]

4.91 Where the previous relationship was sexual, evidence of it may fall within the remit of section 41 and be prohibited unless it can satisfy one of the gateways. It is possible under the current framework for the prosecution to adduce relationship evidence.[161]

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154 P Roberts, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 497.

155 Peter Duff, 'Human Rights, Cosmopolitanism and the Scottish "Rape Shield"' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) 219–220.

156 Including a senior police officer and Marsh and Dein in L Marsh and J Dein, "Serious Sex Offences in England and Wales: defending the indefensible" in R Killean, E Dowds and AM McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (2021), p 52.

157 See for example D Birch "Untangling sexual history evidence: a rejoinder to Professor Temkin" [2003] *Criminal Law Review* 370, 379.

158 In fact, the Office for National Statistics have reported that in the years March 2017 to March 2020, in 44% of rape and sexual assault cases the defendant was a partner or ex-partner of the victim. There is a gender difference, with a higher percentage of male victims reporting being assaulted by a stranger (43% of male victims compared to 15% of female victims). Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020.

159 [2001] UKHL 25; [2001] 3 All ER 1 at [10].

160 *Rook and Ward* (2021), 26.21.

161 N Kibble, "Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1" [2005] *Criminal Law Review*, 190.

They may not always do so, however, and the defence may be restricted by section 41 if they wish to do so.

4.92 However, relationship evidence when used as explanatory or background evidence is distinct from other types of SBE; it is necessary to allow the jury to consider the issues in the right context. Where relevant only as background or explanatory evidence, it is not proportionate to restrict the evidence purely because the relationship is sexual. It is argued that section 41 was not intended to restrict such relationship evidence.[162] The 2006 Home Office study suggested that section 41 should allow for "evidence of previous or subsequent sexual behaviour with the accused" to be admitted.[163]

Complexity

4.93 Amongst divergent views, one fairly consistent message is that the current law is too complex.[164] This makes it difficult to apply consistently, to understand, and can easily lead to confusion and mistrust among the public.[165] Legal stakeholders have shared their concerns with the complexity of the current law.[166] One academic told us that "at the very least people can agree that the legislation might need some clarification and simplification".[167] One judge told us that section 41 is too complex and is "crying out for reform". Barristers and academics have told us that section 41 should be made simpler, direct and straightforward. Conversely, some stakeholders have told us that the law is not too complex, and that any complexity can be dealt with by the judiciary.[168]

4.94 Some have suggested that a move away from gateways is required. Where evidence arguably relates to more than one gateway but is only admitted under one, it may be difficult to limit how the evidence is used once admitted. The gateway approach also presents logical challenges and can be conflated.[169] One study on the impact of SBE in mock juror trials found that jurors exposed to SBE went on to rely on heteronormative ideals to "fill in gaps" in evidence.[170] The findings of that study

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162 See for example, D Birch "Untangling sexual history evidence: a rejoinder to Professor Temkin" [2003] *Criminal Law Review* 370, 375; M Thomason, "Previous sexual history evidence: A gloss on relevance and relationship evidence" (2018) 22(4) *The International Journal of Evidence and Proof*, 342; and the House of Lords in *A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1.

163 Home Office review (2006) p 76. See also M Thomason, "Previous sexual history evidence: A gloss on relevance and relationship evidence" (2018) 22(4) *The International Journal of Evidence and Proof*, 342, 359.

164 C McGlynn, "Challenging the Law on Sexual History Evidence: A Response to Dent and Paul" [2018] *Criminal Law Review* 216–28.

165 The public furore following *Evans* is cited as an example of the public misunderstanding the way the law operates which led to very public calls for reform.

166 Including members of the judiciary; a former prosecutor; a criminal justice stakeholder; and Robert Allen, CPS.

167 Sharon Cowan.

168 Hanna Llewellyn-Waters and members of the judiciary.

169 For example, in *Evans*, both the "similarity" and "not an issue of consent" gateways were in issue, and at times the judgment is unclear to which gateway it refers.

170 C Herriott, "Is the jury out on sexual history evidence? The impact of sexual history evidence on mock jury deliberations in rape trials" (December 2021) Doctoral thesis, Angela Ruskin University.

suggest that the impact at trial of SBE is not limited to the purpose for which it is admitted.

4.95 One particular concern is the differentiation between evidence that goes to an issue of consent (which is only admissible if it meets the similarity or contemporaneity gateways), and that goes to reasonable belief in consent. These two issues are often intertwined in sexual offence cases, often both forming part of the defence case in the alternative. In a case where both consent and reasonable belief in consent are advanced, and SBE is admitted as relevant to the latter, it may be difficult for jurors to distinguish those concepts to apply the evidence only to one and not the other. In *A (No 2)*, Lord Clyde suggested that directing the jury in this way "was thought in the Court of Appeal to be worthy of Wonderland".[171]

Conclusion

4.96 The noted issues with section 41 call into question the utility of a framework that determines admissibility by categorisation of evidence. The category of SBE alone is not determinative of whether it should be admissible given the complexities of sexual offence prosecutions.[172] Instead, it is more important to ensure that the threshold for admissibility is right, is clear and allows for sufficiently consistent application. Regardless of category, SBE should not be admitted if it is used to rely on myths and misconceptions, if it leads to unnecessarily intrusive and humiliating questioning of the complainant or invasion into the complainant's private life.

4.97 The gateways are complex, confusing and appear to produce inconsistent results that have undermined public confidence in the criminal justice system and contributed to attrition and unwillingness to report. The gateways are considered both too restrictive and too broad.[173] The evidence suggests that they are not working optimally.

ANALYSIS OF COMPARATIVE APPROACHES

4.98 We now turn to consider the five main alternative approaches to SBE either from comparative jurisdictions or frameworks suggested by those working in the field:

(1) A complete ban on all SBE, or on third party SBE.

(2) Alignment with the bad character provisions.

(3) A restrictive approach with legislated exceptions. Section 41 is considered a restrictive approach; the four gateways are legislative exceptions to the general

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171 [2001] UKHL 25; [2001] 3 All ER 1 at [130].

172 In the case of *Seaboyer*, the Canadian courts rejected the categorised exemption model used in Michigan partly because they concluded that it was not appropriate to predict relevance based on category of evidence: *R v Seaboyer* [1991] 2 SCR 577. See also N Kibble, "Judicial discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2" [2005] *Criminal Law* Review, 263, 276.

173 The research report prepared for the Stern Review also notes the contrasting evidence about how well s 41 is operating. J Brown, M Horvath, L Kelly and N Westmarland, *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* (April 2010) pp 43-44.

restriction. New South Wales and some US states including Michigan also have a restrictive model with legislated exceptions.

(4) A broad discretion. Ireland has a broad discretion. The approach in England and Wales before the introduction of section 41 was also a broad discretion model.

(5) A structured discretion. Scotland and Canada have models based on judicial discretion, with a legislated framework for applying that discretion.

A complete ban

4.99 Even when relevant and admissible, the admission of SBE can still risk introducing impermissible reasoning. Critics have argued that, regardless of the reason for which SBE is admitted, jurors may still use it to infer consent. For example, Dame Vera Baird KC, then Victims' Commissioner, told us that the judiciary need to recognise that whichever gateway the evidence goes through, the evidence is seen by the jury as supporting consent. There is also the risk that any SBE risks jurors making biased assessments of a complainant's credibility and moral worthiness. As we previously reported in respect of the admission of character evidence,[174] for complainants in sexual offences prosecutions, "fact-finders will be inclined to make a general moral assessment of the complainant".[175] This has led to consideration of a complete ban on SBE.

4.100 A complete ban has been considered in previous reviews of the law.[176] In the wake of the *Evans* decision, Harriet Harman MP proposed an amendment to the Prison and Courts Bill in 2017 that would have amended section 41 to result in a complete ban.[177] The Centre for Women's Justice have told us that they are "closer" to the position of a complete ban on SBE.

4.101 In the Heilbron Report and since, judges, authorities and reviews have highlighted the need for the admission of some relevant SBE, such that a complete ban would be inappropriate.[178] For example, in *A (No 2)*, the Law Lords stated that the right to a fair trial requires the admission of sufficiently relevant SBE.[179]

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174 In reference to findings of the Australian Law Reform Commission in their report Evidence (Interim Report) No 26 (vol 1).

175 LC 273, para 9.18.

176 Including Home Office, *Speaking up for Justice*, (June 1998) that led to the introduction of section 41, and T O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* ("O'Malley Review") (July 2020).

177 The amendment would have removed the clause "except with leave of the court" from subsection (1) of section 41, and the rest of the subsections. See https://publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html. The Bill fell when a general election was called. To note, Harriet Harman MP has said in Parliament that the Criminal Bar Association supported her opinion that section 41 should be abandoned. We have been advised that this is a misquote.

178 Heilbron Report (1975) (Cmnd 6352), para 135.

179 [2001] UKHL 25; [2001] 3 All ER 1.

4.102 Some have suggested a more limited ban. Professor Anne Cossins has argued that evidence of sexual behaviour or sexual reputation be:

> prohibited as the subject of questions during the cross-examination of a complainant in a sexual assault trial where they are to be used to challenge the credibility of the complainant or the reliability of her or his evidence.[180]

This would amount to a ban on the use of SBE in cross-examination of the complainant, not necessarily on other uses, such as in evidence in chief or evidence from other witnesses.

Third-party evidence

4.103 Others suggest a complete ban on third-party evidence. The views we have heard almost all agree that third-party SBE is often irrelevant to the issues in sexual offences cases and carries a great risk of being disproportionately prejudicial. The highly controversial SBE in *Evans* was third-party evidence. Many have called for a ban on third-party evidence, and it has been a feature of the recent reform attempts.[181]

4.104 Not all who criticise the relevance and admissibility of third-party evidence call for a complete ban. The Gillen Review submitted that third-party evidence should be held to a higher threshold of admissibility than SBE involving the defendant.[182] Sir John Gillen has stated that it should only be admissible in a "handful" of cases. McGlynn has argued that it was the intent of Parliament to make a distinction between third-party evidence, and other SBE in section 41. Section 41 case law has referred to the distinction as being of potential relevance, most notably in *A (No 2).*[183] The statute and case law have stopped short of establishing a general rule.[184]

Analysis

4.105 We acknowledge the significant risks associated with SBE however it is admitted. We have thought carefully about the impact of a complete ban. The issues in sexual offences cases are often very fact-specific, and therefore the potential relevance of evidence is also fact-specific. We have considered examples of cases where SBE would be crucial for a fair trial. We do not suggest that the following examples are

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180 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) ch 12.

181 Including: a Private Members Bill introduced by Liz Saville-Roberts MP in February 2017 entitled Sexual Offences (Amendment) Bill; and an amendment to the Police, Crime, Sentencing and Courts Bill introduced on 22 November 2021 by Lord Falconer that would have prevented the admission of evidence, whether by the prosecution or the defence, of any sexual behaviour of the complainant with a third party, for the purpose of showing consent or lack of consent, while allowing the admission of such evidence if it were relevant to any other issue in the case; and an amendment to the same Bill, introduced by Harriet Harman MP on 5 July 2021 that would have removed the possibility of admitting evidence of sexual behaviour with third parties, where that evidence goes to consent.

182 The Gillen Review (2019), para 8.65.

183 [2001] UKHL 25; [2001] 3 All ER 1 at [125].

184 Many have criticised the case law for not always making the distinction between third-party and other types of SBE, including C McGlynn, "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367-92.

typical of sexual offences cases. Instead, they are illustrative of factual scenarios which necessitate the admission of SBE to ensure a fair trial.

> Example 1
>
> D is charged with rape of C. While giving evidence C tells the court that they have never engaged in consensual sexual activity with D before. There is evidence from C's phone records that they had told mutual friends of a previous consensual sexual relationship with D. D wishes to admit that phone record to rebut C's evidence.

4.106 In particular, we have considered third-party evidence. The arguments against admitting third-party evidence are strong. However, again we have provisionally concluded that in some cases it will be necessary for a fair trial.

> Example 2
>
> In a trial for rape, the prosecution asserts that C had never had sexual intercourse before the alleged rape and that a resulting pregnancy (that was later miscarried) was evidence of the offence. The defence case is that D has never had sexual intercourse with C. They have evidence that C had consensual intercourse with another person a week before the alleged rape. As an alternative explanation for the pregnancy, it is relevant evidence with significant probative value.

4.107 We also acknowledge that there are some types of SBE that may seem to have less relevance to issues in sexual offences cases such as consent or reasonable belief in consent, or where the risks of prejudice are high. We note, for example, arguments that SBE not involving the defendant, of which the defendant was unaware at the time of the incident, is considered to have very little, if any, relevance to their case. We have carefully considered such evidence and conclude that in some rare scenarios it may still be that the admission of such SBE is necessary for a fair trial.

Example 3

D is arrested for the rape of C. C has reported to the police that D had sexual intercourse with her while she was asleep and could not have consented. C has no memory of the incident and has provided no details of the sexual activity to the police; she only realised there had been sexual intercourse when she awoke. At first interview D gives a detailed account of the sexual activity. D's case is that they reasonably believed that C consented because C had appeared awake, removed D's underwear, initiated the sexual contact and made noises throughout that sounded like positive affirmation. At trial, C testifies that she was in fact asleep during the intercourse. The prosecution case is that it could not have been reasonable for D to believe C was consenting while asleep. Evidence comes to light that C's previous partner E had experienced a situation with C where she appeared to have a form of "sleep walking" that involved her engaging in sexual activity with him during the night. The next morning, in the context of their ongoing relationship, C and E realised she must have been asleep and made plans to ensure it didn't happen again. E had described that incident at the time to friends, reporting behaviour similar to the behaviour that D reported in his police interview. D did not know this at the time of the incident or interview. The evidence of E is relevant to the reasonableness of D's belief that C appeared to be consenting, and has significant probative value.

4.108 Accordingly, we provisionally conclude it is not appropriate to ban all SBE, or all third-party SBE. Some SBE should be admissible, as highlighted in the examples above. A complete ban could rightly be challenged on article 6 grounds. As we have explained above, the ECtHR requires active supervision of the examination of the complainant and nature of the questions asked by the defence.[185] Since balancing plays a key role as part of this supervision, it can be argued that the ECtHR would not accept a complete ban on questions regarding the complainant's sexual behaviour, since such a ban would unacceptably restrict the defendant's right to a fair trial. Rather, courts must perform the balancing exercise between article 6 and article 8 on a case-by-case basis, prohibiting questions which bear no connection with the facts at issue.[186]

4.109 Although there are strong arguments for treating third-party evidence differently from evidence relating to sexual behaviour with the defendant, they do not necessarily require a complete ban on the former.

4.110 In reaching this view we do not underestimate the significant prejudice that can be caused by the admission of evidence from all categories. Any restrictions on SBE should allow for the exclusion of evidence that seeks to, or will, introduce myths or misconceptions, or undermine the principle that consent is specific to both the occasion and the person.

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185 See *Y v Slovenia* App No 41107/10.

186 See Appendix 2 for further discussion of the ECtHR case law on rape shield legislation.

Alignment with bad character provisions

4.111 As noted above, some evidence will constitute both SBE and bad character evidence, most notably when the defence wishes to adduce evidence of a previous false complaint of a sexual offence. In such cases, both section 41 and section 100 of the CJA 2003 – which governs the admissibility of evidence of bad character of a non-defendant – may be engaged. This was held to be the case in *R v V*, in which it was said that in many cases the ruling under section 41 would be the more difficult to achieve.[187] We discuss this crossover in more detail in Chapter 5.

4.112 Some have argued that, for simplicity, the same provisions should apply to all sexual behaviour and bad character evidence. Brewis and Jackson have suggested incorporating bad character evidence into the SBE provisions.[188] Thomason has suggested aligning the SBE provisions with the admissibility tests for bad character evidence, for example, by using the same operative concepts as the bad character provisions.[189]

Analysis

4.113 Generally, where the defendant seeks to adduce evidence that relates to the complainant's sexual behaviour, it will be subject to the section 41 restrictions regardless of whether it also amounts to bad character evidence.[190] Currently, applications regarding evidence of a complainant's previous false allegation of sexual assault will not always be subject to section 41 restrictions, which can result in inconsistencies and some confusion. In Chapter 5 we will explain our provisional view that it is appropriate to address these concerns by proposing that, where the defendant seeks to introduce evidence of a complainant's previous false allegation of sexual assault, it is dealt with under the SBE provisions only. This will ensure that an appropriately high threshold is applied, as evidence of false allegations introduces a risk that rape myths may have an influence on the jury. In doing so we acknowledge that such evidence would need to be considered under the SBE framework even when its main or only purpose is to impugn the credibility of the complainant. This is the nature of evidence relating to previous false complaints. In this way it is similar to evidence currently admissible under the rebuttal gateway.[191] With this proposal, we remove the need to apply both section 100 of the CJA 2003 and section 41 of the YJCEA 1999 (or any alternative framework for SBE) for the same evidence. As a consequence, the need to align the provisions falls away. Further, there is precedent for treating SBE differently from other types of evidence, including character evidence, and there is no compelling rationale for departing from that.

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187 [2006] EWCA Crim 1901.

188 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84(1) *The Journal of Criminal Law*, 49.

189 M Thomason, "Previous sexual history evidence: A gloss on relevance and relationship evidence" (2018) 22(4) *The International Journal of Evidence and Proof*, 342, 360.

190 See also the Law Commission 2015 report on bad character evidence where we explain that evidence relevant both as bad character and SBE has to satisfy both tests: Law Com 273, 9.45.

191 YJCEA 1999, s 41(5).

A restrictive approach with legislated examples

4.114 The section 41 model is framed as a general prohibition with specific legislated exceptions (or gateways). A similar approach is followed in Northern Ireland, New South Wales, a number of US states and the US federal jurisdiction. The decision in *A (No 2)* created a "safety valve", by reintroducing a narrow level of judicial discretion. Other jurisdictions do not have such a mechanism, although a case in Michigan is said to have reintroduced a level of judicial discretion there.[192]

Northern Ireland

4.115 Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 restricts evidence or questions about a complainant's sexual history in proceedings for sexual offences and mirrors section 41.

4.116 The Gillen Review reported on the law and procedures in serious sexual offences, including the use of SBE, in Northern Ireland.[193] While acknowledging the benefits of a system of structured discretion as in Canada, the Review concluded that reform of the restrictive approach was not necessary if a robust judicial approach was adopted to ensure better implementation.[194]

USA

4.117 In Michigan there is a general prohibition on the introduction of evidence of SBE, subject to certain specific exceptions. It is prohibited except for: (i) evidence of the complainant's past sexual conduct with the defendant; and (ii) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease, where in relation to both types of evidence, it is material to a fact at issue in the case and its inflammatory or prejudicial nature does not outweigh its probative value.[195]

4.118 The Federal Rules of Evidence ("FRE") take a similar approach. Rule 412 creates a prohibition on the use of evidence which:

(1) is offered to prove that a victim engaged in other sexual behaviour; or

(2) is offered to prove a victim's sexual predisposition.[196]

4.119 In criminal cases, three exceptions exist. The court may admit:

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192 *Hackett* (1984) 421 Mich 338.

193 Gillen Review (2019).

194 Gillen Review (2019) para 8.63.

195 2021 Michigan Compiled Laws, Ch 750 – Michigan Penal Code, Act 328 of 1931, Section 750.520j – Evidence of the Victim's Sexual Conduct. There is also a relevant provision in the Michigan Rules of Evidence, Rule 404(a)(3), which creates a similar exception to the general prohibition on character evidence "for the purpose of proving action in conformity therewith on a particular occasion" for evidence of a complainant's sexual conduct with the defendant and evidence of the source or origin of semen, pregnancy, or disease.

196 FRE, amended to 1 December 2019, Article IV Relevance and its Limits, Rule 412(a).

(1) evidence of specific instances of a victim's sexual behaviour, if offered to prove that someone other than the defendant was the source of semen, injury or other physical evidence;

(2) evidence of specific instances of a victim's sexual behaviour with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(3) evidence whose exclusion would violate the defendant's constitutional rights.[197]

4.120 The federal approach differs from the Michigan model in that it explicitly allows evidence to be introduced if its exclusion would violate constitutional principles even if it does not fall into any of the other categories.[198]

New South Wales

4.121 New South Wales generally follows the Michigan model. However, the pathways to introduce such evidence are not as limited and they provide more specific exceptions including rebuttal and contemporaneity gateways. Section 294CB of the Criminal Procedure Act 1986 contains a prohibition on evidence relating to "sexual reputation", and a general prohibition on evidence which discloses or implies that the complainant has or may have had, or lacks, sexual experience or sexual activity with some exceptions. Those exceptions are where:

(a) the evidence relates to activity of the complainant which:

(i) took place at or about the time of the commission of the events in question, and

(ii) forms part of a connected set of circumstances in which the alleged prescribed sexual offence was committed

(b) it is evidence relating to a relationship between the complainant and the defendant which was existing or recent at the time of the events in question

(c) it is evidence relevant to the question of whether the presence of semen, pregnancy, disease or injury is attributable to the defendant, in circumstances where they contest the fact that the sexual intercourse occurred

(d) it is evidence relevant to whether the complainant had any disease which the defendant did not at the relevant time, or vice versa

(e) it is evidence relevant to whether the allegation against the defendant was first made following a discovery of the presence of pregnancy or

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197 FRE, amended to 1 December 2019, Article IV Relevance and its Limits, Rule 412(b)(1).

198 Chun and Love, "Rape, Sexual Assault and Evidentiary Matters" (2013) 14 *Georgetown Journal of Gender and Law* 585, pp 590-591.

disease in the complainant (which took place after the commission of the alleged offence)

(f) it is evidence given by the complainant in cross-examination, given in answer to a question which was permitted to be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.[199]

Analysis

4.122 The Michigan model is a formulation of rape shield legislation which is used by 25 US states, including Alabama, Florida, Georgia and North Carolina.[200] However, the legislated exceptions vary in each state. The model was also adopted in Canada until the Supreme Court in *Seaboyer* found it unconstitutional.[201] Though challenged in the US, the model has been upheld as constitutional.[202]

4.123 In Michigan, an element of judicial discretion was reintroduced by case law, in the 1984 case of *Hackett*.[203] Professor Harriett Galvin has suggested that this shows a non-discretionary framework is unworkable, arguing that the "right" approach can only be reached by ignoring the clear statutory wording.[204]

4.124 The New South Wales model, similar to Michigan, has been subject to criticism; it is argued that a legislated exceptions model tries to foresee the circumstances in which SBE will be relevant without sight of the facts of a case or the purpose of the evidence.[205] Concerns about the New South Wales provisions have previously been considered in the reports by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) and the New South Wales Law

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199 Criminal Procedure Act 1986 (NSW), s 294CB(4).

200 The full list can be found at footnote 41 of Chun and Love, "Rape, Sexual Assault and Evidentiary Matters" (2013) 14 Georgetown Journal of Gender and Law 585, p 590.

201 [1991] 2 SCR 577.

202 *People v Arenda*, 416 Mich 1; 330 NW2nd 814 (1982); *Michigan v Lucas* 500 US 145 (1991); Smith, "Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences" (2022) 1 American Law Reports 283, p 299.

203 *Hackett* (1984) 421 Mich 338; N Kibble, "Judicial discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2" [2005] *Criminal Law* Review, 263. Other cases have also shown the courts' willingness to interpret the statute more broadly than ordinary reading would suggest. See for example *People v Mikula* 84 Mich App 108 (1978) and *Michigan v Lucas* 500 US 145 (1991).

204 Galvin, "Shielding Rape Victims in the State and Federal Courts: A proposal for the second decade" (1986) 70 *Minnesota Law Review* 763.

205 Above, 872.

Reform Commission (NSWLRC).[206] The MCCOC preferred the discretionary models enacted in other Australian jurisdictions.[207]

A broad discretion

Ireland

4.125 In Ireland, the court has a wide discretion to admit SBE. To question the victim about their previous sexual history an application must be made under section 3 or 4 of the Criminal Law (Rape) Act 1981.[208] The judge may give such permission only if an application is made by the defence on the basis of the grounds set out in section 3(2)(b) of that Act, namely that "it would be unfair" to the defendant to exclude it.[209]

4.126 A further protection is also provided under section 2 of the Criminal Justice (Victims of Crime) Act 2017:

> In any proceedings relating to an offence, where a court is satisfied that –
>
> (a) the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and
>
> (b) it would not be contrary to the interests of justice in the case,
>
> the court may give such directions as it considers just and proper regarding any evidence adduced or sought to be adduced and any question asked in cross examination at the trial which relates to the private life of the victim and is unrelated to the offence.

4.127 The restriction in Ireland was "largely based" on the previous provision in England and Wales in section 2 of the Sexual Offences (Amendment) Act 1976.[210]

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206 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Report* (1999); New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)* (1998).

207 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Report* (1999), p 243.

208 Criminal Law (Rape) Act 1981, ss 3 and 4 apply to trials for the offence of rape. Under the Criminal Law (Rape) (Amendment) Act 1990, the same restrictions apply to trials for other sexual offences. The latter Act also widened the restriction so that it applies to any sexual experience with any person, including the defendant (the original 1981 Act only applied to evidence of sexual experience with third parties). See O'Malley Review (July 2020), p 65.

209 Described in the Criminal Law (Rape) Act 1981, s 3(2)(b) as meaning "if [the judge] is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied".

210 O'Malley Review (July 2020), p 64.

USA

4.128 While the majority of states use a model of legislated exceptions, some states, including New Jersey, operate a wider discretionary model.[211] In New Jersey there is a general prohibition unless the judge, on application, determines that the evidence of prior sexual conduct is relevant and highly material and that the probative value of the evidence substantially outweighs its "collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim".[212]

4.129 In other states operating this model, such as Alaska and Kansas, the case law suggests that the courts have interpreted this clause in a similar manner to the legislated exceptions model. For example, prior allegations of sexual abuse are generally inadmissible unless proven false[213] and evidence of sexual abuse by third parties is generally inadmissible unless it serves as an alternative explanation or is admitted in direct response to the prosecution's claim.[214]

4.130 California evidence rules include two "rape shield" provisions. The first is similar to a legislated exceptions model: a ban on SBE used to prove consent with exceptions for evidence of sexual conduct involving the defendant or as rebuttal evidence.[215] The second introduces judicial discretion to allow evidence relating to the sexual conduct of the complainant where it is used to undermine their credibility.[216] The defence must make an application to admit such evidence. The evidence may be admissible if it is relevant to the issue of credibility, unless its "probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury".[217]

Commentary

4.131 The O'Malley Review considered the protections for vulnerable witnesses in the investigation and prosecution of sexual offences in Ireland.[218] The Review took the view that the provisions of section 3 of the Criminal Law (Rape) Act 1981 "strike a fair

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211 And seven other states. The full list can be found at footnote 50 of Chun and Love, "Rape, Sexual Assault and Evidentiary Matters" (2013) 14 Georgetown Journal of Gender and Law 585, p 595. In general, there are said to be five models of the rape shield legislation in the United States. Discussion of this can be found at Chun and Love, "Rape, Sexual Assault and Evidentiary Matters" (2013) 14 Georgetown Journal of Gender and Law 585, pp 593-597.

212 New Jersey Statute 2C:14-7. There are additional provisions in the legislation that limit third-party evidence, evidence that predates the offence charged by more than a year, and when previous sexual behaviour with the defendant shall be considered "relevant". For more detailed discussion of this approach, see N Kibble, "The sexual history provisions: charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?" [2000] *Criminal Law Review* 274 at p 280.

213 *Covington v State*, (1985) 703 P2d 436, 442 (Alaska).

214 *State v Jackson*, (2008) 39 Kan App 2d 89, 94-96 (Kansas).

215 Evidence Code (California) EC1103.

216 Evidence Code (California) EC782.

217 Evidence Code (California) EC352.

218 This review of the protections for vulnerable witnesses in the investigation and prosecution of sexual offences in Ireland was chaired by Tom O'Malley and published in July 2020.

balance between protecting the rights of accused persons and those of victims in sexual offence trials" and accordingly it did not recommend any changes to the provisions.[219]

4.132 Dr Susan Leahy has analysed the legislation relating to SBE in England and Wales, Ireland and Canada.[220] Leahy concludes that the discretionary regime in Ireland is not "capable of appropriately protecting complainants from the unnecessary introduction of sexual experience evidence."[221] Studies have indicated that the legislation has a high success rate for defendants who apply to use it.[222]

4.133 The California model, while discretionary, is not as broad as the others. Indeed, it is the "narrow" exercise of discretion that has been credited with ensuring that the credibility exception does not undermine the general principle behind rape shield legislation in that state.[223]

Analysis

4.134 The jurisdictions that adopt a broad relevance model put relevance and fairness at the centre when determining whether evidence should be admitted. Such a test would be much simpler than section 41. It can be argued that judges are well placed to judge the admissibility of SBE without straining to force varying factual scenarios through particular gateways. A number of stakeholders and commentators have expressed support for a test that admits SBE based on relevance.[224]

4.135 However, this model allows the use of discretion without requiring consideration of how the evidence may perpetuate harmful myths and misconceptions. Such a broad discretion would likely lead to even more inconsistent application and a lack of clarity in the rationale for restricting or admitting evidence in individual cases.

4.136 It is noted that the provisions in Ireland were based on the previous provisions in England and Wales (which were replaced following significant criticism, resulting in the current section 41 regime). Relevance and fairness are key in determining admissibility of SBE, but given the well-known risks associated with its admission, they are not a sufficiently high threshold. Practitioners and the judiciary should be required to turn their minds to the risks associated with such evidence when

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219 O'Malley Review (July 2020), p 66.

220 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4(1) *Irish Journal of Legal Studies* 65-91, 80.

221 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) *Irish Journal of Legal Studies* 4(1) 65-91, 91.

222 In one study of 35 cases, applications to introduce SBE were made in seven cases, six of which were successful: C Hanly et al, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (2009). Another study found that 70% of applications were granted, looking at 40 rape trials between 2003 and 2009: S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) *Irish Journal of Legal Studies* 4(1) 65-91, 68.

223 Chun and Love, "Rape, Sexual Assault and Evidentiary Matters" (2013) 14 *Georgetown Journal of Gender and Law* 585, pp 593-597.

224 For example, one defence barrister stated that there should be a general test of relevance. Dame Elish Angiolini stated that SBE should only be admitted if expressly relevant.

considering the admissibility of SBE. If not, evidence may be admitted that unintentionally perpetuates myths and misconceptions.

4.137 Under a broad discretion model, the trial judge can consider appropriate factors as they apply in each individual case when using their discretion to admit SBE. However, as we have described throughout this chapter and in Chapter 2, the risks of myths and misconceptions associated with SBE are pervasive and judges are not immune to them. Without more detailed structure in the legislative framework, there is still considerable risk that impermissible reasoning will pervade decision making, or that it will be perceived to do so. Such structure could avoid a discretion model being subject to the same criticism that led to the introduction of section 41.

A structured discretion

Scotland

4.138 The Scottish legislation on SBE is contained in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. These provisions restrict the use of evidence designed to show the complainant:

(1) is not of good character (in relation to sexual matters or otherwise);

(2) has engaged in sexual behaviour at any time which does not form part of the subject matter of the charge;

(3) has engaged in behaviour other than sexual behaviour which might found an inference that the complainant is likely to have consented or is not a credible or reliable witness (only applying to acts other than those shortly before, at the same time as or shortly after the acts in question); or

(4) has at any time been subject to any condition or predisposition as might give rise to the same inference as in (3).[225]

4.139 There are a number of exceptions to this general rule. Section 275 provides that the court can admit SBE on an application if:

(1) the evidence or questioning only relates to a specific occurrence or occurrences of sexual or other behaviour, or to specific facts, demonstrating the complainer's character or any condition or predisposition to which they are subject;

(2) that occurrence(s) of behaviour or facts are relevant to establishing whether the accused is guilty of the offence charged; and

(3) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice.[226]

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225 Criminal Procedure (Scotland) Act 1995, s 274(1)(a)-(d).

226 Criminal Procedure (Scotland) Act 1995, s 275(1)(a)-(c).

4.140 The Act provides that "the proper administration of justice" includes:

(1) appropriate protection of a complainer's dignity and privacy; and

(2) ensuring the facts and circumstances of which a jury is made aware are relevant to an issue before the jury, and commensurate to the importance of that issue to the jury's verdict.[227]

4.141 In Scotland, where the defence makes a successful application to have the complainant's SBE admitted, the defendant's previous convictions must be placed before the judge by the prosecution, and unless the defence objects,[228] those convictions will be placed before the jury.[229] This has been held to be compatible with the right to a fair trial under article 6 of the ECHR.[230] Although this provision has the potential to have a chilling effect on applications by defendants with previous convictions, it appears not to be used much in practice.[231] Stakeholders have not suggested that a similar provision be introduced in England and Wales.

Canada

4.142 Section 276 of the Criminal Code[232] contains the provisions governing the admission of SBE. The current formulation is a redraft of an earlier version which the Supreme Court of Canada (SCC) in *R v Seaboyer*[233] found to contravene defendants' rights under the Charter of Rights and Freedoms (including the principles of fundamental justice in section 7 and the right to a fair trial in section 11(d)). The original section 276 (introduced in 1982) created a blanket prohibition on SBE, subject to three exceptions.

4.143 The current law provides that evidence that the complainant has engaged in sexual activity, whether with the defendant or with any other person, is not admissible to support an inference that the complainant is more likely to have consented to the events in question or is less worthy of belief.[234] This is designed to counter the "twin myths". Following this general prohibition, there are three criteria which then must be satisfied before SBE can be admitted. The criteria are that the evidence:

(1) is of specific instances of sexual activity (excluding evidence of general sexual reputation);

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227 Criminal Procedure (Scotland) Act 1995, s 275(2)(b).

228 In some circumstances the judge has discretion (s 275A(2A)). There are specific grounds upon which the defendant can object which include if it would be contrary to the interests of justice, and if there was not a substantial sexual element to the previous conviction: Criminal Procedure (Scotland) Act 1995, s 275A(4).

229 Criminal Procedure (Scotland) Act 1995, s 275A(2).

230 *DS v HM Advocate* 2006 JC 47 (HCJ); 2007 SCCR 222 (PC). See also Scottish Law Commission, *Report of rape and other sexual offences*, (2007) Scot Law Com No 209,

231 Scottish Government Social Research, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*, (2007), p 4.

232 RSC 1985, c C-46.

233 [1991] 2 SCR 577.

234 Criminal Code (Canada), s 276(1).

(2) is relevant to an issue at trial; and

(3) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[235]

4.144 In exercising their discretion under this approach, trial judges must take into account:

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.[236]

4.145 In *R v Darrach*, the SCC found that the legislative restrictions on SBE are compatible with the Charter, including the right to a fair trial,[237] and the principles of fundamental justice.[238] Mr Justice Gonthier stated:

> The current version of s. 276 is carefully crafted to comport with the principles of fundamental justice. It protects the integrity of the judicial process while at the same time respecting the rights of the people involved. The complainant's privacy and dignity are protected by a procedure that also vindicates the accused's right to make full answer and defence.[239]

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235 Criminal Code (Canada), s 276(2). The evidence must be more than just "trifling": *R v Darrach* [2000] 2 SCR 443; 2000 SCC 46 at [41].

236 Criminal Code (Canada), s 276(3).

237 Charter of Rights and Freedoms, s 11(d).

238 Charter of Rights and Freedoms, s 7.

239 *R v Darrach* [2000] 2 SCR 443; 2000 SCC 46 at [3]. See also *R v JJ* 2022 SCC 28.

Commentary

4.146 The Dorrian Review found serious concerns with the way the Scottish provisions were being implemented at trial. The review considered reported cases[240] where there were significant and harmful failures to observe the intended restrictions, and where complainants were subjected to lengthy, unjustified and sometimes insulting cross-examination without intervention or objection from the prosecution, noting that these cases were not isolated incidents.

4.147 In 2022, HM Inspectorate of Prosecution in Scotland (HMIPS) inspected and reported on the operation of the Crown Office and Procurator Fiscal Service (COPFS) in relation to the Scottish provisions that restrict the use of SBE and character evidence.[241] HMIPS reviewed cases, policy guidance and interviewed stakeholders and personnel involved in the operation of the legislation. They reported a high percentage of successful applications,[242] noting that the quality of the applications were generally good. In their view, the majority of the applications were focussed and did not seek to lead any more evidence than strictly necessary.[243] It is noted that the data relates to applications regarding both character evidence and SBE. However, in relation to engagement with the complainer, HMIPS found that the short timescales in the application process risked complainers being approached in an insensitive manner.[244] Further, complainers are often not being advised on the likely outcome or actual outcome as required.[245] The report also found that applications under these provisions had contributed to a wider issue where complainers did not feel able to share their stories in a coherent manner due to the stricter application of the law around SBE and character evidence. In their view, this was an issue that related to complainers' experiences of the justice process more generally. They concluded that this issue merits further consideration.[246]

4.148 Dr Leahy, in her analysis of the approach in Canada, Ireland and England and Wales, favoured the Canadian model because it strikes the right balance between the restrictive approach in England and Wales and the unstructured, overly permissive, discretionary model in Ireland.[247] She suggested that the Canadian approach is simpler because it does not attempt to foresee every situation in which SBE may be

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240 *Dreghorn v HM Advocate* [2015] SCCR 349; *Donegan v HM Advocate* [2019] SCCR 106; *McDonald v HM Advocate* [2020] HCJAC 21.

241 HM Inspectorate of Prosecution in Scotland, *Inspection of Crown Office and Procurator Fiscal Practice in relation to section 274 and 275 of the Criminal Procedure (Scotland) Act 1995* (2022).

242 85% of Crown applications were granted either in full or in part.

243 In 47% of the cases reviewed. The prosecution was found to oppose more applications, or parts of applications, than were refused by the court: HM Inspectorate of Prosecution in Scotland, *Inspection of Crown Office and Procurator Fiscal Practice in relation to section 274 and 275 of the Criminal Procedure (Scotland) Act 1995* (2022), p 6.

244 Above, pp 44-45.

245 Above, pp 50-51.

246 Above, p 4.

247 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4(1), *Irish Journal of Legal Studies*, 65-91, 80.

relevant.[248] However, Leahy notes that this approach has been criticised for allowing judges to make decisions which are not sufficiently balanced between the factors[249] and there is also a lack of visibility about how judges are applying the criteria and the factors.[250] Leahy suggests these problems could be offset by initiatives such as a requirement to provide written and reasoned decisions.[251]

4.149 Brewis and Jackson have also suggested that an approach similar to Canada and Scotland would be preferable to section 41. They supported a focus on a high threshold rather than admitting categories of evidence, and that judicial discretion should be guided by specific factors.[252]

4.150 Thomason has also suggested a move away from the current categories-based framework to a guided discretion model where evidence that has either explanatory, probative or rebuttal value would be admissible. He suggested that the complainant's right to privacy – which he argued should be the only justification for limiting the use of SBE – should be a mandatory consideration.[253] Marsh and Dein have similarly argued for a move away from a category based model to a structured discretion model based on the interests of justice (in line with the hearsay provisions under section 114 of the CJA 2003).[254]

4.151 In the Working Group report "Speaking up for Justice" that led to the introduction of section 41, the Group considered the option of defining the circumstances in which a judge may exercise discretion.[255] They recommended that the law should be clear about when SBE may be admitted, and suggested the Scottish approach as a possible model.[256]

Analysis

4.152 The structured discretion approach in Canada and Scotland is simpler than section 41 because it does not attempt to foresee every situation in which SBE may be relevant.[257] Instead, it establishes how SBE should be treated in prosecutions and

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248 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4(1), *Irish Journal of Legal Studies*, 65-91, 87.

249 L Gotell, "When privacy is not enough: Sexual assault complainants, sexual history evidence and the disclosure of personal records" (2005-2006) 43 *Alberta Law Review* 743.

250 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4(1) *Irish Journal of Legal Studies* 65-91, 89.

251 Above, 90.

252 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84(1) *Journal of Criminal Law* 49. See para 4.180 below for further discussion of what the factors should be.

253 M Thomason, "Draft s.41 Reform – Briefing Note" (2022).

254 L Marsh and J Dein, "Serious Sex Offences in England and Wales: defending the indefensible" in R Killean, E Dowds and AM McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (2021), p 54.

255 Home Office, *Speaking up for Justice* (June 1998) para 9.66.

256 Home Office, *Speaking up for Justice* (June 1998) Recommendation 63.

257 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4 *Irish Journal of Legal Studies* 65-91, 87.

provides a framework for judges to consider admissibility. The models we have considered start with a general ban (as is the case with section 41), followed by a provision for admitting evidence only when its probative value outweighs the risk of prejudice. They then set out factors that should be considered by judges when determining whether to admit the evidence.

4.153 Besides simplicity, structured discretion has a number of benefits. It allows judicial discretion to consider the relevant issues and evidence in the context of individual cases. Neil Kibble has argued that judicial discretion is appropriate in sexual offences cases where the facts are so case specific.[258] This model provides a structure for the use of this discretion which can ensure that the appropriate factors are given weight. This can also help with consistency of application and interpretation. The model also allows for the purpose of the legislation to be part of the statutory language, clarifying the intent. For example, the Canadian model expressly prohibits SBE used to perpetuate the so-called "twin myths". Professor McGlynn has argued that the Canadian model is better at addressing the risks that evidence will be used to perpetuate myths around consent because of this express provision.[259]

4.154 However, the Canadian model has been criticised for allowing judges to make decisions which are not sufficiently balanced between the factors.[260] The factors listed are competing. Though the lack of direction on how to weigh them provides flexibility, it appears also to allow some of the factors which are harder to balance to fall away. For example, Gotell has submitted that usually only the factors of the complainant's right to privacy and the defendant's right to a fair trial are acknowledged. Gotell suggested that this positions SBE as a conflict between those two rights and as a result, the right to a fair trial always prevails.[261] Such a binary interpretation of the relevant factors minimises the other considerations present when SBE is in question. It also fails to reflect situations where complainant's privacy can be protected while still ensuring a fair trial. There is also a lack of visibility about how judges are applying the factors and arriving at their decisions.[262]

4.155 A further issue is that the discretionary model, even with the structure provided by the factors in the statute, is still subject to the views of the trial judge in exercising their

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258 N Kibble, "Judicial discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2" [2005] *Criminal Law* Review, 263. Kibble has suggested that if judges are not trusted to use their discretion appropriately and apply the law accurately, wider reform of judicial convention is required beyond section 41.

259 C McGlynn, "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367-92.

260 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4 *Irish Journal of Legal Studies* 65-91; L Gotell, "When privacy is not enough: Sexual assault complainants, sexual history evidence and the disclosure of personal records" (2005-2006) 43 *Alberta Law Review* 743.

261 L Gotell, "When privacy is not enough: Sexual assault complainants, sexual history evidence and the disclosure of personal records" (2005-2006) 43 *Alberta Law Review* 743, 766.

262 S Leahy, "Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials" (2014) 4 *Irish Journal of Legal Studies* 65-91, 89.

discretion. SCC Justice L'Heureux-Dubé cautioned in the case of *Seaboyer* that the concept of relevance can be infused with judges' bias:

> Regardless of the definition used, the content of any relevance decision will be filled by the particular judge's experience, common sense and/or logic. There are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth … This area of the law has been particularly prone to the utilisation of stereotype in the determination of relevance.[263]

4.156 In fact it has been argued that there is no agreed concept of relevance, which can lead to inconsistent decision making.[264] As with any person, judges may unconsciously hold rape myths and misconceptions. This model allows those to seep into decisions about the admissibility of evidence. This undermines the intention of rape shield legislation. There is evidence from Canada that judges have not used the structured discretion in a progressive way.[265] It is noted that reliance on judicial discretion has been ascribed as the reason for the failure and criticisms of earlier models in this jurisdiction.[266]

Conclusion

4.157 Section 41 is a legislative restriction on SBE that, in part, aims to minimise the negative impact of myths and misconceptions on sexual offence trials. It also aims to protect complainants from unnecessary intrusions into their personal lives, and from being subjected to humiliating questioning at trial. Courts have interpreted the legislation so as to be compatible with the right to a fair trial.

4.158 In this chapter so far we have addressed the wide ranging criticisms and concerns raised about whether section 41 effectively achieves this. We have provisionally concluded that the current framework is not appropriate; it is too complex, the categories create arbitrary outcomes and exclude evidence that ought to be admitted while failing to exclude all evidence that ought not to be admitted.

4.159 We note there are significant issues with each alternative model considered. Indeed, as noted by the research report for Baroness Stern's review of public authorities' handling of rape complaints in England and Wales, "available evidence suggests that

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263 *R v Seaboyer* [1991] 2 SCR 577 at [228].

264 For example, McEwan said of the SOAA 1976, s 2, "[w]e clearly lack a common conception of relevance.": J McEwan, "Law Commission Dodges the Nettles in Consultation Paper No. 141" [1997] *Criminal Law Review* 93, 102. See also McDonald: "Judges (when making admissibility rulings) and fact-finders (when making decisions about what occurred) perform their relative tasks of drawing inferences by referencing their own beliefs and assumptions about the world, which include prejudices as well as knowledge" E McDonald, *Rape Myths as Barriers to Fair Trial Process*, 2020, p 124.

265 S Leahy "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] 4 Criminal Law Review, 229, 241.

266 C McGlynn, "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367-92, 375.

all jurisdictions have encountered similar problems in the effective implementation of 'rape shield' legislation".[267]

4.160 On balance, in our provisional view, the structured discretion model has more benefits than the others. The structure of such models is an express ban on evidence that risks perpetuating prohibited myths with a framework for judicial discretion to admit appropriate evidence. A ban with express reference to the risks of SBE ensures that these risks are at the centre of decisions on admissibility. Under this model judges can use their discretion to consider relevant factors in the context of individual cases. This is preferable to a model that requires the often unique facts of sexual offences cases to fit into limited and specific gateways. Requiring courts to consider the risks of admission reflects the reality that the impact of SBE goes beyond the purpose for which and the gateway through which it is admitted. However, the factors that judges must consider provides structure for that discretion, helping to provide consistency and clarity in decision making, as well as helping to ensure that the decision making is not affected by myths and misconceptions. Academics have long argued that although discretion may not provide absolute certainty, it is more practical and desirable to seek to "structure and check" this discretion rather than to eliminate it.[268]

4.161 Our analysis of the compatibility of rape shield legislation with the right to fair trial suggests that, in principle, restrictions of this kind are compatible. As Lord Hope observed in *A (No 2)*:

> [Article] 6 does not give the accused an absolute and unqualified right to put whatever questions he chooses to the witness. As this is not one of the rights which are set out in absolute terms in the article it is open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial in article 6(1).[269]

4.162 Any new model would need to include provision for considering whether the restriction of the evidence in the individual case infringes the defendant's right to a fair trial. We will discuss how this can be achieved below.

4.163 Structured discretion models are seen as broader than the restrictive section 41. When introduced, section 41 was welcomed for this restrictive approach and, as above, moving to an arguably "less restrictive" model could be seen as a regressive step. However, the approach to admission of SBE under a structured discretion model could better ensure the appropriate factors are considered when meeting the aims of rape shield legislation. Section 41 has been criticised for being both too restrictive and too broad. While these are important criticisms, how restrictive a model is does not determine its effectiveness. As we explain above at paragraph 4.157, the aim of restricting SBE is to minimise the impact of myths and misconceptions and prevent disproportionate humiliating and traumatic questioning, while ensuring that evidence necessary for a fair trial is admitted. We explain above our provisional view that a complete ban is not appropriate to achieve these aims; similarly, we do not think that

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267 J Brown, M Horvath, L Kelly and N Westmarland, *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* (April 2010) p 44.

268 R Pattenden, *Judicial Discretion and Criminal Litigation* (1990, 2nd ed), p 18.

269 [2001] UKHL 25; [2001] 3 All ER 1 at [91].

the most restrictive model will necessarily achieve these aims. Instead, we need to consider how well a model restricts evidence that ought not to be admitted, while allowing evidence necessary for a fair trial. To focus solely on restrictiveness may obscure this. While considering the potential benefits of a structured discretion model, we instead look at whether it is *suitably and proportionately* restrictive to help achieve the aims of rape shield legislation.

4.164 Similarly, empirical evidence on the restrictive efficacy of models may be limited in its utility. For example, looking only at the number of applications, or the number of cases where SBE is introduced, can only tell us so much about how well a regime is working. It is not often easy for observers and researchers to conclude whether the use of SBE in individual cases was "right" or not. That often requires full understanding of all the evidence and issues at trial: effectively to be in the position of the judge.

4.165 In the available evidence on the use of structured discretion in Canada and Scotland are criticisms of real concern. We note that decisions made under these models are not always progressive, and do not always reflect the range of factors required. However, to a greater degree than the other models we have considered, some of the risks associated with a structured discretion model could be mitigated by both its design and implementation. It is the framework of such models that we consider, on balance, has the most potential to achieve fairer outcomes.

4.166 Whether any new framework is suitably and proportionately restrictive in practice depends on the threshold and how well it can be implemented. We now turn to consider how a structured discretion model could operate in this jurisdiction to provide a suitably high threshold and enable consistent, coherent implementation.

DESIGNING A STRUCTURED DISCRETION MODEL

Threshold

4.167 To be admissible in a criminal trial, evidence must be relevant, meaning that it has "some probative value on a matter in issue in the proceedings".[270] This is not a sufficiently robust enquiry for SBE due to its inherent risk of introducing or perpetuating myths and misconceptions, and the negative impact of invading the privacy and dignity of complainants.[271] As McDonald has noted "applying just a mere relevance test to such evidence has historically permitted too many collateral and unfairly prejudicial inquiries".[272]

4.168 One alternative option would be an enhanced relevance test. In our 2001 report on bad character, the Law Commission described enhanced relevance as evidence that has "substantial probative or explanatory value in relation to the issues in the case".

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270 LC 273 at 5.7.

271 See *Rook and Ward* (2021), 26.182.

272 E McDonald, *Rape Myths as Barriers to Fair Trial Process*, (2020) p 128.

Substantial probative value is a significant feature of the character evidence provisions.[273]

4.169 Currently the test under section 41 is considered to be a higher threshold for admission than the enhanced relevance test in the character provisions.[274] This is an appropriate distinction and there is no justification for lowering the current threshold for SBE. Enhanced relevance, while an important feature, is not sufficient to address the risks associated with SBE.

4.170 The Scottish and Canadian models require both that the probative value of SBE is significant *and* that its probative value outweighs the risk of prejudice to the administration of justice. They have slightly different tests:[275]

(1) In Canada, the significant probative value must not be substantially outweighed by the danger of prejudice to the proper administration of justice.[276]

(2) In Scotland, the significant probative value must be likely to outweigh any risk of prejudice to the proper administration of justice.[277]

4.171 Such a threshold means that some evidence that has significant probative value can in theory still be excluded. This ensures the risks of admitting SBE are balanced against its probative value. However, such a threshold poses greater risk to the defendant's right to a fair trial than a threshold that only excludes evidence that does not have significant probative value.

4.172 An alternative threshold could be one of "fairness". The power to exclude evidence under section 78 of PACE uses the "fairness" of proceedings,[278] as do the character provisions.[279] In Ireland, a judge can give leave to admit SBE if the judge is:

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273 In the Law Commission report on bad character evidence, we recommended that for bad character evidence of a non-defendant, the threshold should be "substantial probative value to a matter in issue, and/or … substantial explanatory value for understanding the case as a whole": LC 273. These recommendations were given effect by the CJA 2003, pt 11, ch 1. One of the gateways for the admission of bad character evidence of a defendant is for evidence that "has substantial probative value in relation to an important matter in issue": CJA 2003, s 101(1)(e). Bad character evidence of a non-defendant must have either "substantial probative value" or be "important explanatory evidence" (or both parties must agree on its admission): CJA 2003, s 101.

274 See para 4.111 above.

275 The tests are similar but there are two key differences. First, in Canada, the probative value must not be *substantially* outweighed; it can be outweighed, but not substantially. Secondly, there is a difference in emphasis. In Scotland the test suggests that the evidence *will* risk some prejudice, and therefore to be admissible the probative value has to outweigh that. In Canada, the test starts with evidence having significant probative value, and then considers what danger to the proper administration of justice it poses.

276 Criminal Code (Canada), s 276(2). This is also the same threshold used for the admission of personal records in sexual offences prosecutions. See Chapter 3 for further discussion.

277 Criminal Procedure (Scotland) Act 1995, s 275(1)(a)-(c).

278 See para 4.56 above.

279 CJA 2003, s 101(3): "The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.[280]

4.173 The benefit of a threshold centred on fairness is that it explicitly encourages consideration of the defendant's right to a fair trial under article 6. However, alone it does not sufficiently acknowledge the risk associated with the admission of such evidence. In our provisional view, a combination of these approaches would be preferable.

4.174 In *A (No 2)*, Lord Hope said of section 41:

> The element of judicial discretion has been reduced to the minimum. There are risks involved in that choice. It has deprived the judge of the opportunity, in the last resort, of preventing unfairness to the defendant in circumstances where to do this would not significantly prejudice the proper administration of justice.[281]

4.175 This reasoning reflects both the risks of SBE, and its potential importance for a fair trial. We are provisionally of the view that it could be usefully employed, alongside a test of enhanced relevance based on the character provisions, as the threshold for SBE. Therefore, we provisionally propose that in a structured discretion model the threshold for admitting evidence should be that:

(1) the evidence has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

This approach ensures an appropriately high threshold, while allowing the judge discretion to ensure the defendant receives a fair trial.

4.176 Consideration of prejudice to the proper administration of justice can include the impact on both the prosecution and defence case, the risk to a fair trial, the prejudicial effect of introducing myths, and the effect on the complainant. Where, for example, admission is necessary for the defendant to have a fair trial, the admission would not significantly prejudice the proper administration of justice; it is in fact *necessary* for the proper administration of justice. In our report on bad character evidence, we considered the risk to a fair trial when formulating a test to exclude evidence with probative value:

> It follows, from the decision in [*A (No 2)*], that a requirement of enhanced relevance for bad character evidence would risk infringing article 6 only if the required level of relevance were set so high that evidence sufficiently probative to be necessary for a fair trial might nevertheless fail to satisfy it. This result could be avoided by

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280 Criminal Law (Rape) Act 1981, s 3(2)(b).

281 [2001] UKHL 25; [2001] 3 All ER 1 at [103].

formulating the requirement in such a way that it will inevitably be satisfied whenever the exclusion of the evidence might render the trial unfair.[282]

The threshold we provisionally propose achieves this.

4.177 We have considered the tests used in Canada and Scotland. They both focus on the key elements that should be considered in relation to admissibility: the probative value of the evidence and its risk to the administration of justice. However, we are concerned that weighing the two concepts risks reducing the complex issues to a binary approach. As Gotell has argued, the Canadian model can result in a battle of privacy rights versus fair trial rights. Factors that structure the discretion are important in ensuring that sufficient account is taken of all the relevant circumstances and impacts the evidence may have. In the next section we will consider what factors the court should be required to take into account when making this evaluation. However we think there is also value in a threshold that encourages more holistic consideration. The test we propose requires that SBE must have substantial probative value (enhanced relevance) and in addition, its admission must not significantly prejudice the proper administration of justice. To meet the first hurdle, only the probative value is considered. If it is substantial, the court must then go on to consider all risks to the proper administration of justice. Only if it will not significantly prejudice the administration of justice should it be admitted.

4.178 This approach requires judges to consider the probative value of the evidence separately from the risk of prejudice. This does not mean that they must be considered independently; often the probative value of evidence will also be relevant to whether there is a risk of prejudice to the administration of justice. However, as described in paragraph 4.174 above, there are many factors that are relevant to the administration of justice. Our proposed test requires consideration of all of the relevant risks, including the risks of both admitting and excluding the evidence.

4.179 This approach should lead to clear decision making and robust analysis of probative value. With such a threshold, we provisionally conclude that a structured discretion model is a preferred framework for restricting SBE than the current gateways framework under section 41.

What should the "structure" of the discretion include?

4.180 The benefit of a structured discretion model is the ability to specify the factors that should be considered when determining whether to allow the admission of SBE. The rationale for restricting its admission can form part of the factors for consideration. This means judges would have to address the extent to which risks associated with admission and exclusion would apply in individual cases.

4.181 In Scotland, the legislation directs that the "proper administration of justice" includes:

(1) appropriate protection of a complainer's dignity and privacy; and

[282] Law Com 273 at 9.34.

(2) ensuring the facts and circumstances of which a jury is made aware are relevant to an issue before the jury, and commensurate to the importance of that issue to the jury's verdict.[283]

4.182 The reference to the complainant's dignity and privacy is an important part of the rationale for restricting such evidence. Lord Hutton in *A (No 2)* observed that the legislation has as an objective of "great importance":

> To ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant. [284]

4.183 Dignity and privacy are also found in one of the factors listed in the Canadian provision. The factor relating to the complainant's right to privacy is one of the two most commonly cited in judicial reasoning in Canada (along with the legal rights of the defendant).[285] Thomason has argued that the potential infringement of the complainant's right to privacy is the only "legitimate justification for limiting the admission" of SBE.[286] The Canadian provision also lists as a factor "the right of the complainant and of every individual to personal security and to the full protection and benefit of the law".

4.184 The second factor in the Scottish provisions ensures the evidence has relevance to the main issues in the case. The requirement it be "commensurate" to the importance of the issue would help to filter out relevant evidence that goes only to minor issues. Similarly, Canada includes as a factor "whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case".[287] Such factors direct judges to consider whether the SBE is required to help the jury arrive at a safe verdict. We have proposed that the evidence must have substantive probative value as part of the threshold test.

4.185 The Canadian model includes as its first factor "the interests of justice, including the right of the accused to make a full answer and defence".[288] We have proposed that the threshold test include consideration of significant prejudice to the proper administration of justice. The defendant's right to a fair trial is a fundamental part of that test. Where evidence is necessary for a fair trial the proper administration of justice will not be significantly prejudiced by its admission. There is value in including a factor identifying the defendant's right to a fair trial for explicit consideration. It will ensure due regard is given to this right both in the deliberation and the written reasoning, enhancing transparency. However, there is a concern that including this

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283 Criminal Procedure (Scotland) Act 1995, s 275(2)(b).

284 [2001] UKHL 25; [2001] 3 All ER 1 at [142].

285 L Gotell, "When privacy is not enough: Sexual assault complainants, sexual history evidence and the disclosure of personal records" (2005-2006) 43 *Alberta Law Review* 743, 766.

286 M Thomason, "Draft s.41 Reform – Briefing Note" (2022).

287 Criminal Code (Canada), s 276(3)(c).

288 Criminal Code (Canada), s 276(3)(a).

factor as part of a list suggests that other factors could be given equal or more weight. It would not be right to suggest that admission necessary for a fair trial can be outweighed by other factors.

4.186 The Canadian provision also includes "society's interest in encouraging the reporting of sexual assault offences".[289] Brewis and Jackson have suggested this, along with the defendant's right to a fair trial should be the key factors for determining the admissibility of SBE. McGlynn has also argued this is an important factor.[290] However, Thomason has critiqued this approach. He has argued that the impact on future complainants should not be a factor in a present case as the liberty of the current defendant must have priority.[291]

4.187 A criminal justice system that discourages complainants from reporting crimes and giving evidence to support prosecutions loses legitimacy. As we explained in our previous report on bad character evidence:

> The feelings of the witness are a matter of public interest – witnesses who undergo humiliating or distressing cross-examination will report this experience to others, and witnesses will be deterred from testifying.[292]

When complainants have confidence in the criminal justice system, they will be encouraged to report and support prosecutions, helping ensure a fairer process. This is a legitimate aim, and of particular relevance in sexual offences and the handling of SBE. Including this as a factor would encourage consideration of these benefits as part of the threshold test. It would not necessarily mean that it could outweigh other factors. However, there is a risk that inclusion in a list of factors could give impact on future complainants disproportionate relevance in a determination of admissibility of evidence in present cases.

4.188 The Canadian provision also lists as a factor "the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury".[293] This relates to the prejudicial effect of the evidence. Restricting evidence that causes such sentiments can help remove bias from the role of fact finding. Both the Canadian and Scottish provisions exclude evidence that supports rape myths or misconceptions. Even when evidence is not admitted with the intention or purpose of introducing such myths or misconceptions, the risk that it may still do so should be considered.

4.189 Finally, the Canadian provision includes a "catch all" provision, allowing the judge to consider "any other factor" that they find relevant.[294] Similarly, when determining whether to admit evidence of a defendant's bad character (discussed further in Chapter 5), the court is required to consider a list of factors "and any others it

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289 Criminal Code (Canada), s 276(3)(b).

290 C McGlynn, "Challenging the law on Sexual History Evidence: a response to Dent and Paul" [2018] *Criminal Law Review* 216-228.

291 M Thomason, "Draft s.41 Reform – Briefing Note" (2022).

292 LC 273, at 9.20.

293 Criminal Code (Canada), s 276(3)(e).

294 Criminal Code (Canada), s 276(3)(h).

considers relevant".[295] This provides a level of flexibility, allowing the judge to determine in individual cases what is of relevance. If the list of factors is exhaustive, and without a form of "catch all", there is a risk that an important factor unique to a case or piece of evidence cannot be appropriately considered, leading to the evidence being inappropriately admitted or excluded. Such a factor can act as a sort of "safety valve" in the role of discretion to arrive at a safe conclusion. However, there is also a risk that allowing for consideration of "any other factor" undermines the clarity and consistency of reasoning that listed factors provides.

4.190 We can see force in the arguments for including these factors, that are all currently in the Scottish and/or Canadian provisions. We also note the concerns raised. We therefore welcome views on whether these factors, where they are not already an explicit part of the threshold test, should be part of the framework in England and Wales.

Judicial directions

4.191 As is the case now, upon admission of evidence or questioning related to the complainant's sexual behaviour, judges may consider giving a direction to ensure the aims of the framework are met. Judicial directions are considered in more detail in Chapter 10. Here we only raise the possibility that directions could be used alongside this framework. For example, a judge could give a direction:

(1) when SBE is admitted, to explain what the evidence is to be used for and what it is not to be used for (such as reliance on generic myths that have no factual basis);

(2) if SBE has been permitted through the framework, but when adduced at trial has been used in such a way that it gives rise to a prejudice not foreseen at the application (a direction could help mitigate against that evidence being given undue prejudicial weight);

(3) if SBE is adduced without an application being granted.

4.192 The threshold and application process for the admission of SBE should provide the greatest protection against the associated risks. However, directions can have an important role in further mitigating against the risk of prejudice in decision-making when juries hear evidence of a complainant's sexual behaviour. These are examples when, in some factual scenarios, a direction may help, though one will not be appropriate in all cases. For example, where the threshold for admission is met and the risk of prejudice is considered low, a direction may draw attention to an impermissible myth rather than protect against it. A direction may assist if SBE is admitted but the risk of prejudice is still significant. Directions can also help to counter the negative impact when SBE is adduced without prior permission. Given the variability of the circumstances in which SBE is adduced, judges are best placed to determine whether a direction is needed and if so, whether it should be given when the evidence is adduced or in summing up, and what it should contain.

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[295] CJA 2003, s 100(3).

Conclusion

4.193 From the above analysis, we provisionally conclude that it is appropriate to restrict the use of SBE to protect against the improper use of myths and humiliating intrusive questioning, but to allow some forms of SBE to be admitted where necessary for a fair trial. We provisionally propose that a structured discretion model with a suitably high threshold for admission and a list of factors that must be considered is the best way to achieve the aims of rape shield legislation in a manner consistent with the defendant's right to a fair trial.

Consultation Question 18.

4.194 We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence.

Do consultees agree?

4.195 We provisionally propose that there should not be a complete ban on the admission of third-party sexual behaviour evidence.

Do consultees agree?

Consultation Question 19.

4.196 We provisionally propose that sexual behaviour evidence should only be admissible if:

(1) the evidence has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

Do consultees agree?

Consultation Question 20.

4.197 When the judge is deciding whether sexual behaviour evidence:

(1) has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice,

and therefore can be admitted, which, if any, of the following factors should they consider:

(a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

(b) the interests of justice including the defendant's right to a fair trial;

(c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and

(d) the risk of introducing or perpetuating myths or misconceptions.

4.198 Are there any other factors that should be included in the legislation that the judge should consider when deciding whether to admit sexual behaviour evidence?

4.199 Should the list include "any other factor that the judge considers to be relevant to the individual case"?

Procedure

4.200 Many practitioners and judges have told us that the current procedure for applications to admit evidence under section 41 works well. The current procedure requires timely, written applications which are essential to ensure appropriate scrutiny. There is concern that the procedural rules are not always complied with. For example, applications are not always made within the required timeframe, and can arise late in the proceedings.[296] Sometimes applications can only be made late in the proceedings if the need for an application only arises during the course of the trial, for example. There are also resourcing issues in the criminal justice system that can cause the delays and non-compliance noted in research. While these issues are not unique to SBE applications, there are some amendments that could help improve compliance with procedure rules in this context. We discuss in Chapters 8 and 11 whether there could be better use of pre-trial hearings to help ensure, wherever possible, applications relating to SBE are heard in advance of the trial commencing.

[296] See para 4.55 above; the CBA Report (2018); M Thomason, "Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials" [2021] *Criminal Law Review* 727, 747.

4.201 Applications to admit SBE should continue to include the detail of the evidence sought to be admitted, the purpose for which its admission is sought, and drafts of any proposed questions. We have described the criticisms of the structured discretion model above. These include concern from Canada that there is a lack of clarity as to how the factors are weighted and the rationale for decision making. It is worth noting that critics of various models have suggested that implementation is as problematic as the legislative framework.[297] A robust application procedure is essential, as is a robust procedure for decision making and recording.

4.202 Transparency helps with consistency and public confidence. Requiring judges to provide written reasons for denying or allowing an application will ensure that reasoned decisions are made and articulated, help improve scrutiny of decision making, and increase transparency. Written reasons should include the consideration of the required factors.[298] Requiring written reasons may necessitate more judicial time than delivering an oral judgment. This will have resource implications, and may possibly result in delays, particularly if the application is heard mid-trial. However, delays should be minimal: applications are not lengthy, the issues are relatively narrow, and applications should be decided where possible pre-trial. Further, we think that the practical impact of requiring written reasons is justified by the greater transparency and scrutiny they provide. Transcripts of oral judgments are not a suitable alternative as they are not always available and, when they are, they can be costly and time consuming to obtain. If it is to be possible to appeal a decision on SBE (see Chapter 11), a timely written record of the decision is essential.

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297 The Gillen Review undertook a comparative analysis of SBE across comparable jurisdictions. It found that the research indicated that the problem is not the statutory regime adopted, but the failure of the judiciary in the exercise of their discretion to apply the provisions sufficiently robustly or correctly: The Gillen Review (2019).

298 Written reasons would be prepared (and if relevant, reported) in a way that ensures the anonymity of the complainant as they are so entitled.

Consultation Question 21.

4.203 We provisionally propose, as is currently required, that applications to admit sexual behaviour evidence should be made in writing and that the application should include: detail of the evidence sought to be admitted; the purpose for which its admission is sought; and drafts of any proposed questions.

Do consultees agree?

4.204 We provisionally propose that the judge should be required to provide written reasons for their decision on an application to admit sexual behaviour evidence.

Do consultees agree?

4.205 We provisionally propose that the written reasons should address all of the factors judges are required to consider.

Do consultees agree?

What should be included as "sexual behaviour evidence"?

4.206 Currently SBE is defined as:

> Any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a))[299] anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.[300]

4.207 Blackstone's Criminal Practice describes the definition as "very wide".[301] It includes primary evidence (of the sexual behaviour itself) and secondary evidence (of things associated with sexual behaviour such as abortion, pregnancy, and paternity suits).[302] This is described in more detail at paragraphs 4.44 above.

4.208 A broad definition increases protection for the complainant; anything that falls within "sexual behaviour" would be subject to restriction and scrutiny. Evidence that does not fall within the definition of "sexual behaviour" would be subject only to the usual rules of evidence.[303] We are not aware of any significant criticism of the current breadth. There are however four areas worthy of further consideration for any new framework:

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299 The similarity gateway—where the evidence is of sexual behaviour said to be so similar to something that took place as part of the alleged incident—and the rebuttal gateway.

300 YJCEA 1999, s 42(1)(c).

301 Blackstone's Criminal Practice 2022, F7.28.

302 *Rook and Ward* (2021), 26.39.

303 Evidence that falls outside the definition of "sexual behaviour" for these purposes may still be subjected to broader provisions aimed at reducing the impact of myths and misconceptions in criminal trials. See Chapters 10 and 13 for more detail.

modern forms of sexual behaviour; a broader view of "sexual"; sexual orientation; and aligning the definition with the Sexual Offences Act 2003.

Are modern forms of sexual behaviour involving social media sufficiently included?

4.209 Two academics have suggested that the definition of "sexual behaviour" should more clearly include sexual communications. McGlynn, while noting it is already broad, recommended the definition of sexual behaviour include implied sexual behaviour, such as engaging in "risqué conversations".[304] Leahy has suggested that reference to "sexual communications" in the definition would more effectively include communications data. The Canadian legislation makes express provision: "sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature".[305] The case law in this jurisdiction suggests the current definition is flexible enough to include more modern forms of sexual behaviour, such as sexual communications on social media.[306] Rook and Ward have suggested that the current definition in England and Wales will produce the same result as the Canadian express provision. They say this is "given the wide interpretation given to 'any sexual behaviour or experience' in s.42(1)(c), and in particular in *Ben-Rejab*".[307] There is scant evidence to suggest that modern forms of sexual behaviour, including sexual communications, are not appropriately caught by the current definition of "sexual behaviour", such that further express provisions are required.

Consultation Question 22.

4.210 Are consultees aware of any more modern forms of communication that are not currently covered by the definition of sexual behaviour in section 41 of the Youth Justice and Criminal Evidence Act 1999, that should be covered by any restrictions on sexual behaviour evidence?

4.211 Should the legislation defining sexual behaviour include explicit reference to forms of communication and social media as a form of sexual behaviour?

A broader view of "sexual"

4.212 We have established that the definition of sexual behaviour is broad. It can include evidence of a complainant's sexual reputation.[308] It is not clear whether it does, or

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304 C McGlynn, "Rape trials and sexual history evidence: reforming the law on third-party evidence" (2017) 81(5) *Journal of Criminal Law*, 367, 389.

305 Criminal Code (Canada), s 276(4).

306 For example, answering questions on a sexually explicit online quiz: *R v Ben-Rejab* [2011] EWCA Crim 1136. In other jurisdictions without express provision, case law has interpreted the relevant definitions to include more modern forms of sexual communication activity. For example, in New Zealand, the Court of Appeal similarly held that sending sexually explicit text messages came within the restrictions on SBE (under s 44 of the Evidence Act (NZ) 2006): *R v Singh* [2015] NZCA 435 at [25]. For detailed discussion of the meaning of "sexual behaviour" in the New Zealand provisions see E McDonald, *Rape Myths as Barriers to Fair Trial Process*, 2020, ch 5.

307 *Rook and Ward* (2021), 26.218.

308 Home Office review (2006), p 13.

should, include behaviour said to be "provocative" such as the complainant's clothing or dancing. There is a pervasive myth that suggests a complainant who was acting or dressing "provocatively" was "up for it". In public discourse, the perpetuation of this myth in sexual offence trials is commonly criticised.[309] It is important that such myths do not improperly influence decision making in sexual offence trials. One way to achieve this is to ensure such evidence is caught by the restrictions on SBE.

4.213 Where it is relied on to suggest sexual reputation, or sexual activity, it may well already be caught by the restrictions. However, if it is not said to relate to sexual activity or reputation, it could expand the definition of "sexual behaviour" too far. We are conscious that defining dancing or clothing as "sexual behaviour" may perpetuate the same myth: that "provocative" dancing or clothing suggest a willingness or tendency towards [certain] sexual behaviour. However, there is benefit in bringing such prejudicial evidence within appropriate restrictions. The benefits could be balanced against the risk of perpetuating the myths by such labelling: the same framework that applies to SBE could apply to evidence of the complainant's dancing or clothing, without including it in the definition of "sexual behaviour".

4.214 There are other mechanisms for addressing myths and misconceptions that do not fall within restrictions on SBE, explored in Chapter 10, that may be better placed to address the concerns. For example, the Crown Court Compendium provides guidance for judges on jury directions that may be appropriate to protect against "unwarranted assumptions". The Compendium suggests a direction may be necessary when evidence or arguments suggest that "clothing said to be revealing or provocative" is evidence of consent, or the defendant's reasonable belief in consent.[310]

Consultation Question 23.

4.215 Should the restrictions on sexual behaviour evidence also apply to evidence relating to clothing worn by the complainant, or behaviour such as dancing, even when such evidence does not fall within the definition of sexual behaviour?

Sexual orientation as sexual behaviour

4.216 Currently a complainant's sexual orientation may fall within the definition of sexual behaviour, where it is "suggestive of sexual activity".[311] We are aware that some myths and misconceptions impact male complainants differently, particularly when they relate to sexual orientation. For example, a male complainant's sexual orientation is more likely to be considered relevant to the issues in a case than it would be for a female complainant.[312] There is also a risk that evidence that reveals a complainant's

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309 See, for example, a recent exhibition by the University of Hertfordshire that displayed the clothing worn by sexual assault victims: University of Hertfordshire "University of Hertfordshire exhibition tackles sexual assault myth" (29 October 2021).

310 Judicial College, *Crown Court Compendium Part I* (December 2020) 20-4.

311 *Rook and Ward* (2021), 26.43 and *R v T* [2021] EWCA Crim 318.

312 For further discussion of rape myths, see Chapter 2. For example, there is an established myth that male rape only takes place between gay men.

non-heterosexual orientation may perpetuate homophobic myths such as that gay men are more likely to engage in risky sexual behaviour, to have consented to sex with anyone, or the homophobic view that gay men are less worthy of protection by the criminal law. Professor Phil Rumney has told us that for male complainants, questions that aim to introduce their sexuality to the jury are not always considered "sexual behaviour" and are therefore not restricted. Where questions relating to sexuality are suggestive of sexual behaviour, they should be within the definition and therefore subject to restrictions. Where the evidence is not suggestive of sexual behaviour, the general rules of evidence should apply. Where evidence of a complainant's sexuality is irrelevant to the case, it should be inadmissible. In Chapter 10 we explore further mechanisms to restrict evidence that is introduced to perpetuate myths and misconceptions beyond SBE restrictions.

Should the definition of "sexual" in the Sexual Offences Act 2003 apply?

4.217 The "sexual" part of "sexual behaviour" is not further defined in the YJCEA 1999. In *Mukadi*, the Court of Appeal stated:

> In many cases it will be very easy to say what is or is not sexual behaviour, but there are obviously borderline cases in which the sexuality of what happens may not be so apparent. It would not be possible to try to define sexual behaviour further. Indeed, it probably would be foolish to do so. It is really a matter of impression and common sense.[313]

4.218 Professor Temkin et al in the 2006 Home Office review noted that section 78 of the Sexual Offences Act ("SOA") 2003 provides a definition that could be useful for the purposes of section 41.[314] Section 78 defines "sexual" as something that is either sexual by nature, or something that may be sexual by nature, and is sexual because of the circumstances or the purpose of any person in relation to it. It therefore means that the complainant's purpose (or that of anyone else involved) can be considered when determining if behaviour that objectively may be sexual, was sexual in the circumstances. Dr Thomason has also suggested to us that the definition of "sexual" for the purposes of restrictions on SBE should be aligned with the definition of sexual under the SOA 2003.

4.219 The SOA 2003 definition is well-known by courts and practitioners. We are not aware of any evidence that "sexual behaviour" has been defined or interpreted in a way that is contrary to the definition of sexual in the SOA. We would welcome any evidence and views on this issue.

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313 [2003] EWCA Crim 3765 at [14] (Sir Edwin Jowitt).

314 Home Office review (2006) p 13.

Consultation Question 24.

4.220 Are consultees aware of any evidence that suggests the definition of "sexual behaviour" in section 42 of the Youth Justice and Criminal Evidence Act 1999 is interpreted differently to, or at odds with, the definition of "sexual" in section 78 of the Sexual Offences Act 2003?

4.221 Should the definition of "sexual" in section 78 of the Sexual Offences Act 2003 apply to any definition of "sexual behaviour" for the purposes of restricting sexual behaviour evidence in criminal proceedings?

Relationship evidence

4.222 Above, at paragraphs 4.89, we discussed how some important background "relationship" evidence may be excluded by section 41. We agree that relationship evidence can be important explanatory evidence, admitted for a different purpose than SBE usually is. It is not right that jurors are asked to determine the facts of a case without knowing an important part of the context. We are of the view that this evidence should not be restricted by rules restricting SBE, where it is necessary background or explanatory evidence. If it remains within the scope of the rules restricting SBE there is a risk lawyers and judges will be forced to use more creative routes to allow it, undermining the integrity of the framework.

4.223 We acknowledge the risk that some relationship evidence will be used to introduce issues relating to sexual behaviour that should be restricted. In the case of *Goldfinch*, the Supreme Court of Canada warned that "even relatively benign relationship evidence must be scrutinised and handled with care".[315] Such scrutiny should ensure the evidence is only background evidence rather than evidence of what is "typical" conduct between the complainant and defendant. Rook and Ward also warn that contextual relationship evidence "risks engaging" a myth.[316] Moreover, there is a concern that regardless of intent when admitted, once before the jury they may rely on it for other purposes and use it as evidence of an issue in the case, such as consent or credibility.[317] This is a risk with all SBE.

4.224 We are provisionally of the view that relationship evidence – when it is adduced as background or explanatory evidence – should not be subjected to the same restrictions as SBE. Where relationship evidence goes beyond this purpose and seeks to, or risks, introducing or relying on a myth or misconception, or being treated as

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315 *R v Goldfinch* [2019] SCC 38, (Abella, Karakatsanis, Gascon and Martin JJ). In that case a defendant had been acquitted of rape. At trial he had been permitted to introduce evidence that he had been in a sexual relationship with the complainant as important contextual evidence that was not in support of the "twin myths". The Crown appealed the acquittal and argued the relationship evidence should not have been admitted. The Supreme Court dismissed the appeal.

316 *Rook and Ward* (2021), 26.230.

317 N Kibble, "Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1" [2005] *Criminal Law Review*, 190, 200-201.

evidence of an issue in the case, it should instead be within the scope of the restrictions as SBE.

4.225 Academics have suggested ways of achieving this limitation; Birch has asked if it is evidence that the jury "can be expected to grasp the case without".[318] In our previous report on character evidence we suggested that evidence of a defendant's misconduct may be of value where "it is so much a part of the factual background that the fact-finders would be misled by incomplete evidence, or the case would be incomprehensible to them were it not to be adduced in evidence".[319]

4.226 Relationship evidence may overlap with bad character; for example, where the prosecution seeks to admit evidence that the complainant and defendant were in a violent relationship at the time. This may also have elements of specific sexual behaviour, where the relationship was sexually violent. In such cases, the bad character or SBE framework should apply as appropriate. Where elements of relationship evidence satisfy the relevant definitions of bad character or SBE, and are sought to be admitted as evidence of something other than the fact of the relationship itself, it is appropriate that the relevant restrictions apply.

Consultation Question 25.

4.227 We provisionally propose that relationship evidence that is relevant as explanatory or background evidence only, should not be within the scope of any framework that restricts sexual behaviour evidence.

Do consultees agree?

4.228 We invite consultees' views on whether there should be any restrictions on relationship evidence to ensure that it is only admitted as background or explanatory evidence, and what form those restrictions should take.

When should the framework apply?

4.229 As we have discussed above, section 41 applies to a closed list of "sexual offences" defined in section 62 of the YJCEA 1999. It is possible that prosecutions of nonsexual offences will involve SBE as relevant to an issue in the case. For example, in a case of battery that occurred during consensual sexual behaviour, the defendant may seek to argue that the complainant consented to the harm, relying on evidence of previous consensual sado-masochistic sex. The evidence and questioning may be identical to the evidence or questioning in a sexual offence trial where consent to sado-masochistic sex was in issue. In prosecutions for the offence of controlling or coercive behaviour,[320] the defendant may seek to question the complainant about their sexual relationship to refute the allegation it was controlling or coercive. This does raise the

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318 D Birch, "Rethinking sexual history evidence: proposals for fairer trials" [2002] *Criminal Law Review* 531, 542.

319 LC 273 at 5.14.

320 Under the Serious Crime Act 2015, s 76.

question whether there is any good reason to deny a complainant the same protections based on the offence charged. Whenever SBE is sought to be admitted as relevant to an issue in the case, the same framework could apply.

4.230 If evidence of the sexual behaviour of a witness (including the complainant) or victim (for example, of a homicide) is deemed relevant in a trial of a nonsexual offence, and is therefore admissible, such evidence and questioning poses many of the same risks as discussed throughout this chapter. Myths and misconceptions about the witness or victim based on their sexual experience may influence decision-making risking an unfair trial and unsafe verdict. The witness, if giving oral evidence, may be subject to disproportionately humiliating questioning about their private life. However, the extent of this will depend on the facts and the offence. For example, in a case involving a charge of murder and the so-called "rough sex" defence, where a defendant seeks to adduce evidence of previous "rough sex" with the victim to support their case of consent. The considerations are of course different when such evidence relates to someone who is deceased, however there are still relevant considerations. We have been told that for the victim's loved ones, hearing such evidence causes additional upset. Asides from the impact on the individuals, the risk of prejudice may still be present in all such cases where SBE is used.

4.231 The Federal model in the US is wider than section 41 in that it applies to any civil or criminal proceeding concerning sexual misconduct. This has the advantage of protecting complainants from the recognised harms – usually expressed as distress and humiliation – of questioning on their sexual behaviour, which is not limited to rape and sexual assault cases.

4.232 There are other offences where SBE may more obviously be relevant because there is a sexual component to the offending behaviour. These include murder or manslaughter where a so-called "rough sex" defence is advanced; general criminal conduct where there is a surrounding sexual motive or sexual conduct; or specific offences such as intentional or reckless sexual transmission of infection under section 20 of the Offences Against the Person Act 1861. There are different ways of expanding the offences to which an SBE framework applies beyond the current list in section 62 of the YJCEA 1999. First, more offences with a sexual component, such as those identified above, could be added to section 62. We note that the offences as defined by section 62 already include some more distantly sexual offences such as burglary with intent to rape or human trafficking offences with intent to sexually exploit. However, there is no easy way to identify which offences may have a sexual component. The creation of an extended list of relevant offences could still risk creating arbitrary distinctions. Secondly, the SBE framework could simply apply in any prosecution whenever evidence that constitutes SBE is sought to be admitted. This would avoid arbitrary distinctions and allow the facts of each case to dictate whether the framework is applicable. The framework would apply in the same way as we have discussed in relation to sexual offences: SBE can be admitted and questions asked if

the evidence meets the threshold for admission, and the restrictions do not apply to sexual behaviour that is part of the incident subject to the charge.[321]

Consultation Question 26.

4.233 Should the framework that restricts sexual behaviour evidence apply whenever sexual behaviour evidence is sought to be admitted, rather than being limited to a particular class of offences?

Should the restrictions apply to both the prosecution and defence?

4.234 The restrictions under section 41 only apply to evidence sought to be adduced on behalf of the defendant. The prosecution is not subject to such restrictions and can introduce SBE without the same scrutiny. There is evidence that prosecutors adduce SBE that was or could be the subject of a defence application under section 41.[322] While there is evidence that SBE is adduced by prosecution, it is less clear that it is evidence that should not have been admitted.

4.235 Rook and Ward note that the second most common gateway used to admit SBE is the rebuttal gateway, because the prosecution lead SBE – as background evidence, evidence of virginity, or of pregnancy from an alleged rape.[323] SBE may be used because it has important probative value for the prosecution case.

4.236 The prosecution may also agree to adduce SBE even if it is not a key part of their case. This can have a protective effect for the complainant. For example, the prosecution can agree to lead an issue to avoid the complainant being cross-examined on it. It may also be for practical reasons; where evidence is not controversial, to save on court time deciding an application. However, without scrutiny we cannot be sure that evidence is only being adduced this way when it is uncontroversial, or to protect the complainant from unnecessary cross-examination. There is a risk that SBE may be adduced by the prosecution for practical reasons (such as trial management), or because of lack of experience or understanding of the issues and implications, without full consideration of the risks and impact on the complainant's privacy.

4.237 Further, the relationship between the complainant and the prosecution is not always straightforward.[324] While the prosecution aims to seek justice for victims, it does not

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321 For example, in a case of battery that occurred during consensual sexual activity, evidence about the sexual activity that was occurring when the alleged battery occurred would not be subject to the SBE threshold. However, if the defendant sought to adduce evidence that they had previously had consensual sado-masochistic sexual activity with the complainant, that evidence would be subject to the SBE threshold.

322 The CBA Report (2018), p 8. Members of the judiciary have also advised us that they have seen SBE introduced in trials outside of section 41 by the prosecution.

323 *Rook and Ward* (2021), 26.64.

324 See for example, the Joint Inspection which raised concern with the lack of quality communication post-charge from prosecutors to the complainant. In their key findings they cite "lack of clarity about the role of the CPS in contacting victims post-charge, with some prosecutors openly telling us that they don't think this

represent them in the same way defence counsel represent the defendant. Without scrutiny, it is possible, therefore, that the prosecution may adduce SBE that is humiliating for the complainant and that relies on myths or misconceptions, whether knowingly or not. Prosecutorial decision making may be influenced by the same myths and prejudicial beliefs that are present amongst the general public.[325]

4.238 Regardless of the intent or reasoning of the prosecution in adducing evidence, once it is before the jury there is a risk that it will be relied on to confirm a myth or misconception. When the evidence has been scrutinised in an application to admit SBE, the judge has had the opportunity to consider that risk alongside the probative value of the evidence. Where SBE is admitted as prosecution evidence "subject only to a filter of basic, rather than heightened, relevance and probative value", this higher threshold has not been satisfied.[326]

4.239 Similar to the position in England and Wales, Northern Ireland, Ireland, and Western Australia have rape shield provisions that only restrict evidence or questions about a complainant's sexual history by or on behalf of the defendant.[327] By contrast, in Scotland[328] and New South Wales,[329] the restrictions on SBE explicitly apply to both prosecution and defence. In Scotland, a consultation sought views on whether to maintain the previous exemption that meant that the prosecution were not subject to the same SBE rules as the defence. A "substantial majority" were against the exemption continuing, to ensure "greater accountability".[330] The Scottish Executive decided to extend the SBE (and character evidence) restrictions to the prosecution as in its view the admissibility of such evidence should be a matter for the court to decide and not for the parties. They argued that "applying the same rules to both prosecution and defence creates greater 'equality of arms' and is likely to look fairer to an outside observer".[331] Academics have suggested that this also protects against the defence exploiting SBE inadvertently introduced by the prosecution.[332] The Scottish Executive did not envisage this requirement imposing a heavy burden as prosecution applications would be rare.[333] The New South Wales Law Reform Commission

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is part of their role": Criminal Justice Joint Inspection, "A joint thematic inspection of the police and Crown Prosecution Service's response to rape – Phase two: Post-charge" (25 February 2022) p 5.

325 See for example CPS, *Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes* (21 May 2021). In Chapter 2 we discuss further the prevalence of rape myths amongst the public, and those more directly involved in the criminal justice system.

326 *Rook and Ward* (2021), 26.64.

327 Criminal Law (Rape) Act 1981 (Ireland), s 3; Criminal Evidence (Northern Ireland) Order 1999, art 28; Evidence Act 1906 (WA), ss 36B-36BC.

328 Criminal Procedure (Scotland) Act 1995, ss 274 and 275; HM Inspectorate of Prosecution in Scotland, *Inspection of Crown Office and Procurator Fiscal Practice in relation to section 274 and 275 of the Criminal Procedure (Scotland) Act 1995* (2022), p 9.

329 Criminal Procedure Act 1986 (NSW), s 294CB(5).

330 Sexual Offences (Procedure and Evidence) (Scotland) Bill, Policy Memorandum, paras 37 and 48.

331 Sexual Offences (Procedure and Evidence) (Scotland) Bill, Policy Memorandum, paras 37.

332 F Davidson, "Evidence" in EE Sutherland and KE Goodall (eds), *Law Making and the Scottish Parliament: The Early Years* (2011); Scottish Executive, *Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials: a Pre-legislative consultation* (2000), paras 98, 123-128.

333 Sexual Offences (Procedure and Evidence) (Scotland) Bill, Policy Memorandum, para 37.

recommended that SBE restrictions should extend to the prosecution as this would ensure that all SBE is "properly scrutinised by the court before it is admitted".[334]

4.240 The Australian Law Reform Commission has interpreted the rape shield provisions in the majority of Australian jurisdictions as applying to both parties.[335] In Canada, there is a general ban on SBE used to support the "twin myths", with provision for admitting evidence where it meets certain conditions.[336] The conditions for admissibility explicitly refer to evidence sought to be adduced on behalf of the accused. However, the ban applies to evidence generally, not only that sought to be adduced by one party. In the recent case of *Barton*, the Supreme Court of Canada clarified that the principles in the case of *Seaboyer* that led to the general ban applying to both the Crown and the defendant as the "reasoning dangers inherent" in SBE are "potentially present regardless of which party adduces the evidence".[337] In Canada, therefore, the legislative provision for admitting SBE applies to the defence, but the Crown are subject to the guidance in *Seaboyer* and a hearing without the jury present should be held to determine the admissibility of Crown-led SBE.[338]

4.241 Professor McGlynn has recommended an extension of restrictions to prosecution evidence. She suggested this would root out the potential for the prosecution's evidence to undermine the aims of SBE legislation.[339] One academic and legal practitioner has told us that they are in favour of following the decision in *Barton*, in which the Supreme Court of Canada held that the Crown is bound by the legislative test and cannot make other agreements to admit evidence. One member of the judiciary also expressed support for requiring the prosecution to make applications to admit SBE. It was argued in the case of *R v Soroya*[340] that section 41 should be read as applying to the prosecution otherwise it would infringe the principle of equality of arms between parties.

4.242 Arguments in support of extending the restrictions to the prosecution have referenced "equality of arms". There are many aspects of trial proceedings where there are justified differences between the rules that apply to the prosecution and the

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334 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)* (November 1998), p 157.

335 Australian Law Reform Commission, *Uniform Evidence Law* (2005), p 682.

336 Criminal Code (Canada), s 276.

337 *Barton* [2019] SCC 33 at [80].

338 *Barton* [2019] SCC 33 at [80].

339 C McGlynn, "Rape trials and sexual history evidence: reforming the law on third-party evidence" (2017) 81(5) *Journal of Criminal Law* 367, 389.

340 [2006] EWCA Crim 1884. See also Blackstone's Criminal Practice 2022, F7.29. In the case of *Soroya*, the defendant had been found guilty of rape. The prosecution had adduced evidence that the complainant told the defendant before the rape that she was a virgin, which the complainant subsequently said was a lie to try and dissuade the defendant from attacking her. She admitted that she had had consensual sex once previously, a month before the rape. The prosecution did not seek to rely on evidence of her previous sexual behaviour or lack of experience. The defendant appealed his conviction. The defendant argued that he was disadvantaged as he was restricted from cross-examining the complainant about her sexual history in this context, to demonstrate that the complainant had more than limited sexual knowledge. He claimed this restriction breached his right to a fair trial. The Court of Appeal dismissed his appeal.

defence.[341] However, in this context we do think there is force in the argument that it is appropriate for the defence and the prosecution to be in an equivalent position. This is first because the risks and harms associated with SBE can arise regardless of which party adduces it, or the purpose for which it is adduced. Secondly, neither party represents the complainant and their interests. Therefore, both are in the same position of using SBE where relevant to advance their case which may or may not be at odds with the privacy interests of the complainant.

4.243 However, judges generally do not wish to interfere in prosecutorial decision-making. There are also implications for court time and resources in placing an additional requirement on the prosecution. It could be argued that without strong evidence that inadmissible evidence is being adduced this way, or that the complainant is unduly distressed by it, that use of court time is not proportionate.

4.244 We are provisionally persuaded that the arguments for restricting SBE are applicable regardless of who adduces the evidence. Therefore it is appropriate for the restrictions to apply to all parties. The court has oversight and control of SBE when adduced by the defence. For consistency we think that they should retain such oversight and control for all SBE sought to be admitted at trial using the structured discretion proposed above. The effect of this would be that the prosecution would need to make an application to admit evidence where it relates to the complainant's sexual behaviour. This contrasts with the current position where no prosecution application is required (as evidence may be adduced by the prosecution without an application, including where the prosecution adduce SBE instead of or in response to a defence application) unless they seek to admit evidence under the defendant bad character provisions (in which case an application is required).[342] We recognise that this places an extra resource burden on the prosecution but we think this is justifiable given the importance of properly managing SBE.

4.245 Where it is important and relevant for the prosecution case, the threshold in the proposed framework should not be unduly difficult to meet. Our provisional view is that evidence currently being adduced by the prosecution legitimately and proportionately would continue to be admissible under the proposed framework. Further, where that evidence is background relationship evidence only,[343] it would not be subject to the SBE framework (see paragraphs 4.224 above). Extending the restrictions ensures the right level of scrutiny and prevents the admission of SBE outside of the restrictions.

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341 For further discussion of principled asymmetry in criminal trials, see Chapter 5.

342 See Chapter 5 for further discussion of the effect of this in relation to applications to admit bad character evidence relating to the defendant that includes evidence of the complainant's sexual behaviour such as evidence of a defendant's previous sexual violence towards the complainant.

343 For example, when presenting the relevant facts and history of the case.

Consultation Question 27.

4.246 We provisionally propose that any framework that restricts sexual behaviour evidence should apply to evidence sought to be admitted on behalf of both the defendant and the prosecution.

Do consultees agree?

Informing the complainant

4.247 A final procedural point is the requirement to inform the complainant about the application or outcome of an application. In Chapter 8 we consider the broader question of whether the complainant should have a right to be heard and be legally represented on applications relating to evidence that engages their right to privacy. We provisionally propose that complainants should have a right to be heard on applications to admit evidence of their sexual behaviour. This would mean that they are a party to the application (though not to the prosecution as a whole) and that they should have access to legal representation for that application. If this were to be the case, the complainant would be served the application when it is served on the parties to the proceedings and the court. Here, we consider when the complainant should be informed of an application in the current circumstances when the complainant does not have a right to be heard on an application regarding evidence of their sexual behaviour.

4.248 At paragraph 4.58 above, we set out the current provisions for informing the complainant. We have heard from stakeholders that there is sometimes confusion over informing complainants. The CBA Report suggested that complainants are not always made aware of applications. The HMIPS review of the COPFS application of the provisions in Scotland similarly found that complainers were not always informed of the likely or actual outcomes of applications as required. They made recommendations for more clarity regarding the responsibility for informing complainers and ensuring compliance.[344]

4.249 Clarity of responsibility is beneficial. We consider that it is appropriate for the prosecution to have responsibility for informing the complainant of relevant decisions throughout the prosecution.

4.250 Currently there is only a requirement in the Criminal Procedure Rules to inform the complainant when a successful section 41 application has been made, in order to avoid causing unnecessary distress in relation to an unsuccessful application.[345]

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344 HM Inspectorate of Prosecution in Scotland, *Inspection of Crown Office and Procurator Fiscal Practice in relation to section 274 and 275 of the Criminal Procedure (Scotland) Act 1995* (2022), Recommendation 9.

345 CrPR r 22.3. CPS, *Legal Guidance, Rape and Sexual Offences, Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999* (21 May 2021) and CPS, *Speaking to witnesses at court* (27 March 2018).

Consultation Question 28.

4.251 We invite consultees' views on whether complainants, where they do not have a right to be heard as is currently the case, should be informed of an application to admit sexual behaviour evidence:

(1) when it is made;

(2) only when it is decided regardless of outcome; or

(3) only when it is successful.

CONCLUSION

4.252 The use of SBE is restricted in sexual offence prosecutions because it poses significant risk of introducing and relying on impermissible myths and misconceptions, causing serious injustice. It is also an invasive intrusion into the private life of complainants and can lead to humiliating and distressing questioning in court.

4.253 In this chapter we have considered the current framework and concluded that it requires reform. We have set out alternative frameworks and provisionally concluded that a structured discretion model with a high threshold for admission and robust procedural rules governing applications is best placed to achieve the aims of rape shield legislation. We acknowledge that all frameworks, including structured discretion, present problems.

4.254 We are also aware that structured discretion is seen as a less restrictive model than section 41. However, restrictiveness should not be the determinative factor when assessing the efficiency of rape shield legislation.[346] On balance we consider that a structured discretion model is more logical and coherent. With a suitably high threshold it would not "open the floodgates", but instead provide a clearer, more consistent mechanism for admitting evidence in the exceptional cases when it is required.

4.255 Our provisional proposals in this chapter seek to achieve the balancing exercise between article 6 and article 8 required by the ECHR, recognising the defendant's fundamental right to a fair trial whilst protecting complainants from unduly invasive questioning regarding their sexual experience.

4.256 In a fair trial, the jury is able to determine the truth based on relevant evidence and not myths or bias. They should be able to make findings of fact without being misled either by the evidence itself, or its absence. Short of a complete ban, any framework restricting the admission of SBE allows some SBE to be admitted in some cases. We acknowledge that regardless of the reason for its admission, once admitted it may enable jurors to rely on prohibited reasoning with myths and misconceptions tainting

346 See para 4.163 above.

their decision making. Indeed, Stark argues that reform of restrictions is not a "panacea", and that:

> More research is needed into how to improve reasoning with sexual history evidence once it has been admitted, and reduce the potential for biases to cause undue harm to the interests of complainants in cases involving sexual offending.[347]

4.257 While the extent to which juries are susceptible to rape myths is disputed,[348] as we explain in Chapter 2, the problems with myths and misconceptions in sexual offences prosecutions persist. Indeed, it is not just the risk of myth acceptance or perpetuation amongst jurors that causes concern. Legal professionals including the judiciary are also susceptible to rape myths which can pervade their decision-making unknowingly. The most effective form of rape shield legislation will mitigate this risk. Of the models we have considered, only a complete ban would achieve this. However, it would be contrary to the defendant's right to a fair trial. We consider in Chapters 9, 10, and 13 methods of reducing the impact of myths and misconceptions in sexual offence prosecutions more generally.

4.258 Finally, the issues considered in this chapter demonstrate how integral the rights, experience, and knowledge of the complainant are to effective and appropriate management of SBE. This gives rise to the question of whether the complainant's interests and views are sufficiently before the court when the court considers SBE applications. In Chapter 8 we consider this issue, alongside similar questions raised by applications to disclose and admit evidence from personal records, and ask whether complainants should have a right to be heard and access to independent legal advice and representation.

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347 F Stark, "Bringing the background to the fore in sexual history evidence" [2017] *Archbold Review* 8, 41.

348 See for example C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987; D Birch "Untangling sexual history evidence: a rejoinder to Professor Temkin" [2003] *Criminal Law Review* 370, 374. For fuller discussion of the evidence as to myth acceptance, see Chapter 2.

Chapter 5: Character evidence

INTRODUCTION

5.1 Evidence of a person's good or bad character may in some circumstances be admissible in a criminal trial. Evidence relating to a person's character may be relevant in different ways. It may suggest that the person should (or should not) be believed, which is to say it may go to credibility. It may suggest the person has (or does not have) a tendency to conduct themselves in a particular way, which is referred to as propensity.[1] Evidence of character will usually take the form of proving that the person has engaged in or perhaps abstained from some kind of conduct.[2] Character evidence may potentially be offered in respect of the defendant or a non-defendant, including a witness such as the complainant in a sexual offences prosecution.

5.2 In this chapter we examine the place of character evidence in rape and serious sexual offences ("RASSO") prosecutions. This chapter proceeds in four parts. The first provides an overview of the legal framework governing the admission of character evidence. The rules regarding admissibility will vary considerably depending on the circumstances, with key factors being whether the evidence relates to a defendant (in which case there will be particular caution not to allow prejudicial evidence) and whether the evidence goes to good character or to bad character. The next three parts of the chapter each examine an aspect of character evidence that is particularly relevant to RASSO prosecutions and that research and stakeholders suggest warrants attention.

5.3 Part two is concerned with evidence of the bad character of the defendant. We consider the position where there is evidence the defendant has engaged in misconduct – such as controlling or coercive behaviour, domestic abuse, violence or sexual misconduct – but has no convictions in relation to that misconduct. We conclude that the legislative framework can and does accommodate such evidence and so do not make provisional proposals for legislative change. We do, however, ask

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1 These are not the only ways in which character evidence may be relevant but, as explained below, they are key concepts, especially with respect to judicial directions; see para 5.88 below and *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367.

2 Historically, a defendant could introduce evidence of their general reputation to prove good character. Reputation was said to be the person's "general character founded on his general reputation in the neighbourhood in which he lives", and could be rebutted by evidence of bad reputation: *R v Rowto*n (1865) Le & Ca 520 at 529 (Cockburn CJ). General reputation was not to be proved by evidence of particular conduct, individual opinion, or the presence or absence of prior convictions: *Rowton* at 529-530. In the modern law, however, it has been observed that, although the common law remains intact on reputation evidence as it is retained under the Criminal Justice Act ("CJA") 2003, ss 99(2) and 118(1), "the law has moved well beyond *Rowton* and evidence of particular opinions and acts are routinely admitted, as is evidence of good character based on the absence of convictions", and "it is rare for evidence of general character founded on general reputation to be adduced in a modern criminal trial": *R v Del-Valle* [2004] EWCA Crim 1013 at [11]. We will not address the reputation strand because, as well as being of very limited contemporary application, the matters in contention in this chapter are not reliant on proof by reputation.

consultation questions about the extent to which the current law is sufficiently clear and certain, and about whether published guidance is needed in this area.

5.4 Part three addresses the admissibility of evidence of the complainant's good character. Specifically, we consider the differing positions of a defendant who can adduce good character evidence and a complainant for whom the prosecution rarely can adduce such evidence. We conclude and make provisional proposals that the position of the complainant should be addressed through jury directions, rather than change to the law governing admissibility. Aware, however, that Parliament could ultimately prefer legal change, we also consider potential legislative measures.

5.5 In part four we turn to evidence of the complainant's bad character. Here, we consider the position where the defendant seeks to adduce evidence that the complainant has on other occasions made false allegations of sexual assault. We look specifically at the provisions that govern the admission of such evidence. We conclude that the current position on false allegations is unsatisfactory. Our provisional proposal is that this area of bad character evidence should be governed by the SBE provisions.

5.6 Our discussion contemplates only a single defendant and a single complainant. Where there are multiple defendants or complainants there may be additional rules that add a level of complexity to the detail and practicality. However, the principles that are engaged are the same where there are single or multiple defendants or complainants. We do not pursue those differences here because it would unnecessarily add length and complexity to the analysis, distracting from the key issues at stake.

The human rights framework

5.7 In contrast to some of the other areas of law we consider in this consultation paper, there is little case law on character from the European Court of Human Rights ("ECtHR") and none that we have identified goes directly to the points at issue in this chapter.[3] We are, then, guided by the general jurisprudence in relation to article 6 that was outlined in Chapter 1 and is detailed in Appendix 2. In particular, we have been attentive to the margin of appreciation accorded to states in determining what is required for a fair trial under article 6, the positive obligations under article 8 to afford protections to complainants in sexual offences cases, and the balancing involved when articles 6 and 8 conflict.[4]

THE LEGAL FRAMEWORK GOVERNING CHARACTER EVIDENCE

5.8 Bad character and good character are considered separately in most of this chapter but it is helpful to begin by looking at them together to demonstrate the contrast in the positions in which defendants and complainants find themselves.

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[3] It has arisen in relation to appeals, where the ECtHR has held that where a defendant's character has been in issue in proceedings (including sentencing) then article 6 requires that the defendant be afforded the opportunity to participate in proceedings and that the appellate court hear the defendant directly to gain a personal impression of them: *X v the Netherlands* App No 72631/17 at [45]; *Talabér v Hungary* App No 37376/05 at [28]; *Zahirović v Croatia* App No 58590/11 at [57]; *Cooke v Austria* App No 25878/94 at [42]; *Kremzow v Austria* App No 12350/86 at [67].

[4] See paras 1.79 to 1.89 above and Appendix 2.

5.9 Historically, evidence of a defendant's bad character could not be used against them in determining the likelihood of guilt. This is because such evidence could be unfairly prejudicial, potentially influencing a jury's reasoning inappropriately, especially where the evidence of bad character was prior convictions. The risk is that a jury may take the view that a person who has previously committed a crime is more likely to have committed the offence now charged, regardless of whether the previous offence was of a different type or committed long ago. There may also be a risk that a jury's decision will be affected by "moral prejudice" leading to a finding of guilt on the grounds that a person who has previously committed a crime is more deserving of punishment, including because a jury may think it more likely they have committed other crimes that have gone unpunished.[5] The rule excluding bad character evidence was subject to some limited exceptions if the evidence was relevant to an issue that the jury needed to determine; most notably, bad character evidence could be admissible under the rules governing the admission of similar fact evidence.[6] The defendant could, however, introduce evidence of their good character "in the hope of persuading the court that he was less likely to have committed the offence charged, or more credible in his evidence, or both".[7]

5.10 Other parties, including complainants in sexual offences cases, were in quite a different position. As Spencer explains, there was a:

> gulf between the rules governing evidence of the defendant's character and disposition, and the rules on evidence of the character and disposition of other people (and in particular, prosecution witnesses). For defendants, the rule was that they could produce evidence of their good character if they had one, but their bad character could not generally be used against them. For witnesses, the position was the reverse: a witness was liable to have his discreditable past brought up against him to undermine his credibility, but his good character could not generally be used to enhance it.[8]

5.11 This "gulf" is consistent with a defendant being in a fundamentally different position to a witness; the defendant's liberty is at stake and the criminal justice system rightly provides protections for the defendant and entitles them to challenge and test the credibility of witnesses.[9] These differences were apparent in sexual offences cases:

> Although the defendant's record for sexual misbehaviour (if he had one) was usually suppressed, at common law the defence could use the complainant's irregular sex-life in an attempt to discredit her or her complaint.[10]

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5 P Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (2006) pp 179-180 (references omitted). These concerns still apply and are now potential exclusions on fairness grounds; see paras 5.65 to 5.66 below. Professor Lewis is the Commissioner for Criminal Law at the Law Commission of England and Wales, and lead Commissioner for this project.

6 *Makin v Attorney-General for New South Wales* [1894] AC 57 at 65.

7 J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [1.2] (references omitted).

8 Above, para [1.7].

9 See para 5.73 below on the "principled asymmetry" of the criminal justice system.

10 J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [1.7].

5.12 The defence are now far more restricted in their scope to adduce evidence about the complainant's sex life as the common law has since been overtaken by provisions of the YJCEA 1999 that govern SBE, as we discussed in chapter 4. However, extensive criticisms of the bad character regime remained, especially in relation to its technical complexity, and led to a Law Commission review. Our 2001 report, Evidence of Bad Character in Criminal Proceedings, recommended that the general exclusion of bad character should be reversed.[11] That is, whereas at common law evidence of the defendant's bad character was inadmissible subject to limited exceptions (primarily, similar fact evidence), our view was that it should be admissible provided that it satisfied certain criteria (which were not limited to similar fact evidence) and subject to procedural safeguards. Our recommendations were given effect in the Criminal Justice Act 2003 ("CJA 2003"); that statute is now the primary source of law regarding bad character evidence.[12] The next part of this chapter addresses that law in depth with respect to the defendant's bad character. It will also be the basis of the final part of the chapter that considers the law governing the complainant's bad character.

5.13 Good character, however, remains governed by the common law. It is addressed in the third part of this chapter, with particular attention to the difference in the positions of defendants and complainants. In this regard there is a noteworthy point of continuity. The essence of the difference highlighted by Spencer remains unchanged by the CJA 2003 reforms or the development of the common law: a witness (including the complainant in a sexual offences case) may still be subject to bad character evidence (subject to any limits imposed by the SBE regime) but – unlike the defendant – a witness will not ordinarily get the benefit of good character evidence.

THE DEFENDANT'S BAD CHARACTER: NON-CONVICTION EVIDENCE

5.14 In our pre-consultation engagement, many stakeholders were of the view that the violent or controlling or coercive nature of a relationship is an important consideration in a trial for rape or other sexual offences. As a recent Criminal Justice Joint Inspection Report ("Joint Inspection Report") recognised, bad character evidence showing similar conduct on the part of the defendant can be particularly important in sexual offences prosecutions which often rely heavily on the word of the complainant.[13] Where the defendant has a prior conviction for abusive or violent conduct then (as we explain below), subject to limitations that safeguard fair trial rights, that may be admissible as relevant evidence of bad character.[14] However, stakeholders raised the concern that where there is no such prior conviction then a defendant's history of domestic abuse, controlling or coercive behaviour, violence or sexual misconduct is not being used as evidence of bad character.

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11 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

12 The common law rules were abolished by the Act, subject only to the preservation of the rule that a person's reputation is admissible for proving their bad character: s 99. The preserved rule is rarely used and not relevant here: see note 2 above.

13 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape Phase 2: Post-charge* (HMICFRS and HMCPSI, February 2022) ("Joint Inspection Report") p 36.

14 See paras 5.35 to 5.38 below.

5.15 These concerns would arise in circumstances such as the following, which reflect the types of situations that were discussed by stakeholders:

> D and C have been in a relationship for several years. D has regularly belittled C, controlled her access to money and when she can see her friends, and has threatened to kill her if she leaves. There have been multiple incidents where the police have visited their home to respond to reports by neighbours of noise and violent behaviour, including physical assaults by D on C. There have also been incidents where D has attempted to rape C, though C did not report those attempts to police. D has never been charged with any offences.
>
> One day C tells police that D raped her the previous night. C's account is that she woke in the night with D, drunk, on top of her and immediately asked him to stop and tried to push him off her. D, she said, held down both her hands and said that she would have to do whatever he wanted. D has been charged with rape. He claims that C consented.

5.16 In these circumstances, it may help the prosecution if they can introduce evidence of the defendant's previous conduct. Such evidence may help explain the nature of the relationship within which the rape occurred, working to counter defence claims that the complainant consented. It may also show a propensity to commit acts of violence and sexual violence against the complainant, suggesting a higher likelihood that he has done so on this occasion.

5.17 This section of the chapter looks at how the law provides for the admissibility of such conduct as bad character evidence where there has not been a conviction. It sets out the legal framework, looks at the operation of the regime in practice, and considers potential strategies and reform options with a view to addressing shortcomings that have been identified by stakeholders.

The CJA 2003 framework for the admissibility of evidence of bad character

5.18 The CJA 2003 sets out the legal framework governing the admissibility of evidence of bad character of both defendants and non-defendants.[15] In broad terms the bad character provisions aim to ensure that relevant evidence is admitted but that there is no unfairness to the defendant. The Court of Appeal has said Parliament's purpose was "to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice".[16]

5.19 When bad character evidence is admitted then there will be a judicial direction to the jury – a bad character direction ("BC direction") – that states how the evidence is

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15 There are also significant procedural requirements pursuant to s 111; under the Criminal Procedure Rules ("CrPR") Part 21, these include requirements that parties must give notice if they introduce evidence of the defendant's bad character evidence or make an application to introduce evidence of a non-defendant's bad character: rr 21.2 – 21.4. Applications and notice should be in writing and a ruling should always be given by the court: *R v Guy* [2018] EWCA Crim 1393, [2018] 1 WLR 5876 at [31].

16 *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169 at [4]. The Court goes on to make more general observations, including that bad character evidence "cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant" (at [18]); see generally J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [1.66]-[1.74].

relevant, what it can be used for, and what it cannot be used for.[17] The weight to be attached to the evidence is a matter for the jury, in the light of any directions given by the judge.[18]

The "gateways": when will evidence of bad character be admissible?

5.20 Section 101(1) of the CJA 2003 specifies seven "gateways" for admissibility:

> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> (a) all parties to the proceedings agree to the evidence being admissible,
>
> (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
>
> (c) it is important explanatory evidence,
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
>
> (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
>
> (f) it is evidence to correct a false impression given by the defendant, or
>
> (g) the defendant has made an attack on another person's character.

5.21 Each of gateways (c)-(g) is supplemented by an associated detailed provision in sections 102-106.[19]

5.22 Agreement under gateway (a) aside, the prosecution may seek to have evidence admitted under four gateways: (c), (d), (f) and (g).[20] Non-conviction evidence is most likely to be significant and contentious under gateways (c) (important explanatory evidence) and (d) (relevant to an important matter in issue between the defendant and prosecution). This is because the prosecution may seek to introduce such evidence under these gateways without the defendant having either triggered or agreed to its introduction, which must occur before gateways (a), (b), (f) or (g) could be used.[21] As such, it is to gateway (c) and especially gateway (d) that we turn our attention.

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17 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) ("Crown Court Compendium") ch 12.

18 Blackstone's Criminal Practice ("Blackstone") (2022) F13 Character Evidence: Evidence of Bad Character of Accused, F13.22, with reference to *R v Edwards* [2005] EWCA Crim 1813, [2006] 1 Crim App R 3.

19 CJA 2003, s 101(2).

20 Gateway (e) is not available to the prosecution and may only be used by an accused in the same trial: P Roberts and A Zuckerman, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 737 (references omitted) and generally pp 699-737.

21 Gateway (e) stands slightly apart as it would apply where there is more than one defendant. As explained above at para 5.6, we are not considering the position where there are multiple defendants.

Gateways (c) and (d)

5.23 Bad character evidence will be admissible under gateway (c) if it is "important explanatory evidence". Section 102 defines that phrase:

> For the purposes of section 101(1)(c) evidence is important explanatory evidence if–
>
> (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
>
> (b) its value for understanding the case as a whole is substantial.

5.24 This gateway may be useful in RASSO cases where the defendant and complainant are in a relationship. It may, for instance, help explain the circumstances which led up to the alleged offence. Without that explanation the jury may be given an erroneous impression of the behaviour of one or both of them.

5.25 Under gateway (d) bad character evidence will be admissible if "it is relevant to an important matter in issue between the defendant and the prosecution". Section 103(1) explains that this includes the defendant's propensity in two respects:

> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged …;[22]
>
> (b) the question whether the defendant has a propensity to be untruthful.

5.26 We will refer to these as, respectively, "propensity" and "credibility".[23] They may be particularly important in RASSO cases. If propensity is established it makes it more likely that the defendant committed the offence charged. If credibility is undermined then the defendant's account or suggestions that the claimant is lying will be less believable.

5.27 Under section 103(2), propensity may be proved by evidence of a conviction of an offence of the same description or category,[24] but the provision does not require that the defendant has been convicted or even charged. Rather, the subsection states that while propensity may be established by evidence of conviction, that method is specified "without prejudice to any other way doing so". However, whether a conviction or other evidence is sought to be used, the propensity arm will not be available "if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for [section 103(2)] to apply in his case".

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22 The paragraph continues and provides a limitation; that limb of the gateway will not apply "where his having such a propensity makes it no more likely that he is guilty of the offence": s 103(1)(a).

23 Propensity is sometimes referred to as "tendency". For instance, in *R v Balazs*, the Court of Appeal refers to a "tendency or propensity" to commit offences of the kind charged: [2014] EWCA Crim 937 at [11], approved by the Court at [14]. In Australia, the uniform evidence law uses "tendency": eg, Evidence Act 1995 (Cth), Part 3.6.

24 CJA 2003, s 103(2). The term "category" is further defined pursuant to an order made by the Secretary of State: s 103(4)-(5).

5.28 Three further provisions elaborate on the gateway (d) requirements. In different ways they provide scope for the admission of bad character evidence alongside fair trial protections for the defendant.

5.29 First, in assessing the relevance or probative value of evidence the court must assume that the evidence is true.[25] The effect of this assumption is that the evidence is given the greatest possible chance of being admissible.

5.30 Secondly, an "important matter" means "a matter of substantial importance in the context of the case as a whole".[26] This definition has two effects. One is that it is not necessary to tie importance to a matter specifically and narrowly, which suggests a degree of flexibility is available and prevents barriers to admissibility. The other, however, is that the matter must be more than important; it must be of substantial importance. This is a very significant limitation on admissibility. It tries to ensure that the jury's attention is not drawn away from the central issue they must decide, which is whether they are sure that the defendant is guilty. The reason why juries may be drawn away is because where character evidence is introduced they will need to be persuaded that the facts constituting the evidence are true. They must be persuaded to the criminal standard of proof. This means that bad character evidence can give rise to "satellite litigation", which is, in effect, a trial within the trial. Spencer explains the concern and the approach of the courts:

> [There is a risk that bad character evidence] will give rise to complicated "satellite issues" which deflect the attention of the tribunal of fact from the central issues in the case, and from properly examining the core evidence that implicates the defendant in the alleged offence directly. As the Court of Appeal [has] said, [there is a] "general undesirability of the jury being required to explore satellite issues one stage removed from the charges they are trying unless this is really necessary." … [So, courts] should exclude evidence the hearing of which is likely to take up a disproportionate amount of time and distract the attention of the fact-finders from the evidence which bears directly on the central issues.[27]

5.31 Finally, there is a limiting provision aimed at ensuring fairness. Under section 101(3), the court must not admit the evidence under this gateway if it "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".[28] Where the prosecution seek to rely on evidence of matters that occurred a long time prior to the offence charged then section 101(4) will be significant. It provides that in making that determination about excluding the evidence, the court must have particular regard to the length of time between the matters to which the evidence relates (eg, the misconduct) and the matters relating to the current offence charged.

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25 CJA 2003, s 109(1). There is one exception. If, based on material before the court, including any evidence it decides to hear, it appears that no court or jury could reasonably find the evidence to be true then the court need not assume it is true: CJA, s 109(2).

26 CJA 2003, s 112(1).

27 J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [1.75] (references omitted). The same concerns about satellite issues apply as factors in determinations of admissibility of evidence of good character; see below at paras 5.125, 5.153 and 5.161.

28 Section 101(3) applies only to gateways (d) and (g).

5.32 Section 101(3) is not, however, the only statutory limit aimed at fairness. Section 78 of the Police and Criminal Evidence Act 1984 ("PACE") (on which section 101(3) is based) provides for a limit that applies to all prosecution evidence, including bad character evidence, regardless of the gateway under which admissibility is sought.[29] Section 78 states that:

> the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[30]

5.33 The courts have held that the consideration of section 78 as well as section 101(3) "will avoid any risk of injustice to the defendant" and "should avoid any risk of the court failing to comply with Article 6".[31] Although section 101(3) is framed as a requirement to exclude evidence if its admission would be unfair, and section 78 is expressed in permissive terms ("the court may"), it has been held that there is no difference between the two. This is because under section 78 once the court is satisfied that evidence would have such an adverse effect on fairness that the evidence ought not to be admitted, the court cannot logically exercise a discretion to admit it.[32]

5.34 Taking into account the supplementary provisions and section 78, the upshot of the framework is that non-conviction evidence of bad character is admissible provided that it falls within one or more of the gateways, and is relevant (and sufficiently probative) to warrant admission into evidence without being unfair to the defendant or running an undue risk of satellite litigation.

What constitutes evidence of bad character?

5.35 Under the CJA 2003, evidence of bad character is either "evidence of … misconduct" or "evidence of … a disposition towards misconduct".[33] "Misconduct" is defined as "the commission of an offence or other reprehensible behaviour".[34] It is clear, then, that evidence of bad character is not limited to evidence of prior convictions. The definition plainly envisages that conduct which has not resulted in a conviction, or even in a charge, could constitute evidence of bad character.[35]

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29 As the section only applies to "evidence on which the prosecution proposes to rely", it will be relevant to the four prosecution gateways (c), (d), (f) and (g).

30 PACE, s 78(1).

31 *R v Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472 at [13]-[14]; see also *R v Weir (Somanathan)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885 at [44]; *R v O'Dowd* [2009] EWCA Crim 905, [2009] 2 Crim App R 16 at [29], [31].

32 *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049 at [28]; see further P Roberts and A Zuckerman, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 691.

33 CJA 2003, s 98.

34 CJA 2003, s 112(1).

35 For example, any evidence suggesting guilt of an offence is potentially evidence of misconduct, whether or not an accused has been charged with it: Blackstone (2022), Section F13 Character Evidence: Evidence of

5.36 Evidence of misconduct or a disposition towards misconduct will not always be bad character evidence. Under section 98 it will not be bad character evidence if it:

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.[36]

5.37 The effect of section 98 then is that "the central facts of the case" are excluded from the bad character regime.[37] That is, evidence that goes directly towards proving the offence with which the defendant has been charged will be admissible if it is relevant.[38]

5.38 Where the misconduct evidence does not fall into (a) or (b) then it will be bad character evidence and so only admissible if it falls within one of the seven gateways and is not the subject of any other exclusions.[39]

The operation of the regime

5.39 Given that non-conviction evidence of bad character may be admissible, and that it may be important in establishing propensity or credibility, it might be expected that its appearance in prosecutions would be unremarkable. However, it appears that is not the case. Instead, it seems that non-conviction evidence is not regularly used in prosecutions.

5.40 It seems clear that applications are not always being made to admit non-conviction evidence, even where such evidence is available or could be obtained. The Joint Inspection Report in 2022 found that "prosecutors and investigators were often missing opportunities to consider bad character applications."[40] Stakeholders also expressed this view and suggested some possible reasons and solutions.

Bad Character of Accused, F13.4. This reading of the statute is consistent with the CJA 2003 Explanatory Notes that accompanied the legislation in its passage through Parliament and (at [354]) indicated that the definition was intended to be broad. The Notes stated that evidence of bad character could include previous convictions, conduct that might constitute a crime, or non-criminal conduct: "The definition is therefore intended to include evidence such as previous convictions, as well as evidence on charges being tried concurrently, and evidence relating to offences for which a person has been charged, where the charge is not prosecuted, or for which the person was subsequently acquitted." The Notes also indicated this was intended to reflect the state of the pre-existing law at the time, as per *R v Z* [2000] UKHL 68, [2000] 2 AC 483.

36 CJA 2003, s 98(a)-(b).

37 HHJ Peter Rook and Robert Ward QC, *Rook and Ward on Sexual Offences Law & Practice,* 6th ed ("Rook and Ward") (2021), ("Rook and Ward") [20.15] – [20.16].

38 Above, [20.15], citing *Edwards and Rowlands* [2005] EWCA Crim 3244.

39 Among the potential exclusions is s 78 of the Police and Criminal Evidence Act 1984 ("PACE"), under which the court may exclude prosecution evidence if "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

40 Joint Inspection Report (2022) p 38.

5.41 First, some judges told us that evidence often lacks detail. What is available may be insufficient to prove that the conduct occurred, possibly being incomplete or vague. Its relevance may also be unclear, possibly being quite remote from the issues in the trial. Where proof may not be straightforward – and keeping in mind the standard of proof is beyond reasonable doubt – then a judge may be reluctant to allow it on the basis that it may require satellite hearings to determine admissibility and raise satellite issues for the jury's consideration. This is in contrast with prior conviction evidence where identifying relevant convictions is more straightforward and the conduct need not be separately proved. The Supreme Court in *Mitchell* noted that "the sheer weight of disputed evidence on … uncharged allegations" may have "such an adverse effect on the fairness of the trial that it ought to be excluded".[41] As a result, prosecutors are quite possibly dissuaded from pursuing an application because, if they do not have evidence that can definitively prove the conduct, without raising satellite concerns, they may not succeed.[42]

5.42 A number of stakeholders explained that the lack of detail resulted from a lack of appropriate records, including information not being recorded by police who attended an incident. A senior police officer told us that while police forces should be routinely recording non-conviction material in accordance with certain risk criteria and that "there may be a need to push these practices more rigorously". It may also be that there needs to be more effective case building. We were told by some judges and prosecutors that sometimes supporting evidence does exist but many police and Crown Prosecution Service ("CPS") lawyers do not take steps to locate it. For example, they fail to locate evidence such as body-worn video or 999 recordings. In other instances, such evidence may not exist and so the police might be required to obtain a statement from the complainant or a supporting statement from another witness, such as a neighbour.

5.43 The Joint Inspection Report addressed problems faced by police in identifying potential bad character evidence. The report pointed to the need for information access and sharing so that investigating officers will be aware if a suspect has previously been reported or arrested, or is currently under investigation by another police force for similar offences in a different area. The report gave an example of a case where investigating officers were not aware of the other investigation.[43] This is important because a significant proportion of those accused of sexual offences have previously been arrested, which suggests that there may be a significant volume of potentially relevant non-conviction evidence.[44] The first report on Operation Soteria

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41 *R v Mitchell* [2016] UKSC 55, [2017] 2 AC 571 at 53.

42 CPS legal guidance notes the emphasis the courts have placed on avoiding satellite litigation, including the need to avoid re-calling witnesses and the possible need for witness care, especially in sexual offences cases where a complainant may need to give first-hand evidence of the defendant's previous misconduct: CPS, *Legal Guidance*, "Bad Character Evidence" (10 September 2021).

43 Joint Inspection Report (2022) p 36.

44 For 2018-2020 Project Bluestone (associated with Operation Soteria) found that 23.3% of RASSO suspects are linked to one or more sexual offences and 60.5% of RASSO suspects are linked to all crime types, meaning that only 39.5% of RASSO suspects have never come to the attention of the police: Joint Inspection Report (2022), p 36.

Bluestone noted that providing bad character evidence can be a strategic component in the long-term disruption of repeat offending.[45]

5.44 Secondly, some stakeholders suggested prosecutors were not approaching the law in the right way. It may be that prosecutors are uncertain about when non-conviction evidence can be admitted, including clarity about how (for example) a controlling or coercive relationship is important explanatory evidence. The Centre for Women's Justice told us that sometimes evidence of wider abuse in relationships where sexual violence had occurred is not admitted as it is not considered probative, and argued that there needs to be greater clarity in the law so that it is more robust. Conversely, practitioner Martin Rackstraw told us that non-conviction evidence could be unfairly prejudicial to defendants.

5.45 It is not always clear why bad character applications are not made. The Joint Inspection Report provided two case studies in which evidence was available but no bad character application was made and no rationale for the decision was recorded. In the first of these, a suspect had previously been charged with rape but the case was discontinued when the vulnerable complainant withdrew their support. Police sent prosecutors this information with transcripts of the first victim's interview.[46] In the second, a suspect had previously been reported to police on two occasions with complaints of rape. The previous complainants did not want a prosecution pursued but recorded video evidence for police that could be used in the current case and were willing to attend court. We do not know whether an application should have been made in either or both of these cases – it could well have been that there were good reasons why an application was not made. Rather, the point we take from the Joint Inspection Report is that it is not always clear why bad character applications are not made.

5.46 With regard to solutions, there was considerable support for improving the ways that police record and manage evidence, including retaining Achieving Best Evidence ("ABE") interviews of complainants and witness statements for longer periods.[47] Both judicial and practitioner stakeholders noted that when police are equipped with body-worn cameras, this can produce admissible, persuasive evidence. There were suggestions that more should be done by police and the Crown Prosecution Service ("CPS") to compile non-conviction evidence in ways that will be detailed and most persuasive. A senior police officer noted that although police practices have improved over the years and that the Police National Database should contain any non-conviction information on the suspect, at least for more serious allegations of sexual offences and violence, there was generally a strong view that police could do more to

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45 Operation Soteria is a joint Police and CPS programme to develop new national operating models for the investigation and prosecution of rape, while Operation Soteria Bluestone refers to the policing aspects of the Operation Soteria: B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022) ("Operation Soteria Bluestone Year 1 Report") pp 2, 103.

46 Joint Inspection Report (2022) p 37.

47 Ministry of Justice and National Police Chiefs' Council, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (January 2022).

search for and locate evidence that had more detail, and prosecutors could do more to develop the material in case building.

5.47 The Joint Inspection Report gave considerable attention to these matters. It found that prosecutors were not always structured in their approaches to reviewing rape cases.[48] It gave two clear examples of prosecution failures to pursue evidence provided by the police and in both cases the defendant was acquitted.[49] It recommended that the police and the CPS should immediately start to work collaboratively to make sure that bad character is considered in all rape cases where applicable.[50] This, it was argued, would focus the case on the behaviour of the defendant and help with strong case building. The report recommended that to progress this, all forces should be aware of their responsibilities to research all available intelligence and information systems for information on suspects, all prosecutors should make sure that bad character evidence has been provided by or requested from the police, and forces and prosecutors working together should ensure that opportunities to use bad character evidence had been properly exploited in every case and that the rationale had been recorded.[51]

5.48 Policing and cooperative working by police and prosecutors in this area is clearly vital to effective RASSO prosecutions. However, we limit our discussion of these issues because Operation Soteria is setting about developing new models for the investigation and prosecution of rape, including "transformational change" in police investigations.[52] Nevertheless, we do make the observation that the recommendations of the Joint Inspection Report (above) are important if there is to be effective identification, provision and use of bad character evidence in RASSO prosecutions. In particular, the recommendations in that and the work of Soteria should help address matters stakeholders have told us about, such as:

- The need for police to keep better records of matters that do not proceed beyond reporting or call-out, with record-keeping and sharing done so that the material can be located in the event of a future offence;

- The need for police to search and retrieve records so that there is material that can be used as non-conviction evidence for the sexual offence prosecution; and

- The need for prosecutors to identify the type of evidence that would be needed in a case, request police to locate any existing evidence and obtain further evidence, and to use that evidence in case-building.

5.49 Thirdly, alternative approaches were mentioned by judicial and barrister stakeholders. Among them was that the defendant could be charged with other offences alongside the sexual offence. For example, if there is an additional count of controlling or

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48 Joint Inspection Report (2022) p 37.

49 Above, pp 37-38.

50 Above, Recommendation 8.

51 Above, p 38.

52 Operation Soteria Bluestone Year 1 Report (2022) p 11. Chief Constable Sarah Crew's foreword (p 2) describes the report as providing "an evidence base for transformational change".

coercive behaviour, then evidence would be gathered to prove that charge, with the result that a bad character application would not be required to bring that evidence before the jury. This may also include admission of previous convictions for violence that would be admissible as bad character evidence for the controlling or coercive behaviour charge, but which would not be admissible as bad character evidence for the sexual offence charge.

5.50 However, we need to be alert to the potential for abuse of process if the evidence would not be admitted under the bad character gateway because it was not probative of the sexual offence charged. That is, there may be a concern if the true purpose of other charges was to find a way to bring the non-conviction evidence to the attention of the jury so that, even with a careful jury direction, they would effectively consider it in the totality of the evidence when reaching a verdict on the sexual offence charge. However, if the evidence supports an accompanying charge then that is arguably the appropriate way to charge for sexual offences committed in the context of abusive relationships or other violent circumstances. The selection of charges must of course be consistent with the Code for Crown Prosecutors. No stakeholders suggested that that charging practice departed from those requirements.[53]

The state of the law

5.51 Given the law as we have outlined it and given what we have heard about the operation of the regime, we have considered whether the law as it stands is sufficient to enable the admission of relevant evidence of the defendant's bad character where that evidence comprises (for example) controlling or coercive behaviour, domestic abuse, violence or sexual misconduct but for which the defendant has no convictions.

5.52 In our provisional view, the law as it stands is sufficient to accommodate non-conviction evidence of this kind. This is apparent from looking at how the CJA 2003 regime would apply in different circumstances.

Reprehensible behaviour

5.53 First, the behaviours in question would constitute misconduct for the purposes of the bad character regime. Under section 112, "misconduct" includes "reprehensible behaviour". The Court of Appeal has considered when conduct will meet the threshold of being "reprehensible", holding that "as a matter of ordinary language, the word 'reprehensible' carries with it some element of culpability or blameworthiness".[54] Rook and Ward review a range of cases and observe that the Court of Appeal has found that drinking to excess and taking illegal drugs has met the threshold.[55] There seems

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53 CPS, *Code for Crown Prosecutors*, section 6.

54 *R v Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at [24].

55 Rook and Ward (2021) [20.20] citing *R v AJC* [2006] EWCA Crim 284. The same review identifies examples where the conduct did not meet the reprehensible threshold, including: self-harm; and a male aged 36 being in a relationship with a female aged 16: Rook and Ward (2021) [20.20] (references omitted). They also argue (at [20.20]) that consensual adult homosexual behaviour "cannot properly be described in 2021 as 'reprehensible behaviour'". Where behaviour is not reprehensible and so not admissible as bad character evidence, it may still be admissible as similar fact evidence under the usual rules of evidence, provided that it is relevant.

no doubt that sexual violence, controlling or coercive behaviour, or other violent or abusive behaviour would meet the threshold.

The gateways

5.54 Secondly, the prosecution would need to establish that the evidence falls within one or more of the section 101 gateways. Relevantly here, these are:

- Gateway (c), as important explanatory evidence – that is, without the evidence the court or jury would find it impossible or difficult properly to understand other evidence in the case and its value for understanding the case as a whole is substantial.

- Gateway (d), as being relevant to an important matter in issue between the defendant and the prosecution, particularly demonstrating a propensity to commit offences of the kind with which he is charged.

5.55 Whether evidence falls within one or both of these gateways will always depend on the specific facts of any case but it is helpful to consider the type of previous misconduct that is in issue when the defendant has been charged with rape or a serious sexual offence. To illustrate this we take three examples: sexual violence (on the one hand), and non-sexual physical violence, and controlling or coercive behaviour (on the other).

Important explanatory evidence under gateway (c)

5.56 It is likely that evidence would be admissible under gateway (c) where a defendant has previously committed acts of sexual violence, non-sexual violence, or coercion or control:

(1) against the complainant; or

(2) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.[56]

5.57 In each of these circumstances there would be grounds to argue that it provides important explanatory evidence about the circumstances – including the nature of the relationship – within which the charged allegations of sexual violence have occurred. The case for admissibility may be stronger where the previous conduct was sexual violence, and it may be stronger where the conduct was committed against the complainant, but it seems entirely possible that gateway (c) could be satisfied in any of those circumstances. The case for admissibility would be at its strongest if consent is in issue because, in each of these instances, without the bad character evidence it will be difficult or perhaps impossible for a court or jury to have a proper understanding of other evidence and will be valuable for understanding the case as a whole. That is, without evidence of previous conduct, the circumstances in which the complainant and defendant have come to be together at the time of the alleged

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[56] Where the defendant's previous misconduct was committed against another person but the complainant was unaware of it then it seems less likely that this could be admissible under gateway (c), although it may be admissible under another gateway.

offence and the complainant's account of their own behaviour and the defendant's behaviour may have a different complexion. Such evidence may, for example, help a jury understand the complainant's account of their behaviour during the alleged offence and/or after it. For example, in *R v C*, the complainant's stepfather was charged with sexual offences committed over 20 years, from when the complainant was aged five.[57] He denied that there was any sexual activity prior to the complainant turning 16 and claimed that the sexual activity after that age was consensual, relying on photographs and messages that indicated the complainant participated willingly. The Court of Appeal held that this evidence of the complainant's "apparent consent" needed to be assessed in light of other evidence (already accepted by the jury) of the defendant's long term sexual "abuse, domination and control" of the complainant when she was a child. When viewed against that background, "the evidence consistent with the complainant's apparent consent to sexual activity after she was sixteen years old would be cast in a very different light".[58] Accordingly, the jury could conclude that the defendant's control and abuse continued into the complainant's adulthood (and there was further evidence of this), the complainant had not in fact consented to any of the sexual activity, and the defendant knew she had not genuinely consented.[59]

5.58 It is important to note that the explanatory evidence gateway cannot be used to bring in evidence of propensity. If explanatory evidence may also support a propensity argument then, to be used in that way, it must also be admissible under gateway (d).[60]

Propensity under gateway (d)

5.59 The clearest case for admissibility will lie under gateway (d) where a defendant has previously committed acts of sexual violence, whether against the complainant or another person.[61] In these circumstances there would seem strong grounds to argue that this is evidence of bad character that satisfies gateway (d), demonstrating a propensity to commit offences of sexual violence, which are offences of the kind the defendant has been charged with.[62]

5.60 Conversely, where a defendant has previously committed acts of non-sexual violence or coercion or control, whether against the complainant or another person, then it would seem that these are unlikely to be admissible under gateway (d). This is because these would be offences of a different kind. That is, a defendant would

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57 *R v C* [2012] EWCA Crim 2034, [2013] *Criminal Law Review* 358.

58 *R v C* [2012] EWCA Crim 2034, [2013] *Criminal Law Review* 358 at [14].

59 *R v C* [2012] EWCA Crim 2034, [2013] *Criminal Law Review* 358 at [16]. On explanatory evidence, including further examples, see generally Blackstone (2022) F13.29.

60 Blackstone (2022) F13.29.

61 Where the misconduct was committed against another person then it would be irrelevant to propensity whether or not the complainant was aware of that.

62 Whether offences are of the same or a different kind may sometimes be apparent from the matter charged and on other occasions may be dependent on the particular circumstances in which an offence was committed, and the prosecution will need both to specify the circumstances and how they are to be proved: *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169 at [17]. Where non-conviction evidence is relied on then it seems similar principles must apply.

probably be able successfully to contest any prosecution application to admit such evidence under this gateway.

The authorities

5.61 Although the position about non-conviction evidence is not stated in the case law in the way that we have stated it above, it seems that relevant non-conviction evidence of sexual violence, non-physical violence or coercive or controlling behaviour by the defendant could be admissible as bad character evidence under these gateways, provided that the prosecution can prove beyond reasonable doubt that the conduct described occurred.

5.62 Where there are convictions for such conduct then the evidence will be admissible. In *Balazs*, for example, the defendant (who was charged with rape) had prior convictions for rape, assault occasioning actual bodily harm against a partner and harassment against a partner. The Court of Appeal approved of the trial judge's direction to the jury that:

> You should decide whether the evidence of the previous convictions makes you sure the defendant does have a tendency or a propensity to engage in violent, threatening and sexual behaviour to assert control over his partner within a relationship, during or after the relationship has ended.[63]

5.63 Where there are no convictions, evidence of the conduct can still be admissible under the gateways. For instance, in a prosecution for attempted rape, evidence of a previous unreported rape in that relationship was admitted under both gateways (c) and (d).[64] The Court of Appeal noted that the trial judge thought the evidence was:

> necessary for the jury to consider the nature of the relationship between the appellant and the complainant, and that, as [the trial judge] put it, it would be unfair to the prosecution not to be allowed to adduce what the complainant said about that relationship and that those incidents were matters of importance to explain the relationship and necessary for the jury to understand the case as a whole.[65]

5.64 In sum, prior misconduct can be admissible under gateways (c) or (d), whether proved by convictions or (where there are no convictions) by other evidence.

Fairness exclusions

5.65 Even where the gateways are satisfied, evidence may still not be admissible. As we explained above, where the prosecution relies on gateway (d) then the court "must not admit evidence … if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".[66] With regard to both gateways, there is the accompanying general discretion to exclude evidence under

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63 *R v Balazs* [2014] EWCA Crim 937 at [11], [14].

64 *R v Mark Geoffrey P* [2006] EWCA Crim 2517. This case is also highlighted in the CPS *Legal Guidance, Sexual Offences*, "Case Building" (15 July 2022).

65 *R v Mark Geoffrey P* [2006] EWCA Crim 2517 at [7].

66 CJA 2003, s 101(3).

section 78 of PACE if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".[67]

5.66 The exclusion of non-conviction evidence would depend on all the circumstances of a case but there are likely to be some types of evidence that would not be admitted. Among them, where non-conviction evidence related to sexual offences or other abuse of children then there would be a strong argument to exclude it. Even where it is based on convictions, evidence of this kind is generally excluded.[68] It might be expected that there may also be more general caution about admitting non-conviction evidence on the grounds that, just as knowledge of a conviction may result in unfairness in some circumstances, knowledge of previous criminal conduct even without a conviction could potentially have the same effect.

The relationship to SBE

5.67 Where the defendant's previous misconduct is sexual violence against the complainant then introducing that evidence will almost certainly raise the possibility that there will be questioning of the complainant about her sexual behaviour. As such, it will be necessary to consider whether the SBE provisions (discussed in Chapter 4) will be engaged. Under the current law they will not be engaged because the evidence is being introduced by the prosecution.[69] However, they would be engaged under our provisional proposals for reform of the SBE framework as we propose to extend the restrictions to cover evidence sought to be adduced by the prosecution. Under our provisional proposals, admissibility determinations on evidence involving a complainant's sexual behaviour would be made under a structured discretion model with a higher threshold than that for character evidence. However, as we explain in Chapter 4, our provisional view is that evidence currently being adduced by the prosecution legitimately and proportionately would continue to be admissible under the proposed SBE framework, and that would apply equally to this category of non-conviction evidence of bad character.[70] The distinguishing feature is that, under the provisionally proposed SBE framework, the court would take account of a wider range of factors, including the specific risks associated with SBE. That may be particularly important where a complainant does not wish to have the previous sexual violence admitted into evidence.[71]

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67 See paras 5.32 to 5.33 above.

68 There has been some research on bad character evidence that concluded jurors are more likely to convict in cases involving child sexual abuse where they know that the defendant has a recent conviction for an offence similar to that charged: S Lloyd-Bostock, "The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study" [2000] *Criminal Law Review* 734. We are not aware of research that looks at this effect in sexual offences generally but the law's approach to dealing with risk is well-established.

69 The legislation that governs the admissibility of SBE applies only to evidence sought to be adduced by the defendant; YJCEA 1999, s 41. See also *R v Soroya* [2006] EWCA Crim 1884, [2007] *Criminal Law Review* 181.

70 See para 4.245 above.

71 It is conceivable that a complainant may not wish such evidence to be introduced if, for example, the previous sexual violence occurred while the complainant was a sex worker, or if it occurred outside marriage, or if the complainant was in another relationship at the time.

Conclusions

5.68 In our provisional view, the CJA 2003 can accommodate non-conviction evidence of bad character. Where the misconduct is sexual violence, non-sexual violence, or coercion or control, then there would be strong grounds to argue it provides important explanatory evidence about the nature of the relationship within which the charged allegations of sexual violence have occurred. Where the misconduct is previous sexual violence then there would seem strong grounds to argue that the evidence meets both gateways as important explanatory evidence and evidence that goes to propensity. As such, our provisional view is that the bad character provisions of the CJA 2003 do not require amendment to accommodate non-conviction evidence of previous sexual violence, non-sexual violence, or controlling or coercive behaviour by the defendant.

5.69 Nevertheless, applications are not regularly being made to admit such evidence. Given what stakeholders have told us, there appears to be considerable need for earlier and more effective evidence gathering and case-building so as to give prosecutors sufficient grounds on which to make an application, and judges sufficient basis on which to admit the evidence while avoiding satellite issues. As such, we should not easily set aside the stakeholders' arguments that there is a need for greater clarity about the admissibility of non-conviction evidence, including when it can be admitted and under which gateways. Given that there is already extensive training in place for judges or prosecutors, that clarity could be incorporated into existing programmes or guidance, such as that in the Crown Court Compendium or in other guidance from (for example) the Judicial College.

Consultation Question 29.

5.70 We provisionally propose that the bad character provisions of the Criminal Justice Act 2003 do not require amendment to accommodate non-conviction evidence of previous sexual violence, non-sexual violence, or controlling or coercive behaviour by the defendant. This is because:

(1) Where a defendant has been charged with rape or a serious sexual offence then non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour may be admissible under gateways (c) and (d) of section 101(1) of the Criminal Justice Act 2003.

(2) Where gateway (c) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour:

(a) against the complainant; or

(b) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.

(3) Where gateway (d) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence against the complainant or against another person.

Do consultees agree?

Consultation Question 30.

5.71 Is there a need for guidance about the law to assist prosecutors in case building and making applications and judges in determining applications regarding the admissibility of non-conviction bad character evidence?

5.72 If so, which body should publish such guidance?

THE COMPLAINANT'S GOOD CHARACTER

5.73 In sexual offences the defendant and the complainant are in very different positions regarding the adducing of good character evidence ("GCE"). The former is entitled to introduce GCE and may be entitled to a jury direction. The latter has traditionally been entitled to neither. Some stakeholders have expressed concern that the scales are inappropriately tipped in favour of the defendant. However, this is not to say that the scales should be evenly balanced; as Roberts has argued, criminal justice and the law governing criminal evidence are characterised by a "principled asymmetry" that

protects the innocent from wrongful conviction.[72] While most visible in the "steeply asymmetrical" criminal standard of proof, beyond reasonable doubt, the rules of evidence may rightly exclude relevant evidence "thought to present unconscionable risks of unfair prejudice against the accused".[73]

5.74 In this part of the chapter, we outline the current law, including the extent to which there is now an opportunity for the prosecution to introduce evidence of the complainant's good character. We then present the stakeholders' views we have received and consider possible reform options.

5.75 The law in this area has been developed primarily through the courts. The leading cases are *R v Hunter* (on the good character of the defendant) and *R v Mader* (on the good character of the complainant).[74]

5.76 There are two distinct considerations when courts consider evidence of good character, whether for defendant or complainant:

(1) whether the evidence is admissible, and

(2) if admitted, the jury directions regarding its use.

5.77 GCE may be relevant to either or both of the following, whether for defendant or complainant:

(1) Credibility, meaning that evidence of good character may make it more likely the person should be believed.

(2) Propensity, meaning that evidence of good character "may make it less likely that the defendant acted as alleged".[75] For the complainant, propensity may make their behaviour more likely or less likely, depending on the specifics of the facts and the defence but the key distinction is the same: it is about propensity rather than credibility.

5.78 There are two types of good character direction ("GC direction"). A full GC direction is a direction on its relevance to both the credibility and propensity of the defendant. A modified GC direction, which may address either "limb" of a full GC direction, or both, is a direction "modified as necessary to reflect the other matters [in evidence that do not indicate good character] and thereby ensure the jury is not misled".[76]

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72 P Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review* 393; P Roberts and A Zuckerman, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 21.

73 Above, p 21.

74 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 ("*Hunter*"), where the Court was constituted of five judges; *R v Mader* [2018] EWCA Crim 2454.

75 *Hunter* at [78], referring to the defendant but the concept applies equally.

76 *Hunter* at [80].

5.79 A GC direction will instruct a jury to take the character evidence into account, and will tell them what it is relevant to (credibility or propensity), but does not direct the jury as to the weight they should give the evidence.[77]

The good character of the defendant

Admissibility

5.80 It is well established that the defendant may introduce evidence of their good character. The Court of Appeal in *Hunter* traces the development of the law in detail. The essence of the position prior to Hunter was that a defendant could adduce GCE relevant to both credibility and propensity, and *Hunter* did not change that.[78] Rather, the issue in *Hunter* was "the nature and extent of the GC direction that should follow" when GCE is admitted.[79]

Directions

5.81 Although the CJA 2003 does not create a regime governing the admissibility of GCE, the five-member bench of the Court noted that the law on GC directions needed to be carefully reviewed, set out definitively and clearly, and any wrong turns needed to be corrected. This was necessary because "the whole landscape in relation to evidence of character [had] changed" as a result of the CJA 2003.[80]

5.82 Four features of the law are particularly relevant for the purposes of this part of the chapter.

5.83 First, the Court considered the purpose of the summing up to the jury and criticised the trend towards length and complexity:

> [E]ffective communication depends upon a judge being allowed to focus on the issues and the applicable law. There has been an unfortunate tendency in recent years to require judges to direct juries at length on matters which most would regard as matters of common sense …. Summings-up have become overly long and complicated as a result. This is more likely to prove a hindrance to a just outcome than a help. … A judge's directions on good character relate to the law not the facts; nevertheless the extension of the circumstances in which advocates demand of judges a direction on good character has not helped effective trial management. It has led to lengthy discussions at trial about directions to juries, some convoluted directions to a jury, and a flood of applications for leave to appeal.[81]

5.84 In closing its discussion, the Court observed:

> Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling

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77 Crown Court Compendium (2022) Ch 11 'Good Character', [11].

78 *Hunter* at [4-5].

79 *Hunter* at [1].

80 *Hunter* at [86] (on the CJA); [4-51], [103] (on review); [20], [70] (on wrong turns).

81 *Hunter* at [62], [64].

> the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend.[82]

We return to these concerns below when we consider reform options.[83]

5.85 Secondly, the Court set out some basic principles that govern GC directions. These were derived from decisions of the House of Lords in *Vye* and *Aziz*, and included the following, which we summarise here:[84]

(1) The general rule is that a GC direction on credibility must be given where a defendant has GC and has testified or made pre-trial statements.

(2) The general rule is that a GC direction on propensity must be given where a defendant has GC whether or not they have testified or made pre-trial statements.

(3) There are exceptions to the general rules. For instance, where a defendant has no previous convictions but has admitted other reprehensible conduct then the judge, if they consider a GC direction would be an insult to common sense, has discretion to decline to give a GC direction.

(4) A jury must not be misled.

(5) A judge is not obliged to give absurd or meaningless directions.

5.86 Thirdly, the Court was of the view that the good character principles had been "extended too far" in the cases, with defendants receiving (or on appeal it being decided they were entitled to receive) GC directions in circumstances where they should not:

> It may sound like a statement of the obvious but only defendants with a good character or deemed to be of effective good character are entitled to a good character direction.[85]

5.87 Fourthly, as the CJA 2003 has shaped the use of bad character evidence, the Court identified five categories of cases in which good character may be relevant. In doing so the Court sought to wind back what it saw as the inappropriate use of GC directions. The principles from *Vye* and *Aziz* would apply in all instances. Whether a direction was required or was discretionary would depend on which category a case fell into. Where it was discretionary then the content of the direction would be

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82 *Hunter* at [67].

83 See paras 5.144 to 5.164 below.

84 *Hunter* at [68]; *R v Vye* [1993] 1 WLR 471; *R v Aziz* [1996] AC 41. There is an additional principle engaged where there are multiple defendants. The Court also set out at [69] what *Hunter* did not decide, making it clear, for example, that a defendant with previous convictions is not entitled to a GC direction.

85 *Hunter* at [72].

determined by what the trial judge considered was required for fairness.[86] The discretion is not "narrowly circumscribed" but is "open textured".[87]

5.88 The table below summarises the law as it is stated *Hunter*, where the Court held that a defendant's character will fall into one of five categories and, associated with each, the entitlements or discretion that may result in a GC direction.[88] In presenting the summary, we put to one side the detail and nuance of the five categories of character. Instead, the salient point, and what the table aims to indicate, is that the law requires a complex set of distinctions to be drawn and applied. This will be a significant consideration when we turn to the reform options below.

The defendant's character	**Key features that indicate that character**	**Credibility limb**	**Propensity limb**	**Summary**
Absolute GC[89]	D has no previous convictions or cautions and no other reprehensible conduct alleged, admitted or proven.	Entitled	Entitled	D entitled to a full GC direction. The judge has no discretion.
Effective GC[90]	D has old, minor or irrelevant convictions and/or cautions. The judge decides whether or not to treat D as a person of effective GC.	Entitled	Entitled	If the judge determines that D is of effective GC then D is entitled to a full GC direction. The judge has no discretion. If the judge determines that D is not of effective GC then one of the categories below will apply, each of which gives the judge discretion.

86 *Hunter* at (eg) [66], [73], [79], [82], [83], [88].

87 *Hunter* at [23] (citing *R v Aziz* [1996] AC 41), [82], [86].

88 *Hunter* at [77]-[88].

89 *Hunter* at [77]-[78].

90 *Hunter* at [79]-[80].

The defendant's character	Key features that indicate that character	Credibility limb	Propensity limb	Summary
Previous convictions or cautions adduced under s 101 by the defence[91]	Defence may have chosen to introduce previous convictions or cautions of a different type to the offence charged. The defence aim will be that, although D may not get a GC direction on credibility, D will get a GC direction on propensity.	Not entitled	Not entitled	The judge has discretion to deliver a modified GC direction or to give no direction at all. If a modified GC direction is given then the judge can decide whether to give any part of the direction and if so on what terms. The judge will decide what fairness dictates.
Bad character adduced under s 101 and is relied on by the prosecution[92]	The prosecution has sought to use bad character evidence. This may rely on either or both previous convictions / cautions and other reprehensible conduct. The defence will also have adduced GCE.	Not entitled	Not entitled	The judge will be obliged to deliver a BC direction. The judge has discretion also to deliver a modified GC direction or give no GC direction at all. The Court notes: Where D has no previous convictions or cautions but there is other bad character, the judge will be obliged to deliver a BC direction and fairness may mean that GC and BC are woven together in remarks into a modified GC direction.[93] Where D does have previous convictions or cautions then "it is difficult to envisage a [GC] direction that would not offend the absurdity principle".[94]

91 *Hunter* at [81]-[82].

92 *Hunter* at [83]-[84]. Presumably this includes not only evidence adduced by the prosecution but also evidence adduced by the defence and relied on by the prosecution.

93 *Hunter* at [83].

94 *Hunter* at [84].

The defendant's character	Key features that indicate that character	Credibility limb	Propensity limb	Summary
Bad character adduced under s 101 and is not relied on by the prosecution[95]	D has "no previous convictions but … admit[s] reprehensible conduct that is not relied on by the [prosecution] as probative of guilt."[96]	Not entitled	Not entitled	The judge has discretion to deliver a modified GC direction or give no direction at all. The judge will assess what fairness demands.

5.89 In sum, *Hunter* has set out a clear regime for GC directions for the defendant. However, the Court's accompanying observations (noted above) should not be taken lightly: "shortening the duration of trials through a focus on the issues in the case and by effective trial management is a proper goal",[97] and directions should be clear and to the point. These concerns are taken up below in the consideration of reform options.

The good character of the complainant

Admissibility

5.90 Evidence of the good character of a prosecution witness is ordinarily not admissible "simply to show that a prosecution witness has a good character, in the sense that he or she is a generally truthful person who should be believed".[98] Such evidence is "oath-helping" and is not permitted to bolster the complainant's credibility.[99] Rook and Ward explain the rationale and note the difference in positions of complainant and defendant:

> The theory underpinning this exclusionary rule is that the jury ought to be able to decide for themselves whether the witness is telling the truth, unswayed by evidence that suggests she is. This contrasts starkly with the position of the defendant, who may call evidence designed to show himself in a good light for the purpose of assisting his own credibility. This can work an apparent injustice in cases where a defendant makes full use of their freedom to call character evidence.[100]

5.91 However, with regard to the position of the complainant, exceptions have been established over time, especially in sexual offences, where the courts have founded

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95 *Hunter* at [85]-[88].

96 *Hunter* at [85].

97 *Hunter* at [63], citing The Rt Hon Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, January 2015).

98 *R v IWAT* [2001] EWCA Crim 1898 at [19], cited in *R v Mader* [2018] EWCA Crim 2454 at [17], where the court notes that *R v IWAT* is also known as *R v Amado-Taylor*. Where we refer to a judgment that cites the case then we use the case name that is used by the court, which is generally *Amado-Taylor*.

99 Rook and Ward (2021) 19.105; see also para 10.117 and paras 10.131 to 10.132 below on oath-helping and expert evidence.

100 Above, 19.105 (references omitted).

exceptions on the proposition that what goes to an issue and what goes to credit are not always easily distinguishable. The Court of Appeal in *Funderburk* used a passage from *Cross on Evidence* to explain why the exceptions can be made in sexual offences cases:

> Evidence is often effectively limited to that of the parties, and much is likely to depend on the balance of credibility between them. This has important effects for the law of evidence since it is capable of reducing the difference between questions going to credit and questions going to the issue to vanishing point.[101]

5.92 In 2003, in *R v Tobin*, this created a window for the prosecution to use GCE in relation to the complainant.[102] In *Tobin* the complainant alleged that the defendant forced her to perform oral sex on him while he was driving her and a friend home. The defendant's account was that the claimant was drunk and that it was entirely consensual, with the complainant having suggested and then initiated the oral sex. On both accounts the events happened while the friend, an older woman who was a friend of the complainant's father, was asleep in the car (though the defendant claimed the friend was awake for part of the journey before the incident). Five character witnesses were called for the defendant, describing him as "decent, trustworthy, hard working and honest".[103] The prosecution called evidence from the complainant's mother, who said:

> I have never had any problems with [my daughter] throughout her childhood. She has always done really well at school. At home she gets on well with her brother and sisters. I would say that she is very polite and quiet. She has been brought up to respect people.

5.93 The defendant was found guilty and appealed on the grounds that "the prosecution were wrongly allowed to call evidence to bolster the evidence of the complainant".[104] The defence argued that "the reference to respecting people is unacceptable in a case where the issue was whether the complainant did, or may have, initiated sexual conduct in the presence of the older woman in the back of the car".[105] The prosecution's position was that:

> evidence is permitted which is relevant to an issue in the case or goes to the likelihood of whether the events claimed by the witness to have occurred did occur. The issue in this case was whether the sexual conduct in the car was initiated by the complainant or by the appellant. Evidence of her attitude, towards her family and other people, threw light on the issue and was likely to help the jury to decide whether she is the type of person who would do what the appellant said she did."

5.94 The Court's decision makes it clear that "in criminal trials generally evidence is not admissible simply to show that a prosecution witness has a good character, in the

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101 *Cross on Evidence*, 6th ed, cited in *Funderburk* (1990) Crim App R 466, [1990] 1 WLR 587: Rook and Ward (2021) [19.100]; see also para 4.22 above.

102 *R v Tobin* [2003] EWCA Crim 190, [2003] *Criminal Law Review* 408 ("*Tobin*").

103 *Tobin* at [13].

104 *Tobin* at [14].

105 *Tobin* at [15].

sense that he or she is generally a truthful person who should be believed".[106] Similarly, evidence will not be admissible if it "goes to establish that the complainant is not the type of person who would conduct herself in the manner alleged by the defendant", as that would constitute oath-helping.[107] However, none of this precludes the admission of evidence of the complainant's good character. The starting point in determining admissibility is whether the evidence is relevant to a matter in issue. If so, then the evidence will be admissible even if it also bolsters credibility.[108] However, adopting the point from *Cross on Evidence*, the Court states that "in sexual cases such as these much is likely to depend on the balance of credibility between the parties and that the difference between questions going to credit and questions going to the issue may be reduced to vanishing point".[109] In such a case, the answer to the question of whether evidence is admissible is "an instinctive one based on the prosecutor's and the Court's sense of fair play".[110]

5.95 The Court of Appeal agreed with the trial judge that this was a case of that kind, where questions going to credit and issue were close, but the evidence did in effect go to an issue. It did so because there was "a stark conflict of evidence between the complainant and the appellant"; the defendant's claim that the sex was not only consensual but that the complainant had initiated it meant the defendant's argument was in substance that "the 16 year old [complainant] is a liar".[111] In those circumstances it was plain that "the jury's view of the credibility of the complainant and the appellant was crucial to the outcome of the trial".[112] Turning to the fairness question, given that "very full evidence was given about the background and character" of the defendant, the Court of Appeal's "sense of fair play is not offended but rather affirmed by the admission of the very limited evidence about the complainant's characteristics and conduct".[113]

> The limited evidence that the complainant gets on well with her brothers and sisters, did well at school, is very polite and quiet, respects people and had left home does not render the trial unfair or offend the rule against oath-helping. It was not necessary to achieve fairness to prevent the jury from having that limited information about her. Moreover, as the case was argued, it was not to be excluded for lack of relevance. Given the jury's vital task of deciding the issue whether the events were as described by the complainant or as described by the appellant, the prosecution were entitled to adduce the evidence they did in the circumstances of this case.[114]

5.96 The Court of Appeal in *Tobin* opened the window that was created by the citation of *Cross on Evidence* in *Funderburk* – but it did not open that window very wide. There

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106 *Tobin* at [23].

107 *Tobin* at [31].

108 *Tobin* at [22]-[23] citing *R v Amado-Taylor* [2001] EWCA Crim 1898.

109 *Tobin* at [32], see also at [19].

110 *Tobin* at [32], citing *Funderburk* (1990) Crim App R 466, [1990] 1 WLR 587.

111 *Tobin* at [24], [26].

112 *Tobin* at [26].

113 *Tobin* at [34]. The Court also noted at [34] that the evidence "may have been of very little value".

114 *Tobin* at [35].

was a strong emphasis on the specifics of the facts and the way the defence was cast, and the particular balance of GCE as between the defendant and the complainant. Rook and Ward are critical of the decision in *Tobin*. They describe the Court as engaging in "sleight of hand" when saying that the character evidence went to an issue (rather than solely to credit) and argue the better approach would have been to have been explicit that fairness is the appropriate rationale.[115] It is a description we find persuasive; as the Court stated, "the jury's view of credibility" was crucial to the outcome and fairness is a more convincing and appropriate approach.[116] Nonetheless, the Court in *Tobin* left no doubt that "in sexual cases, prosecution evidence of the complainant's background and characteristics is not inevitably excluded".[117]

5.97 We pause here to make some observations about these decisions and the rationale that underpins them. For those minded to redress the imbalance between the defendant and complainant as regards character, *Funderburk* and *Tobin* may on their face be appealing because they enable a complainant's good character to be raised. However, there are reasons for caution. First, the cases open the door to the admission of SBE even though under section 41 of the YJCEA such evidence is not admissible if it goes solely or mainly to credit.[118] There is a difference here in that section 41(4) concerns evidence that impugns credibility rather than bolsters it, but it is nonetheless a regressive step if evidence of sexual behaviour (or the lack thereof) is to be admissible on the grounds it helps a jury assess credibility. Secondly, if evidence that someone is nice, respectful and well-behaved goes to the question of consent in the *Tobin* circumstances – that is, it goes not merely to credibility but to an issue – then the same rationale suggests that evidence that a complainant is "badly-behaved" could also be said to go to the question of consent. It suggests that where a young complainant has, for example, a long social services record of running away and being seen with older men then that could be used as evidence to attack credibility and to suggest she is more likely to have consented to sexual activity. Such an argument deploys rape myths and is neither legitimate nor logical: previous sexual experience is not probative of consent on this occasion, with this person.

Admissibility and directions

5.98 In 2018 the Court of Appeal in *Mader* reviewed the authorities to set out the position as it now stands. *Mader* was not a sexual offence case. The defendant had stabbed the victim but claimed he acted in self-defence when the victim tried to rob him. The Court stated the law in principles of general application:

> We consider the following propositions are now well established and should be applied when considering if evidence of good character of a non-defendant witness should be admitted:

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115 Rook and Ward (2021) [19.109]. Other criticism of the reasoning is referred to in *R v Mader* [2018] EWCA Crim 2454 at [21-22] and *R v Ali* [2006] EWCA Crim 1976 (cited in *Mader*).

116 *Tobin* at [26]; see para 5.95 above.

117 *Tobin* at [33], citing *R v Funderburk* [1990] 1 WLR 587 and *R v Amado-Taylor* [2001] EWCA Crim 1898.

118 YJCEA 1999, s 41(4).

(a) The starting position is that, generally, evidence is not admissible simply to show that a prosecution witness has a good character in the sense that he or she is a generally truthful person who should be believed.

(b) However, evidence is admissible if it is relevant to an issue in the trial (unless, of course, excluded by one of the normal exclusionary rules of evidence).

(c) The category of issues to which evidence of disposition may be relevant is not closed. However: (a) the issue of consent in a trial involving sexual conduct is an issue to which evidence of character or disposition may be relevant ….

(d) If admitting evidence on the basis that it is "issue-relevant", a trial judge should be astute to ensure that the issue to which it is relevant and its limitations are understood by the jury. The judge should also ensure that the effect of admitting the evidence is not to water down the protection provided by the primary obligation upon the prosecution to prove its case and any good character direction that may be given for the defendant. [119]

5.99 Several aspects of *Mader* indicate that the scope for the admission of complainant GCE remains limited.

5.100 First, the rule against oath-helping is said to be unchanged; evidence can only be admitted if it goes to an issue. However, as we have observed above, in the light of *Tobin* and the rationale under which issue and credibility are reduced to vanishing point in many sexual cases, there is some doubt about whether this really is the case.

5.101 Second, the clear statement of principles in *Mader* should not immediately be interpreted as expanding the circumstances in which complainant GCE will be admitted. Training material provided to Crown Court judges states that the first step a judge must have in mind in the sequence of steps for decision making is, “Only in rare cases will the good character of the complainant be relevant”.[120]

5.102 Third, “issue relevant” GCE can be very intrusive, especially where it goes to consent. For example, the evidence described as GCE in *R v IWAT (Amado-Taylor*) saw the prosecution call the complainant’s former partner to give evidence that she was opposed to sex before marriage for religious reasons.[121]

5.103 Fourth, the Court states explicitly that neither the admissibility of the evidence nor a direction may “water down” the obligation on the prosecution to prove their case.[122]

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119 *R v Mader* [2018] EWCA Crim 2454 at [32] (references omitted). In this case, the Court of Appeal dismissed the appeal, finding that the GCE for the prosecution witnesses was rightly admitted, having a bearing on the likelihood that the victim had in fact tried to rob the defendant, and the trial judge’s direction did not water down the effect of the GC direction for the defendant.

120 We are grateful to a judge for providing us with a copy of the materials.

121 *R v IWAT* [2001] EWCA Crim 1898.

122 This had been a concern in *R v Green* [2017] EWCA Crim 1774, [2018] 4 WLR 39 and, on that point, the Court in *Mader* agreed: [2018] EWCA Crim 2454 at [31]. See also Archbold, [4.466a].

That is watered down where a direction refers to, for example, a "level playing field" between the complainant and the defendant.[123]

5.104 Fifth, the Court does not include in its four-point summary any general statements about giving directions in relation to GCE about complainants. In a later passage the Court approves of the directions the trial judge gave in the case, noting that the directions explained the relevance and limitations of the GCE, but does no more.[124] The Crown Court Compendium provides a sample direction for GCE of a prosecution witness in only one circumstance, which is when the defendant's defence is self-defence and the witness does not have any previous convictions.[125]

5.105 Finally, there is an additional point raised in *Mader* but which the Court does not expressly address in its four-point summary. The Court in *Mader* held that the correct decision was reached in *Green* but that the case has limited value as an authority.[126] However, while the following statement is included in the parts of *Green* that are cited in *Mader*, the Court in *Mader* does not directly address it:

> Unless a jury hears (for good reason) that a Crown witness is not of good character, they will no doubt assume that there is nothing to speak against his or her credibility.[127]

Although not explicitly addressed in *Mader*, the statement arguably articulates the rationale for excluding complainant GCE and/or providing no jury direction on its use. Stakeholders, however, cast considerable doubt on that proposition, expressing the view that jurors who have heard nothing about the complainant's character could just as easily assume that the complainant has bad character. That may be more likely when the jury has heard evidence of the defendant's good character and received a direction in relation to that, but heard nothing at all about the character of the complainant.

Stakeholders' views

5.106 It was generally agreed by stakeholders that there is a difference in the positions of the complainant and the defendant in this area. It was often described by stakeholders as an imbalance, though not all stakeholders referred to it in that way. We are mindful in our consideration of these views that fidelity to the principled asymmetry of criminal justice – explained above[128] – does not mean that every imbalance is required to protect the innocent from wrongful conviction, but nor does it mean that remedying an inappropriate imbalance requires that the scales are evenly balanced. However, there is by no means an agreed or prevailing view about how to approach the difference in positions. On the contrary, there were views across a wide spectrum.

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123 *R v Green* [2017] EWCA Crim 1774, [2018] 4 WLR 39 at [20], [26].

124 *R v Mader* [2018] EWCA Crim 2454 at [34].

125 Crown Court Compendium (2022) 11-10, Example 9.

126 *R v Mader* [2018] EWCA Crim 2454 at [31].

127 *R v Green* [2017] EWCA Crim 1774, [2018] 4 WLR 39 at [25].

128 See para 5.73 above.

5.107 At one end of that spectrum were stakeholders who thought the best approach was to remove the use of GCE and directions entirely for both defendants and complainants on the grounds that it has limited evidential value in the context of sexual offences.

5.108 Moving along the spectrum there were several stakeholders who said there was no need to reform the law; defendants of good character should be entitled to introduce evidence of it and should be entitled to a GC direction, and the scope for complainant GCE should not be expanded. Defence practitioner Martin Rackstraw told us that GCE may be relevant and there has never been equivalence because of the burden of proof and the result for the defendant, which would be imprisonment if found guilty. He did not support a GC direction for complainants. A senior judge was of the view that there was no reason for the prosecution to be given the chance to elicit GCE as the system has been working for a very long time and does not create a grave imbalance.

5.109 Sir John Gillen's *Report into the law and procedures in serious sexual offences in Northern Ireland* ("Gillen Review") addressed the situation in the context of separate legal representation for complainants:

> Arguably there is an imbalance in the system. Defendants are given individual legal representation, which includes the ability to call character witnesses and challenge the complainant directly through counsel. The complainant is not given any ability to be considered a party in proceedings and therefore cannot access character witnesses even though character is so often used by defence when discussing behaviours of complainants.[129]

5.110 However, on the question of directions, Sir John told us that he did not favour removing GC directions for defendants or introducing them for complainants. He said that in his view it would unbalance the fair trial rights of the defendant and the restrictions on complainant GCE and directions are a feature of the adversarial process and the requirement that the prosecution prove its case.

5.111 Perhaps in the middle of the spectrum were several practitioners who did not favour change in the law but saw room for reducing the degree of imbalance. A common theme in these views was that the complainant's character may be thoroughly attacked, including suggesting she has been lying or has made the allegations for compensation, whereas the defendant may not be questioned on their character at all. An academic and practitioner and a recorder both told us that evidence and judicial directions on the complainant's good character could give a better balance in these circumstances. Another recorder made the same point where there has been a "wholesale attack" on the complainant's character. Lynda Gibbs KC was also of a similar view, particularly because sexual offence cases are usually one person's word against another.

5.112 To the extent that a recalibration may be criticised as constituting some kind of special treatment, a judge was of the view that special treatment of GCE may be justified in

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[129] Sir John Gillen, *Gillen Review: Report into the law and procedure in serious sexual offences in Northern Ireland* ("Gillen Review") (2019) Part 1, para 5.95.

sexual offences cases as this is already the case in relation to the provisions on sexual history.

5.113 Further along the spectrum were views often – but not always – in support of an increased use of complainant GCE and directions, though these were often imbued with caution.

5.114 The Centre for Women's Justice and another organisation supporting complainants were of the view that a GC direction to the effect that the complainant had no previous convictions may be useful for women including those from minority communities who may not have others to give evidence of her good character.

5.115 Some stakeholders, including End Violence Against Women Coalition and the Rape Crisis ISVA Reference Panel, drew an important link between character evidence and rape myths and said that defendant's GCE is often used by barristers to reinforce certain societal myths such as the fact that having a rape conviction could be the worst thing that could happen to a young man.

5.116 A defence barrister and End Violence Against Women Coalition raised concerns that the calling of evidence to support complainants' good character or the giving of a GC direction may lead to greater intrusion into the lives of complainants and could be problematic for complainants who may have previous convictions, such as complainants who are vulnerable.

5.117 A Crown Court judge observed that any complainant GCE may be valuable in countering a defence account of events – such as in *Mader*, where the defendant alleged that the victim tried to rob him, or in *Tobin* where the defendant claimed the complainant initiated the sexual conduct – but it could be confined to quite narrow circumstances. The judge gave as examples that if the defendant claims the complainant has lied then it may be relevant that the complainant has no previous convictions for dishonesty, or if the defendant claims the complainant consented to sexual intercourse without a condom then it may be relevant that the complainant only ever had sex if condoms were used (which would engage the rules on SBE).

5.118 A recorder suggested that the direction for complainants only be a line or two, otherwise it would risk exposing their backgrounds. To be given a GC direction, they would have to be subject to a more rigorous examination of their past, because one would have to look at any reprehensible behaviour.

5.119 We also heard from stakeholders that the introduction of complainant GCE may disadvantage vulnerable and minoritised complainants, where there may be difficulty adducing GCE and its absence may be stark. There is a risk that bad character evidence may be brought in to rebut any GCE, which may result in a disproportionate advantage to the defendant and aggravate the retraumatisation of the complainant. For example, minoritised complainants (who are more likely to have convictions due to, amongst other complex factors, over-policing[130]) or sex workers would be vulnerable to that risk. The impact of this is compounded by the current context where

[130] R Thiara and S Roy, *Reclaiming Voice: Minoritised Women and Sexual Violence: Key Findings* (March 2020) p 6.

it is already more difficult to secure convictions where the complainants are from disadvantaged, minoritised or vulnerable groups.

5.120 There were also some technical questions raised. These included queries about how practical it would be to vary good character rules only for RASSO cases (though we note that *Mader* identifies RASSO cases as a specific category) and, if that did happen, whether consideration should be given to extending changes beyond sexual offences.

5.121 Finally, the CPS referred us to a survey of its 708 external lawyers (the CPS Rape Advocates List) and 80 internal higher court advocates qualified to prosecute RASSO cases.[131] There were 125 responses.[132] They have provided us with a summary that includes the following on the GC direction.

> The majority of respondents (61%) expressed the view that the rules around the admissibility of character evidence provided an unfair advantage to defendants. Feedback suggested that whilst the unfairness is not restricted to RASSO cases it is particularly pronounced in RASSO cases where corroborative evidence is limited and the jury's assessment of the credibility of two opposing accounts is critical.
>
> A number of respondents highlighted the role that they believed the current character rules played in contributing to the disproportionately poor trial outcomes seen in rape cases involving young adult defendants.[133]
>
> In terms of solutions some respondents suggested that it was unnecessary to hear any evidence at trial about the good character of either party while other respondents suggested that the prosecution should also be permitted to adduce evidence of the complainant's good character.
>
> Respondents who did not support changes to character evidence cited the risk of unfairness to the defendant and the difficulty of making an exception for RASSO cases.[134]

5.122 Respondents were also able to make comments in response to open-ended questions. Like the summary, there are strong views and a variety of opinions. The vast majority of the 27 comments express the view that evidence of the complainant's good character should be admissible. There were also views that the GC direction for the defendant is too favourable, and (in one instance) that there should be no GC direction at all for the defendant: "The direction is inappropriate, good character should count for nothing in these cases and the jury should be so directed"'.

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131 CPS, *RASSO Advocacy Survey – Summary of Findings* (August 2021). The survey was conducted in collaboration with the Ministry of Justice.

132 Above. Given the external lists it is likely that most advocates who received the survey have both prosecuted and defended, but the survey summary did not provide a breakdown of whether respondents had done both or were predominantly prosecutors.

133 We take this to mean that the defendants were acquitted. See further the comments of End Violence Against Women Coalition and the Rape Crisis ISVA Reference Panel, para 5.115 above.

134 CPS, *RASSO Advocacy Survey – Summary of Findings* (August 2021), section 5.

5.123 The CPS survey shows in the first summary point the strongest evidence we have seen that the difference in positions of the defendant and complainant could be characterised as an inappropriate imbalance in RASSO cases. Still, we remain cautious in attributing too much significance to that as a sole source, not least without knowing whether the survey can be said to represent defence views (though some lawyers on the Advocates List will almost certainly have experience of both prosecuting and defending). There is an added caution that a view held by 61% of respondents cannot be characterised as overwhelmingly pointing in one direction; indeed, the survey results could arguably be viewed as suggesting that 39% of prosecutors see the existing position as striking the right balance. Rather, the survey might be more cautiously seen as reflecting the spectrum of views we received from a range of stakeholders: there is generally a recognition of a difference, but no agreed or dominant view about whether or how it should be addressed.

Comparative Law

5.124 In the comparable jurisdictions we have considered, the law regarding character in sexual offences cases varies considerably in its detail and in the frameworks that govern it, though, as the outline below indicates, there is a degree of common ground in some areas. We begin by looking at provisions regarding the defendant's character and then turn to evidence of the complainant's character.

Defendant good character

5.125 It appears that evidence of the defendant's good character will be admissible in all the comparable jurisdictions. This may be limited to evidence of the absence of prior convictions, depending on the relevance of any GC evidence and if there is a need to avoid satellite issues, though provisions may also be broad.

5.126 In Scotland, for example, defendant GC evidence is contemplated by the Criminal Procedure (Scotland) Act 1995.[135] Lady Dorrian told us that in Scotland GCE could be led in so far as it is that the accused does not have previous convictions, but the defendant is not entitled to a direction from the judge. Otherwise, she said, character is not usually led in evidence as it is rarely relevant and the judge would almost always step in to say it is not relevant. In Canada, Lederman, Bryant and Fuerst explain that there are three ways that the defendant can introduce evidence of their good character: (1) by eliciting evidence of general reputation for particular character traits (but not acts of specific good conduct) from their own witness during evidence-in-chief or, in cross-examination, from a prosecution witness; (2) by personally testifying about specific acts of good conduct; or (3) in limited circumstances, by calling expert psychiatric evidence about disposition to behave or not to behave in a particular way.[136] GCE may be used "as the basis of an inference that [the defendant] is unlikely to have committed the crime charged"[137] and "is also admissible in support

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135 Criminal Procedure (Scotland) Act 1995, s 266.

136 S Lederman, A Bryant and M Fuerst, *The Law of Evidence in Canada* (5th ed 2018) paras 10.22, 10.23-10.42. On general reputation, see *R v Rowto*n (1865) Le & Ca 520 at note 2 above.

137 *R v McMillan* 1975 CanLII 43, (1975) 7 OR (2d) 750 (ON CA) at 758, (affirmed 1977 CanLII 19, [1977] 2 SCR 824); *R v Tarrant* 1981 CanLII 1635, (1982) 34 OR (2d) 747 (ON CA) at 750.

of the credibility of the [defendant]".[138] In the uniform evidence law jurisdictions in Australia, the defendant is entitled to introduce evidence of their good character to show either that they are a person of good character generally or that they are a person of good character in a particular respect.[139]

5.127 The approach to GC directions varies. Lady Dorrian told us that in Scotland the defendant is not entitled to a GC direction. In Ireland, there is no requirement for a GC direction.[140] Tom O'Malley told us that Ireland has never had a tradition of giving a GC direction for the defendant or for the complainant. The Irish Court of Appeal has said that there are problems associated with GC directions.[141]

5.128 In Australia, neither the uniform evidence law nor the common law requires a jury direction on character evidence. The position in Victoria is different. There, counsel may request that a direction on character evidence is given.[142] If a request is made then the judge must give the direction unless there are good reasons for not doing so.[143] If a request is not made then a direction must not be given unless the judge considers that there are "substantial and compelling reasons" for giving a direction regardless of the parties' views.[144] If the trial judge considers that there are such substantial and compelling reasons to give a direction then they must give a direction.[145]

5.129 In Canada, the judge must give a direction when there is evidence of the defendant's GC and, if the prosecution has led BC evidence in rebuttal, the BC evidence must also be addressed in the direction.[146]

Defendant bad character

5.130 The position regarding evidence of the defendant's bad character often substantially mirrors the position in England and Wales where, if a defendant introduces evidence of their own GC then the prosecution may adduce evidence of the defendant's BC.[147]

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138 *R v Tarrant* 1981 CanLII 1635, (1982) 34 OR (2d) 747 (ON CA) at 750, citing *R v Bellis* (1965) 50 Cr App Rep 88.

139 Sexual offences in Australia are prosecuted under the criminal laws of the states and territories. However, there is a uniform evidence law set out in the Evidence Act 1995 (Cth), which has been enacted by several states and territories, eg, Evidence Act 1995 (NSW), Evidence Act 2008 (Vic), sometimes with variations. On character, see, for eg, Evidence Act 1995 (NSW), s 110.

140 *DPP v Sherlock* [2019] IECA 223, approving *obiter* comments by Murray CJ in *DPP v Joseph O'Reilly* [2009] IECCA 118.

141 Mr O'Malley led a major review in Ireland: T O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (July 2020) ("O'Malley Review"); *DPP v Sherlock* [2019] IECA 223 at [11], [13].

142 Jury Directions Act 2015 (Vic), s 27.

143 Jury Directions Act 2015 (Vic), s 14.

144 Jury Directions Act 2015 (Vic), ss 15-16.

145 Jury Directions Act 2015 (Vic), s 16.

146 National Judicial Institute, *Model Jury Instructions*, Part 11.1, "Evidence of Good Character" (June 2012).

147 CJA 2003, s 101(1)(f)(g).

That is also the position in, for example, Scotland, Ireland, Canada, New Zealand and Australia.[148]

5.131 Specific limits or requirements vary across jurisdictions. For example:

- In Canada, the prosecution may "adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed".[149]

- In Scotland, the same applies if the defendant has sought to impugn the character of the complainer or other witnesses.[150] However, there are further provisions in sexual offences cases in that jurisdiction: in the event that the complainer's character is attacked then the prosecutor is obliged to place before the court (including the jury) any relevant previous convictions of the defendant.[151] A prosecutor from the Crown Office and Procurator Fiscal Service (COPFS) told us that in their experience, where the defendant has previous convictions which may on any view be relevant to the jury's consideration of the evidence, they almost never seek to impugn the witness' character.[152]

- In Australia, the court has both a discretion and, in some circumstances, an obligation to exclude evidence. In criminal proceedings the court "must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant", and "may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or misleading or confusing, or cause or result in undue waste of time".[153]

- In New Zealand, evidence must be excluded if "its probative value is outweighed by the risk that the evidence will (a) have an unfairly prejudicial effect on the proceeding; or (b) needlessly prolong the proceeding".[154] In making a determination about whether evidence would be unfairly prejudicial, the judge "must take into account the right of the defendant to offer an effective defence".[155]

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148 Criminal Procedure (Scotland) Act 1995, s 274(4)(b); Criminal Code (Canada), s 666; Criminal Justice (Evidence) Act 1924 (Ireland), s 1(f); Evidence Act 2006 (NZ), ss 38, 41; Evidence Act 1995 (NSW), s 110. Sexual offences in Australia are prosecuted under the criminal laws of the states and territories. However, there is a uniform evidence law set out in the Evidence Act 1995 (Cth), which has been enacted by several states and territories, eg, Evidence Act 1995 (NSW), Evidence Act 2008 (Vic), sometimes with variations.

149 Criminal Code (Canada), s 666.

150 Criminal Procedure (Scotland) Act 1995, ss 266(4)(b), 270.

151 Criminal Procedure (Scotland) Act 1995, s 275A(1). A "relevant" conviction will generally be a conviction for a sexual offence (and sexual offences are listed in s 288C(2)) or a conviction for an offence with a sexual element: s 275A(10).

152 This appears to continue the pattern that had been earlier observed prior to the introduction of the s 275A provisions specific to sexual offences, which was that the s 270 provisions were rarely used: *DS v HM Advocate* 2007 SC (PC) 1 at [32] (Lord Hope), [69] (Lord Rodger).

153 Eg, Evidence Act 1995 (NSW), s 137, s 135(b)-(c).

154 Evidence Act 2006 (NZ), s 8(1).

155 Evidence Act 2006 (NZ), s 8(2).

- In Ireland, the trial judge retains the discretion to decide whether to permit cross-examination on the defendant's character where evidence has been introduced that is unconnected with proving the facts in issue.[156] When exercising their discretion, the trial judge must consider the defendant's right to a fair trial and the probative value and prejudicial effect of the evidence.[157]

Complainant bad character

5.132 There is a deal of common ground in the way that other jurisdictions deal with evidence of the complainant's bad character. Typically, as in England and Wales, there are restrictions on introducing such evidence and these restrictions are found in SBE laws (which we discussed in detail in Chapter 4).

5.133 In Scotland, for example, the provisions of the Criminal Procedure (Scotland) Act 1995 prohibit attacks on the complainant's character unless specific conditions are met.[158] However, in Scots law the evidence must first be admissible at common law, which requires that it is relevant to an issue that is not a collateral issue – and character is generally seen as being collateral to the issues for decision and so the evidence is simply inadmissible and the provisions of the 1995 Act do not arise for consideration.[159] Were it to satisfy the relevance threshold and be admissible at common law then it would also need to meet the requirements of those provisions.[160]

5.134 In other jurisdictions, there are separate provisions for character evidence and SBE. In short, where the evidence goes to sexual behaviour, the SBE rules will be engaged.

5.135 In New Zealand, character evidence that goes to credibility may be admissible if it meets the requirements of section 37 of the Evidence Act 2006, which sets out the "veracity rules". Under these rules a party "may not offer evidence about a person's veracity … unless the evidence is substantially helpful in assessing that person's veracity."[161] In determining whether evidence will be "substantially helpful", section 37(3) lists five factors that the judge "may consider, among any other matters". The factors are all matters that might suggest a witness has a disposition to lie; for example, they include bias, a motive to be untruthful, or that they have previously lied when under a legal obligation to tell the truth. However, if the evidence goes to sexual

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156 M Fitzgerald O'Reilly and S Leahy, *Sexual Offending in Ireland: Laws, Procedures and Punishment* (2018) p 183, citing *R v Selvey* [1970] AC 304 and *People (DPP) v McGrail* [1990] 2 IR 38. In *McGrail* (at 50-51), the court made it clear that the defendant must be able to test the veracity of prosecution witnesses regarding evidence relevant to proving the facts in the case; it would not be a fair procedure if the defendant could only do that by risking their own character being put in evidence.

157 M Fitzgerald O'Reilly and S Leahy, *Sexual Offending in Ireland: Laws, Procedures and Punishment* (2018) p 183; *DPP v D.O.* [2006] IESC 12.

158 Criminal Procedure (Scotland) Act 1995, ss 274-275.

159 *CJM v HM Advocate* [2013] SCCR 215 at [29].

160 *CJM v HM Advocate* [2013] SCCR 215.

161 Evidence Act 2006 (NZ), s 37(1). "Veracity" is defined as "the disposition of a person to refrain from lying": s 37(5).

behaviour then the SBE protections will be engaged, and these have a higher threshold than "substantially helpful".[162]

5.136 Where character evidence goes to propensity, however, the section 40 "propensity rule" will apply. Propensity evidence under section 40 is "evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved".[163] However, any propensity evidence about "a complainant in a sexual case in relation to the complainant's sexual experience, sexual disposition, or sexual reputation may be offered only in accordance with [the SBE provisions]", which, again, have a higher threshold.[164] Finally, under section 40(4), evidence that is "solely or mainly relevant to veracity is governed by the veracity rules … and, accordingly, this section does not apply to evidence of that kind".

5.137 In the next part of this chapter, where we discuss complainant bad character in the context of false allegations, we will return to some of the above provisions and also look at other jurisdictions.

Complainant good character

5.138 The most significant variance is found in the laws relating to complainant GC.

5.139 The position in Canada is similar to that in England and Wales. The prosecution is generally not able to adduce evidence of a complainant's GC as that would constitute oath-helping, though it may be admissible in narrow circumstances where it is relevant to a matters other than credibility.[165] However, the prosecution can reclaim the character of a witness if their credibility has been impugned by cross-examination in re-examination.[166] This allows for the prosecution to pose questions to the complainant to explain or clarify discrepancies between the witness' evidence-in-chief and cross-examination.[167]

5.140 In New Zealand, McDonald has argued that the law permits complainant GC evidence.[168] The New Zealand Law Commission noted in 1997 that there was an imbalance in the positions of the defendant and complainant as regards GC, observing that the defendant had "an unfair advantage over prosecution witnesses such as complainants in rape cases".[169] It is McDonald's argument that the subsequent Evidence Act 2006 (NZ) can accommodate complainant GC evidence and

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162 Evidence Act 2006 (NZ), s 44.

163 Evidence Act 2006 (NZ), s 40(1)(a).

164 Evidence Act 2006 (NZ), s 40(3)(b).

165 S Lederman, A Bryant and M Fuerst, *The Law of Evidence in Canada* (5th ed 2018) para 10.140; *R v Burns* [1994] 1 SCR 656.

166 Above, para 16.222 (references omitted).

167 Above.

168 E McDonald, *Principles of Evidence in Criminal Cases* (2012) p 181.

169 New Zealand Law Commission, *Evidence Law: Character and Credibility: Preliminary Paper* (1997), at [185] (references omitted). This issue had been previously discussed by defence counsel, particularly in the context of sexual offences: E McDonald, *Evidence of Veracity or Propensity* (2012) p 14.

that it was intended to be wide enough to do so.[170] As we noted above, section 37 of the Act sets out the "veracity rules", under which a party "may not offer evidence about a person's veracity … unless the evidence is substantially helpful in assessing that person's veracity."[171] In determining whether evidence will be "substantially helpful" section 37(3) lists five factors that the judge "may consider, among any other matters". The factors are all matters that might suggest a witness has a disposition to lie; they include bias, a motive to be untruthful, or that they have previously lied when under a legal obligation to tell the truth. As such, to adduce complainant GC evidence the phrase "among any other matters" would need to be deployed. In McDonald's view the rules were intended to be wide enough to allow witnesses, including complainants in sexual cases, to offer veracity evidence.[172] Although there is no need for there to have first been a challenge to their veracity, she argues that the test may not be met if such a challenge has not occurred.[173] We are not aware that McDonald's arguments have been applied or tested in the courts. It is also not clear whether these provisions are being used with regard to complainants in sexual cases, though McDonald observes that the NZ Court of Appeal held in one instance that a prosecutor's questions in examination-in-chief allowed the complainant to make a statement of her own good character that unfairly bolstered her credibility.[174]

5.141 In Scotland, there are some provisions that are not about complainant GC but which arguably share parallels to the extent that evidence may be admissible where it is designed to protect the complainant from attacks on their credibility. In Scotland, where the complainant's credibility has been attacked in sexual offences cases then it is not GC evidence but expert explanatory evidence that may be admitted:

> Expert psychological or psychiatric evidence relating to any subsequent behaviour *or statement* of the [complainant] is admissible for the purpose of rebutting any inference adverse to the [complainant's] credibility or reliability as a witness which might otherwise be drawn from the behaviour *or statement*.[175]

5.142 Australian law appears to be silent on the issue, which may suggest that complainant GC evidence is either not admissible or, at the least, that it has not been the practice to seek to adduce such evidence. This does not foreclose the possibility that a court could be persuaded that circumstances are so exceptional that complainant GC evidence should be admitted in a particular case, but we are not aware that such an argument has been run.

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170 E McDonald, *Principles of Evidence in Criminal Cases* (2012) p 181.

171 Evidence Act 2006 (NZ), s 37(1). "Veracity" is defined as "the disposition of a person to refrain from lying": s 37(5).

172 E McDonald, *Principles of Evidence in Criminal Cases* (2012) p 181.

173 Above.

174 E McDonald, *Rape Myths as Barriers to Fair Trial Process* (2020) p 163; *R v J* [2018] NZCA 343 at [50]-53].

175 Criminal Procedure (Scotland) Act 1995, s 275C (emphasis added). The law in Scotland uses the term "complainer" rather than "complainant" but for comparative purposes we use "complainant" here. On expert evidence see further paras 10.100 to 10.163 below.

Conclusions

5.143 The law in comparable jurisdictions suggests that there is neither a consistent approach nor a clear model that might provide particular guidance for reform in England and Wales. The most that can be said is that if England and Wales were to remove the right of the defendant to introduce GC evidence then this jurisdiction would be an outlier. That is not of itself a reason to retain the current position but it arguably would require a stronger case than anyone has made to us so far or than is conveyed in the comments of the Court of Appeal in *Hunter*.[176] With respect to evidence of the complainant's GC, the position reached by the courts in England and Wales cannot be said to be either overly inclusive or overly restrictive when compared to other jurisdictions. In that light, we consider reform options based primarily on the position and experience in this jurisdiction.

Reform options

5.144 It is common ground that the defendant and the complainant are in very different positions with respect to the admission of character evidence. A significant body of stakeholders' views see this as creating unfairness in favour of the defendant.

5.145 The fact that an imbalance or unfairness exists does not by itself mean that it should be removed. On one view, as we have explained above, it is consistent with the principled asymmetry of the criminal justice system and the protections that are rightly afforded to the accused. That is, an imbalance is logical and sensible as the defendant is facing a trial in which their liberty is stake and they are being prosecuted by the state, with all the forces and resources it has. The imbalance arises because the prosecution bears the burden of proving its case and the defendant has a right to a fair trial. However, the fact that the defendant has a right to a fair trial does not of itself mean that change will undermine that right.

Evidence of the defendant's good character

5.146 If the balance is to be altered then there are different approaches that might be taken.

5.147 One approach could be to restrict or abolish the rights of defendants to introduce GCE.

5.148 There was some support for this approach from stakeholders, generally framed as removing GCE for both defendants and complainants (though the latter not to happen without the former). There is some precedent for the approach in other jurisdictions (eg, Ireland). We also note the statements by the Court of Appeal in *Hunter* which, as discussed above, cast some doubt on whether character evidence should be considered at all.[177] However, the Court did not pursue that theme and developed a framework within which character directions could be made consistently and fairly. It might also be argued that abolishing the defendant's rights would correct the imbalance without imposing any additional requirements or intrusions in relation to the complainant. However, it remains the case that GCE may be relevant and a defendant may rightly want to introduce it. For example, where a suspect is charged with a serious sexual offence then evidence from former partners about the absence of

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176 See para 5.84 above.

177 See para 5.84 above.

sexual violence or misogyny or abusive behaviour in their relationship may arguably be relevant. The defendant's (good) behaviour is relevant because how a defendant conducted themselves in a comparable context is evidence of lack of propensity (suggesting it is less likely that they have done the act alleged) and credibility (suggesting that what they say about the allegation is true). This is an important way in which the defendant can refute the prosecution case. Without it, the prosecution would be able to present BC evidence to prove propensity and diminish credibility, but the defendant would be unable to present GC evidence to counter that.

5.149 Removing the defendant's right to introduce character evidence and to receive a GC direction may not always infringe their right to a fair trial, but it is entirely conceivable that in some circumstances a prohibition on the admission of GC evidence or a direction would have the effect of infringing that right. While the issue could potentially be resolved on a case-by-case basis, that would reduce certainty and consistency, and introduce a risk to fair trial rights. On balance, in our view caution, fairness and practicality all dictate that the defendant's rights to GCE should remain.

Consultation Question 31.

5.150 We provisionally propose that the defendant's right to introduce good character evidence and the associated law relating to directions should be retained.

Do consultees agree?

Evidence of the complainant's good character

5.151 A second approach to addressing the imbalance would lie in requiring the trial judge to give a GC direction in relation to the complainant where the judge decides that fairness demands it.

5.152 On our analysis, informed by the views of stakeholders, where the jury has heard no evidence about the complainant's good character, and the complainant has no prior convictions, then the absence of an entitlement to a GC direction is a significant gap in the law. A direction would be one step that would help remedy the existing imbalance. As the judgments in *Mader* and *Tobin* indicate, it is possible to give a direction about the complainant's good character without watering down the defendant's right to a fair trial. Such a direction would be a counterweight to the attacks on the complainant's character that are commonplace in RASSO trials. It would also address the questionable assumption in *R v Green* that a jury will presume a complainant is of good character unless they are told otherwise.

5.153 There are different possible forms that a direction could take. One form could be a GC direction as it is ordinarily understood; that is, a direction that speaks to the relevance of the GC evidence to propensity or credibility. In our view a direction of this kind is not appropriate because it risks watering down the defendant's right to a fair trial and would potentially raise the need for satellite issues to be brought in with GC evidence adduced in order to give a fuller picture of the complainant's character. That path would also risk engaging SBE unnecessarily and inappropriately. A second form of the direction would be one that is more explanatory to avoid a jury drawing adverse

inferences when they have heard no evidence either way about the complainant's character. In our view, such a direction should ordinarily be given where the complainant has no prior convictions but, with a view to ensuring a jury is not misled about the complainant's character and a direction is not absurd, the trial judge should decide whether fairness dictates that a direction is appropriate.

Consultation Question 32.

5.154 We provisionally propose that, if the jury has heard no evidence about the complainant's good character and the complainant has no prior convictions then, if the trial judge decides that fairness demands it, there should be a jury direction that explains why the jury has heard no evidence of the complainant's good character and that no inference adverse to the complainant should be drawn from its absence.

Do consultees agree?

5.155 There will be circumstances where the jury does hear evidence of the complainant's good character. We have considered whether there should be a substantive expansion of the law to go further than the principles set out in *Mader*. We found significant stakeholder support for changing the balance, but that does not necessarily translate to expanding on *Mader*.

5.156 A key concern is that any expansion would conflict with the points made by the Court of Appeal in *Hunter* that character evidence can lengthen trials and draw juries away from the evidence they need to assess. As the sketch of the law in *Hunter* showed, the character evidence regime for defendants is complex and nuanced.[178] An expansion of the prosecution's ability to introduce GCE relating to the complainant would add to the existing risks of distraction, though these may be few where the evidence takes the form of written character references from people who know the person or where it is adduced as agreed evidence and included in the schedule of agreed facts. However, an expansion would also present other risks, including the potential for intrusive questioning about the private lives of complainants. There would be risks that vulnerable complainants would be further disadvantaged and convictions less likely.

5.157 On balance, while *Mader* presents a narrow window through which complainant GCE may be admitted, and that window is valuable, our provisional view is that it should not be opened further. It remains the case though that there is no guidance on directions where evidence of the complainant's good character is admitted. We would welcome views on whether there should be guidance.

[178] See paras 5.88 to 5.89 above.

Consultation Question 33.

5.158 We provisionally propose there should be no substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in *R v Mader*.

Do consultees agree?

Consultation Question 34.

5.159 Where the jury has heard evidence of the complainant's good character should there be guidance about directions?

5.160 What should be the content of any guidance?

5.161 In the alternative, if the law were to be expanded beyond *Mader*, our provisional view is that such expansion should be limited, taking into account the risks we have outlined and to ensure that the defendant's right to a fair trial is not at risk. In consultation question 35, below, we set out our provisional views about what we see as the outer limits of any expansion.

5.162 The first point in the consultation question proposes a limit that reflects the established concerns that expansion of the law in this area may raise satellite issues in a trial. Limiting admissible evidence to an absence of convictions would help address the imbalance without risking satellite issues. Were that limit set to an absence of convictions relevant to credibility then there would need to be a determination of relevance, but the scope would still be fairly limited. The second point expands the possibility of admitting other complainant GC evidence, though seeks to limit it to exceptional circumstances. The factors for consideration in the third point reflect a combination of needs which have arisen in the case law discussed above:

- relevance (keeping in mind both general principles and the risks that satellite issues will distract from the main issues for the jury);
- the complainant's well-being (keeping in mind that the complainant may already have been subject to intrusive questioning and retraumatisation in giving evidence);
- the risk of unfairness to the defendant (that is, the risk of watering down the defendant's fair trial rights);
- the risk of disproportionate advantage to the defendant (that is, the risk that in the absence of complainant GC evidence there may be unfairness to the complainant or prosecution);

- whether the defence may introduce, or seek to introduce, evidence of the complainant's BC to counter the complainant GC evidence (which raises risks of further satellite issues and further intrusive questioning and potential traumatisation of the complainant).

5.163 Given these issues, the fourth point in the consultation question is that in any expansion the complainant should have a right to be heard. The complainant may not want the GC evidence introduced, not least for reasons of the potential intrusion and trauma that may follow, especially if the defendant seeks to introduce BC evidence to counter it. Alternatively, the complainant may want the GC evidence introduced and should have a right to make that argument as well.[179]

5.164 Finally, any expansion beyond *Mader* should include a requirement for directions with a view to ensuring the jury uses the evidence appropriately.

[179] A right to be heard may also engage issues relating to independent legal advice and representation, which are discussed in ch 8.

Consultation Question 35.

5.165 We provisionally propose that if there is to be a substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in *R v Mader*, such expansion should be limited to:

(1) Where the complainant has no previous convictions or has no previous convictions relevant to credibility or propensity, then that may be admitted into evidence.

(2) Other good character evidence may be admissible where the trial judge is of the view it is appropriate.

(3) A determination regarding admissibility should take account of the following:

(a) the relevance of the evidence;

(b) risks to the complainant's well-being;

(c) the risk of unfairness to the defendant if such good character evidence is admitted;

(d) the risk of a disproportionate advantage to the defendant if such good character evidence is not admitted; and

(e) whether bad character evidence may be introduced to counter the good character evidence.

(4) The complainant should have a right to be heard before any evidence of their good character is admitted.

(5) Where any evidence of the complainant's good character is admitted then it should be accompanied by a jury direction that explains its relevance.

Do consultees agree?

THE COMPLAINANT'S BAD CHARACTER: FALSE ALLEGATIONS

5.166 We have considered how evidence of the complainant's good character is managed under the law. We turn now to evidence of the complainant's bad character. Here, we examine the position where the defendant seeks to adduce evidence that the complainant has on other occasions made false allegations of sexual assault. As explained in the introduction and the chapter on myths and misconceptions, the proposition that allegations of rape are commonly fabricated is a myth and has no foundation in reality.[180] This is not to say that false allegations are never made or to

[180] See para 2.6 above.

minimise the effects on persons falsely accused,[181] and nor is it to say it that evidence a complainant has previously made a false allegation of sexual assault should not be admissible. Rather, as research suggests that there is a risk that the myth may affect jury deliberations, there is a case for great care and caution before admitting such evidence.[182]

5.167 We begin by explaining the legal frameworks, starting with the bad character regime for non-defendants under the CJA 2003, and then look at their application where false allegations are concerned. We conclude by considering reform options. We provisionally conclude that the current position on false allegations is unsatisfactory and should be addressed. We provisionally propose that this area of bad character evidence should be governed by the SBE provisions.

The CJA 2003 framework: bad character of non-defendants

5.168 As we explained in the earlier parts of this chapter, the admission of bad character evidence is governed by the CJA 2003. The statute does not have a specific provision governing the admissibility of evidence of the bad character of a complainant. Rather, it sets out separate admissibility rules for:

(1) evidence of bad character of a defendant (which we discussed earlier in the chapter in our consideration of non-conviction evidence), and

(2) evidence of bad character of a non-defendant.

Non-defendants will include witnesses – and thus include a rape complainant, who will almost always be a prosecution witness.[183]

5.169 Evidence of bad character is defined the same way when going to the character of a non-defendant or a defendant: it remains as we explained it earlier, being either "evidence of … misconduct" or "evidence of … a disposition towards misconduct".[184] "Misconduct" is also defined in the same way, as "the commission of an offence or other reprehensible behaviour".[185] There is no question that making false allegations

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181 See P Rumney and K McCartan, "Purported false allegations of rape, child abuse and non-sexual violence: nature, characteristics and implications" (2017) 81 *Journal of Criminal Law* 497, 502-503.

182 A Scottish mock jury study found that "[t]he suggestion that false allegations of rape are common arose in 19 of 32 juries (59 per cent), often linked to a suggestion that the complainer's allegation could have been fabricated": J Chalmers, F Leverick and V Munro, "The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials" (2021) 48 *Journal of Law and Society* 226, 245.

183 A complainant may not be a witness if, for example, they are deceased at the time of the trial, though even then s 100 would still apply: J Spencer, *Evidence of Bad Character* (3rd ed 2016) paras [3.44 – 3.46]. Section 100 also applies to non-defendants who are third parties (ie, neither co-defendant nor a witness) but Spencer notes (at [3.2]) this is not the primary purpose of the section.

184 CJA 2003, s 98.

185 CJA 2003, s 112(1).

of sexual assault would constitute reprehensible behaviour, whether or not any charges or convictions have followed.[186]

5.170 Section 100 of the Act is the primary provision governing the admission of non-defendant bad character evidence. Spencer explains that two aims underpinned its enactment:

> The first was to protect people's reputations and feelings by preventing their trivial misdeeds being publicly paraded in legal proceedings to which they are barely relevant, and the second was to protect the court from being diverted from examining the central issues by "red herrings".[187]

5.171 Under section 100(1) there are only three circumstances in which evidence of bad character of non-defendants is admissible:

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(A) is a matter in issue in the proceedings, and

(B) is of substantial importance in the context of the case as a whole,

or

(c) all parties to the proceedings agree to the evidence being admissible.

5.172 It is not necessary that the complainant's misconduct pre-date the events that are the subject of the charge; the misconduct might have occurred after those events.[188]

5.173 The threshold for admission of evidence is high. As the Court of Appeal has noted, section 100(1) has "the capacity to change the landscape of a trial".[189]

5.174 In the absence of agreement with the prosecution, where a defendant seeks to introduce evidence of the complainant's bad character then that evidence must pass one or both of gateways (a) or (b) in section 100(1). In subsequent provisions the Act expands on what the gateways require.

5.175 The first gateway of "important explanatory evidence" is defined in the same way as it is for the defendant's bad character:

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186 Where a person makes false allegations of sexual assault and is charged with a criminal offence, the charge will be either wasting police time or perverting the course of justice: CPS, *Legal Guidance, Sexual Offences*, "Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases involving Allegedly False Allegations of Rape and/or Domestic Abuse" (September 2019).

187 J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [3.46].

188 *R v A* [2009] EWCA Crim 513.

189 *R v Phillips* [2011] EWCA Crim 2935, [2012] 1 Crim App R 25 at [40]. The Court makes the same observation of s 101(1)(e) in relation to the defendant's bad character.

(a) Without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) Its value for understanding the case as a whole is substantial.[190]

5.176 The second gateway requires that the evidence has "substantial probative value".[191] This does not require that it is "conclusive",[192] but does require that it "has an enhanced capability of proving or disproving a matter in issue".[193] The requirement that it must also be of "substantial importance in the context of the case as a whole" means that the trial judge must also make an assessment of the importance of the issue for the case and conclude that it is substantially important. That is, taken together, the defendant "must establish both the substantial importance of the issue in the case *and* that the evidence which he seeks to introduce is of substantial probative value upon that issue".[194]

5.177 In sexual offences cases, evidence of the complainant's bad character will typically go to credibility. Various matters may affect credibility; the conduct does not need, for instance, to indicate previous dishonesty but could go to other matters.[195] This is because, as Spencer explains, some prior conduct will be directly relevant to evidence the witness has given in the instant case (suggesting the person is not to be believed on the specific point), whereas other evidence may "bear on credibility only indirectly, by inviting us to reason "a person who would do something like that is not a person whose word can be trusted'".[196] The evidence is not limited to criminal convictions and not limited to conduct of particular types:

> The question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair minded tribunal upon the issue of creditworthiness.[197]

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190 CJA 2003, s 100(2).

191 This provision does not mirror the gateways for defendant bad character, though it uses phrases from those gateways. The phrase "substantial probative value" appears in gateway (e), which comes into play where there are co-defendants. The phrase "a matter in issue in proceedings" is slightly different from that in the defendant bad character gateways, where gateway (d) refers to "an important matter in issue between the defendant and the prosecution", thus there is a lower bar for the admission of complainant bad character evidence. The phrase "is of substantial importance in the context the case as a whole" parallels that in the defendant bad character gateway (c) (important explanatory evidence) as well as the first complainant bad character gateway above.

192 *R v S* [2009] EWCA Crim 2457 at [45].

193 *R v Phillips* [2011] EWCA Crim 2935, [2012] 1 Crim App R 25 at [39].

194 *R v Phillips* [2011] EWCA Crim 2935, [2012] 1 Crim App R 25 at [40] (emphasis in original).

195 Rook and Ward (2021) [20.167], citing *R v S (Andrew)* [2006] EWCA Crim 1303.

196 J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [3.14] and see also the subsequent discussion. Spencer's analysis was adopted by the CACD in *Brewster* [2010] EWCA Crim 1194, [2011] 1 WLR 601 at [20] (drawing then on the 2nd edition of Spencer).

197 *R v Brewster* [2010] EWCA Crim 1194, [2011] 1 WLR 601 at [22], cited in Rook and Ward (2021) [20.168].

5.178 That said, Rook and Ward have argued that it will "rarely be possible to adduce evidence of mere allegations (as opposed to convictions or cautions), since it is unlikely to be of 'substantial probative value'".[198]

The intersection with SBE

5.179 Where a defendant wishes to introduce bad character evidence that the complainant has made false allegations in relation to other matters, including false allegations of sexual assault, then section 100 of the CJA 2003 will definitely be engaged and, in addition, it is possible that the SBE provisions under section 41 of the YJCEA will also be engaged. We take these in turn. Although the SBE framework was discussed in detail in Chapter 4, we set out the relevant parts once again to show the relationship with section 100.

Section 100

5.180 Under the section 100 regime, there will need to be consideration of whether the evidence that the complainant has previously made false allegations of sexual assault is admissible under either:

- Section 100(1)(a) as important explanatory evidence, which means that without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case and its value for understanding the case as a whole is substantial; or

- Section 100(1)(b) because it has substantial probative value in relation to a matter in issue in proceedings and is of substantial importance in the context of the case as a whole.[199] In assessing probative value the court must have regard to factors that include: the nature and number of the events, or other things, to which the evidence relates; when those events or things are alleged to have happened or existed.[200]

5.181 If the court is not persuaded that the evidence satisfies one of the gateways then it will not be admissible. If the court is persuaded then section 41 of the YJCEA must be considered.

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198 Rook and Ward (2021) [20.170] (references omitted)

199 Where evidence would be introduced by agreement under s 100(1)(c), counsel will need to explain to the court the basis on which the evidence has been agreed and how it will be used, and the court retains trial management duties with regard to (for example) timing and directions to the jury; see eg *R v Johnson* [2010] EWCA Crim 385, [2010] 2 Crim App R 2 at [21]. There is similar guidance in relation to defendant bad character evidence introduced by agreement under s 101(1)(a): J Spencer, *Evidence of Bad Character* (3rd ed 2016) pp 214-215.

200 CJA 2003, s 100(3)(a)-(b). Were there evidence of false allegations having been made on multiple occasions to suggest similar conduct then the nature and extent of similarities and dissimilarities would be considered: s 100(3)(c).

Section 41

5.182 If the allegations do not raise issues of SBE then section 41 will not be engaged and admissibility will be governed by section 100 alone.[201] Crucially, the law is clear that questioning about a false allegation of sexual assault may not constitute questioning about sexual behaviour because "sexual behaviour" is defined as "any sexual behaviour or other sexual experience".[202] The Court of Appeal has held that where "cross-examination [of the complainant is] genuinely directed towards establishing that the complainant has made a previous false complaint about a sexual matter" then it will not engage section 41 "if it goes to the lies rather than to the sexual behaviour itself".[203] It is important to note here that the evidence alleging the complainant made a false complaint is likely to take one of two forms:[204]

(1) that the complainant completely fabricated the events that were alleged, or

(2) that although the events occurred, the complainant lied about not having consented.

5.183 The Court of Appeal has summarised the settled position in *R v Hilly*, which is a case of the second type:

> It is clear that the restrictions on questions about a complainant's sexual history set out in section 41 of the [YJCEA] do not apply to previous false complaints of sexual assaults. Cross-examination is permitted since such complaints are not about any sexual behaviour of the complainant within the meaning of section 42(1)(c) of the Act. However, before any such questions are permissible, the defence must have a proper evidential basis for asserting that any such statement was (a) made, and (b) untrue.[205]

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201 CPS guidance states that, before cross-examining on alleged false complaints, defence counsel should obtain a ruling from the court that s 41 is not engaged: *CPS Legal Guidance, Rape and Sexual Offences*, "Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999", "False Allegations".

202 YJCEA, s 42(1)(c). *R v AM* [2009] EWCA Crim 618, [6-8]. See also L Hoyano, *The operation of YJCEA 1999 section 41 in the courts of E&W: views from the barristers' row* (Criminal Bar Association, 2019) ("CBA Report"), [129]. The principle that evidence about false allegations can be separated from sexual behaviour questioning is a longstanding one; the Court of Appeal in *R v RT and MH* [2001] EWCA Crim 1877, [2002] 1 WLR 632 at [31] dates this to at least *Cox* (1987) 83 Crim App R 132.

203 *R v V* [2006] EWCA Crim 1901 at [21], citing *R v RT and MH* [2001] EWCA Crim 1877, [2002] 1 WLR 632.

204 There may be other ways in which the complainant is said to have lied, but they do not mean a rape did not occur. For example, a vulnerable or young complainant abused by a family member may have disclosed the abuse but named a different person out of fear. The phenomenon is known as "perpetrator substitution"; see J Yuille, M Tymofievich and D Marxsen, "The nature of allegations of child sexual abuse" in T Ney (ed) *True and false allegations of child sexual abuse: assessment and case management* (1995) pp 21-46.

205 *R v Hilly* [2014] EWCA Crim 1614, [2014] 2 Crim App R 33 at [12]; *R v V* [2006] EWCA Crim 1901 at [21], citing *R v RT and MH* [2001] EWCA Crim 1877, [2002] 1 WLR 632. It has been held that a proper evidential basis may be "less than a strong factual foundation for concluding that the previous complaint was false. But there must be some material from which it could properly be concluded that the complaint was false": *R v Evans* [2009] EWCA Crim 2668 at [23]. An example of a proper evidential basis would be evidence of a retraction: *R v AM* [2009] EWCA Crim 618, [2010] *Criminal Law Review* 792 at [23]. In *Hilly* at [19] the court stated that the "the mere fact that a complaint is raised and is not pursued does not necessarily mean that a complaint is false". Falsity will not necessarily be inferred from a decision not to prosecute or from an

5.184 We do not read this as meaning that section 41 will never be engaged when there is evidence of false allegations, though we note that Rook and Ward state that a complainant may be questioned about falsity relating to consent under CJA 2003 section 100 "even though that would mean the jury would hear of [the complainant's] previous sexual behaviour".[206] It is not clear to us how often that happens or whether in practice section 41 would be applied at least where the alleged falsity goes to consent. Rather, we read the Court of Appeal as saying that section 41 will not be engaged if the questioning is not about the complainant's sexual behaviour. However, where the falsity goes only to consent and the sexual activity is not contested then it seems the jury will almost inevitably hear evidence of the complainant's sexual behaviour, even if the complainant is not questioned about that – though if evidence of sexual behaviour is adduced then it seems the SBE provisions should be engaged and the defendant required to satisfy the court that the YJCEA section 41 conditions are met.[207] These are commonly seen as a higher (albeit different) bar than the section 100 threshold.[208]

5.185 If it would be reasonable to assume that the main purpose of the evidence or questioning would be to impugn the credibility of the complainant then the evidence or questioning will not be permitted under section 41.[209] This does not mean that questioning cannot impugn credibility; the exclusion will only apply if that is the main purpose.

5.186 Brewis and Jackson summarise the relationship in the following terms:

> The s 100 admissibility test will, potentially, be the governing provision in false allegation scenarios in which the evidential basis test is satisfied, whereas in circumstances where cross examination is concerned with the complainant's sexual

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acquittal at trial: *R v Davarifar* [2009] EWCA Crim 2294, [2011] *Criminal Law Review* 818 at [10]; *R v D* [2009] EWCA Crim 2137 at [18]; *R v Gorania* [2017] EWCA Crim 1538 at [20]; *R v Citak* [2017] EWCA Crim 1738 at [40], [49]. See generally Blackstone's, F7.31.

206 Rook and Ward (2021) [12.197] citing D Birch, "Untangling Sexual History Evidence: A Rejoinder to Professor Temkin" [2003] *Criminal Law Review* 370, 382.

207 CJA 2003, s 112(3): the CJA regime does not affect the exclusion of evidence under s 41 of the YJCEA. In *Hilly* [2014] EWCA Crim 1614, [2014] 2 Crim App R 33 the Court of Appeal did not need to resolve the question of whether the SBE provisions would be engaged because it held that the trial judge had correctly decided the defence could not question the complainant about whether her previous complaints of abuse and rape were false as there was no evidential basis on which it could be suggested that those previous complaints were false. The Court of Appeal noted (at [19]) that the "mere fact that a complaint is raised and is not pursued does not necessarily mean that a complaint is false".

208 *R v V* [2006] EWCA Crim 1901 at [25]; J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [3.37]. See also B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law* 49, 54, 62-63. We note, however, that speaking of one section posing a higher bar than the other is arguably of limited assistance because the hurdles facing the defence will depend on the facts and the purpose for admitting the evidence in any given case.

209 YJCEA, s 41(4); *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [75-76, 90-95] (Lord Hope), [138] (Lord Clyde); *R v Martin* [2004] EWCA Crim 916, [2004] 2 Crim App R 22 at [26-39]. See also CBA Report (2019) [131].

behaviour, s 41 is likely to determine whether the accused is granted leave, whether or not the more generous s 100 test is applicable.[210]

5.187 In short, if section 41 is not engaged then questioning on false allegations may be permitted under section 100. If section 41 is engaged and the threshold protections of that section cannot be met, then evidence that could otherwise be brought in under section 100 will not be admissible. However, while the section 41 gateways pose a "formidable obstacle",[211] they are not insurmountable and there will be cases where complainants may be questioned about sexual behaviour in relation to previous false allegations of sexual assault.[212]

Stakeholders' views and the literature

5.188 With the exception of Dr Matt Thomason, who has written on character evidence,[213] stakeholders did not explicitly raise the intersection between section 100 and section 41 as it applies to questioning about false allegations. However, there were views, including from individual judges, that the intersection is problematic. The literature also suggests there is a problem.

5.189 The intersection between the sections is widely characterised as an overlap between the two regimes.[214] The overlap has been described as "troublesome",[215] and "unsatisfactory" and "awkward".[216] Hoyano describes the tension between the two sections as "obvious and unhelpful".[217] She explains that from the outset it:

> was unclear (and indeed remains unclear) under which provision the defence should apply to cross-examine, for example, about the complainant having been a sex worker, or of having told lies about sex, or having made false allegations against third parties. Many counsel now follow the prudent practice of making applications under both provisions.[218]

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210 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law* 49, 65.

211 *R v V* [2006] EWCA Crim 1901 at [25].

212 See for example *R v V* [2006] EWCA Crim 1901 at [36-38], though in that case, where the court directly considered s 41, they found that the thresholds were not met because there was not a proper evidential basis for asserting the statement was a false sexual allegation.

213 M Thomason, A Socio-Legal Study of Non-Defendant Character Evidence in Criminal Trials, PhD thesis, University of Nottingham (2020); M Thomason, "Non-defendant bad character and s. 100 of the Criminal Justice Act 2003: A socio-legal analysis of admissibility gateways and trial tactics" (2023) 27 *International Journal of Evidence and Proof* 26.

214 Rook and Ward (2021) [20.175-20.177]; J Spencer, *Evidence of Bad Character* (3rd ed 2016) [3.35-3.43]; B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law* 49, 63-66; Gillen Review (2019) [8.1].

215 CBA Report (2019) p 7; Gillen Review (2019) [8.1].

216 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law* 49, 65.

217 CBA Report (2019) [114].

218 Above, [114].

5.190 The interaction in the regimes can operate with the effect that observers may be misled into thinking that the section 41 exclusions are being breached. As Hoyano observed, "the lay observer in the courtroom might well think that section 41 was being breached when in fact the distinct procedures were being adhered to under the CJA 2003 section 100".[219] This matters because, as Hoyano notes, it can give misleading impressions that are then conveyed to the public through the media.[220]

5.191 It is not apparent that there is any agreement about how to manage the intersection, and there are few concrete proposals. In the Gillen review, where the Northern Ireland provisions mirror those in England and Wales, the overlap is mentioned but not pursued.[221] Hoyano makes the case for re-drafting section 41, but does not make proposals about how the overlap would be dealt with in any redraft.[222] She stresses that "not a single respondent thought that section 41 should be made *more* restrictive".[223] Generally, the approach seems to be that counsel should be alert to the overlap and submit applications under both sections, and where appropriate obtain a ruling that section 41 does not apply.

Does the intersection of section 100 and section 41 require reform?

5.192 We have considered whether the intersection of sections 100 and 41 requires reform. Our provisional view is that it does not. The case law and CPS guidance tend to indicate that a practical approach can be taken by making an application under section 100 and also seeking a ruling from the court confirming that section 41 is not applicable (or if section 41 is engaged then an application under both sections). Even if there is confusion among practitioners, it is not so damaging that it requires anything more than alertness and care in approach in application and explanation to parties and, where necessary, observers and the public. Our provisional conclusion is that – whether characterised as intersection, overlap or tension – the possibility that both sections may be engaged is not the source of a risk that rape myths will be brought into play. Our provisional proposal below may have the effect of removing any overlap and requiring an application only under SBE provisions, but that is not the driving force behind it.

5.193 We return now to the substantive aspects of the law relating to evidence of false allegations and, in particular, the threshold for admissibility.

False allegations and the admissibility threshold

5.194 Before looking at the admissibility threshold for evidence that the complainant has previously made false allegations of sexual assault, it will be helpful to summarise some of the reform options and our consideration of SBE in Chapter 4. Below, we reach a provisional view that where evidence that the complainant previously made false allegations is sought to be adduced as bad character evidence then admissibility

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219 CBA Report (2019).

220 Above, [138-139].

221 Gillen Review (2019) [8.1].

222 CBA Report (2019) [120]. The overlap is discussed at [114] but there is no solution suggested there, other than perhaps public education around s 41 (eg, [138]) that might address the confusion of lay observers.

223 Above, [117].

should be determined using SBE thresholds, rather than under section 100. If the admissibility path is to be the same path that is used for SBE then any reform options here will be affected by the reform options we set out in Chapter 4. In the discussion here, however, it is sufficient to work on the basis that the core distinction of relevance is that the section 100 character path has fewer hurdles to admissibility than the SBE path, whether the SBE path is the existing section 41 or whether it is the reformed regime we provisionally propose in Chapter 4. What follows now proceeds on those terms. In the event that the threshold for admissibility of evidence of false allegations is ultimately to be the SBE threshold then the specifics of that threshold will be those considered in Chapter 4.

5.195 The category of allegations we are particularly concerned with are those where the court decides that evidence and questioning does not involve SBE; as the discussion above indicated, if SBE is involved then the SBE threshold will apply.

5.196 Evidence that a complainant has on a previous occasion lied about an allegation of sexual assault may be relevant and highly probative. A jury may infer that a person who has lied about such matters on previous occasions should not be believed on this occasion. However, if such evidence is adduced then it risks introducing the rape myth that allegations of rape are commonly false.[224] That is, it presents a risk that a jury hearing the defence claim that the complainant has previously made a false allegation of sexual assault may be inclined to reason, "Yes, I can see that is plausible, because it is common that allegations of rape are false. I believe the defence."

5.197 There is also the potential risk that the evidence a complainant has previously made false allegations of sexual assault may be introduced in such a way that suggests the complainant is "unchaste". For example, there may be evidence that C has made a previous allegation of sexual assault by a famous footballer. C has never met the footballer. D wants to adduce this as evidence that C makes false allegations. D says the allegation is false and that it was made because C wishes they had had sex with the footballer. There is a risk that, depending on how the evidence is adduced, that evidence seeking to suggest that C has particular sexual desires will invite the jury to think of C as "unchaste", engaging one of the "twin myths" that "unchaste" women are more likely to have consented.[225]

5.198 The existence of these risks does not mean that the evidence should not be admitted. Instead, it means that it is appropriate that the risks are considered when the court makes determinations about admissibility. As such, it is apt to ask whether the character provisions are appropriate where there is evidence and questioning about false allegations. The higher threshold SBE protections exist to prevent the risk that rape myths will contaminate a jury's reasoning, as well as to protect the complainant from intrusive and humiliating questioning. Prohibiting such myths from affecting juror decision-making is the very purpose of rape shield legislation in England and Wales and many other jurisdictions.[226]

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224 See para 2.6 above.

225 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45; see also paras 2.23 and 4.1 above.

226 For further discussion, see paras 4.4 and 4.156 above.

5.199 We have not heard from stakeholders whether questioning permitted by section 100 on false allegations of sexual assault is or is not regularly deployed by counsel in ways that appeal to the myths. However, on our analysis there is a risk that myths will affect jury reasoning because evidence that a false allegation of sexual assault has previously been made is very closely connected to evidence about the complainant's sexual behaviour. That is, whether questions revolve around *alleged* sexual behaviour or *actual* sexual behaviour, there is a potential risk that rape myths may be deployed. Once false allegations of sexual assault are raised as part of a defence then it seems there is an inevitable risk that credibility will be impugned for the reasons Spencer explained – that a person who would do something like that is not a person whose word can be trusted – and impugned in a way that engages the myth that, for example, rape allegations are commonly false or that false allegations are easy to make and so extra caution should be applied.

Comparative law on false allegations

5.200 The law about complainant bad character in other jurisdictions was sketched in the previous part of this chapter.[227] Here, we look specifically at how false allegations have been dealt with.

New Zealand

5.201 In New Zealand the Supreme Court held in *Best v R* that evidence suggesting a complainant has previously made a false complaint of sexual assault:

> would be primarily relevant to whether or not the complainant has a tendency to be mendacious, [and] s 40(4) requires the evidence to be considered under [the veracity rules in] s 37 rather than under the propensity rules as the evidence is wholly or mainly directed at the complainant's veracity.[228]

5.202 However, and of more significance, the Court then held that, on the evidence, section 44 was engaged because the evidence was an account of sexual behaviour. The court stated the following (with M being the alleged perpetrator in the previous incident):

> On the complainant's account of the earlier incident, there was sexual activity. M accepts that sexual intercourse took place. He says that the complainant asked for oral sex but says that it did not take place. Even if his account is accepted, we would see the oral sex and the intercourse as part of the same incident and therefore both covered by s 44. Asking for oral sex would in any event likely be included in the term sexual experience.[229]
>
> This means that, even if the complaint against M was false (in the sense that the complainant made the complaint despite knowing she had actually consented to

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227 See paras 5.132 to 5.136 above.

228 *Best v R* [2016] NZSC 122 at [55].

229 *Best v R* [2016] NZSC 122 at [58].

intercourse and/or despite the fact that there had been no oral sex) s 44 is engaged.[230]

5.203 There are two footnotes in the first of those passages:

> We leave open the issue of whether s 44 should be interpreted from the perspective of the complainant so that it would have applied even if M had maintained that there had been no sexual activity at all.[231]
>
> Obviously, however, if a complainant accepts that a prior complaint was false in the sense that there had been no sexual activity at all, then s 44 would not apply.[232]

5.204 In sum, the position of the Supreme Court was that:

- where the alleged perpetrator in the previous incident accepts that there was sexual behaviour, then evidence of a false allegation will engage SBE rules;
- where the alleged perpetrator in the previous incident does not accept that there was sexual behaviour, then the Court left open the question of whether SBE rules are engaged; and
- where the complainant accepts that there was no sexual behaviour in the previous incident, then evidence of a false allegation will not engage SBE rules and falls to be decided under the veracity rules.

5.205 The Supreme Court did not look to foreign cases in making its decision because it found that the resolution of the issues depended on New Zealand's statutory framework.[233] However, the reasoning is persuasive on the first and third points. On the open question of the second point, as our earlier discussion has indicated and as we explain below, our provisional view is that the SBE protections should be engaged.

New South Wales

5.206 In Australia, the NSW Court of Criminal Appeal has held that the SBE provisions of the Criminal Procedure Act 1986 (NSW) will capture a wide spectrum of allegations of false complaints, including, it would appear, circumstances where the allegation is of complete fabrication.

5.207 Section 294CB(3) of the Act states that evidence will attract SBE protections if it "discloses or implies that the complainant … has or may have taken part or not taken part in any sexual activity". In *Jackmain (a pseudonym) v R*, the Court held that this:

> can apply to four categories of evidence that discloses or implies:
>
> (i) that the complainant has taken part in any sexual activity;

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230 *Best v R* [2016] NZSC 122 at [59].

231 *Best v R* [2016] NZSC 122 at [58], n 45.

232 *Best v R* [2016] NZSC 122 at [58], n 46.

233 *Best v R* [2016] NZSC 122 at [53].

(ii) that the complainant may have taken part in any sexual activity;

(iii) that the complainant has not taken part in any sexual activity;

(iv) that the complainant may have not taken part in any sexual activity.[234]

5.208 The Court saw this interpretation of the Act as being consistent with the purposes of the statute, which were "to prevent embarrassing and humiliating cross-examination about past sexual activities which it was believed was a deterrent in reporting sexual offences".[235] The suite of SBE and special measures provisions in the Act "demonstrate[d] the concern of the legislature to protect complainants in sexual assault cases to the greatest extent possible".[236]

Scotland

5.209 As explained above, in Scotland complainant BC evidence must first meet the common law relevance threshold (or it will be inadmissible as a collateral issue). It appears that evidence of false allegations has rarely been admissible at common law, so the question of how the SBE provisions apply has not arisen. The effect has been that evidence of complainant BC in the form of false allegations has not been admissible. Although such a narrow pathway to lead evidence of a complainant's previous false allegations might result in injustice to the defendant, the SBE provisions have been held to be consistent with the defendant's right to a fair trial.[237] Stakeholders such as the Scottish Solicitor General have commented that the provisions are viewed as unfair by the defence Bar and that they are hoping to take the right case to the Supreme Court on judicial review.

Canada

5.210 In Canada, discussions of false allegations in the courts have not centred on whether SBE protections are engaged. Rather, the focus has been on relevance and whether the probative value of the evidence outweighs its prejudicial effect. In *R v Riley*, it was held that the "only legal basis" on which evidence of previous false allegations and cross-examination of the complainant could be justified was:

> in order to lay the foundation for a pattern of fabrication by the complainant of similar allegations of sexual assault against other men. This should not be encouraged unless the defence is in a position to establish that the complainant has recanted her earlier accusations or that they are demonstrably false.[238]

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234 *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 at [21] (Bathurst CJ), with three of the other four members of the court agreeing with the reasoning and decision of the Chief Justice at [232] (Johnson J), [239] (Button J) and [240] (Wilson J). The case refers to s 293 of the Act; the statute has since been renumbered and the section is now s 294CB.

235 *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 at [23] (Bathurst CJ).

236 *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 at [24] (Bathurst CJ).

237 *Moir v HM Advocate* 2005 JC 102 at [29]-[38].

238 *R v Riley* (1992) 11 OR (3d) 151 (ON CA) at 154. The Supreme Court refused leave to appeal: SCC Bulletin 28 May 1993, pp 1067-1068.

5.211 In *R v ARB*, the court positioned this within the trial judge's "general discretion … to exclude evidence where its probative value is outweighed by its prejudicial effect".[239] The court then stated what it meant by "prejudice": "In this regard, prejudice to the trial process is to be considered in addition to the prejudice that might arise with respect to any party or witness to the proceeding."[240]

5.212 In 2019, these principles were applied in *R v Lewis*.[241] There, the court also drew attention to the issue of relevance, noting that "[c]onsideration must be given to whether the proposed cross-examination would assist the trier of fact in determining a live issue at trial".[242] Applying the law to the facts at hand, the court held that the proposed cross-examination about whether a previous allegation had been false was intended to "show that [the complainant] has a pattern of becoming angry and making false allegations",[243] which suggests the first part of the *Riley* statement was met. However, the court did not interrogate whether the allegations could be shown to be demonstrably false but instead excluded the evidence on the grounds it was "incapable of establishing the pattern" and "would be of no assistance to the jury in their task of assessing the complainant's credibility and reliability in this case".[244] Rather, the evidence had "no probative value and significant prejudicial effect that, if allowed, would distract the jury and turn [the] trial into a trial on whether the complainant was assaulted by her common-law spouse over a decade ago".[245]

5.213 In sum, the bar appears to be set high, suggesting that the courts see, and want to mitigate, a risk that questioning about previous false allegations may have a significant prejudicial effect, which may come about in different ways.

Conclusions

5.214 The treatment of evidence of false allegations is in some respects quite specific to each jurisdiction and its laws. Yet, there is a discernible difference between England and Wales on the one hand, and NSW and New Zealand on the other. In the latter jurisdictions there is a consideration of principle and purpose to recognise that evidence of a false complaint strongly leans towards engaging SBE protections. It is a consideration that is consistent with our analysis of false allegations as complainant bad character evidence.

Reform options

The threshold for admissibility

5.215 Our provisional view is that, to mitigate the risks that rape myths and misconceptions may affect jury reasoning, the threshold for admissibility of evidence of false

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239 *R v ARB* (1998) 41 OR (3d) 361, [1998] OJ No 3648 (ON CA) at [16] (Finlayson JA, Abella JA concurring). The Supreme Court dismissed an appeal: *R v ARB* [2000] 1 SCR 781.

240 *R v ARB* (1998) 41 OR (3d) 361, [1998] OJ No 3648 (ON CA) at [16] (Finlayson JA, Abella JA concurring).

241 *R v Lewis* 2019 ONSC 3534.

242 *R v Lewis* 2019 ONSC 3534 at [5].

243 *R v Lewis* 2019 ONSC 3534 at [11].

244 *R v Lewis* 2019 ONSC 3534 at [12].

245 *R v Lewis* 2019 ONSC 3534 at [11].

allegations should be the same threshold as that for the admissibility of SBE so that there is appropriate scrutiny of the specific, significant, concerns associated with the admission of evidence that is about, or is very closely connected to, the complainant's sexual behaviour.

5.216 Consistently with the SBE thresholds we propose (or with the existing thresholds), the evidence would be admissible if it satisfies the SBE tests. This would not prevent false allegation evidence being introduced and it would not prevent defence counsel from questioning the complainant about it. The test we propose for SBE will allow for consideration of the probative value and the risks of admitting evidence as to false allegations; those risks may be different to the risks raised by other types of SBE but the framework is designed to allow for that. Where there is evidence suggesting the complainant did make a previous false allegation, under our proposed test for SBE that evidence will have substantial probative value. Its admission would not significantly prejudice the proper administration of justice because (in respect of the proposed factors for consideration) it is in the interests of justice to admit the evidence and the risks of introducing myths and misconceptions is low because it is evidence of an individualised probability and not generalised tendency.

5.217 The provisional proposal would also see consistency in the scrutiny thresholds for evidence of false allegations in whatever form they take.[246] This would not prevent the admission of relevant evidence; rather, it would ensure appropriate scrutiny before it is admitted.

5.218 While changing the admissibility threshold addresses the risk that false allegations may engage rape myths, we see reasons for caution before taking this path. Such a change would see a higher admissibility threshold for a longstanding category of bad character evidence. It is of fundamental importance that the defendant is not unfairly denied the opportunity to adduce evidence that has substantial probative value. However, trial judges are in a position to admit evidence under the proposed SBE framework without undermining the defendant's fair trial rights.

5.219 For the avoidance of doubt, by including reprehensible conduct such as the making of false allegations – currently subject to the bad character evidence regime – within the SBE framework, we do not suggest that sexual behaviour is reprehensible conduct.

[246] We have considered whether one avenue could be for the court to categorise the form of the allegations (complete fabrication or fabrication going only to consent) and then the threshold would follow the form of the allegations. We do not see this as suitable because it risks leading to unnecessary drawing of fine lines in potentially complex factual situations, which could be confusing.

Consultation Question 36.

5.220 We provisionally propose that where the defendant seeks to adduce evidence that the complainant has made false allegations of sexual assault on previous occasions, the admissibility threshold should be the same as that used for sexual behaviour evidence.

Do consultees agree?

Directions

5.221 Finally, we note that there appears to be no authoritative guidance about directions when false allegations are in issue. For instance, there are no example directions in the Crown Court Compendium in either the collection of directions to address the dangers of assumptions in sexual offences cases or a non-defendant's bad character.[247] We seek views on whether an example direction should be provided.

Consultation Question 37.

5.222 Should the Judicial College consider introducing an example judicial direction for cases where false allegations are introduced that addresses the myth that complainants commonly make false complaints of rape?

5.223 If so, what should be the content of such a direction?

CONCLUSION

5.224 In this chapter we have considered three aspects of the law relating to character evidence:

(1) Evidence of the defendant's bad character in relation to non-conviction evidence of previous sexual violence, non-physical violence, or coercion or control;

(2) Evidence of the complainant's good character and the imbalance in the positions of the complainant and defendant with regard to evidence of character; and

(3) Evidence of the complainant's bad character in relation to previous false allegations of sexual assault.

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[247] Crown Court Compendium (2022) 20-1. In the CrPR, r 21.3 does not make any reference to consideration of directions where an application is made to introduce evidence of a non-defendant's bad character, in contrast to r 21.4(8) that does require such consideration where a defendant gives notice that they seek to introduce evidence of their own bad character.

5.225 Each of these addresses a discrete area of the law about character evidence but, as the discussion has indicated, they interact with a number of issues that arise in other parts of the consultation paper. Most notably, the third issue links to the discussion of SBE and our provisional proposals in Chapter 4.

Chapter 6: Criminal Injuries Compensation claims

INTRODUCTION

6.1 In Chapters 2, 3, 4, and 9 we discuss mechanisms by which myths and misconceptions may be introduced into the trial process tainting and influencing juror deliberations. These include the use of complainants' personal records, the use of sexual behaviour evidence ("SBE") and the use of lines of questioning and speeches which refer to myths and misconceptions. The use of evidence and cross-examination about compensation claims is a further means by which myths and misconceptions may be introduced and is discussed in this chapter.

6.2 Stakeholders have told us that particular issues arise for sexual offences complainants who wish to make a claim for compensation from the Criminal Injuries Compensation Authority ("CICA").[1] The CICA is a government agency which awards compensation to individuals who have sustained physical or psychological injury "directly attributable" to them being a victim of a violent crime.[2] A person may be eligible for compensation regardless of whether there are resulting criminal proceedings or a criminal conviction.[3]

6.3 In sexual offences cases, the existence of a criminal injuries compensation ("CIC") claim is frequently the subject of defence disclosure requests and adduced by the defence at trial to undermine the complainant's credibility as a witness and to suggest during cross-examination that their allegation is false and for the purpose of financial gain.[4] Given that an award of compensation is not dependent on the defendant being

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1 Stakeholders have told us that this issue arises in the context of criminal injuries compensation claims and did not raise this issue in respect of other types of compensation claim such as a compensation order under s 133 of the Sentencing Code or a civil claim.

2 HMCTS, *The Criminal Injuries Compensation Scheme 2012* (June 2019) ("CIC Scheme"), para 4.

3 Above para 9. In accordance with the Criminal Injuries Compensation Act 1995 s3(2), the CICA apply the lower, civil standard of proof, the balance of probabilities, to determine whether an applicant is the victim of a violent crime and is entitled to compensation. The CICA may therefore award compensation where an allegation does not meet the threshold for criminal prosecution. Where an applicant has not cooperated "as far as reasonably practicable in bringing the assailant to justice", the CICA may withhold a claim, or once paid, seek to recover it in full. See above, para 23 and 110. However, absent direct evidence of the complainant's knowledge and intentions, the existence of general rules requiring cooperation with the investigation and prosecution do not on their own support an argument that the complainant made and sustained the allegation for the purposes of financial gain. In addition, the number of cases rejected due to non-cooperation in bringing the assailant to justice is very small, making up only 9% of all rejected cases. See MoJ, *Criminal Injuries Compensation Scheme Review 2020* (July 2020) ("MoJ CIC Scheme Review") para 102. When considering non-cooperation, case officers are directed "to consider the full circumstances of the case" including whether the "psychological impact of the incident" may have "affected the applicant's ability to cooperate". See Centre for Women's Justice ("CWJ") CICA, Freedom of Information Response: FOI 49 2020, para 7 https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5fc4c8302dd96f5918842c05/1606731825 2%2063/CICA+internal+guidance.Nov2020.pdf

4 CPS. See also Office of the Victims' Commissioner ("OVC"), *Compensation without re-traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation* (January 2019) ("OVC Review") p 76 response from Victim Support representative.

convicted, stakeholders have told us that the existence of a CIC claim is rarely relevant, and that the purpose of such cross-examination is to play to juror prejudices and to taint their deliberations.[5] These prejudices may include jurors over-estimating the prevalence of false complaints and/or assuming that a "real" victim would not wish to seek compensation. Geraldine Hanna, Victims of Crime Commissioner in Northern Ireland, and former CEO of Victim Support in Northern Ireland notes that cross-examination on this topic:

> whether explicitly or subtly made in the courtroom, feed[s] into wider, largely sexist, stereotypes portraying victims as 'gold-diggers'. Tellingly, our staff have not witnessed the same propensity for this line of questioning in other criminal trials where victims are equally entitled to and do apply for compensation.[6]

6.4 There are nonetheless circumstances, which this chapter will explore, where CIC claims evidence may be probative and as such does not rely on myths and misconceptions.

6.5 In this chapter, we examine the current framework, guidance and factors which have made this a particularly pressing issue at present. We examine options for reform including amending the CIC Scheme time limits, to permit claims to be made more easily after the conclusion of the criminal case. We consider prohibiting or restricting admissibility of evidence and lines of questioning about CIC claims. We explore how a proper balance may be achieved, so that the defence are able to adduce evidence where relevant. Finally, we look at the role of judicial directions.

DEFENDANT'S RIGHT TO A FAIR TRIAL

6.6 This chapter considers restrictions on the admissibility of evidence and cross-examination. A framework which restricts the use of what might otherwise be admissible evidence engages the defendant's right to a fair trial under article 6 of the European Convention of Human Rights ("ECHR").

6.7 The European Court of Human Rights ("ECtHR") has not directly examined the use of restrictions on admissibility but has considered restrictions on the examination of witnesses in the context of SBE. In principle, where appropriately balanced, restrictions are not incompatible with the defendant's right to a fair trial. Judges must actively supervise and balance the rights of the complainant and the defendant and ensure that questioning is relevant and does not intimidate or humiliate. Questioning must strike:

> A fair balance between the interests of the defence, in particular the right of the defendant to examine or have examined witnesses pursuant to Article 6(3), and the rights ensured to the victim by Article 8.[7]… Even though the defendant must be able to defend themselves by challenging the credibility of the alleged victim and potential

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5 For example, see CWJ written submission, *CICA applications in sexual offences* (September 2022).

6 G Hanna, "Supporting victims through the trial process" in R Killean et al (eds), *Sexual Violence on Trial* (Northern Ireland) (2021) p 65.

7 The complainant's right to respect for their private life.

contradictions in their testimony, the cross-examination must not be used as a means to intimidate or humiliate the victim.[8]

6.8 States are afforded a wide margin of appreciation in relation to the content and application of evidential rules and the focus of the ECtHR is on the fairness of the proceedings as a whole. As we have previously explained, "the Strasbourg Court leaves evidential rules to the domestic courts and looks at the totality of the evidence against someone when deciding whether there has been a fair trial".[9] These issues are more fully discussed in Appendix 2.

CURRENT FRAMEWORK

6.9 Where the defence request disclosure of a CIC claim, the police and prosecution follow the procedures described in Chapter 3. Broadly, they may only pursue this material where it is a reasonable line of inquiry[10] and meets the thresholds described in the Attorney General's Guidelines, which require that there must be "a properly identifiable foundation for the inquiry, not mere conjecture or speculation".[11] This material may be disclosed to the defence where it meets the test for disclosure, namely that it is reasonably capable of undermining the prosecution case or assisting the defence case.[12] In Chapter 3, we make provisional proposals for the creation of bespoke provisions in sexual offences cases for a unified regime governing access, production, disclosure and admissibility of personal records held by third parties. Materials and information held by the CICA should fall for consideration under this regime and as such, this may limit the scope for CIC claims to be incorporated into the trial process, where they are not relevant. That being said, there may be circumstances in which CIC claims are nevertheless in the hands of the defence and for this reason we go on to consider restrictions on admissibility and cross-examination at paragraph 6.36.

6.10 Admissibility and cross-examination regarding CIC claims are governed by the usual test of relevance. In terms of how the trial is conducted, as described in Chapter 9, the judge must deal with a case justly, must actively case manage proceedings[13] and must disallow questioning on matters too far removed from the relevant issues which the jury are to determine.[14]

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[8] *J.L. v Italy* App No 5671/16 (translated from French) para 128.

[9] Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 9.29.

[10] CPIA Code, para 3.5; Attorney General's Office, *Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (May 2022) ("AG's Guidelines"), para 28; Criminal Procedure and Investigation Act 1996 ("CPIA"), s 23(1)(a).

[11] AG's Guidelines, para 30, citing *R v Bater-James and Mohammed* [2020] EWCA Crim 790 at [77].

[12] CPIA, s 3(1).

[13] CrPR 1.1 and 3.2

[14] D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* ("*Blackstone's Criminal Practice*") (2022) F.1.19, citing *R v Haddock* [2011] EWCA Crim 303.

6.11 With certain provisos,[15] the framework for CIC claims permits awards of compensation to individuals who have sustained physical or psychological injury "directly attributable" to them being a victim of a violent crime.[16] Prompt CIC claims are encouraged and, due to criminal courts backlogs, are often made before the conclusion of the criminal proceedings.[17] The CIC Scheme requires complainants to lodge a claim as soon as practicable after the date of the incident and, in any event, within two years.[18] The Victims' Code entitles complainants to be provided with information about CIC including the time limit,[19] and in sexual offences cases, Independent Sexual Violence Advisers ("ISVA") are directed to inform complainants about the scheme and to assist them in making an application.[20]

6.12 The two-year time limit may be extended by the CICA but only where there are exceptional circumstances.[21] There is uncertainty about what constitutes exceptional circumstances. The CIC Scheme Review refers to the general position that "[e]xceptional circumstances do not include situations where an applicant may have waited for the conclusion of a criminal case before submitting a claim for compensation."[22] The CICA's internal guidance clarifies that "advice from a criminal justice agency such as the police about the appropriate time to apply" is a "relevant, but not necessarily decisive, factor".[23] It also adds that in cases of historic sexual abuse, where an application is delayed until the conclusion of criminal proceedings, claims officers "should accept that exceptional circumstances exist unless … there are

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15 For example, claims may be refused or withheld where the offence was not "reported to the police as soon as reasonably practicable" or where the claimant did not cooperate "as far as reasonably practicable in bringing the assailant to justice". See HMCTS, *The Criminal Injuries Compensation Scheme 2012* (June 2019), paras 22 and 23.

16 HMCTS, *The Criminal Injuries Compensation Scheme 2012* (June 2019), para 4.

17 On average, it takes nearly two years for a case to get from initial report to trial. See Criminal Justice Joint Inspection, *A joint thematic inspection into the police and CPS response to rape – Phase Two* (February 2022) Figure 14, p 84. In rape cases, the average number of days from report to the suspect being charged was 361 days; from report to trial was 706 days; and from report until the overall outcome of proceedings was between 586 and 717 days. See also HM Government, criminal justice system delivery data dashboard, https://criminal-justice-delivery-data-dashboards.justice.gov.uk/chart-builder#table. For the period January to December 2022, in adult rape cases, the average days from a crime being recorded to suspect being charged was 338 days and from charge to case completion was 361 days.

18 "[A]n application must be sent by the applicant so that it is received by the Authority as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident." See HMCTS, *The Criminal Injuries Compensation Scheme 2012* (June 2019), para 87.

19 MoJ, *Code of Practice for Victims of Crime in England and Wales* (November 2020), Right 5 and paras 5.4-5.5.

20 Home Office, *The Role of the Independent Sexual Violence Adviser* (September 2017), paras 4.11 and 4.15.

21 The time limit may be extended where the CICA is satisfied that "(a) due to exceptional circumstances the applicant could not have applied earlier; and (b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer." See HMCTS, *The Criminal Injuries Compensation Scheme 2012* (June 2019), para 89.

22 MoJ CIC Scheme Review(2020), para 93.

23 See CWJ CICA, Freedom of Information Response: FOI 49 2020, para 15 https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5fc4c8302dd96f5918842c05/1606731 8252%2063/CICA+internal+guidance.Nov2020.pdf

compelling reasons not to do so".[24] The Office of the Victims' Commissioner ("OVC") Review into Criminal Injuries Compensation found that the "[m]ore flexible guidance on the two-year application deadline is not systematically applied [by the CICA]".[25]

COMMENTARY

6.13 Compensation schemes provide important recognition and financial restitution to complainants for sexual harm. Dr Olivia Smith et al explain their value to complainants seeking "validation beyond the traditional criminal justice system", particularly those who are without funding to bring a civil claim, who do not wish to receive a compensation payment directly from the defendant or where the defendant does not have resources to pay.[26] Rape Crisis told us that CIC awards cannot fully compensate complainants for the extent of harm caused but are seen as "symbolic recognition". As we set out at paragraph 6.33, the Centre for Women's Justice ("CWJ") told us, compensation awards are also of use for some complainants to "help get their lives back on track".[27]

6.14 However, we have been told that there are difficulties with the operation of the time limits and admissibility framework. Practitioner Hanna Llewellyn-Waters described the cross-examination of sexual offences complainants about CIC claims as "a real problem at the moment." She said that issues arise in cases where the CIC claim is said by the defence to be the motive for fabrication of the criminal allegation, notwithstanding the fact that further investigation reveals that instigation of the CIC claim was triggered by the ISVA. In Chapter 3, we discuss access to ISVA records to rebut assertions made by the defence regarding CIC claims in this context.

6.15 Further, in combination, it appears that the two-year time limit, the (entirely appropriate) encouragements to complainants to claim promptly and the current criminal court backlogs mean that claims are often made before the conclusion of the criminal proceedings. This increases the possibility that they will be used at trial.

6.16 The CWJ and Rape Crisis told us that complainants are left with two unsatisfactory options. They may submit their application at the conclusion of the criminal proceedings, without certainty that they will meet the criteria for extension of the time limit. Alternatively, complainants may make their application to the CICA within the time limit, with the risk that they may be cross-examined about this at trial.

6.17 Similar feedback was provided to the OVC Review. One Police and Crime Commissioner ("PCC") reported that the time limit for claims is a particular issue for rape and sexual assault cases, leading to complainants being advised to delay their

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24 See CWJ CICA, Freedom of Information Response: FOI 49 2020, para 14 https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5fc4c8302dd96f5918842c05/16067318252%2063/CICA+internal+guidance.Nov2020.pdf

25 OVC Review (2019), p 8.

26 O Smith, E Daly, C Herriott, and D Willmott, "State compensation as rape justice: Are public attitudes a legitimate foundation for reform of the UK's Criminal Injuries Compensation Scheme?" (2022) 6 *Journal of Gender Based Violence* 79, 80.

27 CWJ written submission, *CICA applications in sexual offences* (September 2022), p 1.

application.[28] A Victim Support representative raised similar concerns and criticised the use of CIC claims at trial to discredit complainants:

> We still have feedback from victims of sexual violence that the police advise them not to claim until the trial has concluded. Given that we know the average length of a rape trial is 2 years and the deadline for application to the CICA is 2 years, we know that people can have a false barrier put into place… There's a lot of fear about the defence using that as a way in which to discredit victims. We know that sometimes still happens in court proceedings even though it should be stopped by judges. There are still a lot of issues particularly around sexual violence and how applications to the CICA are seen and used in the criminal justice system.[29]

6.18 This uniquely prejudicial potential was compellingly described to us by the CWJ, who said CIC claims evidence will:

> rarely be probative of the victim's credibility whatsoever, yet may, regrettably, play to the assumptions or prejudices of juries, who may not be aware that applications for criminal injuries compensation are common and routine; and/or may place weight on the myth that a 'real' victim of a sexual offence would not seek money in connection with their trauma.[30]

6.19 Rape Crisis and the CPS agreed, and a stakeholder who works with complainants added that once it has been suggested to the jury that an allegation has been fabricated for the purpose of financial gain, it is very difficult to challenge this. This is particularly so where the CIC claims process is instigated by the complainant, rather than by the complainant's ISVA.

6.20 Professor Anne Cossins has identified a further issue which relates to opening and closing speeches. She states that there should be prohibitions on speculative commentary about complainants in speeches where such commentary contains rape myths and provides juries with "heuristic cues (or short cuts) to filter the evidence presented".[31] In particular, she argues that legislation should completely prohibit certain topics in opening and closing speeches including, "the complainant's desire for victims' compensation".[32] However, in Chapter 9, we suggest that more consistent use of the relevance threshold to deal with myths will limit the amount of irrelevant material introduced at trial and in turn will limit the extent to which myths are drawn upon in speeches. This remains true in the context of CIC claims. Moreover, given that we

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28 OVC Review (2019) p 73: "[The] two-year time frame to apply when cases of rape and sexual assault are exceeding this time frame and victims are advised to apply post court and not before." The OVC also found that nearly a third of its survey respondents, who were complainants in relation to all types of crimes, were told not to apply under the CIC Scheme until the conclusion of the criminal proceedings. See OVC Review (2019) p 73.

29 OVC Review (2019) p 76. Also, the Victims' Lead for the National Police Chiefs Counsel (NPCC) described concerns about CIC claims being used against all types of complainants at trial. See OVC Review (2019) p 74.

30 CWJ written submission, *CICA applications in sexual offences* (September 2022), p 3.

31 A Cossins, *Closing the Justice Gap* (2020) p 255.

32 A Cossins, *Closing the Justice Gap* (2020) p 597.

provisionally propose the use of an enhanced relevance admissibility threshold for CIC claims evidence, this will further limit its use in speeches.

COMPARATIVE LAW

6.21 Compensation schemes similar to the CIC Scheme are found in a number of jurisdictions. In these jurisdictions, restrictions and even absolute prohibitions are placed on all three methods by which this type of material may be introduced: production and disclosure; admissibility; and cross-examination.

6.22 In all states in Australia, there are established compensation schemes.[33] In New South Wales, a 1996 study found the cross-examination of sexual offences complainants regarding compensation claims to be a problem.[34] However, New South Wales currently has what is effectively a complete prohibition on the production and disclosure of this type of evidence and on its admissibility. There are no restrictions on cross-examination specific to CIC claims.[35] Currently, the existence of a compensation claim or award is generally inadmissible in criminal proceedings.[36] An application for compensation, any supporting documents, whether or not submitted, and any documents provided to or prepared by the Commissioner of Victims Rights,[37] are inadmissible in any criminal proceedings (other than certain very narrow exceptions which would not be applicable in this context).[38] Nor may any person be required to produce any inadmissible compensation claim material, by subpoena or any other procedure.[39]

6.23 In Victoria, access to CIC claims and admissibility is less heavily restricted than in New South Wales. Evidence heard at the determination of a claim and documents prepared solely for the purpose of an application are inadmissible in criminal proceedings unless they fall within certain exceptions. These exceptions arise for certain types of proceedings not applicable in this context;[40] where the person to

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33 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, *Executive Summary and Parts I-II* (2017) (New South Wales) p 192 says: "all states and territories have established statutory schemes that allow victims of crime to apply for and receive a monetary payment, as well as counselling and other services, from a dedicated pool of funds."

34 A 1996 "government-sponsored study" in New South Wales found that during cross-examination, "a third [of complainants] were accused of initiating the case solely in order to obtain compensation." See D Smythe, *Moving Beyond 30 years of Anglo-American Rape Law Reforms: legal representation for victims of sexual offences* (2005), citing New South Wales Department of Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) at 13.

35 The court may make orders about the way witnesses are to be questioned; must disallow improper questions including questions which are misleading or based on stereotypes; and credibility evidence about a witness is generally inadmissible subject to various exceptions including where it is adduced via cross-examination and could substantially affect the assessment of credibility. See Evidence Act 1995 (NSW), ss 26, 41 and 102-103.

36 Sexual Assault Communications Privilege Service, *Subpoena Survival Guide* (September 2016) (New South Wales) p 18.

37 Whose function is to determine compensation applications.

38 Save for criminal proceedings in which the applicant is accused of a criminal offence arising from the facts on which the application is based. See Victims Rights and Support Act 2013 (NSW), s 113(1)(b) and (2).

39 Victims Rights and Support Act 2013 (NSW), s 113(3).

40 Such as offences under the Victims of Crime Assistance Act 1996 (Vic), fraud, or perjury.

whom the document principally refers consents; or where a court is satisfied, on the application of a party, that it is in the interests of justice to admit it.[41] Where the defence seek access to Victims of Crime Assistance Tribunal ("VOCAT") records (which, according to the Victorian Law Reform Commission ("VLRC") is a regular occurrence),[42] the criminal court determines whether they should be disclosed. The court takes account of objections raised by VOCAT; VOCAT's powers to restrict access on the basis of confidentiality and to grant or restrict access in the public interest;[43] and the admissibility criteria.[44] There are no restrictions on cross-examination specific to CIC claims.[45]

6.24 The VLRC noted that complainants are "sometimes cross-examined about whether they have made an application to VOCAT for financial assistance".[46] It was reported to the VLRC that "cross-examination in relation to VOCAT records … has no probative value" and leave should be required.[47] However, the VLRC concluded against this. It noted that this issue was better addressed by "more robust provisions regulating access to, and admissibility of, VOCAT materials" and recommended introduction of a more restrictive model for access and admissibility based on the New South Wales provisions[48] and the use of existing powers to disallow irrelevant cross-examination.[49]

6.25 In Queensland, there is a complete prohibition on the admission of evidence regarding compensation claims. The fact that an application has been made for compensation and decisions made under the scheme are inadmissible in any criminal proceedings arising out of the claim.[50] In addition, it appears to follow that applicants cannot be cross-examined about this either.[51] Disclosure of information or documents acquired under the compensation scheme is also prohibited unless the claimant consents or it is required by law.[52]

6.26 Northern Ireland operates a compensation scheme similar to the one in England and Wales. ISVAs cited various attrition factors to the Gillen Review, which included

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41 Victims of Crime Assistance Act 1996 (Vic), s 65.

42 Victorian Law Reform Commission, *Role of Victims of Crime in the Criminal Process* (2016) para 9.107.

43 Under the Victims of Crime Assistance Act 1996 (Vic), s 42A.

44 Victorian Law Reform Commission, *Role of Victims of Crime in the Criminal Process* (2016) para 9.104.

45 The court may make orders about the way witnesses are to be questioned; must disallow an improper question or improper questioning including questions which are misleading or based on stereotypes; and credibility evidence about a witness is generally inadmissible subject to various exceptions including where it is adduced via cross-examination and could substantially affect the assessment of credibility. See Evidence Act 2008 (Vic), ss 26, 41 and 102-103.

46 Victorian Law Reform Commission, *Role of Victims of Crime in the Criminal Process* (2016) para 9.113.

47 Above para 9.114.

48 Above Recommendation 50.

49 Above para 9.115.

50 Victims of Crime Assistance Act 2009 (Qld), s 137 and sch 3.

51 When reviewing the comparative law position in other states, the VLRC stated that in Queensland there is a complete prohibition on cross-examination regarding compensation claims. See VLRC, *Role of Victims of Crime in the Criminal Process* (2016) para 9.113.

52 Victims of Crime Assistance Act 2009 (Qld), s 140.

complainants being cross-examined regarding compensation scheme claims, in some instances, where no application had even been made.[53] Geraldine Hanna made similar findings based on court observations and information received from Witness Service staff.[54]

6.27 The Gillen Review recommended the court should require advance approval of lines of questioning about CIC claims applying a test of relevance. The then Victims' Commissioner Dame Vera Baird told the Review that "judges should scrutinise such cross-examination to ensure that there is some evidence to support the various suggestions [about the allegation being fabricated for the purpose of seeking compensation]".[55] In light of the evidence it heard, the Review concluded:

> The Judiciary should carefully scrutinise at preliminary or Ground Rule Hearings, the admissibility of cross-examination on the subject of criminal compensation claims made by complainants. In particular cross-examination on the subject of Criminal Injuries Compensation should only be permitted where there is evidence to support its introduction.[56]

ANALYSIS

The particular issue for sexual offences complainants

6.28 CIC claims can be made in respect of any violent criminal offence. However, the use of sexual offences complainants' CIC claims in criminal trials warrants separate treatment and consideration.[57] Disclosure and use of CIC claims is more prevalent in sexual offences cases. A request for information from the CICA confirmed that the majority of police requests for claims information are made in cases concerning sexual offences.[58] This view was shared by Geraldine Hanna, who said that sexual offences complainants are cross-examined about this when other types of complainants are

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53 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland*, (May 2019) ("Gillen Review") para 2.64.

54 See G Hanna, "Supporting victims through the trial process" in R Killean et al (eds), *Sexual Violence on Trial* (Northern Ireland) (2021) p 65: "Our Court Observers and Witness Service record victims being asked whether they have applied for criminal injury compensation, despite this being a legal entitlement. Such questions have no real judicial relevance other than to imply that the allegation is financially motivated."

55 Gillen Review (2019) para 2.184.

56 Gillen Review (2019) Recommendation 13.

57 Consideration of this issue outside of sexual offences proceedings is also beyond our Terms of Reference.

58 The CICA told us that for the period 1 April 2022 to 15 May 2023, it received 392 requests for personal data from the police in England, Wales and Scotland. The CICA was able to identify a relevant application for 243 of those requests and of those, 191 related to claims made for sexual assault. In our view, measuring the true extent of this issue may be difficult: the rate of requests to the CICA does not indicate how often CIC claims are used during sexual offences proceedings. This is because requests to the CICA might not translate into use at court or conversely, CIC claims may be used at court without a request to the CICA. Moreover, a statistical analysis of the use of CIC claims at court would require comprehensive case file reviews, practitioner interviews and/or trial observations. Nevertheless, qualitative evidence from the literature and from stakeholders that CIC claims evidence is used, coupled with information received from the CICA that the majority of police requests are in cases concerning sexual offences are grounds for examining this issue. Moreover, there are other relevant indicators: for example, information about sexual offence complainants delaying their CIC claims until the conclusion of criminal proceedings, which we describe at para 6.16-6.17.

not, see paragraph 6.3. The CPS told us that RASSO prosecutors[59] had reported that the defence regularly seek disclosure and use evidence of CIC claims. The CWJ and Rape Crisis noted that this is a regular issue for sexual offences complainants.[60]

6.29 Moreover, in sexual offences cases, CIC claims have unique potential to cause prejudice. As explained in Chapter 1, sexual offences trials are frequently a credibility contest without any other direct evidence. Therefore, in our provisional view, evidence about a CIC claim may become very prominent and has the potential to be highly prejudicial to the complainant because of its triggering of myths.

Changes to time limits

6.30 A stakeholder who works with complainants suggested that to prevent the introduction of CIC claims, complainants should be able to lodge them after the conclusion of the criminal proceedings and a different time limit could be used. This could be achieved by creating a new separate time limit for sexual offences cases in the CIC Scheme or confirming in guidance that the existing two-year time limit will be extended. This solution was also suggested by the OVC Review, which recommended that the Ministry of Justice ("MoJ") should:

> consider extending the application deadline for submitting a compensation claim to two years after reporting the incident, or, one year after the trial has concluded, whichever date is the latest, thereby giving victims the option to submit their claims once the trial is complete.[61]

6.31 The MoJ's CIC Scheme Review concluded against proposing any change to the time limits. It found that the two-year time limit "allows sufficient time for victims in most cases to consider making a claim for compensation, and to have explored other routes for compensation."[62] It also explained that a longer time limit risked relevant evidence being lost and that claims in sexual offences cases were rarely rejected on the basis of the time limit.[63]

6.32 The Independent Inquiry into Child Sexual Abuse (IICSA) also considered the CIC time limits and noted that the CIC Scheme Review did not indicate how many of the out of time applicants had to seek a review or appeal in order to succeed and did not acknowledge the "extent to which the time limit may act as a deterrent to potential applicants."[64] These are valid concerns. In the light of this and the particular difficulties

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59 Prosecution lawyers specialised in prosecuting sexual offences cases.

60 Rape Crisis and the CWJ told us that sexual offences complainants are regularly deterred from making CIC claims and gave examples of disclosure requests and cross-examination in the context of sexual offences trials. See CWJ written submission, *CICA applications in sexual offences* (September 2022).

61 OVC Review (2019) p 107.

62 MoJ CIC Scheme Review (2020) para 97.

63 See also MoJ CIC Scheme Review (2020) para 96: "From the data set 18% of personal injury cases were submitted outside the 2-year time limit, of these 63% still went on to receive an award. There was no apparent disproportionate impact on those claiming for sexual assault. Of the cases in the data set received after the two-year time limit, 82% were sexual assault cases and 72% of these went on to result in an award being made …Of all rejected personal injury cases, only 4% were rejected for being outside the 2-year time limit."

64 Home Office, *The Report of the Independent Inquiry into Child Sexual Abuse* (October 2022), para 73.

faced by children reporting sexual abuse promptly, it recommended that the MoJ extend the CIC time limits in child sexual abuse cases to seven years from the date of report to the police. However, the IICSA added that their recommendation was not intended to encourage applicants to wait until the conclusion of proceedings before applying. It said this was because the Government had committed to exploring a "robust response when compensation claims are raised in the context of criminal proceedings".[65]

6.33 The CWJ also objected to the use of an extended time limit to address this issue.

> In any event, delaying the application until after a trial can mean a delay of years in receiving their compensation. We see many cases that take over a year, two years or longer to reach a charging decision. If the suspect is charged it can then take a further period of years for the case to reach trial, especially with court backlogs. It is very unfair to deprive victims of sexual offences the compensation that other victims receive promptly, and which can help get their lives back on track.
>
> Furthermore, the charging rate in rape cases is currently around 3%, so a very large proportion of victims who delay in making a CICA application will have waited for a long time and then never see their case go to trial, so the delay was for no benefit.[66]

6.34 They added that compensation can be an important recognition for complainants, particularly where no charges are brought.[67]

6.35 Ultimately, extending time limits and delaying the complainant's CIC claim does not address the underlying risk of myths being introduced and may prevent complainants promptly claiming compensation to which they are entitled. Therefore, the solution to this issue does not appear to be that the MoJ should consider extending the time limits for making a claim.

Restrictions on evidence and questions

6.36 The Survivors Trust, Rape Crisis and the CWJ proposed a further solution, namely restricting the cross-examination of complainants about any CIC claim. As we explain above, the Government has also committed to exploring a "robust response" when CIC claims are raised at trial.[68] Rape Crisis drew a parallel between CIC claims and SBE. As they are both used to undermine and discredit the complainant, they took the view that they will inevitably be introduced unless there is a mechanism which prevents this.

6.37 In this chapter we examine all three mechanisms by which CIC claims may be introduced at trial, namely disclosure, admissibility, and examination of witnesses. Disclosure is discussed at paragraph 6.9. This section considers admissibility and lines of questioning. If lines of questioning are restricted, for consistency, it follows that

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65 Home Office, *The Report of the Independent Inquiry into Child Sexual Abuse* (October 2022), para 74-77, citing MoJ CIC Scheme Review (2020), para 99.

66 CWJ written submission, *CICA applications in sexual offences* (September 2022), p 1

67 CWJ written submission, *CICA applications in sexual offences* (September 2022), p 1.

68 Home Office, *The Report of the Independent Inquiry into Child Sexual Abuse* (October 2022), para 74-77, citing MoJ CIC Scheme Review (2020), para 99.

the same test should be applied to the underlying evidence. It also follows that where admissibility is restricted, cross examination should be restricted. This is because where a CIC claim is inadmissible, defence counsel may nevertheless cause prejudice to the complainant by cross-examining them on it. This section will therefore consider admissibility and restrictions on lines of questioning together. This is the approach adopted in the current provisions on SBE, which apply to both evidence and questions.[69]

6.38 For the reasons set out at Chapter 9, in our opinion, a complete prohibition on adducing evidence and cross-examining on CIC claims is not viable. We note that other jurisdictions have complete prohibitions. The provisions restricting admissibility create an effective prohibition in New South Wales and one exists in Queensland for both admissibility and cross-examination. However, a complete prohibition would prevent the defendant from putting material to the complainant which is relevant and is necessary to ensure a fair trial. Nonetheless, there are a number of reasons why some form of restriction is appropriate. Evidence and cross-examination of the complainant on compensation may have a significant prejudicial effect. As a CIC claim may be made regardless of whether criminal proceedings or a conviction follow, an argument by the defence that the report to the police has been made and sustained to trial for the purpose of receiving compensation is unconvincing in the absence of evidence of such a purpose. The issue of CIC is narrow and clearly defined and restrictions should not lead to significant intrusions into the defendant's rights.

6.39 The CWJ told us that whilst there should be a prohibition on cross-examination about a complainant's CIC claim, where there is a clear evidential basis for it there should be an exception. They suggest that this exception should be narrow and might arise where:

> compelling evidence has come to light which specifically supports the contention that the desire to receive compensation was the sole or primary factor in the victim's decision to report the defendant to the police. (We can see that this might hypothetically arise in a case where, for example, communications have been identified from the victim of the crime in which s/he indicates to the defendant or to a third party that his/her decision to report to the police was financially motivated or expresses satisfaction that s/he stands to gain financially from making a complaint. We suspect however that such cases will be extremely rare.) This would still rule out cross-examination in cases where the mere fact of the victim having applied for compensation is in itself unreasonably relied upon by the defence to suggest that the victim is motivated to lie.[70]

6.40 This suggestion is simple and clear but cannot predict and encompass all possible factual scenarios. An example which falls outside this proposed exception arose in *North (Mark)*.[71] The Court of Appeal found that the unavailability of evidence of a complainant's CIC claim (unrelated to the appellant), rendered the appellant's conviction unsafe. The Court of Appeal concluded that had it been available, this evidence would have been admissible at trial. There was a particular factual context

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69 See Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), s 41.

70 CWJ written submission, *CICA applications in sexual offences* (September 2022), p 3.

71 [2011] EWCA Crim 88.

which led them to this conclusion. In evidence, the complainant denied being told of his ability to claim money if the alleged sexual abuse had taken place. It was only after the trial that social services files were found to contain evidence that the complainant had been seeking to draw down payments from a previous CIC award (held in trust), during the same period that he made the allegations against the appellant. The complainant's testimony contained internal and external inconsistencies and a denial of collusion regarding his evidence, elements of which were demonstrably untrue. The Court of Appeal found that the complainant had either deliberately or unconsciously concealed his knowledge of CIC and had the true position been known, the complainant's "already fragile credibility would have been further undermined".[72]

6.41 CIC claims could alternatively be dealt with using the same approach that we have proposed for SBE (in Chapter 4): a requirement to seek leave; an enhanced relevance admissibility threshold; and a structured discretion. Whilst the existence of a compensation claim is personal information, it does not raise the same privacy concerns as SBE. This is because it does not have the same potential for invasive questioning of the complainant on intimate matters. However, it is private information which could be used to discredit the complainant in cross-examination. Moreover, the factors in our proposed model provide a basis for judicial decisions to reflect the different levels of privacy concerns which arise on SBE and CIC claims.

6.42 The other requirements for a model regulating CIC claims and SBE are similar. Both types of material have the potential to be highly prejudicial, necessitating an enhanced relevance admissibility test. At paragraph 6.18, we noted stakeholder comments that in the absence of other direct evidence, a CIC claim can become very prominent evidence and may play to juror prejudices. Rape Crisis drew a parallel between CIC claims and SBE. They said that the ability of this evidence to discredit the complainant will incentivise counsel to deploy it unless there is a preventative mechanism.

6.43 The use of both SBE and CIC claims involve the admissibility of evidence, along with cross-examination. Both also relate to a specifiable category of evidence and particular lines of questioning which could be restricted in this manner. This model protects the defendant's rights through the use of an interests of justice test as part of the structured discretion. Our provisional view is that the elements of our proposed SBE model would work well in the compensation context.

6.44 A number of other jurisdictions place similar or even greater restrictions on the admissibility of CIC claims than the model we propose. In Victoria, admission requires leave of the court, and must be in the interests of justice and New South Wales effectively completely prohibits admission. Queensland completely prohibits both the admission of evidence and cross-examination.

6.45 An absolute prohibition on admitting evidence and cross-examining about CIC claims would prevent the defendant from introducing relevant evidence. There is a clear parallel between CIC claims evidence and SBE in terms of prejudicial potential and reliance on myths and misconceptions. We therefore provisionally propose that cross-

[72] *R v North (Mark Edward)* [2011] EWCA Crim 88 at [31].

examination about CIC claims should require leave and be subject to an enhanced relevance admissibility threshold and structured discretion, identical to SBE.

Judicial directions

6.46 Stakeholders proposed a further alternative solution to address this issue, namely the use of judicial directions to explain the operation of the CIC Scheme to the jury. However, in our view, given the potentially prejudicial nature of this information, it is unlikely that a direction alone would suffice. As we explain in Chapter 10, the effectiveness of judicial directions is disputed. Although some stakeholders and commentators believe appropriately timed and tailored judicial directions to be very effective, there is empirical evidence which contradicts this. Further, some expressed the view that judicial directions on myths are not given consistently and, in any event, may not dissuade jurors from relying on ingrained beliefs. In the context of CIC claims, Rape Crisis thought that alongside other methods, judicial directions could help, but expressed doubts about relying on judicial directions alone. Their concern was that directions are used inconsistently and may have limited impact on jurors. They said that once seeds of doubt have been sowed regarding compensation, it is difficult to un-entrench jurors' views, particularly ones held before the trial began.

6.47 However, in the limited circumstances where we provisionally propose that evidence could be adduced and cross-examination could take place regarding a CIC claim, via an enhanced relevance admissibility threshold, judicial directions could still be required. This is a narrow and specific category of evidence which may arise at a readily identifiable moment in the trial and may therefore be susceptible to a direction of this nature. Where appropriate, directions could explain that CIC claims are commonplace and the fact that a CIC claim has been made does not necessarily mean that the criminal allegation is false. They could also explain the framework for making a claim, such as the time limits and the fact that CIC may be awarded regardless of whether criminal proceedings take place and regardless of whether there is a conviction.[73]

6.48 This could arise in two ways. First, where it is determined that CIC claims evidence should pass through the new enhanced relevance admissibility threshold, it is unlikely that CIC claims evidence would invoke myths and a direction may give the evidence undue weight. However, a direction could be necessary in this situation if it were concluded that the evidence, while relevant, still carried a risk of invoking an impermissible stereotype. Having heard how the evidence emerged at trial, a judge may also conclude that it had caused prejudice and warranted a specific direction. In other words, while the use of a new enhanced relevance admissibility threshold will significantly minimise the risk that myths are introduced, it will not eliminate the risk altogether, thus a direction may be warranted.

6.49 Directions may be required for a second purpose, namely where inadmissible CIC claims evidence is introduced despite restrictions. In this situation, a direction could be used to address the risk of jurors relying on misconceptions and to direct jurors to ignore the evidence or to restrict its use.

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[73] See para 6.3 which explains the limits of this.

6.50 We therefore provisionally propose that the Judicial College consider the use of directions in circumstances when a CIC claim is admitted. We also provisionally propose that it considers the use of directions to address the risk of jurors relying on misconceptions if inadmissible evidence of a CIC claim is introduced or prohibited cross-examination on such a claim occurs.

Consultation Question 38.

6.51 We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require leave and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence.

6.52 This would require that evidence and cross-examination about criminal injuries compensation claims would only be admissible if:

(1) the evidence has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

Do consultees agree?

6.53 Which, if any, of the following factors should the judge consider when deciding whether to admit evidence or permit cross-examination about criminal injuries compensation claims:

(1) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

(2) the interests of justice including the defendant's right to a fair trial;

(3) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and

(4) the risk of introducing or perpetuating myths or misconceptions.

6.54 Are there any other factors that the judge should consider when deciding whether to admit evidence of a criminal injuries compensation claim?

6.55 Should the list include "any other factor that the judge considers to be relevant to the individual case"?

Consultation Question 39.

6.56 We provisionally propose that the Judicial College consider whether judicial directions should be used:

(1) where permission is given to adduce evidence and cross-examine regarding a criminal injuries compensation claim; or

(2) to address the risk of jurors relying on misconceptions if inadmissible evidence of a criminal injuries compensation claim is introduced or prohibited cross-examination on such a claim occurs.

Do consultees agree?

CONCLUSION

6.57 In this chapter, we have considered the highly prejudicial potential of CIC claims evidence and questioning. We have not provisionally proposed that the CICA consider amending the time limits for claims, as this will delay compensation for sexual offences complainants, to which they may be entitled, which other complainants receive promptly.

6.58 Instead, we tackle the underlying issue, namely the use of this material at trial. This requires a more interventionist approach. We provisionally propose the use of restrictions on the admissibility of evidence and cross-examination on CIC claims using the leave, enhanced relevance admissibility threshold and structured discretion model we provisionally propose for SBE. We dismiss the use of an absolute prohibition, as this may prevent the defendant from introducing relevant evidence and may interfere with the defendant's right to a fair trial.

6.59 We do not think that judicial directions alone would be sufficient to address the prejudice that may arise when CIC claims are introduced. However, we provisionally propose that the Judicial College should consider whether directions may assist where CIC claims and questioning are permitted; or to address the risk of jurors relying on misconceptions if inadmissible evidence of a CIC claim is introduced or prohibited cross-examination occurs.

6.60 In the next chapter, we move onto considering the operation of the special measures framework.

Chapter 7: Special measures

BACKGROUND

7.1 Sections 16 to 33 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999 entitle certain categories of witnesses to assistance when they attend court and give evidence in a criminal trial. These methods of assistance, known as "special measures", may include one or a combination of options such as the witness giving their evidence from behind a screen, remotely via video-link, or pre-recording their evidence.

7.2 The origin of the present legislation governing the use of special measures for adults is the 1998 Government interdepartmental review of the treatment of vulnerable or intimidated witnesses in the criminal justice system, "Speaking up for Justice".[1] This review proposed the introduction of a scheme of special measures, which were then implemented by the YJCEA 1999.[2]

7.3 The introduction of special measures was intended to modify the traditional adversarial approach in criminal proceedings for certain categories of witnesses; acknowledging the particular difficulties such witnesses face in reporting, attending court, and giving evidence. The adjustments are designed to improve and maximise the quality of the witness's evidence in terms of its completeness, coherence and accuracy,[3] enabling witnesses to give their best evidence. They are also designed to improve and maximise a witness's participation by encouraging the witness, who may otherwise have been unwilling, to attend court and give evidence,[4] and to improve the witness's experience.[5] There are eligibility criteria for special measures; witnesses must meet the criteria in the YJCEA 1999 as either:

(1) "intimidated" due to fear or distress about testifying;[6] or

(2) "vulnerable" due to age, physical disability or disorder, mental disorder or impairment of intelligence and social functioning.[7]

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1 Home Office, *Speaking Up for Justice, Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* ("*Speaking up for Justice*") (1998), which followed Council of Europe, *Intimidation of witnesses and the rights of the defence,* Recommendation No R(97)13 (10 September 1997).

2 Explanatory Notes, Youth Justice and Criminal Evidence Act ("YJCEA") 1999, Chapter I, Part II, para 11.

3 YJCEA 1999, s 16(5).

4 For example, the Criminal Procedure Rules ("CrPR") require courts to "take every reasonable step … to facilitate the participation of any person" and provide details of how to do so. CrPR 3.8(3).

5 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 5.

6 YJCEA 1999, s 17.

7 YJCEA 1999, s 16.

Complainants in sexual offences cases are automatically eligible for special measures as "intimidated" witnesses. We discuss this further below.

7.4 The introduction of special measures was accompanied by guidance, first published in 2002, which described good practice for preparing for and conducting interviews with witnesses who may be eligible for special measures, and for preparing all witnesses for attending court.[8] The introduction of the statutory scheme also reflected technological developments which could better facilitate witness participation, such as the development of video-link technology for giving evidence remotely. The Crown Court also has an inherent jurisdiction to make adjustments to the trial process to accommodate the needs of witnesses and defendants. The special measures provisions in the YJCEA 1999 do not affect this inherent jurisdiction.[9]

7.5 Since their introduction more than 20 years ago, special measures have become a well-established part of criminal proceedings and are described by some as a "success story of the criminal justice system" but also as one which does not go far enough.[10] Some working within the criminal justice system perceive special measures as effective: witnesses are better assisted, and more requests are made and granted. Some witnesses have indicated that special measures "lessen[ed] some of the strains associated with giving evidence"[11] and that they "would have been unwilling to give evidence in any other way".[12]

7.6 In this chapter we will explore how well the existing provisions are working for complainants in sexual offences cases,[13] and their scope and impact in relation to defendants. First, we will address the compatibility of special measures with the right to a fair trial under article 6 of the European Convention on Human Rights (ECHR) and the relevant case law of the European Court of Human Rights (ECtHR). Next, we will consider whether a model of automatic entitlement is preferable to the current status of automatic eligibility, and which special measures should be subject to an automatic entitlement. Currently complainants of sexual offences are automatically eligible to apply for special measures. We will go on to provisionally propose that, instead, complainants should be automatically entitled to special measures without having to apply for them. Finally, we will consider measures for defendants.

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8 Home Office, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children Volume I and II* (January 2002). For current version see, Ministry of Justice ("MoJ") and National Police Chiefs' Council ("NPCC"), *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (January 2022).

9 YCJEA 1999, s 19(6).

10 Office of the Victims' Commissioner ("OVC"), *Next steps for special measures: A review of the provision of special measures to vulnerable and intimidated witnesses*, *("Next steps for special measures")* (May 2021), p 56.

11 S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 23, citing G Hunter, J Jacobson, and A Kirby, "Judicial Perceptions of the Quality of Criminal Advocacy" *Institute for Criminal Policy Research* (2018).

12 J Plotnikoff and R Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings*, NSPCC (2009), p 10.

13 As the focus of this consultation paper is Crown Court trials, this chapter does not address the operation of special measures in the magistrates' court.

THE IMPACT OF SPECIAL MEASURES ON THE RIGHT TO A FAIR TRIAL

7.7 The courts in England and Wales have considered the impact of the special measures provisions under the YJCEA 1999 as a modification to the usual trial process, and have concluded that the overall legislative scheme complies with the defendant's right to a fair trial.[14] Case law in this jurisdiction has also confirmed specific special measures and related procedure are compatible with the ECHR.[15]

7.8 Case law from the ECtHR covers the broad range of special measures that courts can use to protect the rights of witnesses and complainants during trials.[16] The ECtHR has considered issues relating both to:

(1) the compliance of special measures with the defendant's fair trial rights (whether a given measure has breached article 6 of the ECHR); and

(2) whether failure to adopt special measures has breached the positive obligation to protect victims and witnesses imposed on states by article 8 of the ECHR.

7.9 In Appendix 2 we set out in fuller detail the wealth of case law on these two issues. For the purposes of this chapter, we explain only the conclusions of that thorough analysis:

(1) The provision of special measures (both currently and the amendments we consider in this chapter) have not been found incompatible with the defendant's protected right to a fair trial. These measures seek to improve the quality of witnesses' evidence, encourage engagement in the trial process, and protect complainants from intimidation and harassment.

(2) The ECtHR has recognised that special measures may be used to help states meet their obligations to the complainant under article 8, but have not ruled that special measures are necessary in order to do so.

THE NEED FOR MEASURES THAT ASSIST COMPLAINANTS IN SEXUAL OFFENCES CASES TO GIVE EVIDENCE

7.10 In an adversarial process, witnesses are usually required to give oral evidence in court. However, as Professors Ellison and Munro have stated:

> It is, nevertheless, now widely accepted that this obligation can place onerous demands on witnesses and is a source of considerable stress for many, and militates against receipt of the best evidence potentially available in some cases.[17]

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14 *Camberwell Green Youth Court, ex parte D* [2005] UKHL4, [2005] 1 WLR 393.

15 *R v Richards (Randall)* (1999) 163 JP 246 confirmed the compatibility of s 25 (clearing the public gallery during the complainant's evidence).

16 This includes: exclusion of the public and the press from the hearing; use of video-link technology; pre-recorded witness's interview; use of one-way mirrors.

17 L Ellison and V Munro, "A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials" (2014) 23 *Social and Legal Studies* 4.

7.11 The purpose of special measures is to enable vulnerable[18] or intimidated witnesses to give their best evidence[19] and encourage witnesses who may not otherwise do so, to engage in prosecutions.[20] It is both the measures themselves, and the increased confidence witnesses have in a system that promotes such measures, that can achieve these aims.

7.12 It has long been recognised that complainants of sexual offences face significant challenges within the criminal justice system. That impacts on their willingness to report, to engage meaningfully in prosecutions and to give their best evidence at trial. Special treatment is needed to support and encourage complainants to be able to do so. As the Speaking Up for Justice report has summarised:

> There are certain offences where the victim or witness may be regarded as vulnerable. This applies particularly to serious sexual offences, including the offence of rape. The offence itself is often a traumatic experience for the victim who is likely to need to be treated with care and sensitivity both at the investigation stage as well as at the trial itself. Indeed, the giving of evidence of an intimate nature in a public court room, and being subjected to cross-examination is likely to be an intimidating experience for the majority of such victims.[21]

7.13 It is in the public interest that sexual offences are reported and effectively prosecuted. This requires a system that enables the complainant to engage meaningfully in the prosecution as witness.

7.14 The overriding objective of the Criminal Procedure Rules ("CrPR") is for courts to deal with cases "justly".[22] The court must further the overriding objective by actively managing the case. This includes the "early identification of the needs of witnesses".[23] In preparation for trial, the court "must take every reasonable step" "to encourage and to facilitate the attendance of witnesses" and "to facilitate the participation of any

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18 For the purposes of this chapter, we use the term vulnerable to mean victims who are eligible for special measures under section 16 of the YJCEA 1999, unless otherwise stated. Others who we quote in this chapter may attach a different meaning to the word. We acknowledge the wider discussions around engaging "vulnerable" people and the use of the term "vulnerable". In its review *Prosecuting Sexual Offences* (May 2019), JUSTICE persuasively argued that a consistent definition of vulnerability is vital for determining critical issues and for early identification and consideration of witnesses' needs. It commended a definition of "vulnerable person" posed by HHJ Simon Drew KC and Lynda Gibbs KC to mean "any child, young person or adult, including a defendant, who may not be able to participate effectively at court if reasonable steps are not taken to adapt the court process to their specific needs" (S Drew, L Gibb, "Identifying and accommodating vulnerable people in the court" [2019] 10 *Archbold Review* 7-9). Although relevant in sexual offence prosecutions, these issues have broader application and are therefore outside of our terms of reference. We do note that they were part of a wider review of the Criminal Practice Directions by the Judicial Office. New Criminal Practice Directions were handed down on 18 April 2023. They will take effect from 29 May 2023. They include an updated section on vulnerable people in the court, describing how "vulnerability may arise by reason of age, but also encompasses anyone who may not be able to participate effectively if reasonable steps are not taken to adapt the court process to their specific needs": CrPD 6.1.3.

19 *Speaking Up for Justice* (1998) para 8.1.

20 P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) ("*Rook and Ward*") 27.03.

21 *Speaking Up for Justice* (1998) para 9.1.

22 CrPR 1.1(1).

23 CrPR 3.2(2)(b).

person, including the defendant".[24] Measures to assist witnesses give evidence are a key tool to achieve this.

7.15 Stakeholders have reported to us that generally,[25] special measures do provide benefits for complainants and the wider trial process. They may reduce trauma for complainants, and allow them to give their best evidence, maximising the quality of that evidence. An empirical study by the Home Office on the impact of special measures for intimidated and vulnerable witnesses reported that witnesses who used special measures were more satisfied and less anxious than those who did not.[26]

7.16 However, this is only true if special measures are properly planned for and well-executed, with the complainant being given sufficient and timely information to make an informed choice.[27] The impact of ill-equipped courtrooms with poor quality audio-visual facilities must also be acknowledged.[28]

7.17 There is some evidence from those working in the criminal courts that special measures can have a negative impact amongst jurors. Members of the judiciary have told us that they agree that special measures assist witnesses but observed that juries do not appear to like them and may perceive them as unfair. The Ministry of Justice ("MoJ") evaluation of the use of pre-recorded evidence in sexual offence cases in pilot courts ("the section 28 evaluation")[29] found that there is a belief amongst legal professionals that special measures can negatively impact juror decision making.[30] We consider this further below from paragraph 7.279. Barristers have also reported their view that jurors do not always understand the purpose of special measures when used for witnesses who appear less obviously vulnerable.[31]

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24 CrPR 3.8(3).

25 Comments provided to us about specific special measures are detailed below.

26 B Hamlyn et al, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimated Complainants*, (2004) Home Office.

27 See for example D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 55.

28 As expressed to us by Vanessa Munro. Various difficulties have been noted with the audio and visual quality of recordings and playback in the courtroom along with other practical features such as the angle of the camera. The OVC have recommended that HMCTS should publish an audit of facilities across courts ensuring that "the quality of audio-visual is assessed as part of this process, including: size of TV screens; their positioning in court; sound and picture quality; and ease of set up" and that "a guaranteed minimum standard [should be] met across all courts": OVC, *Next steps for special measures* (2021) Recommendations 4 and 6. The outcome of such an audit could further inform our analysis of the use of recorded evidence for complainants in sexual offences prosecutions. The 2023 MoJ evaluation of the use of pre-recorded evidence in pilot courts found that not all courts were equipped for pre-recorded evidence and the quality of the playback is variable: D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 62.

29 So named because the power to direct pre-recorded cross-examination is under section 28 of the YJCEA 1999,

30 In particular, that video evidence is less impactful than "live" evidence: D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 25.

31 As reported to Dr Samantha Fairclough in the course of her research.

7.18 In their joint inspection of the police and Crown Prosecution Service ("CPS") response to rape ("The Joint Inspection"), the Criminal Justice Joint Inspection ("CJJI") noted the lack of nationwide evaluation of special measures, which ones are used and complainants' experiences of them. In view of this, they endorsed a recent recommendation by the Office of the Victims' Commissioner ("OVC") following their review of special measures ("the OVC Review").[32] The OVC recommended the creation of a national protocol for data collection on special measures and monitoring of complainants' experience. The Joint Inspection further recommended that the MoJ "should gather and publish quantitative and qualitative data on use of special measures in rape cases" with the aim of monitoring effectiveness of measures, experience of complainants, and ultimately providing assurance that these are improving.[33]

Analysis

7.19 It is an important part of a fair trial, and the court's overriding objective, that witnesses who need support to give evidence have access to measures that will enable them to do so. Fair trial principles apply to the totality of proceedings and not only the rights of the defendant. Although witnesses are not explicitly protected by the right to a fair trial under article 6, "the principles of a fair trial accordingly require that in appropriate cases a balance is struck between the interests of a defendant and the interests of the witness called to give evidence on behalf of the State".[34]

7.20 The law already provides for complainants in sexual offences to have access to special measures. All complainants of sexual offences are automatically eligible as "intimidated" witnesses under section 17(4) of the YJCEA 1999; they do not need to prove eligibility on any grounds other than the nature of the offence. This reflects the ongoing need to provide appropriate support to encourage and facilitate complainants to attend court, engage in the proceedings and give evidence. In this chapter we will consider how best to ensure that complainants continue to have such access, and improve where necessary, the framework that makes them available.

7.21 The legislative provision for special measures under the YJCEA 1999 focus on the quality of the witness's evidence. The test for any measure, which we discuss further below, requires consideration of whether and to what extent that measure, or combination of measures, will improve and maximise the quality of the witness's evidence.[35] While this is the statutory test, their role in protecting witnesses against inhumane treatment was an important feature in the development of special measures.[36] Humane treatment is a key foundational principle of the use of evidence

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32 The OVC have published both a final report from their review and an independently-authored literature review on special measures. The recommendation in the report was informed by a finding in the literature review that "there are no centrally collected statistics on the use of special measures": S Fairclough, *Special Measures Literature Review*, OVC (July 2020.

33 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022) Recommendation 6.

34 *Rook and Ward* (2021) 27.90 citing *Doorson v Netherlands* (1996) 22 EHRR 330.

35 YJCEA 1999, s 19(2).

36 See *Speaking Up for Justice* (1998) p 105 and S Fairclough, "The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment" (2021) 41 *Oxford Journal of Legal Studies* 1066.

in criminal proceedings.[37] Treating witnesses humanely requires that they are not subjected to disproportionate stress, distress, or poor treatment while participating in the criminal justice system. While the nature of criminal proceedings and the adversarial process can be stressful, this should not be disproportionate to the aim of gathering and testing best evidence. Witnesses who are vulnerable or intimidated may need additional support or alterations to ensure that the usual process of giving oral evidence does not cause them disproportionate stress or trauma. This is reflected to some degree by the statutory test: witnesses who are unduly stressed or experiencing trauma are unlikely to be able to give their best evidence. Providing an adjustment that lessens their stress and trauma will enable witnesses to give better quality evidence. However, humane treatment is also a positive and important outcome independent of the resultant quality of evidence. Dr Samantha Fairclough argues that ensuring humane treatment should be a sufficient reason to direct special measures for all eligible witnesses regardless of the impact of those measures on the quality of their evidence.[38] In the legislative provisions for measures in other jurisdictions, such as Scotland and Ireland, the impact on the witness of giving evidence (distinct from the impact on the evidence) is a required part of the consideration.[39] We will consider, as we discuss the role of individual measures below, how they promote and ensure humane treatment for complainants in sexual offences.

7.22 We note from stakeholders' concerns and the recommendations in both the OVC Review and Joint Inspection that better data is required to evaluate more broadly the operation of special measures for vulnerable and intimidated witnesses. Such data will be invaluable to further understand the impact of special measures on witnesses, complainants, juries, and the criminal justice system. We endorse recommendations for better data collection and analysis. However, the evidence that we have considered is sufficient to inform the provisional proposals we make in this chapter. We welcome any further evidence and data as it becomes available to improve our understanding of the issues.

Terminology

7.23 There are concerns with the terminology associated with the current provisions for special measures. First, the term "special measures" itself has been criticised. Secondly, the labelling of complainants as either "vulnerable" or "intimidated" has been criticised as not reflective of their lived experience, or presentation at trial.[40]

7.24 We understand that some dislike the term "special measures" because, in the context of healthcare or education, it is applied to an organisation that is failing. A prosecutor has told us that there are negative connotations to the term "special measures", as it is perceived as an advantage given to complainants. One judge has advocated changing the term "special measures" to something more neutral like "methods by which witnesses can choose to give evidence". The equivalent of special measures in

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37 P Roberts, *Roberts and Zuckerman's Criminal Evidence*, (3rd ed 2022) p 20.

38 S Fairclough, "The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment" (2021) 41 *Oxford Journal of Legal Studies* 1066.

39 See for example, Criminal Procedure (Scotland) Act 1995, 271(2) and Criminal Justice (Victims of Crime) (Ireland) Act 2017, s 20(1).

40 For further discussion, see from para 7.30 below.

New Zealand are referred to as “alternative ways of giving evidence” and in Victoria, Australia they are known as “alternative arrangements for giving evidence”. While “special measures” has the benefit of being a well-known and understood term within the criminal justice system, we are persuaded that a more neutral description is appropriate. Therefore, we provisionally propose use of the term “measures to assist with giving evidence”.

Consultation Question 40.

7.25 We provisionally propose that in sexual offences prosecutions, the term “measures to assist with giving evidence” should be used instead of “special measures”.

Do consultees agree?

7.26 We recognise that our project is limited to the context of sexual offence prosecutions. There may be different considerations for witnesses of other offences for whom the current provisions and terminology also apply. However, we think that some of the rationale we have considered as to terminology for sexual offence prosecutions, may also be applicable to other offences and witnesses.

PROCEDURE AND ELIGIBILITY FOR MEASURES TO ASSIST COMPLAINANTS TO GIVE EVIDENCE

7.27 In this section we consider how best to ensure that complainants in sexual offences prosecutions benefit from measures needed to assist them to give evidence. The current approach is, in essence, one of automatic eligibility for certain categories of witnesses. For witnesses who are eligible, parties can apply for a direction by providing evidence that the measure will improve the quality of their evidence. We first consider how eligibility is determined and propose a change to the way complainants of sexual offences are labelled. Next, we address the model of automatic eligibility and provisionally propose an alternative model of automatic entitlement. We then set out what the current process is for making an application and direction, and provisionally conclude that a new model of automatic entitlement would use a similar process, but with greater use of Ground Rules Hearings (“GRHs”).[41] In the following section we discuss separately the individual measures that should automatically be available to complainants under a new model.

7.28 The current special measures provisions apply to witnesses in all criminal prosecutions. We explain below how complainants in sexual offences cases are explicitly deemed eligible. However, vulnerable or intimidated witnesses in any other case, or witnesses other than the complainant in sexual offences, could also be eligible and have access to the same special measures. In line with our Terms of Reference,[42] we have limited our consideration to the issues as they affect

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41 A pre-trial hearing convened by the court to give directions for the appropriate treatment and questioning of a witness, which the parties must attend, unless otherwise directed. CrPR 3.9(1) and (2). See from para 7.83 below for the full discussion.

42 For our full Terms of Reference, see Chapter 1.

complainants, and later in the chapter, defendants, in sexual offences cases only. Therefore our proposals and conclusions in this section apply only to complainants in sexual offences prosecutions. In the final part of this chapter, our proposals and conclusions apply only to defendants in sexual offences prosecutions. We acknowledge that this would result in separate regimes for witnesses depending on the offence. Some of the discussions and conclusions may have wider applicability and be relevant for other witnesses, or for complainants and defendants in other criminal prosecutions. Where appropriate, consideration could be given to extending the same proposals beyond sexual offences to ensure consistency for all witnesses in the criminal justice system.

Eligibility

7.29 Sections 16 to 33 of the YJCEA 1999 provide for two categories of witness who may be eligible for a special measures direction, usually referred to as "vulnerable witnesses" and "intimidated witnesses". An eligible witness may be either a prosecution or defence witness, but the defendant is excluded.[43]

Vulnerable witnesses

7.30 Under section 16, a witness may be eligible for special measures as a "vulnerable witness" either because:

(1) they are under 18 at the time of the hearing,[44] or

(2) taking account of any views expressed by the witness, the court considers that the quality of their evidence[45] may be diminished due to the fact that they suffer from a mental disorder within the meaning of the Mental Health Act 1983; or they have a significant impairment of intelligence and social functioning; or physical disability or disorder.[46]

Intimidated witnesses

7.31 Under section 17(1), a witness may be eligible for special measures as an "intimidated witness" where the court is satisfied that the quality of their evidence is likely to be diminished by reason of fear or distress in connection with testifying. In so determining, the courts must take into account: the nature and circumstances of the offence; the age of the witness; and any behaviour towards the witness on part of the defendant, the defendant's family or associates or anyone likely to be an accused or witness. In addition, where relevant: the witness' social and cultural background or

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43 YJCEA 1999, ss 16(1) and 17(1) state: "For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance …"

44 YJCEA 1999, s 16(1)(a).

45 YJCEA 1999, s 16(5) explains that throughout the chapter of the YJCEA 1999 concerned with special measures, "references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively."

46 YJCEA 1999, s 16(1)(b), 16(2) and 16(4).

ethnic origin; their domestic and employment circumstances; and their religious and political beliefs.

7.32 Under section 17(4), complainants in sexual offences cases[47] are automatically eligible for special measures, unless the complainant informs the court otherwise. In these cases, it is assumed that complainants are in fear of or distress about testifying. The court need not make an assessment of whether a witness is entitled to assistance by reference to the likelihood of diminished quality of testimony.[48]

7.33 It is possible for a witness to fall into both categories. For example, a complainant in proceedings relating to a sexual offence who has a learning disability may be considered to be both a "vulnerable" and "intimidated" witness.[49]

Commentary

7.34 Stakeholders have told us that, while the measures are beneficial, the labelling associated with the use of special measures may be unhelpful, inaccurate and ill-fitting for some complainants.

7.35 One Recorder advocated changing the term "intimidated". This was because some complainants in sexual offences cases do not consider themselves to be "intimidated". Further, we were informed that using "intimidated" conveys a particular image of someone who is under duress which may not be an accurate description of how all complainants present. This may lead to a failure to recognise and respond to the individual's concerns.[50] We were also told that some complainants reject the suggestion that they are vulnerable. Dr Fairclough has argued that the use of the word "vulnerable" may prevent those who need measures from accessing them because they do not want to identify, or be identified, that way.[51] A clinical psychologist explained to us that the word "vulnerable" might not be helpful, as those working with complainants are trying to assist them in seeing themselves as resilient, empowered survivors. Finally, Professor Vanessa Munro reported to us that the distinction between vulnerable and intimidated witnesses is artificial and unhelpful. Indeed, there is sometimes confusion as to whether a witness is considered either intimidated or vulnerable.[52]

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47 Complainants of certain modern slavery and domestic abuse offences are also automatically eligible for special measures as a witness under the same provisions. A further basis for automatic eligibility arises for a witness to an offence specified to be a "relevant offence" which include various offences of violence and possession of weapons. See YJCEA 1999, s 17(5) to (7) and Schedule 1A.

48 YJCEA 1999, s 17(1) and (2).

49 Our terms of reference explicitly exclude consideration of the trial process in respect of sexual offences against children. We acknowledge that if any amendments are made to the special measures definitions and framework for adults, this may necessitate reconsideration of the framework for children.

50 Vanessa Munro.

51 S Fairclough, "Addressing vulnerability in the witness box: Building resilience in criminal trials through special measures" *Birmingham Law School Research Blog* (17 November 2022).

52 See P Cooper, "Trial: *R v SG* [2017] EWCA Crim 617 Case Comment" [2017] *Criminal Law Review* 733, 735 and D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK p 11.

Comparative law

7.36 In Scotland, section 271(1) of the Criminal Procedure (Scotland) Act 1995 defines vulnerable witnesses, including the defendant, as witnesses:

(1) who are under 18;

(2) for whom there is a significant risk that the quality of their evidence will be diminished due to mental disorder or fear or distress in connection with giving evidence;[53]

(3) in relation to specified offences which include sexual offences,[54] domestic abuse, human trafficking or stalking ("deemed vulnerable witnesses"[55]); or

(4) for whom giving evidence is considered to create a significant risk of harm to the witness.[56]

Thus there is a separate category for witnesses who are deemed vulnerable, and therefore eligible, because of the nature of the offence.

7.37 A prominent review of the law and procedure for sexual offence prosecutions in Northern Ireland, led by the Rt Hon Sir John Gillen (the Gillen Review) commended the Scottish model, stating:

> The fact of the matter is that virtually all such complainants in serious sexual offences are at least temporarily vulnerable and deserve to be treated as such. Vulnerable witnesses should have an automatic entitlement to use standard special measures, which include the use of pre-recorded cross-examination.[57]

7.38 The Gillen Review noted that not all complainants are "vulnerable in the sense that is conventionally used in the legislation", but measures could nevertheless be provided to complainants of eligible offences, "without specifying they are vulnerable as such".[58]

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53 Taking account of specified factors including: the nature and circumstances of the alleged offence; the nature of the evidence which they are likely to give; the person's relationship to the defendant; the person's age and maturity; behaviour towards the person by the defendant, their family, or associates or someone likely to be a defendant or witness; or other factors such as social background, sexual orientation, domestic and employment circumstances, religious or political beliefs, any physical disabilities. See s 271(2).

54 Namely an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003.

55 See Criminal Procedure (Scotland) Act 1995, s 271(5).

56 Taking account of specified factors including: the nature and circumstances of the alleged offence; the nature of the evidence which they are likely to give; the person's relationship to the defendant; the person's age and maturity; behaviour towards the person by the defendant, their family, or associates or someone likely to be a defendant or witness; or other factors such as social background, sexual orientation, domestic and employment circumstances, religious or political beliefs, any physical disabilities. See s 271(2).

57 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (2019) ("Gillen Review") para 4.102.

58 Gillen Review (May 2019), para 4.103.

Analysis

7.39 In our view it is not necessary for witnesses who are giving evidence as complainants in sexual offences prosecutions to be defined as either "vulnerable" or "intimidated". We also appreciate that vulnerability can be understood as specific to a situation, rather than a general status assigned to someone. A separate category for witnesses who are entitled to certain measures because of the nature of the offence is preferable.

Consultation Question 41.

7.40 We provisionally propose that complainants in sexual offences prosecutions should not be included in the categories of "vulnerable" or "intimidated" witnesses under sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999. Instead they should be automatically entitled to measures to assist them giving evidence solely on the basis that they are complainants in sexual offence prosecutions.

Do consultees agree?

Making a special measures direction

7.41 For eligible witnesses to receive the benefit of special measures, the court must make a special measures direction under section 19 of the YJCEA 1999 setting out what measure(s) will apply to their evidence.[59] Such a direction can be made either where a party makes an application or where the court of its own motion raises the issue.[60] When deciding whether to make a direction, first the court must determine whether any available special measure (or any combination) is likely to improve the quality of evidence given by the witness.[61] Secondly, the court must then determine which measure(s) would be likely to maximise so far as practicable the quality of such evidence.[62]

7.42 In determining whether a particular special measure may improve or maximise the quality of the evidence given by a witness, the court must consider all the circumstances of the case. This will include any views expressed by the witness and whether the measure(s) "might tend to inhibit" the evidence being effectively tested by any party to the proceedings.[63] To assist the court, generally a statement from the witness or information is provided explaining which special measures are sought and the reasons for this.[64]

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59 YJCEA 1999, s 19(2)(b)(ii).

60 YJCEA 1999, s 19(1).

61 YJCEA 1999, s 19(2)(a).

62 YJCEA 1999, s 19(2)(b).

63 YJCEA 1999, s 19(3).

64 The Victims' Code states to complainants: "you have the right to have your needs assessed by the police or [police] Witness Care Unit to determine whether you are eligible and would benefit from giving evidence

Commentary

7.43 We have heard from stakeholders that the current system does not always take sufficient account of individual complainants' views, and that sometimes assumptions are made about which measures they may need.[65] This risks disengaging complainants and may undermine their sense of control over the process.[66] Dr Fairclough told us it is problematic if it is assumed that a complainant wants to use special measures, or that they want to use particular measures. Each complainant can have different views on what measures they want or need, if any, and their views should be considered.

7.44 Judicial and practitioner stakeholders indicated that due to automatic eligibility as an "intimidated witness",[67] complainants' vulnerabilities and their entitlement to other adjustments are being identified too late, if at all. Sometimes they only become apparent for the first time when a complainant starts giving evidence in court.

7.45 Particular concerns were raised regarding complainants in sexual offences cases with disabilities who may qualify for special measures as both "vulnerable" and "intimidated" witnesses.[68] Stakeholders indicated that disabilities are not being identified by the police, prosecution or courts. An academic told us that complainants avoid disclosing disabilities because they are concerned the police or prosecution may decline to investigate or prosecute, but this means they do not receive the support that they need.

7.46 A survey conducted by the Office of the Victims' Commissioner found that only 10% of magistrates and judges felt that witnesses' vulnerabilities were identified before trial.[69] In their review, the OVC reported that the overall view of Crown Court judges was "needs assessments were not always sufficiently thorough, the needs of a witness who did not fit into an 'obvious' category might be missed ..."[70]

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using special measures. The police or Witness Care Unit will explain what special measures are available and will ask for your views about which you might like to apply for". See MoJ, Statutory Guidance, *Code of Practice for Victims of Crime in England and Wales (Victims' Code)* (21 April 2021), para 4.11. Along with recording a witness's evidence, the police form MG11 should outline potential eligibility for special measures and whether a witness requires a full assessment. The police form MG2 should set out the police's full special measures assessment including the witness's views and whether a special measures meeting with the CPS is required. See CPS Prosecution Team, Association of Chief Police Officers, National Police Improvement Agency, *The Prosecution Team Manual of Guidance* (2015) and Home Office, *Manual of Guidance and MG Forms* (1 June 2020). The Victims' Code also specifies that when a witness is required to attend court and give evidence: "… you have the right to: … have your needs assessed and be offered a referral to a witness support service who can arrange a visit to the court before the trial date to familiarise yourself with the building…" See para 8.2.

65 Criminal justice stakeholders; Lynda Gibbs KC.

66 A criminal justice stakeholder; a police officer; an academic.

67 Within the meaning of YJCEA 1999, s 17(4).

68 Within the meaning of YJCEA 1999, s 16 and 17.

69 OVC, *Next steps for special measures* (May 2021), p 18, Fig. 2.1. 53% felt that vulnerability was only identified some of the time, or rarely, and 38% of Crown Court judges felt that vulnerability was almost always accurately identified.

70 OVC, *Next steps for special measures* (May 2021), p 18.

7.47 The OVC Review also concluded that "automatic eligibility may, in some instances, encourage a kind of 'tick-box' attitude"[71] and might mean that a witness's needs at trial were not properly assessed. It stated that:

> Thirty-nine per cent of Crown Court judges in our survey said they had encountered cases in which automatic eligibility for special measures for complainants in sex cases had meant that special measures had been granted without potential witness vulnerabilities being identified. This means only the minimum special measures might be being offered, rather than checking for vulnerabilities that would mean further or more tailored support.[72]

7.48 The Joint Inspection found that police failed to identify needs and to provide complainants with a tailored package of measures:

> In our focus groups and interviews with prosecutors and witness support teams we heard that the police often make assumptions about what special measures a victim will want, without discussing with the victim what they might need. Additionally, we were told special measures are not always fully explained to victims in the early stages of the investigation, and our interviewees felt that the police often influence the victim's choices of what will help them give their best evidence….[73]

7.49 The Joint Inspection found that the "inconsistent" quality of information recorded by the police on the form they use to assess special measures compounded this problem. This led to prosecutors applying for measures without considering the complainant's needs fully.[74]

7.50 The Joint Inspection was also told by prosecutors that there were very few pre-trial meetings with complainants to discuss special measures.[75] Prosecutors gave a variety of reasons for this including: lack of skills and resources; lack of time; concerns that they might be accused of "coaching or influencing" the complainant; and a belief that it was not part of their role to meet directly with complainants.[76] It found that there was an unaddressed training need in this respect.[77]

7.51 The OVC Review found "fragmented responsibility" for identifying vulnerabilities was another key reason for needs being missed.[78] This is because neither the police, the

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71 Above, p 23.

72 Above, p 23.

73 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022) p 65.

74 Above, p 66.

75 According to the Joint Inspection, "[s]pecial measures meetings can involve the victim, prosecutor, OIC, counsel and the ISVA. These meetings are to build trust and confidence, and to reassure the victim that their needs will be considered throughout." Above, p 67.

76 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022), p 68.

77 The Joint Inspection noted that a roadshow took place in 2020/2021 to promote the use of special measures meetings. However, despite it being an objective of the Police-CPS Joint National RASSO Action Plan, there was no guidance for prosecutors on special measures meetings. See Above, p 68.

78 OVC, *Next steps for special measures* (May 2021), p 25.

CPS or the court Witness Service have "primary responsibility" for this task.[79] In light of this the OVC Review recommended:

> The police and CPS should streamline the process of assessing need and applying for special measures, focussing response officers on assessing immediate needs and putting the responsibility for special measures with Witness Care Units.[80]
>
> Police Witness Care Units should have overarching responsibility for needs assessment and special measures. They should be resourced to speak to all witnesses and armed with a thorough and standardised needs assessment process.[81]

7.52 Some stakeholders believed that, instead of automatic eligibility where the court must then consider whether to direct special measures, a presumption, or automatic entitlement to one or a combination of special measures may be beneficial. The advantage of this is that complainants would not have to provide a statement setting out how special measures may maximise the quality of their evidence.[82] Dr Susan Leahy thought that automatic entitlement may lead to more consistent use of special measures. Members of The Survivors Trust expressed support for an approach which more closely resembled an opt-out rather than opt-in model.

7.53 However, we have also heard that the problems with the current model, the "tick box approach", may persist with automatic entitlement. For example, there are concerns that this approach may lead to certain special measures (that are automatically applied) being imposed when others may be more appropriate, failing to produce tailored packages of measures for individual needs.[83] Dame Vera Baird KC, then the Victim's Commissioner, and one judicial and practitioner stakeholder indicated that needs assessments must allow for the complainant's requirements changing over the course of the case.[84]

Comparative law

7.54 In Ireland, witnesses are automatically eligible for special measures such as use of live link[85] and intermediaries.[86] Complainants in rape cases are automatically entitled to the exclusion of the general public during the consideration of applications to admit sexual behaviour evidence.[87] However, in other sexual offence proceedings the court

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79 Above, p 25.

80 Above, Recommendation 1.

81 Above, Recommendation 2.

82 Within the meaning of YJCEA 1999, s 19.

83 Dr Susan Leahy; a criminal justice stakeholder; and members of the judiciary.

84 Dame Vera Baird KC has noted that this may be particularly important if a complainant undertakes a court familiarisation visit and accordingly forms a different view of which measures may best assist them.

85 Criminal Evidence Act 1992, s 14.

86 Criminal Evidence Act 1992, s 13(1).

87 Criminal Law (Rape) Act 1981, s 6(1).

needs to be satisfied that "there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation".[88]

7.55 In New Zealand, witnesses are entitled to certain special measures including the exclusion of the public in rape trials.[89] Witnesses and defendants are also automatically entitled to communications assistance,[90] and the presence of support persons.[91] However, no class of witnesses is automatically eligible to give evidence in an alternative way. For evidence to be given in an alternative way, an application must be made specifying the ground it falls under. The judge must also have regard to the need to ensure fair trial rights and to the views of witness and any other relevant factor.[92] Although complainants are neither automatically eligible nor entitled to special measures, case law indicates that there is a presumption in favour of these alternative modes being available to vulnerable adult witnesses.[93] Further, before any direction is given, the judge must give each party an opportunity to be heard and may call for or receive a report from any person who is qualified to advise on the effect of giving evidence on the witness.[94]

7.56 In Canada, each measure individually defines the witnesses who are eligible to apply. There are no special measures to which witnesses in sexual offence cases are automatically entitled. For example, a witness under the age of 18 or one who has a mental or physical disability is permitted to have a support person present on application to the judge. However, for other witnesses, the judge must consider if the special measure is necessary for the proper administration of justice or would help facilitate the witness in giving a full and candid account.[95]

7.57 In Australia, the provisions vary across different jurisdictions. For example, in New South Wales, witnesses in sexual offence proceedings are automatically entitled to give evidence in private,[96] and to have support persons present.[97] In Victoria, the court is required to direct that a complainant in a sexual offence proceeding should be accompanied by a support person unless the complainant does not wish to use this special measure.[98] Further, the directions for giving evidence using CCTV, using screens and being accompanied by support persons are all mandatory where the evidence is being given by a complainant in a sexual offence proceeding.[99] However, directions in relation to other alternative arrangements such as the exclusion of the

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88 Criminal Justice (Victims of Crime) Act 2017, s 20(1).

89 Criminal Procedure Act 2011 (NZ), s 199.

90 Evidence Act 2006 (NZ), s 80.

91 Evidence Act 2006 (NZ), s 79.

92 Evidence Act 2006 (NZ), s 103(4).

93 *R v Driver* [2016] NZHC 186 at [13]; *R v Eruera* (No.6) NZHC 3320 at [40, 47].

94 Evidence Act 2006 (NZ), s 104.

95 Criminal Code, s 486.1.

96 Criminal Procedure Act 1986 (NSW), s 291(1).

97 Criminal Procedure Act 1986 (NSW), ss 294C(1), 306ZK(2).

98 Criminal Procedure Act 2009 (Vic), s 365.

99 Criminal Procedure Act (Vic), ss 363, 364, 365.

public can only be given by the court on application or on its own motion at its own discretion.[100] In Western Australia, a complainant in a serious sexual offence case is automatically eligible for measures such as video link, screens, and a supporter.[101] This is so unless the court is satisfied that the evidence will not be hampered by reason of their physical disability or mental impairment, or as a result of severe emotional trauma, intimidation or distress.[102]

7.58 The procedure in Northern Ireland is similar to that in England and Wales. Vulnerable complainants, including those in sexual offence proceedings, are automatically eligible for a range of special measures if they make an application to the court.[103]

7.59 In Scotland, a "deemed vulnerable witness" is automatically entitled to one or more of the available special measures for the purpose of giving evidence.[104] If a "deemed vulnerable witness" seeks any of the "standard special measures",[105] very limited information is required in support of their application and these measures are automatically granted by the court. The party making the application need only specify on the application which measures they consider are the most appropriate.[106] After considering the application in the absence of the parties, the court must make the order. For other special measures, the court may only order them where it is satisfied on the basis of the application that it is appropriate to do so.[107]

Analysis

7.60 The existing provisions under section 19 of the YJCEA 1999 offer automatic eligibility for complainants in sexual offences prosecutions; the court must then assess whether the measures sought for an eligible witness would improve the quality of their evidence. For that assessment, the complainant must provide evidence to enable the prosecution to explain which measures they seek and how the measures will maximise the quality of the complainant's evidence. This applies whether the application is made orally or in writing. This can be intrusive. Despite being eligible on the basis of the offence itself, complainants still have to justify their need for a special

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100 Criminal Procedure Act (Vic), s 337(1).

101 Evidence Act 1906 (WA), s 106R(3a).

102 Evidence Act 1906 (WA), s 106R(3a), s 106R(3).

103 Criminal Evidence (Northern Ireland) Order 1999, art 5.

104 Criminal Procedure (Scotland) Act 1995. ss 271(1)(c), 271(6) and 271A(1).

105 Namely use of live link, use of a screen, and use of a "supporter".

106 Conversely, s 271A(2) (b) requires that if a witness does not require special measures, the party making the application must state that they consider that the witness should give evidence without the benefit of any special measure.

107 See 271A(3A) and (5)(a)(i).

measure. This is unnecessary when the vast majority of applications are unopposed[108] and even when opposed, are successful.[109]

7.61 This suggests that an automatic entitlement to certain measures would merely give effect to what is already happening in practice, without requiring the complainant to face any additional burden of providing evidence in support of an application. The more streamlined process would also be less resource intensive.

7.62 An automatic entitlement (as distinct from automatic eligibility) would mean that measures will be made available for all complainants, without the need for assessment of impact. Complainants would need only to provide notification of whether they require any measures and, if so, which. This would also create greater consistency for, and confidence amongst, complainants. A 2009 review by the Victims' Champion Sara Payne MBE of the experience of rape victims reported on the impact of the current inconsistent application of measures:

> I have enormous sympathy with the officers who told me that frequently a victim will report a rape and immediately say she cannot face her perpetrator in court. Some officers told me that they want to be able to reassure victims that they will be able to use special measures in order to give evidence, but due to inconsistencies in how they are granted, are unable to do so.[110]

7.63 As an alternative to automatic entitlement, there could be presumptions in favour of certain special measures applying. There are already presumptions in the current framework: there is a rebuttable presumption that video recording adult complainants' evidence in chief is likely to maximise the quality of their evidence.[111]

7.64 We are persuaded that automatic entitlement to certain "standard" measures, has value for complainants in sexual offences prosecutions. In summary, in this model, the complainant's wish to have a particular standard measure (or no measures) must be stated. Once stated, the court must make a direction giving effect to the complainant's preferences (unless no measures are requested). There is no further requirement to prove or consider entitlement.

7.65 This would remove the need for courts to consider the test under section 19(2) of the YJCEA 1999 (the impact of the measure on the quality of evidence). For complainants who want standard measure[s], they would only need to state which measures they

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108 S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 13, citing P Roberts et al "Monitoring success, accounting for failure: The outcome of prosecutors' applications for special measures directions under the Youth Justice and Criminal Evidence Act 1999" (2005) *International Journal of Evidence and Proof 9*, 269, 287-8 and C Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (2012) Crown Prosecution Service Research Team. These studies cite success rates of 98% and 83% respectively. Fairclough notes though that these studies do not tell us whether applications are made as frequently as they ought to be or whether the CPS is conservative in its approach and only makes 'surefire' applications.

109 Jim Sturman KC; Martin Rackstraw; a police officer; and members of the judiciary.

110 S Payne MBE, *Rape: The Victim Experience Review* (November 2009) Home Office.

111 This presumption may be rebutted on the basis of the interests of justice or where the court considers that the video recorded evidence in chief is not likely to maximise the quality of the evidence given: YJCEA 1999, s 22A.

would like. (If complainants do not want any special measures, they would only need to state this.) There would be no assessment needed of the effect of the measures requested on the quality of their evidence. An additional benefit would be that measures necessary to ensure the complainant's experience is humane (that it does not cause disproportionate stress or trauma), or otherwise improved, could be requested without needing to demonstrate the impact of the measures on the quality of their evidence.

7.66 At present, to protect the defendant's right to a fair trial, the court has a general obligation under section 19(3) of the YJCEA 1999 to consider whether any special measures directed "might tend to inhibit … evidence being effectively tested". We consider that this is an important overall safeguard, which should be retained.

7.67 We are conscious that a significant concern with the current provisions is that witnesses' individual needs and vulnerabilities are not being identified early enough, if at all. Relatedly, there are concerns that complainants may not be able to access sufficient information to make an informed choice about the use of measures.[112] Concerns have been raised with us that an automatic entitlement or presumption may compound this lack of individualised assessment and exacerbate the issue of wider vulnerabilities being missed. Further, we have noted the concerns that automatic eligibility and entitlement risk *only* standardised measures being directed, with the model not providing for tailored packages of measures for individuals.

7.68 However, these concerns could be addressed by a model that: promotes individual assessment for all complainants; provides automatic entitlement for standard measures to reduce the need for detailed applications for the most common and important measures; ensures complainants are provided with sufficient information and support to make informed decisions; and includes further provisions to enable additional measures and support for complainants giving evidence over and above the standard. As in the Scottish model, the prosecution could submit an application that simply states the measures to which the complainant is automatically entitled, and which, if any, they wish to use. The court can direct this without the need to consider the extent to which they would improve the quality of their evidence. Where an individual assessment identifies additional measures required, the court can consider directing additional measures on application as they do now. Requiring an application with evidence in support of additional measures only is proportionate in light of the concerns raised.

7.69 Such a model should centre individual needs assessments at an early stage to ensure they are considered throughout the process. For this to be effective, it is appropriate that the responsibility for conducting assessments is clearly stated. Complainants' needs should continue to be considered at appropriate stages particularly when needs may change during the course of the process, and when applications or notice for measures to assist giving evidence are made and determined.

7.70 To help achieve this, we have identified the following features that would make such a model effective:

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[112] D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 3.

(1) The creation of a statutory obligation to conduct an individualised assessment of the requirements of witnesses for assistance with giving evidence.

(2) Primary responsibility for assessments of witnesses' requirements resting with one body, namely the police Witness Care Unit as recommended by the OVC (described above at paragraph 7.51).[113]

(3) Better use of Ground Rules Hearings to identify requirements (discussed further below).

(4) The provision of independent legal advice to complainants about available measures to assist.[114]

(5) Consistent use of court witness familiarisation visits for complainants to see how the measures work in practice at court (discussed further at paragraph 7.248 below).

(6) Consistent use of meetings between complainants and the CPS to identify and discuss required measures.

7.71 In addition to having their needs assessed, complainants should be able to make an informed choice about which measures they want to use. This requires that they are provided with sufficient information and support to enable them to make an informed choice. At paragraph 7.279 below we consider the information they are currently provided and whether more evidence is needed to ensure that information has a sufficiently robust evidential basis. Further, in Chapter 8 we consider the benefits of complainants receiving independent legal advice to provide information and advice to support their decision on the use of measures.

7.72 We therefore provisionally propose that complainants be automatically entitled to standard measures to assist them in giving evidence. In the following sections of this chapter we consider what those standard measures should be and invite consultees' views. We are of the provisional view that there should be additional provision for assessment of individual needs and measures in addition to the standard measures, when appropriate for individual complainants. We invite consultees' views on these additional provisions.

7.73 In Chapter 8 we provisionally propose a scheme for providing independent legal advice to complainants and propose this includes advice to complainants about their entitlements to measures to assist with giving evidence. We ask for consultees' views on independent legal representation and advice in that chapter.

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113 See OVC, *Next steps for special measures* (May 2021), Recommendations 1 and 2.

114 In Australia, the Victorian Law Reform Commission ("VLRC") recommended this. See VLRC, *Improving the Justice System Response to Sexual Offences Report* (September 2021) Recommendation 46.

Consultation Question 42.

7.74 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to standard measures to assist them giving evidence, with the ability to apply to the court for additional measures.

Do consultees agree?

7.75 If complainants are automatically entitled to standard measures to assist them to give evidence, it could be of benefit to require the prosecution to indicate on an application form which of the measures the complainant wants and which they do not want, without requiring any information or evidence in support. We invite consultees' views on this.

7.76 We invite consultees' views on additional provisions that may facilitate individualised consideration of complainants' wishes and needs in relation to assistance with giving evidence:

(1) A statutory obligation for enquiries to be made about complainants' requirements.

(2) Police Witness Care Units having primary responsibility for assessing complainants' needs and facilitating assistance measures.

(3) Better use of Ground Rules Hearings to identify complainants' requirements (see from paragraph 7.183 of the consultation paper for further detail of the use of Ground Rules Hearings in this context).

(4) Consistent use of court witness familiarisation visits for complainants to see how the measures work in practice at court.

(5) Consistent use of meetings between complainants and the CPS to identify and discuss required measures.

Procedure for special measures applications

7.77 Currently, a party who wants the court to make a special measures direction must apply in writing as soon as reasonably practicable and in any event, not more than 10 business days after the defendant pleads not guilty in the Crown Court.[115] The application must explain: how the witness is eligible; why special measures would be likely to improve the quality of the witness's evidence; which measures are likely to maximise the quality of the evidence given; and any views expressed by the witness about these matters. The court may shorten or extend the time limit for a special measures application, even after the time limit has expired.[116] The court may make a special measures direction without a written application where a party notifies the

[115] CrPR 18.4.

[116] CrPR 18.6.

court of their application at the Plea and Trial Preparation Hearing ("PTPH"), and that application is unopposed. Even without a written application, the applicant must provide information which will allow the court to assess which measure(s) will maximise the quality of the evidence given.[117]

7.78 The court may give, discharge, or vary a direction for special measures on an application made by a party or of its own motion[118] and must state in open court its reasons for giving, varying, discharging, or refusing an application.[119] The party who makes the application must inform the witness of the court's decision as soon as reasonably practicable and advise the witness of the arrangements that will be put in place.[120] A special measures direction may be made at the PTPH or any pre-trial hearing, including a GRH or at trial. The Better Case Management Handbook states that unopposed special measures directions may be made at the PTPH without further formality.[121]

7.79 We have provisionally concluded above, that for standard measures, an application would only need to identify which measures are required and which are not, without additional information or evidence to support their need. For any measures over and above the standard, the application could follow the same format as now. Except for the requirement to provide evidence in support of eligibility, which we address above, we have not heard any significant concerns about the procedural aspects of the current application and directions process. We do note however, the concerns that an individual's needs are not always identified in a timely fashion. The reforms we propose above, including statutory responsibility for assessment should help to alleviate those concerns. However, needs can change during a trial. This raises a question about the time limits for applications.

Time limits

7.80 Time limits help to ensure that applications for special measures are made in a timely fashion. They create certainty for complainants and give court staff time to accommodate requests that have been made. However, the needs of witnesses, or a need to give evidence, may not always arise by a particular stage of proceedings.

7.81 Prosecutors reported to the OVC Review that applications tended to be late when new information about the witness came to light at a later stage. Although courts were generally willing to hear out of time applications, prosecutors had to seek permission to apply out of time.[122] The court may retrospectively extend the time limit for a special measures application after the time limit has expired.[123] The OVC Review concluded

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117 CrPR 18.9. See also Criminal Procedure Rules Committee ("CrPRC"), *Plea and Trial Preparation Hearing Parties Pre-Hearing Information Form* (2019), p 4 and Judiciary of England and Wales, *The Better Case Management (BCM) Handbook* (2018), p 21.

118 YJCEA 1999, ss 19(1) and 20(2).

119 YJCEA 1999, s 20(5).

120 CrPR 18.5.

121 Judiciary of England and Wales, *The Better Case Management (BCM) Handbook* (8 January 2018), 3.13 and 3.15.

122 OVC, *Next steps for special measures* (May 2021), para 5.3.

123 CrPR 18.6.

that "streamlining the application process might improve this but some late applications were inevitable", and it was important that "they will be given due consideration by the court".[124] In view of this the OVC's Review recommended that "[t]here should be no time limits to special measures applications."[125]

7.82 Special measures applications are overwhelmingly granted by the court and it is difficult to think of a situation where an application to extend the time limit would not be granted, for example, if new information had recently come to light or if the complainant had simply changed their mind. We have not heard evidence that the current time limits or practice regarding out of time applications are causing significant issues.

Consultation Question 43.

7.83 We provisionally propose that time limits for special measures applications should not be changed or removed.

Do consultees agree?

Ground Rules Hearings

7.84 As indicated above, special measures directions can be made at any hearing in the course of a prosecution, including the PTPH, GRH, or at trial. The Criminal Practice Directions ("CrPD") set out, in the procedure for section 28 applications (for pre-recorded cross-examination), that special measures applications should be heard at the PTPH, with applications being served 5 days before.[126] The PTPH is usually the first hearing in the Crown Court, occurring several weeks after the defendant is charged. While early identification of complainants' needs is important, the PTPH may be too early in the process for parties to make informed applications for all measures to assist witnesses give evidence. Pre-recording evidence requires the earliest identification and timetabling as it necessitates an expedited procedure. Other measures are implemented at the trial itself and so may be better facilitated nearer the time. By the PTPH not all evidence will be available, particularly if there is to be expert evidence, so parties may not be able to provide information to the court on proposed scope and lines of questioning. A GRH, which usually takes place much closer to trial, may be better placed to establish the need and scope of such measures. However they are currently underused.

7.85 Where the court wishes to give directions for the appropriate treatment and questioning of a witness,[127] it may convene a pre-trial hearing at which the parties and

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124 OVC, *Next steps for special measures*, (May 2021), p 42.

125 OVC, *Next steps for special measures*, (May 2021), Recommendation 12.

126 CrPD 6.3.10 and 6.3.13. References to the CrPD are to the CrPD handed down on 18 April 2023, which come in to force on 29 May 2023, unless otherwise stated.

127 Under CrPR 3.8(6) and (7). At the GRH, the court may place limitations on the scope of questions put to certain categories of witness such as children and vulnerable witnesses. See *R v Lubemba* [2014] EWCA

any intermediary must attend, unless otherwise directed. This is the GRH.[128] It is expected that a GRH will take place "in every case involving a vulnerable witness, save in very exceptional circumstances".[129] At the GRH, the court may give directions about the ground rules for questioning, this includes directions about special measures.[130] In practice, GRHs are most often used where an application is made for a witness or defendant to give evidence via an intermediary.[131] The CrPD state that: "Where there is a vulnerable witness or accused, consideration must be given to holding a 'ground rules hearing' (GRH). The greater the level of vulnerability the more important it will be to hold such a hearing".[132]

7.86 GRHs may be used to determine a number of pre-trial issues. These include: applications to admit sexual behaviour evidence under section 41 of the YJCEA 1999; applications to admit non-defendant bad character evidence under section 100 of the Criminal Justice Act ("CJA") 2003; the conduct of a hearing recording a witness's cross-examination under section 28 of the YJCEA 1999; and broader adjustments to the trial process for any witnesses with vulnerabilities including the defendant.[133]

7.87 GRHs could therefore be an important feature of a more effective procedure for identifying needs and directing special measures for complainants in sexual offences prosecutions.

Commentary

7.88 It has been suggested by members of the judiciary that GRHs could be put to better use in this context to identify additional needs earlier in the process and put in place appropriate adjustments. One judge explained to us that they would like to have a GRH in every sexual offence case but recognised that making them mandatory would create resource issues for both costs and listing.

7.89 The OVC's Review found that in the Crown Court, there was a "high usage of GRHs" for young witnesses, vulnerable witnesses[134] and witnesses who needed the assistance of an intermediary.[135] However, there was much more limited use of GRHs

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Crim 2064, [2015] 1 WLR 1579, at [45]. For hearings pre-recording witness evidence, see *R v RL* [2015] EWCA Crim 1215 at [15] – [16].

128 CrPR 3.9(1) and (2).

129 *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579, at [42].

130 These include directions about the timetable for submission of questions; the timetable for trial including any breaks; seating arrangements and any explanation to be given to the jury about the witness's or defendant's communication needs and behaviour, and the role of any intermediary; and any other directions as may be required to facilitate the effective participation of the witness or defendant. See CrPR 3.9.

131 An intermediary is an interpreter or other person approved by the court, who assesses the communications needs of a witness, and facilitates communication where such a need arises. The use of an intermediary is one of the special measures available under s 29 of the YJCEA 1999.

132 CrPD 6.1.4.

133 MoJ, *Plea and trial preparation hearing, parties pre-hearing information form* (July 2019) pp 12 and 14.

134 Including witnesses with a communication need, and "other" vulnerable witnesses: OVC, *Next steps for special measures*, (May 2021), p 32.

135 OVC, *Next steps for special measures*, (May 2021), p 32.

for witnesses outside these categories. In light of this, the OVC Review recommended that:

> Ground Rules Hearings should be mandatory in every case involving vulnerable or intimidated witnesses as a final assurance that needs assessments have been adequate and special measures are provided. HMCTS should monitor the occurrence of GRHs across both the higher and lower court[s].[136]

This would include complainants in sexual offences prosecutions who are currently classed as "intimidated" witnesses.

7.90 In their report on prosecuting sexual offences, JUSTICE also noted that GRHs could be used to better effect regarding special measures. JUSTICE noted the success of GRHs for pilots of pre-recorded cross-examination and to plan the assistance to be given by an intermediary. Its view was that although the rigorous case management required in sexual offences cases could be done at the PTPH, this could be further improved with the use of GRHs.[137]

7.91 JUSTICE remarked that there is evidence which suggested that judges and advocates were not "requesting a GRH where it would be appropriate to do so"[138] but noted the resources limitations, particularly when there is already "severe listing pressures".[139] It welcomed the change to the PTPH form which specifically asks if a GRH is necessary where there is a vulnerable witness or defendant.

7.92 Their impact may however be limited. One academic informed us that what is agreed to in a GRH is not necessarily followed in practice. One judicial stakeholder told us that GRHs have not resulted in detailed pre-trial consideration by parties and the court of special measures. One Recorder told us that even obligatory GRHs are not treated seriously, that they are rushed as practitioners feel they already understand the rules and how to question the witness.

Comparative law

7.93 GRHs are increasing in popularity in other jurisdictions. The Gillen Review recommended that there should be an "obligatory GRH for all pre-recorded cross-examination hearings"[140]. They also concluded that GRHs "should initially be held in every case involving child or vulnerable witnesses" with the eventual aim of one taking place in all serious sexual offence cases.[141]

7.94 In Scotland, the Criminal Procedure (Scotland) Act 1995, specifies that when a court appoints a commissioner to preside over the taking of evidence of a vulnerable

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136 OVC, *Next steps for special measures*, (May 2021), Recommendation 7.

137 JUSTICE, *Prosecuting Sexual Offences*, (May 2019), para 4.6-4.9.

138 JUSTICE, *Prosecuting Sexual Offences*, (May 2019), para 4.8. H Henderson and M Lamb, "Pre-recording Children's Testimony: Effects on Case Progression" [2017] *Criminal Law Review* 348.

139 JUSTICE, *Prosecuting Sexual Offences*, (May 2019), para 4.8.

140 Gillen Review (May 2019), Recommendation 29.

141 Gillen Review (May 2019), Recommendation 127.

witness, the court must also fix a date for a GRH.[142] The leading review of the procedure of sexual offence prosecutions in Scotland, chaired by Lady Dorrian (the Dorrian Review) recommended that in sexual offences cases, GRHs "should be introduced when a complainer is to give evidence on commission or at trial."[143]

7.95 In Ireland, the review of the treatment of vulnerable witnesses in sexual offence prosecutions in Ireland (the O'Malley Review), recommended the introduction of a preliminary hearing. This recommendation now has a statutory basis and is operative.[144]

7.96 In the Australian state of Victoria, for certain proceedings including sexual offences, where a witness (other than the defendant), is under 18 or has a cognitive impairment, the court may direct that a GRH is held. If an intermediary is appointed, a GRH is mandatory.[145] At the GRH, the court may give any direction for the "fair and efficient conduct of the proceedings" and these may place limits on the questions which may be put to the witness, or direct that a party is not obliged to put contradictory evidence in its entirety.[146] Similarly, in Tasmania, a GRH is mandatory where an intermediary has been appointed, in certain proceedings, including sexual offences.[147] South Australia provides for a similar type of non-mandatory hearing in certain circumstances where a witness's evidence is to be pre-recorded in child sexual offences proceedings.[148] The South Australian Law Reform Institute (SALRI) stated that that GRHs are "now an established and accepted feature in both [New South Wales] and Victoria and have been recently introduced in Tasmania, the [Australian Capital Territory (ACT)] and Queensland."[149]

Analysis

7.97 The benefits of GRHs in sexual offences prosecutions are that they may lead to early identification and consideration of issues in the case, beyond that available at the

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142 Criminal Procedure (Scotland) Act 1995, s 271I(1ZA), as amended by Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, s 5(2). Giving evidence by commission is a special measure in Scotland where an eligible witness may give their evidence away from the courtroom and jury, and before the trial, in the presence of a commissioner (often a judge). The witness will still be questioned by lawyers for the prosecution and defence, the commissioner will listen and record the evidence to be played at the trial. This is similar to the provisions in England and Wales for pre-recorded evidence.

143 Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offences Cases Final Report from the Lord Justice Clerk's Review Group* (March 2021), Recommendation 1(c).

144 Criminal Procedure Act 2021 (Ireland), s 6.

145 Criminal Procedure Act 2009 (Vic), ss 389A and 389B

146 Criminal Procedure Act 2009 (Vic), s 389E.

147 Evidence (Children and Special Witnesses) Act (Tas), ss 3 and 7K.

148 A court may direct a pre-trial hearing to pre-record a witness giving their evidence (for certain offences and for witnesses who are children or who have a disability), and for child sexual offences proceedings may also make directions about the manner of questioning. See Evidence Act 1929 (SA), ss 12AB (1), (2), (11a) and (14). According to SALRI, these pre-trial special hearings "have been envisaged in courts where there is, pursuant to an order under s 14A of the Evidence Act, a communication partner who provides communication assistance to the witness". See SALRI, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia*, Report 16 (September 2021), p xxxviii.

149 SALRI, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia*, Report 16 (September 2021), p xxxix.

PTPH, which may improve the complainant's experience of the trial process. The GRH can also be effectively used for other purposes beyond directions for measures to assist witnesses give evidence. The GRH can usefully be used to determine adjustments to the trial process including the use of inherent powers and dealing with applications to admit non-defendant bad character or sexual behaviour evidence.

7.98 The evidence suggests however that they are not always used, and are usually only used in cases where an intermediary is required. GRH's can be used more effectively in a wider range of sexual offences cases and we invite views on how this can be achieved in practice.

7.99 Making GRHs mandatory in sexual offences prosecutions could help ensure that these benefits are available in all cases. However, there are clear resourcing implications and other practical issues such as listing difficulties which may arise from the use of mandatory GRHs. Further, we note that the CrPD consider that the PTPH should be used to hear applications for special measures. Allocating resources to GRHs may also have knock-on effects elsewhere and cause further delays in the timetabling of sexual offences proceedings. A presumption that a GRH will take place is a less resource-intensive alternative. However, the JUSTICE Review suggested that this too "could not be accommodated … due to severe listing pressures".[150] Guidance or training could be used to encourage judges and practitioners to be more proactive about their use. Though this may not be sufficient to improve consistency of use.

7.100 However, the increased availability and use of pre-recorded cross-examination[151] may already be leading to changes in listing practices for GRHs in sexual offences cases. The MoJ evaluation of section 28 refers to the positive effect of prior approval of questions at GRHs.[152] However the evaluation also reflected concern amongst court staff that the requirements for additional hearings under the section 28 procedure puts significant additional pressure on listing.[153]

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150 JUSTICE, *Prosecuting Sexual Offences*, (May 2019), para 4.8.

151 YJCEA 1999, s 28.

152 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 15.

153 Above, p 23.

Consultation Question 44.

7.101 We invite consultees' views on the role of Ground Rules Hearings in sexual offences prosecutions. In particular:

(1) The benefits and costs of having Ground Rules Hearings in every sexual offences prosecution.

(2) Whether they should be mandatory, or whether there should be a presumption that Ground Rules Hearings should be used in all sexual offences prosecutions where a complainant is required to give evidence.

(3) Whether the role and purpose of Ground Rules Hearings should be made clearer in guidance, training or legislation.

(4) Any other views on how courts and practitioners can be encouraged to utilise Ground Rules Hearings in all cases where they may be useful.

STANDARD MEASURES

7.102 Having provisionally proposed that complainants should be automatically entitled (instead of just automatically eligible) to some measures to assist them give evidence, we now turn to consider the individual measures that should be included in that entitlement.

7.103 The current measures available to complainants of sexual offences, as an "intimidated" witness, are listed in section 18(1)(b) of the YJCEA 1999. Section 19(2) permits the court to direct, so far as is practicable, one or a combination of special measures.[154] There are further measures available to the court by use of its inherent jurisdiction. We consider all of these measures in turn below.

Measures to which complainants should have automatic entitlement

Screens

7.104 Currently, for eligible witnesses, a special measures direction may provide that a screen be erected or some other arrangement made preventing the witness from seeing the defendant when giving their testimony or being sworn as a witness.[155] However, these arrangements must not prevent the witness from being able to see and be seen by the judge, jury, legal representatives acting in the proceedings, any interpreter or other person appointed to assist the witness.[156] In practice, screens are placed around the witness box so that the witness cannot see the defendant when giving their evidence.

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154 As acknowledged by CrPD 6.3.15.

155 YJCEA 1999, s 23(1).

156 YJCEA 1999, s 23(2)(a) to (c) and (3).

7.105 Screens are the most commonly used special measure. They have been found to be the "preferred measure amongst practitioners".[157] The vast majority of adult complainants reported that they gave evidence using a screen.[158] The benefits of automatic entitlement explored above clearly apply to the use of screens.

Consultation Question 45.

7.106 We provisionally propose that a complainant in a sexual offences prosecution should be automatically entitled to the use of a screen so that they cannot see the defendant while they give evidence in court.

Do consultees agree?

Live link

7.107 A live link is defined as a television link or other arrangement whereby a witness, who is absent from the courtroom, is able to see and hear and be seen and heard by the judge, jury, legal representatives acting in the proceedings, any interpreter or other person appointed to assist the witness.[159] In practice, a live link direction means that a witness may give their evidence either from another courtroom within the same court building or from an entirely different location, which might include a specialised remote evidence centre. If required, it is possible for the advocates to join the witness in the live link room,[160] although we have been told that this is not always available in practice.[161]

7.108 We understand that applications for use of live link are commonly granted, have a high success rate and are rarely opposed by the defence.[162] The benefits of automatic entitlement expressed above clearly apply to the use of live link.

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157 S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 19, citing S Fairclough, "Using Hawkins' surround, field and frames concepts to understand the complexities of special measures decision-making in Crown Court trials" (2018) 45 *Journal of Law and Society* 457-485.

158 S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 19, citing R Majeed-Ariss, et al, "'Could do better': Report on the use of special measures in sexual offences cases" [2019] *Criminology and Criminal Justice* 4.

159 YJCEA 1999, s 24(8).

160 *Rook and Ward* (2021) 27.78.

161 Dr Fairclough.

162 The defence may choose not to object to an application for a variety of reasons, including perceived advantage to their case: Dr Fairclough.

Consultation Question 46.

7.109 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use a live link to join the trial proceedings and give evidence.

Do consultees agree?

Recorded evidence

7.110 There are currently different provisions for the recording of evidence in chief and cross-examination.

7.111 In practice, due to their status as "intimidated" witnesses, the police should ask complainants in sexual offences cases to provide their account by way of a video-recorded interview, which should be conducted in accordance with the Guidance on Achieving Best Evidence in Criminal Proceedings.[163] Subject to the interests of justice, there is a presumption that this video-recorded interview will be admitted as the complainant's evidence in chief.[164] The video recording will usually be reviewed by the prosecution, who will consider whether they wish to rely on the complainant's video evidence in chief and therefore, whether they will make an application for a direction to allow this. The recording of evidence in chief via an Achieving Best Evidence ("ABE") interview[165] has been found not to breach the procedural requirements of article 6(1(3)(d) of the ECHR, that give the defendant the right to examine witnesses.[166]

7.112 Unique to this measure, the court may decide not to admit the video recording (or part of it) where the court concludes, taking account of all the circumstances, that not to admit it is in the interests of justice. The court must consider whether any prejudice to the defendant is outweighed by the desirability of showing the whole (or substantially the whole) recording.[167]

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163 The stated purpose of this guidance is "to obtain an accurate and reliable account in a way that is fair". See MoJ and NPCC, *Achieving Best Evidence in Criminal Proceedings* (January 2022), p 76. The Guidance provides detailed information on planning and preparation of interviews; conducting the interview; witness support and preparation and dealing with witnesses in court.

164 YJCEA 1999, s 22A(7) requires that, subject to the power under s 27(2) (not to admit a video recorded interview in the interests of justice), the court must make a special measures direction to admit video recorded evidence in chief under s 27. Under s 22A(9), this presumption may also be rebutted where the court is satisfied that admitting the video recorded interview in chief would not be likely to maximise the quality of the complainant's evidence so far as practicable either because other special measures would achieve the same purpose or for any other reason.

165 An ABE interview is a video-recorded interview with a vulnerable and/or intimidated witness, conducted by the police, which follows trauma-informed guidance about the approach adopted. It is intended that this video will be played at trial and will be the witness's evidence in chief.

166 *Camberwell Green Youth Court, ex parte D* [2005] UKHL4, [2005] 1 WLR 393, at [49], by Baroness Hale.

167 YJCEA 1999, s 27(1) to (3).

7.113 For eligible witnesses, where video-recorded evidence in chief has already been admitted,[168] a special measures direction may provide for cross-examination and re-examination of the witness to be video recorded and that the recorded evidence may be admitted. The recording of cross-examination must be made in the presence of any person indicated in the CrPR or the court's direction, and in the absence of the defendant. This must be in circumstances in which the judge and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with persons present in the room with the witness, and the defendant is "able to see and hear any such examination and to communicate with any legal representative acting for him".[169] The recording of the cross-examination will normally take place with the witness appearing via live link from the witness suite within the court building, unless a remote link has been directed, with the judge, legal representatives and defendant in the courtroom.[170]

7.114 In June 2021, as part of the government's Rape Review, it committed to expand the pilot of pre-recorded cross-examination (known as "section 28" (of the YJCEA)) with a view to its full roll-out.[171] The roll-out commenced in 2013 and was initially staggered across certain categories of witnesses and Crown Courts. By September 2022, it became available for adult complainants in sexual offences cases (and certain offences under the Modern Slavery Act 2015) in all Crown Courts.[172] In cases eligible for the section 28 procedure, there is a separate hearing at which the cross-examination of the complainant is recorded that takes place before the trial and, where possible, "close to the time of the offence".[173] The process for section 28 cases is included in the CrPD[174] which provide for an accelerated timeline to allow for disclosure and relevant directions to be made promptly in advance of the section 28 hearing.

Commentary

7.115 The MoJ have twice evaluated their section 28 roll-out. In their 2016 evaluation they found that the pilot of pre-recorded cross examination was broadly successful. The evaluation found that: the recording of cross-examination took place sooner, with more focussed and shorter questioning; in most cases, more positive experiences of cross-examination were reported by complainants; there was less waiting time at

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168 YJCEA 1999, s 28(1). The admission of video recorded evidence in chief is a pre-requisite for the making of a s 28 direction and a s 28 direction is made explicitly for the purpose of capturing cross-examination and re-examination. However, the court may direct that an ABE interview is conducted where a witness "would be eligible for video recorded cross-examination … but for the fact that they made a written statement, rather than participating in a video recorded interview." See MoJ and NPCC, *Achieving Best Evidence in Criminal Proceedings* (January 2022), para 2.183.

169 YJCEA 1999, s 28(2). However, there is no explicit recognition in YJCEA 1999, s 23 that the defendant may (or indeed must) see the witness when the witness gives evidence from behind a screen

170 CrPD 6.3.37 and 6.3.38.

171 HM Government, *The end to end rape review report on findings and actions* (June 2021) CP 437, para 110.

172 Within the meaning of YJCEA 1999, s 17(4). See the Youth Justice and Criminal Evidence Act 1999 (Commencement No. 29) Order 2022, SI 2022/992.

173 HM Courts and Tribunals Service, *Section 28 for vulnerable victims and witnesses in Crown Courts*, 26 November 2020.

174 CrPD 6.3.

court; fewer trials were aborted due to witnesses not attending; more guilty pleas were entered before trial possibly due to earlier disclosure of evidence; and there were minimal differences in conviction rates.[175] In their 2023 evaluation they found benefits of improved witness experience ("key" to this, they report, is the physical separation from the defendant and courtroom while they give evidence) and reduced stress; better recall; more timely evidence hearings; and agreed questions in advance. However, they also found significant concerns about the negative impact on listing and delays; disclosure; the quality of recording and playback and the impact of this at trial. They concluded that, on balance, most practitioners support or are neutral about wider roll-out of the use of section 28.[176]

7.116 Stakeholders have also explained the benefits of recorded evidence. Dame Vera Baird KC, then Victims' Commissioner, has told us that pre-recorded cross-examination offers complainants the opportunity to access therapy earlier, and involves taking evidence at an earlier stage when memories of events are likely to be much better. The MoJ section 28 evaluation also reported that complainants benefitted from earlier access to therapy due to pre-recording evidence.[177] However, it also noted that there was still some confusion about access to therapy; some complainants had to wait until after the trial due to the chance of being recalled to give further evidence.[178]

7.117 Lawyer Martin Rackstraw has commented that cross-examination may be less comprehensive and effective when performed in advance of a trial because issues for cross-examination arise during the process of the trial itself. Similarly Marsh and Dein have argued that pre-recording can require cross-examination to be done "when the defence are not fully 'trial ready'" which "represents a significant downside for the defence".[179]

7.118 The Joint Inspection found that hearings to record cross-examination were not "being used or considered consistently" by the police or the CPS[180] due to lack of knowledge and perceptions that recorded evidence was less effective and impactful.

7.119 The House of Commons Home Affairs Committee Report welcomed the roll-out of recorded cross-examination and noted its benefit to complainants. However, it also recognised the significant resourcing challenges it presents. Practitioners have highlighted to us practical problems with the listing of section 28 hearings at a time where the trial advocate can attend and problems for practitioners in receiving timely disclosure of the prosecution case and frontloading their trial preparation. The

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175 J Baverstock, *Process evaluation of pre-recorded cross-examination pilot (section 28)* (2016) Ministry of Justice.

176 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK.

177 Above, p 2 and 15.

178 Above, p 50.

179 L Marsh and J Dein, "Serious Sex Offences in England and Wales: defending the indefensible" in R Killean, E Dowds and AM McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (2021), p 50.

180 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022) p 70.

Criminal Bar Association (CBA) reported to the Committee that section 28 hearings are unworkable, the protocols for managing section 28 cases are not being complied with and there is a lack of appropriate remuneration. The CBA have stated that as a result, advocates are currently declining cases, prosecuting or defending, where such a hearing is required. This is also reflected in the 2023 MoJ section 28 evaluation. Taking this into consideration, the Committee urged the Government, working together with the judiciary as well as the Bar Council and CBA, to "consider the obstacles to a successful roll-out".[181]

7.120 The Joint Inspection also referred to the impact of recording cross-examination on listings. They heard that where cross-examination has been recorded and secured, judges may be more inclined to adjourn the trial date in order to prioritise other cases.[182] Sir John Gillen said that pre-recording cross-examination reduces the extent to which complainants feel the impact of any delays. However, after recording their cross-examination, complainants may remain in limbo until the trial has reached its final conclusion. The Joint Inspection stated that while recording their evidence earlier in the process may alleviate some of the distress for complainants, "[the distress] remains until the case has concluded"[183] (and beyond). Pre-recording can however protect the complainant from having to give evidence more than once were a retrial required.

7.121 JUSTICE have commented that interviewing the complainant using "skilful and sensitive techniques" is particularly important[184] yet found that ABE guidance is "not always fully followed and at times [video recorded interviews] fall short of the standards that can reasonably be expected".[185] It also noted that the roll-out of video recorded cross-examination[186] had highlighted the "disparity of quality" between video recorded evidence in chief carried out by police officers and video recorded cross-examination by an "experienced and prepared advocate".[187] Both JUSTICE and the Angiolini Review acknowledged the difficulties caused by the "dual purpose"[188] of

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181 House of Commons Home Affairs Committee, *Investigation and Prosecution of Rape*, *Eighth Report of session 2021-22* (29 March 2022), p 70.

182 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022) p 70. Similarly, a Senior Crown Prosecutor reported to academic researchers that some cases were delayed specifically because they were s 28 cases and the complainant had already recorded their evidence: L O'Doherty et al *Justice in Covid-19 for Sexual Abuse and Violence: Impacts of the Covid-19 pandemic on criminal justice journey of adult and child survivors of sexual abuse, rape, and sexual assault* (2022), p 33.

183 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022) p 72.

184 JUSTICE, *Prosecuting Sexual Offences* (May 2019), para 4.24.

185 Above, para 4.27, citing HMCPSI and HMIC, *Achieving Best Evidence in Child Sexual Abuse Cases – A Joint Inspection* (December 2014).

186 Under YJCEA 1999, s 28.

187 JUSTICE, *Prosecuting Sexual Offences* (May 2019), para 4.28.

188 Above, para 4.28.

video recorded interviews as both a "substitute for oral evidence" as well as an "investigative tool".[189]

7.122 In a similar vein, judicial stakeholders reported to us that ABE interviews are overly long, lack focus, require significant editing and due to poor audio quality and complexity also frequently require a transcript to be provided to the jury. Judicial stakeholders have told us that this can lead to jury disengagement. Crown Court judges reported to the OVC Review that ABE interviews were "poorly executed" and were problematic due to technical issues with quality of playback, picture or sound.[190] Members of the judiciary have also told us that the playback of ABE interviews was impacted by poorly equipped courtrooms with poor quality audio-visual facilities.

7.123 The OVC Review recommended that:

> The quality of audio-visual is assessed as part of an HMCTS audit process, including: size of TV screens; their positioning in court; sound and picture quality; and ease of set up. A guaranteed minimum standard is met across all courts.[191]

7.124 The impact of recorded interviews on the jury's perception of the evidence is a noted concern. It has been reported that in one section 28 case, after the complainant's pre-recorded evidence was played, the jury sent the judge a note to ask why they had not heard evidence from the complainant. "It seemed they had not considered the recorded evidence to have the same weight or seriousness as evidence given in person."[192] The Angiolini Review referred to "speculation" during focus groups about whether evidence given in person is more impactful and effective than ABE or video link evidence.[193] Similar concerns were reported by judges to the OVC Review.[194] Qualitative feedback to the OVC Review was that in contrast to the position for the defendant, ABE interviews create distance from the jury, are harder to concentrate on and juries do not get a feel for the witness.[195] The MoJ section 28 evaluation reported that practitioners are both aware of the belief that "live evidence" is more impactful, and hold the belief themselves.[196] Marsh and Dein have suggested that pre-recorded evidence is "conducted in a sterile atmosphere" and that conversely, prosecution evidence becomes "heavily distorted" when juries are not able to watch that particular

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189 Rt Hon Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* ("Angiolini Review") (April 2015), para 715.

190 OVC, *Next steps for special measures*, (May 2021), p 34.

191 OVC, *Next steps for special measures*, (May 2021), Recommendation 6.

192 N Vineall KC, "Supporting all at the Bar" *Counsel Magazine* (March 2023).

193 Angiolini Review (April 2015), para 721.

194 For example, the OVC found that "while 42% of [Crown Court] judges felt that ABE interviews were very effective in lessening witnesses' anxieties around giving evidence, only 26% felt they were very effective in achieving best evidence." See OVC, *Next steps for special measures*, (May 2021), p 34.

195 See OVC, *Next steps for special measures*, (May 2021), p 34.

196 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 25.

evidence play out contemporaneously. This can give a different quality to the evidence of the complainant which can be to the detriment of the defence.[197]

7.125 However, both empirical evidence and input from stakeholders cast doubt on this. For example, Lady Dorrian told us that there was no evidence to support this and since the COVID pandemic, juries routinely saw evidence delivered via screen.[198] Research by Professors Ellison and Munro using mock trials which explored whether special measures affected juror decision-making suggested that jurors were less influenced by the way the evidence was delivered than by whether they subscribed to rape myths and misconceptions.[199] A further mock jury study in Australia found that, where there was a clearly visible and audible screen or recording, the mode of presentation of the complainant's evidence – whether that was in person, live link or pre-recorded video – "did not impact differentially on juror perceptions of the complainant or the [defendant]" or their individual verdict.[200] The Scottish Government's evidence review examined the impact of pre-recorded and live link evidence across a range of jurisdictions and found that although there have been fewer studies in relation to adult witnesses, "the level of any impact of pre-recorded evidence on mock jurors' decision-making is low, and its direction in terms of ultimate jury verdict is unpredictable".[201] The MoJ section 28 evaluation explains the limitation in their report that they can only reflect practitioners' perceptions of the impact on jury decision making of such measures. They recommend further research to improve our understanding of the impact of pre-recorded cross-examination on justice outcomes.[202] Research is also being carried out with real jurors. Professor Cheryl Thomas is currently conducting research with jurors post-verdict, which will assess the impact of in court, remote, live and pre-recorded evidence on jurors' perceptions of the evidence and their verdicts.[203]

Comparative law

7.126 A number of jurisdictions have comparable provisions for recorded evidence in chief. In Ireland, an interview with the Gardaí for sexual offences prosecutions may be video

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197 L Marsh and J Dein, "Serious Sex Offences in England and Wales: defending the indefensible" in R Killean, E Dowds and AM McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (2021) p 51.

198 CVP was introduced to courtrooms at the beginning of the pandemic, resulting in an increased reliance upon live link where previously complainants might have been encouraged to attend court. L O'Doherty et al *Justice in Covid-19 for Sexual Abuse and Violence: Impacts of the Covid-19 pandemic on criminal justice journey of adult and child survivors of sexual abuse, rape, and sexual assault* (2022) p 26. We note that as formal restrictions during the pandemic have been lifted, the necessity and use of remote hearings and live link because of those restrictions may change.

199 L Ellison & V Munro, "A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials" (2014) 23 *Social and Legal Studies* 3-29.

200 N Taylor & J Joudo, "The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision making: an experimental study", *Australian Institute of Criminology Research and Public Policy Series (No.68)* Canberra: Australian Institute of Criminology (2005), p x.

201 V Munro, "The Impact of the use of Pre-recorded Evidence on Juror Decision-making: An Evidence Review", *Scottish Government Research Findings 64/2018* (2018), p 3.

202 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 56.

203 See Juries, the digital courtroom and special measures - Nuffield Foundation.

recorded.[204] This video recording will be admitted at trial provided: its contents would be admissible if given in direct oral evidence; the witness who made the video recorded statement is available at trial for cross examination; and there are no objections based on the interests of justice.[205] In sexual offences proceedings, these provisions apply to any witnesses, other than the defendant, who are either under 18 or to adults with a mental disorder.[206] The O'Malley Review considered the merits of recorded cross-examination but rejected this model on practical rather than principled grounds. Its concerns were that delays in obtaining, analysing and disclosing digital and third-party material would be problematic. It noted that without effective and timely disclosure by the prosecution, the defence could not "be expected to conduct an effective cross-examination" during a pre-trial hearing.[207] It also took account of concerns raised about technological issues and the potential for video recorded evidence to be less compelling.[208]

7.127 In Canada, section 715.1 of the Criminal Code permits a video interview of the complainant to be admitted as their whole or partial evidence in chief, provided the complainant adopts the contents of the video and was under the age of 18 at the time of the alleged offence.[209] In *R v L (DO)*,[210] the Supreme Court of Canada ruled on the constitutionality of section 715.1 and found that it did not impermissibly interfere with the defendant's right to a fair trial and right to be presumed innocent under sections 7 and 11(d) of the Charter of Rights and Fundamental Freedoms. L'Heureux-Dubé J examined section 715.1 in the context of the "innate power imbalance between the abuser and the abused child, which is often tied to both the gender and the age of the victim and the perpetrator."[211] She reiterated that whilst the defendant has the right to a fair trial, they do not have the right to the "most favourable procedures that could possibly be imagined".[212] The objective of the trial process is also: to elicit the truth; to provide "dignified means"[213] for complainants to give their account; and to "[curb] the trauma" of giving evidence.[214]

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204 Evidence given via live link during proceedings sending an indictable only offence to trial may also be admitted. See Criminal Evidence Act 1992, ss 16(1)(a).

205 Criminal Evidence Act 1992, ss 16(1)(b).

206 Above, s 16. S 19 extended this provision to adults with a mental disorder within the meaning of s 5 of the Criminal Justice Act 1993.

207 Department of Justice and Equality, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (August 2020), para 6.24.

208 Department of Justice and Equality, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (August 2020), para 6.25.

209 See also Criminal Code, s 715.2, which makes identical provision for witnesses with a mental or physical disability.

210 [1993] 4 SCR 419.

211 *R v L (DO)* [1993] 4 SCR 419 at 422a.

212 *R v L (DO)* [1993] 4 SCR 419 at 422e.

213 *R v L (DO)* [1993] 4 SCR 419 at 422a.

214 *R v L (DO)* [1993] 4 SCR 419 at 422c.

7.128 In Scotland, evidence of a vulnerable witness may be taken in front of a commissioner appointed by the court for this purpose,[215] either via video recording or television link[216] and may be used for both evidence in chief as well as cross-examination. The Dorrian Review cited the benefits of recorded evidence and recommended that:

> In accordance with the recommendations of the earlier Evidence Procedure Review, the police interviews with complainers in serious sexual offences should be video recorded to capture the evidence of the witness at the earliest possible opportunity. The interviews should be conducted with officers trained in taking such statements, all as recommended by the EPR. The resultant recording(s) should be used, subject to editing under the control of the court, as the evidence in chief of the witness. Any further evidence should be pre-recorded on commission at the earliest opportunity in the proceedings and where appropriate this should be done prior to service of the indictment.[217]

7.129 In Victoria, Australia, for child and cognitively impaired witnesses, their police interview may be video recorded for use as evidence in chief,[218] and special hearings may then take place to video record their cross-examination and re-examination.[219] The Victorian Law Reform Commission (VLRC) have noted the benefits of video recorded evidence, such as avoiding the complainant giving their account on multiple occasions, recording the account close in time to the allegation, and limiting their time in court. However, it also identified quality issues with police interviews arising from their dual investigative and evidential function, such as the presence of irrelevant or inadmissible material or failure cover all matters required for the trial.[220] It recommended that complainants in sexual offences cases pre-record all their evidence at one pre-trial hearing. It noted that existing provisions permit this to some extent, if the court considers it appropriate and is satisfied that it is in the interests of justice.[221] The VLRC took the view that this would: streamline the process; retain existing benefits of video recording; and avoid "the recording happening too early before the main issues [in the case] are identified".[222]

7.130 The Gillen Review noted that the use of pre-recorded cross examination is already undertaken, at the very least for children and vulnerable adults, in Scotland, New Zealand, six jurisdictions in Australia, Iceland, Norway and France.[223] John Riley and

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215 Criminal Procedure (Scotland) Act 1995, s 271I(1).

216 Criminal Procedure (Scotland) Act 1995, ss 271I, 271I(1A) and 271I(2).

217 Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offences Cases Final Report from the Lord Justice Clerk's Review Group* (March 2021), Recommendation 1.

218 For child and cognitively impaired witnesses in sexual offence, assault and family violence cases. See Criminal Procedure Act 2009 (Vic), Division 5.

219 For child and cognitively impaired complainants, the whole of their evidence including cross-examination and re-examination may be recorded at a special hearing. See Criminal Procedure Act 2009 (Vic), Division 6.

220 VLRC, *Improving the Justice System Response to Sexual Offences Report* (2021), para 21.85-21.95.

221 For example, under s198 of the Criminal Procedure Act 2009 (Vic), where a witness is overseas during the trial. VLRC, *Improving the Justice System Response to Sexual Offences Report* (2021), para 21.97-21.98.

222 VLRC, *Improving the Justice System Response to Sexual Offences Report* (2021), para 21.99.

223 Gillen Review (May 2019), para 4.13.

Professor Hoyano also refer to the fact that in Western Australia, which pioneered the use of video recorded evidence, there is now a flexible model where the initial video recorded interview:

> may constitute examination-in-chief, or a witness's entire evidence may be ordered to be recorded at a special hearing, including examination-in-chief being led by prosecuting counsel, according to how the court considers best evidence can be achieved.[224]

Analysis

7.131 In England and Wales, pre-recording of all parts of the complainant's evidence (in chief, cross-examination and re-examination) is already permitted. We are of the provisional view that there may be considerable benefit from:

(1) adopting a more flexible procedural model; and

(2) providing an automatic entitlement to the recording of all evidence for complainants in sexual offences prosecutions.

7.132 Applications for the use of video-recorded in chief are commonly granted, have a high success rate and are rarely opposed by the defence. Therefore, it could benefit from being the subject of an automatic entitlement. The main concerns about the use of this measure are the impact of low quality recorded interviews (both in substance and technology), and the impact on the jury's evaluation of the complainant as a witness and their evidence, when evidence is pre-recorded as opposed to live in court. These could be mitigated by additional measures we consider below.

7.133 Similarly, automatic entitlement to the recording of all evidence, including cross-examination, would enhance consistency and ensure the benefits of the measure are available to all complainants. As with all standard measures, automatic entitlement would be subject to a party being required to indicate that the complainant wishes to have this measure. Recorded cross-examination has only been rolled out at all courts for complainants in sexual offences cases since September 2022; the MoJ section 28 evaluation has reviewed the implementation of section 28 procedures for intimidated witnesses and reported, at this stage, many benefits as well as practical concerns, discussed above.[225]

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224 L Hoyano and J Riley, "Making Section 28 More Flexible and Effective", (1 June 2021) *Counsel Magazine*. See Evidence Act 1906, s 106RA and 106I, for a special witness (which includes complainants in serious sexual offences) and child witnesses, the whole of their evidence, including cross-examination and re-examination, may be video recorded at a special hearing. In addition, under s 106HB, child and cognitively impaired witnesses, police video interviews may be conducted and admitted as whole or part of their evidence in chief and directions made about how further evidence in chief may be given and how cross-examination conducted. Under s 106K, a child's video recorded police interview can be combined with the other evidence they give at any special hearing.

225 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK. They also made recommendations for further improvement including training on section 28, clear and consistent information being provided to witnesses, and further research on the impact on jury decision making: p 55-56.

Consultation Question 47.

7.134 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to pre-record their evidence.

Do consultees agree?

7.135 Currently, a section 28 (recording of cross-examination) hearing can only occur where there is already an ABE interview that is admissible as recorded evidence in chief. John Riley and Professor Hoyano have argued that the admission of recorded evidence in chief should be removed as a precondition for a witness to be eligible for recorded cross-examination. They stated that "there is no intrinsic logic to requiring the ABE interview to be admitted before the witness has access to section 28."[226] They comment on the artificiality of judges on occasion ordering the police to conduct an ABE interview to enable them to consider making a section 28 direction. There may be a number of valid reasons why no ABE interview was conducted such as the police overlooking the need for one; an ABE interview being inappropriate; or the prosecutor concluding that the ABE interview is unusable. They noted that permitting both examination in chief and cross-examination at the same hearing would allow prosecuting counsel to present the evidence more coherently to the jury than is possible in an ABE interview. It would also overcome the poor quality of ABE interviews caused by their dual investigative and evidential function.

7.136 These arguments are persuasive. For complainants who wish to do so or where the circumstances require it, it should be possible to record all their evidence in one hearing, pre-trial. This will retain the benefits of recorded evidence, such as the capturing of the evidence at an early stage and the minimisation of the risk of re-traumatisation through the court process. It will also allow the complainant to be examined by a fully prepared and experienced advocate at a stage of the case where the investigation is complete and the issues to be explored with the witness have been more fully identified. This may in turn resolve the issue of overly long ABE interviews which contain irrelevant and inadmissible material that require substantial editing.

7.137 As set out at paragraph 7.128 above, the VLRC have proposed a model for complainants in sexual offences cases that means they record all of their evidence at a single pre-trial hearing.[227] The VLRC made this recommendation to avoid poor-quality video evidence and to ensure that the recording took place at a point in the case where the main issues had been identified.

7.138 We recognise that there are potential difficulties with the recording of all the complainant's evidence at a specially convened hearing. In order for the police to investigate, interview the suspect and for the CPS to reach a charging decision, the complainant would still be required to give an account at the police investigation stage. If not recorded in the ABE format, this would have to be recorded in a written

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226 L Hoyano and J Riley, "Making Section 28 More Flexible and Effective", (1 June 2021) *Counsel Magazine*.

227 VLRC, *Improving the Justice System Response to Sexual Offences Report* (2021), para 21.97-21.99.

format. This requires a complainant to give multiple accounts on multiple occasions and may increase the risk of re-traumatisation and of inadvertent inconsistency between accounts. Some complainants may find the prospect of video recording all their evidence in a court before a judge and legal representatives more difficult than recording their initial account in a police ABE suite, with the interview conducted by a specially trained police officer. A flexible model should take account of this by considering the needs and wishes of the complainant, the circumstances of the case and how best evidence may be achieved.

7.139 We therefore provisionally propose the removal of the current requirement that a recorded ABE interview be admissible before a direction can be made for the recording of cross-examination. Instead, there should be a flexible model that provides for automatic entitlement to the recording of all evidence for complainants, which can include an ABE and later pre-recorded cross-examination, or the recording of all evidence at once pre-trial.

Consultation Question 48.

7.140 We provisionally propose that, for complainants in sexual offences prosecutions, evidence in chief, cross-examination and re-examination should all be able to be pre-recorded before trial and should not depend on there being an admissible Achieving Best Evidence (known as "ABE") interview.

Do consultees agree?

Should measures provide for the complainant to be out of view of the defendant?

7.141 These measures (screens, live link and recorded evidence) offer the complainant a level of privacy and distance from the defendant and public. The statutory aim of measures like the screen is to prevent the complainant from seeing the defendant.[228] However stakeholders have explained that complainants also do not want the defendant to see them. This may be because they have changed physically and do not want the defendant to know what they look like,[229] or to offer them control over the circumstances in which the defendant can view them.[230] The fear of being exposed and visible to the defendant while giving evidence and being cross-examined may discourage them from engaging fully with the trial and giving their best evidence. It may even dissuade complainants from supporting a prosecution, contributing to attrition.

7.142 Practically, screens set up to prevent the complainant from seeing the defendant often also prevent the defendant from seeing the complainant. With live link evidence, or the playing of pre-recorded evidence in trial, the defendant can, absent any additional measure or alteration, see the complainant on a screen in the courtroom.

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228 YJCEA 1999, s 23(1).

229 A stakeholder who works with complainants and members of the judiciary.

230 A victim and campaigner.

7.143 Similarly, if their evidence is recorded before the trial, the defendant may see the complainant give evidence by watching their recorded ABE interview. In accordance with their obligations under the Criminal Procedure and Investigations Act 1996, the CPS must serve the complainant's ABE interview and any transcript on the defendant's legal representatives. The ABE interview and any transcript may then be shown to the defendant for them to provide instructions so their legal representatives may prepare their case and represent them at trial. One judicial stakeholder told us that the defendant is shown the video but does not have unrestricted access to it.[231] The police and CPS may also seek undertakings from the defendant's legal representatives that they may show the video to the defendant, but they will not provide the defendant with a copy.

7.144 As with being seen while giving evidence in court, some complainants do not wish the defendant to see their current appearance via the ABE video. This may be particularly pertinent if the complainant has deliberately taken steps to change their appearance since the offence to avoid identification, or when significant time has passed since the offence. However, police stakeholders told us that they are not permitted to pixelate the complainant's image on the ABE video before it is sent to the defence. Any proposed edits, such as pixelation, must be discussed between defence and prosecution legal representatives, which requires the defence legal team (and the defendant) to have sight of the unedited video.

7.145 In practice some measures are taken to prevent the defendant from seeing the complainant while giving evidence in court. Screens and other measures are provided and adapted to prevent the defendant from seeing the complainant when a direction for special measures is made.[232] For example, the CrPD provides for witnesses whose evidence is pre-recorded:

> The accused is entitled to communicate with their representative and should be able to hear the witness via the live link and see the proceedings... Whether the witness is screened or not will depend on the other special measures ordered, for example screens may have been ordered….[233]

7.146 CPS guidance provides:

> Screens will be placed either around the witness box or around the dock to prevent the witness from having to see the defendant and the defendant from seeing the

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231 A former prosecutor told us of anecdotal accounts of ABE videos being shown by the defendant to other prisoners. However this already constitutes a criminal offence. See, for example, Prison Act 1952, s 40D possession of a device capable of transmitting or receiving images; or Criminal Procedure and Investigations Act, ss 17 and 18, contempt of court for using or disclosing prosecution material otherwise than in connection with criminal proceedings.

232 For example, one judge advised us that in their courtroom, a black cover is placed over the screen to which the defendant has access when the complainant attends via live link, so they cannot see the complainant. However, courtrooms vary in their size, set up and facilities which can impact in practice how and when this can be achieved.

233 CrPD 6.3.38.

witness – the witness will still be seen by others in the court including the judge, jury, lawyers and barristers and, in some courts, the public gallery.[234]

7.147 This practice has been criticised. Professor Laura Hoyano has argued that the adopted standard practice does not take into account the defence rights, and that it fails to recognise that the right of the accused to see their accuser should only be denied in "rare circumstances" as held by the Court of Appeal.[235] Dr Fairclough has told us that the practical set up of screens should not prevent the defendant being able to engage with the rest of the trial, such as being shielded from the jury or the rest of the courtroom.

7.148 The rights of the defendant in this regard are also enshrined in the ECHR. Article 6(3)(d) of the ECHR provides that anyone charged with a criminal offence has the right to:

> examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

7.149 Any exception to this:

> Must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[236]

7.150 When a defendant is prevented from seeing the complainant while they give evidence,[237] they are prevented from seeing the evidence in its entirety. The defendant is deprived of information and context such as the complainant's body language and demeanour. The judge, jury and prosecution will have been able to see the full evidence including its visual impact. The defendant may be placed at a disadvantage if they are the only party unable to do so.

7.151 It may also prevent their legal representatives from meaningfully advising their client or making meaningful submissions to the court. For example, if the defendant is prevented from seeing the complainant in their recorded ABE interview, the defendant's legal representatives may be prevented from taking full instructions and making meaningful submissions about any proposed edits.[238]

7.152 Preventing the defendant from seeing the complainant does not prevent their legal representative from doing so. The defendant is still able to participate fully through

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234 CPS, *Special Measures Legal Guidance* (22 July 2021).

235 *R v Taylor* [1995] Crim LR 253; *Watford Magistrates' Court, ex parte Lenman* [1993] Crim LR 388; L Hoyano, "Video and live-link evidence: state of play", (September 2018) *Counsel Magazine*.

236 *Al-Khawaja and Tahery v the United Kingdom* App Nos 26766/05 and 22228/06 (Grand Chamber decision) para 118.

237 Whether that is by placement of a screen in court, covering the video stream where recorded evidence or live link is displayed, or pixelating the complainant in recorded evidence.

238 The court must approve any edits. See YJCEA 1999, s 27(1) to (3).

their legal representative. However, some defendants may not have a legal representative. While defendants are prevented from personally cross-examining the complainant,[239] it is important for unrepresented defendants to be able to engage with all evidence in the case against them to prepare and advance their defence.

7.153 Measures that prevent the defendant from seeing the complainant while giving evidence would only limit access to the complainant's physical appearance and demeanour; the defendant would still be able to hear what is said and how it is said. It is acknowledged that the demeanour of a complainant can be misleading.[240] The Court of Appeal has noted that "it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth".[241]

7.154 The ECtHR case law suggests that measures that limit the defendant's access to the complainant at trial are not incompatible with the defendant's right to a fair trial, where there is adequate opportunity to challenge the evidence and question the witness. In Appendix 2 we discuss this case law more fully. We note here that with specific regard to the examination of witnesses in sexual offence proceedings, the ECtHR has held in relation to personal cross examination by the defendant:

> Since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatisation on the latter's part, in the Court's opinion personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are.[242]

7.155 Also, the ECtHR has acknowledged that the use of video-link technology, for example, is an option available to courts to ensure that the witness's rights are adequately protected while at the same time guaranteeing the defendant's fair trial right to examine the witness.[243] In order for the trial to be fair, the defendant must be able to participate effectively in it. In our provisional view, from the case law, preventing the defendant from seeing the complainant while they give evidence is not inconsistent with the defendant's right to a fair trial (with one exception which we consider below). However it is a limitation on their ability to engage fully with the evidence against them. We also note that in practice, and as permitted by the CrPD, the complainant is sometimes shielded from the view of the defendant such as when a screen is used while the complainant gives evidence. However, this practice is inconsistent. Complainants fear being visible to the defendant while they give evidence (see paragraph 7.140 above). The legislation does not clarify which, and when, special

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239 YJCEA 1999, s 35.

240 See Chapter 2 and 10.

241 *Sri Lanka v the Secretary of State for the Home Department* [2018] EWCA Civ 1391 [36] (Leggatt LJ). In that (immigration) case the Court of Appeal considered whether the appellant was caused injustice by delay. In doing so they considered the weight given to the appellant's demeanour when giving evidence. The appeal was dismissed. While recognising the benefits of oral evidence, the Court held that assessment of demeanour should not be given "significant weight" in contrast to the content of the evidence given [43].

242 *Y v Slovenia* App No 41107/10 para 106.

243 *WS v Poland* App No 21508/02 para 61; *SN v Sweden* App No 34209/96 para 49.

measures should prevent the defendant from seeing the complainant. Clarity and consistency would be beneficial. We seek consultees' views to inform these issues.

7.156 A consistent approach requires that the practical implications of each measure are known and understood before they are implemented. We seek views on whether, when certain measures discussed below are made available, they should have the effect of preventing the defendant from seeing the complainant. If so, that would therefore be the effect of those measures in all cases. However, in rare and exceptional circumstances, the unique needs of a defendant may require them to be able to see the complainant, even if the complainant wishes to avail themselves of a measure that otherwise would prevent the defendant from seeing them. For example, a defendant with a severe cognitive impairment that prevents them from understanding speech without seeing the speaker, or a defendant who is deaf and uses lip reading rather than sign language. In such cases, the particular vulnerability or impairment means that the defendant is not able to participate fully while the complainant gives evidence, as defendants without such an impairment or vulnerability can do. They may need to see the complainant give their evidence so that they can understand what is being said, give instructions, and follow their trial. This is a consideration that is over and above the issues of engagement described in the rest of this section. It is appropriate that, in such exceptional cases, when a measure is used that would otherwise prevent the defendant from seeing the complainant, provisions are made to allow the defendant to see the complainant in a way that enables them to understand the evidence and give instructions.

Consultation Question 49.

7.157 When a direction is made for the use of a measure to assist the complainant in a sexual offences prosecution to give evidence, should the defendant be able to see the complainant when:

(1) the complainant gives evidence behind a screen;

(2) the complainant gives evidence using a live link;

(3) the complainant is pre-recording their evidence;

(4) the complainant's pre-recorded evidence is disclosed to the defence; and

(5) the complainant's pre-recorded evidence is played in court.

Consultation Question 50.

7.158 We provisionally propose that, where a defendant has a vulnerability or impairment that requires them to watch someone speaking in order to understand what they are saying, provision should be made to allow them to see the complainant while they give evidence. This should be allowed even if the complainant has chosen to use a measure to assist them give evidence that would otherwise prevent the defendant from seeing them.

Do consultees agree?

Should measures provide for the public to be prevented from seeing the complainant?

7.159 When a witness gives evidence via live link, behind a screen or when their pre-recorded evidence is played, they may see and be seen by the public in the court. As noted above, the statutory aim of the special measures described so far is not to prevent the complainant from being seen by the public.[244] However we have heard from stakeholders including the CPS, counsel, judiciary, and a victim and campaigner, that complainants do not wish the defendant *or* the public in the court to see them when they give evidence. The Angiolini Review heard that "complainants are shocked to find" that at trial, during the playback of their ABE interview and their live link evidence, they could be seen by the public gallery and by the defendant, potentially leading to their identification.[245] Complainants in sexual offences prosecutions are afforded life-long anonymity.[246]

7.160 The statutory provisions make no explicit reference to the witness seeing or being seen by the public and there is conflicting guidance about the interpretation of this measure. As described above, it is common in practice for screens, when ordered as a special measure, to be arranged so that the defendant and the public gallery are prevented from seeing the complainant. This is not the case with other measures, leading to inconsistencies. The Angiolini Review heard that if it had been better explained to complainants that their pre-recorded evidence, or attendance via live link would be visible to the defendant and public, "many witnesses would have opted to give evidence in court from behind a screen …"[247] Similarly, the OVC Review heard that available Remote Evidence Centres (RECs) were used "infrequently" because of concerns from complainants about being visible on the live link screen in court. This meant that they "would reluctantly choose screens in court instead".[248] The Joint

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244 See for example, YJCEA 1999, s 23(1).

245 In 2014, the Rt Hon Dame Elish Angiolini DBE KC was asked by the Commissioner of the Metropolitan Police and the Director of Public Prosecutions to conduct an independent review of the way rape allegations are investigated and prosecuted in London. The work included a review of sample cases and consultation with experts, practitioners and complainants. Angiolini Review (April 2015), para 756.

246 Under Sexual Offences (Amendment) Act 1992, s 1.

247 Angiolini Review (April 2015), para 756.

248 OVC, *Next steps for special measures* (May 2021), p 52.

Inspection also found that as a matter of practice, it is already common to combine a live link direction with the use of a screen.

7.161 Article 6(1) of the ECHR expressly states that in criminal proceedings "everyone is entitled to a fair and public hearing" and that "judgment shall be pronounced publicly". Such transparency aims to contribute to the achievement of a fair trial. Therefore, the exclusion of the public and the press from a sexual offences trial may constitute a breach of article 6.

7.162 However, the ECtHR has also recognised that the vulnerability of some witnesses might require courts to impose limitations on the public nature of proceedings "to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice".[249] The ECtHR has also recognised that, without public and press scrutiny, witnesses may "feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment".[250]

7.163 The purpose behind measures to assist the complainant to give evidence is to protect their dignity while affording them the chance to give their best evidence at trial. As explained above it is the impact on their evidence that forms the legislative test for directing the use of measures. If complainants are worried about being identified or feeling "watched" by members of the public, who may include friends and family of the defendant, they may be prevented from giving their best evidence. Measures that prevent the public from seeing the complainant do not necessarily infringe the important principle of open justice. The complainant's evidence will still be heard by the public and press. Further, the defendant's right to challenge evidence and engage fully in proceedings, as explored above, does not extend to the public.

7.164 Given the intimate and personal nature of the evidence given by complainants of sexual offences, we provisionally propose that when using a screen, live link or pre-recorded evidence, measures should prevent the public in the court from seeing the complainant. This would protect the complainant without undue interference with the transparency of the trial.

7.165 As we discuss from paragraph 7.167 below, one currently available special measure is to "clear the courtroom", meaning that the public are excluded while the complainant gives evidence. There is an exemption for a named member of the press. Clearing the courtroom is a more stringent measure than preventing the public from seeing (while still allowing them to hear) the complainant while they give evidence, which provides a stronger case for such an exemption. We seek consultees' views on whether there should be any exemptions to a measure that prevents the public from seeing, while still being able to hear, the complainant give evidence.

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249 *B and P v UK* App Nos 36337/97 and 35974/97 para 37.

250 *B and P v UK* App Nos 36337/97 and 35974/97 para 38.

Consultation Question 51.

7.166 We provisionally propose that where a screen, live link, or pre-recorded evidence is used for a complainant in a sexual offences prosecution to give evidence, it should include measures to prevent the complainant from being seen by the public observing the trial.

Do consultees agree?

Consultation Question 52.

7.167 If measures prevent the complainant in a sexual offences prosecution from being seen by the public in the court when they use a screen or live link to give evidence or when their pre-recorded evidence is played, but the public are still able to hear the evidence, should there be an exemption to allow:

(1) a member of the press; or

(2) any other individual or group

to see the complainant?

Excluding the public

7.168 There is already one special measure that, when ordered, prevents the public from seeing and hearing the complainant. Under the YJCEA 1999 the court is permitted to exclude the presence of any persons of any description specified by the court when a complainant gives their evidence during a sexual offences trial,[251] except for the defendant, legal representatives acting in the proceedings, any interpreter or other person appointed to assist the witness.[252] One named member of the press must also be permitted to attend.[253] This is also known as "clearing the courtroom"; the effect of this direction is generally that the public are excluded from the court. There is a common law power to clear the public gallery. The CrPD also confirms that the court has the inherent power to "restrict" access to the courtroom for members of the public where necessary in the interests of justice,[254] and that the court should consider doing so when vulnerable witnesses give evidence.[255] While the principle of open justice requires court proceedings to be accessible to the press and public, excluding them

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251 YJCEA 1999, s 25(1). This direction is also permitted under s 25(4)(a) where the proceedings relate to any offence listed under section 17(4A) which include: an offence under Modern Slavery Act 2015 ss 1 or 2 or domestic abuse within the meaning of s 1 of the Domestic Abuse Act 2021.

252 YJCEA 1999, s 25(2).

253 YJCEA 1999, s 25(3).

254 CrPD 2.2.3.

255 CrPD 2.2.5.

where it is in the interest of justice to do so has been held compatible with the right to a fair trial found in article 6 of the ECHR.[256]

Commentary

7.169 We were informed that this measure may offer significant benefit to complainants who wish to avoid giving highly sensitive and traumatic evidence in front of the defendant's friends, family and associates, and members of the public. We have heard that better use of clearing the courtroom may encourage complainants to report offences in the first place, to give live evidence in the court room, and will protect the lifetime anonymity they are afforded.[257]

7.170 The Angiolini Review received evidence that "the presence of the defendant's supporters is likely to have an inhibiting effect on the witness even if the witness is behind a screen and cannot see them."[258]

7.171 The CPS Special Measures Legal Guidance suggests that "clearing the public gallery will only be granted if there are highly sensitive issues and in very exceptional cases".[259] Research has found that the power to clear the courtroom while a witness gives evidence is rarely used.[260] Practitioners, academics, and judges have confirmed the same to us.[261] The Joint Inspection has described this underuse as a "missed opportunity to make victims feel safer when giving their evidence".[262] In accordance with the Joint National RASSO Action Plan, the CPS and National Police Chiefs'

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256 In *R v Richards (Randall)* (1999) 163 JP 246, [1999] Crim LR 764-765, the Court of Appeal concluded that article 6 of the ECHR and the common law principles of open justice require that criminal proceedings do not take place in secret and that justice is seen to be done. Courts must adhere to the broad principle that criminal trials are to be held without the exclusion of members of the public. However, exceptions may be made to this principle, based on the more fundamental principle that the main object of the court process is that justice has to be done. The Court of Appeal further found that "for the purpose of protecting the various potentially conflicting interests" identified, article 6 permits the press and public to be excluded from all or part of a criminal trial "to the extent strictly necessary … in special circumstances where publicity would prejudice the interests of justice." See also Appendix 2 for further discussion of the ECHR jurisprudence on special measures.

257 Robert Allen, CPS; Centre for Women's Justice; a victim and campaigner; Sir John Gillen and members of the judiciary.

258 Angiolini Review (April 2015), para 714.

259 CPS, *Special Measures Legal Guidance* (22 July 2021).

260 OVC, *Next steps for special measures* (May 2021), p 41; S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 19, citing J Plotnikoff, R Woolfson, NSPCC, *Falling Short? A Snapshot of Young Witness Policy and Practice* (2019) and S Fairclough, *The role of equality in the provision of special measures to vulnerable or intimidated court users giving evidence in Crown Court trials* Doctoral thesis, University of Birmingham (2017).

261 Robert Allen, CPS; a defence barrister; Hanna Llewellyn-Waters; Martin Rackstraw; police officers; Dr Fairclough; and members of the judiciary. We have heard that reasons for its underuse may include: a desire to maintain the principle of open justice; lack of awareness of its availability and experience of its use amongst prosecutors; lack of applications by the prosecution; and concerns about juror perceptions of the defendant arising from clearing the public gallery just for one part of the trial.

262 From the interviews and surveys that the OVC's Review conducted, it emerged that giving evidence in private was consistently under used. See OVC, *Next steps for special measures* (May 2021), p 41. The complainant giving evidence in private was used in only one of the case files reviewed by the Joint Inspection. See Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022), p 66.

Council published an information sheet for investigators and practitioners encouraging greater use of this measure.[263] The OVC's Review made the following recommendation:

> In its guidance to prosecutors on closing the public gallery, the CPS should remove references to "exceptional" cases.[264] MOJ should engage with the judiciary to promote use of this as a special measure during the evidence of a vulnerable or intimidated witness.[265]

7.172 In support of the principle of open justice, media stakeholders reiterated that it was important both that justice is done *and* is seen to be done. Public knowledge of criminal trials is important for all types of cases including sexual offences. It has been argued that, where the public are excluded, accredited press members must be permitted to remain. Currently, where a direction to exclude people from the court covers members of the press, there must be an exception for one named press representative to remain.[266]

7.173 It has been suggested that it is not necessary to exclude the public for witnesses in most sexual offences cases as the use of other measures such as video link and/or screens are commonly used and sufficient to allay their fears. Further, when screens are used, the public gallery is often cleared for the witness's entry to and exit from the court. When live link is used, the complainant may never need to enter the court room while the public gallery is in use. Since June 2022 it has also been possible for members of the public and press to observe trials remotely.[267]

Comparative law

7.174 We have been advised by both Dame Elish Angiolini and Sir John Gillen that England and Wales stands alone as the only jurisdiction in the United Kingdom and Ireland where complainants in sexual offences prosecutions routinely give evidence in public.

7.175 Two comparative models exist: clearing the courtroom for the complainant's evidence only; and conducting the entire trial in private, with the exception of the verdict and sentencing.

(1) Exclusion of the public while giving evidence. In a number of common law jurisdictions, there are long-established provisions either allowing or requiring the courtroom to be cleared during the complainant's evidence. In New Zealand, in any case of a sexual nature, the court room must be cleared while the complainant gives evidence save for the judge, jury, parties, their legal representatives, the officer in the case, any member of the media, witness supporter to the complainant and any other person expressly permitted by the

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263 CPS and NPCC, *Could clearing the public gallery help the victim to give their best evidence at court?* (December 2021).

264 See CPS, *Special Measures Legal Guidance* (22 July 2021).

265 OVC, *Next steps for special measures* (May 2021), Recommendation 14.

266 YJCEA 1999, s 25(3).

267 Courts Act 2003, s 85A (amended by Police, Crime, Sentencing and Courts Act 2022, s 198) implemented by the Remote Observation and Recording (Courts and Tribunals) Regulations 2022.

judge to be present.[268] In New South Wales, the evidence of the complainant in sexual offence proceedings must be given in private unless otherwise directed by the court.[269] In Scotland, the court may exclude the public during the evidence of a vulnerable witness, which would include a complainant in a sexual offences case, save for members or officers of the court, parties and their representatives, bona fide members of the press and such others as the court may authorise to be present.[270] The Gillen Review noted that in Scotland, "[w]hilst there is no statutory obligation to do this, the exclusion is invariably successfully made upon the application of the procurator fiscal in every serious sexual offence trial."[271]

(2) Trial in private. In both Ireland and Northern Ireland, serious sexual offences must be tried in private; in Canada the court has discretion to hold any criminal proceedings, or selected parts, in private.[272] In Ireland,[273] in rape or sexual assault proceedings,[274] the court must exclude all persons, save for: officers of the court; persons directly concerned in the proceedings; bona fide members of the press; and such other persons as the court permits to remain. The public are permitted to attend only for the verdict and sentencing. The court may not exclude a parent, relative or friend of the complainant; or where they are under 18, a parent, relative or friend of the defendant; or a support worker chosen by the complainant. In Northern Ireland, the Justice (Sexual Offences and Trafficking) Act (Northern Ireland) 2022 broadened powers to exclude the public, following a recommendation of the Gillen Review.[275] That Act requires that, where a person is tried on indictment for a serious sexual offence, the court must give an exclusion direction.[276] In Canada, a judge may order the exclusion of all or any members of the public from all or part of any criminal

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268 Criminal Procedure Act 2011, s 199.

269 Criminal Procedure Act 1986 (NSW), s 291(1).

270 Criminal Procedure (Scotland) Act 1995, s 271HB.

271 Gillen Review (May 2019), para 3.41

272 Criminal Code, s 486(1).

273 Criminal Law (Rape) Act 1981, s 6.

274 Criminal Justice (Victims of Crime) Act 2017, s 20; Children Act 2001, s 257; and Criminal Law (Sexual Offences) Act 2017, s 29. The O'Malley Review also recommended that extension beyond rape and aggravated sexual assault to all sexual assault offences. See Department of Justice and Equality, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (August 2020), para 4.25.

275 Gillen Review (May 2019), Recommendation 19. This recommendation was made for a number of reasons: unlimited public access is a factor in underreporting and attrition in sexual offences cases (para 3.57); limiting public access would reduce the risk of potentially inaccurate reporting of proceedings on social media (para 3.59); and excluding the public during only the complainant's evidence does not suffice, particularly because of the problems with "jigsaw" identification in a small jurisdiction (para 3.60). The review recognised the importance of freedom of the press and open justice and suggested the recommendation was only a "modest intrusion" into those principles because of the people permitted to remain (para 3.54).

276 The relevant sections of the Act are not yet in force. S 19 will amend Criminal Evidence (Northern Ireland) Order 1999 to provide that an exclusion direction excludes all persons from the court with the exception of members and officers of the court; persons involved in the proceedings; any relative or friend of the complainant; any relative or friend of the defendant; bona fide representatives of the press and any other person specified by the court as excepted from the exclusion.

proceedings if it is "in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international or national defence or national security." The judge must consider various factors, including: "society's interests in encouraging the reporting of offences and participation of victims and witnesses in the criminal justice process"; the ability of the witness to give a "full and candid account" and any "salutary and deleterious effects of the proposed order".[277] The Supreme Court of Canada has confirmed that:

> The exclusion of the public … is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences.[278]

Analysis

7.176 Complainants are in a unique position of having to give evidence about very private matters and can be concerned about doing so in public. The ability to exclude the public may be necessary to enable complainants to give evidence to ensure justice can be done. The current provisions for excluding the public from the courtroom in sexual offences prosecutions are limited. The existing discretionary power has not been well utilised and this leads to inconsistency and uncertainty.

7.177 There are significant benefits to a more robust approach, as is common in many other jurisdictions. An automatic entitlement to exclude the public while the complainant gives evidence (whether in person, by live link or where evidence is recorded and played in court) could increase consistency, certainty and complainants' confidence in the criminal justice system. With automatic entitlement, the complainant could still choose to give their evidence in public.

7.178 The concerns that arise from the attendance of the public while the complainant's evidence is given arise whether that involves the complainant giving evidence in court, via live link, or when their pre-recorded evidence is played and whether the public are watching in court or remotely. When giving evidence via live link or pre-recording evidence, the complainant will be aware that it will be played in court. Therefore, they are giving their evidence knowing that it could be watched by the public. While it may not always have the same immediate effect as being in the same room as the public, it can have a similar impact on the complainant's ability to give their best evidence. This also applies when the public are observing remotely and the complainant is giving live evidence in court. The CrPD recognise this and explain that the courtroom could be cleared when the complainant is giving evidence at a section 28 hearing (where their evidence is being recorded pre-trial) "if the presence of people in the public gallery is assessed as having the potential to adversely affect the ability of the witness to give their best evidence".[279] For example, complainants may be worried about talking

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277 Criminal Code, s 486 (2).

278 *Canadian Broadcasting Corporation v The Attorney General for New Brunswick* [1996] 3 SCR 480, [505]. See also J Cameron, *Victim Privacy and the Open Court Principle*, (March 2003) Department of Justice Canada.

279 CrPD 6.3.38.

about personal and sensitive details knowing they will be heard by the public, about their appearance being visible, or disclosing or showing identifying features or facts that would expose their identity to the public. We describe at paragraph 7.50 above the concern about identification of a complainant who has the right to lifetime anonymity, when the public see them give evidence. Where a complainant chooses to give evidence via live link, or pre-records their evidence, they may feel this is sufficient to enable them to give their best evidence and may not elect also to have the public excluded. A model of automatic entitlement allows for this.

7.179 Further, it is already mandatory that certain pre-trial hearings should take place in private. For example, an application for leave to introduce sexual behaviour evidence must be heard in private.[280] It is inconsistent that there is no mandatory hearing in private when the complainant gives evidence on these matters. In our provisional view, complainants in sexual offences prosecutions should be automatically entitled to the exclusion of the public (with suitable limitations as described above) while they give their evidence.

7.180 We have considered, as an alternative to automatic entitlement, a presumption in favour of excluding the public. This would mean that, instead of the current test, the court should order the exclusion of the public while the complainant gives evidence, unless there is a compelling reason not to do so in an individual case. This would retain some judicial discretion and therefore could be said to be less of an intrusion into open justice. However, such an approach would involve a lack of certainty for complainants, and may therefore perpetuate the concerns with the current model that discourage complainants from reporting and giving evidence. For the benefits of coherency and consistency, we are of the provisional view that complainants should be automatically entitled to an order excluding the public, with exemptions as explained below.

7.181 There has been a significant move in recent years towards open justice in courts that have previously been private in nature. Family courts have long been criticised for a presumption of privacy,[281] and recently in England and Wales a pilot has begun where accredited journalists may be permitted to attend and report on cases involving the welfare and care arrangements of children, albeit with strict anonymity provisions.[282] In the criminal justice system a small number of parole hearings[283] and sentencing hearings[284] have also been opened up to the wider public. This shows a commitment to improving and enhancing open justice throughout the justice system. A move to automatic entitlement to exclude the public while the complainant gives evidence in sexual offences prosecutions is not at odds with this. First, the measure is already available; a move to automatic entitlement would ensure it is more consistently

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280 YJCEA 1999, s 43(1) and CrPR 22.2(1)(a).

281 See for example The Guardian, "The Guardian view on the family courts: secrecy isn't working" (1 November 2021).

282 Courts and Tribunals Judiciary, "Reporting Pilot" (January 2023).

283 Since a change to the Parole Board Rules 2019 on 21 July 2022, it is now possible to apply for a parole hearing to be held in public. See Parole Board "Amendments to Parole Board rules" (21 July 2022).

284 Since July 2022, some Crown Court sentencing hearings can be broadcast live by the press. See Gov.uk "Guidance: Broadcasting Crown Court sentencing" (27 July 2022).

available to those who would benefit from it in this specific context only. Secondly, it is a limited measure that applies only when the complainant is giving evidence or their evidence is being played rather than to the whole trial (we note, for example, that the press have routinely been prevented from reporting on any part of family cases). Thirdly, automatic entitlement to the exclusion of the public could allow for a member of the press, and other specified people, to be permitted to attend while still limiting the negative impact on the complainant. Fourthly, England and Wales are an outlier in the UK in requiring sexual offence complainants routinely to give evidence in public.

Exemptions

7.182 Currently, a direction made under section 25 can (although does not have to) require that members of the press be excluded from the court while a witness is giving evidence. Where a direction does specify such an exclusion of the press, it must allow one named representative of the press to attend.[285] This can achieve a balance: promoting open justice and recognising the role of press reporting, while preventing additional pressure and stress being caused to witnesses by having multiple reporters present. The press play an essential role in disseminating criminal proceedings to the wider public and their presence at court allows them to challenge any rulings which may impact on open justice.[286] We have been told by a media stakeholder that court reporters would be concerned for open justice and the encouragement of court reporting if an order were made to exclude them from the court during a sexual offence trial. However, permitting one press representative to remain, we were told, would protect against the risk to open justice. Our provisional view is that this important exemption should be retained under a model of automatic entitlement.

7.183 We note that currently the exemption is aimed at a representative of a "news gathering or reporting" organisation. Exclusion orders under section 25 are not frequently made and we have not yet heard evidence about the way this exemption works in practice, such as how a representative is identified and allowed to report. We understand that a "press card"[287] can be used by journalists to identify themselves, which may assist with this exemption in practice. We would welcome evidence and views on how this does, or could, operate, to enable one identified member of the press to remain in court when an exclusion order is made.

7.184 Currently the defendant, legal representatives, and anyone appointed to assist a witness (such as an interpreter) are also exempted from a direction to exclude the public under section 25. It is important that they are able to be present to engage with the evidence; our provisional view is that such exemptions should remain under a model of automatic entitlement.

7.185 A provision allowing the exclusion of the public while the complainant gives evidence could also include an exception for: persons involved in the proceedings (in addition to the defendant and legal representatives); any relative or friend of the complainant; any

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285 YJCEA 1999, s 25(3).

286 For example, members of the press, as a person "aggrieved" by an order restricting publication of a report or public access to a trial on indictment in the Crown Court, may seek leave to appeal the order under s 159 of the Criminal Justice Act 1988. See Chapter 11 for further discussion of this appeal right.

287 Provided by the National Union of Journalists.

relative or friend of the defendant; bona fide representatives of the press (in addition to one representative currently permitted); and any other person specified by the court. The presence of some such groups or individuals could help ensure a minimal interference with open justice, and enable all involved in the proceedings to have the support they require. However, the attendance of groups including relatives and friends of the defendant, for example, may undermine the purpose of excluding the public. We seek consultees' views on whether any of these, or any other individuals or groups should be exempted from a direction to exclude the public while a complainant gives evidence.

Consultation Question 53.

7.186 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the exclusion of the public from observing the trial while they are giving evidence, whether in court or by live link, or while their pre-recorded evidence is played. As is currently the case under section 25 of the Youth Justice and Criminal Evidence Act 1999, exclusion of the public would not apply to: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, all of whom would still be permitted to attend.

Do consultees agree?

Consultation Question 54.

7.187 If the public are excluded from observing the trial while a complainant in a sexual offences prosecution is giving evidence, whether in court or by live link, or while their pre-recorded evidence is played, should there be an exemption to allow the attendance of any other individual or group, in addition to those listed in the Consultation Question above?

Should the public be excluded from the courtroom for any other parts or the whole trial?

7.188 The need for greater privacy is most acute when complainants are giving personal and intimate evidence. However, this is not the only time when a complainant may feel discouraged from engaging with the trial process when members of the public are in attendance.

(1) The whole trial. Some jurisdictions hold the full trial of serious sexual offences in private, primarily to avoid undermining the complainant's right to anonymity.[288] The presence of the public during the trial may permit 'jigsaw' identification of the complainant from other parts of the evidence and the presence of the complainant's friends or family. Excluding the public from the whole trial may encourage a witness to attend court who would otherwise be unwilling and may

[288] Including Northern Ireland, Ireland and Canada. See para 7.174 above for further discussion.

create greater general confidence in the process. However, there are very substantial concerns from about the impact of clearing the courtroom on open justice and extending it to the whole trial may be considered too great an intrusion into this principle. Further, the responses to the OVC's consultation with rape survivors[289] suggest that their primary concern was to be shielded from the public while they gave evidence.

(2) Verdict and sentencing hearing. The O'Malley Review in Ireland was of the view that the public should not be permitted to attend the verdict and sentencing[290] as it risked exposing the identity of the complainant, defeating the object of conducting the proceedings in private. In its view, since representatives of the press can attend, the open justice principle would be upheld.[291] However, wider public knowledge of the outcome of a trial and any sentence imposed is important. Public attendance should have a lower impact on complainants because they are unlikely to give evidence and more limited personal details are given about them at this hearing.

(3) Pre-trial hearings where applications are made concerning personal information about the complainant. Some pre-trial hearings that may occur in sexual offences cases, such as applications for leave to introduce sexual behaviour evidence, or an application to determine whether material held by the prosecution attracts public interest immunity, must be heard in private.[292] For special measures, currently where an application contains information that the applicant thinks ought not to be revealed to another party, unless the court otherwise directs, the hearing must take place in private.[293] The hearing of an application for leave to introduce evidence of a non-defendant's bad character, and case management hearings including GRHs, may take place either in public or private.[294] Excluding the public from the courtroom at pre-trial hearings in sexual offences cases is a justifiable interference with the principle of open justice. At pre-trial hearings, sensitive and private matters regarding the complainant may be discussed. The hearing may refer to the account that the complainant will give at trial and the outcome of the hearing may have a direct bearing on their decision to give evidence. In order to avoid prejudicing the trial, reporting on these matters may in any event be constrained. For example, section 43(1) of the YJCEA 1999, which sets out the procedure for hearings relating to SBE, states that the hearings should be "held in private". There is no statutory press exemption similar to that in section 25. There is likely to be very limited presence of the public at pre-trial hearings of this nature.

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289 OVC, Rape Survivors and the Criminal Justice System (October 2020),

290 Criminal Law (Rape) Act 1981, s 6(4); Criminal Justice (Victims of Crimes) Act 2017, s 29(2).

291 Department of Justice and Equality, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (August 2020), para 4.26.

292 YJCEA 1999, s 43(1) and CrPR 22.2(1)(a) and 15.3(6).

293 CrPR 18.12.

294 CrPR 21.3(5) and 3.5(2).

(4) When the victim personal statement is read. The victim personal statement may contain very personal information about the complainant.[295] It may be distressing to the complainant if it is read out in public, or referred to in detail in sentencing remarks given in public. However, wider public knowledge of any sentence imposed, along with the reasons for it, is a very important part of open justice. In New Zealand, the court has a discretion to direct that public be excluded in cases of sexual nature, when the victim personal statement is read or otherwise presented.[296] The order may only be made if the court is satisfied that it is necessary to avoid causing the victim undue distress.

Consultation Question 55.

7.189 We provisionally propose that the current powers to direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant should continue.

Do consultees agree?

7.190 We invite consultees' views on whether, for sexual offences prosecutions, there should be a power to direct the exclusion of the public with the exception of: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, from observing the following:

(1) The whole trial.

(2) The verdict and sentencing hearing.

(3) When the victim personal statement is read.

7.191 If so, should this power be discretionary, or should the complainant be automatically entitled to such a direction?

7.192 If there is a direction for the public to be excluded from observing the whole trial, the verdict or sentencing hearing or when the victim personal statement is read, should there be an exemption, in addition to those listed above, to allow the attendance of any other individual or group?

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295 The Victim Personal Statement (VPS) is a statement given by the victim to the police, or another agency. It is an opportunity for the victim to explain the impact the crime has had. It is an important feature of the criminal justice process for victims. Upon conviction, the VPS will be taken into consideration by the sentencing judge. It is also used to help assess what support the victim might need from the criminal justice system. For more information see HM Government, *Guidance: Victim Personal Statement*, (13 September 2018).

296 Criminal Procedure Act 2011, s 199AA.

Removal of wigs and gowns

7.193 For eligible witnesses, a special measures direction may provide that wigs or gowns usually worn by the judge and legal representatives are removed during the giving of the witness's evidence. The intention is to create a less formal and traditional court setting, that will be less intimidating.

7.194 Applications for removal of wigs and gowns are rare, particularly in proceedings relating to adults. The Northumbria Police and Crime Commissioner's rape trial observation project reported that wig and gowns were removed in 2 of the 30 observed trials. The removal was "praised" by the observers.[297]

7.195 The use and role of wigs and gowns (also called "court dress") has been a discussion point among the legal profession and public for many years. There have been public consultations,[298] Parliamentary debates,[299] and numerous articles sharing differing views of the benefits and concerns with their continued use. For some, both in the legal profession and amongst the public, wigs and gowns are an important symbol that can help signify the gravity of the process. Relatedly, some lawyers and judges see court dress as a uniform that provides a level of anonymity.[300] Others consider them archaic and exclusionary.[301] Some defendants may also value the significance of court dress, and the ease with which it identifies the roles of the professionals involved.[302]

7.196 It is not necessary for these purposes for us to form a view on their use. The removal of wigs and gowns has been a measure for which vulnerable and intimidated witnesses can apply, since the introduction of the YJCEA. This enables consideration in individual cases, of whether removal will improve the quality of the witness's evidence. Some complainants may think more informal dress is vital to their effective engagement while giving evidence, others may prefer to have everyone in full court dress. This individualised approach, we think, is appropriate.

7.197 There is limited evidence available about the use of this measure in the context of sexual offences. We have not received any feedback to suggest it should be treated differently to other measures. In the absence of such evidence, we are of the provisional view that in order to provide a coherent and consistent regime of measures to assist the complainant to give evidence, there should be an automatic entitlement to the removal of wigs and gowns. Given the anecdotal evidence and discussion above, it is likely that this measure may be requested infrequently. Infrequent use however does not justify a higher bar to availability where it is requested.

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297 R Dawson et al, *Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-2016* (2017) p 18.

298 Ministry of Justice, *Consultation on Court working dress in England and Wales*, 4 June 2007.

299 *Hansard* (HL) 22 June 1992, vol 538.

300 See for example, C Dyer, "Civil court judges prepare to cast aside their wigs after 300 years" (5 January 2007) *The Guardian*.

301 See for example, Professor Leslie Thomas KC, "Itchy. Expensive. Fashioned for caucasian hair. And just plain outdated! Why it's time to ditch barristers' wigs", (14 February 2022) *Mail Plus*.

302 See, for example, The Prison Reform Trust, *Fair Access to Justice?* (2012), p 9.

Consultation Question 56.

7.198 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to have wigs and gowns removed while they are giving evidence.

Do consultees agree?

Attendance of a supporter

7.199 The YJCEA 1999 expressly preserves the inherent power of the court to make adjustments to the trial process, outside the special measures framework, in respect of eligible witnesses. The court may rely on its inherent powers to permit a supporter[303] to accompany a complainant into the courtroom and sit next to them when they give evidence. Currently there is only specific provision in the YJCEA 1999 for a supporter when a witness gives evidence by way of live link.[304] The CrPR clarify that it is a duty of the parties to "actively assist" the court to fulfil its case management role by notifying the court if a witness may need someone with them while they give evidence.[305] The CrPR also clarify that courts must take "every reasonable step" to facilitate the attendance of witnesses and participation of "any person" which includes complainants.[306] Such facilitation includes directing the attendance of a "companion" while a witness gives evidence.[307] The 2015 CrPD also acknowledged that where a witness has chosen not to give evidence via live link and instead does so in the courtroom, it may still be appropriate for a supporter to sit alongside them.[308]

7.200 As a matter of practice, some courts rely on their inherent powers to permit a supporter, usually an Independent Sexual Violence Adviser ("ISVA"), to act as a witness supporter in the courtroom. Without a clear statutory provision, there is inconsistent provision for the support of an ISVA, or other supporter. We were told that some judges allow ISVAs to sit beside the complainant when they give evidence while others do not.[309]

7.201 The Angiolini Review noted inconsistency in the approach to ISVAs:

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303 The 2015 Criminal Practice Directions (CrPD V Evidence 18B.1 and 5) gave an overview of the role of a witness supporter generally, describing the witness supporter as providing emotional support to enable a witness to give their best evidence. In determining who this should be, the court must have regard to the wishes of the witness. The 2023 CrPD does not include this overview.

304 YJCEA 1999, s 24(1A).

305 CrPR 3.3(g).

306 CrPR 3.8(3).

307 CrPR 3.8(6).

308 CrPD V Evidence 18B.5.

309 Chief Constable Sarah Crew; The Survivors Trust and The Survivors Trust member agencies; a criminal justice stakeholder; an ISVA; and a recorder.

> Although in some courts in London ISVAs are permitted to sit with their clients while they give evidence (whether in the witness box or in the live link room) this is not permitted everywhere. We heard of occasions where witnesses were told they must, instead, be accompanied by the Witness Service volunteer, whom they had not previously met…. Complainants need to be prepared for their court appearance and to have certainty about the arrangements. To do otherwise risks inflicting further harm on individuals who may already be enduring psychological injury and social isolation.[310]

7.202 ISVAs informed the Joint Inspection that applications for them to sit beside the complainant when giving evidence were not always being made and considered. Its case file review noted an absence of information about ISVAs on special measures assessment or application forms. Court staff informed the Joint Inspection of practical barriers to the presence of ISVAs such as limited space in the live link room or close to the witness box.[311]

7.203 The judicial stakeholders with whom we spoke expressed no reluctance regarding the presence of ISVAs, as long as they understood that their role was not to participate in proceedings. One judge, and forensic physician told us there is a lack of clarity about the role and functions of the ISVA and this might impact on their treatment by judges and court staff.

7.204 Judges and support organisations told us that including the attendance of an ISVA or other witness supporter as a special measure may formalise their role and ensure they are more consistently allowed to sit beside the complainant, should the complainant so choose.[312] Support organisations have also told us that the role of the ISVA must be recognised within the criminal justice system so that the ISVA is able to carry out their role from report to court.[313]

Comparative law

7.205 The use of a supporter, who may sit alongside the witness when they give evidence is formally a special measure in Scotland, where it is one of three measures which do not require evidence from the complainant in support (along with live link and screens).[314] The attendance of a supporter is also a permitted special measure for all complainants in New Zealand[315] and for complainants in sexual offences proceedings in certain states in Australia. In Victoria[316] and New South Wales[317] the court must direct that a witness supporter may sit beside them when they give evidence in order to provide emotional support. In South Australia, a relative, friend or canine court

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310 Angiolini Review (April 2015), para 759-760.

311 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape - Phase two: Post-charge* (25 February 2022), p 74.

312 Dame Vera Baird KC; an organisation supporting complainants; The Survivors Trust; an ISVA.

313 Nicci King, Yellow Door.

314 Criminal Procedure (Scotland) Act 1995, ss 271H and 271L.

315 Evidence Act 2006, s 79.

316 Criminal Procedure Act 2009, ss 360(c) and 365.

317 Criminal Procedure Act 1986, s 294C.

companion may accompany a witness when they give evidence.[318] In Ireland, in rape and aggravated sexual assault proceedings, the complainant has the right to be accompanied by a support worker of their choice, even where the general public are excluded.[319] As this provision allows for a support worker to be present even when the public is excluded, it is taken to mean that the complainant has a general right to be accompanied by a support worker of their choice. A support worker is defined as "a volunteer of, or an individual employed … by, an organisation which provides support to victims of crime."[320]

Analysis

7.206 Where a witness elects to give evidence via live link, the presence of a witness supporter is already permitted by statute and their role is well understood.[321] It is inconsistent that there is no statutory equivalent when a witness chooses to give evidence in the courtroom. It also creates an incentive away from in-person evidence in favour of live link. As a matter of practice some courts, albeit inconsistently, already permit a witness supporter to sit beside the witness when they give evidence using their inherent powers.[322]

7.207 The CrPR make reference to the duties of parties in respect of supporters, and the role of the court to facilitate participation which can include supporters. The CrPD also refer to a witness's entitlement to the presence of a witness supporter.[323] There is, therefore, a clear basis on which to formalise this measure for complainants in sexual offences cases and to make it an automatic entitlement. This will give it more prominence, ensure that applications are made earlier, giving complainants greater certainty and confidence and ensure consistency. It will also formalise the status of a witness supporter and the ambit of their role and will align the position in England and Wales with other jurisdictions, in the context of sexual offences cases.

Consultation Question 57.

7.208 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of a supporter when they are giving or recording their evidence at court or remotely.

Do consultees agree?

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318 Evidence Act 1929 (SA), ss 13 (to protect the witness from embarrassment, distress or intimidation or for any other proper reason) and 13A (for a vulnerable witness to facilitate the taking of their evidence or to minimise embarrassment or distress).

319 Criminal Law (Rape) Act 1981, s 6(3). Support workers are also permitted in proceedings for other offences under s 20 of the Criminal Justice (Victims of Crime) Act 2017.

320 Criminal Law (Rape) Act 1981, s 6(5).

321 See MoJ and NPCC, *Achieving Best Evidence in Criminal Proceedings* (January 2022), Appendix L.

322 As described in the 2015 CrPD I General Matters 3D.2 and with specific reference in CrPD V Evidence 18B.5.

323 CrPD 6.3.37.

Independent Sexual Violence Advisers

7.209 As we describe above, the role of witness supporter can be performed by an ISVA, as a professional supporter (as opposed to a family member or friend taking on the role of supporter). ISVAs play an invaluable role in supporting complainants. While their role varies to reflect the needs of the individual complainant, an ISVA provides impartial advice and support to complainants of sexual offences.[324] ISVAs have specialised professional knowledge that enables them to advocate and advise on a range of matters, not only in respect of criminal prosecutions. In fact, ISVAs work with victims whether they report to the police or not.

7.210 The Victims' Bill Consultation cited research in relation to 585 reported rapes, which found that complainants "who received support from services such as [ISVAs] were 49% less likely to withdraw from the … investigation process" when compared with those who did not receive support.[325] The role of ISVA is a professional one. As such, they should be considered suitable as a witness supporter. This could be recognised in legislation. Indeed, in practice, where a complainant has been allocated an ISVA, it is most common that the ISVA will act as their supporter.[326]

7.211 At the time of writing, the Victims and Prisoners Bill contains a definition of an ISVA and seeks to provide guidance on "recommended minimum standards and best practice", as well as placing an obligation on ISVAs to take account of this guidance.[327] At present, the CrPR require the parties to identify witness companions and require the court to give directions about the participation of those companions.[328] However, there is no express provision for the presence of an ISVA or for a description of their role in the CrPR or CrPD. [329] We understand that the Criminal Procedure Rule Committee intends to prepare and consult on more detailed rules about the functions and duties of ISVAs and Independent Domestic Violence Advisers in criminal courts now that the Victims and Prisoners Bill has been published.

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[324] Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements*, (September 2017).

[325] MoJ, *Delivering justice for victims A consultation on improving victims' experiences of the justice system* (December 2021), CP 574, p 37, citing Walker et al, 'Rape, inequality and the criminal justice response in England: The importance of age and gender', (2021) 21(3) *Criminology & Criminal Justice* 297, 304.

[326] Where an ISVA is allocated and available to take on the role of witness supporter for a complainant, they will be the only witness supporter. An ISVA is generally not permitted to attend in addition to another supporter while a complainant gives evidence.

[327] MoJ, *Draft Victims Bill* (May 2022), p 22.

[328] CrPR 3.3 and 3.8.

[329] A description can be found in the Victims' Code, MoJ, Statutory Guidance, Code of Practice for Victims of Crime in England and Wales (21 April 2021) and the Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements* (September 2017).

Consultation Question 58.

7.212 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of an Independent Sexual Violence Adviser as a supporter when they are giving or recording their evidence at court or remotely.

Do consultees agree?

Separate, accessible entrances and waiting areas

7.213 There is no provision currently in the YJCEA 1999 that allows for a direction to be made to provide the complainant with a separate entrance and waiting room in the court building. However, there is an expectation of such a provision. The Victims' Code states:

> when attending court, and where possible, you will be able to enter through a different entrance to the defendant and wait in a separate waiting area before and after your case has been heard. Some court buildings do not currently have separate entrances for victims, however, where informed, Her Majesty's Courts and Tribunals Service staff will make arrangements to ensure that you do not have to see the defendant on arrival.[330]

7.214 In practice, Court Witness Service managers reported considerable variation in arrangements being made for separate entrances.[331] The OVC Review recommended:

> HMCTS must ensure that a separate entrance to the court building is available to all vulnerable or intimidated witnesses. If the only alternative entrance is the judicial or staff one, it must gain any agreement necessary from the judiciary. The alternative entrance must be suitable for disabled witnesses to use.[332]

ISVAs have "praised" court staff for their willingness to manage the risk of complainants coming in to contact with defendants at court by, for example, securing separate entrances.[333]

7.215 A number of stakeholders expressed support for formalising measures to provide for separate entrances to court and separate waiting rooms.[334] A clinical psychologist was of the view that this would help to make the process less traumatic for witnesses and their families, and would improve accessibility. A senior police officer told us that the

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330 MoJ, *Statutory Guidance, Code of Practice for Victims of Crime in England and Wales (Victims' Code)* (21 April 2021) para 8.5.

331 Above, p 40-41.

332 OVC, *Next steps for special measures*, (May 2021), Recommendation 18.

333 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 17-18.

334 Dame Vera Baird; Centre for Women's Justice; a defence barrister; The Survivors Trust; Hanna Llewellyn-Waters; Martin Rackstraw; a senior police officer; a clinical psychologist; and members of the judiciary.

fear of running into the defendant was a major barrier for witnesses being willing or comfortable to attend court. We were told of many instances where complainants had unexpectedly come across the defendant while entering the court or in a waiting room, causing unnecessary distress.[335] A judicial stakeholder took the view that if there was a formal measure for separate entrances, this would force the improvement of court infrastructure. Further, they observed that it can do no harm to the defendant's right to a fair trial.

7.216 Automatic entitlement would provide a statutory basis for the provision of a separate entrance and waiting room, that is accessible for complainants. The availability of this measure obviously requires adequate court facilities to accommodate it.[336] Where courts do not already have adequate facilities to accommodate separate and accessible entrances for witnesses, it could be costly to do so. For example, it may necessitate construction work on the court building. We acknowledge the argument that a formal requirement for separate accessible entrances and waiting rooms could ultimately lead to improvements in court infrastructure. However, this would be in the long term and the funding implication is a very present barrier. As the OVC Review suggests, above, courts can also make use of non-public entrances and space for staff and judges, to enable complainants to enter and wait separately from the public.

Consultation Question 59.

7.217 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use an accessible entrance and waiting room that is separate from members of the public and the defendant.

Do consultees agree?

Conclusion

7.218 We therefore provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to:

(1) the use of live link to attend court and give evidence remotely;

(2) the use of screens in court;

(3) the attendance of a supporter, including while giving evidence whether in person or by live link;

(4) the removal of wigs and gowns while they give evidence;

(5) separate, accessible entrances and waiting areas;

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335 Centre for Women's Justice; The Survivors Trust; Dr Siobhan Weare. Dr Siobhan Weare noted this occurred in the context of the Covid-19 pandemic.

336 The OVC Review recommended that HMCTS should publish an audit of facilities across courts, updating the current audit if necessary. See OVC, *Next steps for special measures*, (May 2021), Recommendation 4.

(6) the exclusion of the public from the courtroom while they give evidence, either in person, by live link or the playing of recorded evidence; and

(7) the recording of evidence.

7.219 Where a complainant gives evidence using live link, a screen or pre-recorded evidence, or any combination of those, the public in the court should be prevented from seeing the complainant.

7.220 Under our proposed framework, a court must make a direction for these measures where the complainant has indicated on an application that they wish for their use. The complainant does not have to avail themselves of these measures if they do not wish to do so.

7.221 Any further or additional measures beyond these "standard" measures could be made available to complainants on application, in the same way as they are now. The court would need to decide if the measure would improve the quality of their evidence. We consider below other measures that do, or could, apply in this way.

ADDITIONAL CONSIDERATIONS

7.222 The YJCEA 1999 expressly preserves the inherent power of the court to make adjustments to the trial process, outside the special measures framework, in respect of eligible witnesses. It also preserves these inherent powers for non-eligible witnesses including defendants.[337]

7.223 The court also has general duties under the CrPR to manage cases justly, to identify the needs of witnesses and to facilitate and encourage the participation of witnesses and defendants.[338] The CrPD also acknowledge very powers of the court to facilitate attendance and participation of vulnerable witnesses and defendants.[339]

7.224 In this section we discuss some of the measures that would not be considered standard (and therefore not an automatic entitlement) but could still be directed under the current provisions and inherent jurisdiction. We also address additional issues and queries that arise from the application of measures to complainants in sexual offences prosecutions.

Intermediaries and communication aids

7.225 As detailed at the start of this chapter, the YJCEA 1999 provides for various special measures for eligible witnesses, who are eligible either because they are vulnerable or intimidated. Most of the measures discussed so far are available to complainants as "intimidated" witnesses. A direction for assistance of an intermediary or a

337 YJCEA 1999, s 19(6).

338 CrPR 3.2(1) to (2) and 3.8(3).

339 CrPD 6.1.1.

communication aid is available only to witnesses who are eligible because they are vulnerable.[340]

7.226 The role of an intermediary is to assess a witness's needs, provide a report about this and in the light of their findings, to facilitate communication with the witness.[341] Their statutory function is to communicate to the witness questions which are put to them, to communicate their reply, explaining questions and answers, only as far as necessary, to enable them to be understood.[342] If an inappropriate question is asked, they may ask the advocate to rephrase it; may interpret the question for the witness; or without changing it, may communicate the witness's answer.[343] However, they cannot give evidence for the witness. Intermediaries are independent and owe their duties to the court. The CrPR explain the intermediary must help the court achieve the overriding objective to deal with the case "justly",[344] and this overrides any obligation to the witness.[345] The judges and legal representatives acting in the proceedings must be able to see and hear the examination of the witness and to communicate with the intermediary.[346] Unless the examination is video recorded, the jury must also be able to see and hear the examination of the witness.[347] At trial, before the witness gives evidence, the judge should explain to the jury: the need and purpose for an intermediary; that they are independent; that the use of an intermediary must not affect the jury's assessment of the evidence and is no reflection on the witness.[348]

7.227 Typically, intermediaries are used to assist children and young people, witnesses who have any physical disabilities, mental health difficulties or learning disabilities.[349] The 2015 CrPD made it clear that, whilst a decision is made based on individual need, the use of intermediaries is exceptional.[350] The CrPD handed down in 2023, replacing the

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340 A court may only direct the use of an intermediary in respect of a vulnerable witness eligible under YJCEA 1999, ss 16 and 18(1)(a), where they are under 18 or suffer from mental disorder or significant impairment of intelligence and social functioning.

341 "Intermediaries come from a wide variety of professional backgrounds such as speech and language therapy, psychology and social work" and "[bring] to the role specific expertise and skills in facilitating communication"; P Cooper and M Mattison, "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model", (2017) 21 *The International Journal of Evidence and Proof* 351-370, 355.

342 YJCEA 1999, s 29(2).

343 *Rook and Ward* (2021) 27.142.

344 CrPR 1.1.

345 CrPR 18.30.

346 YJCEA 1999, s 29(3)(a).

347 YJCEA 1999, s 29(3)(b).

348 Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (August 2021), 3-7 Intermediaries, para 9.

349 CPS, *Special Measures Legal Guidance* (22 July 2021) states: "Intermediaries play an invaluable role in facilitating communication at police interviews and at court. Prosecutors are reminded that intermediaries should not just be considered for children and young people but also for deaf witnesses or witnesses with physical disabilities, mental illnesses, autism, learning disabilities or difficulties, dementia, personality disorders, acquired brain injuries. There is no blanket age requirement because each case should be assessed on its own circumstances and merits."

350 CrPD I General matters (October 2020), 3F.5.

2015 version, provides detail on the use of intermediaries and does not refer to their exceptional use or scarcity.

7.228 In respect of communication aids, a direction may require a vulnerable witness to be provided with an appropriate device to enable questions or answers to be communicated. Examples given by the CPS of such devices include computers, voice synthesisers, symbol boards and books.[351]

Commentary

7.229 The OVC Literature Review concluded that intermediaries offer a number of benefits. These include improving the quality of the evidence given:

> because of their expertise in relation to the formation of advocates' questions, and also because of their recommendations around the most effective combinations of special measures.[352]

7.230 Practitioner Hanna Llewellyn-Waters reiterated the usefulness of intermediaries, not just for witnesses with linguistic difficulties but also where a witness might become emotionally overwhelmed and otherwise shut down.

7.231 Feedback about the effectiveness of intermediaries has been positive.[353] It has been concluded that without the presence of an intermediary, many vulnerable witnesses would not be able to attend and give evidence.[354] In practice, we understand that the role of the intermediary is often more advisory than interventionist at trial, for example, they will have input into the questions in advance and raise concerns if it appears at trial there are misunderstandings, but it is still the lawyers who ask the questions to the witness.[355] The MoJ section 28 evaluation reported the positive experiences of complainants who had registered intermediaries who intervened to ensure they understood questions.[356] However, an intermediary's effectiveness is dependent on the "communicative competence" of the advocates and the robustness of the case management by the judge.[357] There is also a lack of empirical evidence about "the

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351 CPS, *Special Measures Legal Guidance* (22 July 2021).

352 S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 5

353 For example, in the OVC's survey of Crown Court judges, 67% felt that intermediaries were very effective/effective: OVC, *Next steps for special measures* (May 2021), p 34.

354 See S Fairclough, *Special Measures Literature Review*, OVC (July 2020), p 24, citing P Cooper, and D Wurtzel, "A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales" [2013] *Criminal Law Review*, 4.

355 Guidance on Achieving Best Evidence in Criminal Proceedings (the ABE Guidance). See also Chapter 13 for further discussion of intermediaries.

356 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 45.

357 J Plotnikoff, R Woolfson, NSPCC, *Falling Short? A Snapshot of Young Witness Policy and Practice* (2019) NSPCC, p 105.

completeness, accuracy and coherence of the evidence that intermediaries facilitate".[358]

7.232 It was reported to the OVC Review that intermediaries are underused because communication needs are not being identified at all or too late. They are not always present at ABE interviews, or at trial. There is evidence that some judges make use of an intermediary to assess the witness's needs and to advise the court and the parties at the GRH regarding rules for questioning the witness at trial, but do not then direct their attendance when the witness gives evidence. The OVC Review also heard that there should be a greater knowledge amongst police officers and judges about the role of intermediaries and training about how to identify those in need of assistance.[359]

Analysis

7.233 Not all complainants in sexual offences cases will have communication needs that justify the use of an intermediary. Therefore we provisionally conclude that use of an intermediary should not be an automatic entitlement.

7.234 It has been reported to us that police, CPS and the courts fail to identify potential eligibility for an intermediary amongst complainants in sexual offences cases. In respect of eligibility due to disability, the ABE Guidance provides detailed information for interviewers to consider when dealing with vulnerable adults in order to identify mental disorder, learning disabilities and physical disabilities. The guidance advises that some witnesses may be reluctant to reveal their disability. It also sets out the steps that should be taken to support witnesses and their eligibility for an intermediary.[360] The accompanying paperwork which is to be completed by the police also contains prompts for police officers to consider and capture relevant information including the offer of a pre-trial meeting with the CPS to discuss special measures.

7.235 For complainants who do have relevant communications needs, an appropriate needs assessment at an early stage and necessary directions for the use of an intermediary should be standard practice. It is of great importance that complainants with disabilities are able to make use of the intermediary resource when needed. We invite consultees' views and evidence on how these provisions are currently working for complainants with additional communications needs.

7.236 At the investigation stage, the ABE Guidance acknowledges the need to take a trauma-informed witness engagement strategy and that account should be taken of how trauma may impact on the ability of a witness to recall events. It notes that in complex cases, a witness may have been diagnosed with Post-Traumatic Stress Disorder (PTSD) and as a result this may warrant the appointment of an intermediary.[361] Similarly, for court proceedings involving an adult complainant, where a communication need arises from their exposure to an event which causes them trauma, under the statutory framework, the court may appoint an intermediary only

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358 P Cooper and M Mattison, "Intermediaries, vulnerable people and the quality of evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 367.

359 OVC, *Next steps for special measures* (May 2021), p 31.

360 MoJ and NPCC, *Achieving Best Evidence in Criminal Proceedings* (January 2022), para 2.78-2.110.

361 Above, paras 2.25 and 2.263-2.264.

where there is a diagnosed mental disorder. This may arise, for example, where they have been diagnosed with PTSD.

7.237 The South Australian Law Reform Institute have recommended that when determining eligibility for intermediary-style assistance, a "complex communication need" may arise from trauma, including trauma from allegations of sexual abuse.[362]

7.238 A number of stakeholders have commented on the need for the courts to take a trauma-informed approach. This is one way in which this might be achieved. We invite consultees' views on how best the impact of trauma can be accounted for when assessing the need for an intermediary.

Consultation Question 60.

7.239 We invite consultees' views on how the current legislation and practice of the use of intermediaries is working in respect of complainants in sexual offences cases with disabilities and disorders.

7.240 We invite consultees' views on how the current process might be improved.

7.241 For complainants in sexual offences prosecutions who have experienced trauma, we invite consultees' views on whether, and if so, how the impact of that trauma could best be reflected in the assessment and use of intermediaries.

Should the victim be entitled to assistance to facilitate their attendance at the sentencing hearing?

7.242 The provisions to direct special measures under section 19 of the YJCEA 1999 apply only to trial proceedings. They do not apply to hearings which take place after the trial has concluded such as the sentencing hearing.[363]

7.243 However, we have been informed that, after relying on special measures such as live link or the use of a screen, some complainants then wish to be present to observe the verdict and subsequently the sentencing hearing. Hanna Llewellyn-Waters and a judicial stakeholder told us that special measures directions should extend to the sentencing hearing as, in their experience, complainants who wish to attend and observe the sentencing hearing do not do so due to the lack of available special measures.

7.244 Victims should feel supported to attend sentencing hearings if they wish. It is an important part of the justice process and they are entitled to do so. We are of the view that victims should be provided with assistance to attend the sentencing hearing. Apart from the court resources required to facilitate such attendance, there appears to be little difference to the court or defendant between the victim doing so in person or

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362 SALRI, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia*, Report 16 (September 2021), p xxix-xxx.

363 A special measures direction has a binding effect from the time it is made until the proceedings are determined by acquittal, conviction or otherwise; or are abandoned. See YJCEA 1999, s 20(1).

being provided with assistance to do so, for example, using live link and/or a screen.[364]

7.245 One way to achieve this could be to extend the effect of a direction for measures to assist the giving of evidence to the sentencing hearing. However, a direct extension may be undesirable for the following reasons. Currently, such directions are made to enable a witness to give their best evidence. Unless they are called as a witness to read out their victim personal statement, a victim will not give evidence at the sentencing hearing; thus the rationale for the directions is therefore not always applicable. Further, certain special measures may be inappropriate for the sentencing hearing. Due to principles of open justice, it may be inappropriate for the courtroom to be cleared if the complainant wishes to attend the sentencing hearing. Certain other special measures are redundant such as pre-recorded evidence.

7.246 However, some measures which have the effect of distancing the defendant and victim, such as live link and screens, could have a positive impact on victims' engagement in sentencing hearings. Further, we note again that the introduction of special measures was partly to improve complainants' treatment and engagement in proceedings, although it is the quality of evidence that forms the legislative test. We are provisionally of the view that they should be made available to complainants in sexual offences cases if they wish to attend the verdict and sentencing hearing.

Consultation Question 61.

7.247 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the use of live link or screens to facilitate their attendance at the verdict and sentencing hearing.

Do consultees agree?

Additional measures

7.248 We have asked about measures that are currently available, with amendments where appropriate. There may however be other measures that could be made available as standard, or on application.

7.249 For example, several stakeholders have raised with us court familiarisation visits, or pre-trial visits. Practitioner Hanna Llewellyn-Waters explained that these are very important in putting a complainant's mind at ease in advance of giving evidence. They also serve a useful purpose in ensuring that the requested special measures are effective. This was also spoken of positively by a member of the judiciary and police officers. However, a criminal justice stakeholder also noted that courts sometimes struggle to accommodate pre-trial visits and we note the potential resource implications. Court familiarisation visits are not provided for in the statutory framework for special measures in the YJCEA 1999.

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[364] Any member of the public may ask to observe a court hearing remotely. See HMCTS, Guidance Observe a court or tribunal hearing (June 2022).

7.250 We welcome views on whether there are any further measures that should be made available to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence.

Consultation Question 62.

7.251 Are there any other measures that should be made available to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence?

7.252 If yes, should they be available:

(1) as a "standard measure" to which the complainant is automatically entitled; or

(2) as a measure for which, as is currently the case, the complainant is automatically eligible to apply on the grounds that it would improve the quality of their evidence?

MEASURES TO ASSIST DEFENDANTS TO GIVE EVIDENCE

7.253 While our terms of reference specify consideration of special measures for complainants, [365] two stakeholders have explicitly raised the issue of measures for defendants and the lack of parity. In this section, we explore this issue in our necessarily limited context of sexual offences.

7.254 The current provisions for special measures for defendants apply to defendants in all criminal prosecutions. Unlike measures for complainants, there are no provisions specifically for sexual offences proceedings. There is, therefore, limited evidence that relates solely to the use of and need for measures for defendants only in the context of sexual offences; however, that must be the focus of our analysis. Most of the discussion below applies to defendants in all prosecutions. We have not seen evidence that suggests that the context of sexual offences prosecutions necessitates consideration that is separate from general consideration of vulnerable defendants. We would welcome information and evidence that addresses that specific issue. We note that we have in our work on unfitness to plead considered the availability of measures to assist defendants with participation difficulties to give evidence, [366] but in this project we can only consider the context of sexual offence prosecutions.

7.255 In this section, we will first consider what measures are available to assist defendants in sexual offences cases to attend court and give evidence. We then outline commentary on these measures and what is available in comparative jurisdictions. We then invite consultees to share their views and provide us with evidence that will help

[365] See Chapter 1 for the full terms of reference for this project.

[366] Our project on Unfitness to Plead considered special measures as part of the availability of adjustments to assist defendants with participation difficulties to engage in the trial. Unfitness to Plead Volume 1: Report (2016) Law Com No 364, ch 2.

expand our understanding of how measures may apply or assist defendants specifically in sexual offences prosecutions.

Current provisions for defendants in sexual offences prosecutions

7.256 Chapter IA of the YJCEA 1999 provides for the use of live link[367] and intermediaries[368] for defendants if they meet the following criteria:

(1) Are under 18 and their ability to participate effectively by giving oral evidence is "compromised" by their "level of intellectual ability or social functioning".[369]

(2) Are over 18 and suffer from a mental disorder,[370] have a "significant impairment of intelligence and social function", and are therefore unable to participate effectively by giving oral evidence.[371]

Live link

7.257 Section 33A of the YJCEA 1999 permits a live link direction to be made on the application of a defendant who meets the criteria. A direction can only be made where it is in the interests of justice to do so and where the use of a live link would enable the defendant to participate more effectively as a witness. This provision for children is aimed at child defendants with a low level of intelligence or a particular problem dealing with social situations. It is not intended to operate "merely because the defendant is a juvenile and is nervous."[372] The starting assumption of this provision in relation to adult defendants who choose to give evidence, is that "almost everyone should and can give evidence" and that "live link is reserved for exceptional cases where the [defendant] has a condition that prevents their effective participation" to the extent that it may prevent a fair trial.[373]

Use of intermediaries

7.258 Using the same eligibility criteria as for live link, where necessary to ensure the defendant receives a fair trial, section 33BA permits the court to direct the examination of a defendant "through an interpreter or other person approved by the court for the purposes of this section ("an intermediary")". However, this section has not yet been brought into force. Instead, a court may use its inherent powers, the CrPR, and CrPD to direct the use of an intermediary for a defendant giving evidence.[374] The CrPD make clear that appointment is not "mandatory" even where it would have the

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367 YJCEA 1999, s 33A.

368 YJCEA 1999, s 33BA.

369 YJCEA 1999, ss 33A(4)(a), 33BA (5)

370 Within the meaning of the Mental Health Act 1983.

371 YJCEA 1999, ss 33A(5)(a) and (b), 33BA (6)(a) and (b).

372 Police and Justice Act 2006, Explanatory Notes, s 47, para 386.

373 Police and Justice Act 2006, Explanatory Notes, s 47, para 386.

374 CrPR –6.2.4.

"potential to improve the trial process".[375] However, the CrPR state that the court "must" exercise its power to appoint an intermediary where:

(a) the defendant is under 18 and their ability to participate is likely to be diminished by reason of their age; or where they are 18 or over, and it is likely to be diminished by mental disorder, a significant impairment of intelligence or social functioning, or a physical disability or disorder and

(b) where appointment is necessary to facilitate a defendant's effective participation in the trial.

7.259 Case law demonstrates the potential value of intermediaries for vulnerable defendants in sexual offences cases. In *R v Beards*, the vulnerable defendant had an intermediary at trial, who helped ensure, for example, that questions were phrased in such a way that enabled the defendant to understand and respond.[376]

Other measures

7.260 The CrPD requires consideration to be given to ensuring that defendants can "comprehend and participate effectively" in the trial, "by any appropriate means".[377] The CrPD describes some other non-statutory measures which may be used in relation to vulnerable defendants, where they are reasonably required. In summary, those detailed in the CrPD are:[378]

(1) Use of court facilities to enable communication.

(2) The impact on co-defendants who are not vulnerable.

(3) Court familiarisation visits, where the defendant is accompanied by their intermediary where necessary.

(4) Practice sessions for live links.

(5) For high profile defendants, steps being taken to limit their exposure to "intimidation, vilification or abuse".

(6) The attendance of a supportive adult and the opportunity to sit with a family member supporter somewhere that enables "easy, informal" communication with their lawyer.

(7) Conduct of the trial according to a timetable that accommodates the defendant's ability to concentrate.

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375 CrPD 6.2.4. That section of the CrPD goes on to state that, while intermediaries may not be mandatory, "the court must adapt the trial process to address a defendant's communication needs".

376 *R v Beards* [2016] EW Misc B14 (CC) (23 May 2016).

377 CrPD 6.4.3.

378 CrPD 6.4.2.

(8) Removal of wigs and gowns, considering both the wishes of vulnerable defendants and any vulnerable witnesses.[379] Use of non-uniformed security and no obvious police presence in court.

(9) Restricting members of the public and the press in the courtroom, while permitting facilities for reporting (unless there is a reporting restriction).

The CrPD also states that "where appropriate the defence will provide information about the defendant's welfare".[380]

7.261 Additionally, the court retains its inherent jurisdiction to make adjustments to the trial process to accommodate the needs of defendants. Case law suggests that this includes making special measures available to vulnerable defendants. For example, the Divisional Court has concluded that the inherent jurisdiction of courts extends to the provision of screens outside the YJCEA 1999 regime.[381]

Commentary

7.262 One judge was of the view that there should be greater flexibility in the provisions around special measures to ensure that everybody who requires support throughout criminal proceedings receives it, including defendants. They noted that a very high proportion of defendants have serious mental disabilities or impairments.

7.263 Dr Fairclough has suggested that there are three "dangers" arising out of the disparity between the provision of special measures for vulnerable defendants as compared to other vulnerable participants in criminal proceedings.[382] These are that:

(1) Vulnerable defendants will give evidence badly, risking making a bad impression on the jury and therefore affecting their assessment of culpability.

(2) Vulnerable defendants will not give evidence, allowing juries to draw (legitimate) adverse inferences from their silence.

(3) Vulnerable defendants will plead guilty – some who are in fact innocent. Even defendants who have committed an offence have the right for the State to prove their guilt.

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379 The removal of wigs and gowns and closing the court to members of the public were introduced as possible measures for vulnerable defendants following the judgment in *T and V v United Kingdom* [1999] ECHR 170; [2000] 30 EHRR 121.

380 CrPD 6.4.2 j.

381 *On the application of S v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) at 31. The case was a judicial review of a refusal to make a direction for the use of live link to enable a young, vulnerable defendant to give evidence against their co-defendants because of fears of intimidation.

382 S Fairclough, "Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality" [2018] *Criminal Law Review* 4, 5. There is disparity in both the available measures and the eligibility criteria.

Dr Fairclough has also argued that this is particularly concerning given the documentation of high levels of vulnerability among defendants and offenders.[383] Marsh and Dein have argued that the aim of the special measures legislation:

> in protecting witnesses from the distress, humiliation and potential trauma of participation suggests defendants are not equally vulnerable and in need of equivalent protections.[384]

7.264 The statutory powers for directing special measures focus on witnesses and complainants and expressly exclude the defendant. Academics and practitioners suggest that this shifts focus away from vulnerable defendants and their needs. Dr Fairclough argues that this means that the defendant's vulnerabilities "may not be (as quickly) identified".[385] Marsh and Dein submit that the aims of the statutory provision for pre-recorded evidence for complainants "suggests defendants are not equally vulnerable and in need of equivalent protection".[386] The CrPR include consideration of the needs of defendants to participate effectively in the trial, as part of the duty of parties and case preparation.[387]

7.265 Professor Jenny McEwan has raised concerns about the expansion of special measures to defendants without proper consideration. She has suggested, for example, that defendants may be confused if a judge does not wear a wig.[388] Additionally, she has suggested that providing for defendants to sit with supporters can be unhelpful. In *SC v United Kingdom*,[389] the defendant constantly asked his social worker who was sitting with him to explain what was happening, which led to visible disapproval from the jury.[390] The measures available to defendants are not clearly set out in statute in the same way as the special measures for witnesses under the YJCEA 1999. This lack of transparency can lead to confusion about what is available and what might be appropriate for individual defendants.[391]

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383 S Fairclough, "Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality" [2018] *Criminal Law Review* 4, 5.

384 L Marsh and J Dein, "Serious Sex Offences in England and Wales: defending the indefensible" in R Killean, E Dowds and AM McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (2021).

385 S Fairclough "Special measures for vulnerable defendants: the who, what, when, where, why, and how" [2022] 9 *Archbold Review*, 6, 9.

386 L Marsh and J Dein, "Serious Sex Offences in England and Wales" in R Killean, E Dowds and AM McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (2021), 51.

387 CrPR 3.3(2)(f), 3.8(3)(b), and 3.8(6)(b).

388 Referring to *Fair Access to Justice?*, The Prison Reform Trust (2012), p 9, where a defendant asked how they would know who the judge was if they weren't wearing a wig.

389 [2004] ECHR 263; (2005) 40 EHRR 10

390 Jenny McEwan, "Vulnerable Defendants and the Fairness of Trials" [2013] *Criminal Law Review* 100, 108.

391 S Fairclough "Special measures for vulnerable defendants: the who, what, when, where, why, and how" [2022] 9 *Archbold Review* 6.

Comparative law

7.266 In Ireland, several of the available special measures explicitly exclude the defendant, such as the use of live link.[392] However, defendants may give evidence via an intermediary.[393]

7.267 In Scotland, the definition of "vulnerable witness" explicitly includes the accused.[394] However, two special measures are disapplied where the accused would otherwise be a vulnerable witness.[395] These are the use of a screen,[396] and excluding the public when giving evidence.[397] Similarly, in New Zealand, whilst some parts of their regime apply to defendants, the mandatory requirement to clear the courtroom in sexual offences proceedings does not apply when the defendant gives evidence.[398]

7.268 In New South Wales, there a discretionary provision allowing the judge to direct any part of proceedings to be heard in private. This can be done on the judge's own motion, or at the request of any party to proceedings (therefore including the defence).[399] There is a mandatory provision for the complainant's evidence to be given in private.[400]

7.269 In Canada, section 486(1) of the Criminal Code allows for clearing the courtroom, upon the application of the prosecutor, a witness or upon the judge's own motion. It appears that the defendant can apply under this section to give their evidence in private.[401]

Analysis

7.270 There is an imbalance between vulnerable witnesses and defendants in respect of their eligibility for statutory special measures. The use of live link is the only measure in the YJCEA 1999 in force that may be directed for a defendant. The eligibility criteria for live link are more restrictive for vulnerable defendants than for vulnerable witnesses in two respects. First, a child defendant has to demonstrate that their participation is compromised by their level of intellectual ability or social functioning, whereas a child witness is eligible on the basis of their age alone. Secondly, for an adult defendant, eligibility does not extend to those with a physical disability or disorder.

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392 Criminal Evidence Act 1992, s 13(1).

393 Criminal Evidence Act 1992, s 14(1)(a).

394 Criminal Procedure Act 1995, s 271(1) defines "vulnerable witness"; s 271F confirms its application to the accused.

395 Criminal Procedure Act 1995, s 271F(8).

396 Criminal Procedure Act 1995, s 271H(1)(c).

397 Criminal Procedure Act 1995, s 271H(1)(ea).

398 Evidence Act 2006 (NZ), s 199.

399 Criminal Procedure Act 1986, s 291A.

400 Criminal Procedure Act 1986 (NSW), s 291(3).

401 There is a duty upon the judge to give reasons in certain circumstances if an application is refused, where it is made by the prosecutor or the accused: Criminal Code, s 486(3).

7.271 The justifications given in the *Speaking Up for Justice* Report for excluding defendants from special measures provisions were that special procedures are already in use when interviewing vulnerable suspects; there are safeguards to ensure a fair trial; and special measures operate to shield witnesses from defendants.[402] Dr Fairclough has criticised these, arguing that they do not sufficiently justify the current disparity.[403] Specifically, she criticised the notion that special measures exist to protect witnesses from defendants when they can also be used to help people to "give more complete, coherent and accurate evidence in court."[404] Fair trials in which we ask finders of fact to establish the truth require all witnesses, including defendants, to be able to give their best evidence.

7.272 In our 2016 report on Unfitness to Plead,[405] we highlighted this inequality between defendants and witnesses in relation to the use of live link and intermediaries and their eligibility criteria.[406] We concluded that vulnerable defendants should have a statutory entitlement to an intermediary.[407] We recommended a separate statutory entitlement for defendants to have the assistance of an intermediary; first, for the giving of evidence and secondly, in the wider trial process, where the court is of the view that such assistance is necessary for the defendant to have a fair trial. We also recommended that the eligibility criteria for these two types of assistance should mirror the current eligibility criteria for witnesses.[408]

7.273 We understand that the MoJ is preparing a response to the Unfitness to Plead report which will include a response to these recommendations.

7.274 Our work on unfitness to plead did not extend to the question of whether any of the other non-statutory trial adjustments set out above should be the subject of a statutory entitlement. The special measures available under the YJCEA 1999, described above, do not apply to defendants. Some may be available to defendants under other powers. This recognises that some of the reasoning for applying measures to vulnerable or intimidated witnesses may also apply to vulnerable or intimidated defendants, for example, exclusion of the public or removal of wigs and gowns. However, the purpose of some measures, such as the use of screens to prevent the witness seeing the defendant, clearly do not apply to a sole defendant.

7.275 Our report on Unfitness to Plead did not specifically consider defendants, whether vulnerable or not, in sexual offences proceedings. Some of the considerations

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402 S Fairclough, "Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality" [2018] *Criminal Law Review* 4, 10.

403 S Fairclough, "Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality" [2018] *Criminal Law Review* 4, 11-13.

404 S Fairclough, "Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality" [2018] *Criminal Law Review* 4, 16.

405 Unfitness to Plead Volume 1: Report (2016) Law Com No 364.

406 Within YJCEA 1999, ss 33A and 33BA.

407 Unfitness to Plead Volume 1: Report (2016) Law Com No 364, ch 2.

408 Unfitness to Plead Volume 1: Report (2016) Law Com No 364, para 2.66 – 2.69. We also recommended that a scheme equivalent to the Registered Intermediary Scheme for intermediaries assisting prosecution witnesses should be created for intermediaries assisting defendants, including a training scheme and code of practice or guidance manual, at para 2.84.

regarding complainants giving evidence in sexual offences proceedings may also apply to defendants, whether vulnerable or not. For example, similarly to complainants, defendants may be giving highly personal evidence due to the subject matter of the allegations against them. If they choose to give evidence at trial, they will be giving evidence and cross-examined on sensitive personal information in view of the public and press. This may include the complainant and their supporters.

7.276 There is currently a number of discrepancies in the measures available to defendants and complainants:

(1) There is only one statutory provision in force for vulnerable defendants: live link.

(2) The eligibility criteria for defendants are stricter than for complainants.

(3) There is no automatic eligibility for special measures for defendants in sexual offences prosecutions.

7.277 However, there are justifications for some of these discrepancies, explored above. The unique vulnerabilities experienced by complainants of sexual offences warranted specific eligibility for special measures. We have already made recommendations to remove some unjust discrepancies in statutory provisions and eligibility for vulnerable defendants. There are provisions for courts to direct other measures for vulnerable defendants using their inherent jurisdiction. We invite consultees' views on whether the law should go further to address the imbalance between complainants and defendants in respect of special measures in sexual offences prosecutions.

7.278 Currently, there are no specific provisions for measures to assist defendants in sexual offences prosecutions to give evidence. Defendants in sexual offences prosecutions do have access to some measures if they are considered vulnerable, in the same way that defendants in all other criminal prosecutions do.

Consultation Question 63.

7.279 We invite consultees' views on whether there should be specific, or different, provisions for measures to assist defendants in sexual offences prosecutions to give evidence, beyond those currently available for all vulnerable defendants.

CONCLUSION

7.280 In this chapter we have explained our view that the special measures framework is largely fit for purpose. However, there is room for improvement. We have provisionally proposed that to improve consistency and to minimise unnecessary detailed applications, complainants in sexual offences prosecutions should be automatically entitled to a set of standard measures. For any additional measures complainants should still be automatically eligible for an application to be made for a direction, as is the case now for all measures.

7.281 We have also asked about the application of measures to assist defendants in sexual offences prosecutions to attend court and give evidence. The conclusions and

proposals in this chapter apply only to complainants and defendants in sexual offences prosecutions. They do not impact the way special measures apply to all other witnesses in sexual offences prosecutions, or witnesses, complainants and defendants in any other criminal prosecution. We note however that some of the discussion and analysis may have wider applicability than the sexual offences context to which this chapter is limited.

7.282 In June 2022, the MoJ announced the piloting of "enhanced specialist sexual violence support" at three courts.[409] This will involve specialist trauma-informed training for court staff, police and prosecutors; at-court support from ISVAs; tackling court backlogs; and improving technology for the recording and playback of evidence. If these pilots are successful, the use of specialist staff and improved technology could enhance the reforms we consider in this chapter.

7.283 One final consideration is the approach from judiciary and legal professionals to measures. Some legal practitioners have raised concerns that the use of measures such as recorded evidence and live link diminish the impact of the complainant's evidence on the jury. This may be for various reasons, such as creating an emotional distance between the witness and the jury, reducing the immediacy of the evidence and reducing the jury's ability to read the witness's body language. We explain above, at paragraphs 7.123 that the evidence on this is mixed, and not yet comprehensive.

7.284 The OVC Review commented on the lack of robust evidence to support these notions, adding that:

> This is important because the attitude of professionals may affect both the choices witnesses are given, and the choices they make about special measures.[410]

The OVC Review recommended:

> Judges, magistrates, police and prosecutors should receive training on the empirical evidence of the effects of special measures on quality of evidence. Police and prosecutors should be trained not to prejudice witness choice of special measures.[411]

7.285 It would be of concern if legal professionals were influencing the choice of measures for any complainant, particularly if the views of those professionals were based on incomplete evidence. Legal professionals can advise witnesses on the use and impact of measures based on their professional experiences in court. This is justifiable and of clear value. However, it would be preferable if this advice could be informed by evidence outside the scope of their own experience. Further, independent evidence would enable complainants to reach an informed decision aided but not unduly influenced by a legal professional's advice. As we have described above, the MoJ

409 See MOJ, *New pilots to boost support for rape victims in court* (16 June 2022).

410 OVC, *Next steps for special measures*, (May 2021), p 35.

411 OVC, *Next steps for special measures*, (May 2021), Recommendation 9.

evaluation of section 28 also concluded that more research is needed on the impact of measures on jury decision making.[412]

7.286 Our provisionally proposed model of automatic entitlement should hopefully reduce concerns about such influence. However, further research, evidence, and training and education on the impact of measures on juries would be beneficial regardless. Any training and education should be informed by further research and evidence on this issue.

Consultation Question 64.

7.287 We provisionally propose that the Judicial College consider providing training to the judiciary on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court.

Do consultees agree?

7.288 We provisionally propose that legal professionals receive training on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court.

Do consultees agree?

7.289 We believe the provisional proposals in this chapter will create a better framework, and more effective use of measures. However, the impact of this will be affected by the ability robustly and promptly to give effect to directions for measures. This has significant resource implications. It also requires those working in sexual offences prosecutions to be knowledgeable about the measures, their rationale and impact. We consider this further in Chapter 13 when we discuss the potential for specialist courts for sexual offences prosecutions.

412 D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice and Ipsos UK, p 56.

Chapter 8: Independent legal advice and representation for complainants

INTRODUCTION

8.1 Under article 6 of the European Convention on Human Rights (ECHR), anyone who is charged with a criminal offence has the right to:

> defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.[1]

8.2 This right to independent legal representation for defendants is a well-established principle of the criminal justice process. In England and Wales, the criminal justice process is "adversarial". In adversarial criminal proceedings the prosecution are responsible for investigating the case against a defendant. Both the prosecution and defence call their own evidence and present their cases to a judge, jury or magistrates, who determine on the facts and evidence presented to them, whether the prosecution has proved their case against the defendant beyond reasonable doubt.[2] In criminal proceedings the parties are the prosecutor and defendant; most commonly the defendant is an individual and the prosecutor is the state itself. When challenging the case of a power as big as the state, it is clear to see that legal representation for individuals who are the subject of a prosecution is fundamental for a fair trial.

8.3 When the state, the "Crown", is the prosecutor, they represent the interests of the state and the general public in the fair and objective prosecution of criminal offences. While the interests of individual complainants directly affected are a key part of that work, they are not the only or overriding interest for the prosecution. In general, complainants are not parties in the criminal process. They are witnesses in the prosecution's case. Sometimes this comes as a surprise to complainants.

8.4 As we have explored throughout this consultation paper, the position of complainants in sexual offences prosecutions is in many ways unique compared to complainants of other offences. Often, sexual offences prosecutions are described as a credibility contest, where the only evidence available is the account of the complainant and defendant. In such cases, the complainant often feels as much on trial as the defendant, as their credibility is robustly challenged in court. In Chapter 3 and Chapter 4 we explain how applications to access and admit sensitive personal information about complainants can interfere with their privacy rights. This gives rise to the question of whether complainants in sexual offences prosecutions should be afforded

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1 Art 6(3)(c).

2 The other model, more common in continental European jurisdictions is the "inquisitorial" model where the person determining the case, the judge, also has a role in directing investigation and calling evidence to help establish the truth. See for example, Judicial Office, "*The Judicial System of England and Wales A visitor's guide*" (2016).

some level of independent legal advice or representation to help them navigate the process and appropriately challenge decisions that impact on their rights.[3]

8.5 In this chapter we will first look at the existing provisions for independent legal advice (ILA) and independent legal representation (ILR) for complainants and the case for extending or formalising this provision. We provisionally propose that complainants in sexual offences prosecutions should have access to ILA throughout criminal proceedings, and should have access to ILR when an application to access or admit their personal records or sexual behaviour evidence is made.[4] We also propose that complainants should have access to ILA to help them with navigating measures to assist them to give evidence. We then explain that, for this ILA and ILR to be meaningful, effective, and equally available to all complainants, it should be provided by legally qualified professionals and publicly funded.

8.6 In this chapter we will discuss legal advice, legal representation and advocacy. Generally, legal advice is advice provided by an independent, qualified professional to an individual about a particular issue, question or case, based on their instructions. Discussions with legal advisors are usually confidential. The individual is not obliged to act on the advice they receive. The adviser reports only to the individual that has sought their advice; they do not generally make any representations to other parties or the court on the individual's behalf. In some instances, advice can include engaging with material or other parties or organisations where permitted. We refer to this as "assistance". For complainants in sexual offences prosecutions, it may include, for example: an adviser speaking with the police or Crown Prosecution Service ("CPS") to obtain information about the prosecution case; providing police with information about the complainant's interests in respect of a request for their personal records; or accompanying the complainant at a meeting with the CPS to discuss special measures.

8.7 Legal representation involves a legally qualified person acting on behalf of an individual either in anticipation of, or during, court proceedings. They will take instructions from the individual, give advice to them and make representations to other parties or the court on their behalf, essentially representing the individual's interests, position, or case where that individual has a right to be heard in the court process.[5] Communications between a lawyer and their client are generally confidential.

8.8 Advocacy can take a variety of forms. In general, it means speaking in support of a position or individual. Advocacy is often thought of as a form of legal representation;

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3 In Chapter 5 (paras 5.162 to 5.164), though we do not propose legislative reform in relation to complainant good character evidence, we indicate that if such reform were to be pursued then it should include a right for the complainant to be heard, which would engage issues of independent advice and representation discussed in this chapter.

4 When referring to applications relating to personal records (meaning personal records held by third parties) or SBE in this chapter, we include applications made by the police or prosecution to access personal records, applications to the court for disclosure of personal records, and applications to the court as to the admissibility of evidence at trial that relates to the complainant's sexual behaviour or personal records, as would be subject to the current frameworks or our provisionally proposed new frameworks in Chapter 3 and 4.

5 Legal representatives only have a right to be heard in court where the person or party they represent has that right.

for example, when a lawyer speaks in court to present their client's case. However, individuals, charities and interest groups or other professionals such as Independent Sexual Violence Advisers (ISVAs) can also advocate for complainants and victims of sexual violence in many other ways, for example by advocating for them to access a certain support service.

8.9 Legal advice, representation and advocacy can be made available to someone without them being a full party to proceedings. Full party status would mean access to all documents disclosed, the right to test evidence, the right to appear at court and make submissions throughout the proceedings and at appeals made during the proceedings or upon conviction and sentencing. Currently, only the prosecution and defendant have full party status in criminal proceedings, with a few exceptions explored below.

8.10 Our terms of reference[6] for this project include consideration of whether the complainant should be a party to applications to admit evidence of their sexual behaviour or their personal records. Therefore, in this chapter we focus on the possible provision of ILA and ILR in those two contexts. However, we will also consider the wider benefits and concerns arising from ILA and ILR for complainants, including in relation to the identification and application of measures to assist complainants to give evidence.

CURRENT LAW

Legal advice

8.11 Complainants in sexual offences proceedings can, like all victims of crime, seek independent legal advice (ILA) to a limited extent. Within certain parameters, complainants may seek advice by instructing their own solicitor on a privately funded basis or by obtaining free advice from the charitable sector. Complainants can seek advice on any aspect of their case, but the adviser will be limited by the fact that they do not have a right to engage with other parties, or see all relevant documents or evidence.

Legal representation

8.12 In general, complainants may not be a party to the criminal proceedings nor to any application to disclose or admit their personal records or sexual behaviour evidence (SBE). They may not make representations to the court, either themselves or through ILR. Instead the police while investigating, and the prosecution as a party in the criminal proceedings, are expected to take into account the complainant's interests. However, as noted above, the police and prosecution do not represent the complainant. They must also take into account other factors and interests such as the wider public interest in achieving justice.

8.13 There is one instance where complainants can make representations to the court, either themselves or through ILR. As described in Chapter 3, a person who is the subject of an application for a witness summons to produce documents can make

6 For the full terms of reference see Chapter 1.

representations to the court about the application.[7] This applies to the record holder (such as a medical professional) as well as the person who is the subject of the records (the complainant).

Pilot schemes and consultations

8.14 The need for complainants to access ILA or ILR has been considered for some time. Indeed, the 2010 Stern Review[8] also reviewed the schemes for separate legal representation available in France and Ireland and referred to them as worthy of consideration. In 2021, Lord Falconer of Thoroton introduced an amendment to the Police, Crime, Sentencing and Courts Bill that would give legal standing and a right to legal representation to complainants in respect of applications to admit evidence of their sexual behaviour under section 41 of the Youth Justice and Criminal Evidence Act 1999.[9] The amendment was ultimately not included in the Police, Crime, Sentencing and Courts Act 2022.

8.15 In this section we set out the pilot schemes and government consultations that have proposed an extended ILA or ILR scheme for complainants in sexual offences prosecutions.

Northumbria pilot

8.16 A pilot legal advice scheme, known as the Sexual Violence Complainants' Advocate (SVCA) scheme,[10] was conducted in Northumbria between September 2018 and March 2020, funded by the Home Office. The scheme used local solicitors, already specialised in family or criminal law with expertise in dealing with vulnerable witnesses and sensitive evidence. They were given additional training to provide free legal advice and support to adult rape complainants. The scope of this advice was the complainant's right to privacy, along with providing general information about the legal process and advice about giving an Achieving Best Evidence ("ABE") interview.[11] The scheme did not allow the advocate to attend the ABE interview.[12] The original plan was for the scheme to include legal advice on applications to admit SBE but that was removed from the scheme before implementation after being challenged by stakeholders who "did not believe there were sufficient legal mechanisms for SVCAs to be privy to section 41 hearings".[13]

8.17 Academics at Loughborough University and the Northumbria Police and Crime Commissioner (PCC) conducted an evaluation of the SVCA scheme, published in

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7 CrPR, r 17.5(3), 17.5(4), following *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin).

8 V Stern, Government Equalities Office, Home Office, *The Stern Review: a report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* (2010).

9 Amendment number 289. The amendment was debated on 22 November 2021 but was ultimately not moved. *Hansard* (HL) 22 November 2021, vol 816, col 598.

10 O Smith, and E Daly, *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme*, (December 2020) ("SVCA Scheme Evaluation Report").

11 For further discussion of ABE interviews see Chapter 7.

12 SVCA Scheme Evaluation Report, pp 4-5.

13 The authors of the review expressed their disappointment that this led to the removal of ILA for SBE applications from the scheme. SVCA Scheme Evaluation Report, para 4.4.1.

2020 ("SVCA Scheme Evaluation Report"). They concluded that there was "sufficient rationale to justify the existence of a legal advocacy scheme".[14] The PCC, Kim McGuiness, stated that the current treatment of complainants, the impact on them individually and on their access to justice justifies "independent legal representation: legal advocates who can assert and protect the rights of individuals who currently have no voice in the system" and recommended that the government "invest in operationalising ILR across England and Wales as a matter of urgency".[15]

8.18 Smith and Daly, the authors of the evaluation, identified poor practice and a significant number of excessive requests made for complainants' private information. This, they concluded, justifies the need for an advocacy scheme to protect complainants' interests and challenge poor practice. They found evidence of police officers believing there was no requirement for them to seek the complainant's consent to access their personal information, consent forms providing agreement to access unlimited data (known as "Stafford statements"[16]), police concerns about indiscriminate requests for personal records from the prosecution, and complainants who did not understand to what they had consented. This impacted on complainants' well-being. Some complainants delayed counselling because of concerns that their notes would be accessed. Some said that data requests were an important factor in their decision to withdraw their complaint.[17]

8.19 The evaluation found that the pilot scheme was a success. Its authors stated that of the 83 eligible complainants who were referred to the scheme by the police, 57% took up the support. Most of those who declined did so because they had decided not to proceed with the complaint. SVCAs challenged data requests in 47% of cases; of the 12 cases where outcomes were known, 67% (8 cases) resulted in the request being withdrawn or amended. Interviews with participants indicated an overwhelming consensus that the pilot changed the overall culture, reducing indiscriminate police and prosecution requests, even when SVCAs were not involved, and resulted in SVCAs working with the police to draft best practice consent forms. Complainants gave positive feedback and indicated increased confidence from having someone of their own to advise them.[18]

8.20 Alongside national roll out of the pilot, Smith and Daly also recommended the creation of a "dedicated salaried role" for an experienced qualified lawyer, "housed within existing specialist support services", for adult and child complainants in all types of sexual offences. They recommended that advice be extended to making applications and submissions to court, for example, at pre-trial hearings. However, they did not

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14 SVCA Scheme Evaluation Report, p 5.

15 Above, p 4.

16 The consent forms largely used are referred to as "Stafford statements", which were developed locally by police forces in response to *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin) (discussed above at para 8.18) with the intention of avoiding complainants being unnecessarily notified and called to attend court where an application for a witness summons was made. For an example of a Stafford statement, see SVCA Scheme Evaluation Report, Appendix 3. The use of Stafford statements has been criticised and in May 2022, the Information Commissioner issued an opinion mandating all police forces to stop using them, discussed in Chapter 3.

17 SVCA Scheme Evaluation Report, pp 5-6.

18 Above, para 6.3.

recommend that the complainant be given party status in the proceedings, or for complainants or their legal representatives to make submissions before the jury at trial.

Home Affairs Committee

8.21 In their report on the investigation and prosecution of rape, the House of Commons Home Affairs Committee recommended that the Northumbria pilot be extended to other areas with differing demographic and geographic profiles, and that it be extended to advice on applications to admit SBE and to obtain pre-trial therapy records.[19] The Committee also recommended that, subject to the success of the pilot, the government must commit to offering legal advice to all complainants of rape.[20] The Committee heard evidence from the Ministry of Justice (MoJ) Director-General, Policy and Strategy Group, that the MoJ were consulting on the possibility of providing ILA to complainants of rape. That MoJ official also told the Committee that it was hoped that once there is "sufficient confidence in the criminal justice system", people would not feel the need for legal advice. The Committee were concerned about this view, stating "we believe it is unlikely that 'sufficient confidence' in the criminal justice system will be achieved, without the implementation of such interventions as the provision of legal advice".[21]

Ministry of Justice consultation on the provision of legal advice

8.22 As noted above, as part of its commitments in the End-to-End Rape Review,[22] the MoJ launched a consultation with stakeholders regarding the provision of legal advice to complainants in sexual offences cases. The consultation sought evidence on how best to enhance access to legal advice to empower complainants to understand and challenge police digital and third-party information requests. The consultation concluded in June 2022; its outcome is awaited.[23]

Operation Soteria Bluestone

8.23 Operation Soteria Bluestone is a "unique police and CPS programme to develop new operating models for the investigation and prosecution of rape in England and Wales by June 2023".[24] Their Year One report published in April 2023 sets out a draft outline of a new National Operating Model, which includes "independent legal advice for victims".[25] We understand that Operation Soteria, working with the London Mayor's Office for Police and Crime, is currently establishing a pilot scheme for the provision of independent legal advice to complainants in London, run by the Women and Girls

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19 House of Commons Home Affairs Committee, *Investigation and Prosecution of Rape*, *Eighth Report of session 2021-22* (29 March 2022), Recommendation 20.

20 Above, pp 54 and 64.

21 Above, para 123.

22 Lord Chancellor and Ministry of Justice, *The end-to-end rape review report on findings and actions* (2021) CP 437, p 12.

23 HM Government, *Rape Review progress update* (December 2022).

24 Home Office, *Operation Soteria One Year Report* (December 2022).

25 B Stanko, *Independent Report: Operation Soteria Bluestone Year One Report* (14 April 2023).

Network with the Centre for Women's Justice providing external legal supervision. We await further detail of the scope of the pilot once it is established.

IS REFORM REQUIRED?

8.24 The success of the Northumbria SVCA pilot scheme and the conclusion of the House of Commons Home Affairs Committee provide a strong basis for considering extension of the current ILA and ILR provisions for complainants in sexual offences cases. The House of Commons Home Affairs Committee received evidence of the significant potential benefits to complainants of receiving legal advice and the support for this across the spectrum of practitioners and support organisations, and in other jurisdictions. Evidence was given to the Committee that ILA could improve complainants' experiences of the criminal justice system and make them less likely to withdraw. This is also reflected in the SVCA Scheme Evaluation Report. The Criminal Bar Association ("CBA") told the Committee that both complainants and the investigation process itself would benefit from complainants accessing publicly funded ILA pre-trial at the disclosure phase and in relation to defence applications to admit SBE.

8.25 In our terms of reference, we committed to looking at whether complainants should be a party to applications to admit their personal records and SBE. This would mean they have a right to make representations to the court. In this section we will also consider the benefits of both ILA and ILR for complainants in respect of such applications. We then consider the concerns about and criticisms of extending ILA and ILR to complainants.

8.26 There is a particular justification for the provision of legal advice and representation to complainants in sexual offences prosecutions. In the absence of any other direct evidence, as a matter of practice, these cases tend to focus on the background and credibility of the complainant.[26] Reform may address any unjustifiable focus on the complainant and may prevent disproportionate requests being made. Special treatment is already afforded to complainants in sexual offences prosecutions through the use of special measures, anonymity, and special rules of evidence regarding sexual behaviour.[27] We are alert to concerns that, as sensitive information also goes before the court in non-sexual offences cases, introducing ILA or ILR only for complainants of sexual offences risks creating a legal tension and inequality between witnesses.[28] Lady Dorrian has similarly commented that extensive ILR in sexual offences prosecutions would open the door to arguments that it should be present in other serious cases such as murder, where the deceased's family might wish to be legally represented. However, this project is limited to considering the issues as they arise for complainants in sexual offences prosecutions.

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26 Killean argues that the attacks complainants in sexual offences cases face in relation to their credibility and personal information justifies different procedures from other offences. R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021), p 181.

27 See, for example, Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (May 2019) ("The Gillen Review") para 5.96.

28 A criminal justice stakeholder.

Benefits of extended provision of ILA and ILR to complainants

8.27 In Chapter 3 and 4, we have explored the issues that arise from the disclosure and admission of a complainant's personal records and SBE. In brief, both personal records and SBE contain highly sensitive and confidential personal information to the complainant, engaging the right to respect for their private life under article 8 of the ECHR. Historically, and currently, evidence from personal records and of sexual behaviour has been used in sexual offences proceedings to introduce and perpetuate myths and misconceptions and expose the complainant to intrusive probing of their personal life and humiliating cross-examination. There are serious questions about the extent to which such evidence is relevant or proportionate to the issues to be determined by juries in sexual offences cases. As such, personal records and SBE are subject to a higher level of scrutiny than other types of evidence before they are admitted in a trial. Both have also attracted controversy in the wider public discourse. In this context, the rationales for enabling complainants to access legal advice or representation in respect of applications to disclose or admit personal records or SBE are that:

(1) legal advice would improve complainants' understanding of the process and rationale for applications, how their evidence might and can be used, what the limitations are, and what their rights are;

(2) independent legal representation would enable complainants to advocate their position in respect of this evidence to the court, independent from other concerns such as the public interest; and

(3) legal representation would enable complainants to challenge inappropriate applications or use of their personal information.

8.28 In this section we will outline the benefits of this to the complainants themselves, for the trial, and for the wider criminal justice system.

The complainant's right to privacy is most effectively protected by independent legal advice and representation

8.29 Personal records and SBE involve inherently private information about the complainant. Keane and Convery[29] have concluded that article 8 of the ECHR provides the complainant with a right to be heard in the context of SBE. Drawing on *Mraovic v Croatia*,[30] they state that the European Court of Human Rights (ECtHR) has recognised that the justice system should operate in a manner that "does not increase the suffering" of complainants or "discourage them from participating [in sexual offences proceedings]", while always having due regard to the rights of the defendant. The ECtHR has also held that criminal proceedings should be organised so as "not to unjustifiably imperil the life, liberty or security of witnesses", particularly where a complainant gives evidence or their article 8 interests are engaged. Due to the personal nature of the information involved, a similar argument could be made about

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29 E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) p 16.

30 [2020] ECHR 323 at [46].

personal records. Indeed, in *WF v Scottish Ministers*,[31] Lord Glennie concluded that an application for the disclosure of medical records undoubtedly engaged the record subject's rights under article 8 of the ECHR.

8.30 Domestically, the authors of the SVCA pilot evaluation argued that "the Data Protection Act 2018 strengthens complainants' privacy rights and outlines robust procedures around private data that gives an obvious role for legal representation".[32]

8.31 If this important right is engaged, there is clear benefit to the complainant in having both legal advice (to help them understand their rights, the application and procedure) and legal representation (to represent their interests when the court makes decisions about such evidence).

8.32 We have heard from stakeholders about the importance of complainants being able to access legal advice about their rights in this regard. This includes Dame Vera Baird KC, then the Victims' Commissioner, who has told us that ILA is "essential" for complainants to safeguard their rights under article 8. A psychotherapist has also emphasised to us the value of legal advice in ensuring informed consent to personal records disclosure. They explained to us that it is important that complainants understand that they have a meaningful choice, given that victims of sexual offences have had their personal boundaries violated as a result of the sexual offence. Then, broad disclosure requests for criminal proceedings can invade very personal areas of their lives.

8.33 The complainant's privacy rights are engaged not only by the material subject to such applications, but also by the way the evidence is adduced and by the cross-examination of the complainant. The Gillen Review (a review of the law and procedures for sexual offences in Northern Ireland), referencing a response by Dame Vera Baird KC in her then role as Northumbria Police and Crime Commissioner, noted that complainants give evidence as a public duty.[33] However, complainants in sexual offences cases are treated as if the trial is between the complainant and defendant, resulting in exhaustive examination of the complainant's character. ILR could help challenge or prevent irrelevant, unnecessary or disproportionate examination of the complainant in respect of their personal records or SBE.

8.34 There is particular benefit to the advice and representation being independent, meaning that it is for the complainant only. Currently, the prosecution can respond to requests for disclosure and admission of SBE taking into account the views of the complainant. Many commentators suggest that ILA or ILR is unnecessary because the prosecution are able satisfactorily to represent the relevant arguments on behalf of the complainant. However, the prosecution do not represent the complainant, their role is not as the advocate for the complainant, and where the complainant's position differs

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31 *WF v Scottish Ministers* [2016] CSOH 27. In that case a complainant in criminal proceedings for domestic assault sought judicial review of the Scottish authorities' refusal of legal aid for her to be represented in proceedings brought by the defendant for the disclosure of her medical records under the Criminal Procedure (Scotland) Act 1995, s 301A, for the recovery of documents by commission or production.

32 SVCA Scheme Evaluation Report, p 6.

33 The Gillen Review, para 5.120.

from that of the prosecution they may understandably not be able to advocate for the complainant's position.

8.35 The public interest requires prosecutors to be independent and to take impartial and objective decisions in order to "secure justice for victims, witnesses, suspects, defendants and the public."[34] Prosecutors do not have a vested interest in the outcome of criminal proceedings, they must fairly assess the case and "must ensure that the law is properly applied, that relevant evidence is put before the court and that obligations of disclosure are complied with."[35] In its broadest expression, the public interest therefore requires that the defendant receives a fair trial, complainants and witnesses are fairly treated and their rights are respected, with the wider objective of inspiring confidence in the criminal justice system, encouraging the reporting of criminal offences and preventing attrition. The Gillen Review has noted that safeguarding the complainant's rights is not the "main role" of the court or the prosecution.[36]

8.36 This does not mean that the prosecution cannot, or does not, seek to protect the interests of the complainant. Indeed, one judge described to us, from their experience, how especially in SBE applications the prosecution would strive to protect the complainant's interests. However, this may not always be possible. Keane and Convery have also suggested that expecting the prosecution to take on this role places it in a difficult position. This may cause distress to the complainant when the prosecution do not oppose an application to which the complainant objects.[37] Additionally, research has indicated that prosecutors are often reluctant to intervene to protect the complainant during cross-examination as they believe that the jury would perceive them as hiding something,[38] or because a distressed complainant is perceived as being more credible.[39] The SVCA Scheme Evaluation Report acknowledged the role the prosecution has to play in challenging requests from the defence, but, citing Raitt, stated that the prosecution must "ultimately prioritise the protection of [a] fair trial when balancing the interests of the public, complainant, and the accused".[40]

8.37 We have heard directly from stakeholders of scenarios where the interests of the complainant do not align with those of the prosecution. The Centre for Women's Justice, echoed by Dame Vera Baird KC, then the Victims' Commissioner, noted that this is particularly true when dealing with third-party materials. This is because

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34 Crown Prosecution Service ("CPS"), *The Code for Crown Prosecutors* (October 2018), para 2.5.

35 CPS, *The Code for Crown Prosecutors* (October 2018), para 2.5.

36 The Gillen Review, para 5.97.

37 E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) pp 18-20.

38 R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021), citing Brown et al*, Sex crimes on trial: The use of sexual evidence in Scottish courts* (1993).

39 R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021), citing J Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 32 *Journal of Law and Society* 294, 307.

40 SVCA Scheme Evaluation Report, p 29 citing F Raitt "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] *Criminal Law Review* 729.

complainants' interests in privacy and their rights under article 8 of the ECHR are not in the forefront of the minds of prosecutors trying to secure a conviction. Police officers have described to us a situation where a complainant had withdrawn support for the case and the prosecution was nonetheless considering a witness summons. In such cases it would not be appropriate to rely on the prosecution to represent the complainant's valid and relevant interests. Stakeholders have argued this gives rise to the need for ILA and ILR.[41]

8.38 Further, prosecuting in the public interest can prevent the prosecution from discussing certain aspects of the evidence with the complainant during the investigation and court proceedings. Citing Raitt,[42] Keane and Convery have noted that the prosecution cannot take instructions directly from the complainant and because there is no lawyer-client relationship, the complainant's relationship with the prosecution does not have any of the characteristics of such a relationship such as "trust, confidentiality and legitimate partisanship".[43]

It provides an appropriate level of scrutiny for sensitive and difficult areas of evidence

8.39 Better advised and represented complainants would add an extra layer of scrutiny to applications regarding personal records and SBE. Better scrutiny, directly from the person whose privacy is at risk, could discourage or prevent overly broad disclosure requests and SBE applications.

8.40 The SVCA Scheme Evaluation Report found that providing complainants access to ILA improved the culture and practice of personal record requests. Even in cases where an SVCA was not used, police requests were more specific and the culture around the process improved.[44] Sir John Gillen has also noted the potential for legal advice to change cultures, including the practice of overly broad disclosure requests.[45] He noted this could be achieved by providing advice about judicial review where article 8 rights are engaged, for example. The Survivors Trust also suggested that this advice could be a disincentive for defence barristers adducing SBE "other than through a successful application under the required framework. Some stakeholders have told us that ILR would be useful in both discouraging overly broad disclosure requests, and challenging inferences built on them.[46]

8.41 The authors of the SVCA Scheme Evaluation Report rejected the idea that legal advocacy is unnecessary as a layer of scrutiny because what is required instead is more robust judicial enforcement of existing mechanisms. They have argued that, while robust judicial consideration is important, most cases do not reach court and

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41 Centre for Women's Justice; Lady Dorrian; police officers; and a member of the judiciary. See also, E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020).

42 F Raitt, Rape Crisis Scotland, *Independent Legal Representation for Complainers in Sexual Offence Trials*, (2010) paras 7.10 to 7.12.

43 E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) p 19.

44 SVCA Scheme Evaluation Report, p 8.

45 Sir John Gillen; Robert Allen.

46 Chief Constable Sarah Crew; and a victim and campaigner.

breach of privacy arises at the point of the disproportionate and unjustified access and not only at the point of disclosure to the defence.[47] This demonstrates that the benefits of ILA and ILR arise even before a hearing on disclosure and admissibility.

8.42 In 2021, the MoJ confirmed they had launched a pilot with Thames Valley Police that allows complainants to challenge police requests for personal records.[48] We understand that by September 2022, there had been little take up of the scheme by complainants and that Thames Valley Police are looking into the reasons for this. Similarly, in Ireland there is a protected disclosure regime for counselling records. The O'Malley Review into the investigation and prosecution of sexual offences in Ireland reported concern that it seemed to be the norm that complainants waive their rights to allow for disclosure. Dr Susan Leahy has questioned whether complainants were waiving their rights on a "fully-informed basis". ILA and ILR can help complainants understand their rights, the purpose of such requests, potential use of the material, and how to challenge such requests, potentially improving the take up of such schemes. In this way ILA and ILR could contribute to a robust, informed consent process and to improve the take-up of opportunities to challenge requests for personal data.

Enabling best evidence and provision of information for the trial

8.43 We have considered in Chapter 3 and 4 the appropriate tests to be used by the court when determining whether such evidence should be admitted in individual cases. Part of our provisionally proposed tests require consideration of the privacy interests of the complainant.[49] It is logical therefore that the complainant is in the best place to provide the court with the relevant information to help them determine the issues. Lord Glennie in *WF v Scottish Ministers* asked, "if the complainer is not given the opportunity to be heard, how is the court to carry out the balancing exercise required of it?"[50] Legal advice and representation can ensure that the complainant is more engaged with the proceedings, can give their best evidence, and provide vital information to the criminal process in a more meaningful way.

8.44 Stakeholders have explained that informed complainants could often offer explanations or routes of investigation to the prosecution, if they had the opportunity to

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47 SVCA Scheme Evaluation Report, para 4.1, citing Home Office, *Crime Outcomes in England and Wales 2019-2020* (2020).

48 HM Government, *Rape Review progress update* (December 2021).

49 For SBE we propose a test that requires the judge to determine whether the evidence has substantial probative value and its admission would not significantly prejudice the proper administration of justice. We ask whether, when deciding this, the judge should be explicitly required to consider protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights. Similarly, for personal records, we propose a test that requires the judge to determine whether the evidence is relevant to an issue at trial or to the competence of a witness to testify and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. In doing so we propose that the judge should be explicitly required to consider the potential prejudice to the complainant's personal dignity and right of privacy. See Chapter 3 for further discussion of the test for disclosure and admission of personal records, and Chapter 4 for further discussion of the test for the admission of SBE.

50 *WF v Scottish Ministers* [2016] CSOH 27.

do so, and improved confidence to do so from better understanding of the law.[51] Survivors' groups have said that some crucial information is missed in trials as a result of the complainant being detached from proceedings and unable to assist the prosecution fully. Keane and Convery have commented that unless the complainant is allowed to participate properly in the process, the court is left relying on the limited information available from the prosecution – with all the difficulties identified arising from the context of that relationship – or no information as to the complainant's views at all. They acknowledge that ultimately the determination is for the court but state that the court will be better placed to carry out that exercise with the benefit of submissions from the complainant.[52]

8.45 One judge has advised that ILR for SBE applications could help complainants explain why aspects of their sexual behaviour should not be regarded as relevant, as the prosecution are not best placed to make these arguments. Survivors' groups also raised the fact that ILR at trial could help complainants to give relevant information to the prosecution for the purposes of cross-examination.

8.46 Some police officers and victims' organisations[53] also took the view that ILA could assist in attaining best evidence, because it would reduce the risk of complainants being blindsided on the stand, and would make them feel more confident when giving evidence. Kirchengast has suggested that providing legal representation could result in improved conviction rates as a result of more robust witness testimony.[54]

8.47 More informed decisions, assisted by representations from the complainant on issues that directly impact them, can be of wider benefit to all parties, the investigation, and trial process. Better informed, more confident and engaged complainants would be beneficial to the pursuit of justice and ILA and ILR could provide this information and support. As one defence barrister told us, criminal proceedings are a quest for justice, and are not about tactics and withholding information.

Improved confidence and engagement in the trial process and criminal justice system

8.48 The SVCA Scheme Evaluation Report concluded that extended ILA and ILR can improve outcomes, and bring about cultural change, in respect of the use and requests for personal records and SBE.[55] This itself would improve the justice process for sexual offences and therefore lead to improved confidence in the process.

8.49 There are also benefits that arise for complainants from having an independent advocate during the process. Stakeholders have reported to us that complainants are aware that defendants are provided with legal advice throughout the trial process, and

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51 A barrister; and Dame Vera Baird KC, then the Victims' Commissioner.

52 In the context of applications to admit SBE, but these arguments are also relevant in the context of personal records. E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020).

53 The Survivors Trust.

54 T Kirchengast, "Victim legal representation and the adversarial criminal trial: a critical analysis of proposals for third-party counsel for complainants of serious sexual violence" (2021) 25 *International Journal of Evidence and Proof* 53, 55.

55 SVCA Scheme Evaluation Report, pp 7-8.

that they do not have the same opportunity. The Law Reform Commission of Ireland highlighted that defendants have the support of their legal representation throughout the criminal process to tell them how the system operates and to give insightful and meaningful legal advice. The complainant has no equivalent[56] and could benefit from a similar lawyer-client relationship.[57] The representation would not only be of practical benefit, but would allow complainants to feel like someone had their interests at heart and that their case had been properly considered. A Consultant Clinical Psychologist has explained to us that ILR could give complainants a sense of agency and control over the process, and self-agency is a crucial part of recovery.[58] The authors of the SVCA Scheme Evaluation Report reported that complainants gave positive feedback and indicated increased confidence from having someone of their own to advise them.[59]

8.50 Even in cases where the public and complainants' interests may not be at odds (as explored above), the prosecution do not have a client-lawyer relationship with the complainant. One police officer noted cases he had witnessed where he regarded prosecution barristers as good for the case, but nonetheless insensitive to complainants' interests. A joint inspection[60] of the police and CPS response to rape reported as a headline finding that "communication with the victim after charge is often confusing and inconsistent".[61] In 2022, HM Inspectorate of Prosecution in Scotland (HMIPS) inspected the operation of the Crown Office and Procurator Fiscal Service (COPFS) specifically in relation to applications to admit character evidence and SBE under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. HMIPS reported that in 19% of cases reviewed, the Crown's engagement with the complainant was unsatisfactory.[62]

8.51 One further advantage is that complainants' communication with their legally qualified advisor and representative can be protected against being disclosed to the defence. Communications between lawyer and client are subject to Legal Professional Privilege (LPP) and, unless the complainant expressly agrees to waive privilege, their disclosure is generally prohibited.[63] Because it is not a lawyer-client relationship, communications between the complainant and, respectively, the prosecution or their

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56 An Irish researcher.

57 There is no equivalent lawyer-client relationship between the prosecution and complainant.

58 See also UK Trauma Council, *Complex trauma: evidence-based principles for the reform of children's social care* (March 2022) and Hobfoll et al "Five Essential Elements of Immediate and Mid–Term Mass Trauma Intervention: Empirical Evidence" (2007) 70 *Psychiatry* 283.

59 SVCA Scheme Evaluation Report, p 8.

60 By the Criminal Justice Joint Inspectorate.

61 Criminal Justice Joint Inspectorate, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape – Phase two: Post-charge* (25 February 2022) p 5.

62 HM Inspectorate of Prosecution in Scotland, *Inspection of Crown Office and Procurator Fiscal Practice in relation to section 274 and 275 of the Criminal Procedure (Scotland) Act 1995* (2022) para 218.

63 See P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) ("*Rook and Ward*"), 18.32 to 18.34. LPP attaches to confidential communications between client and lawyer "made for the purposes of obtaining and giving legal advice". It also arises in relation to communications between client, lawyer and third parties "with the dominant purpose of preparation for contemplated or pending litigation."

ISVA are not afforded this protection. The Gillen Review recommended ILR at preliminary hearings for applications for personal records and SBE, noting that the presence of LPP assures the complainant "unchallengeable confidentiality".[64] Without this protection, complainants may feel constrained in the information that they are willing to share.

8.52 The traumatising and harmful impact of the court process for complainants is well understood and documented.[65] Having the benefit of ILA and ILR is one measure that could significantly improve their experience, or mitigate some of the more harmful aspects. For example, the Gillen Review observed that ILR can reduce secondary trauma and is "the most effective way of supporting complainants during trials".[66]

8.53 The benefits to individual complainants go on to have wider impact. Complainants may be better placed to give their best evidence if the traumatic effect of the trial process is minimised. For more victims of sexual offences to come forward, they need to feel protected within the system;[67] ILA and ILR would better protect complainants. For example, Killean and others noted research which indicated that the mere presence of a complainant's legal representative had resulted in reduced animosity from defence lawyers.[68] The Centre for Women's Justice have highlighted that ILA could address the lack of confidence which complainants have in the criminal justice system, as reflected by the high attrition rates.[69] The focus on complainants' credibility and character may disproportionately impact those who have particularly sensitive information in their personal records, for example those who have substance dependency or mental ill-health. Access to a professional who can make representations on their behalf may provide a counterbalance to this and help complainants with more complex backgrounds engage with the proceedings.

Concerns about the provision of ILA and ILR to complainants

8.54 There are also a number of concerns raised about extending ILA or ILR to complainants in sexual offences. Generally, these concerns focus on either the practical effects (such as delay and cost, difficulty with legal professional privilege, and risk of witness coaching) or the principled effects (such as interference with the established binary adversarial system). All the concerns raised, in some way, suggest that the defendant's right to a fair trial may be negatively impacted by the provision of ILA or ILR to complainants.

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64 The Gillen Review, para 5.84.

65 See Chapter 1.

66 The Gillen Review, para 5.75, citing I Bacik, C Maunsell, S Gogan, *The Legal Process and Victims of Rape: The Dublin Rape Crisis Centre and the School of Law* (1998).

67 The Survivors' Trust; and a member of the judiciary.

68 R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021) p 176.

69 Centre for Women's Justice.

Delay and cost

8.55 Providing legal advice and representation to complainants may be costly.[70] It may also lead to delay.[71] It can take time to seek legal advice; where a complainant has a right to seek legal advice before responding to requests from police or to applications to admit evidence, there may be a delay before they are able to respond. If a complainant has the right to be legally represented, similarly it can take time for them to identify and instruct a lawyer and for their lawyer to prepare to represent them. The listing of hearings, and the hearings themselves, naturally will take longer the more people there are to accommodate.

8.56 Concerns about delay and cost may be addressed in the design of a model for advice and representation. For example, reports from jurisdictions which have adopted a model of limited ILR suggest that it is not a significant or concerning expense.[72] In addition, legal advice and representation may not necessarily result in delay as it may create efficiencies elsewhere, for example by avoiding resources being used unnecessarily to examine disproportionate volumes of personal records.

Legal Professional Privilege

8.57 A judge and practitioner raised with us a concern that in certain circumstances, communications between a complainant and lawyer may be disclosable. This may therefore require the prosecution to review the communications to verify that they do not contain information which meets the test for disclosure. In turn, this may create complexity and delays and cause the complainant to feel that they cannot freely confide in their legal representative, which would otherwise be a benefit of ILA and ILR as described above.

8.58 Sir John Gillen was of the view that there was no basis for this concern due to absolute legal professional privilege. Rook and Ward also suggest that LPP is absolute in this context; that where waiver is refused by a complainant, the defence can only comment on that refusal in their closing speech. They also note that, in "extreme circumstances" (such as where the whole of the case relies on the evidence the defence have sought to have disclosed, LPP attaches to it, and the complainant refuses to waive that privilege) the defence could argue abuse of process or that the defendant would not have a fair trial. If this argument succeeds, the result would be that the proceedings are stayed; the evidence would not be disclosed.[73] Therefore, where communication between the complainant and their legal adviser or representative attracts LPP, it will be absolute.

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70 The Gillen Review stated that in Ireland, in 2017, public funds spent on legal representation for complainants in respect of sexual behaviour evidence applications totalled €66,389. The SVCA Scheme Evaluation Report estimated the costs of roll-out to England and Wales of a legal advice scheme for complainants to be £3.9m.

71 This was raised by Parliamentarians as a concern in response to Lord Falconer's proposed amendment to the Police, Crime, Sentencing and Courts Bill that would introduce ILR for complainants in respect of SBE applications. *Hansard* (HL) 22 November 2021, vol 816, col 598.

72 For further detail, see para 8.153 below.

73 *Rook and Ward* (2021) 18.34 and *Derby Magistrates' Court Ex p. B* [1996] AC 487.

8.59 There is one further concern in the literature about the scope and protection afforded by LPP. The SVCA Scheme Evaluation Report raised, following consultation with "senior judiciary", that advice given before the complainant's report to the police may not be subject to LPP.[74] The Evaluation does not expand on the rationale for this concern. LPP is capable of attaching to pre-report advice. Where it is argued that pre-report advice does not attract absolute LPP, this issue could be resolved by challenging requests for this material on a case-by-case basis. Further, guidance on the scope and role of legal advisers could also assist in this regard. We consider this at paragraph 8.171 below.

Witness coaching

8.60 Concerns have been raised that the scope of any legal advice provided, at any stage of the process, should take account of the rules against witness coaching. Barrister Hanna Llewellyn-Waters noted that representation for complainants could result in allegations of contamination when information about the case is shared with them, which would risk the failure of the entire case. An allegation of witness coaching may arise, for example, if a complainant is told about evidence in the case which may contaminate their evidence and influence how the complainant responds to questions in their police interview, pre-recorded evidence or at trial. Concerns were raised with the SVCA Evaluation about the prospect of SVCAs being accused of witness coaching in relation to information given by them to their clients in the context of personal records.[75] Despite the concerns, provision of legal advice in respect of personal records remained part of the pilot scheme. However, SBE was removed from the scope of the SVCA pilot because of the risk of witness coaching or the perception of it.[76]

8.61 The rule against coaching a witness is explained in *R v Momodou & Limani*.[77] The court stated that training or coaching witnesses is prohibited as the witness should give their own evidence "uninfluenced by what anyone else has said". However, this principle does not prevent pre-trial witness familiarisation with "the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants." The court added that "witnesses should not be disadvantaged by ignorance of the process, nor should they be taken by surprise" at the way the process works when they give evidence. However, none of this involves "discussions about the proposed or intended evidence".[78]

8.62 Other jurisdictions have adopted a less restrictive approach. Professor Hoyano has noted that the Australian Bar Code of Conduct is more permissive than the rule in

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74 SVCA Scheme Evaluation Report, para 4.4.

75 Participants in the SVCA evaluation reported that advising on the proportionality and necessity of a request for personal records would require SVCAs to pass on information which might contravene the rule against witness coaching. SVCA Scheme Evaluation Report p 30-31.

76 SVCA Scheme Evaluation Report, p 5.

77 [2005] EWCA Crim 177; [2005] 2 All ER 571.

78 [2005] EWCA Crim 177; [2005] 2 All ER 571, at [62].

England and Wales.[79] It prohibits coaching, defined as "advising what answers the witness should give to questions which might be asked". The Code also states that that prohibition would not be breached:

> by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.[80]

8.63 The complainant is already entitled to information about various elements of the wider defence and prosecution case.[81] It can be argued that a more permissive approach enables complainants to have adequate time to understand perceived difficulties in their evidence and to prepare and respond, avoiding ambush. At paragraph 8.46 above, we explain that police officers and victims' organisations told us that one of the benefits of ILA was to prevent complainants being blindsided when giving evidence, allowing them to give their best evidence.

8.64 Legal professionals are assisted in fulfilling their obligations to the court and their clients within the rules set out in *Momodou* by guidance and codes of conduct. For example, CPS Guidance for Speaking to Witnesses at Court advises that while prosecutors may "not provide the detail of, discuss or speculate upon the specific questions a witness is likely to face or discuss with them how to answer the questions", to enable a witness to give their best evidence, they may be informed of certain matters. These include the "general nature of the defence where it is known (for example, mistaken identification, consent, self-defence, lack of intent)" but without engaging in a discussion of the factual basis of it.[82]

8.65 Further, the question of witness coaching has already been resolved in the context of ISVAs within the current rules by delineating the scope of the ISVA role.[83] The SVCA pilot also ultimately resolved this issue by clearly delineating the SVCA role. After

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79 L Hoyano, "Reforming the adversarial trial for vulnerable witnesses and defendants" [2015] *Criminal Law Review* 107, 123.

80 Australian Bar Association Barristers Conduct Rules, Rule 68 and 69.

81 See Chapter 3.

82 CPS, *Speaking to Witnesses at Court Legal Guidance*, (March 2018), para 3.4(3)(d)(i). The code of conduct for barristers (Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct) states that it may be appropriate to draw a witness' attention to evidence which appears to conflict with what a witness is saying and an advocate is entitled to indicate to the witness that a court may find a particular piece of evidence difficult to accept (at gC7). Advocates must not encourage a witness to give evidence which is misleading or untruthful (at rC9.3) and must not rehearse, practise with or coach a witness in respect of their evidence (at rC9.4). The code of conduct for solicitors (The Solicitors Regulation Authority*, SRA Code of Conduct for Solicitors, RELs and RFLs* (November 2019)) states that solicitors should not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence (para 2.2).

83 Home Office Guidance gives examples of prohibited conduct including: not discussing the best way for the complainant to give evidence to ensure the jury believe them; not telling the complainant about other evidence which may exist, as it could influence how the complainant responds to questions in their police interview or at trial; and not discussing with complainants the experiences of other complainants at court, as this could influence the complainant to react in a certain way before the jury. See Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements*, (September 2017) para 3.5.

taking legal advice, the SVCA Scheme concluded that SVCAs should adopt best practice for talking to witnesses outlined in the case law[84] and in the CPS Guidance for Speaking to Witnesses. This meant that SVCAs could "inform complainants about court procedure, updates on the case, the process of giving evidence, and the general nature of the defence case".[85] They were also advised that they should be clear with the complainant about the scope of their role and should take notes, which should be subject to LPP and therefore not disclosable to the defence. The SVCA Scheme Evaluation Report concluded though that any expansion of the pilot scheme would benefit from clear guidance on the degree to which SVCAs can be told about defence statements, along with how this should be appropriately communicated to complainants. We also note that based on evidence from the Criminal Bar Association, the House of Commons Home Affairs Committee also recommended that the role of SVCAs should be defined in a code of practice.[86]

8.66 The scope of information which may be given to the complainant and the risk of contaminating the complainant's evidence is one aspect of ILA and ILR which may encroach into the defendant's right to a fair trial. However, this risk could be adequately managed through guidance and a code of practice. The authors of the SVCA Scheme Evaluation Report took the view that any fair trial concerns about witness coaching were "negated" by the prevalence of legal representation in other jurisdictions "bound by the same right to a fair trial as England and Wales."[87]

Relationship with the wider trial process

8.67 There is a risk that complainants could be further disengaged from the process if expectations set by the provision of ILA and ILR are not delivered in practice.[88] This may be particularly acute if the ILR were limited to making submissions on particular issues, rather than representation of the complainant throughout the trial before a jury.[89] One member of the judiciary also raised the concern that separate legal representation risks damaging the complainant's relationship with the judge. The judge is supposed to make the complainant and other witnesses feel that there is someone who will fairly assess the case and who will intervene if cross-examination becomes unacceptable. One judge explained that an earlier dispute with the judge about the admission of SBE, for example, could have damaged that relationship.

Risk to binary adversarial model

8.68 The binary model means that there are only two parties: the state which must establish the prosecution case, and the defendant who challenges it or presents their own case. The prosecution case is brought by the state against the defendant and the

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84 As set out in *R v Momodou & Limani* [2005] EWCA Crim 177; [2005] 2 All ER 571.

85 SVCA Scheme Evaluation Report, p 33.

86 House of Commons Home Affairs Committee, *Investigation and Prosecution of Rape* (2021-22) p 55.

87 SVCA Scheme Evaluation Report, p 33.

88 For example, Dr Leahy has reported concerns (from people who support complainants at court) that complainants may expect their own lawyer to interject at trial in the way other advocates can, then query their value if they do not: S Leahy, *The Realities of Rape Trials in Ireland: Perspectives from Practice* (2021) p 40.

89 Dr Leahy.

complainant is a witness without separate legal standing or right to be heard. That only the prosecution and the defendant have party status reflects their role and the potential impact of the decision; the state is responsible for investigating and prosecuting offenders, and the defendant faces losing their liberty or other sanctions, being labelled an offender, and having a criminal record.

8.69 We have heard from stakeholders that providing ILR to complainants would be a big change to this current adversarial system, with risks to the provision of a fair trial for the defendant.[90] Providing legal advice and representation to complainants may dilute the binary approach of the adversarial process. The O'Malley Review recognised that the adversarial process requires that a criminal trial is a "binary contest between the prosecution and defence" and concluded that changing this would "risk upsetting that well-established balance".[91]

8.70 The introduction of a third party challenging the defendant means they will essentially be faced with "two prosecutors".[92] Professor Hoyano has argued that providing a wider role for representation for complainants throughout the trial is "perilous on principled, empirical and costs grounds".[93] In 2001, in his review of the criminal courts of England and Wales, Lord Justice Auld rejected Victim Support's submission that complainants be given a formal role in the trial process similar to that found in France and Germany, known in Germany as an auxiliary prosecutor. Lord Justice Auld said that:

> It is difficult to see how such a scheme would fit our adversarial system, in which there are only two parties and the hearing is a substitute for private vengeance not an expression of it. To put an alleged victim whose account the defendant challenges — as will often be the case — in the ostensibly privileged role of an auxiliary prosecutor would be unfair. Whilst the current concern for the plight of victims in the criminal justice process and the steps taken to right it are thoroughly justified, care must be taken, in particular when there is an issue as to guilt, not to treat [the defendant] in a way that appears to prejudge the resolution of that issue.[94]

8.71 While the potential impact on the current adversarial system is noted by many, not all agree it is fatal to the introduction of some forms of ILA and ILR.[95] The impact on the binary adversarial model would depend greatly on the scale and model of ILA and ILR introduced. For example, a binary system would be most disrupted if complainants were given full party status, resulting in three parties with equal standing throughout proceedings. ILA, however, without any representation, would not have any impact on

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90 Sir John Gillen and a member of the judiciary.

91 T O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* ("O'Malley Review") (July 2020) para 6.16-6.17.

92 L Hoyano, "Reforming the adversarial trial for vulnerable witnesses and defendants" [2015] *Criminal Law Review* 107, 112.

93 Above, pp 115-119.

94 Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (September 2001), ch.11, paras 69-75.

95 See for example, R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021). Killean argues that the adversarial process itself does not pose an insurmountable barrier to legal representation. See also, F Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] *Criminal Law Review* 729.

the party status of the defendant and prosecution, maintaining the typical binary adversarial model.

8.72 While the binary model is well-established, it is not absolute. There are already occasions when a third party has the right to be heard in criminal proceedings. This includes confiscation proceedings under the Proceeds of Crime Act 2002,[96] applications on press and reporting restrictions,[97] applications for non-disclosure due to public interest immunity,[98] and as we have discussed above, witness summons regarding the production of confidential information. Additionally, courts have exercised their discretion to allow individuals and groups to intervene in proceedings relating to criminal trials. While rare for individuals, it occurs more often for interest groups or government representatives,[99] largely in appeals which will determine a point of law, rather than in relation to fact-sensitive decisions.

8.73 Further, one former senior prosecutor noted that the traditional adversarial system is not well-placed to deal with nuanced cases, for example where issues around disclosure of a complainant's personal records arise. A change in the binary model could therefore be beneficial to take account of these interests.

8.74 We also heard from a number of stakeholders, including members of the judiciary and practitioners, that ILR was not necessary to protect the complainant's rights and ensure their views are before the court, as that is the responsibility of the prosecution. For example, one practitioner and Recorder argued that decisions on SBE applications are legal rulings, and the judge is determining a question of law on the basis of representations from both the prosecution and defence, which does not require the complainant's involvement.

8.75 Other practitioners also argued that if the complainant is properly consulted, the prosecution are able to deploy specific and relevant arguments.[100] Some have suggested that arguments on behalf of the complainant form part of the public interest arguments in a case, so if the prosecution operated effectively then there would be no

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96 Where the confiscation proceedings affect an asset in which the third party has an interest: Proceeds of Crime Act 2002, s 10A(2).

97 Before making a restriction on reporting or public access, the court must ensure that every person directly affected is present or has had an opportunity to attend or to make representations: CrPR 6.2.

98 For example, under Part 15 of the CrPR, where the prosecutor wants the court to decide on the question of disclosure, the prosecutor must make an application in writing and serve it on any person who would be directly affected by disclosure. In a hearing on the issue, the court will generally consider representations by the prosecutor and anyone else served with the application, before considering representations from the defendant: CrPR 15.3(7).

99 The court will allow interventions where it would best assist the administration of justice. This will likely occur where the court regards the expertise of a third party as useful in resolving the legal issues. In one notably rare case, an individual (Emily Hunt, now a special adviser to the MoJ on the Rape Review) was given permission to intervene in an appeal against a conviction for voyeurism. The appeal was to determine an issue of law (the meaning of the phrase "private act" in the context of the voyeurism offence in s 67 of the Sexual Offences Act 2003) which would have been resolved a few days later in a judicial review application lodged by Ms Hunt. The appeal was dismissed; the Court of Appeal agreed with the interpretation advanced by Ms Hunt in her judicial review. See also, *R v A (Joinder of appropriate Minister)* [2001] 1 WLR 789: a government minister was given permission to join as a party to an appeal (before trial) against a determination under section 41 YJCEA 1999 on admissibility of sexual behaviour evidence.

100 Dame Elish Angiolini; a former prosecutor; and members of the judiciary.

issue requiring separate representation.[101] Further, separate representation could convey the impression that the state does not represent the interests of individual victims or witnesses. Judges and practitioners have suggested that evidence either meets the relevant threshold and is admissible or not. Therefore, the only difference from the prosecution case offered by ILR would be framing legal arguments in a more emotive way.[102] However, the value of individual complainants' input on applications regarding their personal information is not limited to emotion. The complainant will usually be the only person who has full knowledge of, and context for, the evidence sought to be admitted. As we explain above, complainants and their legal representatives will therefore be able to draw information to the attention of the court which may not otherwise be before it. This will help ensure that decisions regarding such evidence are as fully informed as possible. Further, the ability to put forward the same position but for different reasons is justified where the interests or rationale of the prosecution and the complainant do not align.

The defendant's right to a fair trial

8.76 These legitimate concerns raised about the provision of ILA and ILR to complainants in sexual offences suggest that such provision could negatively impact on the defendant's right to a fair trial. As we have noted above, for example, there is a risk of witness coaching; information provided to the complainant and potential contamination of their evidence could unfairly disadvantage the defendant.

8.77 The most significant concern for the defendant's right to a fair trial arises from the potential dilution of the binary adversarial model. The Gillen Review has summarised this concern: "third party representation of complainants will elevate private interests of the complainant to a par with those of the State, contravening criminal justice norms of public prosecution."[103]

8.78 However, provision of ILA and ILR is not necessarily incompatible with a defendant's right to a fair trial. First, the risks identified could be adequately managed. For example, guidance and enforced codes of practice can help prevent witness coaching, as they do currently in respect of ISVAs. Delay and costs, depending on the model of ILA and ILR adopted, may not be significant.[104]

8.79 Secondly, the extent of the ILA and ILR can either aggravate or mitigate these risks. Affording the complainant full party status would impact most strongly on the defendant's right to a fair trial. However, this is not the only way of extending the benefits of ILA and ILR to complainants. Models where the ILR is more targeted and less general would be more proportionate and avoid the concerns about "two prosecutors".

8.80 Thirdly, changes to the typical trial model do not automatically interfere with the defendant's right to a fair trial. Throughout this consultation paper we have explored ways in which the trial system is justifiably different in the context of sexual offences,

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101 Dame Elish Angiolini; a former prosecutor; and members of the judiciary.

102 A criminal justice stakeholder and members of the judiciary.

103 The Gillen Review, para 5.71.

104 See para 8.153 below.

in ways that are compatible with the ECHR. Further, we have outlined, at paragraph 8.72 above, examples where parties other than the prosecution and defendant can make representations in criminal proceedings where they have a specific interest to represent or protect.

8.81 A number of ECHR member states, as we set out below, provide ILR for complainants in sexual offences. This has not been found to be incompatible with the defendant's rights under the ECHR. For further discussion of the right to independent legal representation in the context of the ECHR, see Appendix 2.

8.82 While the defendant's right to a fair trial is absolute it does not prevent states from implementing measures that protect the rights of complainants while still guaranteeing a fair trial.[105] There are obligations on states to protect privacy rights, and to provide legal assistance to complainants in sexual offences.

8.83 The right to legal representation in the ECHR applies only to those charged with a criminal offence, and not to complainants or other witnesses. However, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention") places an obligation on contracting states to "provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law"[106] for complainants of gender-based violence,[107] including complainants of sexual offences. Further, states have an obligation to ensure the right to respect for private life under article 8 of the ECHR. Providing legal advice or representation to complainants in sexual offences where issues of their right to privacy arise could be a form of compliance with this obligation.[108]

8.84 Case law in Scotland has determined that the requirements of article 8 of the ECHR are not satisfied unless the complainant or their representative is heard on applications concerning their medical records.[109] In Ireland, the O'Malley review found that representation of complainants in respect of applications for disclosure of their counselling records struck a reasonable balance between the defendant's right to a fair trial and the complainant's right to privacy.[110]

8.85 Academics in comparable jurisdictions have argued that ILR for complainants for determinations that impact their privacy rights does not breach the defendant's right to

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105 See for example, *Goeckce v Austria* (2007) in which the Committee on the Elimination of Discrimination against Women asserted that the defendant's rights including the right to a fair trial cannot "supersede women's human rights to life and to physical and mental integrity" (at para 12.1.5).

106 Art 57. The Convention was ratified by the UK on 22 July 2022 and entered into force in this jurisdiction on 1 November 2022.

107 For these purposes gender-based violence includes "violence that affects women disproportionately", therefore the obligation would apply to complainants of any gender if they have been a victim of a violent offence that disproportionately affects women, such as sexual offences.

108 See *JL v Italy App* No 5671/16 and E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) pp 16-17.

109 *WF v Scottish Ministers* [2016] CSOH 27 at [39].

110 O'Malley Review, para 6.40.

a fair trial. As Raitt has noted, most arguments against ILR on the basis of the defendant's fair trial rights rely on the principle that ILR that affords legal standing to the complainant is at odds with the equality of arms said to be necessary for a fair trial.[111] However, as we explore above, criminal law proceedings already have provisions for legal representation for third parties including record holders at hearings to decide the admissibility of sensitive or personal records. Raitt concludes, therefore, that the equality of arms principle cannot be determinative of a defendant's right to a fair trial.

8.86 Academics such as Iliadis, Smith, and Doak conceptualise the right to a fair trial as one of "a collective view of justice".[112] They refer to domestic case law where courts have acknowledged that a fair trial is not only measured by the impact on the defendant.[113] They therefore consider that, where provided to complainants in "defined circumstances", ILR can protect their right to a private life "without unduly interfering with the due process rights of the accused"[114] ensuring the defendant's absolute right to a fair trial is not infringed. As Raitt states:

> ILR does not give complainants an advantage over the accused—it only compensates for the vacuum created by the absence of someone to represent complainants' legitimate rights.[115]

Similarly, Killean has argued that it is not inevitable that affording rights to the complainant results in diminished rights of the defendant. Instead, Killean argues that "caution" is needed when determining the form that ILR should take in order not to "unfairly disadvantage" the defendant.[116]

8.87 We are not persuaded that all forms of ILA and ILR are incompatible with the defendant's right to a fair trial. Instead, we consider that ILA and ILR may be necessary to protect the complainant's article 8 rights and to the pursuit of justice, without infringement of the defendant's right to a fair trial.

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111 F Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] *Criminal Law Review* 729, citing A Ashworth, "Crime, community and creeping consequentialism" [1996] *Criminal Law Review* 220 and J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008).

112 M Iliadis et al, "Independent Separate Legal Representation for Rape Complainants in Adversarial Systems: Lessons from Northern Ireland" (2021) *Journal of Law and Society* 250.

113 For example, May LJ in *R (On the application of TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin), a case involving witness summons for personal records, quoted Munby J in *Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam) "procedural fairness is something mandated not merely by article 6, but also by article 8".

114 M Iliadis et al, "Independent Separate Legal Representation for Rape Complainants in Adversarial Systems: Lessons from Northern Ireland" (2021) 48(2) *Journal of Law and Society* 250, 261.

115 F Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] *Criminal Law Review* 729, 744.

116 R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021) p 180.

COMPARATIVE LAW

8.88 Many studies and reviews have noted that a significant number of jurisdictions have more extensive provision for ILA and/or ILR for complainants in sexual offences cases than England and Wales. As part of their evaluation of the SVCA Northumbria pilot, academics undertook a scoping exercise to determine the extent of ILA and ILR in jurisdictions that have both an adversarial model, and a similar right to a fair trial as in England and Wales.[117] They found that "seven of the 12 'pure' adversarial jurisdictions offered rights-based legal advocacy for complainants, and in six of these[118] the lawyer could make submissions to the court".[119] Further, in four[120] of those 12 jurisdictions, there are provisions that permit legal advocacy for applications to admit SBE. Of the eight where such provision is not yet established, five had either a plan to implement, or an ongoing review about whether to implement, such provision.[121]

8.89 In their recent briefing calling for an extension of ILA for complainants, Rape Crisis Scotland also noted that many European jurisdictions have provision for ILA and ILR. They summarised:

> Sweden provides legal advice throughout proceedings and about police processes. In Denmark, guidance is given on cross examination. There are similar provisions in Norway and Finland.[122]

8.90 The Gillen Review noted that in France the complainant has party status, civil and criminal claims are heard together and the complainant's lawyer has equivalent status to the prosecution and defence. In Germany, complainants may be legally represented in relation to applications to exclude the public or defendant from proceedings. They are also entitled to a representative with similar rights to the prosecution. The Gillen Review also considered a range of common law jurisdictions and noted a "clear discernible trend" towards the provision of legal representation. We now look at the most relevant jurisdictions in more detail.

Scotland

8.91 In Scotland, complainants in criminal proceedings are entitled to publicly funded legal representation in relation to applications for disclosure of their personal records. In *WF*

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117 E Daly and O Smith, *Scoping Review: Legal & Non-Legal Advocacy for Rape Complainants in Adversarial Jurisdictions* (2020).

118 With the exception of Namibia.

119 SVCA Scheme Evaluation Report, para 4.3.

120 Canada, India, Ireland, US.

121 Of the countries considered by the scoping report, only New Zealand, South Africa and South Sudan did not have any such provision, plan or ongoing review. The authors noted however that those three jurisdictions have either "much stricter rules on sexual history, specialist courts to ensure collaboration with complainants, or are young democracies with developing legal processes", see SVCA Scheme Evaluation Report, para 4.4.1.

122 ` Rape Crisis Scotland, *Beyond ILR: The Case for Independent Legal Advice for all Survivors of Sexual Violence* (2022) p 3.

v Scottish Ministers,[123] Lord Glennie (referring to the case of *R (TB) v The Combined Court at Stafford*),[124] stated that the complainant should have an opportunity to be heard before an order for recovery of their medical records was made, "if there is not to be a breach of the [complainant's] Article 8 rights". He noted that without this, the court could not carry out the balancing of the defendant's and complainant's rights as required. Without information from the complainant regarding any particular sensitivities, the process would not satisfy the requirements of article 8 of the ECHR. It followed from this that the complainant in the case was entitled to legal representation to be so heard. In this judgment, Lord Glennie made clear that the complainant would still only participate in the criminal trial as a witness, as the application for the records on which they had a right to be heard was not part of the criminal proceedings against the defendant.

8.92 The Dorrian Review of the prosecution of sexual offences in Scotland considered the extension of ILR beyond applications for personal records. The Review group noted that at present, complainants are not permitted to be independently legally represented in relation to applications to admit evidence of their sexual behaviour or character (whether in relation to sexual matters or otherwise).[125] The Review group agreed with the findings of Keane and Convery[126] that applications to admit this type of evidence involve sensitive and intimate information. They also noted that courts have confirmed that applications relating to evidence of the complainants' sexual behaviour or character "are likely to" engage article of 8 of the ECHR.[127] The Review group recommended that publicly funded ILR should be made available to complainants in respect of applications to admit SBE and character evidence, with representation at any later hearings in respect of further restricting the evidence permitted[128] to be at the judge's discretion. In April 2023 the Victims, Witnesses, and Justice Reform (Scotland) Bill was introduced to the Scottish Parliament. The Bill would give effect to the Review group recommendation by introducing an automatic right to legal representation, funded by the state, for complainants in regard to SBE applications or applications to admit evidence of the complainant's "bad character".[129]

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123 *WF v Scottish Ministers* [2016] CSOH 27. In that case a complainant in criminal proceedings for domestic assault sought judicial review of the Scottish authorities' refusal of legal aid for her to be represented in proceedings brought by the defendant for the disclosure of her medical records under the Criminal Procedure (Scotland) Act 1995, s 301A, for the recovery of documents by commission or production.

124 [2006] EWHC 1645 (Admin) at [38], [39], [41], [43] and [48].

125 Within the meaning of Criminal Procedure (Scotland) Act 1995, ss 274-275.

126 E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) p 116.

127 The Rt Hon Lady Dorrian, *Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (Scottish Courts and Tribunals Service, March 2021) ("Dorrian Review") para 4.36.

128 The Dorrian Review, Recommendation 3(b)(iv). Criminal Procedure (Scotland) Act 1995, s 275(9) permits review hearings to limit further the permissible evidence.

129 Victims, Witnesses, and Justice Reform (Scotland) Bill, cl 64. For further discussion of non-defendant bad character evidence, see Chapter 5.

Northern Ireland

8.93 In April 2021, the Northern Ireland Department of Justice launched a Sexual Offences Legal Advisors ("SOLAs") pilot scheme. This scheme continues to provide adult complainants in sexual offences cases with publicly funded legal advice from qualified lawyers before or after a formal complaint has been made to the police. Advice is provided on a wide range of issues with a particular focus on privacy rights and SBE. SOLAs have also taken on the role of engaging with the prosecution regarding their clients' wishes. We have been informed by Sir John Gillen that by June 2022, 433 individuals have benefited from legal advice, with an uptake rate of over 95% of referrals to the scheme. A full evaluation is being carried out but feedback from service users has been universally positive. Further work to develop legislative proposals in relation to pre-trial legal representation for complainants in court is underway.[130]

8.94 This pilot scheme was introduced following recommendations in the Gillen Review. At the time of the Gillen Review, there was no publicly funded legal representation for complainants in sexual offences proceedings in Northern Ireland. As noted above, the Review analysed the extent of legal representation available in other jurisdictions.[131] The Review noted that there was very substantial public support for the proposals for legal representation via their online survey.[132]

8.95 The Review recommended publicly funded representation for complainants as "essential" to enhance their confidence in the system and to recognise their rights to privacy. It recommended that legal advice and legal representation be extended to oppose cross-examination on sexual behaviour and disclosure of personal records and that legal advice should be available regarding the legal process from the point that an allegation is first reported to the police. Among the reasons given were that: such an approach is consistent with common practice in other common law jurisdictions; the absence of legal representation may be a factor in under-reporting and withdrawal of allegations; and safeguarding the complainant's rights is not the main role of the court or the prosecution, who must also consider the public interest and the defendant's right to a fair trial. The Review also considered that the wider role of advisers, and advice that may be given, will operate as another "confidence building block" for complainants.[133] Aspects of the role considered by the Review included: presence during an ABE interview; raising queries regarding delay; progress of the case; reasons for adjournments; the available special measures; meetings with prosecution counsel; being present at preliminary hearings including challenging the scope of intended questioning.[134]

8.96 The Review recommended against an immediate extension of legal representation to the trial itself because this "might confuse the jury as to the respective roles of

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130 Sir John Gillen, written submission (June 2022).

131 The Gillen Review, pp 167-171.

132 Above, para 5.113.

133 Above, para 5.70.

134 Above, paras 5.86-5.88.

counsel".[135] Instead, they recommended that consideration be given and cost analysis be carried out of extending legal representation to examination in chief and cross-examination at trial only after piloting and analysis of the recommendation for pre-trial legal advice and representation.[136]

Ireland

8.97 In Ireland, complainants in sexual offences proceedings are entitled to be independently legally represented in respect of applications to disclose their counselling records.[137]

8.98 Complainants are also entitled to be legally represented in relation to applications to introduce sexual behaviour evidence.[138] The prosecution must also notify the complainant of this entitlement as soon as practicable after an application is made and the complainant must be afforded reasonable opportunity to arrange legal representation.[139]

8.99 The O'Malley Review into the prosecution of sexual offences recommended that these provisions be extended beyond rape and aggravated sexual assault to all sexual assaults.[140] The Review noted that the Legal Aid Board, who instruct counsel to act for the complainant, often received insufficient notice of an application and were therefore not able to instruct counsel of comparable experience to the prosecution and defence. The Review proposed to address this by requiring a SBE application to be made at (a newly introduced) pre-trial hearing. It recommended that applications made after this date would only be permitted where there was good reason.[141] It concluded that it would assist the judge if counsel for the complainant could bring to the court's attention failures to comply with directions made regarding SBE during cross-examination of the complainant. In view of this, it recommended that representation should be extended to allow counsel for the complainant to be present for this part of the trial.[142]

8.100 There is also provision for funded legal advice for complainants of certain sexual offences.[143] The O'Malley Review noted that this provision is not well known and recommended, as above, that it be extended to include complainants of more sexual offences.[144]

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135 Above, p 13.

136 Above, Recommendation 40-44.

137 Criminal Evidence Act 1992, s 19A(9), as amended by the Criminal Justice (Sexual Offences) Act 2017.

138 Criminal Law (Rape) Act 1981, s 4A, inserted by the Sex Offenders Act 2001, s 34.

139 Above.

140 O'Malley Review, para 6.10. The Irish Government have published a General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 which would give effect to this recommendation (Head 5 of the General Scheme).

141 The O'Malley Review, paras 6.11-6.14.

142 The O'Malley Review, para 6.15.

143 Civil Legal Act 1995, s 26(3A) as amended by the Civil Law (Miscellaneous Provisions) Act 2008.

144 The O'Malley Review, paras 7.13 and 7.14.

Canada

8.101 A number of jurisdictions in Canada provide legal advice, free of charge to the complainant. In some provinces this is capped at a maximum of 4, and in some it is only available by phone.[145] Complainants are also entitled to be legally represented in relation to applications to disclose their personal records and admit SBE.[146] Complainants have legal standing to make an application for measures to assist them to give evidence. This does not explicitly include the right to legal representation.[147]

New South Wales

8.102 In New South Wales, in relation to applications made to disclose counselling records, the complainant of any sexual offence, or their legal representative, can be heard in court to oppose the application by asserting their confidential privilege over the records. This extends to any part of the proceedings where the material may be introduced including the trial or sentencing, pretrial and interlocutory proceedings, along with preliminary criminal proceedings such as committal proceedings and bail hearings.[148] The court must be satisfied that the complainant has been given "reasonable opportunity to seek legal advice".[149]

8.103 Legal Aid New South Wales advised that the Sexual Assault Communications Privilege Service (SACPS) can provide free ILR for sexual assault complainants regarding privilege matters.[150] All sexual assault complainants who need legal help in relation to this privilege can access a lawyer for advice and to represent them in court. There is no means or merits testing for this.[151]

WHAT SHOULD BE AVAILABLE

8.104 There are a significant number of benefits to providing ILA and ILR to complainants in sexual offences proceedings in respect of applications concerning their personal records and SBE. A significant number of comparable jurisdictions already provide it to some extent. However, we are alert to the concerns discussed at paragraphs 8.54 to 8.87 above. In this section we will consider different models of ILA and ILR, provisionally proposing a model that maximises the benefits identified while mitigating the concerns raised.

8.105 Currently, most requests for personal records are made after the complainant has given their interview to police. We have provisionally proposed a model of judicial oversight that would likely mean that most disclosure requests for personal records

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145 In Ontario (with a costs cap of four hours work) and Québec, there is free telephone legal advice. In Nova Scotia there is two hours free ILA on the phone or in person. In Alberta, Yukon and Saskatchewan there is up to four hours of free ILA.

146 For personal records: Criminal Code, ss 278.4(2) and 278.4(2.1). For sexual behaviour evidence: Criminal Code, ss 278.93, 278.92(2) and 278.94(3).

147 Criminal Code, s 486(1).

148 Criminal Procedure Act 1986, ss 299A and 295(1).

149 Criminal Procedure Act 1986, s 299.

150 See Chapter 3 for further discussion of this provision.

151 "Subpoena Survival Guide" Legal Aid New South Wales.

are made after the defendant has been charged.[152] Applications to admit SBE would also be made post-charge, when court proceedings have commenced. Complainants may wish to seek legal advice about either of these issues at any point before or after reporting. Advice may necessarily be more generalised before criminal proceedings have commenced. Advice usually includes assistance with the process; the adviser can directly engage with other parties including the police and CPS, in writing or orally.[153] For requests for personal records this may mean speaking directly with the police or CPS, requesting information, or responding on the complainant's behalf to the request for access.

8.106 Advice and assistance, however, may not be sufficient to protect complainants' privacy interests in this regard; a right to be heard in court when considering related applications may be needed. If the complainant is given the right to be heard to ensure their engaged rights are advanced, it should include the right to be legally represented in order for the right to be heard to be meaningful. As Lord Glennie stated in *WF v Scottish Ministers*: "If the complainer has a right to be heard, whether initially or at some later stage, it must follow that she is entitled to legal representation".[154] This would mean that the adviser or representative can respond to applications to the court, and make representations to the judge, advocating for the complainant's position. For applications to the court regarding admissibility of personal records or SBE, that representation may include responding to the application and making submissions to the court on behalf of the complainant.

8.107 Currently, complainants can privately instruct solicitors to provide them with legal advice. However, without any formal right to do so, the extent to which they can access such legal advice is limited. First, by their own resources, and secondly, by the standing that the adviser has to access documentation and engage directly with police, prosecutors and the court where necessary. Formalising the right to access legal advice and representation for complainants in respect of requests and applications for personal records and SBE could address these limitations.

Legal advice and assistance

8.108 We have heard substantial support for ILA to be provided to complainants.[155] There are current calls to include provision of free legal advice to complainants in the Victims and Prisoners Bill.[156] Better informing, advising and assisting complainants does not

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152 See Chapter 3.

153 See, for example, Sentencing and Punishment of Offenders Act 2012, s 8.

154 [2016] CSOH 27 at [46].

155 From stakeholders including a victim and campaigner; an Irish researcher; Sir John Gillen; End Violence Against Women; Dr Olivia Smith; Eamon Keane; and a member of the judiciary. Also from reviews including the SVCA Scheme Evaluation Report and the Gillen Review.

156 In the second reading of the Victims and Prisoners Bill, MPs including Steve Reed, Sarah Champion, Apsana Begum, Kate Kniveton, Janet Daby, and Anna McMorrin have spoken in support of providing complainants with free legal advice to support them through the criminal justice process and reduce the numbers who disengage: *Hansard* (HC), 15 May 2023, vol 732. Victim support and campaign organisations in a joint briefing have called for the Victims and Prisoners Bill to include provision of independent legal advice and representation to "ensure victims/survivors' rights are respected…" and to "boost the confidence of victims/survivors when engaging with the criminal justice process". They suggest that legal advisors could

interfere with the defendant's right to a fair trial. Any delay caused by requesting advice should be minimal and would be proportionate given the benefit to the complainant and the proceedings in general. The concerns about witness coaching and LPP do arise. However, formalising the role of legal advisers presents an opportunity to establish the parameters of the role. The SVCA Scheme Evaluation Report concluded that any legal advice model requires clearly established parameters. This may avoid unintended consequences that may impact on complainants, defendants and the overall investigation and trial process. Parameters may include the following:

(1) That the complainant's legal adviser may not accompany the complainant during their ABE interview.

(2) That any legal advice at any stage of the process must take account of the rules against witness coaching and the professional codes of conduct for solicitors and barristers. Professional guidance that currently assists legal professionals to fulfil their obligations to their client and court in this regard could assist.[157] This would not be unique to the provision of legal advice in this context. Information may already be given to complainants on a variety of issues;[158] there is already case law[159] and CPS Guidance[160] on the scope of legal advisers and representatives speaking to witnesses. Legal advisors and representatives for complainants could similarly operate within the current rules on witness coaching, with concerns about coaching addressed by drafting guidance and a code of practice which clearly delineates the role of the adviser.

8.109 To be effective, legal advice in respect of requests and applications for personal records and SBE should include advice on: procedure; any legal test; complainants' rights; use and extent of evidence once admitted; and grounds of challenge where relevant. Assistance should include: engaging directly with police and prosecutors; providing written or oral responses to queries and requests; and making written or oral requests. Legal advisers may need to know basic details of the prosecution and defence case and the evidence sought to be admitted, to be able to advise fully and frankly.

8.110 Advice alone (without assistance) could be too limited to achieve the benefits to complainants and the trial process that ILA can provide. Without access to documents

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assist with applications relating to personal records, Victims' Right to Review certain CPS decisions, complaints to police and the CPS and other issues that arise during the criminal justice process: Centre for Women's Justice, Rape Crisis England & Wales, Rights of Women, End Violence Against Women Coalition, *Briefing: Independent Legal Advice and Representation for Survivors of Sexual Violence and Abuse* (May 2023).

157 Based on evidence from the CBA, the House of Commons Home Affairs Committee recommended that the role of SVCAs should be defined in a Code of Practice. See House of Commons Home Affairs Committee, *Investigation and Prosecution of Rape*, (2021-22), p 55.

158 For example when there is an application for a witness summons (CrPR 17.5); when the prosecution makes an application for public interest immunity (CrPR 15.3); where the court permits the introduction of SBE (CrPR 22.3); where third-party material is disclosed to the defence (CPS, *Speaking to Witnesses at Court Legal Guidance*, (March 2018), para 3.4(3)(ii).).

159 For example, see *R v Momodou & Limani* [2005] EWCA Crim 177; [2005] 2 All ER 571, paras 48-49.

160 CPS, *Speaking to Witnesses at Court Legal Guidance* (March 2018).

or to communication with others involved in the process, the ability to give meaningful individual advice may be hampered. Granted, if the complainant is later legally represented, their legal representative will be able to engage directly with the material and other parties. However, this possibility does not resolve the need for assistance alongside advice. For example, not all complainants may choose or need a legal representative. Further, assistance may be needed at an earlier stage in proceedings when a representative is not required, such as in advance of an ABE interview when the complainant may be questioned about their sexual behaviour, or when the police early on in their investigation request access to the complainant's personal records.

8.111 There are a few ways in which legal advice can be provided. Ireland provide legal advice leaflets on specific topics such as personal records.[161] Information leaflets like this could be helpful for complainants and others who work on such cases. Legal information leaflets are cost effective and can be made widely and easily accessible. However, they can only provide legal information and not advice. The information would be generic and is therefore no substitute for the provision of legal advice tailored to the complainant's circumstances and questions.

8.112 Some provinces in Canada offer only free legal advice by telephone.[162] Phone or web-based support can provide the tailored advice required, but in a more cost-effective way than in-person advice. It may be more appropriate for complainants who have urgent queries or who are unable to access in-person meetings. Remote advice will not always be appropriate, however, if the adviser needs to review documents or engage with the police or prosecution.

8.113 A comprehensive and cost-effective model of legal advice could include a mixture of information leaflets (for basic information on procedure and rights, for example), online and telephone advice (for urgent or remote queries) and in-person advice and assistance where necessary and appropriate (for example where there are physical documents and when direct engagement is required). This would be most effective if complainants were made aware of their right to advice when the relevant issues arise in their case. For example, when police make a request to access personal records, they could inform the complainant that they have the right to seek legal advice.

Legal representation

8.114 The support for ILR is less clear-cut. The concerns we have described above apply more obviously in respect of ILR than ILA. It is more costly, more likely to cause delay, has greater risk of interference with the binary adversarial process and, relatedly, the defendant's right to a fair trial. However, we are provisionally of the view that many of the benefits described above can only be achieved with ILR. Legal representation is needed to enable more complainants effectively to respond to and challenge requests and applications that can result in the use in court of their sensitive personal information. The improved culture and more proportionate requests noted by the authors of the SVCA Scheme Evaluation Report came about because of the ability of the SVCAs to challenge those requests, not just provide advice. The authors of the

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161 Office of the Director of Public Prosecutions, Ireland, "Releasing my counselling recordshttps://www.dppireland.ie/app/uploads/2019/03/Releasing_my_counselling_records_ENG_revised_Feb_2019.pdf" (Feb 2019).

162 Such as Québec and Nova Scotia.

evaluation recommended that the pilot be rolled out throughout England and Wales, and include both ILA and ILR.[163] Victim support organisations have recently called for provision of both ILA and ILR to be included in the Victims and Prisoners Bill.[164]

8.115 As described at paragraph 8.13 above, there is already precedent for providing complainants the right to make representations where a witness summons is sought in respect of their personal records. It is inconsistent that this right only arises where the complainant and/or the third party have declined to provide the police with access to the records when the potential breaches to the complainant's privacy may arise well before this. The need for legal representation may equally arise at other stages.[165]

8.116 We provisionally conclude that in principle it is appropriate to extend provision of both legal advice and legal representation to complainants in sexual offences cases for advice, assistance and to make representations on requests and applications for personal records and the admission of SBE. Concerns raised about extended legal representation could be addressed, or mitigated, by the model for providing such advice and representation.

8.117 While access to ILA and ILR has been established in many jurisdictions, as described above, there is no single model that has emerged.[166] We explore here the three models that arise commonly in the literature and practice.

Representation limited to pre-trial hearings

8.118 This would involve representatives being able to advise their client throughout, to advocate to police and prosecutors, and to represent the complainant at pre-trial hearings where applications involving personal records or SBE are being heard. They would be able to make submissions in writing and orally in response to such applications. Pre-trial hearings are separate from, and are completed before the trial, so the jury is never present. They are used to determine ancillary questions such as timetabling, process and admissibility of evidence.

8.119 This would ensure that advice and representation is available until the point the judge makes a decision as to the admissibility of the relevant evidence. However, it would preclude representation when that evidence is used in the trial and the complainant is cross-examined about it.

Representation at trial and when the complainant's oral evidence is given

8.120 This would involve the above, plus the presence of the representative during the trial. When that evidence is used at trial, when the complainant is giving evidence and being cross-examined, or if any related issues arise during trial, the representative

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163 SVCA Scheme Evaluation Report, appendix 4.

164 Centre for Women's Justice, Rape Crisis England & Wales, Rights of Women, End Violence Against Women Coalition, *Briefing: Independent Legal Advice and Representation for Survivors of Sexual Violence and Abuse* (May 2023).

165 The need for legal representation may arise when the police make a disproportionate request, or access the records, or when decisions are made to disclose any records to the defendant.

166 R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021) pp 184-185.

could engage. For example, occasionally the need to apply to admit SBE or disclose personal records may only arise as a result of evidence given at trial. If the complainant's representative is present, they would be able to respond to such an application promptly. That engagement could also include making representations to the court, either with or without the jury present. For example, if the complainant is being cross-examined and is asked a question about their sexual behaviour beyond the extent permitted by the court's prior ruling on the admission of SBE, the representative could raise an objection with the court to prevent the line of questioning. If that is found to be appropriate, this model may necessitate the representative being present when the complainant gives evidence even when given separately from the trial, such as pre-recorded cross-examination or examination in chief.[167]

Full party status

8.121 Affording complainants full party status would ensure that they are able to engage fully in all aspects of the proceedings as an equal party, to seek independent legal advice and be represented throughout the proceedings. This would include making submissions to court, calling and cross-examining witnesses. While this would include advice and representation in relation to personal records and SBE, it would also go far beyond that.

Analysis

8.122 The full party status model would be the most costly and introduce the most delay.[168] As explained above, a prominent criticism of ILR is that it is incompatible with the common law adversarial system where significance is placed on the principle of equality of arms. Introducing full party status for the complainant would have the biggest impact on the binary adversarial model throughout the trial process including at any appeal.

8.123 Other stakeholders have suggested that full party status would subvert the role of the complainant as a witness. As one defence barrister advised, the basic guiding concept should be that a witness is present to give evidence, not to have wider involvement in proceedings. Full party status may "elevate private interests of the complainant to a par with those of the State, contravening criminal justice norms of public prosecution".[169]

8.124 A further concern with full party status is that it may displace the current responsibilities for the prosecution and the court to ensure fair procedures for all participants, with no guarantee of better protection for the complainant. Studies from other jurisdictions where complainants are represented have found the complainant's

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167 For more on this, see Chapter 7.

168 Dr Leahy.

169 The Gillen Review, para 5.71.

legal representative too hesitant to intervene or not sufficiently proactive or that their presence does not deter perceived harsh cross-examination.[170]

8.125 Many recognise that these concerns would be met by providing a model of ILR that does not equate to full party status. Academics such as Killean and Raitt have argued that fair trial rights of the accused are not prejudiced by ILR when complainants are not given full party status with equal participatory rights.[171]

8.126 There is broader support for ILR for complainants at pre-trial hearings on topics relating to their right to privacy. The authors of the SVCA Scheme Evaluation Report recommended that it was essential that complainants' legal representatives could make submissions to the court, for example, at pre-trial hearings but without them being given party status or making submissions before the jury at trial.[172]

8.127 The need for such representation at pre-trial hearings, when the majority of applications regarding personal records and SBE will be heard, is clearest. There are concerns that third-party representation at trial may confuse jurors' understanding of the complex issues, and the role of the parties, to the detriment of the defendant.[173] For example, the Gillen Review noted that the presence of additional counsel for the complainant may create a perception amongst the jury about a lack of equality of arms between the prosecution and the complainant on one hand and the defence on the other.[174] In essence, it can appear to be two (the complainant and prosecution) against one (the defendant). Pre-trial hearings are in the absence of the jury so this concern would not arise. It is a simpler model that would make defining the role and parameters of ILR for complainants easier, resulting in a more consistent approach. Some have specified that ILR should extend only to pre-trial hearings such as Ground Rules Hearings, and after that point the onus would be on the judge to ensure compliance with rulings.[175]

8.128 If it is appropriate for ILR to ensure that the process of seeking and admitting sensitive personal information is robustly challenged and scrutinised by an independent legal representative, it could be argued that it is appropriate to extend that scrutiny to the deployment of the evidence at trial. Evidence from the use of SBE at trial suggests that cross-examination can stray beyond the confines of the agreed lines of

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170 L Hoyano, "Reforming the adversarial trial for vulnerable witnesses and defendants" [2015] 2 *Criminal Law Review*, 107 citing Brienen and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (2000), pp 380 (Germany), 536–538 (Italy), 738–740 (Norway); I Bacik, C Maunsell, S Gogan, *The Legal Process and Victims of Rape: The Dublin Rape Crisis Centre and the School of Law* (1998) pp 17, 125–127, 157.

171 See for example, R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021) pp 184-185; and F Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] *Criminal Law Review* 729.

172 SVCA Scheme Evaluation Report, para 4.3.

173 T Kirchengast, "Victim legal representation and the adversarial criminal trial: a critical analysis of proposals for third-party counsel for complainants of serious sexual violence" (2021) 25(1) *International Journal of Evidence and Proof* 53, 57.

174 The Gillen Review para 5.103.

175 Dr Leahy.

questioning, undermining the scrutiny of the application process.[176] However, representation at trial is closer to full party status, or at least it may appear to be to the jury and defendant. ILR during the complainant's cross-examination about personal records or SBE may be even more problematic. It may be difficult to explain the presence of counsel to the jury and again may cause unnecessary delay and additional cost.

8.129 It could be possible to allow complainants' legal representatives to make representations at pre-trial hearings and, without the jury being present, during the trial. This would enable the representatives to respond to issues that arise after the pre-trial hearing, providing a consistent and comprehensive service in respect of personal records and SBE. However, this would not dilute the adversarial binary model because it would not confer full party status on the complainant, nor would it risk affecting jurors' perception of equality of arms.

8.130 There is support for extending ILR beyond pre-trial hearings.[177] First, applications may arise during trial and it would be inconsistent to deny representation purely because of the timing of the application which is not in the hands of the complainant;[178] to do so would also create a perverse incentive effect against making timely pre-trial applications. One judge advised us that it was not realistic only to have ILR at a Ground Rules Hearing (a type of pre-trial hearing), because the issues relating to potential SBE applications, for example, are fact-specific and thus evolve over the course of the trial.

8.131 Secondly, presence of the representative at trial could reduce inappropriate or inadmissible questions.[179] In the view of this judge, this would also result in reducing the frequency of objections and would not extend the length of the trial.[180] The Gillen Review recommended that consideration be given to extending legal representation to examination in chief and cross-examination at trial only after piloting and analysis of its pre-trial legal advice and representation recommendation.[181]

8.132 There is varying practice in other jurisdictions regarding the extension of ILR to pre-trial hearings and beyond. In Canada[182] and in New South Wales,[183] this

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176 See Chapters 4 and 9.

177 See for example M Iliadis, "Victim Representation for Sexual History Evidence in Ireland: A Step Towards or Away from Meeting Victims' Procedural Justice Needs?" (2019) 20(4) *Criminology & Criminal Justice* 416; R Killean, "Legal representation for sexual assault complainants" in Killean et al (eds), *Sexual Violence on Trial* (2021) p 190.

178 E Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) pp 31, 32.

179 K Barun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform" (2014) 25(3) *Current Issues in Criminal Justice* 819, 832.

180 Above.

181 The Gillen Review, Recommendations 40-44.

182 Applications for personal records, where the complainant may appear, are considered by a judge who is or will be the trial judge. See Criminal Code, ss 278.3(1)-(3).

183 In relation to requests for counselling records, this includes the complainant appearing at the trial or sentencing, pre-trial and interlocutory proceedings, along with preliminary criminal proceedings such as committal proceedings and bail hearings. See Criminal Procedure Act 1986, ss 299A and 295(1).

representation does so extend. However, in Northern Ireland, the Gillen Review did not recommend extending representation beyond pre-trial hearings. In Scotland, representation is only permitted in the context of pre-trial hearings in relation to personal records. The Dorrian Review did recommend ILR at pre-trial hearings for applications to introduce SBE. However, for applications that arise subsequently, the Review recommended that ILR at later hearings should be at the discretion of the court.[184] In Ireland, the O'Malley Review recommended that ILR for complainants should permit counsel for the complainant to be present during their cross-examination at trial in respect of SBE. It noted that counsel do usually remain, and it would be helpful to the trial judge and complainant if counsel "were allowed to object to a question or … submit to the trial judge that a particular question did not come within the terms of the leave that was given".[185]

8.133 A final consideration is for a model that extends ILR, but not ILA. We refer to this as an "independent legal representation only" model. We have discussed above at paragraph 8.114 the limitations of an ILA only model. An ILR only model would only allow a complainant to access legal support when a legal representative is assigned. That representative would be able to provide advice and assistance as well as representation. However, if a complainant wanted to seek only advice and assistance, for example, in relation to the disclosure of their personal records before contemplating the trial process, that would not be made available unless they instructed a representative. Ireland provide an ILR only model where the representative is assigned once a notice of a relevant application (regarding personal records or SBE) is made. The O'Malley Review, above, noted that there was delay caused by this process, particularly where the notice of application is made late in the proceedings. Such a model would not include the more cost effective methods of providing legal advice and assistance such as telephone advice. For some complainants, advice alone will be sufficient to address their question or concern and mean they can then fully engage with the trial process without ILR. Some complainants may not wish to have a representative. We do not think a model that prohibits that option is appropriate and therefore we provisionally reject a model that would provide only representation, and not advice without representation.

Conclusion

8.134 The full party status model is disproportionate. It is not necessary in order to confer the benefits of ILA and ILR on complainants and risks too great an interference with the defendant's right to a fair trial. Such a model would most distort the binary adversarial model; the defendant would have essentially two prosecutors.

8.135 We consider that a targeted approach to ILA and ILR is more appropriate. Applications regarding personal records held by third parties and SBE engage complainants' legitimate rights which are not sufficiently protected by any other role in proceedings.[186] We provisionally propose that, in order to ensure their privacy rights are protected, the complainant should have a right to be heard at applications

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184 LCJ Clerk's Working Group, *Improving the Management of Sexual Offence Cases* (May 2021) pp 81-87.

185 O'Malley Review, para 6.15.

186 F Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] *Criminal Law Review* 729, 742.

regarding the admissibility of their personal records and evidence of their sexual behaviour. As we explain at paragraph 8.3, when referring to applications relating to personal records or SBE in this chapter, we include police or prosecution applications to access personal records, applications to the court as to disclosure of personal records, and applications to the court as to the admissibility of evidence at trial that relates to the complainant's sexual behaviour or personal records, as would be subject to the current frameworks or our provisionally proposed new frameworks in Chapter 3 and 4.

8.136 Where any party has a right to be heard, they or their legal representative should be provided with the material and information necessary to enable them to exercise that right effectively. This should be proportionate to the issues to be determined by the application. The existing rules and guidance to protect against witness coaching will help ensure that such access does not give an unfair advantage to the complainant when they give evidence.

Consultation Question 65.

8.137 We provisionally propose that complainants should have a right to be heard in respect of applications relating to the admission of their personal records or sexual behaviour evidence.

Do consultees agree?

8.138 Affording the complainant legal standing without ILR would significantly limit their ability to properly advance and protect their legal rights. Complainants will not usually be legally qualified. They are still able to represent their views to the court, but this would obviously be limited by the individual complainant's ability and confidence to make representations to a judge and respond to legal argument in what is often a very daunting and stressful context. It is not appropriate to expect the complainant to be able to protect their own right to privacy in such circumstances.[187] This concern is particularly acute for complainants from marginalised groups who may face additional barriers to understanding and engaging with the trial process.[188] ILA and ILR would ensure that the benefits described above are realised.

8.139 Any impact regarding delay and cost, or change to the overall adversarial process, may be much more limited and would be justifiable.

8.140 However, the risk of detriment to the defendant and trial process explored above grows significantly where the complainant is represented throughout the process across a wide range of issues and their representative is present in front of the jury.

8.141 The Gillen Review proposed that complainants should have access to legal advice and representation at three stages: general information and legal advice throughout the process; and representation to object to disclosure of private material and to the

[187] Even where there is ILR, the complainant may choose to represent themselves at court.

[188] The Gillen Review, para 5.76 and ch 13.

introduction of previous sexual history.[189] We see attraction in this model. At pre-trial hearings, where complainants' rights are being determined, we provisionally conclude that ILR is necessary and proportionate.

8.142 If ILR is justified at pre-trial hearings where the complainant's rights are determined, it is difficult to say it is not justified when the hearings arise at trial. Applications relating to SBE and personal records do come up at trial unexpectedly. It would be inconsistent to deny complainants the right to representation based on the timing of the application, which as we note above, is not for them to determine. However, when applications arise during trial, ILA and ILR may cause delay. The trial would need to be adjourned to make time for the complainant to instruct a lawyer and for the lawyer to prepare to make representations to the court on the application. Provision of legal advice and representation can be prompt (for example, when a defendant is arrested, they are able to instruct a lawyer to represent them at the police station within hours). Also, applications relating to SBE and personal records are relatively narrow in scope and would not require the length of preparation needed for a whole trial. However, even short adjournments can have a significant impact on the trial's progress and risk delaying other cases waiting to be heard.

8.143 While these are significant practical challenges, we remain of the view that the justifications for providing ILA and ILR for such applications apply regardless of when the application arises. The risks of delay further speak to the need to ensure that pre-trial hearings are used efficiently to determine applications regarding personal records and SBE. For further discussion of the greater use of pre-trial hearings and risk of, and harm caused by, delay, see Chapters 11 and 12.

8.144 We are provisionally of the view that the right to representation should arise whenever issues relating to SBE and personal records are determined.

Funding

8.145 Expanding the provision of ILA and ILR to complainants in sexual offences prosecutions is an important way of ensuring their article 8 rights are protected, improving the process of making and resolving applications in relation to personal records and SBE, and building complainants' confidence, agency, and engagement with the trial process. Adequate public funding for these legal services is required to ensure that these benefits can be available to all complainants, and that the objectives of introducing ILA and ILR can be achieved.

Current law

8.146 Legal aid is generally available for advice and representation for either criminal matters (criminal legal aid) or for civil legal services[190] (civil legal aid).[191] Usually only someone arrested (or attending a voluntary interview with police), charged or convicted of a criminal offence is eligible to apply for criminal legal aid, therefore

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189 The Gillen Review, Recommendation 40.

190 The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 8(3) defines "civil legal services" as any type of advice, assistance or representation not provided as criminal legal aid under ss 13-16.

191 Legal aid is the system of public funding which helps meet the cost of legal advice, family mediation and representation in courts or tribunals.

complainants will not be eligible.[192] At present, complainants can only obtain ILA for a criminal case through privately funded means. Of note, the state funds legal services under civil legal aid where an individual's ECHR rights, assured by the Human Rights Act 1998, are engaged. This is of particular relevance to SBE and disclosure of personal records, where the complainant's right to respect for their private life under article 8 is engaged, as detailed above.

8.147 Complainants in sexual offences prosecutions may be able to apply for civil legal aid for advice, assistance and representation[193] under the following limited categories:

(1) First, 'general' civil legal aid may be granted for the provision of certain civil legal services to the victim of a sexual offence.[194] There does not need to have been a criminal prosecution for someone to qualify as a "victim".[195] The legal services funded by general civil legal aid do not include legal advocacy in criminal proceedings in the Crown Court.[196]

(2) Secondly, a grant of civil legal aid can be made in "exceptional" cases where the failure to provide legal services would be a breach of the individual's ECHR rights; or "having regard to any risk that failure to do so" would be such a breach.[197]

8.148 The case of *M v Director of Legal Aid Casework*[198] illustrates the limitations of the current civil legal aid framework for complainants in sexual offences. The claimant was a complainant in a sexual offences prosecution who wished to obtain civil legal aid to challenge a witness summons application for her personal records in the Crown Court. The Administrative Court concluded that in refusing her application for exceptional public funding, the Legal Aid Agency had unlawfully applied the legal aid merits criteria.[199] Further, prior to this ruling, in order to protect her interests, the

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192 Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 13, 15(2), 16(1)(a), 16(2) and 16(6). See also Sir Christopher Bellamy, *Independent Review of Criminal Legal Aid* (November 2021) p 1.

193 Civil legal aid can provide for: legal advice on how the law applies; advice and assistance in relation to legal proceedings and prevention or settlement of legal disputes; mediation; and representation: Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 8.

194 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 9 and sch 1, para 39. This can include civil claims for personal injury and certain torts and for damages for breaches of ECHR rights by a public authority, made under s 7 of the Human Rights Act 1998. The Explanatory Notes for sch 1 para 39, at 939 refer to the provision including legal aid for civil claims "against the alleged perpetrator of an offence or against a person that negligently failed to prevent a sexual offence". Other categories of "general" cases where legal aid may be available to all types of complainants include judicial review (sch 1, para 19).

195 Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1, s 39(6).

196 With the exception of proceedings for the variation or discharge of an order under s 5 or 5A of the Protection from Harassment Act 1997, and certain proceedings under the Proceeds of Crime Act 2002: Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1, part 3, para 6.

197 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 10(3).

198 *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] 5 WLUK 57.

199 Above at [77].

claimant's legal representatives had had to carry out significant work and appear on the complainant's behalf in the Crown Court on a pro bono basis.[200]

Commentary and comparative law

8.149 International standards recognise a need for public funding for complainants in sexual offences cases, subject to the applicable domestic law[201] and acknowledge a right to public funding where complainants have party status in proceedings.[202]

8.150 The most extensive public funding is found in Denmark and France, where complainants have a greater role in proceedings; they are entitled to publicly funded ILA and ILR at the reporting, pre-trial and trial stage.[203] In other jurisdictions, public funding is extended to complainants in specific contexts where they have the right to be heard. In Ireland, sexual offences complainants are entitled to be heard in respect of applications to admit SBE and to disclose their counselling records. Funding is granted to them for that purpose and once notified of an application, the Legal Aid Board instructs counsel.[204]

8.151 Similarly, in Scotland, there is public funding for complainers to oppose personal records applications. Lady Dorrian told us that following the decision in *WF v Scottish Ministers*,[205] complainers have appropriate legal funding for legal representation at those specific hearings.[206] The Dorrian Review also recommended that extension of ILR to SBE and character applications[207] should be accompanied "by appropriate public funding".[208] Additionally, in New South Wales, complainants in sexual offence

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200 *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] 5 WLUK 57 at [11].

201 The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), art 57 states: "Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law."

202 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards for the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, art 13 states: "Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law."

203 Administration of Justice Act, 1994 (Denmark), ss 741A-741E; Law No. 91-647 of July 10, 1991 on legal aid (France), § 9-2.

204 For SBE applications, see Civil Legal Aid Act 1995, s 28(5A), as amended by the Sex Offenders Act 2001, s 35(3). For applications to disclose counselling records, see Civil Legal Aid Act 1995, s 28(5C), as amended by the Criminal Law (Sexual Offences) Act 2017, s 40.

205 The Court of Session concluded that in respect of personal records applications, entitlement to legal representation follows from the right to be heard. While the grant of funding is at the discretion of Scottish Ministers, funding decisions should take account of the need for complainers to effectively exercise their rights. See *WF v Scottish Ministers* [2016] CSOH 27 at [46]-[50] and the Legal Aid (Scotland) Act 1986, s 4(2)(c).

206 Under the Criminal Procedure (Scotland) Act 1995, s 275.

207 Under the Criminal Procedure (Scotland) Act 1995, s 275.

208 LCJ Clerk's Working Group, *Improving the Management of Sexual Offence Cases* (May 2021), Recommendation 3(b)(iv).

cases receive public funding to assert their rights under the sexual assault communications privilege in relation to their therapeutic and counselling notes.[209]

8.152 Some jurisdictions offer a much more limited model of public funding, leading to ineffective protection of complainants' rights. Dr Susan Leahy has argued that the lack of publicly funded ILR for personal records applications is a "serious shortcoming" of the Canadian regime and has led to a lack of adequate representation of complainants' interests.[210] In 2016, Ontario launched a pilot of funded legal advice for sexual offence complainants. While not limited to any particular topic or right to be heard, it is advice only and capped at four hours.[211] In view of this, it is unlikely to address the concerns raised by Dr Leahy.

8.153 The SVCA Scheme Evaluation Report estimated the costs of a rollout of legal advice and representation for sexual offence complainants in England and Wales to be £3.9 million annually. This is based on 60% uptake for the scheme from qualifying offences, requiring 66 solicitors (costing £3m) and advocacy in 1% of cases (costing £0.8m) and miscellaneous costs (£0.1m).[212] The SVCA Scheme Evaluation Report also concluded that these costs could be off-set by costs savings elsewhere.[213] We understand that the costs of providing ILR over the last 20 years in Ireland have not caused undue concern. The Gillen Review cited the limited costs in Ireland in support of its recommendation to introduce publicly funded legal representation in Northern Ireland.[214]

Analysis

8.154 Stakeholders who represent victims of sexual violence, the Centre for Women's Justice and The Survivors Trust told us they were in favour of publicly funded ILA and

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209 Jilliard et al, "From Pilot Project to Systemic Reform: Keeping sexual assault victims; counselling records confidential" (2012) 37 *Alternative Law Journal* 254.

210 S Leahy, "The Defendant's Right or a Bridge too Far? Regulating Defence Access to Complainants' Counselling Records in Trials for Sexual Offences – Part 2" (2012) 22(2) *Irish Criminal Law Journal* 34, 39-40.

211 Ontario Ministry of the Attorney General "Independent legal advice for survivors of sexual assault" (September 2022). A similar programme was made available in Québec in 2021: Commission des Services Juridiques "Legal advice services in matters of sexual abuse and domestic violence".

212 SVCA Scheme Evaluation Report, p 69. Figures are based on 53,970 recorded rape offences. Appendix 4: This estimate is based on the recommended national legal advocacy scheme within which complainants' lawyers would provide free legal advice and representation, and offer advice on best practice for police and other criminal justice system practitioners. The remit of advice and representation should include information before reporting, requests for consent to collect personal data among other services.

213 For example, the costs of treating victims or preventing further sexual offending. SVCA Scheme Evaluation Report, p 69. Westmarland et al, "Cost-benefit analysis of specialist police rape teams" (2015) *Durham University*.

214 The Department of Justice and Equality in Ireland told the Gillen Review that: "43 Legal Aid Certificates were issued in 2017 to provide for complainant representation in rape trials. For the same period the total expenditure was €66,389 which includes €7,023 in respect of advice in 5 cases before they went to trial." However, it noted that: "the costs of solicitor and counsel sitting through an entire trial in every serious sexual offence, or indeed even every rape trial, would be prohibitive." See Gillen Review para 5.46 and 5.103, and Recommendation 40.

ILR for sexual offence complainants. A number of other jurisdictions offer this to sexual offence complainants.

8.155 We have set out in detail above the justification for extending ILA and ILR to complainants in sexual offences prosecutions. It would entirely undermine the benefits of the scheme, and the protections it would provide, if only those who could afford to pay for legal support could make use of it. The efficacy of a regime providing for ILA and ILR is contingent on funding. We provisionally propose ILA and ILR that is limited to applications relating to personal records and SBE, and ILA for special measures. These issues may arise at any stage of the criminal justice process: seeking advice before making a report, at the police station after reporting a crime, at pre-trial hearings, or during the trial itself. Provision of ILA and ILR therefore needs to be funded in a way that enables prompt access to legal services whenever the qualifying issues arise.[215]

8.156 We do not propose that the complainant is given full party status, for the reasons we explain above, therefore their right to be heard and to ILA and ILR would be significantly more limited than that of the defendant. This may require different provisions for funding ILA and ILR from those that apply to the defendant.

Consultation Question 66.

8.157 We provisionally propose that complainants in sexual offences cases should have access to independent legal advice, assistance, and representation in respect of requests and applications relating to personal records and sexual behaviour evidence.

Do consultees agree?

8.158 If consultees do not agree that complainants should have access to independent legal advice, assistance, and representation, we invite consultees' views on whether complainants should have access to:

(1) Independent legal advice only?

(2) Independent legal advice and assistance only?

(3) Independent legal representation only?

(4) None of these?

[215] In their submission to the MoJ consultation on the provision of legal advice to complainants, the Centre for Women's Justice explained that sometimes the assessment for public funding can take longer than the provision of advice, which is particularly problematic where the advice is urgent. *Centre for Women's Justice submission on the need for independent legal advice and representation for sexual violence survivors* (6 June 2022) p 3.

Consultation Question 67.

8.159 We provisionally propose that independent legal representation for complainants in sexual offences prosecutions should include representation at court when applications for admission of such evidence are determined, whether that is pre-trial or during the trial in the absence of the jury.

Do consultees agree?

Consultation Question 68.

8.160 We provisionally propose that independent legal advice and assistance should include, where appropriate, legal information leaflets, online and telephone advice, and in-person advice and assistance.

Do consultees agree?

Consultation Question 69.

8.161 We provisionally propose that legal advisers and representatives should be permitted to access documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence.

Do consultees agree?

Consultation Question 70.

8.162 We provisionally propose that legal advisers and representatives should be permitted to engage directly with police, prosecutors and defence counsel where necessary. This is in order to obtain trial documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence.

Do consultees agree?

Role of the legal representative post-application

8.163 Once the relevant application has been determined, it is less clear to us at present what role the representative should have in regard to the rest of the trial, and in particular, during the complainant's evidence. There are persuasive arguments of the

benefits of a representative able to provide extra scrutiny to ensure the questioning is within agreed parameters. However, it can also be argued that it is the role of the prosecution and judge to ensure that cross-examination is within parameters that are ultimately decided by the judge. Further, a complainant's legal representative being an active presence during the trial will likely engage the concerns explored above in respect of the impact on the defendant's right to a fair trial. It would be, or at least appear to be, a move away from the binary adversarial model. The jury may equate the role of the complainant with that of the prosecution, effectively as "two against one". It may extend the length of the trial, or cause delay by doing so. It may also be more difficult to clarify the remit of a complainant's representative if they are permitted to attend trial while evidence is being given.

8.164 Some of these challenges could be managed by the presence of a complainant's representative being at the discretion of the trial judge. The judge could determine, based on the applications and their decision on admissibility, whether it is appropriate for the representative to attend while that evidence is being given to be able to give effect to the decision. The judge is also well placed to explain the representative's role and remit to the parties and jury, and to oversee their attendance to ensure it remains within that remit. This could minimise potential interference with the defendant's right to a fair trial. These issues are finely balanced; we seek consultees' views on them.

Consultation Question 71.

8.165 We invite consultees' views on whether the independent legal representative for the complainant should be permitted to:

(1) attend the trial and, not in the presence of the jury, make representations to the judge in respect of compliance with the order permitting the relevant evidence to be admitted;

(2) attend and make representations only while the complainant is giving evidence relating to their personal records or sexual behaviour, including during cross-examination, whether at trial (including in the presence of the jury) or during a pre-trial hearing at which their evidence is recorded; or

(3) make representations to the court during the whole trial in the presence of the jury.

Who should provide the advice or representation?

8.166 In our view, the efficacy of any scheme providing advice and representation to complainants requires its provision by a qualified legal professional in order to achieve the benefits identified in this chapter. Some general advice on legal matters and proceedings could be provided by people who have knowledge and expertise in the area but are not legally qualified, such as ISVAs. However, the extent to which they can advise will be understandably limited compared to someone who is legally qualified. The advice may have to be more generic, more akin to legal information rather than advice, and that would not meet the needs identified in this chapter. Stakeholders have informed us and the SVCA Scheme Evaluation Report noted that it

would be inappropriate for ISVAs to take on the role of providing legal advice.[216] The SVCA pilot scheme, for example, deliberately chose lawyers with specific expertise.

8.167 This is more pronounced in the case of legal representation. There are restrictions on who can make representations in criminal courts on behalf of someone else.[217] In general, only legally qualified professionals with the appropriate rights of audience can do so.[218] ISVAs do not have rights of audience.

8.168 ISVAs themselves have told us that they agree they could not provide ILA or ILR. We heard that it would place unfair demands on them to advise on complex issues without adequate qualification. It would also require an ISVA to take a potentially adversarial role with the police, which is inappropriate for an ISVA who needs to preserve a "constructive working relationship" with the police.[219] However, there would be benefit from collaboration between the legal representative or adviser and the ISVA. The Centre for Women's Justice have noted the many benefits of such collaboration. An ISVA could: identify legal issues and provide factual summaries; make contact with a lawyer to avoid the complainant having to repeat their account; provide trauma-informed support; and identify systemic issues and themes for broader strategic legal challenges and policy work.

8.169 Most importantly, we were told that legal advice to complainants should be provided by qualified lawyers so that LPP applies to their communications. This allows for frank exchange of confidential information and advice.

8.170 We are aware of concerns regarding issues with resourcing criminal legally aided work.[220] It is understandable that funding any additional service would be seen to further strain those resources. However, we note the experience of other jurisdictions, explored further below, that providing ILA and ILR to complainants is not a significant strain on resources. In our provisional view, it is necessary for the ILA and ILR to be provided by legally qualified professionals.

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216 See also *Centre for Women's Justice submission on the need for independent legal advice and representation for sexual violence survivors* (6 June 2022) p 2.

217 Legal Service Act 2007.

218 A "right of audience" is the right to "appear before and address a court, including the right to call and examine witnesses": Legal Services Act 2007, sch 2, para 3(1). Rights of audience are required to be able to conduct litigation in criminal courts. A right of audience is granted to either the individual party (if they do not have legal representation) or to a solicitor or barrister in England and Wales who is representing a party.

219 *Centre for Women's Justice submission on the need for independent legal advice and representation for sexual violence survivors* (6 June 2022) p 3.

220 In particular we note the outcomes of the review of criminal legal aid. Sir Christopher Bellamy, *Independent Review of Criminal Legal Aid* (November 2021).

Consultation Question 72.

8.171 We provisionally propose that independent legal advice and independent legal representation for complainants in sexual offences cases should only be provided by qualified legal professionals.

Do consultees agree?

8.172 We have described throughout this chapter that concerns relating to scope, role, witness coaching and LPP could be addressed by guidance that provides a clear and consistent definition of the role. We would be grateful to hear consultees' views on how to define the scope of the advice and the role of the complainant's legal representative.

Consultation Question 73.

8.173 How should the role of independent legal advisers and representatives be defined?

8.174 Would written guidance, such as a code of conduct, be useful? If so, what should it include?

Independent legal advice and assistance regarding measures to assist a complainant to give evidence

8.175 In Chapter 7, we explain the variety of measures that are available to assist complainants to give evidence in sexual offence proceedings. These include the use of screens, live link, pre-recorded evidence, exclusion of the public, removal of wigs and gowns, and separate waiting areas and entrances. Currently, complainants in sexual offences prosecutions are automatically eligible to apply for a range of these measures. We provisionally propose that, instead, complainants should be automatically entitled to certain measures, the key difference in practice being that a complainant would simply need to notify the court which of those measures they require rather than provide evidence in support of their application for any measure.

8.176 Whether under a model of automatic eligibility or entitlement, the use and availability of measures, application, and considerations for each can be complex for complainants who are not familiar with courtrooms or trial processes. In either model, the complainant at least needs to notify the court which measures, if any, they want. This requires them to know the options, understand how they work and any limitations or concerns. For example, with the use of pre-recorded evidence or live link, there is debate about the impact of the distance between the complainant and jury on the way the evidence is interpreted.[221] It is important that complainants can access advice, to

[221] See Chapter 7.

understand their options in order to make a fully informed decision that enables them to give their best evidence and engage fully with the trial process.

8.177 We also note that early identification of the need for measures will greatly benefit the complainant, who can feel reassured from the start they will have necessary access to measures to be able to give evidence. It will also benefit the trial process, by reducing delay. Some measures, such as the use of pre-recorded evidence, can arise before the trial begins. Making available from the earliest stages independent legal advice and assistance could provide complainants the opportunity to understand these measures and decide which, if any, they need in good time. While police may be able to advise generally on the process of, for example, recording evidence in an ABE interview, they will have their own views and needs in respect of gathering the complainant's evidence that could impact the independence and scope of the advice they are able to give. Further, the legal adviser would be able to assist by liaising with the relevant parties to help ensure that the measures are implemented.

8.178 We note that in Australia, the Victorian Law Reform Commission have recently recommended that independent legal advice be made available for complainants in respect of alternative arrangements for giving evidence to "ensure victim survivors can exercise their rights and protect their interests".[222]

8.179 In our provisional view, complainants and the trial process would benefit from the provision of legal advice and assistance for complainants in relation to measures to assist them giving evidence. This could be easily incorporated into a model that already provides for legal advice and assistance, as proposed above, including by phone or web services. As such, it would not impose a significant further resource burden.

8.180 The model of automatic entitlement we provisionally propose means that the court does not need to make a decision about whether to make available the measures that we propose should be "standard". There will be no application process during which parties make submissions. Therefore, we do not think it is necessary for a complainant to have a right to be heard on an application for standard measures.

Consultation Question 74.

8.181 We provisionally propose that complainants in sexual offences cases should have access to independent legal advice and assistance in relation to their right to measures to assist them give evidence (currently called "special measures").

Do consultees agree?

222 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences Report* (September 2021), Recommendation 46.

CONCLUSION

8.182 In this chapter we have considered the need for a right to be heard and ILA and ILR that arises from the issues relating to the use of personal records and SBE in sexual offences prosecutions. We have specifically addressed ILA and ILR in respect of personal records and SBE although we are aware that there may be other benefits, and concerns, were ILA and ILR to be made available more widely. We have also considered the benefits of ILA about measures to assist the complainant to give evidence.

8.183 We have provisionally proposed that complainants should have a right to be heard and access to ILA and ILR in respect of applications relating to personal records and SBE, up to and including at trial. We have provisionally proposed that ILA should be available about measures to assist the complainant to give evidence. We have not made a provisional proposal regarding the role of representatives while the complainant is giving evidence and instead seek consultees' views.

Chapter 9: Limitations on the conduct of sexual offences trials

INTRODUCTION

9.1 The way in which a case is conducted by counsel and regulated by the judge will affect how the jury interprets the evidence which it has heard. It is therefore important to consider ways of regulating the conduct of a trial which could reduce the extent to which myths and misconceptions influence jury deliberations. In addition, as we explained in Chapter 1, what is expected to happen at trial informs earlier decisions by investigators and prosecutors.[1] This means that regulating the conduct of the trial is likely to affect the response of police and prosecutors to reports of sexual offences. Further, it is important to limit the intrusion of myths and misconceptions in order to increase public confidence and reduce the potential for complainant distress and attrition in the number of cases pursued to trial.

9.2 In this chapter we first look at how the conduct of the trial in relation to myths and misconceptions has been addressed by the European Court of Human Rights ("ECtHR") and the Committee for the Elimination of Discrimination Against Women ("CEDAW"). We then consider requiring practitioners to complete mandatory training on myths and misconceptions before engaging in sexual offences cases, so that they are given the tools to undertake their role appropriately, without reliance on myths and misconceptions. We then consider whether any lines of questioning beyond those based on sexual behaviour evidence ("SBE") should be restricted. Next, we examine regulating other aspects of the trial, including opening and closing speeches by counsel and generalisations about sexual offences which might feature in those speeches. Finally, we move on to considering potential consequences which could exceptionally be imposed as a result of reliance on myths and misconceptions, such as professional misconduct proceedings and wasted costs orders.

THE HUMAN RIGHTS FRAMEWORK

9.3 Addressing myths and misconceptions in a sexual offences trial may engage both the complainant's right to respect for private life under article 8 of the European Convention on Human Rights ("ECHR") and the defendant's right to a fair trial under article 6.

9.4 In finding a breach of article 8 in *J.L. v Italy*,[2] the ECtHR explicitly underlined the possible conflict between the protection afforded by article 6 to defendants and the protection afforded by article 8 to complainants. The court emphasised that in relation to the conduct of parties and their examination of witnesses, states must strike:

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1 Several stakeholders also told us this including Dame Vera Baird, speaking in her capacity as the then Victims' Commissioner, and representatives from the Centre for Women's Justice.

2 *J.L. v Italy* (2021) App No 5671/16 (translated from French).

> a fair balance between the interests of the defence, in particular the right of the defendant to examine or have examined witnesses pursuant to Article 6(3), and the rights ensured to the victim by Article 8. The manner in which alleged victims of sexual offences are questioned must ensure that a fair balance is achieved between the victim's personal integrity and dignity and the defendant's rights. Even though the defendant must be able to defend themselves by challenging the credibility of the alleged victim and potential contradictions in their testimony, the cross-examination must not be used as a means to intimidate or humiliate the victim.[3]

9.5 CEDAW has also considered myths and misconceptions in sexual offences cases. In finding a violation of Articles 2 and 5 of the Convention in *Vertido v Philippines*,[4] the Committee observed that:

> [s]tereotyping affects women's right to a fair and just trial and … the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.[5]

9.6 The Committee further held that a passage of the national court's judgment in which the court said that "'an accusation for rape can be made with facility', reveals in itself a gender bias".[6] We note that this comment by the national court echoes the observation of Hale LCJ in 1736 that "an accusation of rape is easily made",[7] as discussed in Chapter 1 at paragraph 1.27, and reflects comments heard in trial observation studies, discussed below at paragraph 9.37.

9.7 In England and Wales, the verdict in a sexual offences case is given by the jury, which does not give reasons. Nonetheless, despite not providing verdicts, courts must take account of the defendant's fair trial rights and be alert to the risk of myths and misconceptions in lines of questioning, statements by counsel and observations by the judge, which may impact on the rights of the complainant and affect the jury's decision-making.

MANDATORY TRAINING

9.8 Most practitioners have mandatory training on myths and misconceptions before they can be involved in sexual offences cases. The training which prosecution litigators and advocates undertake includes instruction on myths and misconceptions. Only advocates who have undergone a selection process for the Crown Prosecution Service ("CPS") RASSO Advocate Panel may prosecute these cases.[8] The selection process includes demonstrating competencies and knowledge of rape myths and stereotypes, and showing that applicants have undergone CPS accredited training

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3 *J.L. v Italy* (2021) at [128].

4 *Vertido v Philippines* (2010), CEDAW/C/46/D/18/2008, Comm No 18/2008.

5 *Vertido v Philippines* at para 8.4.

6 *Vertido v Philippines* at para 8.5.

7 Sir Mathew Hale, *History of Pleas of the Crown* (1736) p 635

8 CPS, *Selection Criteria: The Rape and Serious Sexual Offences List ('the RASSO List')*, (June 2021).

courses which include training on myths and misconceptions. Inclusion on the panel requires refresher training every four years. CPS RASSO lawyers are required to undergo mandatory training in order to prosecute sexual offences cases, which covers understanding myths and stereotypes relating to rape.[9]

9.9 Judges who preside over sexual offences trials receive specialist training which must be updated every three years.[10] We were told by two individual members of the judiciary that this contains training on myths and misconceptions.

9.10 In relation to the police, we were told that Operation Soteria has recommended that all police officers should receive training on myths and misconceptions, as part of the move to offender-focussed investigations.[11] Prosecutors and the police are also directed by CPS Guidance[12] to avoid myths and misconceptions in their decision-making on each case. The Specialist Sexual Assault Investigators Development Programme provides in its curriculum that myths should be addressed in training.[13] However, a report on Operation Soteria found that this specific training on myths was lacking in practice.[14]

9.11 Any advocates who work with child or vulnerable witnesses should attend "Advocacy and the Vulnerable" training provided by the Inns of Court College of Advocacy.[15] At present, this training is not mandatory.[16] However, in cases involving vulnerable witnesses or defendants, it is expected that an advocate has undertaken relevant training and is satisfied that they are competent to act. Not taking these steps would be considered a "serious dereliction of duty to the court, quite apart from a breach of professional duty".[17] Judges are encouraged to ask advocates about their awareness of The Advocates Gateway, which provides resources on examining vulnerable

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9 CPS, Rape and serious sexual offences strategy (July 2020), pp 6 and 12; See also comments of Siobhan Blake, CPS Rape lead on tackling myths at How we prosecute rape | The Crown Prosecution Service (cps.gov.uk).

10 We were told this by stakeholders. See also Criminal Practice Directions (2023) 5.9.3-5.9.4.

11 We discuss Operation Soteria in Chapter 1.

12 CPS, *Legal Guidance, Rape and Sexual Offences*, Chapter 4, Tackling Rape Myths and Stereotypes, Annex A (21 May 2021).

13 See Specialist Sexual Assault Investigators' Development Programme (SSAIDP): Programme specification (whatdotheyknow.com).

14 B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022) pp 145-146. Eg "the research found, across the sites, officers who had received no specialist training to investigate RAOSO [rape and other sexual offences]"; "In the absence of formal learning sources practitioners are learning from their own and their peers' trial and error experiences with limited time for reflecting on and evaluating their decisions. This approach to learning is unlikely to address culturally entrenched practices and beliefs around the complexities of dealing with RAOSO. For example, rape myths, victims' vulnerabilities and investigative approaches."

15 The Inns of Court College of Advocacy was established in 2016 and took over the work of the Advocacy Training Council.

16 See the description by The Inns of Court College of Advocacy at https://www.icca.ac.uk/post-qualification-training/cpd/advocacy-training/advocacy-the-vulnerable-crime/.

17 *R v Rashid (Yahya)* [2017] EWCA Crim 2, [2017] 1 WLR 2449 (Lord Thomas CJ at [81]). In *Grant-Murray; Henry; Hewitt; Hewitt* [2017] EWCA Crim 1228, Lord Thomas CJ at [226] added: "It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training."

witnesses, and whether they have attended the Advocacy and the Vulnerable training course.[18]

9.12 However, there is no mandatory training on myths and misconceptions for defence practitioners which is equivalent to that for prosecution litigators and advocates. There is no reason in principle for this distinction, as defence counsel will be involved in examining complainants and will deliver arguments which may draw upon myths and misconceptions. Training is likely to be beneficial in resisting the use of myths and misconceptions in the conduct of cases, particularly if these myths are relied upon through inexperience or a lack of awareness.[19]

9.13 In the Gillen Review into the law and procedure in serious sexual offences in Northern Ireland, Sir John Gillen observed that:

> training is a vital ingredient… It is crucial to the process that the Judiciary and the legal profession be aware of the issues of rape mythology and that there are consistent approaches to the issue. The Judicial Studies Board, the Bar Council and the Law Society should set up regular training sessions on these matters with participants from the voluntary services and psychologists.[20]

9.14 The requirement to be trained on myths and misconceptions to work on sexual offences cases would not be unique, as there are other areas where registration and training have been made mandatory due to the specialist nature of the work. Following the 2015 Youth Proceedings Advocacy Review, the Bar Standards Board ("BSB") changed its Handbook so that barristers and pupils working in the Youth Court are now required to register with the BSB and declare that they have the specialist skills, knowledge and attributes which the BSB considers necessary to work effectively with young people.[21]

9.15 There is a document which lists the Youth Proceedings competences, applicable to both prosecutors and defence counsel.[22] The Annex advises that:

> [t]here is a large amount of training available on effective communication and identifying and dealing with vulnerability. Barristers should actively consider how to build their competence in this area.[23]

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18 P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) ("Rook and Ward") 28.09.

19 See O Smith and T Skinner, "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441, 459, which states that the fact that myths were resisted suggests that training of legal professionals has been helpful.

20 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (May 2019) ("Gillen Review") para 6.113.

21 Bar Standards Board, *BSB Handbook*, (December 2020), Part 3, Scope of Practice, Authorisation and Licensing Rules, rule S59. Registration of Youth Court work (barstandardsboard.org.uk).

22 Bar Standards Board*, BSB Youth Proceedings Competences* (February 2017), p 2.

23 Above, p 10.

The document provides a list of three training providers and ten sources of resources.[24]

9.16 A report into complainant experience published by the Ministry of Justice in 2014 also recommended that:

> the bodies responsible for professional conduct and practitioners be encouraged and supported to develop an accreditation system for defence advocates that is open and transparent.[25]

9.17 This recommendation was made because:

> unlike for prosecutors and judges there is no system in place for the accreditation of advocates acting for the defence. Barristers and Solicitor Advocates are able to act for the prosecution or defence, so they may be accredited if they apply to join the CPS specialist panel. If they do not, there is no way at present to require them to undertake training or demonstrate their capability to undertake cases involving vulnerable witnesses. The Bar Council and Law Society advised that the best approach would be to encourage advocates to undertake training of their own volition, acknowledging that they need to know as much and be as competent as the judges and prosecutors who are accredited – they could then use the fact that they have been trained to attract work to their practice. However, this would not be transparent and there would be no apparent process for ensuring that the specialist expertise is gained and maintained by individual advocates.[26]

9.18 Legal representatives are expected to undertake training as part of their ongoing professional development, so many defence lawyers may already have undertaken training on these issues voluntarily, or because they prosecute as well as defend. A requirement for mandatory training on myths and misconceptions would not require these practitioners to be trained again.

9.19 The academic literature has highlighted some risks of training.

> Rumney… acknowledged that some legal professionals would attend training without challenging their preconceptions. In addition, Stern… argued that training could perpetuate stereotypes if interpretations of the course material are not checked. For example, Smith… found that one barrister perceived his training as teaching him to doubt any victim/survivor who *was* emotionally distressed.[27] While

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24 Bar Standards Board*, BSB Youth Proceedings Competences* (February 2017), pp 12-13.

25 Ministry of Justice *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014), Recommendation (ii) 1.1.

26 Above, para 41, p 16.

27 This is a reference to training highlighting that many victims will not be visibly distressed when recounting their assault.

> training is likely to play a key part in tackling rape myths, then, it is not a simple or comprehensive answer.[28]

9.20 Mandatory training may also limit client choice in relation to the solicitor or barrister whom they wish to instruct. The New Zealand Law Commission ("NZLC") considered this issue in relation to training on sexual offences generally.

> [C]are must be taken with any proposal to require accreditation of defence counsel given the right of defendants to counsel of their choosing. One might argue that the right is infringed upon if the defendant is limited to a pool of defence lawyers who have completed the necessary requirements to become accredited to appear in sexual violence cases.[29]

9.21 However, the NZLC did not dispense with the idea of training, and suggested two mechanisms of strongly encouraging it without requiring it in all circumstances. These were to use the competency requirements within the legal aid regulations, and to encourage the incorporation of sexual offences training into the continuing professional development which is mandatory for a practising certificate.[30]

9.22 However, making training mandatory as a pre-condition of conducting sexual offences cases on a publicly funded basis may place unacceptable financial, regulatory and administrative burdens on solicitors and barristers, whose resources are already very stretched.[31] This may, in turn, lead to defence practitioners refusing to take on publicly funded sexual offences cases.

9.23 Further, to achieve the aims of training, those accepting private instructions would also need to be trained. This means that the body with regulatory oversight would not be the Legal Aid Agency.

9.24 It might also be the case that training would not achieve the aim of significantly reducing the use of myths and misconceptions in sexual offences trials.

> While training is likely to play a part in tackling rape myths it is not a comprehensive solution… Barristers appeared to be aware of the realities behind rape myths and yet drew on them anyway. It is therefore important to move beyond explanations of rape myths as being about poor attitudes or ignorance… barristers manipulate evidence and invoke stereotypes if it increases the persuasiveness of their

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28 O Smith and T Skinner "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441, 445, citing P Rumney "Judicial Training and Rape" (2011) 75 *Journal of Criminal Law* 473; V Stern, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (2010); and O Smith "An investigation into the effects of court culture on barristers' opinions of responses to rape" University of Bath unpublished BSc Dissertation (2009).

29 NZLC *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (December 2015) Report No 136, para 5.92.

30 Above, paras 5.94-5.96.

31 See Sir Christopher Bellamy, *Independent Review of Criminal Legal Aid*, (November 2021).

argument. For rape myths to be truly addressed, this focus on winning at any cost must therefore be tackled.[32]

9.25 We therefore invite views on whether training on myths and misconceptions should be made mandatory for all practitioners.

Consultation Question 75.

9.26 Should it be mandatory for practitioners to undergo training on myths and misconceptions in order to work on sexual offences cases?

RESTRICTING LINES OF QUESTIONING BEYOND RESTRICTIONS ON SEXUAL BEHAVIOUR EVIDENCE

9.27 A "line of questioning" refers to a plan to question a complainant on a particular topic, or to cause the complainant to give particular evidence, rather than referring to the wording of specific questions. For example, a line of questioning on delay could involve asking the complainant questions to ascertain when they reported the offence and their reasons for reporting when they did. Unless the complainant is vulnerable[33] because they are a child or have other communication needs, or an application is made to admit SBE or non-defendant bad character,[34] formal advance discussion of permissible lines of questioning is unlikely to take place between the judge and counsel. However, informal discussions as to planned topics of questioning may take place, for example on the first day of trial before the jury comes in. Such discussions have the benefit of giving the judge advance notice of what evidence is likely to emerge and therefore what directions might be necessary, along with alerting counsel that the judge is aware of potentially contentious areas. At the trial stage, there are unlikely to be any other direct prohibitions or requirements set on the conduct of the case in relation to myths and misconceptions, other than directions from the judge to the jury. Nonetheless, lines of questioning must always be evidentially relevant.

9.28 When considering how to reduce the reliance on or introduction of myths and misconceptions in sexual offences trials, we must consider how to distinguish between myths and legitimate arguments. This can be difficult, where a line of questioning or a comment does not fall within the provisions regulating non-defendant bad character or SBE, but nonetheless risks prejudice and improper reasoning by jurors. There will not necessarily be a signal indicating that this line of questioning requires scrutiny, despite the potential effects on the fairness of the trial. After considering the distinction, we turn to possible approaches to reducing the reliance upon myths and misconceptions while ensuring that the defence can present their case effectively.

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32 O Smith, *Rape Trials in England and Wales* (2018) p 78.

33 Within the meaning of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA 1999"), s 16. See also *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579.

34 Under YJCEA 1999, s 41 and Criminal Justice Act 2003 ("CJA 2003"), s 100.

Reliance on myths

9.29 We first consider what the evidence shows about the deployment of myths and misconceptions in sexual offences cases.

9.30 As we observed in Chapter 2 at paragraph 2.35, Professors Julia Quilter and Luke McNamara recently conducted a major study of rape trials for the Victorian Law Reform Commission. They told us they found defence questions and arguments continued to invoke myths, in spite of legislation designed to prevent this.

> Traditionally, defence counsel are given wide latitude when it comes to deciding what questions they want to ask in cross-examination… Based on our reading of Victorian and NSW trials, our sense is that in sexual offence trials the latitude extended to defence is often too wide…
>
> We think that prosecutors should be much more active in objecting to such lines of questioning that go to irrelevant topics and trial judges should more rigidly police the boundaries of relevance…
>
> That such practices persist despite the clear language of the legislation is, in part, a product of the adversarial system: some defence lawyers will continue to push lines of defence unless they are challenged by the prosecutor and trial judge. So our finding is not that nothing can change [as a result of legislative change]. Rather, legislative change needs to be *activated* in trials – and prosecutors and judges need to be proactive rather than simply expect defence lawyers to change.[35]

While these observations are not directly relevant to this jurisdiction, they illustrate the potential limits of legislative reform given the incentives of the adversarial model, and emphasise the role which must be played by other participants in the courtroom in order for reforms to be effective in practice.

9.31 Beyond Australia, many stakeholders in England and Wales expressed concern with how barristers utilise what they saw as rape myths.[36] A Recorder told us that a delay in the complainant reporting an offence and any lack of resistance always form a significant part of cross-examination.

9.32 In 2021, the CPS conducted a survey of advocates qualified to prosecute RASSO cases.[37] 29% of respondents said that the defence "regularly" deployed rape myths in their case presentation, while a further 37% said that the defence "occasionally" did so. Further, 90% of respondents said that in cross-examination the defence "regularly" cited apparent inconsistencies between the accounts provided by the complainant to third parties and to the police. While inconsistencies in account may legitimately be the subject of cross-examination or comment in the defence's closing speech, there

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35 J Quilter and L McNamara, "[Pre-consultation] Comments for Law Commission re Sexual Offences Consultation Paper" (8 December 2022).

36 Eg Dr Dominic Willmott; an Independent Sexual Violence Adviser ("ISVA"); Dame Elish Angiolini; The Survivors Trust.

37 CPS, RASSO Advocacy Survey (2022). The survey was conducted in collaboration with the Ministry of Justice. There were 125 responses.

are significant misconceptions as to how inconsistencies affect credibility and how human memory operates, as we explored in Chapters 2 and 3.

9.33 The stakeholders' concerns and practitioners' perceptions are borne out by trial observation studies which "have, over decades, consistently found that rape myths are deployed with frequency by barristers in sexual violence trials."[38] These studies allow for whole cases to be observed, and can therefore reflect how narratives are built and deconstructed over the course of an entire trial. This means that they can comment on how questions or topics raised briefly in cross-examination become a relevant feature in closing speeches, or the use of tone of voice and body language, for example. Further, trials in England and Wales are not routinely transcribed, so trial observation studies are one of the only ways to review the conduct of criminal cases. Additionally, trial observation studies do not rely on asking barristers for their views on how cases are conducted, which may be influenced by the adversarial culture in which they operate.

9.34 However, it is important to be cautious when considering trial observation studies. Given their methodology, only a small number of cases can be observed and analysed and therefore, their findings may not provide a representative picture. Further, researchers are not privy to the case papers which might indicate the relevance of a line of questioning, rather than unfounded reliance on a myth. Researchers are also unlikely to have witnessed pre-trial hearings setting out expectations for the case and giving directions about the approach to be adopted by the parties.[39] Nonetheless, trial observations in England and Wales do consistently reveal examples of barristers deploying myths and misconceptions about sexual offences. These match observations in other jurisdictions[40] and perceptions from stakeholders. It is therefore important for us to consider ways of addressing advocates' use of myths and misconceptions within the trial.

9.35 In a study conducted in 2010 by Temkin and others, the use of myths was found to be prevalent even on "a conservative approach" which involved allowing:

> leeway to counsel and only classifying myth use as occurring when counsel expressly made generalisations about rape, rape victims, or rape defendants, which

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38 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 18, citing Z Adler, *Rape on Trial* (1987); M Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007); R Durham et al, *Seeing is Believing – the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017); S Lees, *Carnal Knowledge: Rape on Trial* (2002); O Smith and T Skinner, "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441; and J Temkin et al, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 *Feminist Criminology* 205.

39 Similar concerns were raised by Professor Laura Hoyano. See L Hoyano, *The operation of YJCEA 1999 section 41 in the courts of E&W: views from the barristers' row* (Criminal Bar Association, 2019) ("CBA Report"). In each of the studies we refer to, fewer than 20 cases were analysed – two studies considered 18 cases, one considered eight and another six. There is no suggestion that the researchers had access to the case papers. However, Dr Williams witnessed seven s 41 applications at trial (rather than in a pre-trial hearing). Professor Temkin refers to the ambit of specific s 41 applications and rulings, but it is unclear whether these were witnessed directly or whether the relevant information was gained from counsel who were interviewed for the study.

40 See eg E McDonald, *Rape Myths as Barriers to Fair Trial Process* (2020) in New Zealand; J Quilter and L McNamara, *Final Report to VLRC [Victorian Law Reform Commission]* (2021) in Victoria, Australia.

were false or where such false generalisations were clearly implicit in the argument.[41]

9.36 Some examples included comments made by defence counsel in closing speeches. One defence counsel asked: "Would a victim not at least scream or do something to show some kind of resistance?"[42] Suggesting that victims of sexual offences normally (or should) resist vocally or physically is false and not supported by the empirical evidence.[43] As Temkin noted:

> it is of no significance that C was uninjured, that her clothing was undamaged, or that she failed to resist unless there is specific evidence that suggests that such a result would have been expected in the particular circumstances of the case.[44]

9.37 Temkin also observed reliance on the 17th century dictum of Lord Hale warning against convicting for rape on the basis of a complainant's testimony, which we discussed in Chapter 1 at paragraph 1.27. One barrister in her closing speech commented that "[u]nfortunately, the experience of the courts is that false allegations of this type are made, sadly regularly made, and are made for all sorts of reasons. Allegations are quite easy to make: you only have to say it and it has to be investigated." In this case these comments were echoed by the judge who told the jury that "sexual allegations are easy to make but difficult to refute."[45]

9.38 This study noted instances where prosecution barristers would intervene or challenge these myths, but the overall impression was of missed opportunities to do so. Similarly, judges did not often intervene, though occasionally did so. In one case where defence counsel was questioning the complainant about whether she had attempted suicide as a teenager, the judge intervened and said that if the line of questioning was to be pursued, the judge would need to hear legal argument.[46]

9.39 In 2012, Smith and Skinner conducted trial observations and concluded that "rape myths were used extensively in every trial and were a routine way for the defence to undermine prosecution witnesses' credibility."[47] They noted problematic expectations of physical resistance including an observation by defence counsel to the jury that

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41 J Temkin, J Gray and J Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 *Feminist Criminology* 205, 209.

42 Above, 211.

43 See eg L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office, 2006) p 2, citing L Kelly, *Surviving Sexual Violence* (1987); A Möller A, HP Söndergaard and L Helström, "Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression" (2017) 96 *Acta Obstetricia et Gynecologica Scandinavica* 932, 932. "Of the 298 women [who had visited the Emergency clinic for raped women within 1 month of a sexual assault], 70% reported significant tonic immobility and 48% reported extreme tonic immobility during the assault."

44 J Temkin, J Gray and J Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 *Feminist Criminology* 205, 212.

45 Above, 212.

46 Above, 218.

47 O Smith and T Skinner, "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441, 449.

"squirming is the word [the complainant] uses throughout. She doesn't do anything else…. What would you do? Is just squirming what you would do?"[48]

9.40 Again, there was evidence that myths were resisted to some extent – most frequently by prosecution counsel, but also occasionally by the defence.[49] Nonetheless, they witnessed the same barrister rely on directions "debunking" rape myths when acting as prosecuting counsel, and then relying on those myths when defending in a different case.[50]

9.41 Smith and Skinner noted that prosecution barristers relied on myths as well as the defence, particularly with regard to distress, pointing out the complainant's distress as support for their account. In their view, this approach to myths was "legitimating the defence usage. This must be tackled if 'myth-busters' are not to be undermined".[51]

9.42 When directions challenging myths were given by the judge or explained by the prosecution, these were challenged by the defence. One barrister portrayed them as patronising, by saying that while the prosecution had told the jury to ignore myths and stereotypes, "I'm not going to insult your intelligence by talking about them; they belong in the last century…". As Smith and Skinner observed,

> [t]his comment implied that 'myth-busters' were redundant… When he subsequently focused on myths for the rest of his closing speech, the jury may therefore have failed to consider whether or not he was drawing on stereotypes because they had been told such arguments would not be used.[52]

9.43 Williams conducted observations of 18 trials between 2016 and 2017, with a focus on cross-examination.[53] She analysed the use of express or implied generalisations and the use of factually "refutable rape myths, where these questions have no factual basis in the case", drawing a distinction from lines of questions which allow parties to advance their case.[54] She witnessed complainants being questioned about their delay in reporting, where their responses were frequently met by disbelief.[55] For example, in one case the complainant had said in her interview that she didn't report immediately to the police because she felt disgusted, ashamed, angry and hurt. The barrister then asked her "Why would you be ashamed?"[56]

9.44 In three of the cases where the complainant was cross-examined on the basis of a delay in reporting, the complainant had reported the offence within seven days, and in

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48 O Smith and T Skinner, "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441, 449.

49 Above, 453.

50 Above, 460.

51 Above, 460.

52 Above, 454-455.

53 A Williams, *Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials*, University of the West of England PhD thesis (2020) p 127.

54 Above, pp 186, 338 and Appendix 5.

55 Above, p 170.

56 Above, p 170.

two of those within several hours.[57] Williams regarded it as remarkable that these complainants were nonetheless challenged on their failure to complain immediately.[58]

9.45 Three complainants were questioned about their lack of physical resistance, including a lack of injury, pain or damage to their clothing.[59] As Williams observed,

> the appropriateness of these questions will depend upon a complainant's allegations. For example, where a complainant alleges additional physical violence, the defence could properly challenge whether she was injured. However, the complainants within these three cases did not allege additional violence or suggest they physically resisted.[60]

9.46 This reflects the tension which we referred to above at paragraph 9.28 and will return to. Some lines of questioning are subject to alternative interpretations, and could either be advancing myths and misconceptions, or could be the examination of facts in order to advance the defence case fairly. As Williams explains,

> [t]he acts of the complainant, such as delayed reporting, will often form part of the case narrative. These issues could be probative and may need to be raised when questioning complainants, to address matters that occupy the jury's minds… This underscores the importance of distinguishing where questions regarding the complainant's behaviour clearly utilise myths, from good advocacy where questions allow barristers to legitimately challenge the credibility of a complainant's account. Such assessments would need to be made subject to the individual facts of each case.[61]

9.47 Most recently, Daly observed a small number of trials in 2019.[62] In her view, the trials she saw:

> were permeated by problematic ideas relating to: the expectation of victim-survivor resistance; pre- and post-assault relationships between victim-survivors and defendants; the expectation of prompt reporting of assaults; and the expectation that victim-survivors provide consistent and detailed accounts.[63]

9.48 However, Daly found that myths and misconceptions were rarely explicit but were instead bound up with the overall trial narrative and reproduced broader cultural narratives around gender and social class.[64] As Daly noted,

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57 A Williams, *Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials*, University of the West of England PhD thesis (2020) p 171.

58 Above, p 171.

59 Above, pp 174-175.

60 Above, pp 175-176.

61 Above, pp 185-186.

62 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 6.

63 Above, p 20.

64 Above, p 147.

whilst rape myths and cultural narratives were sometimes explicitly drawn upon, they were more often seeded through micro-examinations, demonstrating that it is not about questions or arguments in isolation. Rather, it is about the pattern of questions and the overall pictures these help to build, which culminate in character assassination in closing arguments.[65]

9.49 To tackle this, she suggested that:

> [b]arristers who draw on rape myths to bolster their cases should be required to justify why and how their argument is relevant. This could help to ensure fairness for victim-survivors and the upholding of public interests whilst still protecting the defendant's right to a fair trial.[66]

Sexual behaviour evidence

9.50 In Chapter 4, we considered potential reform to the principles regulating the admission of SBE. It was recognised that admitting this form of evidence risks unnecessarily intrusive and humiliating questioning for the complainant, while also risking reliance on myths and misconceptions about the complainant's credibility, consent and moral worthiness. For this reason, the admission of the evidence is restricted.

9.51 As we noted, stakeholders told us of some occasions where counsel inadvertently raised SBE outside of the relevant statutory gateways,[67] and the judge dealt with this by considering whether to discharge the jury or give specific jury directions. However, some stakeholders told us of cases where they believed that SBE had been introduced outside of the gateways without sufficient consequences.[68]

9.52 In the CPS survey of RASSO advocates, 48% of prosecutors said that they were "regularly" or "occasionally" required to raise objections to inadmissible defence questioning related to the complainant's sexual history. However, in Hoyano's study for the Criminal Bar Association, she found that "in only a handful of 223 cases was questioning permitted outside a section 41 application or order where one should have been made."[69]

9.53 Temkin's trial observations reflect occasions where questioning appeared to extend beyond what the judge had ruled was permissible. In one trial, the defence applied to cross-examine the complainant about previous allegations of abuse which she had made. The judge decided that there was no evidence that the allegations were false, and only allowed one question in relation to the prior allegations. However, defence

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65 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 147.

66 Above, pp 155-156.

67 Under YJCEA 1999, s 41.

68 For example, an ISVA in the Rape Crisis ISVA Reference Panel raised a case where counsel introduced evidence that the complainant had had sexual relations with the brother of her partner. The judge sent the jury out and criticised defence counsel for not making an application under s 41. The ISVA did not know whether this was addressed in a direction or in summing up, but in her view the unjustified damage to the complainant's credibility had already been done.

69 CBA Report, para 124.

counsel referred to the prior allegations five times and reminded the jury about the prior allegations at length in her closing speech.[70]

9.54 Williams also witnessed cross-examination extend beyond the parameters of an SBE ruling. In one case, the defence were allowed to ask three specified questions about anal sex, to rebut the complainant's evidence that she did not like it. Instead, cross-examination went beyond this and included the frequency with which the complainant and defendant had sex throughout their relationship.[71]

9.55 Hoyano has raised significant criticisms about inferring from trial observations alone that SBE has been inappropriately used. These include the small sample of cases which are often used to justify the conclusions, the delay in publishing which means that the results do not reflect the change in culture over time, the fact that some studies use lay observers who insufficiently understand the law, and that in general insufficient regard is paid to defence rights. She also refers to the fact that observers do not always know on what basis any SBE has been admitted: they may not have been present for the hearing of a section 41 application, or know whether or why prosecution opposed an application, or even if the prosecution have agreed to adduce some SBE as part of their case. Instead, observers assume that any questions or evidence about the complainant's sexual behaviour contravene section 41.[72] This last criticism does not necessarily address the issue of the inappropriate admission of SBE as the prosecution are not obliged to represent the complainant's interests, and may themselves be operating on the basis of myths and misconceptions. The prosecution have a duty to act in the public interest, which we describe in Chapter 8 at paragraph 8.35, and may also agree to admit evidence which they perceive to be legally relevant and would support a safe conviction, despite the complainant's views.

9.56 Despite these concerns, we were told by stakeholders, and Hoyano's own results bear out, that there are some occasions when SBE is inappropriately elicited or questions asked about it. This demonstrates that methods of restricting evidence and lines of questioning are not infallible, and counsel and judges must remain alert to the risk of reliance on myths and misconceptions.

9.57 Based on this analysis, it appears that myths and misconceptions do feature in sexual offences cases, though their prevalence is unclear. It is therefore important to consider how reliance on myths and misconceptions could be reduced or eliminated.

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70 J Temkin, J Gray and J Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 *Feminist Criminology* 205, 214.

71 A Williams, *Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials*, PhD thesis (2020) p 190.

72 CBA Report at paras 20-42. If the defence are required to make an application under s 41 of the YJCEA 1999, the prosecution can oppose it, in which case there is usually a full hearing. Even if they do not oppose it, the judge still has to determine the application. In some cases, the prosecution may agree to adduce some SBE as part of their case, which means that the defence do not have to apply under s 41 (as the prosecution are not subject to the restrictions in s 41). This may be where the evidence is uncontroversial and necessary background evidence. If the defence wish to question the complainant on any SBE adduced by the prosecution, they will need to apply under s 41. See Chapter X for further details of procedure.

Reliance on myths by the defence and prosecution

9.58 Based on stakeholders' comments and the trial observation studies, most but not all reliance on myths and misconceptions comes from defence counsel. This gives rise to a concern about double standards, if the defence are prohibited from certain lines of questioning but the prosecution are not. In a summary of key principles to bear in mind when addressing the impact of myths and misconceptions held by jurors during a trial, the Gillen Review acknowledged the concern that reliance on myths by the prosecution authorises reliance by the defence.

> First, there is substantial evidence suggesting that many jurors struggle to understand and apply judicial directions.
>
> Secondly, even where judges employ specific legislative language with the aim of dispelling rape myths within trials, such myths and stereotypes continue.
>
> Thirdly, observations across the jurisdictions record that the defence tend to strongly undermine any challenge to rape myths by the judge or prosecution and that the myths often remained relevant to juries through a focus on identifying inconsistencies and discussions around "rationality" and "normality".
>
> These issues were further complicated by the use of rape myths by the prosecution where they supported the complainant's evidence, for example, where the complainant reported immediately and displayed distress when giving evidence. Such use by the prosecution could be viewed as legitimising the use of rape myths by the defence.[73]

9.59 There are some features which are not probative in establishing whether an offence occurred, unless other evidence establishes it. For example, if the prosecution refer to the fact that the complainant was distressed while giving evidence, this does not mean that the complainant was telling the truth. Similarly, if the defence point to the fact that the complainant was very calm when giving evidence, this would not demonstrate falsity. The misconception is therefore that distress when giving evidence is relevant when in fact it is not, so neither the prosecution nor the defence should refer to it. However, this is not the case for all myths, and in some circumstances the prosecution may in fact be relying on relevant supporting evidence for their account. For example, as summarised by Daly,

> the prosecution bringing evidence of a victim-survivor's resistance does not rely on a rape myth and should therefore not be seen as problematic. This is because consensual sexual encounters do not usually involve one person resisting it. The absence of resistance, however, cannot be said to indicate consent because it is known that victim-survivors often do not resist. Therefore, when defence barristers point to lack of resistance as justifying a reasonable belief in consent, they are drawing on a rape myth.[74]

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73 Gillen Review (2019) paras 6.38-6.41.

74 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) pp 20-21, explaining W Hovdestad and E Renner "What does it mean to use a "real rape" myth in a sexual assault trial?" Social and Legal Studies Blog (2021).

Addressing the use of myths

Distinguishing myths

9.60 Cossins argues that some lines of questioning should be completely prohibited in sexual offences cases. Rather than attempting to remedy the introduction of myths and misconceptions via judicial directions, for example, the focus should instead be "on introducing reforms that would *prevent* the use of rape myths within the trial".[75]

9.61 She has drafted a provision which would entirely prohibit the use of myths during cross-examination where the defence are attempting to challenge the complainant's credibility or the reliability of their evidence.[76] These include questions on sexual history; sexual reputation; intoxication; dress; physical resistance; verbal resistance; recent complaint; delayed complaint; psychiatric treatment; mental health; medical history; criminal history; and allegations made against any other person.

9.62 The arguments in favour of a complete ban on certain lines of questioning include the fact that the dynamics of an adversarial system and the requirement to act fearlessly in the client's interests will always incentivise the use of myths and misconceptions. Where there is this incentive, there is a risk that the jury's deliberations will be tainted by myths and misconceptions rather than being a fair appraisal of the evidence.

9.63 However, there will be times when examination on these issues is relevant to the facts at hand and is therefore necessary in order to ensure a fair trial for the defendant. We explained this position with regard to SBE in Chapter 4. A complete ban on certain lines of questioning is a blunt instrument and cannot cater adequately for situations where the questioning is relevant. We therefore reject Cossins' suggestion to ban certain topics of cross-examination.

9.64 The issue of how to distinguish between myths and permissible, relevant questioning has been considered by academics in Canada. Judge Wayne Gorman has commented on a decision of the Ontario Court of Appeal in *JC*,[77] where the court observed that:

> …it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype… For example, in *R v Kiss*… evidence that the complainant did not scream for help was admitted, not to support the impermissible stereotypical inference that her failure to do so undermined the credibility of her claim that she was not consenting, but for the permissible purpose of contradicting her testimony that she had screamed to attract attention.
>
> By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead based on the evidence. For example, although it is a stereotype that men are interested in sex, it was not an error to infer that the accused male was interested in sex at the time of the alleged assault where that

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75 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 591, emphasis in original.

76 Above, p 592.

77 *R v JC* 2021 ONCA 131.

> inference was based on evidence… Similarly, in *R v FBP*… the trial judge was found not to have erred in finding it implausible that the complainant would consent to spontaneous sex on a balcony, potentially in full view of others, because that inference did not rest in stereotypes about the sexual behaviour of women. The inference was based on evidence about the ongoing sexual disinterest the complainant had shown in the accused, and the ready availability of a private bedroom.[78]

9.65 Dufraimont has also commented on the complexity of determining when evidence is relevant independent of myths and misconceptions, and the consequent risk for defendants from trial judges drawing the line in the wrong place, using the case of *R v Esquivel-Benitez*[79] as an illustration.

> The male accused was charged with sexual assault after he had sexual intercourse with an adult female acquaintance in his home while her husband was asleep in an adjacent room. The complainant's husband came into the room as the sexual activity was ending and promptly became enraged. On their walk home, the complainant's husband persistently demanded that she tell him what happened, repeatedly asking whether or suggesting that the accused had abused her. At first, the complainant did not say that she had been assaulted. She told her husband that the accused assaulted her only after they returned home and in response to his persistent questioning. At trial, the central issue was consent. The defence suggested that these interactions with her husband undermined the complainant's credibility, but the trial judge rejected this submission as "part of an ongoing myth regarding sexual consent." The Court of Appeal for Ontario concluded that the trial judge erred in rejecting the defence submission about this evidence, which "ought to have been considered and not dismissed as irrelevant by the trial judge." The evidence was relevant because it could have supported an inference that the complainant had a motive to lie.[80]

9.66 Dufraimont went on to observe that:

> [t]rial judges must, of course, avoid stereotypes about complainants' truthfulness. For example, it would be an error for a trial judge to rely on the idea that sexual assault complainants are generally untrustworthy or that they are generally likely to lie to conceal from partners and family members that they have consented to sexual activity. *JC* and *Esquivel-Benitez* remind us, however, that where there is an evidentiary basis for a defence suggestion that a particular complainant had a specific motive to lie, a trial judge is required to give that suggestion fair consideration.[81]

9.67 In our view, where there is an evidential basis to refer to what would otherwise be a myth, and doing so can properly advance the defence case and present an alternative

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78 *R v JC* 2021 ONCA 131 at [69]-[70], in WK Gorman, "The Avoidance of Stereotypical Reasoning in Rendering Judgment" (2021) 57 *Court Review* 224, 226-227.

79 *R v Esquivel-Benitez* 2020 ONCA 160 (Court of Appeal for Ontario).

80 L Dufraimont, "Current Complications in the Law on Myths and Stereotypes" (2021) 99 *Canadian Bar Review* 536, 552.

81 Above, 552-553.

to the prosecution case, then this is not reliance upon myths and misconceptions. Consider a case where the complainant did not report an alleged assault until six months later. The defence might call evidence of an argument where the defendant broke up with the complainant, after which the complainant went to the police. If so, then asking the complainant about the reasons for the delay in reporting might be reasonable. This could support a defence case that the complainant fabricated the account due to resentment and hurt after the defendant ended their relationship. However, if there is no evidence of any argument, then asking about the reasons for the complainant to have delayed reporting the assault is irrelevant. It encourages reliance on misconceptions about what a "real" victim would do.

9.68 Similarly, it is inappropriate to refer to issues which are not relevant on the facts of the case but are known to engage misconceptions, even if this does not constitute a line of questioning aimed to undermine credibility. For example, such a reference could include a passing reference to the complainant's clothing.

9.69 Finally, it is inappropriate to generalise about sexual offences where this is not supported by empirical evidence, such as a suggestion that most rapes result in internal injuries. Generalising about complainants as a class rather than addressing the specificities of the case is equally inappropriate. Addressing generalisations is especially significant because sexual offences myths infiltrate legal reasoning by positing a generalisation about an ordinary or reasonable response and then contrasting this "expected" response with the complainant's behaviour[82] to demonstrate that the offence has not in fact occurred. Further, generalisations infringe the requirement that there should be an evidential basis for any assertion of fact made. Any assertions should be restricted to the specific complainant and their account.

9.70 We rejected Cossins' suggestion of prohibiting certain lines of questioning, because some of the arguments which she rejects might be relevant on the facts of a specific case. We now consider how best to ensure that questioning remains relevant using the distinction we have drawn between myths and legitimate argument.

Addressing myths

9.71 In England and Wales, the judge might disallow questioning of a witness if it relates to matters which are too far removed from relevant issues which the jury have to determine.[83] In addition to the judge's powers to regulate the cross-examination of children and vulnerable witnesses, the judge also has a general discretion to prevent questions which are unnecessary, improper or oppressive.[84] Judges have responsibility for managing proceedings in the interests of justice and ensuring that the case is conducted fairly and in accordance with the law. This is an active duty of

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82 See eg O Smith and T Skinner "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441, 446-448.

83 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* ("*Blackstone's Criminal Practice*") (2022) F.1.19, citing *R v Haddock* [2011] EWCA Crim 303.

84 Blackstone's Criminal Practice (2022) F.7.16.

case management.[85] For example, the judge has a duty to stop irrelevant evidence being elicited and heard.[86] In *Lubemba*, it was emphasised that:

> [t]he trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate.[87]

9.72 As we observed in 2001 in our report on bad character,

> [t]he court has the power to control cross-examination. Cross-examination is not confined to issues raised in evidence in chief, but if the cross-examiner strays outside the issues in the case (including the credit of the witness), then the court should disallow questions which are irrelevant or vexatious, or which are designed to prolong the case unnecessarily. It is erroneous for a court to take the view that cross-examination cannot be stopped because there is some tenuous legal reason for it.[88]

9.73 In that report, we recommended an enhanced relevance threshold for non-defendant bad character evidence for reasons other than the impact on the jury of such evidence. We took the view that:

> even if the fact-finders did base their verdict on the evidence unaffected by the relative moral standing of the parties, the witness might suffer humiliation and distress in the process. The feelings of the witness are a matter of public interest – witnesses who undergo humiliating or distressing cross-examination will report this experience to others, and witnesses will be deterred from testifying.
>
> We do *not* argue that the sensibilities of witnesses should be protected at the expense of the defendant's rights, but, where the questions which the defence would like to ask do not substantially advance the defence case, then we do say that such questions should not be allowed.[89]

9.74 We posited some benefits for an enhanced relevance threshold with a requirement to apply for leave to adduce bad character evidence, which included

(1) requiring advocates and courts to consider whether questions would elicit evidence meeting the enhanced relevance threshold;

(2) addressing the fact that judges might be reluctant to intervene to prevent questioning because they are unsure that a question is *wholly* irrelevant;[90] and

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85 Criminal Procedure Rules (2020) ("CrPR") r 3.2.

86 M Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* ("*Archbold*") (2022) 4-388.

87 *R v Lubemba* [2014] EWCA Crim 2064 at [44].

88 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 9.5.

89 Above, paras 9.20-9.21.

90 Above, para 9.24.

(3) Making explicit the process of reasoning by which the evidence was deemed substantially probative.[91]

9.75 We concluded that:

> [u]nder an enhanced relevance test, the court would force the advocate to consider and articulate why it is that the evidence should be admitted as satisfying that test. The outcome might be that a witness was saved a public humiliation for a cause which could not sensibly have been thought to advance the defendant's case. At the very least the defence will have been forced to sharpen up the focus of its attack.[92]

9.76 We similarly regard it as important that where lines of questioning or evidence might invoke myths and misconceptions about sexual offending, advocates and the court should properly turn their minds to the relevance of the material. Nonetheless, we do not believe that it would be appropriate to introduce a heightened threshold outside of the context of SBE and criminal injuries compensation (CIC) claims, as discussed in Chapters 4 and 6. This is because SBE and CIC claims myths are narrower and more clearly defined and carry greater prejudicial potential. In contrast, other myths and misconceptions have less prejudicial potential, are more nebulous, may be more relevant on the facts of a case, and are not necessarily easily identified. Introducing a higher threshold for questioning would therefore present a greater risk to the defendant's fair trial rights than for SBE and CIC claims.

9.77 In our view, outside SBE and CIC claims, the use of existing powers to control the questioning of witnesses, applying an ordinary test of relevance, should be sufficient to ensure that myths and misconceptions are not introduced and relied upon in examination and cross-examination. The test of relevance preserves judicial discretion and allows flexibility for the facts of each case, but will not allow for myths to be relied upon where it is applied rigorously and consistently. We therefore provisionally propose that relevance should remain the test for acceptable lines of questioning on subject matter which might otherwise invoke myths and misconceptions, other than for SBE and CIC claims.

Consultation Question 76.

9.78 We provisionally propose that, in sexual offences prosecutions, the test for determining acceptable lines of questioning of a witness on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour or claims for criminal injuries compensation.

Do consultees agree?

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91 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No. 273, para 9.27.

92 Above, para 9.33.

Consultation Question 77.

9.79 We invite consultees' views on whether there are any types of potentially highly prejudicial material or factual scenarios beyond sexual behaviour and claims for criminal injuries compensation where evidence and cross-examination should be subject to an enhanced admissibility threshold rather than the relevance threshold?

9.80 The test of relevance is the existing constraint upon lines of questioning, but, as we explained above, there are concerns about its effectiveness in practice at preventing lines of questioning based upon myths and misconceptions.[93] We turn now to considering some measures which might help to ensure that the relevance test is consistently applied.

Codification

9.81 Codifying the relevance test might assist, by giving greater prominence to these issues and focusing the minds of advocates and the court. Codification could also result in a more consistent application of the threshold.

9.82 This codification could include indicative factors to be considered when determining whether a line of questioning is relevant. Such factors could include:

(1) whether the line of questioning constitutes or relies upon a generalisation, unsupported by evidence;

(2) whether the line of questioning will be used to invoke an impermissible stereotype;

(3) whether the line of questioning is based upon a factual conclusion deriving from the evidence in the case; and

(4) whether the potential prejudicial effect of the line of questioning outweighs its potential probative value.

Encouraging discussion

9.83 Another means of ensuring that relevance requirements are being observed would be to encourage discussion about lines of questioning and potential limits. At Ground Rules Hearings ("GRHs") for vulnerable witnesses and where an application has been made to introduce SBE, the court may already place limits on permissible and impermissible lines of questioning in advance.[94] This approach is considered to be an acceptable constraint on the defendant's right to present their case.

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93 A review into the operation of the s 28 procedure for pre-recording cross-examination also documented complainants' perceptions of being asked irrelevant questions: D Ward et al, "Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses" (April 2023) *Ministry of Justice and Ipsos UK*, p 42. The review also noted instances where complainants believed that the judge should have intervened to constrain lines of questioning, at p 45.

94 See YJCEA 1999, s 41 and *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579.

9.84 As indicated by the Court of Appeal in *Lubemba*, the previous version of the Criminal Practice Directions ("CrPD") recognised that a court may restrict an advocate from putting their case to a vulnerable witness.

> All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed, or acquiescing to leading questions… Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistences after (instead of during) the witness's evidence… The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial.[95]

9.85 Furthermore, in *R v Dinc*,[96] the Court of Appeal reaffirmed that the judge controlling cross-examination or requiring a list of questions in advance is not inherently unfair, and in fact may ensure that cross-examination is more focussed and effective.[97] The courts are however aware of "the potential for prejudice if a defence advocate is wrongly prevented from pursuing a legitimate line of questioning."[98] In *Dinc*, Hallett LJ referred to the earlier case of *R v SG*.[99] There, the complainant was a "mature and articulate young woman". Despite becoming distressed during cross-examination, the Recorder was wrong to treat her as a vulnerable witness and to require defence counsel to submit his remaining questions for approval. Instead, she should have been given a break and then cross-examination could have continued as normal. Where the witness has no difficulty in understanding the questions, requiring an advocate to prepare a list of questions for the court's approval during cross-examination should be regarded as exceptional.[100]

9.86 This indicates that while advance approval of lines of questioning has been sanctioned by the Court of Appeal, formal assessment of lines of questioning is unusual in practice in cases where the complainant is not a child or has no other communication needs, or outside of the context of an application to admit SBE or character evidence. There is no case of which we are aware in which a GRH was used to determine lines of questioning in advance specifically with a view to reducing the introduction of myths and misconceptions about sexual offending. As we explained

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95 *R v Lubemba* at [40]. CrPD (2015), 3E.4. The most recent CrPD (2023) contains substantially similar observations at 6.1.1 and 6.1.8-6.1.9.

96 [2017] EWCA Crim 1206, [2018] Crim LR 263.

97 *Rook and Ward* (2021) 28.25.

98 *R v Dinc* [2017] EWCA Crim 1206.

99 *R v SG* [2017] EWCA Crim 617, [2017] 4 WLR 119.

100 *R v Dinc* [2017] EWCA Crim 1206. See, *Rook and Ward* (2021) 28.25.

above, informal conversations between the judge and counsel which cover the intended topics of examination might occur more regularly.

9.87 However, the advance approval of lines of questioning via a GRH could be expanded to include consideration of lines of argument based on the complainant's delay in reporting, for example, or the clothing they were wearing during the alleged offence. Such an approach is supported by comment from other jurisdictions, most notably in Canada.

9.88 The Gillen Review suggested that:

> [t]he judge could swiftly intervene, either at the Ground Rules Hearing if the matter of rape myths has been raised or at trial, in the event of counsel unwittingly or otherwise attempting to unjustifiably invoke rape myths in the course of the case. Should counsel wish to challenge any of these assertions given the particular facts of the case, the matter could first be dealt with pre-trial or in the absence of the jury, during the hearing.[101]

9.89 Sir John Gillen further observed:

> I agree entirely that robust judicial case management is necessary in dealing with rape myths and I am of the view that the topic needs to be specifically raised at each Ground Rules Hearing so as to anticipate the possibility of such myths emerging in the course of the trial or even in the course of closing speeches by counsel/advocates.[102]

9.90 Additionally, based on a study of trial transcripts in Victoria, Australia, Henderson and Duncanson argue that

> [i]t is possible that a little judicial direction in the early stages of decision-making, at pre-trial hearings and in evidentiary rulings throughout the trial, may help prosecution and defence counsel to move away from a continued tendency to rely on myths in trials.[103]

9.91 Requiring clear articulation of permissible lines of reasoning is supported by several Canadian academics, albeit not through the format of a GRH. Tanovich observes that:

> an important way to regulate this problematic reasoning is to demand a clear articulation by defence counsel of the relevance of the complainant's impugned behaviour and a vigorous testing of the logic of that articulation by the trial judge in the context of all of the evidence and relevant legal standards on consent and mistaken belief in consent.[104]

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101 Gillen Review (2019) para 6.102.

102 Above, para 6.142.

103 E Henderson and K Duncanson "A little judicial direction: Can the use of jury directions challenge traditional consent narratives in rape trials?" (2016) 39 *University of New South Wales Law Journal* 750, 778.

104 DM Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases" in B L Berger, E Cunliffe and J Stribopolous (eds), *To Ensure That Justice is Done: Essays in Memory of Marc Rosenberg* (2017) p 87.

9.92 Dufraimont similarly suggests that:

> [b]road conclusions that particular forms of evidence are irrelevant should be avoided. Instead, false premises and discriminatory lines of reasoning should be identified and explicitly prohibited. Identifying the impermissible lines of reasoning will permit judges to distinguish them from legitimate lines of reasoning. In short, myths and stereotypes about sexual assault are properly understood as prohibited inferences, and the tendency of some forms of evidence to invite these prohibited inferences is a form of prejudice. That prejudice can lead to exclusion of the evidence, but it will not invariably do so if the evidence is also relevant for some other purpose.[105]

9.93 She acknowledges that there are potential downsides to this approach, when compared to complete prohibitions.

> Admittedly, the flexible approach to admissibility described here may not be as effective as bright-line rules in rooting out myths and stereotypes from sexual assault trials… If the evidence could not be used at all, there would be no concerns about its being used to support discriminatory or stereotypical inferences. However, Canadian law has rejected such bright-line rules and embraced a flexible, context-sensitive approach to relevance and admissibility for good reasons. This approach remains the only way to ensure that the defence has access to relevant evidence for legitimate purposes.[106]

9.94 Ultimately, she emphasises that:

> this entire analysis depends on achieving a clear understanding of the lines of reasoning that are prohibited. Myths and stereotypes must be identified with precision. Absent a clear understanding of the prohibited inferences, judges will be unable to instruct juries (or themselves) to avoid them. They will also be ill equipped to meaningfully balance the probative value of evidence against its prejudicial effect. Clarity in identifying and articulating myths and stereotypes about sexual assault is therefore fundamental to the task of separating these prohibited lines of reasoning from legitimate inferences and making those distinctions meaningful in the adjudication of sexual assault cases.[107]

9.95 Encouraging articulation of lines of reasoning was advocated by Daly, above at paragraph 9.49. It is also supported to some degree by the judgment of the Privy Council in *Myers v R (Bermuda)*. In the context of bad character evidence, the Court held that:

> relying on mere propensity as evidence of guilt is an inadmissible chain of reasoning. If the inadmissible chain of reasoning is the only purpose for which the evidence is to be adduced, the evidence is inadmissible. If there is some other

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105 L Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44 *Queen's Law Journal* 316, 346.

106 Above, 346-347.

107 Above, 348.

justification for the admission of the evidence, the jury usually needs to be warned not to pursue the inadmissible chain of reasoning.

9.96 Despite the current limited use of GRHs for this purpose, GRHs could be used in advance of sexual offences trials, during which lines of questioning could be canvassed and attention turned to the question of their relevance.

9.97 There are significant objections to using a GRH to conduct this case-by-case analysis of intended lines of questioning and admissibility of evidence. One objection is that limitations on the defendant's entitlement to test the prosecution's case and the complainant's account fully may be justified in very narrowly confined circumstances such as for vulnerable witnesses or in relation to evidence of the complainant's sexual behaviour. However, the justification does not extend to defendants being restricted in advance across a wide range of topics and might result in impermissible prejudice to the defendant. Further, conducting pre-trial hearings to determine lines of questioning and to manage this during the trial is likely to be an onerous and time-consuming task for judges and parties and risks elongating the trial.

9.98 Further, in Chapter 4 at paragraph 4.155, we commented on criticisms of relying on judicial discretion to determine relevance. Nonetheless, given the need for flexibility and fact-sensitivity in order to preserve the defendant's right to a fair trial, continued reliance on judicial discretion may be appropriate when coupled with increased attention to myths and misconceptions.

Directions

9.99 If judicial approval of lines of questioning were introduced in advance of cross-examination, it would follow that there should also be a response if the restrictions were breached. This response would be in addition to potential professional misconduct consequences for intentional breaches, as discussed below. The CrPD state that where restrictions have been set on lines of questioning, the judge has a duty to ensure compliance with these restrictions. If the restrictions are breached, the judge should give directions to the jury and should prevent further non-compliant questioning.[108] When myths and misconceptions slip through the advance approval process and feature in lines of questioning, this could trigger a relevant direction to correct the risk of the jury relying on myths and misconceptions.[109] This direction would be triggered where the evidence would not have satisfied the relevance threshold had it been considered in advance.

9.100 We invite views on how to ensure that the threshold of relevance for lines of questioning is applied in each sexual offences case.

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[108] CrPD (2015) 3E.4; CrPD (2023) 6.1.7.

[109] As we explain in Chapter 10, in the case of *R v Bhatt* [2022] EWCA Crim 926 at [72] the Court of Appeal explained that the purpose of giving directions on myths is to "address the risk of stereotypical thinking that would be unfair to the complainant".

Consultation Question 78.

9.101 We invite consultees' views on how the situation can be improved so that the requirement for lines of questioning to be relevant is considered and adhered to in each case. Some possibilities include:

(1) codification of the relevance threshold;

(2) a requirement that lines of questioning are discussed and approved by a judge at a hearing in advance;

(3) that the Judicial College consider whether a direction should be given where a line of questioning is deemed irrelevant because it relies on myths.

OTHER FEATURES OF THE TRIAL

9.102 Beyond lines of questioning in cross-examination and the admission of prejudicial evidence outside of the specified routes, there are other components of the trial where myths and misconceptions may feature. The trial observation studies frequently comment on the use of myths in barristers' opening and closing speeches. We therefore go on to consider other aspects of a trial, such as speeches by counsel and generalisations about sexual offences which might feature in those speeches.

Speeches

9.103 At the beginning of a Crown Court case where the defendant has pleaded not guilty, the prosecutor may make an opening speech. The speech sets out the charges, the nature of the case against the defendant, the evidence that will be called by the prosecution to prove their case, and the matters in dispute between the prosecution and the defence.[110] After this, the defence may make a speech which identifies the matters in issue. The terms of the defence's speech may, in some circumstances, be subject to the court's approval.[111] The defence are not automatically entitled to make this speech, but the previous version of the CrPD held that the court should invite the defence to address the jury unless there is a reason not to.[112] In practice, a defence speech at this stage is rare and usually only occurs for complicated cases or those involving restricted cross-examination.

9.104 After the prosecution have concluded their case, the defence may make an opening speech which summarises the defence case if at least one witness other than the

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110 CrPR (2020) r 25.9(2)(b).

111 CrPR (2020) r 25.9(2)(c).

112 CrPD (2015) 25A.4. Some examples were given: the issues are apparent; the prosecution summary was fair, accurate and comprehensive so a defence summary would be superfluous; an unrepresented defendant would risk injustice to themselves. The CrPD explained that this speech is not intended to be a summary of the defence case, but instead should set out the relevant issues in the defendant's own terms, so that the jury can focus on the issues and evaluate the prosecution evidence accordingly (see CrPD (2015) 25A.2).

defendant will be called to give evidence on the facts.[113] This statement can outline the defence case and comment on the prosecution evidence.[114] In practice, defence opening speeches are rare.

9.105 After the defence has concluded their case, the prosecution may be able to make final representations in the form of a closing speech. This is a right if the defendant is represented or if the defendant has called at least one witness other than themselves to give evidence. In other circumstances the court may permit the prosecution to make a closing speech but there is no automatic entitlement.[115] Nonetheless, in practice it would be very rare for the prosecution to be prevented from making a closing speech where the defence called no evidence. The defence are then always entitled to make final representations[116] which sum up their case, identify weaknesses in the prosecution's case or the case of any co-defendants, and comment upon the evidence which the jury has heard.[117] Defence counsel may put forward hypotheses which go beyond the defendant's stated version of events, as long as evidence has been called which would support these.[118] Counsel cannot give evidence or make assertions about facts not adduced in evidence,[119] and where a line of questioning has been ruled inadmissible by the judge then counsel should not refer to the matter in closing arguments.[120]

9.106 Juries are directed that opening and closing speeches are not evidence.[121] Nonetheless, research shows that jury verdicts are affected by the content of the speeches,[122] which could include the introduction or reinforcement of myths and misconceptions which have been developed throughout the trial. Cossins argues that this is because:

> [w]hile jurors may be instructed that prosecution and defence opening/closing addresses do not amount to evidence, they provide the context or framework in which the trial evidence is interpreted and represent the starting point for any pre-decisional distortion.[123]

9.107 As Cossins observes,

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113 CrPR (2020) r 25.9(2)(g).

114 *R v Randall*, The Times 11 July 1973.

115 CrPR (2020) r 25.9(2)(j).

116 CrPR (2020) r 25.9(2)(k).

117 Blackstone's Criminal Practice D18.15.

118 Blackstone's Criminal Practice D18.20, citing *R v Bateson*, The Times 10 April 1991.

119 Archbold 4-428, see eg *R v Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr App R 8.

120 Archbold 4-428, see *R v Fahy* [2002] EWCA Crim 525, [2002] *Criminal Law Review* 596.

121 See eg Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) ("Crown Court Compendium") at 28-13.

122 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 249, citing T Haegerich and B Bottoms, "Empathy and Jurors' Decisions in Trials Involving Child Sexual Assault Allegations" (2000) 24 *Law and Human Behavior* 421.

123 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 271.

> [e]ven though jurors in the study[124] were told that defence and prosecution opening/closing addresses did not amount to evidence, the findings show that "the manner in which case material is presented" in a trial can influence verdicts, "putting the fairness of the legal system in jeopardy"… Thus, controlling the content of counsels' "biasing statements about the defendant during opening and closing arguments might be more important in decreasing juror bias" than other strategies.[125]

9.108 Daly observed instances of defence barristers undermining judicial directions aimed at reducing jury reliance upon myths and misconceptions in their closing speeches. This included statements such as "[Her Honour has directed you about not making assumptions about reactions, but in this case…] you may find it somewhat surprising as to why she took no action at all."[126] In another case, during closing speeches defence counsel suggested that rape is only possible in certain sexual positions and therefore contributed to a "real rape" stereotype by commenting "[d]are I say, that woman on top during sex may not be what you imagine when the word rape is mentioned… you may think that suggests an element of control for the woman…".[127]

9.109 There are clear limitations to the trial observation studies, which we identify above at paragraph 9.34. These limitations include small sample sizes, meaning that they may not represent the general realities of practice. Nonetheless, they provide sufficient evidence for us to undertake an informed consideration of the issue.

9.110 In practice, it might be difficult for prosecution counsel to challenge or stop the exploration of myths and misconceptions in the defence's closing speech, because opposing counsel interrupting a speech is discouraged and very rare. Similarly, a convicted defendant may seek to appeal on the basis of excessive judicial intervention or bias demonstrated by the judge intervening in speeches. An interruption may also serve to reinforce and highlight the defence submissions which are being criticised. Therefore, a more appropriate time to deal with myths and misconceptions in closing speeches seems to be for the judge to correct comments in their summing up.

9.111 To avoid the use of myths in opening and closing speeches completely, Cossins suggests that:

> [a]rguably, it would be necessary to restrict the content of opening addresses of both counsel to information that will be supported by admissible evidence and the content of closing addresses to information that has been supported by the evidence adduced in the trial, not merely counsel speculation or commentary.
>
> For opening addresses in a sexual assault trial, a simpler approach would be to limit the prosecutor's opening address to a summary of the elements of the charge(s)

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124 The study is reported in T Haegerich and B Bottoms, "Empathy and Jurors' Decisions in Trials Involving Child Sexual Assault Allegations" (2000) 24 *Law and Human Behavior* 421.

125 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 251, citing T Haegerich et al, "Are the Effects of Juvenile Offender Stereotypes Maximised or Minimised by Jury Deliberation?" (2013) 19 *Psychology, Public Policy and Law* 81.

126 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 27.

127 Above, pp 28-29.

against the defendant, followed by a defence opening address which is limited to a denial of the defendant's guilt with respect to the charge(s).[128]

9.112 In her view,

> [l]egislation would be required to prohibit the use of certain information in opening and closing statements in order to prevent the use of supposition, gossip, speculation and rape myths, such as commentary about the complainant, including: the complainant's style of dress; the complainant's 'flirtatious' behaviour; the complainant's voluntary consumption of alcohol and/or drugs; the complainant's desire for victims' compensation; the complainant's delayed complaint; revenge on the part of the complainant; a desire by the complainant to protect her reputation; and the passivity of the defendant versus the 'titillating' behaviour of the complainant.[129]

9.113 However, an outright ban on using this information when addressing the jury may pose problems where these factors are relevant to the case and support a legitimate line of reasoning. As we explained above in relation to restricting lines of questioning, there are occasions where a piece of evidence or reasoning which may support a myth or misconception (in a different case) is in fact material to a relevant issue in the proceedings. Where this is the case and where the complainant will be cross-examined on this basis, there is little reason for restricting mention of this information in opening or closing speeches. Doing so could result in a conviction being found unsafe on appeal, leading to a retrial and the complainant having to give evidence again, or the conviction being quashed without a retrial.

9.114 Further, this restricted approach to prosecution and defence speeches is problematic because it could deprive the jury of a useful framework by which to evaluate the evidence. A bare statement or denial of the charges would not inform the jury about evidence which will be called, which is said to support or refute the prosecution case. As such, it has the potential to undermine the prosecution obligation to prove their case and the defence's entitlement to explain to the jury why they have not done so.

9.115 Opening and closing speeches are also an opportunity for the prosecution to explain myths and misconceptions, and to posit alternative narratives. For example, the Angiolini Review recorded that:

> [a] senior member of the Bar, with considerable experience of prosecuting rape, suggested that barristers should include the issue of stereotypes in their opening speech.[130]

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128 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 597.

129 Above, p 597.

130 Rt Hon Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (April 2015) ("Angiolini Review") para 211. However, some defence counsel and judges might object and see this as a comment on the evidence, more appropriate for closing speeches than for opening the case. A member of the bar was of the view that there is inconsistency in support for this approach among the judiciary.

9.116 We therefore rule out the idea of an absolute prohibition on certain information featuring in opening and closing speeches.

Generalisations

9.117 In Victoria, Australia, there is a statutory requirement that the trial judge, prosecution and defence counsel must not say or suggest in any way that the law regards complainants in sexual offences cases as an unreliable class of witness; or that they are an unreliable class of witness; or that complainants who delay or do not make a complaint as a class are less credible or require more careful scrutiny; or that sex workers, or complainants with a particular sexual orientation or gender identity are as a class less credible or require more careful scrutiny.[131]

9.118 The judge must also not say or suggest that because the complainant delayed in making a complaint or did not make a complaint it would be unsafe to convict the defendant, or that the complainant's evidence should be scrutinised with great care.[132] If these provisions are not complied with, the judge is under a duty to correct the suggestion, though need not do so if there is a good reason to refrain such as counsel already having corrected their statement.[133]

9.119 Defence counsel are nonetheless permitted to say that in the *particular* case the complainant's delay in reporting impacts upon their credibility.[134] As explained by the Supreme Court of Victoria,

> [t]hat is not to say that delay in making a complaint can never be relevant to the credibility of a complainant. Of course it can. But, in order to avoid taking a mental shortcut, the delay in question must be assessed against the experience that delay in making a complaint about a sexual offence is common, and that there may be good reasons for it. It must also be assessed in light of any reasons given by the complainant for the delay.[135]

9.120 Any discussion of the complainant's delay in reporting triggers a mandatory judicial direction on delay.[136]

9.121 The justification for this provision is to prevent juries from making decisions on the basis of misconceptions. The Department of Justice and Regulation regards the statute as striking an appropriate balance between this aim and the fair trial rights of the defendant. The defence are entitled to run their case, but the jury must interpret the evidence based on facts rather than misconceptions. The defendant should not be

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131 Jury Directions Act 2015 (Vic), s 51(1).

132 Jury Directions Act 2015 (Vic), s 51(2).

133 Jury Directions Act 2015 (Vic), s 7.

134 Jury Directions Act 2015 (Vic), note 3 to s 51.

135 *AB v XYZ Pty Ltd* [2019] VSC 788 at [44].

136 Jury Directions Act 2015 (Vic), s 52.

permitted to derive an advantage from a common misconception, and this ensures fairness for the community, the complainant and the defendant themselves.[137]

9.122 There is a similar requirement in New South Wales, where statute provides that a judge must not direct a jury or make any suggestion that complainants as a class are unreliable witnesses.[138] In Queensland, statute provides that the judge must not suggest that the law regards the complainant's evidence to be more or less reliable based on the time taken to make a complaint.[139]

9.123 In England and Wales, there used to be a common law requirement to give a mandatory direction, warning juries about the dangers of convicting on the basis of the uncorroborated evidence of a complainant. This was justified on the basis that "complainants about sexual offences may lie or fantasise for unascertainable reasons or no reason at all".[140] This requirement was abolished by statute,[141] but the Court of Appeal decided in *Makanjuola* that there remains a discretion to give a "caution warning" where there is an ''evidential basis for suggesting that the evidence of the [complainant] may be unreliable''.[142] This urges caution but does not say that it would be dangerous to convict on the uncorroborated evidence of the complainant. Where the evidence of unreliability is stronger, for example, ''if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge'', the jury might be told that it would be wise to look for supporting evidence.[143] "Any reference to supporting material will not, however, be encumbered by the old common law rules on the meaning of corroboration and the kind of evidence capable of being corroborative."[144] This therefore removed a generalisation which suggested that complainants as a class are unreliable, while still allowing unreliability to be raised as an issue where there is evidence of it.

9.124 If a prohibition on generalisations were introduced and were breached, the likely outcome would be a direction to the jury to disregard a specific comment, or a direction which explicitly corrected the relevant misconception. Case law indicates that discharging the jury in response should be seen as a last resort. In the case of *Farooqi*, the appellants argued that their convictions were unsafe due to the misconduct of trial counsel for one of their co-defendants. This included inappropriate comments in his closing speech which suggested bias on the part of the judge. The Court of Appeal held that:

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137 Department of Justice and Regulation, "Jury Directions: A Jury-Centric Approach Part 2", (2017) Criminal Law Review, p 21.

138 Criminal Procedure Act 1986 (NSW), s 294A.

139 Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A(4).

140 *R v Makanjuola* [1995] 1 WLR 1348 at 1350.

141 Criminal Justice and Public Order Act 1994, s 32.

142 *R v Makanjuola* [1995] 1 WLR 1348 at 1352.

143 *R v Makanjuola* [1995] 1 WLR 1348 at 1351.

144 P Lewis, "A Comparative Examination of Corroboration and Caution Warnings in Prosecutions of Sexual Offences" [2006] *Criminal Law Review* 889, 893-894, citing *R v Makanjuola* [1995] 1 WLR 1348 at 1352. Professor Lewis is the Commissioner for Criminal Law at the Law Commission of England and Wales, and lead Commissioner for this project.

> [w]hen issues like this arise, the starting point however, and this requires emphasis, is that the overwhelming likelihood is that the appropriate response is for the trial to continue to its conclusion. The derailment of a trial, whether on the basis of deliberate or inadvertent misconduct by counsel, must remain the exception. The judge is vested not only with authority over the conduct of the trial, but with the means, through careful and unequivocal directions to ensure that the jury, with its own interest in the fairness of the trial process, understands the criticisms properly made by the judge for which counsel is responsible, and does not, unless directed to do so, visit them on either his client, or any of the remaining defendants.[145]

9.125 And subsequently:

> As the judge recognised it was open to him to discharge the jury and order a new trial, a decision involving huge inconvenience to everyone else involved in the case, and substantial public expense… Provided the judge was satisfied that the issues and evidence could be summed up to the jury in a way which would correct the errors… while simultaneously ensuring that the trial of the defendants would not be prejudiced, the trial could sensibly continue to its normal conclusion.[146]

9.126 It is important that generalisations about complainants or sexual offending which are not based in evidence are addressed by the court, to prevent improper reasoning by juries and to protect complainants. Requiring judges to respond to generalisations might disincentivise counsel from making these statements, as they know that a direction would follow. Further, it could turn attention to the issue of generalisations and remind advocates and the court about this form of prohibited reasoning. However, we do not suggest a general prohibition on making generalisations, as this could lead to undesirable consequences such as applications to discharge the jury, despite the guidance in *Farooqi*. A general prohibition may also compromise judicial independence. Instead, we invite views on whether the Judicial College should consider providing guidance on this issue to judges.

Consultation Question 79.

9.127 Should the Judicial College consider providing guidance to judges on how best to respond to generalisations which rely on myths or misconceptions where they are raised in counsels' speeches? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

(3) suggesting that delayed reporting, in itself, makes complainants less credible.

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145 *R v Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr App R 8 at [103].

146 *R v Farooqi* at [116].

9.128 We acknowledge that the issues of myths and misconceptions raised in advocates' speeches extend beyond generalisations about complainants or about sexual offending. However, a consistent application of the relevance threshold should reduce the amount of irrelevant evidence adduced at trial. This would consequently reduce the extent to which myths and misconceptions based on the specific case could legitimately be drawn upon by advocates in their speeches. Further, the split summing up framework which we describe in Chapter 10 at paragraphs 10.29 to 10.31 can respond to misconceptions raised during speeches, both pre-emptively and reactively. A direction before closing speeches can signal to advocates the limits of appropriate comment, while further directions after speeches could respond to any myths which had nonetheless been introduced.[147]

PROFESSIONAL MISCONDUCT

9.129 We now turn away from addressing the use of myths and misconceptions during individual trials, and look at ways of disincentivising this behaviour more generally. One way in which this could be done is to provide clarity regarding the circumstances in which professional misconduct consequences would follow from the introduction of or reliance on myths and misconceptions. We emphasise that the courtroom is an environment where decisions have to be taken quickly. Questioning may unintentionally stray into reliance on myths and misconceptions for a range of reasons, including work pressures, inexperience and inadequate training. Our consideration of professional misconduct consequences is limited to instances of intentional or tactical breaches of the requirement not to rely on myths and misconceptions about sexual offences.

9.130 Legal representatives owe duties to the court and must follow codes of conduct.[148] These codes are formulated to protect and promote the public interest and to support the rule of law. Solicitors and barristers are bound by the codes of conduct of their independent regulators, which are the BSB for barristers and the Solicitors Regulation Authority ("SRA") for solicitors. Where the BSB consider that an allegation should be

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147 We also acknowledge that judges may themselves express myths and misconceptions when addressing counsel or the jury, which is not addressed by our analysis. However, stakeholders did not tell us that this was a problem which they had observed, and judges receive training before sitting in sexual offences cases which should avoid this problem arising. We therefore do not consider options for addressing myths and misconceptions, including generalisations, expressed by judges. It should be noted, however, that as we discuss in this chapter, in Chapter 10 and in Appendix 2, following *J.L. v Italy* (2021) App No 5671/16 (translated from French), judicial reliance upon myths or stereotypes may constitute a breach of the complainant's rights under article 8 of the ECHR.

148 See Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct. Barristers are expected to observe their duty to the court in the administration of justice (CD1); act in the best interests of each client (CD2) fearlessly and by all proper and lawful means (rC15.1); act with honesty and integrity (CD3); and not behave in a way which is likely to diminish trust and confidence which the public places in the profession (CD5). The duty to act in the best interests of each client is subject to the duty to the court and the obligation to act with honesty and with integrity (rC16). The duty to the court to act with independence in the interests of justice overrides any inconsistent obligations (rC3 and rC4). Barristers may not mislead the court by making statements, asking questions or making suggestions to a witness known to be untrue or misleading (rC6). See The Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs* (November 2019). Solicitors are not permitted to mislead the court or be complicit in the acts or omissions of others which do so (1.4); may only make assertions which are properly arguable (2.5); must comply with court orders which place obligations on them (2.5); and must act in the client's best interests (3.1).

investigated, it acts as prosecutor before the Bar Tribunal and Adjudication Services ("BTAS") and the SRA prosecutes disciplinary breaches before the Solicitors Disciplinary Tribunal ("SDT").[149]

9.131 Solicitors, as well as potentially appearing as advocates, may indirectly contribute to the reliance on myths and misconceptions at trial through their instructions to counsel and drafting of documents such as the Defence Statement. However, as this material is not usually before the jury and may not be ventilated in public at all, our analysis is limited to advocates who make arguments at trial.[150]

9.132 The status of the Bar's Code of Conduct was explained in 1975 in the case of *McFadden*.[151]

> The Bar Council issues statements from time to time to give guidance to the profession in matters of etiquette and procedure. A barrister who conforms to the Council's rulings knows that he cannot be committing an offence against professional discipline. But such statements, although they have strong persuasive force, do not bind the courts. If therefore a judge requires a barrister to do, or refrain from doing, something in the course of a case, the barrister may protest and may cite any relevant ruling of the Bar Council, but since the judge is the final authority in his own court, if counsel's protest is unavailing, he must either withdraw or comply with the ruling or look for redress in a higher court.[152]

9.133 A representative of the BSB explained to us that if clear directions from a judge were disregarded, this could constitute a breach or breaches of the following provisions of the BSB Handbook:

Core Duty 1 – You must observe your duty to the court in the administration of justice;

Core Duty 3 – You must act with honesty, and with integrity (**integrity only**); and/or

Core Duty 5 – You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.

9.134 However, she told us that if legislation and guidance about relying on myths and misconceptions were clarified, it would make it easier for the BSB to decide on breaches in specific factual circumstances.

9.135 A stakeholder who works with complainants told us that barristers should be aware that they will face serious consequences if they rely on rape myths during sexual offences cases, including being reported to the Bar Council. Similarly, Sir John Gillen told us that invoking rape myths should be a ground of professional misconduct which is written into the Bar Council and Law Society disciplinary rules. The Gillen Review

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149 BTAS is governed by the Council of the Inns of Court. Its President is Sir Nicholas Green, who is the Chair of the Law Commission.

150 Although the judge can direct that the jury is given a copy of the defence statement where the defendant declines to give an opening statement of issues. See CrPR (2020) r 25.9(2)(c)(ii).

151 *R v McFadden* (1976) 62 Cr App R 187.

152 *R v McFadden* (1976) 62 Cr App R 187, James LJ at 190.

also recommended that inappropriately questioning a child or vulnerable person should be a matter of specific professional misconduct.[153] This was regarded as necessary because:

> [t]he perception is, however erroneous it may be, that advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a child or other vulnerable person. This perception needs to be dealt with by both the Bar Council and the Law Society.[154]

According to the Gillen Review, both the Bar Council and the Law Society asserted that inappropriate questioning already constitutes professional misconduct, without the presence of a specific ground.[155]

9.136 Although the recommendation in the Gillen Review is primarily directed at inappropriate questioning through exploitation of vulnerabilities, such questions could be inappropriate because they rely on myths and misconceptions. Due to the availability of specific training on how to question vulnerable witnesses, discussed below, failure to comply with the guidance in this training is more clearly a breach of the Code of Conduct than reliance on myths and misconceptions.

9.137 Smith highlights some potential issues in attempting to regulate the reliance on myths and misconceptions via the existing professional Codes of Conduct.

> [T]he Bar Council Code of Conduct… asserts that barristers must protect vulnerable witnesses and cannot knowingly mislead the jury, both of which attempt to ensure that questioning remains appropriate. This is often ineffective, however, because barristers tend to prioritise another part of the Code which states that they should advance their client's interests by any legal means possible. In addition, Nicolson… has highlighted that barristers are unlikely to become "whistle-blowers" against their colleagues and so a Code of Conduct cannot be expected to create change by itself.[156]

9.138 However, we were told, and it is clear in the BSB Code, that the primary duty held by a barrister is to the court to act in the interests of justice[157] and the duty to act in the best interests of each client is subject to the obligation to act with honesty and with

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153 Gillen Review (2019), Recommendation 200.

154 Above, para 14.166.

155 Above, para 14.202.

156 O Smith, "Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials", University of Bath PhD thesis (2013) p 210, citing M Burton et al, "Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales" (2007) 11 *International Journal of Evidence and Proof* 1; A Sanders and I Jones, "The Victim in Court" in *Handbook of Victims and Victimology* (2007). The internal reference is to D Nicolson, "Making Lawyers Moral? Ethical Codes and Moral Character" (2006) 25 *Legal Studies* 601.

157 The duty to the court to act with independence in the interests of justice overrides any inconsistent obligations (Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct rC3 and rC4).

integrity.[158] Barristers are also expected to report their own serious misconduct to the BSB, which includes knowingly or recklessly misleading the court.[159]

9.139 It has been observed, both in case law and in a government review, that standardising the relevant Codes of Conduct and professional requirements could lead to a change in practice in trials.[160]

9.140 There are reasons not to use disciplinary proceedings to tackle the use of myths and misconceptions in sexual offences cases. One argument is that the introduction of or reliance on these myths might be inadvertent. Individual members of the judiciary told us that, in their experience, where SBE had been introduced without an SBE application, this was always accidental and was adequately resolved by judicial directions, without tainting the proceedings. Inadvertent reliance might be especially likely where the myths reinforce wider cultural narratives, as observed by Dr Daly. The risk of inadvertent use of myths means that professional consequences would be inappropriate and would likely not result in a finding of misconduct meriting disciplinary sanction.

9.141 In addition, as we explained, arguments which might otherwise be based on myths and misconceptions might be appropriately made in a particular case. Whether or not this is the case might be ill-suited for retrospective disciplinary proceedings to determine, as compared to a judge making this assessment as part of their oversight of the trial. Further, we recognise that advocates are making decisions under pressure, and that professional misconduct proceedings should be reserved for exceptional serious cases, where restrictions have been intentionally or tactically breached.

9.142 Finally, there is a risk that the threat of disciplinary sanction may cause fewer counsel to accept instructions to act in sexual offences cases. For fair trials to occur, it is essential that a sufficient number of trained practitioners are available to act in sexual offences cases. We acknowledge that an emphasis on disciplinary action may have negative consequences, and therefore reiterate that our discussion aims to add clarity and reinforce positive practice.

9.143 The content, scope and application of its Codes of Conduct are for the BSB to determine. Nonetheless, we were told by stakeholders that intentionally invoking myths and misconceptions could breach professional obligations. We therefore invite views on whether practitioners should be warned of this possibility.

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158 Bar Standards Board, *BSB Handbook* (December 2020), Part 2, Code of Conduct rC16.

159 Above, rC65.

160 Ministry of Justice *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014) eg at [32]; *R v Farooqi* [2013] EWCA Crim 1649 eg at [109] where Lord Judge CJ said: “In the trial process the advocate is subject to some elementary rules. They apply whether the advocate in question is a barrister or a solicitor, and to the extent that the rules of professional conduct of either profession are not consistent, they should be made so. In the forensic process the decision and judgment of this court bind the professions, and if there is a difference, the rules must conform with the decision of the court.”

Consultation Question 80.

9.144 Should the Judicial College consider providing guidance to judges on warning advocates about the potential for professional misconduct consequences to follow from their reliance on myths and misconceptions in the conduct of a sexual offences case?

Consultation Question 81.

9.145 Should the Bar Standards Board consider making explicit reference in its Code of Conduct to the potential for professional misconduct consequences to arise from reliance on myths and misconceptions in sexual offences cases?

9.146 A prohibition against generalisations of the type discussed above at paragraphs 9.117 to 9.126 would provide a clearer foundation for a warning or for professional misconduct consequences for breach than the general duties to conduct the case fairly and not to mislead the court. This would also be a more serious consequence than the corrective directions discussed above.

9.147 There are some difficulties with introducing a specific prohibition against making generalisations which rely on myths and misconceptions, for the purposes of professional misconduct proceedings. These include that the provisions may be difficult to apply in practice if counsel or the judge do not use the exact words that are prohibited but nonetheless introduce myths and misconceptions. Suggestions or implications are hard to identify, regulate and sanction, especially retrospectively. Further, applying this approach in England and Wales might constrain advocates in their duty to act in the best interests of their client, through fear of contravening the prohibition.

9.148 Nonetheless, prohibiting generalisations would carry a strong signalling function that generalisations founded on myths and misconceptions have no place in sexual offences trials. Disciplinary consequences arising from breach of a prohibition on generalisations might also have more of an effect in disincentivising counsels' reliance on myths and misconceptions than a corrective direction. We therefore invite views on whether generalisations constituting myths and misconceptions about sexual offences should be prohibited in advocates' speeches, for the purposes of disciplinary proceedings.

9.149 We have focussed on speeches here for the same reasons as above, namely that the relevance threshold when applied appropriately would not permit generalisations which rely on myths and misconceptions. There is thus no need for a prohibition to otherwise regulate lines of questioning.

Consultation Question 82.

9.150 Should the Bar Standards Board consider explicitly stating in its Code of Conduct that generalisations relying on myths and misconceptions about sexual offences in advocates' speeches are prohibited as they constitute a breach of the duty not to mislead the court? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

(3) suggesting that delayed reporting, in itself, makes complainants less credible.

9.151 We acknowledge that professional disciplinary consequences would not impact the jury's decision-making in a specific case where a barrister had introduced a myth or misconception, but they would be aimed at reducing the frequency of this happening, along with supporting the aims of enhancing public confidence and reducing trauma to complainants.

WASTED COSTS

9.152 In certain circumstances, the court may award costs against parties or legal representatives due to their conduct. Where costs have been incurred due to the actions of the party or representative, the court may direct that that party pays the other party money to compensate for that loss. These wasted costs may be awarded on an application from the party who has incurred the costs or exceptionally[161] on the court's own initiative.[162] They may be awarded against a party where the costs were incurred due to an unnecessary or improper act or omission.[163] They may be awarded against an individual legal representative where the costs were incurred due to an improper, unreasonable or negligent act or omission by the representative.[164] The case law confirms that this is a high threshold.

9.153 In the leading case of *Ridehalgh v Horsefield*,[165] it was held that "improper" includes conduct which would justify a serious professional penalty such as suspension or disbarment. "Unreasonable" refers to behaviour which is vexatious or harassing. "Negligence" does not refer to tortious conduct, but instead covers a failure to act with the competence which is reasonably expected of ordinary members of the

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161 *Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398.

162 CrPR (2020) r45.9(3). However, when acting on its own initiative the court should proceed cautiously. If the judge proposes the costs order then there is a danger that the judge will be seen as acting in their own cause. See *Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398 at [44].

163 Prosecution of Offences Act 1985, s 19.

164 Prosecution of Offences Act 1985, s 19A. See also, *Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398, discussed at para 9.155, where Lord Burnett revoked a wasted costs order against defence counsel albeit that the comments made by defence counsel "strayed beyond the bounds of appropriate comment".

165 *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 WLR 462.

profession.[166] *Persaud v Persaud*[167] added that the negligence must be severe enough to constitute a breach of the representative's duty to the court.[168]

9.154 The high threshold has also been confirmed at appellate level. In *Re a Barrister (Wasted Costs Order) (No.9 of 1999)*,[169] Clarke LJ held that a wasted costs order is appropriate only where the lawyer

> gave advice or committed an act or was responsible for an omission which no member of the profession, who was reasonably well informed and competent, would have given or done or omitted to do.[170]

9.155 *Le Brocq* was a case where the judge discharged the jury and imposed a wasted costs order upon a defence barrister. The barrister had discussed SBE and criticised the restrictions imposed upon cross-examination in his closing argument, including criticising the GRH procedure and suggesting that the trial was unfair. However, the wasted costs order was overturned upon appeal. The Court of Appeal thought that as the prosecution had already raised the SBE, the barrister's comments did not satisfy the test in *Ridehalgh*. The other comments made were unreasonable, but the judge should not have discharged the jury as the issue could have been adequately dealt with by a direction. Wasted costs should not have been imposed.

9.156 The general approach to take when considering wasted costs is as articulated in *Re a Barrister (Wasted Costs Order) (No.1 of 1991).*[171]

> A three-stage test or approach is recommended when a wasted costs order is contemplated. (i) Has there been an improper, unreasonable or negligent act or omission? (ii) As a result have any costs been incurred by a party? (iii) If the answers to (i) and (ii) are 'Yes,' should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?[172]

9.157 The Practice Direction on Costs in Criminal Proceedings emphasises that wasted costs orders are "draconian", so there must be a clear and particular ground for imposing one.[173] Further, while there is a penal element, the aim is not to punish but instead to compensate the party who wasted the costs. It therefore needs to be clearly established that costs have in fact been wasted.[174]

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166 *Ridehalgh v Horsefield* [1994] Ch 205, 232.

167 *Persaud v Persaud* [2003] EWCA Civ 394, [2004] 1 Costs LR 1.

168 *Persaud v Persaud* at [22].

169 *Re a Barrister (Wasted Costs Order) (No. 9 of 1999)* The Times 18 April 2000.

170 As quoted by P Hungerford-Welch, case comment on *Le Brocq v Liverpool Crown Court*, [2020] *Criminal Law Review* 565, 568.

171 *Re a Barrister (Wasted Costs Order) (No.1 of 1991)* [1993] QB 293, [1992] 3 WLR 662.

172 *Re a Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] QB 293, 301.

173 Practice Direction (Costs in Criminal Proceedings) 2015, 4.2.4.

174 Practice Direction (Costs in Criminal Proceedings) 2015, 4.2.5.

9.158 It therefore appears that the high threshold for imposing a wasted costs order is unlikely to be met by reliance on myths and misconceptions, even where the reliance is intentional and requires a judicial direction to correct it. However, it is not impossible for a wasted costs order to be made. For example, on the facts of *Le Brocq*, if the prosecution had not introduced the SBE, then the Court of Appeal might have found the discharge of the jury to be proportionate. In any event, discharge of the jury is discouraged and, without this, it is unlikely that wasted costs will be awarded given the need to establish loss.

9.159 A costs order against a party, rather than an individual legal representative, under section 19, has a different statutory threshold, but one that is nonetheless high. It also has the same requirement of the costs having been wasted, which is unlikely in relation to the introduction of myths and misconceptions.

9.160 As with professional misconduct, we note that imposing a wasted costs order would not impact the jury's decision making in a specific case where a barrister had introduced a myth or misconception inappropriately, but it would aim to reduce the occurrence of such behaviour by disincentivising it.

Consultation Question 83.

9.161 Should the Judicial College consider providing guidance to judges on warning advocates about the possibility of a wasted costs order where reliance on myths and misconceptions in their conduct of a sexual offences case has caused costs to be wasted?

CONCLUSION

9.162 In this chapter we have considered ways in which the conduct of the case could be regulated to prevent the introduction of myths and misconceptions, while allowing the defence fully to advance their case. We have first considered a mandatory training requirement, so that advocates are supported to proceed appropriately in sexual offences cases. At trial, in our view, the test of relevance should be sufficient to prevent unacceptable lines of questioning. For most myths and misconceptions, we have considered introducing warnings that professional misconduct consequences or wasted costs orders might result. Finally, however, in line with a model adopted in several Australian states, we have considered a different approach for generalisations which rely on myths and misconceptions, such as that "complainants are less reliable than other witnesses". This is because these (false) generalisations do not suffer from the difficulty of determining what is inappropriate and what is a legitimate argument on the facts of a specific case. Therefore, the potential consequences we consider for the introduction of and reliance on generalisations are more serious: corrective directions during a trial; and a recognition that introducing and relying on generalisations breaches the duties owed by advocates.

9.163 We acknowledge that there are limitations to these potential solutions, especially given their fact-sensitivity in each case. As we acknowledged in Chapter 4 with regard to SBE, there are some lines of argument which, even if relevant to the case, risk

prejudice to the complainant and impermissible reasoning based upon myths and misconceptions. We consider some options for addressing these concerns in Chapter 13.

Chapter 10: Jury decision making

INTRODUCTION

10.1 Chapter 2 considers the prevalence of myths and misconceptions and their impact on jurors in sexual offences trials. The extent to which juries are fallible to rape myths is disputed, but the existing research in this area suggests that jurors may lack accurate knowledge of how victims respond to sexual violence leading them to proceed on the basis of myths and misconceptions. However, when bad character or sexual behaviour evidence ("SBE") is adduced, jurors are expected to understand any restrictions on the evidence and on the purposes for which it can be used. Further, as explained in Chapter 2, there is a level of inherent bias in all members of society, not just actors in the legal system. We must be careful to avoid blaming jurors for reasoning which might be based on myths and misconceptions, or counsel for introducing these myths. Nonetheless, ensuring fair trials in sexual offences cases includes protection of the defendant's rights to a fair trial and prevention of an acquittal founded on myths and misconceptions.

10.2 This chapter considers how information should be directly conveyed to jurors to ensure they fairly evaluate the evidence before them untainted by myths and misconceptions. The danger inherent in such misconceptions is that they may be inadvertently deployed by jurors when considering the reliability and truthfulness of the complainant's or defendant's account. As a result, a false but sincere belief held by jurors can contaminate their decision-making process and inadvertently lead a jury into error despite their best intentions.

10.3 Judges are encouraged to give appropriately tailored directions to the jury to address myths and misconceptions. We consider how the use of directions may be improved, whether the use of directions alone is sufficient and whether additional methods may be justified. One such additional method is the use of expert evidence about general behavioural responses to sexual violence. This evidence may provide jurors with a further framework by which to assess the evidence in the case. Other juror education methods do not rely on the judge or an expert – for example, written information notices, an educational video or online interactive tool – and provide more standardised information to jurors. We consider whether and, if so, how these different methods may be used in combination in sexual offences trials.

10.4 Directions provide a template for jurors' deliberations and also for the conduct of the case by the judge and the parties. The conduct of the case impacts on jurors' perceptions of the complainant, the defendant, and the evidence, so warrants separate consideration. Chapter 9 contains a wider exploration of the conduct of the case by the judge and by the parties and how this may be improved.

10.5 The final section of this chapter turns to an issue that was discussed in chapter 2: the state of knowledge about how juries deliberate. As we explained in chapter 2, research into juries is constrained by laws that prohibit the soliciting or disclosing of

information about the conduct of deliberations.[1] In this section we ask whether there is a case for reforms that would increase understanding of jury deliberation in England and Wales.

DEFENDANT'S RIGHT TO A FAIR TRIAL

10.6 In seeking to address myths and misconceptions via judicial directions, expert evidence, and juror education tools, the defendant's right to a fair trial and the complainant's right to respect for their private life are both engaged. These rights are found respectively in articles 6 and 8 of the European Convention on Human Rights ("ECHR"). Article 8 covers issues related to a person's sexual sphere, including sexual life, sexual orientation,[2] reputation,[3] and autonomy,[4] which might be undermined by the influence of myths and misconceptions over jurors in sexual offences trials.

10.7 In principle, judicial conduct of the trial and judicial decision-making designed to avoid jurors relying on myths and misconceptions in their deliberations are compatible with the defendant's right to a fair trial. In relation to the judge's conduct of the trial, in *J.L. v Italy*,[5] the European Court of Human Rights ("ECtHR") concluded that in regulating the examination of witnesses and the overall conduct of the trial, the court must strike a "fair balance" between the interests of the defendant in challenging the evidence against them and the complainant's personal integrity and dignity.[6]

10.8 In relation to judicial decision-making, the court found that judges have a role in ensuring that myths and misconceptions are not replicated in courts' decision-making and judgments. Given that in England and Wales juries decide the facts, this obligation extends to judges using their powers[7] to avoid the incorporation of myths and misconceptions into jurors' deliberations and verdicts (as well as judges' decisions). In *J.L. v Italy*, the ECtHR was highly critical of passages of the Court of Appeal's judgment which contained reasoning and decision-making about evidence which was based on stereotypes. The ECtHR observed that these considerations were "neither relevant for the assessment of the [complainant's] credibility … nor decisive in resolving the case."[8] It found that the state's positive obligation to protect complainants and witnesses during criminal proceedings limits judicial decision-making.

> Accordingly, judges' entitlement to express themselves freely in decisions, which is a manifestation of the judiciary's discretionary powers and of the principle of judicial

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1 Juries Act 1974, s 20D.

2 *Dudgeon v UK* (1981) App No 7525/76 at [41]; *Sousa Goucha v. Portugal* (2016) App 70434/12 at [27].

3 *Axel Springer AG v Germany* (2012) App No 39954/08 (Grand Chamber decision) at [83].

4 *Christine Goodwin v UK* (1996) App No 28957/95 (Grand Chamber decision) at [90].

5 *J.L. v Italy* (2021) App No 5671/16 (translated from French).

6 *J.L. v Italy* (2021) App No 5671/16 (translated from French) at [128].

7 Including the powers that are the subject of this chapter, such as giving directions on myths, determining the admissibility of expert evidence and permitting the use of juror education tools.

8 *J.L. v Italy* (2021) App No 5671/16 (translated from French) at [137].

independence, is limited by the obligation to protect the image and private life of persons coming before the courts from any unjustified interference.[9]

10.9 However, judicial decision-making must also take account of the defendant's right to a fair trial, and this right may justify interference with the complainant's right to respect for their private life in this context.[10] We explore these issues further in Appendix 2 and return to them at paragraph 10.160(6) in the context of our discussion of expert evidence.

DIRECTIONS

Background

10.10 In a Crown Court trial, judges give directions to the jury on matters of law, which the jury must apply to their determination of the facts. In the chapter on Myths and Misconceptions, we explained that the example directions in the Crown Court Compendium[11] could be used to address myths and misconceptions about sexual offences. One example direction warns against making assumptions, and there are further specific example directions covering individual myths.

10.11 We have discussed directions to the jury elsewhere in this consultation paper, where this has been relevant to our analysis. In Chapter 3, we considered the example direction on inconsistent accounts resulting from trauma. In the Chapter 4, we considered the example direction about the complainant's revealing or provocative clothing. In Chapter 5, we provisionally propose a new jury direction available in certain circumstances to explain why the jury had not heard any evidence about the complainant's good character. We also considered whether there should be a new example direction about false allegations, where these are introduced as evidence of the complainant's bad character.

10.12 Subsequently, in Chapters 6 and 9, we consider corrective directions where myths and misconceptions have been introduced. In Chapter 6, we also consider whether there should be a new direction in relation to compensation claims made to the Criminal Injuries Compensation Authority.

10.13 In this section, we consider the existing example directions within the Crown Court Compendium, and their potential to assist the jury in dispelling myths and misconceptions about sexual offences. We received views from stakeholders on a wide range of issues relating to directions, including tailoring directions to the facts of a specific case, the advantages and disadvantages of split directions and split summing up, inconsistency in the use and content of directions, and omissions in the current range of example directions. In this section we also consider approaches to directions taken in other jurisdictions. Based on this assessment, we note some

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9 *J.L. v Italy* (2021) App No 5671/16 (translated from French) at [139].

10 In *J.L. v Italy* (2021) App No 5671/16 (translated from French) at [138], the ECtHR considered whether the defendant's right to a fair trial might justify the interference with the complainant applicant's rights and concluded on the facts that the interference was not justified. It stated: "it could not be considered that this interference with the applicant's private life and image had been justified by the need to ensure that the accused could enjoy their defence rights."

11 See Chapter 1 for an introduction to the Crown Court Compendium.

concerns about the efficacy of judicial directions but proceed to consider ways of improving this given the widespread use and support of directions to the jury. We consider whether directions should be mandatory when triggered, amendments to the example directions, the addition of new example directions, and increasing the use of split directions and split summing up to tackle myths and misconceptions.

Current law

10.14 The current approach to tackling myths and misconceptions held by jurors is for the trial judge to address this in their directions to the jury. In practice, directions are discussed with counsel before they are given, so that representations can be made, and the judge can make revisions where appropriate.

10.15 In *R v D*, the Court of Appeal accepted that a trial judge may give directions to the jury in respect of certain myths to counter the risk of jurors relying on misconceptions.[12] The Court of Appeal has subsequently explained the rationale for this, using the wording of the 2010 Bench Book on "Directing the Jury"

> The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.[13]

10.16 There is recent Court of Appeal authority reiterating the importance of directions and emphasising that they should not be perceived as unfairly aiding the complainant. In *R v Bhatt*,[14] the appellant was convicted of 12 serious sexual offences against a complainant who was a child at the time of the offending. The judge included two sections in his written directions, titled "Avoiding myths and stereotypes" and "Children and young people".[15] The appellant argued that these directions bolstered the complainant's evidence to the unfair disadvantage of the appellant. The Court of Appeal observed that

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12 *R v D* [2008] EWCA Crim 2557, [2009] *Criminal Law Review* 591.

13 *R v CM* [2010] EWCA Crim 1578, [2010] 7 WLUK 270 at [23].

14 *R v Bhatt* [2022] EWCA Crim 926, [2022] 7 WLUK 44.

15 *R v Bhatt* [2022] EWCA Crim 926, [2022] 7 WLUK 44 at [38].

> …it is necessary to look at why such directions are given. As their terms make clear, they are to address the risk of stereotypical thinking that would be unfair to the complainant. Each section deals with a different problem…[16]
>
> We accept that the effect of each direction may be to bolster the evidence of a victim; but it only bolsters their evidence to the extent necessary to prevent unfairness to the victim caused by the stereotypical thinking against which it warns.[17]

10.17 Judges are assisted by written guidance in the Crown Court Compendium which gives examples of directions for the judge to consider.[18] They have a broad discretion about whether to give these directions and how to tailor their content to the specific circumstances of the case, after hearing submissions from the parties. The Crown Court Compendium lists the following "indicators" which suggest that a direction may be necessary and for which there is a corresponding example direction.[19]

> Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant:
>
> (1) Of untruthfulness:
>
> (a) Delay in making a complaint.
>
> (b) Complaint made for the first time when giving evidence.
>
> (c) Inconsistent accounts given by the complainant.
>
> (d) Lack of emotion/distress when giving evidence.
>
> (2) Of truthfulness:
>
> (a) A consistent account given by the complainant.
>
> (b) Emotion/distress when giving evidence.
>
> (3) Of consent and/or belief in consent:
>
> (a) Clothing worn by the complainant said to be revealing or provocative.
>
> (b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.

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16 *R v Bhatt* [2022] EWCA Crim 926, [2022] 7 WLUK 44 at [72].

17 *R v Bhatt* [2022] EWCA Crim 926, [2022] 7 WLUK 44 at [73].

18 See Chapter 1.

19 Judicial College, *The Crown Court Compendium - Part 1: Jury and Trial Management and Summing Up* (June 2022) ("Crown Court Compendium") 20-1, paras 11 to 12.

(c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.

(d) Some consensual sexual activity on the occasion of the alleged offence.

(e) Lack of any use or threat of force, physical struggle and/or signs of injury. Again it may be necessary to alert the jury to the distinction between submission and consent.

(4) Background of defendant

(a) A defendant who is in an established sexual relationship;

(b) Sexual orientation if that has the potential to be an issue.

10.18 The first example direction given in the Crown Court Compendium is a general direction aimed at dispelling myths and misconceptions and is titled "Avoiding assumptions about rape and other sexual offences".[20]

It would be understandable if some of you came to this trial with assumptions about the crime of rape. But as a juror you have taken a legal oath or affirmation to try D based only on the evidence you hear in court. This means that none of you should let any false assumptions or misleading stereotypes about rape affect your decision in this case. To help you with this I will explain what we know about rape/sexual offences from experience that has been gained in the criminal justice system.

We know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related.

We also know that there is no typical response to rape.

People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation.

So all of you on this jury must make sure that you do not let any false assumptions or stereotypes about rape affect your verdict. You must make your decision in this case based only on the evidence you hear from the witnesses and the law as I explain that to you.

10.19 The example direction for indicator 1(a) "delay in making a complaint" is as follows:[21]

Example 2: Delay (in the context of the complainant's allegations)

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[20] Crown Court Compendium 20-5. Where the example direction refers to "D", it means the defendant and where it refers to "W", it means the witness, which in a sexual offences case, is usually the complainant.

[21] Crown Court Compendium 20-6.

When you consider why this allegation was not made earlier, you must not assume that because it was delayed it is untrue. The fact that a complaint is made late does not make the allegation untrue. And a complaint is not necessarily true just because it was made immediately.

The defence say that because the complaint was not made at the time this means W is not telling the truth and that W has made up the story. This was suggested to W in evidence. But W said {insert e.g. that W was a child aged 12 and afraid to tell anyone because D had told W that if W did so W would not be believed and this was "our little secret"; and that W only overcame this fear when W's own daughter was approaching the age that W was when W said D did this to W}.

To decide this point, you should look at all the circumstances. This includes the reason W gave for not complaining at the time. Different people react to situations in different ways. Some people may tell someone about it straight away. But others may not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people. It is your job to consider whether or not any of those things affected W's decision not to complain at that time and whether or not that impacts upon W's reliability as a witness.

I am explaining these points so that you will think about them in your deliberations. I am not expressing any opinion. It is for you to decide whether or not W's evidence is true.

10.20 The judge has discretion about when these directions are given. They may be given "at any time at which to do so will assist jurors to evaluate the evidence".[22] In practice, this means that directions may be given at the outset of the case, before the complainant gives evidence, and again at the end of the case when summing up. Giving directions at the outset of the trial and at the end is known as giving "split directions". The judge may also split their summing up, giving their directions before the prosecution and defence closing speeches and their summary of the evidence afterwards.[23]

Scope for reform

Effectiveness

10.21 One judge told us that at present there are lots of directions which are difficult for the jury to follow. They suggested that cumbersome, voluminous directions are exhausting for juries. However, another judge told us that judicial directions worked well and were adequately understood by jurors. At paragraph 10.168 we also explain that written directions and routes to verdict are permitted and routinely used.

Tailoring

10.22 A number of judges commented that when appropriately tailored, directions are effective at addressing myths. Some judges told us that tailoring directions is a difficult

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22 Criminal Procedure Rules ("CrPR") r 25.14(2).

23 The Crown Court Compendium notes that the purpose of a split summing up is that it "may deter advocates from making bad points" in their closing addresses. See Crown Court Compendium 20-1, para 15.

exercise because it raises the prospect of judges giving evidence while giving directions, which is not permitted. Similarly, practitioner Martin Rackstraw told us that it is important to tailor directions but to base them carefully on established research, as has happened with *Turnbull* directions on eyewitness identification and *Lucas* directions on lies.[24]

10.23 Henderson and Duncanson have noted a risk which arises with tailoring directions in Australia. They observed a trial where the judge gave a direction that the fact that the complainant had kissed a different man earlier in the night did not indicate that she consented to sex with the defendant. However,

> the force of the jury directions is diminished through the use of the judge's own interpretation. While the interpretation appears to be a gentle reworking of the legislative language, in fact there is a crucial omission. By removing the imperative… that the jury '*are not* to regard a person as having freely agreed just because…' the judge offers an alternative… that 'just because' the complainant kissed one man 'does not mean' she agreed to have sex with another.[25]

10.24 This illustrates that while tailoring directions is important in order to reflect the facts of the case, there must be no complacency in their application. Participants should be aware of the underlying intention behind the direction, and the misconception which it is attempting to address.

Split directions

10.25 We were frequently told that directions should come at the beginning of the trial.[26] The Crown Prosecution Service ("CPS") told us that its survey of RASSO advocates[27] had demonstrated significant support for the trend for split directions which was said to alert jurors about the dangers of assumptions from the beginning of a case. Similarly, the Angiolini Review into the investigation and prosecution of rape in London heard that directions are more effective when given at the start of the trial, as at the end "it is too late to influence jurors' ingrained attitudes".[28]

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24 A *Turnbull* direction (*R v Turnbull* [1977] QB 224) warns the jury that they must be cautious when relying on visual identification, and that eyewitnesses can be wrong. A *Lucas* direction (*R v Lucas* (1981) 73 Cr App R 159) tells the jury when they are entitled to rely on a lie told by the defendant to support other evidence against the defendant.

25 E Henderson and K Duncanson "A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?" (2016) 39 *University of New South Wales Law Journal* 750, 769.

26 Dame Vera Baird KC (who thought that having read the case papers, judges should identify the myth-busting directions relevant to the facts and forewarn the jury of them at the outset of the trial); Jim Sturman KC; Hanna Llewellyn-Waters; Dr Susan Leahy; Dame Elish Angiolini; Sir John Gillen (who also supported the use of written directions).

27 Publication of the survey data is subject to approval. CPS, RASSO Advocacy Survey (2022). The survey was conducted in collaboration with the Ministry of Justice. Given the external lists it is likely that most advocates who received the survey have both prosecuted and defended, but the survey summary did not provide a breakdown of whether respondents had done both or were predominantly prosecutors.

28 Rt Hon Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (April 2015) ("Angiolini Review") para 210.

10.26 A Recorder told us that some judges give split directions if the case calls for it, but others do not. They thought that further education would be needed for the judiciary to understand fully the benefits of split directions in some cases, and this would standardise the approach taken. The inconsistency between judges was echoed by practitioner Hanna Llewellyn-Waters and Dame Elish Angiolini.

10.27 One judge reported that the defence may be resistant to outlining details of their case at the beginning of the trial, when asked to address the judge regarding the proposed content of a split direction. However, their view was that this approach was consistent with other developments such as the roll-out of pre-recorded cross-examination and the general power of the court to ask parties to identify issues in the case. Nor does this approach require every detail to be provided, just the relevant issues which might indicate the need for a direction. We were also told that giving directions at the start would give the defence enough time to deal with the directions over the course of the trial by adjusting their arguments.[29]

10.28 In contrast, another judge told us that they always give directions at the end. They said that giving directions as and when they were relevant throughout proceedings would make the trial very broken up. In their view, it is better for the jury to receive the legal information in one go so that they can focus on it.

Split summing up

10.29 The CPS also found support for the practice of split summing up, where legal directions are given before counsels' closing speeches and the judge's summary of the evidence is given after. This was said to help the jurors distinguish between legal directions and the factual summary, and also potentially help to keep defence counsel "in check".

10.30 Trial observations conducted by Daly in 2019 found that judicial directions were largely given at the end of the trial as part of the judge's summing up. However, she concluded that these directions were easily contradicted by defence barristers.

> [M]y observations saw that it remains easy for defence barristers to subvert these directions through, for example, acknowledging that a rape myth exists but then going on to explain why the case in question is an exception to it. This can be particularly effective where judges have delivered a split summing-up, whereby the judicial directions are delivered *before* the closing speeches and the summing-up of the evidence given afterwards. This means that the specific 'myth-busting' directions given by the judge can be addressed by the defence in their closing arguments and this would be the final thing the jurors heard about it.[30]

10.31 There is no problem with the defence explaining their case in light of a judicial direction addressing a myth, as long as any explanation does not undermine the direction which was given or reinforce a misconception which risks being inappropriately relied upon. Judges have an ongoing duty to give directions to remedy any incorrect perceptions conveyed by counsel in their speeches. We discuss the

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29 Jim Sturman KC.

30 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 154 citing O Smith, *Rape trials in England and Wales: Observing Justice and Rethinking Rape Myths* (2018).

content of closing speeches in Chapter 9. In contrast to the practice identified by Daly of closing speeches undermining myths directions, the Crown Court Compendium suggests that judges should consider giving directions in light of the closing speeches.

> It is of particular importance in cases of this nature to listen to the closing speeches of the advocates with care and if necessary review the directions to be given.[31]

Consistency of use and content

10.32 Three advocates in the CPS survey raised significant concerns about the inconsistent use of directions:

> The variation amongst judges as to what directions to give is worrying. Some judges are happy to give them others not so.
>
> Directions should not be left so far in the discretion of the Judge. Some Judges (despite extensive training and enormous experience) appear only to pay lip-service to these directions. There should be a set spiel that can only be departed from with the approval of an external ombudsman litigating in real time during the trial. The current system is too uneven and there is no practical remedy for the 'old school' contingent of Judges and senior Recorders.
>
> My concern with some judges is that they consider the myths and stereotypes directions as a tick box exercise and do not tailor the direction to the specific case, it can be a struggle to get them to do any more than the bare minimum 'there is no typical rapist, rape victim….'. The directions are capable of being specifically tailored to the case but some judges for whatever reason are reluctant to give them. I think some are still so old fashioned that they believe they are trespassing on jury territory.[32]

10.33 Trial observation studies suggest that myths directions are not given when required or when they are given, have inconsistent content. Smith and Skinner's 2012 trial observation research concluded that myths directions were given at the end of 10 out of 18 trials[33] and that "judges did not give the full directions listed, but rather summarised their essence and ignored the concrete examples provided".[34]

10.34 Several judges and Vera Baird KC (Hon) similarly told us that there is inconsistency in which directions are given, their content and their timing. A Recorder told us that the discretion to tailor directions means that some judges cut them down too much. She suggested that unless there was good reason not to, a general myths direction should be given before the complainant's evidence. There should still be discretion to tailor the content of the direction, akin to the current approach to bad character directions. Practitioner Hanna Llewellyn-Waters also supported mandatory (written) directions, with a discretion to amplify the directions where not provided for in a list of examples

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31 Crown Court Compendium, 20-1 at para 14.

32 CPS, RASSO Advocacy Survey (2022).

33 18 adult rape and sexual assault trials were part of the sample, with a further 10 in the pilot study. O Smith and T Skinner "How rape myths are used and challenged in rape and sexual assault trials" (2017) 26 *Social and Legal Studies* 441, 453.

34 Above, 462 note 9.

and where merited in the particular circumstances. This is because of a perception by judges that that certain concepts are understood by jurors, when in fact they need to be spelled out. Additionally, she highlighted the onus upon counsel to draw attention to relevant example directions in the Crown Court Compendium, when judges appear to be unaware of them.

An omission from the current example directions

10.35 Daly has highlighted what she regards as an omission within the current guidance which is that

> for some cases it may be necessary to address problematic cultural narratives that assume sexual violence is considered permissible in some minoritized communities… Whilst a list of potential circumstances in which directions could be adapted could never be exhaustive, noting specifically that the perceived race, ethnicity, age, (dis)ability, or social class of those involved in the trial, and the way they have been portrayed during the trial, may warrant adaptations of directions would be a useful starting point.[35]

10.36 Daly derives support from the Court of Appeal case of *Andreous*[36] where the court endorsed a direction that a defendant was not more or less likely to commit a sexual offence based on their culture, age, class or profession.[37] She recommends that similar guidance should be included within the Crown Court Compendium.

Comparative law

10.37 In some jurisdictions there are no statutory directions and judges have a wide discretion. For example, in Ireland there are no example directions or instructions to judges. However, judges may give general directions to the jury about not speculating and avoiding bringing any prejudice to their decision making.[38] An Irish academic and practitioner told us that in Ireland there is a concern that directions dispelling myths could be perceived as directions to convict or as instructing the jury to believe the complainant.

10.38 In Northern Ireland, the Gillen Review observed that judges borrow from the examples of directions given in the Crown Court Compendium.[39] The Review recommended that written judicial directions regarding myths and misconceptions should be given at the outset of the trial.[40] However, the Review rejected the introduction of mandatory directions because they could produce a "judicial straitjacket which may not fit the facts… [and] the absence of certain myths in the statute may unfairly relegate their importance".[41] Sir John Gillen told us that he thought mandatory directions would

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35 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 155.

36 *R v Andreous* [2014] EWCA Crim 2886, [2014] 11 WLUK 279.

37 *R v Andreous* [2014] EWCA Crim 2886, [2014] 11 WLUK 279 at [26].

38 S Leahy "The Realities of Rape Trials in Ireland: Perspectives from Practice" (June 2021) p 17.

39 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland*, (May 2019) ("Gillen Review") para 6.3.

40 Gillen Review (2019) p 29, key recommendation 4.

41 Gillen Review (2019) para 6.93.

unduly restrict the ability of a judge to tailor directions for each case. The Review was also concerned that mandatory directions would encroach upon judicial independence.[42]

10.39 However, other jurisdictions have more prescriptive statutory directions. In Scotland, there is a statutory presumption that a direction should be given where the complainant delayed reporting or did not report the offence; or the complainant did not physically resist, or physical force was not used. The directions to the jury on both delay and resistance are mandatory if evidence of delay or resistance has been adduced, or if a particular question or statement has tried to elicit or draw attention to this evidence. The judge retains a discretion not to give the direction where no reasonable jury would consider the evidence, question, or statement to be material.[43]

10.40 In New South Wales, there is a framework of directions each with different levels of judicial discretion. There is a mandatory direction regarding delay or absence of complaint which arises where evidence is given, or a question is asked on this topic. The judge must direct the jury that absence of complaint or delay does not necessarily mean that the allegation is false, and that there may be good reasons for it.[44] The court "must not direct the jury that delay in complaining is relevant to the [complainant's] credibility unless there is sufficient evidence to justify such a direction."[45]

10.41 Secondly, there is a comprehensive set of statutory presumptions about giving directions on consent.[46] Directions on consent must be given if there is good reason to do so; or if requested by a party, unless there is good reason not to do so. The judge is not required to use a particular form of words.[47] The directions include the fact that non-consensual activity can take place between all kinds of people, even those who know each other or are married; that there is no typical response to non-consensual sexual activity and this can include the person freezing and not saying or doing anything; the absence of injury, violence or threats; the impact of trauma on the complainant's demeanour; and the complainant's behaviour in terms of clothing, consumption of alcohol and/or drugs or presence in a particular location.[48]

10.42 Finally, there is an entirely discretionary direction about differences in the complainant's account.[49] After hearing submissions, the court may make this direction

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42 Above, para 6.94.

43 Criminal Procedure (Scotland) Act 1995, ss 288DA-288DB.

44 Criminal Procedure Act 1986 (NSW), s 294.

45 Criminal Procedure Act 1986 (NSW), s 294(2)(c).

46 These were updated following recommendations from the New South Wales Law Commission, see New South Wales Law Reform Commission ("NSWLRC"), *Consent in Relation to Sexual Offences* (September 2020) Recommendations 8.1 to 8.8.

47 Criminal Procedure Act 1986 (NSW), s 292.

48 See Criminal Procedure Act 1986 (NSW), ss 292A - 292E.

49 Defined in s 293A(3) as gaps and inconsistencies within an account and inconsistencies between accounts.

where there is evidence of a difference in the complainant's account which may be relevant to the complainant's truthfulness or reliability.[50]

10.43 Victoria also has a framework of directions. Full mandatory directions exist in respect of two myths: delay and inconsistency. Where it is considered likely to arise or where there is evidence in the trial on the issue of delayed complaint or lack of complaint, it is mandatory for the trial judge to make a direction.[51] This direction may be given on the trial judge's motion, or on the prosecution's request.[52] For inconsistency, where there is evidence in the trial which suggests that there is a difference in the complainant's accounts which is relevant to credibility or reliability, it is mandatory for the trial judge to make a direction.[53] Again, this may be made on the judge's own motion or at the request of the prosecution.[54]

10.44 There are further directions on consent and reasonable belief in consent which must be given if the judge considers that there are "good reasons" to give them, having regard to submissions from the parties. These include directions on the absence of injury; responses to a sexual offence; the irrelevance of other sexual activity; and irrelevant conduct (such as intoxication and clothing).[55]

10.45 The Victorian legislation was amended in response to a report by the Victorian Law Reform Commission ("VLRC") which had proposed the introduction of new directions to tackle misconceptions and emphasised the importance of the timing of directions.[56]

10.46 In New Zealand, the judge has the discretion to make a direction if evidence is given or a question is asked, or a comment is made about the complainant delaying in reporting or failing to complain. The judge may tell the jury that there can be good reasons for a complainant to delay in making or fail to make a complaint.[57]

10.47 In its 2019 review of the Evidence Act 2006, the New Zealand Law Commission ("NZLC") recommended that new sample judicial directions be developed to address certain misconceptions, including those in relation to acquaintance rape and physical

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50 The judge may direct the jury that where there are differences in the complainant's account, experience shows that people may not remember all details and trauma may impact on how people recall events; differences in an account are common; both truthful and untruthful accounts may contain differences; and it is for the jury to decide whether these differences are important to the complainant's truthfulness and reliability. See Criminal Procedure Act 1986 (NSW), s 293A.

51 Jury Directions Act 2015 (Vic), s 52. The judge must direct the jury that people may react differently to sexual offences and that delay in complaint is a common occurrence.

52 Jury Directions Act 2015 (Vic), s 52(2A).

53 Jury Directions Act 2015 (Vic), ss 54A-54D. In giving the direction on a difference in account, the court must inform the jury of the following: it is for the jury to decide whether the offence was committed; that differences in the complainant's account may be relevant to their assessment of the complainant's credibility and reliability; and that experience shows that inconsistencies in account are common, people may not remember all details and trauma may affect how people recall events.

54 Jury Directions Act 2015 (Vic)s 54D(2A).

55 Jury Directions Act 2015 (Vic), s 47C.

56 Victorian Law Reform Commission ("VLRC"), *Improving the Justice System Response to Sexual Offences* (September 2021) Recommendations 78 and 79.

57 Evidence Act 2006 (NZ), s 127.

force.[58] This would reduce the need to call expert evidence, discussed in further depth from paragraph 10.100.[59] It also recommended that the Act be amended to give an express power for judges to address misconceptions by directions. This would remind counsel and judges of the risk of juror misconceptions and would encourage consideration being given to directions. The NZLC hoped this would increase transparency and consistency between cases.[60]

10.48 However, the NZLC recommended that the Act should not contain a list of particular directions, given the evolving research. Instead, it recommended creating a bench book in the style of the Crown Court Compendium, to provide guidance for judges who would then have discretion in individual cases to reframe the template directions.[61]

10.49 In Canada, directions are known as "jury instructions" and are discretionary, except when SBE is being adduced under section 276 of the Criminal Code.[62] Model jury instructions have been created by the National Committee on Jury Instructions, which is supported by the Judicial Council. The jury must be properly instructed, but a judge need not use the model instructions. Where the model instructions are used, they must be tailored to the individual case.[63] These instructions are publicly available online and include a direction laying out the legal elements of sexual assault, with the inclusion of a general warning against myths and misconceptions:

> I now want to remind you not to approach the evidence with unwarranted assumptions as to what is or is not sexual assault, what is or is not consent, what kind of person may or may not be the complainant of a sexual assault, what kind of person may or may not commit a sexual assault, or what a person who is being, or has been, sexually assaulted will or will not do or say. There is no typical victim or typical assailant or typical situation or typical reaction. My purpose in telling you this is not to support a particular conclusion but to caution you against reaching conclusions based on common misconceptions.[64]

Analysis

10.50 At the outset, it should be borne in mind that there is dispute as to the effectiveness of judicial directions. This dispute relates to all directions, not just those which aim to dispel myths and misconceptions. However, we necessarily limit our analysis to concerns about the efficacy of directions which address myths. Some stakeholders

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58 New Zealand Law Commission ("NZLC"), *Second Review of the Evidence Act 2006* (February 2019) para 12.60.

59 Above, para 12.46.

60 Above, para 12.48.

61 Above, para 12.104.

62 National Committee on Jury Instructions, Evidence of Other Sexual Activity https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/mid-trial-instructions/evidence-of-other-sexual-activity-ss-276-276-4/(Jan 2018).

63 National Committee on Jury Instructions, Preface, https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/preface/.

64 National Committee on Jury Instructions, Sexual Assault, https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/offences/sexual-offences/offence-271-sexual-assault/, (May 2019).

told us that judicial directions are not an effective way of dealing with myths and misconceptions held by jurors. A psychologist told us that myths and misconceptions are so ingrained in jurors' minds that they cannot be addressed effectively by a direction at trial. A psychotherapist specialising in sexual trauma, also told us that, based on her understanding of empirical research which has been conducted, directions do not have a significant impact on the jury's decision-making process. Further, police officers told us that the language used by the judiciary is not easily understood by the jury. Similarly, member agencies of The Survivors Trust told us that legal directions frequently confuse juries. An academic said that she was sceptical about the effectiveness of directions when set against the myths and misconceptions deployed by defence practitioners during a trial.

10.51 The Gillen Review referred to these concerns.

> First, there is substantial evidence suggesting that many jurors struggle to understand and apply judicial directions.
>
> Secondly, even where judges employ specific legislative language with the aim of dispelling rape myths within trials, such myths and stereotypes continue.[65]

10.52 Cossins has commented that

> [i]n relation to juror comprehension of judicial directions, there are several studies to show that judicial directions are not necessarily effective… or well understood by jurors… even if jurors believe they understand them…
>
> For example, Thomas… found that:
>
> > While over half of the jurors perceived the judge's directions as easy to understand, only a minority (31%) actually understood the directions fully in the legal terms used by the judge … [while] comprehension of directions on the law declin[ed] as the age of the juror increased.[66]

10.53 A study using mock jurors which had been conducted by Cossins and others as part of the Royal Commission into Institutional Responses to Child Sexual Abuse had compared deliberations where different directions were given explaining the use which could be made of certain types of evidence. As we saw in Chapter 4, relationship evidence is a form of circumstantial evidence explaining the relationship between the defendant and the complainant. As we saw in Chapter 5, tendency evidence, also known as propensity evidence, is evidence of a person's reputation, character or

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65 Gillen Review (2019) paras 6.38-6.39.

66 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) pp 590-591, citing J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*. Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse (2016); D Simon, "More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms" (2012) 75 *Law and Contemporary Problems* 167; L Trimboli, "Juror understanding of judicial instructions in criminal trials" (2008) 119 *Crime and Justice Bulletin* 1. Sydney: Bureau of Crime Statistics and Research; NZLC *Juries in criminal trials part two: A discussion paper* (1999); Queensland Law Reform Commission, *A review of jury directions* (2009); and C Thomas, "Are juries fair?" (2010) *Ministry of Justice Research Series* No 1/10.

conduct which could suggest that they would be more likely to act in a certain way again.

> The findings in this study are in line with a large body of empirical research demonstrating the ineffectiveness of most jury directions. Systematic statistical comparisons of jury reasoning and decisions… accompanied by standard directions (on the one hand) and specific directions on the uses of relationship evidence and tendency evidence (on the other) yielded few differences… Analyses of the content of jury deliberations revealed that error rates in using the context evidence and the tendency evidence were unaffected by the presence of these directions.[67]

10.54 Temkin has similarly endorsed a statement that "if there is one point upon which nearly every commentator agrees it is that juries have a great deal of difficulty understanding and applying judicial instructions".[68] This is due to several factors, including the syntax and vocabulary used by the judiciary.[69]

10.55 A CPS representative told us that some areas are better dealt with by judicial directions than others. This was echoed by an academic, who told us that directions on delay were useful in changing juror expectations while directions on resistance made no difference, based on a systematic review of multiple mock-juror studies.

10.56 Similarly, the Angiolini Review noted that

> [a] direction by the Judge to the jury regarding delay in reporting the allegation of rape may assist the jury but cannot, on its own, go far enough in rebutting ingrained and common perceptions of how complainants are expected to react and behave following major trauma.[70]

10.57 However, an academic and criminal practitioner told us that judicial directions can be very effective in tackling misconceptions. A barrister told us that his experience as a practitioner indicates that jurors understand the directions given to them. Similarly, Jim Sturman KC told us that his perception was that the general direction on myths and misconceptions works well.

10.58 Similarly, the previous Criminal Practice Direction ("CrPD") stated that "[j]urors can be expected to follow the instructions diligently."[71] The CrPD also referred to the Privy Council's decision in *Taylor*, where it was held that the "assumption must be that the jury understood and followed the direction that they were given."[72] Lord Hope in *Taylor*

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67 J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*. Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) p 28.

68 J Temkin, ""And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13 *New Criminal Law Review* 710, 721.

69 Above, p 722.

70 Angiolini Review (2015) para 660.

71 Criminal Practice Direction ("CrPD") (2015) 26G.2.

72 *Taylor (Bonnett) v The Queen* [2013] UKPC 8; [2013] 1 WLR 1144 at [25].

explained that this is a view which has also been endorsed by the judiciary in Canada, Australia and Ireland.[73]

10.59 However, we were told by one judge that juries frequently return verdicts which do not appear to reflect the evidence presented at trial, which she thought indicated that the current form of juror education is not adequate.

10.60 Despite the problems indicated in the literature concerning judicial directions, Temkin also does not reject them altogether.

> They do involve a public recognition from an authoritative source that some commonly held beliefs about rape are false. They would thus take their place as one in a number of different strategies that can be deployed to dismantle the structure of damaging untruths about rape that exists in our society. Furthermore, they are important in terms of the complainant's experience in court.[74]

10.61 Temkin has derived some guiding principles to maximise the effectiveness of directions. These are that directions must be clear and simple; thought needs to be given to the fact that different myths should be challenged in different ways; pitfalls identified in the literature about unintentionally reinforcing myths should be avoided; and some myths have been exploded by research and might be better addressed via expert evidence (such as the impact of trauma on recall).[75]

10.62 She also strongly recommends that even for myths which can be tackled by directions, "it would be optimistic indeed to think that they are likely to be fully dislodged by a couple of sentences in the judge's summing up at the very end of the trial."[76] This is supported by Dr Henderson and Dr Duncanson who, based on a review of 10 rape trials in Victoria, concluded that "jury directions delivered at the conclusion of a trial come too late to disrupt rape myths".[77]

10.63 We acknowledge that directions, either alone or in combination with the other methods considered in this chapter, may not adequately address juror myths and misconceptions. We address these concerns in Chapter 13. However, given the widespread use of directions in England and Wales and the support for them from many stakeholders and also members of the judiciary, we go on to consider whether directions can be improved. Specifically, we consider whether a Scottish-style

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73 *Taylor* [2013] UKPC 8 at [25]: "In the Supreme Court of Canada in *R v Corbett* [1988] 1 SCR 670 at 692, Dickson CJ said that the experience of trial judges is that juries perform their duty according to law. In the High Court of Australia in *R v Glennon* (1992) 173 CLR 592 at 603, Mason J and Toohey J said that the law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. To conclude otherwise would be to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions by the trial judge. In the Irish High Court in *Z v Director of Public Prosecutions* [1994] 2 IR 476 at 496, Hamilton J expressed confidence in juries to follow the directions given to them by the trial judge…"

74 J Temkin, ""And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13 *New Criminal Law Review* 710, 732.

75 Above, 733-734.

76 Above, 730.

77 E Henderson and K Duncanson, "A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?" (2016) 39 *University of New South Wales Law Journal* 750.

presumption in favour of certain directions could address concerns about the inconsistent use and content of directions. We acknowledge that judges have significant expertise in giving directions as required by the facts of each case. However, a strong case has been made for considering how directions are given, based on the academic literature, the results of trial observation studies and different approaches taken in other jurisdictions. Further, concerns about inconsistency in directions were raised with us by stakeholders, and also members of the judiciary.

Mandatory or presumptive directions

10.64 At paragraph 10.32, we describe significant concerns about inconsistent use of directions to address myths and misconceptions. One way of tackling inconsistent use of directions would be to make these directions mandatory if a triggering condition is met, or for this to engage a presumption in favour of a direction. This is the approach taken in Scotland, Victoria and New South Wales for certain myths and misconceptions, as discussed paragraph 10.39. In New South Wales, a judge must give a direction on consent on their own initiative if there is a good reason to do so; or when asked by a party, unless there is a good reason not to give it. In Scotland, there is a discretion for the judge not to give a direction on delay or resistance where no reasonable jury would consider the evidence, question, or statement to be material. This approach could therefore be characterised as a rebuttable presumption in favour of giving a direction, where this obligation has been triggered. The relevant trigger could be evidence in the case, an application by the party, or that the judge considers there are compelling reasons to give a direction.

10.65 A potential objection would be that this would unduly constrain the trial judge, who is best placed to make decisions about whether directions are needed based on their knowledge of the case. Where judges retain very little or no discretion regarding the use of directions, this may also be considered a breach of the fundamental constitutional principle of judicial independence. There is also a concern that making directions on some myths or misconceptions mandatory or creating a presumption in favour of such a direction would create the impression that some myths or misconceptions are more significant or more in need of remedying than others, as explained by the Gillen Review.[78]

10.66 However, other common law jurisdictions have mandatory or presumptive directions for certain myths in limited circumstances, and this is not regarded as unduly constraining judges or contravening constitutional principles. Making the directions reactive to evidence being led reduces the risk that directions would be given which are inappropriate for the specific case. Further, making a direction mandatory in certain circumstances would not prescribe the content or timing of a direction, and therefore the judge would retain significant discretion to tailor the direction as appropriate.

10.67 The concern about prioritising some myths over others could be addressed by a continuing obligation to review the example directions, draft new examples, and review whether existing or new directions should be mandatory or discretionary. Currently, the examples in the Crown Court Compendium cover a range of myths but not all of those identified by the CPS in their guidance to prosecutors, for example.

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78 Gillen Review (2019) para 6.93.

Additionally, as explained by the NZLC, making some directions mandatory or the subject of a presumption might facilitate discussion and consideration of whether any discretionary directions should be given about other myths.

10.68 A rebuttable presumption that a direction on a particular myth or misconception be given would alleviate the concern that directions are not given when they should be and would require the judge to justify why it would not be appropriate in a particular case. We therefore invite views on whether there should be a rebuttable presumption that a direction on myths and misconceptions will be given and when the presumption should arise. We also ask whether there are any myths or misconceptions in relation to which the judge should retain complete discretion as to whether or not to give a direction.

Consultation Question 84.

10.69 Should there be a rebuttable presumption that a direction on myths or misconceptions will be given?

10.70 If so, what should be the triggering conditions for a presumption in favour of a direction? For example, these could be that evidence is or will be led, questions are or will be asked, or an application by the parties.

Consultation Question 85.

10.71 Should the test for rebutting the presumption be where no reasonable jury would consider the evidence, question, or statement to be material, as it is in Scotland?

Consultation Question 86.

10.72 In relation to which myths or misconceptions should there be such a rebuttable presumption? Some examples from other jurisdictions are:

(1) delay;

(2) absence of resistance; and

(3) inconsistency.

Consultation Question 87.

10.73 Are there any myths or misconceptions for which the decision to give the direction should remain entirely at the discretion of the judge? If so, in relation to which myths or misconceptions?

10.74 To address some concerns raised about how directions are given, there could be mandatory content or a presumption of the content of a direction. For example, in New South Wales, when the judge gives a direction about delay, they must tell the jury that a delay in reporting the offence does not necessarily indicate a false allegation, and that there may be good reasons for a delay. However, there is limited support for this approach in other jurisdictions. Also, a strict requirement or a presumption as to the content of a direction significantly encroaches into the independence of the judiciary and the discretion of the judge to tailor the direction as appropriate in the case. We therefore provisionally propose that there should be judicial discretion as to the content of any mandatory or presumptive direction.

Consultation Question 88.

10.75 We provisionally propose that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion. Do consultees agree?

Amendment to existing directions

10.76 We were told that the Crown Court Compendium is reviewed twice a year by two members of the panel of editors, who will suggest changes to the directions. This is also reflected within the Compendium.

> The example directions on the dangers of assumptions were extensively reviewed and revised in the December 2020 edition of the Compendium. All directions are as a matter of course subject to further review and, where necessary, amendment with each revision of the Compendium.[79]

10.77 Some stakeholders raised concerns with the existing example directions, or with directions given in practice. 74% of respondents to the CPS survey stated that the example directions should be expanded to cover the additional complexities which arise in sexual offences cases.[80] Several stakeholders told us that it would be useful to have more detail in the general phrases used in directions, such as "it is the experience of the court". A judge told us that it should be made clear that the directions are grounded in expertise, because jurors might not take "the experience of

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79 Crown Court Compendium, 20-1 at para 16, n 1257.

80 CPS, RASSO Advocacy Survey (2022).

the court" seriously. He said that jurors could benefit from the material which underlies the assertions.

10.78 Another phrase which stakeholders criticised is that "there is no typical response to rape", which appears in the general direction. We were told that this is insufficiently nuanced to explain the findings of empirical research on this topic. A psychotherapist told us that people tend to expect active responses to assault, while in fact research indicates that the vast majority of complainants are passive. She does not think that this is adequately explained by saying that victims have different responses. Similarly, a Recorder told us that a common response is for a complainant to freeze, but juries are not told that this is common, simply that people behave differently. A representative from the CPS similarly told us that the direction "there is no one response to rape" does not give any indication as to what potential responses are, so does not assist the jury in assessing the credibility of the complainant.

10.79 The Angiolini Review observed that

> While such activity may appear counter-intuitive, for many the 'flop' or 'freeze' response is the brain's autonomic reaction to trauma and a way of protecting the victim from further physical harm which might be precipitated by a 'fight' response.[81]

We discuss the proposals which the Angiolini Review made in relation to freezing below at 10.127.

10.80 Cossins has commented on the lack of a direction about freezing as a frequent response to a sexual offence.

> Relevant judicial directions would need to be drafted to warn fact-finders about the physiological response known as the freeze response to explain that there may be good reasons why a complainant remained silent or offered no physical resistance. This might assist in preventing fact-finders from using silence/lack of resistance as reasonable grounds for a defendant's belief in consent.[82]

10.81 Cossins has also criticised the example direction on delay for not adequately summarising the state of the research on the topic. In her view, the direction

> does everything to highlight the apparent significance of a delayed complaint to a group of laypeople even though there is sound evidence that the majority of complainants of sexual assault delay their complaint… and there is no evidence to prove a relationship between delay and fabrication.[83]

10.82 Further, "judges rarely refer to the psychological literature which reveals that delay is a typical, not aberrant, feature of sexual assault."[84] However, if judges were to refer to this literature directly this might lead to perceptions that they were giving expert evidence, which is not permitted. Further, there is a risk of contravening the obligation

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81 Angiolini Review (2015) para 205.

82 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 331.

83 Above, p 487.

84 Above, p 492.

of balance in directions, and of prejudging issues which are for the jury to determine, such as the complainant's credibility. It was recently reiterated in *R v KC* that when a judge gives directions to the jury,

> [t]he touchstone… is fairness and balance. Moreover, a judge should not seek or be seen to be seeking to constrain in any way the ambit of factual considerations that the jury might wish to consider.[85]

10.83 Given the arguments in favour of accuracy but against excessive or potentially prejudicial detail in judicial directions, we invite views on whether any of the existing example directions—especially those on delay and freezing—should be reviewed by the Judicial College.

Consultation Question 89.

10.84 Should the Judicial College consider amending the Crown Court Compendium example directions on delay and freezing better to reflect the empirical evidence about complainants' responses?

Consultation Question 90.

10.85 Are there any example directions other than those on delay and freezing which do not reflect the empirical evidence, and therefore the Judicial College should consider amending?

Additional directions

10.86 Professor Cheryl Thomas has identified two myths on which she believes jurors would benefit from additional guidance.[86] These are the prevalence of stranger versus acquaintance rape, and the relevance of emotion displayed by a complainant when giving evidence. However, these two issues are already referred to as "indicators" in the Crown Court Compendium and detailed examples are given.[87] In addition, Professor Thomas is conducting ongoing research "to determine the most effective means of directing juries on these issues."[88]

10.87 Professor Phil Rumney told us that the example directions in the Crown Court Compendium do not adequately deal with myths and misconceptions about male complainants. For example, the direction addressing myths around clothing refers to

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85 *R v KC* [2022] EWCA Crim 1378, [2022] 9 WLUK 429 at [50].

86 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987, 1002-1003.

87 Crown Court Compendium, 20-8, Example 6 and 7 and 20-9, Example 10.

88 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987, 1005.

clothing being provocative, while research indicates that the relevant myth believed by jurors for male complainants is that their clothing would have been a physical barrier to the offence.[89]

10.88 In addition, the directions refer to the sexuality of the defendant as an "indicator" which potentially warrants a direction. The relevant direction tells the jury not to believe that a gay man is more likely to be interested in young boys than a straight man is to be interested in young girls. However, research indicates that there is a misconception that a closeted gay man, for example, would make a false allegation of rape out of shame or fear of reprisal for consensual sexual activity with another man. Whilst there may be sufficient flexibility in the directions to take account of these matters, it may be beneficial for there to be more explicit recognition of the particular myths and misconceptions that arise in relation to male complainants.

10.89 We were also told by a Recorder, and two academics that the directions should specifically deal with complainants' vulnerabilities such as autism and mental health difficulties, as this affects their risk perception and delivery of evidence.[90] Complainants may present in a range of ways due to their disabilities, and the directions should be amended to reflect this.

10.90 The benefit of this may be that complainants with disabilities are not further disadvantaged in the trial process. However, a direction on this topic would require careful consideration as it may cause the judge's directions to stray into the territory of them giving expert evidence, which is not permitted.[91] It could also stray into a comment on the complainant's credibility, as opposed to how they present as a witness, which is a matter for the jury to decide. A preferable route might be for the prosecution to call expert evidence to support the complainant's condition and how this impacts on their presentation.[92] The judge would then be able to refer to this in summing up.

10.91 There are also further myths identified by Burrowes and the CPS in its Guide for Prosecutors, which do not currently have example directions. These include that rape is a crime of passion; male rape only occurs between gay men; and prostitutes cannot be raped.[93]

10.92 Based on the concerns identified by Professor Rumney, we believe that the Judicial College should consider additional example directions better to reflect the myths and misconceptions which affect male complainants of sexual offences. We invite views

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89 See eg P Rumney and N Hanley, "The Mythology of Male Rape: Social Attitudes and Law Enforcement" in C McGlynn and VE Munro (eds), *Rethinking Rape Law International and Comparative Perspectives* (2010), p 304.

90 Member of the judiciary and two academics.

91 See *R v D* [2008] EWCA Crim 2557, [2008] 10 WLUK 643 at [11], where it was commented that "it is no part of the judge's task to put before the jury Dr Mason's [an expert in psychological responses to rape] learning without her having been called as a witness''.

92 See *R v Mulindawa* [2017] EWCA Crim 416, [2017] 4 WLR 157, though this evidence must not stray into an assessment of credibility, which is a matter for the jury.

93 CPS, *Legal Guidance, Rape and Sexual Offences*, Chapter 4, Tackling Rape Myths and Stereotypes, Annex A (21 May 2021) ("CPS, Annex A").

on whether an example direction should be considered for complainants with mental health conditions or learning disabilities, and whether any other myths should be addressed by an example direction. We also invite views on the effectiveness of the example directions on the prevalence of acquaintance rape as opposed to stranger rape, and on distress shown by the complainant when giving evidence, given that Professor Thomas concluded that jurors required further guidance on these issues.

Consultation Question 91.

10.93 We provisionally propose that the Judicial College should consider whether additional example directions are needed in order to address the particular myths and misconceptions relating to male complainants. Do consultees agree?

Consultation Question 92.

10.94 Should the Judicial College consider an additional example direction to address the presentation and particular myths and misconceptions relating to complainants with a mental health condition or learning disability?

Consultation Question 93.

10.95 We invite consultees' views on the effectiveness of the example directions on:

(1) the prevalence of acquaintance rape as opposed to stranger rape; and

(2) distress shown by the complainant when giving evidence?

Consultation Question 94.

10.96 Are there any other groups of complainants or myths and misconceptions which are not currently addressed by example directions and should be?

Training on split directions and summing up

10.97 As we explained at paragraph 10.20, split directions involve giving part of the legal instruction to the jury at the beginning of the trial, throughout, or before closing speeches rather than all at the end of the trial. The main objection to the use of split directions is that directions may be more readily digestible for the jury if they are given in one complete set. However, the benefits of split directions and split summing up are

established[94] and there is an increasing trend for this approach,[95] which is recommended or used in a number of other jurisdictions.[96]

10.98 Stakeholders have told us that use of split directions is inconsistent, and there is a lack of training on this approach. The CPS survey echoed this for split summing up. Greater consistency may be achieved by providing further training to the judiciary. We therefore provisionally propose that training about the usefulness of split directions and split summing up is considered in the context of myths directions.

Consultation Question 95.

10.99 We provisionally propose that the Judicial College consider training about the use and benefits of split directions and split summing up for myths directions. Do consultees agree?

EXPERT EVIDENCE

Background

10.100 The function of expert evidence is "to furnish a court with scientific information likely to be outside the experience of a judge or jury".[97] Expert evidence can assist the court in understanding a variety of different areas, including but not limited to science,[98] medicine[99] and matters of foreign law.[100]

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94 See F Leverick, "What do we know about rape myths and juror decision making?" (2020) 24 *International Journal of Evidence and Proof* 255, 273, citing J Chalmers and F Leverick, *Methods of Conveying Information to Jurors: An Evidence Review* (2018) pp 27-31. See also J Horan and J Goodman-Delahunty "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: Failures and Lessons Learned" (2020) 43(2) *University of New South Wales Law Journal* 707. The advantages include the fact that directions given only at the end of the trial may be less memorable as they will be given alongside a lengthy summing up of the evidence and detailed instructions given by the judge on the relevant law. Further, jurors may be better equipped to assess the complainant's evidence by receiving guidance about misconceptions before they form their opinions about their credibility. Split summing up might give jurors a useful framework for assessing counsels' speeches, and gives the judge an opportunity to make further directions in response to content in the speeches.

95 See Crown Court Compendium, 22-4, foreword by the Lord Chief Justice, which refers to early directions as "commonplace". The CrPDs provide that the judge should provide an early direction where this will assist the jury to evaluate the evidence (CrPD 8.5.1). The previous version of the CrPDs also stated that the judge should provide a split summing up where the judge decides that this will assist the jury when listening to closing speeches. (CrPD (2015) 26K.19).

96 It was recommended by the Gillen and Dorrian Reviews. See Gillen Review (2019) key recommendation 4; Scottish Courts and Tribunals Service, *Improving the Management of sexual Offences Cases Final Report from the Lord Justice Clerk's Review Group*, (March 2021), para 5.57; VLRC, *Improving the Justice System Response to Sexual Offences* (September 2021) Recommendation 79. A discretion to give split directions is provided in statute in New South Wales: see Criminal Procedure Act 1986 (NSW), s 292.

97 *R v Turner* [1975] QB 834 at 841-842.

98 *Folkes v Chadd* [1782] 3 Doug KB 157.

99 *R v Davies* [1962] 3 All ER 97.

100 *R v Ofori* (1993) 99 Cr App Rep 223 at [591].

10.101 In trials of sexual offences, expert evidence is commonly used to provide DNA analysis, explanations of injury, and psychological expertise beyond the knowledge of the jury.[101] However, expert evidence explaining the general psychological effects of sexual violence on victims, and their behaviour both during and after an alleged offence, is largely inadmissible.[102]

10.102 In the leading practitioner text, Rook and Ward have recognised the potential of such expert evidence for addressing myths and misconceptions:

> There is clear potential for evidence of these psychological effects [of rape and sexual assault] to be adduced in evidence by the prosecution in order to explain victim behaviour, for example late reporting or uncharacteristic conduct, in order to counter "rape myths"—i.e. to negate any assumptions that may be held by jurors that the victims of serious sexual assaults will behave in a certain way, which the jurors may bring to bear in assessing the truth of the complainant's evidence.[103]

10.103 In this section, we examine whether expert evidence of general behavioural responses to sexual violence, during and after an alleged offence, should be admissible in RASSO trials to counter the influence of myths and misconceptions.

10.104 Our inquiry is largely focussed on expert evidence of general behavioural responses to sexual violence, as opposed to expert evidence regarding particular complainants' reactions. As we explain below, the use of expert evidence of general behavioural responses to sexual violence may be less intrusive to complainants and minimises the risk of "oath helping".[104]

10.105 Psychologists highlighted to the Angiolini Review the need for expert evidence "to explain the physiological and psychological responses to trauma that affect how individuals conduct themselves during and after trauma"[105] including the impact of trauma on memory and on complainants' ability to recall and recount the details of the alleged offence cogently and chronologically. We therefore address expert evidence concerning complainants' behaviour both during the alleged sexual offence and after the alleged sexual offence has taken place. Complainants' behaviour may appear to be counterintuitive both during and after sexual violence and therefore similarly subject to the influence of myths and misconceptions.[106] For example, a counterintuitive behaviour which may occur at the time of the incident is the 'freeze or flop' response;[107] one that may occur afterwards is delayed reporting. Jurors'

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101 P Rook and R Ward, *Rook and Ward on Sexual Offences* (6th ed 2021) ("*Rook and Ward*") 24.01.

102 See *R v ER* [2010] EWCA Crim 2522.

103 *Rook and Ward* (2021) 24.29.

104 "Oath helping" refers to the prohibited practice of improperly bolstering a witness's credibility. Lord Taylor of Gosforth CJ summarised the rule against oath helping in *R v Robinson* [1994] 3 All ER 346, 352: "[T]he Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard the witness as reliable."

105 Angiolini Review (2015) para 662.

106 The Angiolini Review recommended that consideration should be given to legislation admitting expert evidence about victim behaviour not just subsequent to a sexual offence, but during the incident. See Angiolini Review (2015) Recommendation 37.

107 See above, paras 10.78-10.79.

understanding of both behaviours may benefit from the use of expert evidence. The impact of expert evidence on the defendant's case and the overall fairness of the trial is likely to be very similar regardless of whether it concerns general complainants' responses during or after the alleged offence. We therefore consider the use of expert evidence addressing behaviour both during and after the alleged offence.

10.106 We evaluate a wide range of views on the knowledge of juries regarding complainants' reactions to sexual trauma, and whether an expert is best placed to inform the jury on such matters. With reference to various empirical evidence and stakeholders' experiences, we also consider whether expert evidence would be effective at addressing myths and misconceptions in sexual offence trials. Throughout, we pay close attention to any impact on the defendant's right to a fair trial.

Current law

General principles

10.107 Expert opinion is generally admissible in criminal proceedings at common law based on the following four broad criteria:

(1) it is relevant to a matter at issue in the proceedings;[108]

(2) it is needed to provide the court with information likely to be outside the court's knowledge and experience (the "necessity criterion");[109]

(3) the witness is competent to give that opinion;[110]

(4) the scientific basis on which it is advanced is sufficiently reliable for it to be put before the jury (the "reliability criterion").[111]

10.108 In *R v Turner*, Lawton LJ summarised when expert evidence may be necessary to furnish the court with information outside the experience and knowledge of a judge or jury:

> If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. … The fact that an expert has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of jurors themselves; but there is a danger that they may think it does.[112]

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108 *R v Brecani* [2021] EWCA Crim 731.

109 *R v Brecani* [2021] EWCA Crim 731.

110 *R v Brecani* [2021] EWCA Crim 731.

111 *R v Reed, R v Garmson* [2009] EWCA Crim 2698 at [111]. See also, CrPD (2015), 19A.4, which sets out relevant factors and was introduced in response to Law Commission, Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325 at [9.11] and see CrPD 7.1.1.

112 *R v Turner* [1975] QB 834 at 841D-841E.

Expert evidence of general behavioural responses to sexual violence

10.109 Expert evidence regarding general behavioural responses to rape and sexual assault has been held to be inadmissible.[113] CPS Guidance explains that this general rule is true in respect of evidence to explain the responses of complainants both during and after the incident.[114] Rook and Ward articulate the two reasons which are usually given for this, in summary they state as follows.

(1) That this evidence is not necessary as "it is not generally accepted that jurors require expert evidence of the emotional and psychological aftermath of sexual assault, either to understand how ordinary people react to this unusual and traumatic event or in order to assess the veracity of a complaint."[115]

(2) That leading this type of evidence may be "oath helping", rather than insight into the behaviour of trauma victims generally.[116]

10.110 In *R v ER*,[117] a trial concerning three counts of historic sexual abuse, the prosecution relied on the expert evidence of a psychotherapist who had extensive experience of counselling individuals who had suffered intra-familial sexual abuse. This expert evidence was admitted at trial. Admission of the psychotherapist's evidence was sought to address two commonly held misconceptions about complainants' responses to sexual trauma. First, it was offered to rebut any inference that might be drawn from the delay in reporting the allegations to the police. Secondly, it was admitted to counter the defendant's assertion that the continued association within the family between the complainant and the defendant was inconsistent with the allegations.[118]

10.111 However, in the Court of Appeal, Hughes LJ noted that the psychotherapist did not have medical qualifications and was not either a psychiatrist or psychologist. Hughes LJ criticised her report as wide-ranging, very general, extending well beyond the issues for the jury and reading as "a powerful piece of advocacy" for the prosecution.[119]

10.112 In delivering his judgment, Hughes LJ accepted that the jury may need some guidance on how to approach the evidence regarding the specific kind of intra-familial sexual abuse suffered by the complainant.[120] He confirmed that "the remedy for that need, however, is, and is now well understood to be, judicial warning and direction" rather than expert evidence.[121] The court cited a number of reasons for this approach:

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113 *R v ER* [2010] EWCA Crim 2522.

114 CPS, *Legal Guidance, Rape and Sexual Offences,* Chapter 3, Case Building (15 July 2022*)*.

115 *Rook and Ward* (2021) 24.24.

116 Above, 24.24.

117 [2010] EWCA Crim 2522.

118 *R v ER* [2010] EWCA Crim 2522 at [9].

119 *R v ER* [2010] EWCA Crim 2522 at [8]-[9] and [32].

120 *R v ER* [2010] EWCA Crim 2522 at [14].

121 *R v ER* [2010] EWCA Crim 2522 at [14].

(1) such patterns of behaviour are commonly understood;

(2) the directions given to the jury about this are similar to the warnings given in identification cases (about the range of reasons why visual identification may be unreliable)[122] and cases in which the defendant accepts having told a lie (about the range of explanations for a witness telling a lie)[123];

(3) expert assistance carries the danger of being given special status or weight by a jury and it may not appropriately consider the contrary case;

(4) a judge is well placed to help jurors in a neutral way, balancing the arguments on both sides and an expert may not be in a position to do so;

(5) routine admission of this type of evidence is likely to lead to defendants seeking to adduce their own expert evidence, adding to the length of the trial.[124]

10.113 In their 2006 consultation paper, the Home Office and Office for Criminal Justice Reform proposed that general expert evidence "concerning certain characteristics of behaviour and psychological reactions that victims may experience and demonstrate after a violent, sexual crime" should be admissible in rape cases.[125] They argued that general expert evidence would help judges and jurors to understand the "normal and varied" reactions to sexual violence beyond their common knowledge, thereby challenging myths and misconceptions.[126] Additionally, they suggested that admitting general expert evidence "'levels the playing field between the prosecution and the defence by providing an alternative explanation to the defence's assertions" regarding complainants' seemingly counterintuitive reactions to sexual violence.[127]

10.114 In their view, experts would have the benefit of appearing balanced before the jury when addressing myths and misconceptions, unlike prosecution advocates.[128] Moreover, they suggested there would be no benefit to the complainant attempting to explain their own behaviour because their perceived credibility will already have been influenced by the very myths and misconceptions they are seeking to challenge.[129] However, in the light of the consultation responses that were received, the Government rejected this proposal, finding there were "substantial risks" associated with admitting general expert evidence in this way, namely:

(1) the risk that general expert evidence would become particularised to the complainant in the specific case at hand;

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122 *R v Turnbull* [1977] QB 224.

123 *R v Lucas* [1981] QB 720.

124 *R v ER* [2010] EWCA Crim 2522 at [15]-[20].

125 Office for Criminal Justice Reform, *Convicting rapists and protecting victims – justice for victims of rape: a consultation paper* (2006) p 16.

126 Above.

127 Above.

128 Above, p 19.

129 Above, p 18.

(2) the risk of a "battle of the experts" which would distract from the core legal issues of the trial;

(3) the risk of formulating a new profile for a "typical rape complainant" and excluding complainants who do not fit this new profile.[130]

10.115 These arguments in favour of, and against, the introduction of expert evidence on the general behavioural responses to sexual violence in RASSO trials will be explored in further depth below.

Expert evidence of a particular complainant's response to sexual violence

10.116 Whilst expert evidence regarding the general behavioural responses to sexual violence is inadmissible, evidence explaining the impact of a sexual offence on a particular complainant may be admissible.[131] Expert evidence concerning a specific complainant may be admitted in certain circumstances:

(1) As background against which the jury may judge the consistency and veracity of the complainant's account.

In *R v Zubair Anwar*, the Court of Appeal accepted the possibility of adducing expert evidence of the complainant's alleged post-traumatic stress disorder (PTSD).[132] The court commented that the jury could use this expert evidence to provide a background against which to judge whether the complainant's account was consistent and whether she was telling the truth.[133]

(2) As evidence of the complainant's psychological injury.

In *R v Eden*, the Court of Appeal approved the use of expert evidence from a psychologist diagnosing the complainant with PTSD.[134] It stated that evidence of psychological injury was justified "in exactly the same way as any doctor might give evidence of physical injury consistent with a particular allegation."[135]

The Angiolini Review into the investigation and prosecution of rape in London heard that many sexual offences complainants suffer from psychological rather than physical injury.[136] The Review argued that the Court of Appeal's decision in *R v Eden* "should be more widely relied upon" to lead psychological evidence

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130 Home Office and Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (November 2007) p 21.

131 *Rook and Ward* (2021) 24.28.

132 *R v Zubair Anwar* [2012] EWCA Crim 1478.

133 *R v Zubair Anwar* [2012] EWCA Crim 1478 at [18]. Gage LJ stated: ''In our judgment, the question of whether or not it is so consistent and whether or not [the complainant] is telling the truth is one for a jury to decide, having heard, if it is admitted, the evidence of psychiatrists and [the complainant] give evidence. The jury can judge her evidence against the background of such psychiatric evidence as is called.''

134 *R v Eden* [2011] EWCA Crim 1690.

135 *R v Eden* [2011] EWCA Crim 1690 at [14].

136 Angiolini Review (2015) para 25.

in sexual offences cases.[137] The Review emphasised the "high incidence of psychological injury" following sexual violence and suggested that:

> Hearing evidence of the complainant's diagnosis, whether for post-traumatic stress disorder or another condition, can significantly broaden jurors' understanding of the case which they are hearing and provide additional evidence to assist them in reaching their decision.[138]

On this basis, the Angiolini Review recommended that in all sexual offences cases involving psychological injury, the prosecution should consider presenting expert evidence regarding such psychological injury.[139]

This category of evidence has the potential to apply to many complainants in sexual offences trials. In their 2022 Joint National Rape Action Plan, the CPS and National Police Chiefs' Council outlined their plans to launch a pilot programme reporting evidence of psychological injury at different stages of the criminal justice process.[140] This pilot is aimed at raising "awareness of the existence of psychological injury at an early stage of the investigation to inform case-building and decision-making."[141]

(3) As evidence to explain the witness's presentation when giving evidence where the witness has a mental disorder.

In *R v Mulindawa*, the Court of Appeal confirmed that in rare cases, where there is a "proper medical basis", expert evidence could be adduced to help the jury understand the presentation of a witness with a mental disorder.[142] However, this was limited to explaining the impact of their condition on their presentation, and must not stray into an assessment of credibility, which was a matter for the jury.

10.117 Expert evidence relating to a particular complainant and alleged offence has the benefit of being specifically tailored to the facts of the case. This level of precision serves to assist the jury in their decision-making and avoids the vagueness sometimes associated with general response evidence. However, because such evidence is specific to the complainant and their role within the circumstances of the case, it is at higher risk of being "oath helping". In contrast, expert evidence regarding general behavioural responses to sexual violence could still effectively assist the jury if it is relevant to the case and specifically where it is relevant to particular myths in a given case, whilst avoiding "oath helping". Rather than being adduced in an entirely abstract and generalised fashion, expert evidence about the general behavioural responses to sexual violence could be admitted in relation to the specific myths and

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137 Above, para 700.

138 Angiolini Review (2015) para 701.

139 Above, Recommendation 40.

140 CPS and National Police Chiefs' Council, *Police-CPS Joint National Rape Action Plan* (October 2022) p 19.

141 Above.

142 *R v Mulindawa* [2017] EWCA Crim 416. This case relates to the presentation of a defendant with a mental disorder.

misconceptions raised in a case, whilst still avoiding comment on the complainant and their behaviour. For example, where a complainant has delayed in reporting, general expert evidence could be adduced which explains that delayed reporting to the police is common and the range of reasons for this. This would be relevant to a myth raised on the facts of the case, so would aid the jury in their understanding of the evidence before them, but would not be tailored to the circumstances of the complainant's delay or any explanation they have given for that delay so as to avoid being "oath helping".

10.118 Moreover, where expert evidence is particular to the complainant, this is likely to require the complainant to undergo an assessment by an expert or experts, potentially instructed by both the prosecution and the defence, which may intrude into the complainant's private life. Evidence of general behavioural responses should not require this potentially invasive assessment to take place. Further, none of the stakeholders we consulted suggested there should be expanded use of particularised expert evidence. Where evidence particular to the complainant is needed, the prosecution could make use of the existing categories of admissible evidence described above; for example, the category of evidence of the complainant's psychological injury was highlighted in the Angiolini Review and is being further developed by the 2022 Joint National Rape Action Plan.[143]

10.119 For these reasons we have focussed our review on the admissibility of expert evidence on the general behavioural responses to sexual violence, rather than expert evidence particular to the complainant.

Scope for reform

10.120 As the law currently stands, expert evidence is not permitted generally to address the myths and misconceptions surrounding the behaviour of complainants during or after an alleged sexual offence. Moreover, expert evidence can only be utilised to explain a particular complainant's behaviour under a very limited set of circumstances.

10.121 After considering academic commentary, stakeholders' views, and comparative law, we review whether expert evidence regarding general behavioural responses to sexual violence, both during and after an alleged offence, should be admissible in RASSO trials. In order to address this question, we consider views on the knowledge and experience of the jury; whether an expert is best placed to impart such knowledge; and the effectiveness of expert evidence at addressing myths and misconceptions.

The knowledge and experience of the jury

10.122 As set out above, expert evidence serves to "furnish a court with scientific information likely to be outside the experience of a judge or jury".[144] Expert evidence is therefore inadmissible where "a judge or jury can form their own conclusions without help".[145]

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143 See para 10.116.

144 *R v Turner* [1975] QB 834 at 841-842.

145 *R v Turner* [1975] QB 834 at 841D.

10.123 The Angiolini Review was "left asking whether more could be done" to address myths and misconceptions[146] including:

> whether expert evidence should now be made available in court to explain how the human brain responds to threats, fear, and trauma and about the significant psychological dynamics which prevent many complainants behaving post-rape in a manner compatible with the normal expectations of many in the wider community.[147]

10.124 The Review heard compelling arguments that these types of behaviours are beyond the knowledge and experience of the jury and that opportunities to build alternative case narratives were being missed. The Review's case file analysis revealed that counterintuitive behaviours were interpreted by prosecutors as evidential weakness[148] and prosecutors were not aware that "[m]any of the normal human responses to trauma run counter to the ingrained societal views as to how a victim of sexual assault should respond."[149]

10.125 The Review similarly found that prosecutors lacked "familiarity with cultural pressures and norms in certain minority communities".[150] The Review concluded these types of behaviours could be explained:

> through the use of expert evidence from psychologists and psychiatrists as well as experts in cultural or religious norms and the effects of prolonged domestic abuse.[151]

10.126 Psychologists reported to the Review they were concerned that evidence:

> which relates to aspects of general human behaviour not commonly understood by members of the general public, was not permitted to be put before juries to address such misunderstanding.[152]

10.127 The Review's focus groups similarly responded:

> Expert evidence could explain how the human brain works in response to a perceived threat to life, and the autonomic freeze and flop responses. It might also explain the way memories are stored during, and accessed after, a traumatic incident and that many actions considered by some to be abnormal are in fact completely normal, including delayed, incremental or partial reporting.[153]

10.128 Moreover, in support of its conclusion that expert evidence of general behavioural responses should be admissible, the Review criticised the criteria in *R v Turner*:

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146 Beyond the use of directions, counsels' speeches and the training of judges.

147 Angiolini Review (2015) para 211.

148 Above, para 655.

149 Above, para 656.

150 Above, para 657.

151 Above, para 659.

152 Above, para 662.

153 Above, para 702.

> These criteria enable the use of expert testimony to explain complex scientific evidence such as DNA or to help a jury decide how a particular physical injury may have been caused. They do not however permit jurors to hear expert evidence on the way the human brain responds to trauma. It is submitted that this is not something about which jurors could readily 'form their own conclusions' as demonstrated by the prevalence of societal myths.[154]

10.129 Harriet Wistrich, the founder of the Centre for Women's Justice, a psychotherapist and several members of the judiciary agreed that general behavioural responses to sexual violence are outside the knowledge and experience of the jury. Hanna Llewellyn-Waters noted the benefits of jurors receiving help, via expert evidence, in understanding why complainants often struggle to recollect events in a linear and comprehensive narrative. In her experience, complainants often remember the alleged offence in the form of flashbacks or snapshots.

10.130 However, various stakeholders felt that expert evidence could only offer information outside the scope of the jury's knowledge in exceptional cases. A police officer and a judge thought that expert evidence could be useful but should not become standard. They therefore suggested distinguishing certain exceptional cases as suitable for expert evidence, such as, for example, to explain the exceptional impacts of prolonged intra-familial abuse in cases like *R v ER*.[155]

10.131 A commonly cited concern amongst academics and other stakeholders alike is that expert evidence of this nature would be "oath helping".[156] Admission of expert evidence regarding the general behavioural responses to sexual violence may be seen as fortifying the complainant's credibility, in turn, making significant inroads into the jury's role of determining credibility. We explain at paragraph 10.117, why expert evidence about general behavioural responses to sexual violence would not be "oath helping". It would be adduced where relevant to the myths raised in a given case but would not be tailored to the complainant. For example, where a complainant froze during the alleged offence, an expert giving particularised evidence would comment on the complainant's unique psychology and the reasons why they may have frozen under those exact circumstances. In contrast, an expert giving evidence on the general behavioural responses to sexual violence would provide general psychological and physiological evidence demonstrating that freezing during a sexual assault is common and the general range of reasons for this. This evidence would not serve to bolster the complainant's credibility; it would simply address a misconception present within the circumstances of a case by educating the jury about the relevant empirical evidence.

10.132 Rook and Ward similarly propose that the "oath helping" objection to expert evidence could be easily tackled if the purpose of such evidence were reframed as educational rather than directly addressing the issue of credibility.[157] As we have outlined in Chapter 2, the prevalence of myths and misconceptions in RASSO trials suggests that

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154 Above, para 706.

155 *R v ER* [2010] EWCA Crim 2522.

156 See para 10.109.

157 *Rook and Ward* (2021) 24.30.

the range of reactions to sexual trauma is outside jurors' knowledge and expertise. Therefore, jurors arguably need to be educated about general behavioural responses to sexual violence before they are able to assess whether the complainant's behaviours affect their credibility as a witness. As Dempsey argues:

> In the absence of expert testimony, the insidious power of myth threatens to limit or destroy the jury's ability to engage in clear-headed, rational analysis of the facts before them. By negating the power of myth, expert testimony clears the way for fact-finders to deliberate regarding the *actual* facts of the case and the logical conclusions that flow from such facts, rather than focusing upon the falsehoods created when the evidence is viewed through the distorting lens of myth.[158]

10.133 In other words, expert evidence serves to dispel myths and misconceptions, allowing jurors to assess the complainant's credibility according to the facts of the case rather than any preconceived misconceptions.[159] Framed in this educational way, expert evidence would not usurp the function of the jury in assessing credibility, and could instead be viewed as strengthening the jury's abilities in this regard.

Comparative law

10.134 In comparison to other common law jurisdictions, England and Wales stands as an outlier in its restrictive approach to expert evidence in RASSO trials.

10.135 Some jurisdictions have explicitly recognised that knowledge of behavioural responses to sexual trauma does not fall within the expertise of a jury. For example, in Scotland, there are separate statutory rules of admissibility which permit the use of expert evidence relating to myths and misconceptions in sexual offence and domestic abuse proceedings. Expert psychological or psychiatric evidence may be called in relation to any of the complainer's behaviour or statements after the alleged offence.[160] Such evidence is admissible "for the purpose of rebutting any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn".[161] The Policy Memorandum to this legislation states:

> The Bill will enable certain expert evidence to be admitted when it is relevant to the case. This is considered necessary as most people do not have any knowledge of how the behaviour of [victims of sexual abuse] can be affected and expert evidence can provide additional information to the judge or jury to help them reach their decisions. This type of evidence can be necessary to advise the court on why

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158 MM Dempsey, *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence* (Crown Prosecution Service: London, 2004) 11 (emphasis in original).

159 See P Lewis, "Expert evidence of delay in complaint in childhood sexual abuse prosecutions" (2006) 10 *International Journal of Evidence and Proof* 157, 160: "Such evidence is designed to 'dispel misunderstandings which might otherwise impact upon the minds of the triers of fact'. The jury will then be able to 'determine whether [the] information has any application to the particular case', thus avoiding potentially impinging upon the jurors' role in assessing credibility", citing I Freckelton, "Child Sexual Abuse Accommodation Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand" (1997) 15 *Behavioural Sciences & Law* 247, 250. Professor Penney Lewis is the Commissioner for Criminal Law at the Law Commission of England and Wales, and lead Commissioner for this project.

160 Criminal Procedure (Scotland) Act 1995, s 275C(3). In Scotland, the complainant is referred to as the complainer.

161 Criminal Procedure (Scotland) Act 1995, s 275C(2).

victims of particular offences, such as sexual abuse, may behave in a particular way such as disclosing details of the alleged offence over a period of time.[162]

10.136 According to Lisa Gillespie KC, based on the case law that pre-dated its introduction, this legislation appears to permit the use of expert evidence of general behavioural responses of complainants, rather than just the particular behaviour of the complainant in the case.[163] The Angiolini Review recommended that consideration should be given to an equivalent provision in England and Wales, to "codify and strengthen existing common law powers to lead expert evidence to rebut any inference adverse to the complainant's credibility or reliability that may be drawn from subsequent behaviour or statements of the complainant."[164]

10.137 Also recognising the limitations of juror knowledge regarding behavioural responses to sexual violence, some Australian jurisdictions have legislated to make expert evidence admissible in this area. Referring to the provisions in New South Wales and Victoria,[165] Horan and Goodman-Delahunty state: "[o]ver the last decade, counterintuitive expert evidence has been permitted to educate the jury as to how complainants vary in their behaviour both during and following a sexual assault."[166]

10.138 In New South Wales, opinion evidence is generally inadmissible.[167] However, an exception is created for opinion evidence based on "specialised knowledge". Specialised knowledge must be derived from a person's "training, study or experience" and the opinion evidence must be based "wholly or substantially" on that knowledge and the expert must have certified that this is the case.[168] There is a general rule that credibility evidence about a witness is inadmissible,[169] but there is an exception to this in relation specialised opinion evidence, where the opinion could substantially affect the assessment of credibility and the court gives leave for it to be introduced.[170] These provisions also permit expert opinion to be given on the general

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162 Scottish Parliament, *Vulnerable Witnesses (Scotland) Bill, Policy Memorandum* (June 2003) b05s2-introd-pm.pdf (parliament.scot), para 53.

163 See L Gillespie, "Expert evidence and credibility" (2005) 9 *Scots Law Times* 53, 55. The Memorandum to the legislation explains that it was introduced to address the case of *HM Advocate v Grimmond* 2002 SLT 508, 2001 SCCR 708, which took the contrary position on the admissibility of expert evidence of general behavioural responses.

164 Angiolini Review (2015) para 37.

165 Evidence Act 1995 (NSW), s 177 and Criminal Procedure Act 2009 (Vic), s 388 and the Evidence Act 2008 (Vic), s 79.

166 J Horan and J Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: Failures and Lessons Learned" (2020) 43 *University of New South Wales Law Journal* 707, 708-709.

167 Evidence Act 1995 (NSW), s 76.

168 Evidence Act 1995 (NSW), s 79 and s 177.

169 Evidence Act 1995 (NSW), s 102.

170 Evidence Act 1995 (NSW), s 108C.

behavioural responses of both adults and children.[171] There are identical provisions in Victoria and the Australian Capital Territory.[172]

10.139 In Victoria, there is an additional rule concerning the use of expert evidence in sexual offences proceedings. This rule states that despite any rule to the contrary, the court may receive opinion evidence based on specialised knowledge of the "nature of sexual offences" and the "social, psychological and cultural factors" that may affect the behaviour of complainants and victims including the reasons that may contribute to delayed reporting.[173]

10.140 Similarly, in New Zealand, expert opinion is admissible if it is likely to be of "substantial help" to understand other evidence or ascertain any fact of consequence to the determination of the proceedings.[174] The New Zealand Law Reform Commission noted that these provisions permit the calling of experts to give "counter-intuitive evidence".[175] The Supreme Court confirmed that this evidence should focus on what is substantially helpful; on the live trial issues; not be unduly lengthy and be "expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial".[176]

10.141 In South Australia, general and particularised expert evidence may be called outside the context of sexual offences in cases specifically concerning family violence, where certain defences are raised, namely self-defence, duress or "sudden or extraordinary emergency". Following the 2020 recommendations of the South Australian Law Reform Institute, amendments were made to the Evidence Act 1929 regarding victims of abuse who kill their abuser. This 'social framework evidence' concerns the nature and effect of family violence, to provide context to the experiences of victims. It may include evidence of the general nature and dynamics of relationships affected by family violence, its cumulative effect and evidence to assist the jury's understanding of family violence generally.[177]

10.142 In the United States, under Federal Rule of Evidence 706, the court is able to appoint its own expert witness, either one that is agreed on by the parties or one of its own choosing.[178] Further, according to Federal Rule of Evidence 702 ("FRE 702"), for an expert witness to testify, various criteria must be met including that the expert has specialised knowledge that will assist "the trier of fact to understand the evidence or to determine a fact in issue".[179] FRE 702 was held by the US Supreme Court to be the

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171 Evidence Act 1995 (NSW), s 79(2)(b) and see NSWLRC, *Consent in relation to Sexual Offences*, Report 148 (2020) para 8.148.

172 NSWLRC, *Consent in relation to Sexual Offences*, Report 148 (2020) para 8.148.

173 Criminal Procedure Act 2009, s 388.

174 Evidence Act 2006 (NZ), s 25.

175 NZLC, *Second Review of the Evidence Act 2006* (February 2019) p 196.

176 *DH v R* [2015] NZSC 25 at [110].

177 See Evidence Act 1929 (SA), s 34X-34Y.

178 Federal Rule of Evidence 706.

179 Under FRE 702, a qualified witness may testify if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the

standard for use in federal courts[180] and this standard, or a similar version of it, has since been adopted in a "supermajority" of states.[181] Expert evidence is widely used to explain counterintuitive victim behaviours in sexual offence cases.[182] Many state and federal courts[183] have explicitly held that expert evidence is admissible to explain complainant behaviour where it appears "inconsistent with being raped",[184] and is "beyond the ken of the average juror".[185]

10.143 For example, in *People v Taylor*, the Court of Appeals of the State of New York held that:

> Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970s, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror.[186]

10.144 In 2012, "Pennsylvania shed its distinction of being the only state in which expert testimony to explain victim behaviour in sexual assault cases was inadmissible" on the grounds that "[s]uch testimony would invest the opinions of experts with an unwarranted appearance of authority on the subject of credibility, which is within the facility of the ordinary juror to assess."[187] The new provision[188] has been described as:

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testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

180 *Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579.

181 *Rochkind v Stevenson* (2020) WL 5085877 at para 16. See LexVisio, "The States of Daubert after Florida" (2020) https://www.lexvisio.com/article/2019/07/09/the-states-of-daubert-after-florida. As of 2020, 42 states have adopted the *Daubert* standard or a substantially similar standard for admitting expert evidence.

182 J G Long, V Kristiansson, C Mallios, "When and How: Admitting Expert Testimony on Victim Behavior in Sexual Assault Cases in Pennsylvania" (2013) 18 *AEquitas Strategies in Brief* 1.

183 Such jurisdictions include: the Fifth Circuit, the Sixth Circuit, the Seventh Circuit, the Eighth Circuit, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Texas, West Virginia, Vermont, and Wyoming. See C S Fishman and A T McKenna, *Jones on Evidence* (7th ed 2004, January 2023 Update) § 56:17.

184 Above. Fishman and McKenna have also noted that the states of "Arizona, Indiana, Kansas, Montana, New Mexico, South Carolina, and perhaps Virginia" allow expert testimony on rape trauma syndrome as evidence that sexual violence has occurred (see § 56:16). However, expert evidence admitted to prove a sexual offence has occurred, thus bolstering the complainant's credibility, would be considered to be oath helping in England and Wales. For further discussion of oath helping, see above at paras 10.117 and 10.131-10.132.

185 *Harris v State* (2007) 283 Ga App 374 at 379, 641 SE2d 619, and see *People v Williams* (2013] 20 NY3d 579 at 583-584.

186 *People v Taylor* (1990) 552 NE 2d 131 at 136.

187 *Commonwealth v Gallagher* (1988) 519 Pa 291 at 297, 547 A2d 355 at 359.

188 Section 5920 of the Judicial Code. See JG Long, V Kristiansson, C Mallios, "When and How: Admitting Expert Testimony on Victim Behavior in Sexual Assault Cases in Pennsylvania" (2013) 18 *AEquitas Strategies in Brief* 1.

> a critical tool for prosecutors seeking to provide a context for understanding sexual assault and sexual assault victims, as well as to counter entrenched myths and misperceptions about sexual assault and sexual assault victims.[189]

10.145 Recently, in the case of *People v Harvey Weinstein*,[190] the prosecution presented an expert on the subject of rape trauma syndrome as a recognised behaviour that causes victims of sexual violence to engage in behaviour in relation to their assailant that is counterintuitive. The New York Supreme Court Appellate Division considered the defendant's arguments against the validity and admissibility of the prosecution's expert evidence at length. However, the court was of the view that since rape trauma syndrome was "shrouded by certain rape "myths"", the jury would need "the elucidation that can be facilitated by an expert witness".[191] The court cited *People v Spicola*,[192] explaining that if

> there was a risk that the jury would be "puzzled" by some of the behaviours of the complainants during and after their sexual encounters with [the] defendant, it was appropriate to admit "evidence of psychological syndromes" that would eliminate that confusion.[193]

10.146 In sum, there is agreement amongst some academics,[194] and in Rook and Ward's practitioners' text,[195] that juries need assistance to understand victim responses to sexual trauma and fairly assess the evidence, untainted by misconceptions. Several other jurisdictions, the Angiolini Review, and some of the stakeholders with whom we engaged have explicitly recognised that general behavioural reactions to sexual trauma are outside the knowledge and expertise of the jury. We therefore provisionally conclude that expert evidence of general behavioural reactions to sexual violence could assist the jury in their assessment of the evidence of the complainant's responses to the events in question and the complainant's ability to recollect those events in a linear chronological narrative. Providing jurors with expert evidence on general behavioural responses to sexual violence would therefore fulfil the "necessity criterion" of the admissibility test for expert evidence.[196]

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189 JG Long, V Kristiansson, C Mallios, "When and How: Admitting Expert Testimony on Victim Behavior in Sexual Assault Cases in Pennsylvania" (2013) 18 *AEquitas Strategies in Brief* 1.

190 *People v Harvey Weinstein* (2021) NY App Div Case No 2020-00590 at 2632.

191 *People v Harvey Weinstein* (2021) NY App Div Case No 2020-00590, p 27.

192 See *People v Spicola* (2011) 16 NY3d 441.

193 *People v Harvey Weinstein* (2021) NY App Div Case No 2020-00590 at 27-28, citing *People v Spicola* (2011) 16 NY3d 441 at 465.

194 See MM Dempsey, *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence* (Crown Prosecution Service: London, 2004) and P Lewis, "Expert evidence of delay in complaint in childhood sexual abuse prosecutions" (2006) 10 *International Journal of Evidence and Proof* 157. Professor Penney Lewis is the Commissioner for Criminal Law at the Law Commission of England and Wales, and lead Commissioner for this project.

195 *Rook and Ward* (2021) 24.30.

196 See para 8.104 and *R v Brecani* [2021] EWCA Crim 731.

The effectiveness of expert evidence

10.147 There is limited research specifically exploring the effectiveness of expert evidence at addressing myths and misconceptions in sexual offences trials, but wider academic literature concerning the effectiveness of expert evidence appears to provide some promising indications.

10.148 General expert evidence has been found to influence juror decision-making effectively in various mock trial contexts.[197] For example, Gabora et al. found particularised and general expert evidence to be "equally effective in overcoming misconceptions concerning child sexual abuse" after comparing jurors' Child Sexual Abuse Belief Scales before and after a mock trial.[198] The Child Sexual Abuse Belief Scale measures agreement with various commonly held misconceptions related to child sexual abuse, such as delayed reporting, inconsistencies in complainants' stories, and the prevalence of acquaintance abuse.[199]

10.149 With specific regard to adult sexual offences trials, Ellison and Munro argue that the findings of their mock jury study in relation to certain myths

> give cause for optimism in terms of the ability of general expert testimony and/or extended judicial instruction to inform jurors about the disparate reactions of victims of rape, and to generate, in turn, less prejudicial assessments of the relevance of counter-intuitive behaviours, such as delayed reporting or a calm courtroom demeanour.[200]

Ellison and Munro's results were not as positive regarding misconceptions related to the absence of physical injury or resistance.[201]

10.150 In their study of 280 mock jurors, Ryan and Westera found that jurors were more likely to use "evidence-based reasoning in their judgements" when presented with both expert evidence and the complainant's testimony explaining the complainant's seemingly counterintuitive behaviour after an alleged offence.[202]

10.151 Lara Hudspith and Dominic Willmott carried out a systematic review[203] to establish which methods are most effective to address myths and misconceptions amongst jurors.[204] Judicial directions were found not to be effective in relation to certain myths,

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197 L Ellison and V Munro, "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 *British Journal of Criminology* 363, 375.

198 N Gabora, N Spanos and A Joab, "The Effects of Complainant Age and Expert Psychological Testimony in a Simulated Child Sexual Abuse Trial" (1993) 17 *Law and Human Behavior* 103, 118.

199 Above, 109.

200 L Ellison and V Munro, "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 *British Journal of Criminology* 363, 379.

201 Above, 379.

202 N Ryan and N Westera, "The effect of expert witness testimony and complainant cognitive statements on mock jurors' perceptions of rape trial testimony" (2018) 25 *Psychiatry, Psychology and* Law 693, 693.

203 The importance of undertaking a systematic review in this area as noted in Chapter 2].

204 L Hudspith et al, "Systematic Literature Review 2 - Juror Rape Myth Acceptance Interventions" (2022 – under review).

namely lack of resistance.[205] They also found that cross-examination negated the impact of expert evidence on jurors.[206]

10.152 Horan and Goodman-Delahunty carried out a detailed case study exploring the effectiveness of expert evidence in Australia. They noted that the challenges for lawyers and experts posed by expert evidence have led to its "underuse and unsuccessful use".[207] In their case study, they found that the expert evidence called to address myths and misconceptions was "mostly ineffective".[208] This was because their evidence was insufficiently tailored to the facts because the expert had omitted relevant information about myths, or conversely, had included irrelevant information. However, they did not dismiss the use of experts altogether. They concluded that steps should be taken to maximise the effectiveness of expert evidence by the expert giving evidence early in the trial, before the complainant and to ensure tailoring of the evidence, and the expert being properly and fully instructed.[209] Some of the stakeholders with whom we engaged agreed that an expert should be called, or their evidence read before the complainant gives evidence. This view is similarly reflected by the VLRC which recommended that, as with judicial directions, expert evidence may be most effective when given early in the trial.[210]

10.153 Stakeholders shared various apprehensions regarding the effectiveness of expert evidence at addressing myths and misconceptions. Concerns were raised by Dr Susan Leahy that the use of psychological evidence of general behavioural responses of victims may be too generalised to be helpful to the jurors. Jurors may need more concrete information on which to hang their own ideas. A Recorder similarly emphasised that whether an expert was likable or not could have an impact on the jury's receptiveness to their evidence.

10.154 A Recorder stated that when prosecuting they would not want to call a psychiatrist as an expert witness, because it gives the defence another opportunity to counter their arguments. Jim Sturman KC told us that if the prosecution could call such an expert, then the defence would also call one and that would lead to more challenge, not less. The combination of two experts and increased cross-examination would result in the defence having additional opportunities to counter prosecution arguments. This would likely result in juries more often finding a reasonable doubt, undermining the effectiveness of expert evidence as a countermeasure against myths and misconceptions.

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205 Above.

206 Above.

207 J Horan and J Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: Failures and Lessons Learned" (2020) 43 *University of New South Wales Law Journal* 707, 732.

208 Above, 732.

209 Above, 732-734.

210 VLRC*, Improving the Response of the Justice System to Sexual Offences*, (September 2021), para 20.77.

Are experts best placed to inform the jury?

10.155 Even after accepting that jurors need help understanding behavioural responses to sexual trauma, the question remains whether experts are best placed to inform the jury in this regard.

10.156 As confirmed by Hughes LJ in *R v ER*, the remedy for bridging the gaps in juror knowledge of these matters "is now well understood to be, judicial warning and direction" rather than expert evidence. The use of judicial directions in sexual offences trials is fully explored earlier in this chapter at 10.10. Judicial directions are considered to be authoritative and can be tailored to the individual case, whilst being flexible to accommodate the multi-faceted nature of myths and misconceptions. Nevertheless, as mentioned at paragraph 10.56, the Angiolini Review noted that judicial directions on their own cannot "go far enough in rebutting ingrained and common perceptions of how complainants are expected to react and behave following major trauma".[211] For this reason, the Review recommended that expert evidence should be used to address myths and misconceptions amongst jurors.[212]

10.157 Stakeholders' views on this matter largely fell into two categories: those who supported the use of experts to address myths and misconceptions and those who felt judicial directions were more appropriate.

10.158 Those in support of experts giving evidence felt that even very generic evidence discussing the impact of trauma would be helpful for jurors. They additionally noted that experts could assist the jury by tailoring their evidence to the particular myths that are relevant to the case. The Centre for Women's Justice told us that experts can give a fuller explanation of behaviour than is possible within a judicial direction. One member of the judiciary told us that while judicial directions work well in more "standard" cases, expert evidence could be used in exceptional circumstances, to explain the presentation of a witness, where the jury had no touchpoint in their own lives. For example, an organisation working with complainants thought expert evidence could be particularly useful to explain cultural differences, which might impact when a complainant reported or to whom they disclosed an offence. Another member of the judiciary felt that the jury may wish to hear expert evidence to understand the scientific basis behind the judicial directions on myths and misconceptions. Mock jury research has also found that jurors respond in similar ways to both an expert or a judge offering such information.[213]

10.159 The stakeholders who favoured judicial directions criticised the use of experts in addressing myths and misconceptions for five broad reasons:

(1) Undue prominence given to expert evidence.

Some stakeholders felt that admitting expert evidence risked diverting the jury's attention from the facts of the case. There is similarly a risk that jurors will defer to the expert evidence, rather than making their own assessment. This is

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211 Angiolini Review (2015) para 660.

212 Above, para 662, Recommendation 36.

213 L Ellison and V Munro, "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 *British Journal of Criminology* 363.

particularly the case if the defence do not have an expert, whose report they can use to inform their cross-examination of the prosecution expert. Professor Thomas told us that there have been in-depth inquiries in other common law jurisdictions about how some scientific evidence should be presented to juries where there is widespread agreement within the scientific community about that evidence, and that those inquiries had concluded that this widespread agreement meant that this information should be given to juries by judges not expert witnesses.

However, judicial directions may not be sufficiently prominent to effectively address myths and misconceptions. Judicial directions are generally given along with other information in the trial such as a lengthy summing up of the evidence by the judge, and detailed directions on all the relevant law. Expert evidence on relevant myths may be more memorable and therefore have a greater chance of dispelling the misconceptions held by the jury.

(2) "Battle of the experts".

Two seemingly competing experts, one prosecution and one defence, might distract the jury from the issues in the trial, leading them to focus on which expert they believed. A Recorder told us that whether an expert was likeable or not could have an impact on whether the jury believed their evidence. Moreover, a "battle of experts" could introduce an element of doubt in the mind of the jury, which is otherwise not present in judicial directions. A defence barrister pointed out that the parties could not be forced to agree on an expert. A judge added that there is always room for disagreement, and it is preferable to have information coming from a single source, such as via judicial directions.

However, some members of the judiciary took the view that given the consensus of experts' evidence about the range of complainants' responses to sexual offences, the concern about evidence from competing experts was misplaced. Alternatively, it should be possible for the prosecution and defence to reach agreement and the resulting expert report could be read to the jury, suitably edited to take account of any defence objections. Professor Rumney notably pointed out that there is a consensus about certain myths and misconceptions but not about others, such as the frequency of false allegations. One judge posited that the expert could be called by the court rather than instructed by the prosecution to avoid appearing adversarial.

(3) New framework for how a victim of sexual assault should behave.

A judge and a police officer told us that they were concerned that an expert would set up a new conceptual model of how a victim should behave in response to sexual violence. Dr Leahy agreed, pointing out that a counter-narrative might be created where the appropriate response is "syndromised": effectively enforcing an alternate framework, or "syndrome", which victims would now have to abide by to be believed. Ellison and Cook have previously expressed this concern, in particular where expert evidence explicitly refers to "rape trauma syndrome":

> jurors may infer that the complainant was raped or abused because their behaviour fits, or does not fit, the [rape trauma] syndrome profile…[214]

Nevertheless, one judge emphasised that the aim of general expert evidence is not to specify a reaction, but to dispel the idea of expecting one particular reaction.

(4) Poorly qualified experts.

We were told by stakeholders that the use of expert evidence risks poorly qualified experts with dubious credentials being called to give evidence, the so called "rent an expert".

However, the Criminal Procedure Rules ("CrPR") and CrPD contain extensive requirements regarding the reliability and the integrity of expert evidence before it may be admitted,[215] which were based on Law Commission recommendations.[216] The CrPR and CrPD therefore give ample basis for the court to filter and exercise quality control over expert reports and the experts that parties seek to call. If this is not sufficient, consideration could be given to introducing a code of practice for such experts.[217] For example, the Victorian Law Reform Commission recommended the creation of a panel of experts, similar to the panel used for intermediaries. It recommended that appointment to the panel would be subject to approval and periodic review.[218]

(5) Resource concerns.

Various practical concerns were raised by stakeholders, such as costs, sourcing and validating experts, along with elongating trials. The Gillen Review, concerning the law in Northern Ireland, raised concerns that expert evidence would lead to the defence wishing to call their own expert, leading to greater costs, delays, and complexity.[219]

The Council of Circuit Judges emphasised in response to the 2006 Home Office Convicting Rapists and Protecting Victims consultation paper that:

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214 Home Office and Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (November 2007) para 4.11.

215 See CrPD 7.1.2–7.1.6.

216 See Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325.

217 The NZLC recommended a code of practice for all experts. NZLC, *Second Review of the Evidence Act 2006*, (February 2019) para 11.4.

218 VLRC*, Improving the Response of the Justice System to Sexual Offences* (September 2021), Recommendation 80.

219 Gillen Review (2019) paras 6.6 and 6.58.

> We are far from clear what sort of expert might be appropriate, how the qualification of such an expert might be established and how many such experts might be available.[220]

The Police Federation also responded by highlighting the challenges involved in encouraging properly qualified experts to offer evidence in trials of this nature:

> It is becoming apparent, as shown in child protection cases such as the Sally Clarke and Angela Canning cases, that experts are less willing to become involved due to high risks to their own careers, stress associated with court proceedings and high profile media attention.[221]

(6) The defendant's right to a fair trial.

Expert evidence will provide a framework by which jurors assess the complainant's evidence. Further, to make it effective, general behavioural response evidence would need to be tailored to the particular myths and facts in each case. This creates a risk that the expert evidence is oath helping and usurps the role of the jury.[222]

In their response to the 2006 Home Office Consultation, the Council of Circuit Judges said:

> …the distinction between independent expert evidence assisting a jury to find facts and usurping the jury's function is likely to be blurred in a majority of cases of rape… where the facts of cases vary a great deal and a decision has to be case specific, general expert evidence that cannot focus on the credibility of the individual case would be of little real value.

At paragraphs 10.117 and 10.131 to 10.132 above, we explain the rationale for rejecting the oath helping objection. On this basis, we provisionally conclude that expert evidence of this nature has an educative, rather than oath helping, function and its purpose is to allow jurors to assess the complainant's credibility in accordance with the facts, rather than preconceived misconceptions.

At para 10.7 above, we note that the ECtHR requires courts to strike a "fair balance" between the interests of the defendant in challenging the evidence against them and the complainant's personal integrity and dignity.[223] Jim Sturman KC and a Recorder told us, expert evidence provides greater opportunity for such challenge against the complainant because it gives the opportunity for both the prosecution and defence to cross-examine the expert. The defendant could also challenge the admissibility of the expert evidence called by the prosecution or could call their own expert. in our view, this may provide greater fairness to the defendant than the present position which only

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220 Home Office and Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (November 2007) para 4.7.

221 Above, para 4.5.

222 Above, para 3.6.

223 *J.L. v Italy* (2021) App No 5671/16 (translated from French) at [128].

requires that the defence is consulted on the content of any judicial direction given. If they disagree with it, their remedy, if the defendant is convicted, is to seek leave to appeal.

Our provisional view based on this analysis, that the admission of expert evidence would not infringe the defendant's right to a fair trial echoes the view of Professor Rumney, who explained to the 2006 Home Office Consultation that "[it] should be remembered that this type of expert evidence does appear to work in challenging rape myths, while in no way threatening defendant rights."[224]

10.160 As explained above, experts are regularly trusted to offer evidence of general behavioural responses to sexual violence in New South Wales, Victoria, and the Australian Capital Territory. Experts are similarly permitted to present this evidence in New Zealand and in many jurisdictions in the United States. The Victorian Law Commission has expressly noted the advantages of expert evidence over judicial directions. It noted that expert evidence can address a wider range of issues than found in jury directions including: how memory works; complainants' behaviours that may be counterintuitive and the power dynamics and characteristics of family violence.[225] The Commission similarly highlighted that expert evidence can respond to research as it develops.[226] We provisionally conclude that properly qualified experts would be suitable to address myths and misconceptions before the jury, alongside the use of judicial directions, when presented in a balanced and generalised manner and where the defendant has the opportunity to challenge such expert evidence.

10.161 Whilst there are funding, sourcing, and validating concerns to consider, there appears to be strong potential for experts to offer a uniquely detailed insight into this area, as recognised by various common law jurisdictions and the academic literature. Rather than being "viewed as mutually exclusive alternatives", expert evidence could be used in tandem with judicial directions, and the alternative juror education tools discussed at paragraph 10.165. In this way, properly qualified experts could effectively address myths and misconceptions in a tailored, flexible, and balanced fashion.

10.162 In light of mock-jury research,[227] evidence from other jurisdictions,[228] and our engagement with stakeholders, our provisional view is that such expert evidence would be adduced at the start of the trial, prior to the complainant's evidence for maximum effectiveness. This would provide a framework, grounded in empirical evidence, which jurors could then use to assess the other evidence in the trial, untainted by myths and misconceptions. In their opening, which is given before any

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224 Home Office and Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (November 2007), para 3.7.

225 VLRC*, Improving the Response of the Justice System to Sexual Offences*, (September 2021), para 20.60.

226 Above, para 20.62.

227 See J Horan and J Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: Failures and Lessons Learned" (2020) 43 *University of New South Wales Law Journal* 707, 732-734.

228 See VLRC, *Improving the Response of the Justice System to Sexual Offences*, (September 2021), para 20.77.

witnesses are called, the prosecution could explain the relevance of the expert evidence to their case.

Consultation Question 96.

10.163 Should expert evidence of the general behavioural responses to sexual violence be admissible to address myths and misconceptions in sexual offences trials?

JUROR EDUCATION TOOLS

Background

10.164 In this section we consider various alternative methods of juror education, namely juror information notices, juror education videos, and online interactive tools used during trials.

10.165 If these alternative methods of pre-trial juror education became prevalent, this might reduce the need for split directions[229] and avoid the associated problems which we describe at paragraph 10.25. However, given that directions are tailored to the case and pre-trial juror education provides generic information, split directions may still be required.

10.166 We acknowledge the potential of wider public education campaigns aimed at addressing myths and misconceptions, as highlighted by several of the stakeholders we engaged with. We were told by an academic that in the mock jury trials she conducted exploring jury deliberation in Scottish rape cases (the Scottish Jury Project) jurors often drew on public education campaigns. For example, the Rape Crisis Scotland campaign called "I just froze" was referenced by many participants during the Scottish Jury Project.[230] Several stakeholders also referred positively to a video made to educate viewers on the law of consent, referred to as "Tea and Consent", published on the Thames Valley Police YouTube channel.[231] The Shadow Rape Review recommended an ongoing, government-backed public awareness campaign about consent and rape myths.[232] Similarly, the Gillen Review took the view that "a preventive approach needs to be taken which emphasises the need for education of the public at large from which juries are drawn and follows the lead of the Istanbul Convention".[233] Article 14 of the Istanbul Convention states that all parties to the convention should take:

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229 Giving directions at the outset of the trial and at the end.

230 J Chalmers, F Leverick, V Munro, *The Provenance of what is proven: Exploring (Mock) Jury deliberation in Scottish Rape Trials' Scottish Jury Research Working Paper 2* (2019) p 1.

231 See https://www.youtube.com/watch?v=pZwvrxVavnQ.

232 Centre for Women's Justice, et al, *The Decriminalisation of Rape: Why the justice system is failing rape survivors and what needs to change* (November 2020), https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/C-Decriminalisation-of-Rape-Report-CWJ-EVAW-IMKAAN-RCEW-NOV-2020.pdf p 72.

233 Gillen Review (2019) para 6.114.

the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.[234]

This obligation applies to "informal educational facilities, as well as in sports, cultural and leisure facilities and the media."[235] The Review recommended that it was "crucial" that a public education campaign, similar to that undertaken in Ireland and Scotland, be conducted in Northern Ireland.[236]

Current law

10.167 At present, general information educating jurors on their role and responsibilities during a trial is permitted via juror information notices and a juror education video.[237] Jurors are also assisted in their role by spoken judicial directions which are discussed at paragraph 10.10 above. Written directions and routes to verdict are also encouraged.[238]

Juror information notices

10.168 In all courts in England and Wales, jurors are given an information notice at the start of the trial.[239] This juror information notice is titled "Your Legal Responsibilities as a Juror" and outlines the rules and legal obligations by which all jurors must abide, as well as the consequences for breaching such requirements.[240] The compulsory juror information notice emphasises that jurors have "taken a legal oath or affirmation to try the defendant based only on the evidence [they] hear in court."[241] In the information notice, jurors are explicitly prohibited from making their own inquiries about anything related to the case.

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234 Article 14(1), Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014 ("Istanbul Convention").

235 Istanbul Convention, article 14(2).

236 Gillen Review (2019) para 6.124.

237 See HMCTS, 'Your Role as a Juror' https://www.youtube.com/watch?v=UMbYXyn0lro>.

238 See CrPD 8.5.1-8.5.3. The judge "must give the jury directions on the relevant law orally and, as a general rule, in writing as well" and may give the jury directions about the relevant law at any time, when it will assist them to evaluate the evidence. In *R v BQC* [2021] EWCA Crim 1944 at [69], the Court of Appeal reiterated its approval of the provision of written assistance to the jury. It stated that it is expected that "judges will provide the directions of law, or at the very least a route to verdict, in all but the simplest of cases". In practice, written directions are routinely used; for example, a survey of judges conducted by the Judicial College at their training courses found that 90% of judges reported that they used written directions some of the time but there were differing views about how often they should be used and their format. See Crown Court Compendium, 1-4.

239 See Crown Court Compendium, Appendix IX, 30-1; CrPD 8.3.3.

240 See CrPD 8.3.3. HM Government, 'Your Legal Responsibilities as a Juror' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938496/j001-eng.pdf.

241 HM Government, 'Your Legal Responsibilities as a Juror' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938496/j001-eng.pdf.

10.169 This information is re-emphasised in the Crown Court Compendium's "Guide to Jury Deliberations" which reminds jurors to refer back to the compulsory juror information notice during their deliberations.[242] The Crown Court Compendium recommends judges provide the jury with a hard copy of the "Guide to Jury Deliberations"[243] either just prior to their deliberations, or "even earlier" to provide time for jurors to absorb the information before they deliberate.[244]

Juror education videos

10.170 General information regarding jurors' roles and responsibilities is also permitted via an educational video. As outlined in the CrPR and 2015 CrPD:

> HMCTS provide every person summoned as a juror with information about the role and responsibilities of a juror. Prospective jurors…may also view the film "Your Role as a Juror" online at any time on the Ministry of Justice ("MoJ") YouTube site.[245]

Jurors can locate this video by visiting the gov.uk 'Jury Service' webpage,[246] as highlighted in their jury summons letter.

10.171 Beyond informing jurors of their role and responsibilities at trial, Professor Thomas told us that she is conducting research with real juries at court which examines whether the form and timing of directions jurors receive on avoiding false assumptions in sexual offences cases have any effect on juror views about false assumptions and jury verdicts in those cases. This research examines different forms of directions, including a film.

Scope for reform

Juror information notices

10.172 On the basis of Professor Thomas' research confirming the benefits of the compulsory juror information notice in developing jurors' understanding of their legal obligations, the information notice was rolled out to all courts in England and Wales. Professor Thomas found that when it was first introduced, the notice "achieved close to 100 per cent understanding with jurors in the most critical categories of the statutory offences".[247] Subsequently, "[a]fter over a year of full implementation in all Crown Court jury trials, the new juror notice had achieved almost 100 per cent understanding with jurors in the most critical categories of the statutory offences."[248]

10.173 Given the evidenced effectiveness of juror information notices at enhancing jurors' understanding of their role and responsibilities, a general juror information notice

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242 See Crown Court Compendium, Appendix IX, 30-3.

243 Above, Appendix IX, 30-1.

244 Above, Appendix IX, 30-1 to 30-2. See Chapter 1 Introduction at para 1.65 and footnote 87.

245 CrPD (2015), 26A.2. See HMCTS, 'Your Role as a Juror', https://www.youtube.com/watch?v=UMbYXyn0lro.

246 See HM Government, 'Jury Service', https://www.gov.uk/jury-service.

247 C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987, 994.

248 Above, 995.

addressing myths and misconceptions could similarly aid juror understanding in sexual offences trials.

10.174 Written information is already provided to jurors regarding myths and misconceptions in the form of written judicial directions and routes to verdict. A number of stakeholders told us that they were not opposed to the use of a juror information notice, provided it was properly drafted and used in conjunction with other methods to educate the jury. The provision of an additional juror information notice is likely to be cost effective and may easily be used for a large number of jurors.

10.175 One member of the judiciary raised the objection that generic written notices may have limited value in addressing the specific myths and misconceptions present in a particular case. A psychologist also questioned the value of written notices because research indicates that myths and misconceptions are very deeply ingrained, thus likely rendering a written notice ineffective. It would also be difficult to provide appropriate detail in one generic notice to make it readily comprehensible and helpful to a range of jurors across a wide spectrum of professional and educational backgrounds. However, Dr Dominic Willmott noted that research has shown that even general educational interventions have an impact in reducing myth acceptance among jurors.

10.176 There do not appear to be juror information notices of this kind utilised in other jurisdictions to address myths and misconceptions in sexual offences cases.

Juror education video regarding myths and misconceptions

10.177 Professors Chalmers and Leverick conducted an evidence review alongside the Scottish government to assess the effectiveness of different methods of conveying information to jurors.[249] In their review they considered eight different methods: trial transcripts, juror note-taking, audio-visual and digital presentation methods, juror questions, pre-instruction, plain language directions, written directions, and structured decision aids (routes to verdict).[250] They noted there is currently only a small evidence base concerning the use of audio-visual methods to inform jurors:

> The evidence that does exist shows that this can be helpful in improving juror memory for both evidence and legal directions (although in relation to directions, the more obvious way to target this is through written directions or structured decision aids).

10.178 The Dorrian Review has adopted a cautious approach to juror education tools by recommending that a pilot juror education video, similar to the programme led by Professor Thomas, should be introduced in Scotland. The Review recommended a

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249 J Chalmers and F Leverick, *Methods of Conveying Information to Jurors: An Evidence Review Research Findings* (2018), https://www.gov.scot/publications/methods-conveying-information-jurors-evidence-review-research-findings/.

250 Above, 1.

pilot programme to first assess research findings on the effectiveness of video before its universal introduction in Scotland.[251]

10.179 The Gillen Review examined the potential benefits of a juror education video to address myths in Northern Ireland. The Review concluded in favour of the use of a video, which is currently being developed and piloted in Northern Ireland, along with amendments to juror information leaflets and notices. The arguments the Review gave in favour were as follows, in summary:

(1) There was a "strong argument" that juries should be given more than "somewhat bland" judicial directions concerning myths and misconceptions. Gillen suggested judicial directions alone may be "inadequate" to address "deeply held" myths and misconceptions. A video could provide jurors with an engaging and detailed explanation of judicial directions.

(2) A single film from an authoritative source may reduce inconsistency in the way that myths and misconceptions are addressed.

Videos do not rely on the individual interpretation and delivery of directions by the judge, which according to the RASSO Advocates survey are at times inconsistent. Therefore, the use of a video may lead to greater consistency in how myths and misconceptions are described to jurors.

(3) If played to the jury at the start of the case, it would allow for jurors to make "an informed and fair assessment of the evidence and would guide the approach of counsel". A video can provide jurors with a framework by which they can understand evidence in the trial and may inform their later deliberations.

(4) These views were subject to practitioners and judges in Northern Ireland approving the content of the video to ensure that it did not provide an opinion on matters which are for the jury to determine. They were also subject to a selection of videos being produced for different types of cases, for example for a child or male complainant.[252]

10.180 Many of the stakeholders we engaged with agreed with the arguments proposed in the Gillen Review, especially where a juror education video is introduced in conjunction with judicial directions or other tools for juror education.

10.181 One member of the judiciary emphasised that a video is a readily understandable and engaging format which may make the information more accessible to a wider range of jurors than written notices or directions. A police officer expressed that they have had success using videos to explain complicated phone evidence in other types of trials. Another member of the judiciary told us that a juror education video could potentially work on a number of levels: educating jurors; reassuring complainants; and inspiring public confidence. This is obviously only the case where the video is effective at addressing myths and misconceptions.

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[251] Scottish Courts and Tribunals Service, *Improving the Management of sexual Offences Cases Final Report from the Lord Justice Clerk's Review Group* (March 2021) recommendation 4.

[252] Gillen Review (2019) paras 6.96 to 6.104.

10.182 Stakeholders in favour of introducing a juror education video emphasised that the quality of this video would be very important and that for a juror education video to be authoritative it should be filmed by judges and experts. It was suggested that such a video would need to be agreed by the Bar Council and by the judiciary to ensure it was not subject to challenge at trial, albeit one stakeholder suggested such challenges were likely to be rare. Dame Elish Angiolini emphasised the video would have to undergo frequent updates as societal understanding and scientific research developed regarding responses to sexual violence. Angiolini also reiterated that any video would have to be careful to cater to different cultures and backgrounds.

10.183 With this level of tailoring and concurrent flexibility in mind, one member of the judiciary highlighted that trying to write a script which would successfully be pitched at all levels without over-complicating or over-simplifying would be very difficult. Stakeholders also noted that a video cannot be specifically tailored to the facts of a particular case in the same way that judicial directions can be. However, any new video would be presented alongside tailored judicial directions and as suggested by the Gillen Review, it may be possible to introduce different videos for certain fact scenarios. For example, adult female complainants; adult male complainants and child complainants.[253]

10.184 Practitioners were also concerned that a juror education video may give undue prominence to specific issues within the trial or entrench alternative stereotypes as to how victims of sexual offences should behave. A psychotherapist added that as with all forms of juror education, the effectiveness of any video would be dependent upon jurors' willingness to learn.

Online interactive tools

10.185 There is some research and emerging evidence that the use of an online tool containing interactive tasks may be effective at reducing the acceptance of myths and misconceptions in juries.[254] Currently, there are no online tools containing interactive tasks aimed at addressing myths and misconceptions available for jurors, and no provision permitting their use. Research regarding juror education tools has noted the potential benefits of online interactive tools such as that they are cost effective, can be used for larger numbers of participants, and can be easily tailored.[255]

10.186 An academic told us that a variety of juror education methods would be beneficial, as people absorb information in different ways. She specifically noted that a web-based format has practical advantages, because it could be implemented while the jury are in the waiting room, or in periods of time when they are not engaged in anything else.

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253 Above, paras 6.96 to 6.104.

254 L Hudspith, N Wager., D Willmott, B Gallagher, "Forty Years of Rape Myth Acceptance Interventions: A Systematic Review of What Works in Naturalistic Institutional Settings and How this can be Applied to Educational Guidance for Jurors" (2021) 24 *Trauma Violence and Abuse* 1, 13. See L F Salazar, A Vivolo-Kantor, J Hardin & A Berkowitz, "A web-based sexual violence bystander intervention for male college students: Randomized controlled trial" (2014) 16 *Journal of Medical Internet Research* e203.

255 L Hudspith, N Wager., D Willmott, B Gallagher, "Forty Years of Rape Myth Acceptance Interventions: A Systematic Review of What Works in Naturalistic Institutional Settings and How this can be Applied to Educational Guidance for Jurors" (2021) 24 *Trauma Violence and Abuse* 1, 13.

Another stakeholder noted that an online interactive tool may be difficult to use for some jurors who struggle with technology.

10.187 According to academic stakeholders and the supporting research, the evidence base around the impacts of an online interactive tool on rape myth acceptance is still developing. It would therefore be premature to propose its introduction at this stage, particularly when other more established juror education methods may be as effective and are already in progress.

Alternative tools for educating jurors

10.188 Given the still-developing evidence base regarding the effectiveness of juror education tools, we seek views on the suitability of the alternative juror education tools we have discussed for addressing myths and misconceptions in sexual offences trials and on any other methods for educating jurors about myths and misconceptions. Given that an online interactive tool has the least evidence of its effectiveness, we would like views on their potential use for addressing myths and misconceptions.

Consultation Question 97.

10.189 We invite consultees' views on the use of written juror information notices to address myths and misconceptions amongst jurors?

Consultation Question 98.

10.190 We invite consultees' views on the use of education videos to address myths and misconceptions amongst jurors?

Consultation Question 99.

10.191 We invite consultees' views on the use of online interactive tools to address myths and misconceptions amongst jurors?

Consultation Question 100.

10.192 Are there any other methods for addressing myths and misconceptions amongst jurors that we should consider?

JURY RESEARCH

10.193 In Chapter 2, we reviewed the literature on jury research and the state of knowledge regarding how and to what extent myths and misconceptions may have an effect on juries. As we explained, researchers have generally had to use mock juries and, while studies have built a substantial body of evidence, a mock jury study by its very nature has limits – it is not a real jury in a real trial. In England and Wales, one researcher (Professor Thomas) has received permission to undertake research with real jurors. However, as we explained in Chapter 2, that permission did not extend to observing deliberations or seeking or obtaining information about how deliberations were made, and so there are significant limits on the extent to which that research advances the body of knowledge about how jurors deliberate.[256] As a result, there is a substantial gap in knowledge in this area. Researchers have described it as "a deliberative 'black hole' at the centre of the trial process"[257] and argued there is a "chasm in knowledge and understanding that remains as a result of restrictions on conducting research with real juries".[258]

10.194 Given that any and all measures that seek to assist juries and to mitigate the risk that irrelevant factors will be taken into account in deliberations should be evidence-based, that gap is an important one.

10.195 In so far as it is possible, the approach in England and Wales has been evidence-based. The Crown Court Compendium, for example, is informed by research and by collective judicial experience. There is, however, a fundamental underlying problem: there are laws that limit the extent to which it is possible to discover and understand how juries deliberate in England and Wales.

10.196 Most significant among these is section 20D(1) of the Juries Act 1974 under which it is an offence for a person intentionally:

(a) to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or

(b) to solicit or obtain such information.

10.197 There are exceptions[259] where information is disclosed or solicited to enable a jury to reach its verdict[260] or for the purposes of exposing, investigating or prosecuting juror misconduct.[261]

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256 See Chapter 2.

257 J Chalmers, F Leverick and V Munro, "The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials" (2021) 48 *Journal of Law and Society* 226, 230.

258 J Chalmers, F Leverick and V Munro, "Why the jury is, and should still be, out on rape deliberation" [2021] *Criminal Law* Review 753, 761.

259 Juries Act 1974, ss 20D(1), 20E-20G.

260 Juries Act 1974, ss 20E(1)-(2)(a), (4), 20G.

261 Juries Act 1974, ss 20E(2)(b)-(3), 20F, 20G.

10.198 The effect of section 20D is that researchers cannot observe juror deliberations or ask jurors about their deliberations, and jurors cannot disclose any information. There are very good reasons to protect juror deliberations. The ability of jurors to be confident that their deliberations will be in private is one part of what gives the criminal justice process its integrity. However, another component that is constitutive of integrity is the confidence that deliberations are untainted by the influence of irrelevant considerations. It is arguable that the existing limits on jury research hamper the extent to which it is possible to understand the deliberative process and that some measures should be taken to improve knowledge in this area.

10.199 There have been proposals to enable research into deliberations. Zander notes that the predecessor to section 20D (section 8(1) of the Contempt of Court Act 1981) was introduced in the House of Lords with an additional clause:

> This section does not apply to publications which do not identify the particular proceedings in which the deliberations of the jury took place or the names of the particular jurors, and do not enable such matters to be identified, or the disclosure or solicitation of information for the purpose of such publication.

10.200 That clause, the Lord Chancellor (Lord Hailsham) said, would safeguard research:

> Provided that individual cases are not identified, there is also a place for bona fide research in this field, and bona fide research has taken place sometimes of a most useful kind.[262]

10.201 Although peers in support of the clause included the Lord Advocate, Lord Mackay, the provision did not make its way into the Act. However, Zander explains, the proposal was revived a decade later. In 1993 the Runciman Royal Commission (of which Zander was a member) recommended that the Contempt of Court Act 1981 be amended so that it would be possible to conduct "research into juries' reasons for their verdicts … so that informed debate can take place rather than argument based only on surmise and anecdote."[263] Zander recounts the way the decision was reached: "The recommendation was unanimous. … My recollection is that it was not an issue over which we laboured long." The government responded that it was "sympathetic to the Commission's recommendation" but "still considering the precise scope of the research that the law might allow and the rules under which it might be carried out."[264]

10.202 Zander's position in 1998 was that although mock jury studies were useful and worthwhile, and that "obviously, research into what goes in in the jury room would be

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262 *Hansard* (HL) 9 December 1980 vol 415 c 664; M Zander, "The case for jury research" (1998) 38 *Medicine, Science and the Law* 106, 107.

263 The Royal Commission on Criminal Justice Report (1993) Cm 2263 ("Runciman Commission") pp 2, 188 (Recommendation 1); M Zander, "The case for jury research" (1998) 38 *Medicine, Science and the Law* 106, 107. Zander was also the co-author of jury research for the Royal Commission: M Zander and P Henderson, *The Crown Court Study* (Royal Commission Research Study No 19) (1993).

264 M Zander, "The case for jury research" (1998) 38 *Medicine, Science and the Law* 106, 107, citing *Interim Government Response to the Runciman Commission* (1994) p 3. Zander subsequently wrote that "[i]t was said that the strong opposition of the late Lord Taylor, Lord Chief Justice, prevented the matter going ahead": M Zander, "The case for jury research" (1998) 38 *Medicine, Science and the Law* 106, 107.

an extremely sensitive issue requiring delicate handling"[265], but "only the real thing will provide the real evidence".[266]

10.203 This view is mirrored in the current research, both by Thomas and by those who use mock jury methods, and (as we observed in Chapter 2) it is also a view the Law Commission has previously expressed.[267] To that end, we seek consultees' views on whether and how jury research might be further facilitated, across the research community, with suitable protocols,[268] without risking the integrity of the jury system or the criminal process.

Consultation Question 101.

10.204 Should there be further commissioning of, or permission for, research that engages real jurors? If so, what criteria should govern access and what conditions should be placed on research?

10.205 Should researchers and juror participants be given a statutory exemption from section 20D of the Juries Act 1974 that makes it an offence intentionally to "disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or to solicit or obtain such information"?

CONCLUSION

10.206 In this chapter, we have suggested improvements regarding how information is conveyed to jurors about myths and misconceptions. To encourage consistency of use, we have sought consultees' views about whether the Judicial College should consider whether the giving of directions on at least some myths and misconceptions should be the subject of a rebuttable presumption. We have also asked for views on whether the Judicial College should consider amending existing example directions or introducing example directions on further myths and misconceptions concerning male complainants and complainants with a mental health condition or learning disability.

10.207 We have provisionally concluded that directions alone are insufficient and that psychological and physiological responses to sexual violence are complex and are outside the common understanding of jurors. We have asked consultees whether expert evidence of general behavioural responses to sexual violence should be

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265 M Zander, "The case for jury research" (1998) 38 *Medicine, Science and the Law* 106, 110.

266 M Zander, "The case for jury research" (1998) 38 *Medicine, Science and the Law* 106, 110.

267 See Chapter 2.

268 There are established protocols and systems for some types of research in the justice system. For instance, there are clear protocols for requesting judicial participation in research, with criteria and processes clearly stated: Courts & Tribunals Judiciary, Judicial participation in research projects (16 October 2020). HM Courts and Tribunals Service (HMCTS) data can be accessed "for example to support academic research or the development or evaluation of policy and services" and there is an established process for application through the Data Access Panel: Get access to HMCTS data – Data Access Panel (24 March 2023).

admissible. We have also sought views on the use of written juror information notices, education videos, online interactive tools, and other forms of juror education.

10.208 We are conscious that bombarding jurors with information from multiple sources may not necessarily be effective in addressing myths and misconceptions. Therefore, in relation to all the measures we have considered, we would like to hear consultees' views about which measure or combination of measures is likely to work best.

Consultation Question 102.

10.209 Which of the following methods should be prioritised for introduction and which is likely to be the most effective combination to address myths and misconceptions, alongside judicial directions?

(1) expert evidence of general behavioural responses to sexual violence;

(2) a written information notice;

(3) an education video; or

(4) an online interactive tool.

10.210 In the next chapter, we ask further questions about the combined and cumulative effect of the measures we discuss throughout the entire consultation paper. A number of stakeholders have also told us that the prejudicial beliefs held by jurors which may influence their deliberations are so ingrained that they are very unlikely to be susceptible to any of the methods we evaluate in this chapter.[269] In Chapter 13, we go on to consider more radical options for reform.

[269] See, for example, Angiolini Review (2015) para 210 and the views expressed to us by a psychologist at paras 10.50 and 10.176.

Chapter 11: Right of appeal

INTRODUCTION

11.1 In Chapter 8 we have explained the rationale for allowing complainants in sexual offences prosecutions the right to be heard in applications concerning the disclosure and admissibility of evidence involving their sexual behaviour or personal records. Such evidence is inherently sensitive, personal and private, therefore applications to admit it engage the complainant's right to privacy. To ensure that their views are adequately advanced to the court on matters that so directly engage this right, we have provisionally proposed that they should have a right to be heard when the application is being considered by the court, and that they should have access to independent legal representation ("ILR") for that application.

11.2 A right of appeal provides a level of oversight to judicial decision making; this can be particularly important when the decisions are made in areas of great complexity or sensitivity. Where decisions impact the outcome of the trial, the defendant has a right to seek an appeal of either conviction or sentence, after the trial concludes. However, decisions relating to evidence, including applications to disclose personal records and to admit or exclude sexual behaviour evidence ("SBE"), are judicial rulings that can affect or determine what evidence may be heard at the trial. Therefore they are decided before the trial has concluded and the verdict is given, and sometimes before the trial starts (such as at pre-trial hearings where case management decisions are made in anticipation of the trial). Consequently, if it were necessary or appropriate to challenge that decision, such challenge would also need to occur before the conclusion of the trial.

11.3 In this chapter we will consider the scope of the rights of appeal from judicial rulings on the admissibility of evidence, both for the prosecution and defendant. In doing so, we will consider whether there should be any additional right of appeal arising from decisions relating to personal records or SBE.[1]

11.4 Having earlier considered that it is appropriate for the complainant to be heard on applications regarding their SBE or personal records, we now consider whether there should also be a right to appeal the outcome of those applications before the proceedings conclude. The complainant currently has no right of appeal, either at the conclusion of the trial or during it. We explore in this chapter existing circumstances where individuals or groups other than the defendant and prosecution have a right of appeal in relation to decisions and orders made in criminal proceedings.

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[1] In this chapter when referring to decisions relating to personal records or SBE that could be subject to an appeal right, we include both judicial decisions as to disclosure of personal records and the admissibility of evidence at trial that relates to the complainant's sexual behaviour or personal records, as would be subject to the current frameworks or our provisionally proposed new frameworks outlined in Chapter 3 and 4. Decisions on the admissibility of such evidence includes decisions regarding the wording and extent of questions permitted in examination in chief and cross-examination.

CURRENT LAW

11.5 In this section we will first set out the extent to which the prosecution and defendant are able to appeal decisions relating to the admissibility of evidence made by the court before the verdict in criminal proceedings. We will then describe the circumstances in which parties other than the prosecution and defendant are able to appeal any decisions made in criminal proceedings.

Appeal rights before conclusion of the proceedings

11.6 The rights of the parties to appeal rulings made by a court in the course of a criminal case are limited. Where the ruling is made at a "preparatory hearing" both the prosecution and the defence may seek to appeal it to the Court of Appeal.[2] Where the ruling is made otherwise than at a preparatory hearing the prosecution may seek to appeal it, but if the appeal is unsuccessful the defendant is entitled to be acquitted.[3]

Appeals from preparatory hearings

11.7 Preparatory hearings for case management, unlike other pre-trial hearings, can only be ordered by a judge in certain cases (either serious fraud cases or where the case is complex, lengthy or serious[4]) *and* where "substantial benefits" arise from ordering the hearing, such as identifying material issues, assisting juror comprehension or managing the trial.[5] Under section 35 of the Criminal Procedure and Investigations Act ("CPIA") 1996, there is a right to appeal, with leave of the court, a decision made at a preparatory hearing. The preparatory hearing cannot be concluded until the appeal is either decided, or abandoned.[6]

11.8 When ordered, preparatory hearings are held before the jury is sworn in. Under section 31(3) of the CPIA 1996, the judge at the hearing can make rulings as to:

(a) any question as to the admissibility of evidence;

(b) any other question of law relating to the case; and

(c) any question as to the severance or joinder of charges.[7]

11.9 Either the prosecution or the defendant may appeal against such a ruling,[8] with leave from the judge or the Court of Appeal.[9] This means that in some sexual offences cases, both the prosecution and defendant could appeal a ruling on the admissibility

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2 Criminal Procedure and Investigations Act ("CPIA") 1996, s 29.

3 Criminal Justice Act ("CJA") 2003, ss 58-61.

4 CPIA 1996, s 29(1); CJA 1987, s 9.

5 CPIA 1996, ss 29(1)-29(2); CJA 1987, s 7(1).

6 CPIA 1996, s 35(2).

7 CPIA 1996, s 31(3).

8 CPIA 1996, s 35(1); CJA 1987, ss 9(11)-(14); Criminal Procedure Rules ("CrPR"), Part 37.

9 CPIA 1996, s 35(1); CJA 1987, s 9(11).

of SBE or personal records when made at a preparatory hearing. There is no such right for the complainant.

11.10 Preparatory hearings are infrequently used. They are limited to "complex, lengthy, or serious" cases; not all sexual offences cases will meet this test. Further, case law has described the rarity of such hearings. The court in *Lear*,[10] reiterated that the correct approach to directing preparatory hearings is that explained by Lord Justice Hughes in *I(C)*:

> Virtually the only point for directing [a preparatory hearing] nowadays is if the judge is going to have to give a ruling which ought to be the subject of an interlocutory [before the verdict] appeal. Such rulings are few and far between and do not extend to most rulings of law.[11]

11.11 Additionally, while rulings at preparatory hearings can relate to the admissibility of evidence, not all evidential rulings can, or must, be made at a preparatory hearing. Usually other preliminary hearings (which do not attract rights of appeal) are used to make such rulings. Rulings made at a preparatory hearing must serve a "useful trial purpose".[12]

11.12 Finally, case law has shown that an appeal from a ruling in a preparatory hearing is "justified", if the point is "discrete, novel, certain to arise… [involves] no factual dispute" and needs to be determined to avoid the risk of error resulting in a retrial.[13] This makes it unlikely that fact-sensitive rulings determining the admissibility or exclusion of SBE or personal records will be regarded as fit for appeal from a preparatory hearing.

Prosecution appeals otherwise than from preparatory hearings

11.13 Outside preparatory hearings, the only other right of appeal against a judicial ruling is for the prosecution to appeal under section 58 of the Criminal Justice Act ("CJA") 2003. Following the ruling, the prosecution must immediately inform the court of their intention to appeal.[14] This appeal right exists for any ruling made "in relation to a trial on indictment", whether before or after the trial has started, until the judge begins their summing up,[15] including after the jury have been sworn in.

11.14 The prosecution can only appeal under section 58 if they enter an "acquittal agreement" – they must first inform the court that they agree that the defendant should

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10 *R v Lear* [2018] EWCA Crim 69, [2018] 2 Cr App R 11, at [51].

11 *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10, at [21].

12 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* ("*Blackstone's Criminal Practice*") (2023) D15.58.

13 *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10, at [21].

14 If further time is needed for consideration, then they must immediately request an adjournment to consider the ruling: CrPR r 38.2.

15 CJA 2003, s 58(13).

be acquitted if leave to appeal is not obtained or the appeal is abandoned.[16] The effect of this is that the prosecution have a general right of appeal against any preliminary ruling, including evidentiary rulings,[17] if such an undertaking is made.[18] The prosecution can therefore appeal a ruling relating to SBE or personal records if they enter an acquittal agreement. The acquittal agreement is a "critical" condition that must be met before a ruling can be appealed, and has the effect of making the ruling terminating.[19]

11.15 Such appeals are often described as appeals from terminating rulings.[20] While section 58 of the CJA 2003 does not use the phrase "terminating", the Explanatory Notes for the CJA 2003 explain that section 58 "sets out the procedure that must be followed when the prosecution wish to appeal against a terminating ruling".[21] We note that the Court of Appeal in *R v Y* cautioned that the term can be misleading,[22] though it is used in criminal law texts.[23]

11.16 Such an appeal might be against a ruling that is formally terminating,[24] or a ruling which has the practical effect of terminating the proceedings. This could include, for example, an instance where the judge has ordered the exclusion of a key piece of prosecution evidence[25] or where a prosecution application for public interest immunity has failed.[26] Even if the prosecution could continue despite the ruling, in rare cases they might choose to appeal despite having to provide an acquittal agreement. Thus a ruling on the admissibility of evidence, including SBE or personal records, could be

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16 CJA 2003, ss 58(8)-(9). The acquittal agreement does not apply to the outcome of an appeal, once leave is granted. If the prosecution are granted leave but subsequently lose the appeal, the prosecution of the defendant can continue.

17 See, for example, *R v Killick (Shane)* [2020] EWCA Crim 785, [2020] 6 WLUK 610: this includes rulings on bad character evidence; and *R v LT* [2019] EWCA Crim 58, [2019] 4 WLR 51: rulings on identification evidence can also be appealed.

18 In *R v Y* [2008] EWCA Crim 10, [2008] 1 WLR 1683 at [20], the Court of Appeal (on appeal from a Court Martial) confirmed that the undertaking was said to be an essential prerequisite for lodging an appeal; *R v Killick (Shane)* [2020] EWCA Crim 785, [2020] 6 WLUK 610.

19 *R v LSA* [2008] EWCA Crim 1034, [2008] 1 WLR 2881 at [24].

20 There are different ways that a judicial ruling can be terminating. A ruling can determine the outcome of a case (such as a stay of proceedings). A ruling can have such a significant impact on the strength of a case that it would mean the prosecution cannot continue (such as a ruling excluding key prosecution evidence). The prosecution can appeal both types of ruling under section 58. They must still give the acquittal agreement. The prosecution can also appeal rulings that are neither determinative nor terminating in this way. However, by giving the acquittal agreement, they have in effect agreed that the ruling will be terminating if they do not obtain leave to appeal or they abandon the appeal.

21 Explanatory Notes to the CJA 2003, para 276.

22 [2008] EWCA Crim 10 at [20] (Hughes LJ).

23 For example, see *Blackstone's Criminal Practice* (2023) D16.73.

24 This could include rulings such as refusing a stay on the grounds of abuse of process or a ruling that there is no case to answer.

25 See the Explanatory Notes to the CJA 2003, s 58.

26 CrPR r38.8.

the subject of an appeal under section 58 if the prosecution were willing to enter into an acquittal agreement.[27]

11.17 Case law has determined that the threshold for the Court of Appeal to grant the prosecution leave to appeal is high. It must be "seriously arguable" that it was unreasonable for the judge's discretion to be exercised as it was.[28] At the substantive appeal hearing, a ruling may only be reversed if the Court of Appeal is satisfied that the ruling had been wrong in law; had involved an error of law or principle; or was not a ruling it was reasonable for a judge to have made.[29]

11.18 Section 62 of the CJA 2003 also introduces a power for the prosecution to appeal against evidentiary rulings (rulings as to the admissibility of prosecution evidence which would include rulings relating to SBE and personal records) but without the need for an acquittal agreement.[30] However, this provision has not yet come into force and requires an order of the Secretary of State to do so.[31]

Third party appeal rights

11.19 In certain circumstances, a right of appeal is not limited to parties to the proceedings and extends to third parties who are affected or aggrieved by the decision or have an interest in it.

11.20 There is a right to bring an appeal by way of case stated against a decision by a magistrate's court that applies to "any person … aggrieved by the conviction, order or determination or other proceeding".[32] Therefore, it is not limited to the parties in the case. For illustration, in *DPP v Smith*,[33] the parents of a motorcyclist, who was killed in a road accident involving another driver, were permitted to bring an appeal by way of case stated against a decision of the magistrate's court to adjourn the prosecution of the other driver.

11.21 There are also various provisions that afford parties other than the defendant or prosecution the right to appeal decisions made by the court in criminal proceedings. Persons who are directly affected or have an interest in the decision also have a right to appeal in other circumstances. For example:

(1) In confiscation proceedings where there has been a determination of the defendant's interest in a property, and a third party claiming an interest in that property is refused an opportunity to make representations, the third party may

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27 *R v Y* [2008] EWCA Crim 10, [2008] 1 WLR 1683.

28 *R v B* [2008] EWCA Crim 1144.

29 CJA 2003, s 67.

30 The ruling does not need to have a terminating effect, however under CJA 2003, s 63, leave to appeal under s 62 can only be granted where the challenged ruling would "significantly weaken" the prosecution case.

31 CJA 2003, s 336(3).

32 Magistrates' Court Act 1980, s 111. An "appeal by way of case stated" is an application made to a District Judge or magistrate to specify a set of facts for the opinion of the High Court on a question of law.

33 [1999] 7 WLUK 377.

appeal against the determination;[34] and where the court appoints a receiver, an affected third party may appeal.[35]

(2) A legal or other representative of a party to the proceedings may appeal a wasted costs order made against them.[36]

(3) A parent or guardian may appeal a parenting order made against them upon conviction of a child or young person aged under 18.[37]

(4) Any person "aggrieved" by an order restricting publication of a report or public access to a trial on indictment in the Crown Court, or proceedings related to that trial, may seek leave to appeal the order.[38]

11.22 The right of appeal against reporting or public access restrictions is of particular relevance. First, because the right of appeal is from judicial rulings made before the proceedings conclude. Secondly, because the order that attracts the right of appeal by third parties affects important rights such as freedom of the press and open justice. The right to appeal extends to "persons aggrieved" or "a person directly affected".[39] There is no right of appeal against a refusal of an order to apply reporting restrictions.

COMPARATIVE LAW

11.23 Whilst many jurisdictions permit appeals by the prosecution and/or the defence for evidential decisions where they are terminating rulings, appeals against other judicial rulings are less common. Prosecution and defence appeal rights against other judicial rulings exist in New Zealand, Scotland, New South Wales and Victoria. One jurisdiction, Canada, has no such appeal rights, though for the prosecution, this is offset by a right of appeal against an acquittal on a point of law and the defendant may appeal their conviction on a question of law or fact.

11.24 Some jurisdictions with such appeal rights, such as New Zealand and New South Wales respectively, have rights of appeal specific to SBE (including both admissibility of evidence and restrictions on questions) and counselling records (both production and admissibility). However, other jurisdictions such as Victoria and Scotland have more generic appeal rights. In Scotland, these arise from a range of decisions which may occur at pre-trial hearings, such as admissibility of evidence and restrictions on evidence in sexual offences cases.

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34 Proceeds of Crime Act 2002, s 31.

35 Proceeds of Crime Act 2002, s 65.

36 Prosecution of Offenders Act 1985, s 19A.

37 Sentencing Code, s 366(9).

38 CJA 1988, s 159.

39 CrPR, Part 40.

11.25 New South Wales extends such appeal rights beyond the prosecution and the defence. In relation to counselling records under the Sexual Assault Communications Privilege ("SACP"), appeal rights extend to the complainant and record holder.[40]

11.26 Where such appeal rights do exist in other jurisdictions, to avoid fragmenting the trial process, their use is heavily restricted. They have high thresholds for leave which underline the extraordinary nature of the application. These include factors such as whether the appeal is arguable; the impact of the issue on the strength of the prosecution case or on the trial as a whole; whether the issue would be best determined at trial; and whether the appeal will cause unnecessary delay.

11.27 Moreover, even where leave is granted, there may be limited scope for the appeal court to intervene in a fact-sensitive discretionary decision of the trial judge. This is particularly true for decisions on SBE or personal records made in the light of the facts, or having heard the evidence, where primacy will be afforded to the trial judge.

Canada

11.28 In Canada, there is no right of appeal from judicial rulings for either the prosecution or the defence.[41] The Supreme Court of Canada has explained the rationale for this:

> Fragmenting criminal proceedings by permitting interlocutory appeals[42] risks having issues decided without the benefit of a full evidentiary record — a significant source of delay and an inefficient use of judicial resources.[43]

11.29 However, the prosecution do have a right to appeal acquittals on a question of law and may also appeal terminating rulings, without leave.[44] The Public Prosecution Service of Canada Deskbook[45] explains the circumstances in which appeals from terminating rulings may arise:

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40 Criminal Appeal Act 1912 (NSW), s 5F(3AA). See from para 3.94 for further detail on the SACP.

41 In *R v Meltzer* [1989] 1 SCR 1764 at [1774], the Supreme Court dismissed the argument that in the absence of an express statutory right of appeal, one could be inferred from the Canadian Charter of Rights and Freedoms. It referred to *Mills v The Queen* [1986] 1 SCR 863, at [959], which stated: "It has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters." See also Criminal Code (Canada), s 674, which states that no appeal proceedings may be brought other than those specified in Part XXVI.

42 An interlocutory appeal is an appeal against a judicial ruling made before the proceedings conclude. The appeal is heard and determined before the ruling can take effect, which is also before the conclusion of the proceedings.

43 *R v Awashish* [2018] SCC 45 at [10], citing *R v Johnson* (1991) 3 OR (3d) 49 (Ontario CA), at [54]. Because of this, at [11], the Supreme Court reiterated that the use of certiorari (power to quash a lower court's error of law) is "tightly limited ... so as to ensure that it is not used to do an 'end-run' around the rule against interlocutory appeals". At [19], it therefore concluded that the use of certiorari should be confined to jurisdictional errors and should not extend to errors on the face of the record, such as evidentiary rulings.

44 Under the Criminal Code, s 676, the prosecution may appeal "a judgment or verdict of acquittal" on a question of law alone or orders that quash an indictment or stay proceedings. The defendant may appeal their conviction on a question of law, without leave and on a question of fact or mixture of both, with leave. See Criminal Code, s 675(1)(a).

45 The Canada Deskbook is the practice book for federal prosecutors in Canada, providing instructions and guidance that must be followed by Directive of the Attorney General.

Where the trial judge has made a pre-trial ruling that for all practical purposes ends the prosecution, for example, a decision to exclude critical evidence under s. 24(2) of the Charter,[46] or a disclosure order with which the Crown cannot comply because it would breach informer privilege, the prosecutor may simply invite an acquittal or a judicial stay, and consider an appeal on the basis of an error of law in the impugned ruling. However, where the impact of the ruling is not so decisive, the prosecutor should continue the prosecution and await the verdict as otherwise the prosecutor's decision to invite an acquittal in order to trigger a right of appeal may be seen as an abuse of process.[47]

Northern Ireland

11.30 Northern Ireland has the same statutory framework and limited scope for appeals against judicial rulings as England and Wales. The prosecution may appeal from terminating and de facto terminating rulings and both the prosecution and defence may appeal from preparatory hearings.[48]

11.31 The Gillen Review rejected the creation of an "additional right to appeal" for the prosecution in respect of SBE rulings.[49] It took the view that extending the prosecution's right of appeal beyond terminating rulings[50] to include SBE decisions would "be a wholly new concept of appeal on this interlocutory matter" and this would subvert "a longstanding decision by Parliament".[51]

Scotland

11.32 In Scotland, there are much more extensive rights of appeal against judicial rulings. Both the prosecution and the defence have a pre-trial right of appeal. With leave from the first instance court, they may appeal decisions made at a preliminary hearing, including evidential rulings.[52] At a preliminary hearing, where a not guilty plea has been entered, a wide range of pre-trial issues may be determined including any issues which have a bearing on trial readiness, admissibility of evidence and restrictions on

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46 Section 24(2) of the Canadian Charter of Rights and Freedoms requires a court to exclude evidence that the court concludes has been obtained in a manner which breaches Charter rights or freedoms, if it is established that its admission would bring the administration of justice into disrepute.

47 Public Prosecution Service of Canada Deskbook (March 2022), s 3.15, para 2.2, citing *R v Jewitt*, [1985] 2 SCR 128; *R v Power* [1994] 1 SCR 601; *United States v Fafalios* 2012 ONCA 365.

48 For appeals against terminating and de facto terminating rulings, see Criminal Justice (Northern Ireland) Order 2004/1500, art 17. Like in England and Wales, provisions regarding prosecution appeals of evidentiary rulings, which in Northern Ireland are under art 21, are not in force. For appeals from preparatory hearings, see CPIA 1996, s 29.

49 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (2019) ("Gillen Review") para 8.100.

50 Under Criminal Justice (Northern Ireland) Order 2004/1500, art 17.

51 Gillen Review, para 8.100.

52 Criminal Procedure (Scotland) Act 1995, ss 74(1) and (2A)(b). Under s 74(2), certain decisions may not be appealed such as listings, authorisation of questioning and special measures. Under s 74(2A)(a), the prosecution may also appeal a decision to dismiss the indictment without leave.

the use of evidence in sexual offences cases.[53] However, the Court of Appeal has confirmed that, in contrast to the low threshold required for leave to appeal against conviction, an appeal from a preliminary hearing is "an extraordinary application".[54] This is because it "will inevitably disturb the standard procedure leading to trial".[55] There are no statutory criteria but leave will not normally be granted unless "the appeal has a realistic prospect of success" and "it is in the interests of justice" that there is a pre-trial determination, rather than the point being "advanced (if still relevant) after the trial".[56]

11.33 The Dorrian Review recommended that sexual offence complainers should have a right to appeal using the above procedure[57] in relation to the provisions governing admissibility of personal records, sexual behaviour and character evidence.[58] The Review also concluded that complainers should receive ILR and public funding to give effect to their rights, which we discuss in Chapter 8.[59]

11.34 At trial, there is a further avenue of appeal against evidential rulings, which is open to the prosecution only. Before the close of the prosecution case, the prosecution may appeal a ruling that the evidence that they seek to lead is inadmissible.[60] The trial court must grant leave for the appeal based on whether there are arguable grounds of appeal and the effect of the admissibility ruling on the strength of the prosecutor's case.[61]

Victoria

11.35 In Victoria, there are also extensive but generic appeal rights against judicial rulings. The prosecution and defence may appeal decisions provided the appeal is certified by the judge who made the decision and leave is granted by the appeal court.[62] This appeal right arises for decisions made before or during the trial, including the refusal or grant of a stay of proceedings.[63]

11.36 Again, there is a high threshold for granting leave. For decisions on admissibility of evidence, the first instance judge must certify that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case. For other decisions,

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53 High Court of Justiciary, Practice Note No. 1 of 2005, Preliminary Hearings (Jan 2005), paras 25-27 and Criminal Procedure (Scotland) Act 1995, s 79(2)(b). The use of evidence relating to sexual offences refers to applications under s 75, which includes the admission of evidence and allowing questioning on SBE, character evidence and personal records.

54 *Haashi v HM Advocate* 2015 JC 4 at [8].

55 Above at [9].

56 Above.

57 Under the Criminal Procedure (Scotland) Act 1995, s 74(2A)(b).

58 Under the Criminal Procedure (Scotland) Act 1995, s 275.

59 LCJ Clerk's Working Group, *Improving the Management of Sexual Offence Cases* (May 2021), Recommendation 3(b)(iv).

60 Criminal Procedure (Scotland) Act 1995, s 107B(1).

61 Criminal Procedure (Scotland) Act 1995, s 107B(2).

62 Criminal Procedure Act 2009, s 295(1)-(2).

63 Above.

they must certify that the decision is of sufficient importance to justify an appeal.[64] The appeal court must be satisfied that it is in the interests of justice to grant leave. A non-exhaustive list of factors to consider in this regard includes: the extent of any delay or disruption which may arise and whether the appeal may benefit the trial.[65]

New Zealand

11.37 Similarly, New Zealand, has more extensive rights of appeal. However, in contrast to Scotland and Victoria, they attach to specific court decisions. Both the prosecution and the defence have a pre-trial right of appeal in relation to certain court decisions. Decisions which may be appealed by both parties include the admissibility of evidence, restrictions on the use of evidence and questions about SBE,[66] and for the defence only, refusal to order disclosure of evidence.[67] However, they may only be appealed with the leave of the appeal court.[68] In addition, where it concludes that it is in the interests of justice to do so, the trial court may allow the trial to continue where the leave application or appeal has not yet been determined.[69]

11.38 The statute does not specify the leave requirements for pre-trial appeals and the Court of Appeal of New Zealand issued a Practice Note explaining them.[70] It noted the policy arguments for and against such appeals. The arguments of most relevance in this context were those against, namely that such appeals may cause delays in the trial process, may waste courts and parties' time, may result in a "confusing fragmentation" of the trial process and that "primacy" should be given to the decision of the trial judge, who is often best placed to decide the issues.[71] The Court of Appeal set a high threshold for leave to be granted. It identified factors suggesting leave should be granted, which included that: "the application involves admissibility of evidence that is important to one of the parties",[72] and "the matter cannot be dealt with adequately" via a post-trial appeal.[73] It also identified factors against the granting of leave including that: "the issue will need to be revisited at trial or is best dealt with in the context of the trial";[74] the admissibility ruling "would not make a significant

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64 Criminal Procedure Act 2009, s 295(3).

65 By making the trial unnecessary; substantially reducing the time required for the trial; resolving an issue necessary for the proper conduct of the trial; or reducing the likelihood of a successful appeal against conviction. See Criminal Procedure Act 2009, s 297.

66 These appeal rights arise for both judge alone and jury trial cases. See Criminal Procedure Act 2011, ss 215(2)(a) and (b) and ss 217(2)(b) and (i) respectively.

67 This right arises for jury trial cases. See Criminal Procedure Act 2011, s 218(2)(a).

68 Criminal Procedure Act 2011, ss 215(2), 217(2) and 218(2).

69 Criminal Procedure Act 2011, s 222.

70 *R v Leonard* CA417/07 [2007] NZCA 452 (last updated 19 January 2018), which deals with the leave requirements of s 379A of the Crimes Act 1961, which has been repealed but provided a similar framework to the current provisions.

71 *R v Leonard* CA417/07 [2007] NZCA 452 at [5]-[6].

72 *R v Leonard* CA417/07 [2007] NZCA 452 at [13](d).

73 *R v Leonard* CA417/07 [2007] NZCA 452 at [13](f).

74 *R v Leonard* CA417/07 [2007] NZCA 452 at [14](a).

difference to the course of the trial";[75] "the application challenges the exercise of a discretion";[76] and "the appeal will cause unnecessary delay".[77]

11.39 The prosecution and defence may also appeal convictions, acquittals, or terminating rulings on a question of law. With leave of the appeal court, they may appeal questions of law that arise "in proceedings that relate to or follow the determination of the charge" or "in the determination of the charge" including a conviction, acquittal, dismissal of the charge or stay of prosecution.[78]

New South Wales

11.40 In New South Wales, there are extensive appeal rights before and during trial. A general right of appeal arises in two ways. First, without leave, the prosecution may appeal "an interlocutory judgment or order"[79] given during the proceedings, including pre-trial committal proceedings.[80] The defence may also appeal "an interlocutory judgment or order", with leave.[81] The principles for granting leave include: "showing an error of principle that is apt to cause an irregularity or injustice"; "the usual restraint and limitation placed upon the appellate court's intervention" in the exercise of first instance discretion; and there being "sufficient doubt [in the decision] … to warrant the matter being argued on appeal" or it otherwise being in the interests of justice.[82]

11.41 Due to their lack of finality, "rulings on the admissibility of evidence are not [considered] an interlocutory judgment or order."[83] They are dealt with via a second mechanism: again, without leave, the prosecution (only)[84] may appeal any decision or ruling on the admissibility of evidence where it eliminates or substantially weakens the prosecution case.[85]

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75 *R v Leonard* CA417/07 [2007] NZCA 452 at [14](b).

76 *R v Leonard* CA417/07 [2007] NZCA 452 at [14](e). Leave should not be granted unless, in exercising the discretion, the judge "acted on some wrong principle, has given weight to extraneous or irrelevant matters, has failed to give sufficient weight to relevant considerations, or is plainly wrong."

77 *R v Leonard* CA417/07 [2007] NZCA 452 at [14](f).

78 Criminal Procedure Act 2011, s 296.

79 According to the New South Wales Law Reform Commission ("NSWLRC"), this provision applies to decisions such as granting a stay of proceedings or excluding all of the prosecution evidence, leaving the prosecution unable to proceed with their case. See, NSWLRC, *Criminal Appeals* (2014), para 11.3-4, citing *R v Bozatsis* (1997) 97 A Crim R 296, 304 (Gleeson CJ).

80 Criminal Appeal Act 1912, ss 5F(2) and 1(a).

81 Under Criminal Appeal Act 1912, s 5F(3), leave may be granted by the appeal court or the trial judge may certify the judgment as suitable for appeal.

82 NSWLRC, *Criminal Appeals* (2014), para 11.29, citing *Queanbeyan City Council v Environment Protection Authority* [2011] NSWCCA 108 at [24]-[27] (Whealy JA).

83 NSWLRC, *Criminal Appeals* (2014), para 11.8, citing *R v Steffan* (1993) 30 NSWLR 633 at [639].

84 It is expected that the defendant will contest evidentiary rulings by appealing their conviction and there is limited scope for the prosecution to appeal an acquittal. See NSWLRC, *Criminal Appeals* (2014), para 11.12, citing *Kocer v R* [2006] NSWCCA 328.

85 Criminal Appeal Act 1912 (NSW), s 5F(3A). According to the NSWLRC, this provision is intended to apply to decisions "on the admissibility of particular pieces of evidence" so the prosecution could "test the

11.42 Appeals under these two provisions are infrequent.[86] The New South Wales Law Reform Commission's consultation on criminal appeals heard that "stakeholders were generally content with the current breadth of interlocutory appeals, including the distinction between prosecution and defence appeal rights."[87] It concluded that the scope of interlocutory appeals should not be expanded because if delays occurred, this would impede effective case management.[88]

11.43 There is a third element of the framework in New South Wales which goes further than any other jurisdiction we consider here. For decisions determining production (to the court) and the admissibility of counselling records under the SACP, it provides a right of appeal to a person who is not a party to the proceedings. With leave,[89] the complainant or record holder[90] may appeal against a decision under the SACP to grant leave to produce or admit a counselling record, or a determination that a document contains a protected confidence.[91]

COMMENTARY

11.44 There have been proposals and support for reform to widen the rights of appeal arising from applications relating to complainants' personal and sensitive evidence in sexual offences prosecutions.

11.45 Some stakeholders have expressed their support for a right to appeal against SBE admissibility decisions.[92] Decisions on SBE can be complex and, as we discussed in Chapter 4, are potentially vulnerable to myths and misconceptions affecting determinations of relevance. Therefore, judicial scrutiny provided by a direct right of appeal for all parties to the application could be of benefit. There are comparable arguments in respect of applications involving personal records given the complexity and potential for introducing harmful myths. Indeed, one police stakeholder was of the view that complainants should have a right of appeal in applications where their privacy interests are concerned. We note, however, that this has not been the subject of much discussion or debate beyond the context of SBE.

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correctness of evidentiary rulings, and to ensure that the defendant did not derive the benefit of an acquittal obtained because of an erroneous evidentiary ruling. It was expected that the prosecution would exercise this power sparingly." See NSWLRC, *Criminal Appeals* (2014), para 11.4, citing Crimes Legislation Further Amendment Act 2003 (NSW) and the second reading speech for the Bill: NSW, Parliamentary Debates, Legislative Council, 20 November 2003, 5428.

86 In the years between 2003 and 2013, the number of appeals under this section ranged from four to 21. See NSWLRC, *Criminal Appeals* (2014), Table 11.1.

87 NSWLRC, *Criminal Appeals* (2014), para 11.20.

88 NSWLRC, *Criminal Appeals* (2014), para 11.21.

89 Under Criminal Appeal Act 1912 (NSW), s 5F(AB), leave may be granted by the appeal court, or the trial judge may certify the decision as suitable for appeal.

90 Under Criminal Appeal Act 1912 (NSW), ss 5F(3AA)(a)-(c), this includes "a person who … is required to produce" the counselling record and the "protected confider" within the meaning of the Criminal Procedure Act 1986, ss 295-296.

91 Criminal Appeal Act 1912 (NSW), s 5F(3AA).

92 Lynda Gibbs KC (Hon); a police officer.

11.46 A right of appeal in relation to decisions on the admissibility of SBE could encourage better-reasoned decisions in the first instance as the knowledge that the decision can be appealed might lead to more consideration and clearer expression of the reasoning. One member of the judiciary agreed that this was arguable, but noted that with SBE, for example, the requirement to provide the proposed questions and their relevance[93] with the application should lead to better quality argumentation.

11.47 There is support for extending the right to appeal to complainants specifically. Their right to privacy is directly engaged by the adducing of the evidence, separately from any impact the evidence has on the issues in the trial. One judge told us that a right to appeal would give complainants a voice in proceedings, helping ensure both the perception and reality of fairness, regardless of the ultimate outcome of the appeal. In 2021, Lord Falconer of Thoroton proposed an amendment[94] to the Police, Crime, Sentencing and Courts Bill that would give complainants the right to be legally represented in applications to admit SBE under the current legal framework, and the right to appeal from such decisions.[95] In response, Lord Pannick KC raised a concern about the potential delay that would be caused by such provisions.[96] Ultimately this amendment was not included in the Police, Crime, Sentencing and Courts Act 2022. As detailed above, the Dorrian Review recommended the extension of appeal rights to complainants against decisions regarding the admissibility of their SBE or character evidence.[97] Academics Keane and Convery are similarly in favour of introducing a right of appeal for complainants in Scotland from decisions on SBE and character evidence. In their view the complainant should have a right to appeal prior to the evidence being led, as "post-trial vindication" in relation to SBE would be meaningless.[98] They recommend that this right should reflect the existing rights of the defendant and prosecution to appeal against preliminary rulings.[99]

11.48 However, there are many practical problems raised by the extension of any appeal rights against judicial rulings: primarily the negative impact on the trial caused by delay while an appeal is listed and heard and the impact of the outcome of the appeal on the trial.

11.49 Some have raised concerns in this regard, noting that existing rights of appeal against judicial rulings already cause problems at the Court of Appeal due to the time needed to obtain transcripts and list the appeal hearing; and that extending any right of appeal

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93 CrPR r 22.4.

94 See House of Lords Committee Stage Amendment 289 and *Hansard* (HL), 22 November 2021, vol 816, col 598. See Chapter 8 for additional discussion of this amendment and the right to be represented.

95 Under the Youth Justice and Criminal Act 1999, s 41. See Chapter 4 for further information.

96 *Hansard* (HL) 22 November 2021, vol 816, col 600.

97 LCJ Clerk's Working Group, *Improving the Management of Sexual Offence Cases* (May 2021), Recommendation 3(b)(iv).

98 E Keane and T Convery, "Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character" [2020], p 32.

99 E Keane and T Convery, "Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character" [2020], pp 31-32. They also encourage "serious consideration" of the introduction of a "statutory pre-trial appeal" for the defence and prosecution in relation to applications under the Scottish provisions restricting the admissibility of complainants' character evidence and SBE in summary proceedings (p 15).

could exacerbate existing issues within the criminal justice system by adding further delay to trials in conditions already afflicted with delays.[100] Dame Elish Angiolini observed that these delays impact the willingness of complainants to come forward and to engage with the system.

11.50 Some have suggested that to mitigate the risk of delay such appeals should be dealt with as an emergency.[101] One judge suggested that appeals against SBE rulings could be considered by, for example, the Resident Judge at the Crown Court, each Circuit's Presiding Judge, or a High Court judge, instead of the Court of Appeal, using the online court hearing system rather than in person. This would offer the benefit of independent oversight of a ruling without adding disproportionate delay.

11.51 Others argue that no reform of appeal rights in this context is needed. The Gillen Review did not recommend extending appeal rights in relation to SBE beyond those already available to the prosecution (which, as described above, are very similar in Northern Ireland to those available in England and Wales) on the basis that it would be contrary to Parliament's intention that the availability of appeal rights from judicial rulings before the conclusion of proceedings is restricted.[102] Members of the judiciary have argued that extending the right of appeal to complainants would complicate the process of determining admissibility and would be ineffective.

11.52 In our 2010 report on the High Court's jurisdiction in relation to criminal proceedings, we considered the potential need to introduce a right of appeal against a decision where the outcome of that decision results in the "release of information that cannot be retrieved, resulting in a potential breach of article 8".[103] In Chapter 8 we explain our rationale for provisionally proposing a right to be heard and ILR for complainants in respect of applications relating to their SBE and personal records, because such evidence directly engages their right to respect for their private life under article 8 of the European Convention on Human Rights ("ECHR"). When such evidence is permitted following a hearing, the right to private life is breached at the time the evidence is adduced at trial: the private information then becomes public knowledge before the jury. As we have explained in the introduction of this chapter, this means that any appeal against such a decision must be decided before the ruling is implemented at trial; however, such appeals have the most impact on the timings of the trial. This is particularly so when such applications can arise during the trial itself. In our 2010 report we considered these issues in the context of the admission of personal records and orders permitting public attendance or publication of a report of the trial.[104] We concluded that for all such matters, in general, the impact on the trial of such an appeal right was not justified. In respect of personal records we commented:

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100 Criminal justice stakeholders.

101 Including practitioner Tom Little KC. See also E Keane and T Convery, "Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character" [2020], p 32.

102 The Gillen Review, para 8.100.

103 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 6.47.

104 Above.

> We have considered specifically the position of witnesses who are compelled to disclose medical records or similar personal information, and concluded that their position is now protected following amendment to the Criminal Procedure Rules [that provided for witnesses so compelled to be served and to be able to make representations in respect of the summons]. … We think it is a pertinent point that the right to intervene and have one's concerns taken into account … at the time the court makes its ruling is more use than a possible right of appeal or review after an order has been made.[105]

11.53 Further, the prosecution do currently have the ability to bring an appeal against an admissibility ruling, in the limited circumstances described above. This therefore already provides a level of additional judicial scrutiny. A member of the judiciary and a member of the police have advised us that the prosecution could therefore bring an appeal where it is appropriate to do so, rather than extending appeal rights to the complainant.[106] We note, however, the concern explored in Chapter 8 that the prosecution do not, and cannot, always sufficiently represent the interests of the complainant given their overriding duty is to the public interest.

ANALYSIS

11.54 In this section we will consider first the arguments for providing a right of appeal against decisions on applications regarding complainants' SBE and personal records, beyond the existing limited appeal rights. Such appeal rights would apply to any party who has a right to be heard on the application. Secondly, we will consider the arguments for extending appeal rights specifically for the complainant, who currently has no such right of appeal.

Extending the general right of appeal to applications concerning complainants' SBE and personal records

11.55 As we have explored in Chapters 3, 4 and 8, decisions regarding the admissibility of complainants' personal records and SBE can be complex, carry a high risk of introducing myths and misconceptions, and engage important rights including the complainants' right to respect for their private life and the right to a fair trial. They are difficult decisions: their outcome and rationale has significant impact on the trial, the complainant's experience and willingness to engage in the proceedings, public understanding of the process and the legitimacy of the prosecution of sexual offences. The benefit of appeal rights specific to such decisions could include additional judicial scrutiny, and a clear domestic route to challenge decisions engaging ECHR rights. This can improve decision-making in the first instance, which would ultimately lead to fewer appeals at all stages.

11.56 The current appeal rights, though limited, do provide an existing avenue of challenge against decisions involving the admissibility of SBE or personal records where they are either:

(1) made at a preparatory hearing;

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105 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 6.49.

106 A senior police officer and a member of the judiciary.

(2) a terminating ruling; or

(3) a ruling made before the judge begins summing up and the prosecution enter an acquittal agreement upon notification of intention to appeal.

11.57 There is also an additional right of appeal for the defendant against conviction or sentence. Where such an evidentiary ruling arguably leads to an unsafe conviction, the defendant is rightly able to challenge that. However, the limitations of these existing provisions mean that appeals from SBE and personal records rulings will be very rare. Unless ordered at a rarely used preparatory hearing, the defendant has no ability to appeal evidentiary rulings before the conclusion of the trial. We are concerned that the impact of this is such that the timing of an application can dictate whether there is an appeal right or not. Even where a right to appeal from a preparatory hearing exists, rulings on SBE and personal records may not meet the threshold for leave to appeal given the fact-sensitive nature of many of these decisions.[107] There are no rights of appeal from judicial rulings that attach specifically to the type of evidence considered at the ruling. However, we have explained in Chapter 1 that some aspects of sexual offences prosecutions justify different treatment.

11.58 The concern with extending any appeal rights from judicial rulings is the significant potential for delay and the resultant impact on the fairness and efficacy of the trial process and interests of justice for the immediate trial, and knock-on effect for listing other ongoing trials and appeals. Currently there is an intentionally limited right of appeal against all preliminary decisions in criminal proceedings, as described above. Case law has interpreted such rights narrowly so as not to give rise to the significant impact of delays without sufficient justification. However, we do note that section 62, if enacted, would be a notable extension of appeal rights for preliminary admissibility rulings.[108] Its presence in the statute shows some acknowledgement of the need to extend appeal rights beyond the currently limited provision.

11.59 In our 2007 consultation paper on the High Court's jurisdiction in relation to criminal proceedings, the Law Commission considered the impact of delay on criminal trials, noting that:

> Delay to criminal trials can seriously compromise the interests of justice, especially when the trial is before a jury. If it cannot be accurately predicted when a trial before a jury will be ready to commence, the interests of defendants, victims, and witnesses may be adversely affected. The passage of time can affect the ability of witnesses to recall events. The greater the delay in a jury starting to hear the evidence, the greater the strain on defendants, victims and witnesses. A trial the start of which is delayed may have a disproportionate effect on a defendant who is in custody awaiting his or her trial. In addition, delay in starting one trial may have a knock-on effect if it delays the start of other trials.[109]

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107 *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10, at [21].

108 See para 11.18 above.

109 The High Court's Jurisdiction in Relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184, para 5.18.

11.60 Appeal rights can cause delay to proceedings both before and during a trial. When a party is permitted to appeal, usually the proceedings pause until the appeal is determined by the Court of Appeal, which can be a more limited resource than the Crown Court. For example, appeals are usually heard by three judges whereas in the trial only one judge is required. It can take weeks or months for an appeal to be listed, heard and decided at the Court of Appeal. This may mean that the trial has to be moved weeks or months later too. There is already significant backlog in Crown Courts; delays of this kind add to the pressure on resources.[110]

11.61 If an appeal arises before a trial commences and the jury has not been sworn in, it may be that the appeal can be determined before the trial was due to commence so there is no, or limited, knock-on effect. If it arises close to the trial, it may require that the trial is delayed, risking the negative impact described in our 2007 consultation paper, above. If it arises after the jury has been sworn in, there are significant challenges. Trials for serious sexual offences usually take between 3 and 5 days in court. When an appeal arises, the trial is paused and the jury have to wait to resume the case. The longer the wait, the greater the risk that the trial will be prejudiced by the delay. The jury may forget evidence and arguments that they have heard, there is a greater risk that they will hear or read information about the case or parties outside of the trial while they are back home waiting to resume. If a delay is likely to be more than one week, the judge may discharge that jury and decide that the trial needs to start again with a new jury after the appeal has been determined. The defendant, prosecution, and complainant will all have invested time, energy and expectation in the trial being at the original listed time. If that is moved back even by a number of weeks there can be a significant impact on the individuals, and the case. Witness recollection and ability to engage may diminish. The defendant may be held in custody longer than anticipated. The process of the build up to the trial and preparing to give evidence can be difficult for a complainant and they may feel unwilling to go through that again when a trial is delayed at a late stage.[111]

11.62 In our final report on High Court jurisdiction, we concluded that even where the decision results in the admission of evidence that may breach article 8 of the ECHR, such as personal records, the impact of delay on the trial by introducing such an appeal right is not justified.[112] Part of this rationale was that affording the affected person the right to be heard when the matter is being considered can sufficiently ensure their rights are protected.

11.63 We note that the debate around personal records and SBE in sexual offences prosecutions has developed since that report, as explored throughout this paper. Indeed, this has led us provisionally to propose reform of the models and thresholds

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110 A report by Rape Crisis found that the backlog of sexual offences in the Crown Court is at a "record high": Rape Crisis England and Wales, *Breaking Point: the re-traumatisation of rape and sexual abuse survivors in the Crown Court backlog* (2023) p 9, with an average time of over two years from the report to police and the case concluding at court: Criminal Justice Joint Inspection, *A joint thematic inspection into the police and CPS response to rape – Phase Two* (February 2022) Figure 14, p 84. See also para 6.2 for further detail about the length of time for rape cases.

111 For further discussion of the impact of delays in the criminal justice system on complainants of sexual offences, see Rape Crisis England and Wales, *Breaking Point: the re-traumatisation of rape and sexual abuse survivors in the Crown Court backlog* (2023).

112 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 6.48.

for admitting personal records and SBE, which include requiring written reasons. We have also provisionally proposed that the complainant have a right to be heard and to publicly-funded legal representation when such applications are considered. We believe that these proposals will provide for improved judicial scrutiny, protection and advancement of the complainant's rights and views, while protecting the defendant's right to a fair trial.

11.64 It is possible that the risk of delay could be managed or mitigated by the procedure for dealing with appeals. Where appeals arise early on in the proceedings, the risks to those proceedings from any delay is lessened. Appeals from decisions made at pre-trial hearings could be dealt with before the trial commences and so would not impact the trial listing. This of course depends on the pre-trial hearing being listed sufficiently far in advance of the trial for appeals to be heard in the interim. Judicial rulings on evidence are relatively narrow in scope; they concern specific pieces of evidence. Appeals from such rulings will therefore also be relatively narrow. They would not require a lengthy appeal hearing which could make them easier to schedule.

11.65 If there were a significant increase in the number of appeals from judicial rulings going to the Court of Appeal, there could still be delays even if the appeals arise before the trial commences, and are of short duration. As noted above, the Court of Appeal is a limited resource.

11.66 Where an appeal arises closer to, or during, the trial there could be an expedited process to enable the appeal to be determined within a matter of days. Section 59 of the CJA 2003 provides for a prosecution appeal under section 58 to be expedited. Non-expedited appeals may require the jury to be discharged;[113] an expedited appeal means that the trial is adjourned. As part of their case management responsibilities, judges and legal representatives can make arrangements with the courts to enable an appeal to be heard as quickly as possible. However, as described above, Court of Appeal resources are limited. Even where there is express provision, it will not be practically possible to expedite all appeals to be heard and determined within days of the original ruling.

11.67 We are of the view that more evidence is required as to the potential benefit of a general right of appeal specific to decisions regarding the admissibility of personal records and SBE.

Consultation Question 103.

11.68 Should there be a right, for all parties to the relevant application, to appeal the decision on an application to admit evidence relating to either the complainant's personal records or sexual behaviour?

11.69 We are only concerned in this project with the right of appeal in relation to decisions regarding personal records and SBE in cases of sexual offences prosecutions. We have noted here the limitations of general rights of appeal from judicial rulings, and the

[113] CJA 2003, s 59(3)(b).

extent of third party appeal rights. The Law Commission has recently begun a review of the law of appeals in criminal cases.[114] Where evidence, commentary or rationale for reform apply to issues of appeal beyond the scope of this project, we will explore those findings in the wider appeals project.

Extending to the complainant a right of appeal on applications concerning their SBE and personal records

11.70 Currently the very limited rights of appeal before the conclusion of proceedings apply only to the defendant and prosecution. Many of the arguments for extending appeal rights apply, sometimes solely, to the complainant. For example, the Dorrian Review recommended the complainant have a right to appeal against decisions on applications to admit their SBE and evidence relating to their character or personal records. We have provisionally proposed that complainants have a right to be heard on applications relating to their personal records or to admit SBE. Above we have asked for views on whether there should be a right of appeal attached to the decisions themselves which would be available for all parties, extending what is currently available to the defendant and prosecution. If such an extension were made, and complainants were given a right to be heard on the application, they would then also have a right to appeal the decision. In this section we consider whether there should be rights afforded specifically to the complainant.

11.71 Under the current regime, even if the complainant were given a right to be heard, without specific provision they would be the only party to the application who does not have a right to appeal; yet it is their privacy rights which are at risk.[115] Granting complainants a right of appeal from judicial rulings on SBE and personal records would have the benefit of resolving issues as to admissibility before substantial harm is done to the complainant's privacy interests by allowing the evidence to be heard during the trial.

11.72 There are already provisions for extending a right of appeal in criminal proceedings to individuals other than the defendant and prosecution, described from paragraph 11.19 above. In particular we note the right of appeal against reporting restrictions or orders excluding the public. These are appeal rights that allow those impacted by a decision relating to important rights, such as open justice and freedom of the press, to challenge it before the conclusion of the proceedings. Such a rationale could apply equally to decisions regarding SBE and personal records. We note, however, that there is no right to appeal a decision *not* to make a reporting restriction or public exclusion order. It was explained in Parliament that such a provision would not be necessary as the interests of those who would seek to appeal a refusal to make such an order (witnesses or parties who wish to assert their privacy) are "already adequately protected by the trial judge".[116]

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114 See Law Commission, Criminal Appeals.

115 In some cases there will be individuals other than the defendant or complainant whose personal details are included in SBE or personal records. For example, SBE that relates to sexual behaviour between the complainant and someone other than the defendant may include personal details about that third party. Consideration of that third party's privacy rights is outside the scope of this project.

116 *Hansard* (HL) 23 November 1987, vol 490, col 523.

11.73 We are not persuaded that the ability of the prosecution to appeal an admissibility decision sufficiently addresses the arguments for allowing the complainant to appeal. As we have provisionally concluded in Chapter 8, the interests of the prosecution and complainant do not always align. They may have different views on the admissibility of evidence and the judge's decision and reasoning. The prosecution must act in the public interest; this could override any interest in bringing an appeal that is sought by the complainant. This may be particularly relevant when the prosecution have to consider the risk of delay and the cost of an appeal against a judicial ruling.

11.74 Without any right to appeal a decision that engages their right to private life, the complainant has no route of challenge in a domestic court of a decision that potentially breaches their rights under the ECHR.[117] Having exhausted domestic remedies, their only option therefore would be to appeal to the European Court of Human Rights.

11.75 In Scotland, the Dorrian Review recommended that complainants be given the same right of appeal as is afforded to the prosecution and defence in relation to decisions regarding the admissibility of evidence. This is a helpful consideration. In preparatory hearings, there may be scope for giving a complainant a right of appeal. If the complainant has a right to be heard on these applications at a preparatory hearing, there is a strong rationale for extending the same right of appeal as is afforded to the defendant and prosecution in an equally limited way. The serious concerns about the potential for delay and practical problems about listing would not arise to the same degree with such a limited extension and because preparatory hearings take place before the trial begins.

11.76 We provisionally conclude that it is appropriate to grant the same limited rights of appeal to complainants who have a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour, as are available to defendants and the prosecution where the decision is made at a preparatory hearing. We think this could achieve an appropriate balance between the importance of a right to appeal, and the serious consequences of delay that are exacerbated when the appeal arises during the trial rather than before it begins.

11.77 The right of appeal on such applications is explicitly linked to the right to be heard. In Chapter 8 we explain that for all complainants to be able to take up their right to be heard, appropriately publicly funded ILA and ILR would be needed. This also applies to their right of appeal. If it is appropriate for the complainant to be heard and legally represented at a hearing on the admissibility of SBE or their personal records, it is appropriate that they are legally represented for their appeal. Therefore, we provisionally propose that complainants should have access to ILA and ILR for an appeal from a judicial ruling regarding their SBE or personal records.

11.78 However, as described above, these are very limited rights of appeal. It is currently very rare that applications relating to SBE and personal records will be determined at a preparatory hearing. Only sufficiently complex, lengthy or serious sexual offences cases will be eligible for a preliminary hearing. While procedural rules establish time

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[117] The High Court does not have jurisdiction over decisions of inferior courts by way of judicial review on "matters relating to trial on indictment" under the Senior Courts Act 1981, s 29(3). This would prohibit the use of judicial review to challenge decisions relating to the trial of most sexual offences as they are tried on indictment.

limits for applications, it is accepted that sometimes the need to make an application to admit evidence relating to personal records and sexual behaviour only arises later in the trial process. Limiting the right of appeal only to cases where it was possible to hold a preparatory hearing, and possible to make all applications relating to private evidence at that hearing, may not in practice provide a route for the complainant to challenge a potential breach of their right to respect for their private life in the courts of England and Wales.

11.79 The prosecution have additional rights to appeal judicial rulings not made in preparatory hearings. However, these are contingent upon the ability to offer an acquittal agreement, which the complainant cannot. While the defendant has no further right to appeal judicial rulings, they are able, upon conviction, to challenge a ruling that arguably led to that conviction being unsafe. This too is not available to a complainant. By that stage of criminal proceedings, the complainant's privacy will already have been breached by the decision to admit the evidence in question.

11.80 This raises the question of whether it is therefore appropriate to extend rights of appeal for complainants beyond those currently available to defendants and the prosecution from rulings made at (rarely used) preparatory hearings. We consider below two possible ways of further extending rights of appeal to complainants:

(1) Better use of preparatory hearings. This would increase the number of applications regarding SBE and personal records that are determined at preparatory hearings, and therefore that attract an appeal right.

(2) Extending to the complainant a right to appeal judicial decisions regarding their SBE and personal records that is not limited to decisions made at preparatory hearings.

The use of preparatory hearings

11.81 We understand that preparatory hearings, even in cases where they may be ordered, are seldom used. Therefore it is likely that most applications for admitting personal records or SBE are made at other preliminary hearings, or, when the need only arises later on, during the trial itself. While it is necessary to allow for the possibility of later applications, we think there may be some benefit in greater use of preparatory hearings for deciding applications on personal records and SBE. The cost of delay, as explored above, is more significant the later it comes in the trial process. Where rulings, and therefore appeals, occur at preparatory hearings before the jury are sworn in, there is no risk that the jury has to be discharged mid-trial. Neither the defendant nor complainant would need to go through the trial process again with a new jury. We think that better use of preparatory hearings to decide applications relating to SBE and personal records could ensure that, in all cases where it is possible, these applications (and therefore any resulting appeal) happen before the trial begins.

11.82 Currently preparatory hearings are rarely used. If they are used to greater effect, this will mean that all those who have appeal rights attached to preparatory hearings will have more opportunity to bring an appeal. This would have advantages: it would ensure that all parties to the application equally have the opportunity to challenge rulings that they argue were incorrect before they take effect in the trial. However, the complainant and defendant are in different positions. A complainant would likely only

appeal if the ruling was to admit evidence. A defendant would likely only appeal if the ruling was to exclude it. Defendants have less to lose by appealing a judicial ruling made at a preparatory hearing. Extending their right of appeal by encouraging greater use of preparatory hearings may result in a significant increase in defendants' appeals against decisions to exclude evidence of the complainant's SBE or personal records. While this may be entirely proper to enable them to challenge rulings that impact their right to a fair trial, we would not want to encourage tactical use of such an appeal right to further the complainant's distress, or to increase the chance that the complainant "gives up" on supporting the proceedings. We do note that there are already some adverse consequences for a defendant who brings a frivolous appeal. The potential for cost consequences, for example, may discourage defendants from bringing appeals against decisions made at preparatory hearings purely to cause the complainant distress or encourage them to "give up".

11.83 We invite consultees' views on the use of preparatory hearings to enable further consideration of the potential for further rights of appeal to attach to rulings made at preparatory hearings.

Rights of appeal not limited to preparatory hearings

11.84 To address the concerns specific to the complainant, rights of appeal could be extended to the complainant not limited to decisions made at preparatory hearings. As we note above, there are already some specific appeal rights afforded to parties that are not the defendant or prosecution.

11.85 As we have discussed at paragraph 11.56 above, a right of appeal could attach to the application itself. This would mean that it is available at any stage once a relevant application is made, and is available to all parties to the application. This could also be made available to the complainant.

11.86 We note that in New South Wales there is specific provision for non-parties, including complainants, to seek leave to appeal against a decision regarding the admissibility of counselling records under the SACP.[118] However we also note that in other jurisdictions considered above, there is no such specific right of appeal, and in fact, the general rights of appeal against preliminary judicial rulings are significantly limited.

11.87 We are alert to the real risks to the interests of justice that can be caused by delay due to appeals from preliminary judicial rulings, as described above. However, providing an appeal right in itself does not cause delay. Permission to appeal could be set at an appropriately high threshold to reflect the justification for appeals and the risk of delay and disruption. Further, the right to appeal could be attached to the application and still limited by the timing of determination. For example, a right of appeal attached to an admissibility ruling on SBE could be made available for any ruling made before the jury is sworn in, to avoid the more significant delays caused by appeals mid-trial. While this may mitigate against the more serious impacts of delay, it would also limit the benefits of an appeal right. There are many reasons why admissibility decisions are made at trial instead of before the trial begins. As such, it

[118] Criminal Appeal Act 1912 (NSW), s 5F(3AA). See para 11.43 above.

could be argued that limiting the appeal by the timing of the application creates arbitrary distinctions.

11.88 We invite consultees' views on whether complainants should have a right of appeal against judicial decisions regarding their SBE and personal records that is not limited to decisions made at preparatory hearings.

Consultation Question 104.

11.89 We provisionally propose that complainants who have a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant. This will only occur where the decision is made at a "preparatory hearing" (a hearing that can be ordered by a judge pursuant to section 29 of the Criminal Procedure and Investigations Act 1996).

Do consultees agree?

Consultation Question 105.

11.90 We invite consultees' views on the following:

(1) Could preparatory hearings be better used to determine applications regarding the admissibility of evidence relating to the complainant's personal records or sexual behaviour?

(2) Should the complainant have any further right of appeal against decisions regarding the admissibility of evidence relating to their personal records or sexual behaviour that is not limited to decisions made at preparatory hearings? If so, should that right of appeal be:

(a) Limited to decisions that are made before the trial commences; or

(b) Not limited so that the right includes a right to appeal a judicial ruling on admissibility made during the trial?

Consultation Question 106.

11.91 We provisionally propose that complainants should have access to independent legal advice and representation when they have a right to appeal a judicial ruling relating to evidence of their sexual behaviour or personal records.

Do consultees agree?

Chapter 12: Holistic reform

INTRODUCTION

12.1 In Chapters 3 to 11, we invite feedback from consultees by considering issues and posing open questions about reform options and in some cases, making provisional proposals for change. However, we also wish to hear the views of consultees more comprehensively regarding the overall effect of these measures, when combined.

12.2 In light of this, in this chapter, we discuss the implications, and combined and cumulative effect of the measures we discuss in previous chapters. Tied to this is a wider question about whether any measures should be prioritised or deprioritised and the rationale for doing so. In our view, each chapter and consultation question should not solely be considered in isolation, rather, each needs to be viewed in conjunction with the others, and the wider context of the criminal process as a whole.

12.3 We do not set out in this chapter an exhaustive list of possible combinations of measures and their implications. There is an almost limitless range and it is not possible for us to consider all of them. Instead, we provide some examples, and seek the assistance of consultees in identifying others. We encourage consultees to offer insights regarding the interrelationship of measures with each other and their consequences for complainants' experience of the trial process, defendants' right to a fair trial, and for the wider trial process. A full list of our consultation questions is at Chapter 14.

WHY TAKE A HOLISTIC APPROACH?

12.4 A holistic approach is necessitated by the very broad nature of our terms of reference. Our terms of reference require us to consider reform of the various mechanisms of the trial process – the law, procedure, guidance and practice. They also require us to examine issues that arise in both the pre-trial and trial process, taking account of our overall objectives to improve understanding of consent and sexual harm, to improve complainants' experiences of the trial process and to ensure defendants receive a fair trial.

12.5 Without a holistic approach, the overall objectives of our terms of reference may not be met. Munro suggests that piecemeal reform has been a factor in the failure to alleviate complainants' "confidence-deficits" and "justice-gaps" in sexual offences cases, "despite decades of reform".[1] Furthermore, other comparable jurisdictions have also sought to avoid a piecemeal approach in recent reviews of sexual offences proceedings. Lady Dorrian stated that in Scotland, the "drivers" of the Dorrian Review (2021) were "to make the system better; to take the holistic approach …, and try to

[1] V Munro, "A Circle That Cannot Be Squared? Survivor Confidence in an Adversarial Justice System" in M Horvath and J Brown (eds), *Rape: Challenging contemporary Thinking – 10 years on* (2023), pp 203-217, 208 and 214.

deliver the whole package."[2] This led to the Dorrian Review (2021) making wide-ranging recommendations for reform on a number of issues, including: pre-recording of evidence; case management; the creation of a specialist court; independent legal representation; improved communications with complainers; and a pilot of single judge rape trials.[3]

12.6 In Northern Ireland, the Gillen Review (2019) also adopted a holistic approach with the aim of creating a package of "confidence-building blocks" of equal value which, when combined, would lead to comprehensive and "radical" change.[4] Whilst accepting that the Review contained certain core recommendations, it cautioned against considering or implementing particular measures in isolation.

> This report contains a large array of individual recommendations, all of them important and relevant. Together they create a pattern of coordinated reform. Cherry picking will not work. The system needs a holistic approach. However, 16 key recommendations have emerged around which perhaps the others revolve.[5]

12.7 In our view, a holistic consideration of the issues is vital because incremental change in relation to isolated elements of the trial process may not lead to meaningful systemic change in relation to what is a complex, multi-faceted issue. Appendix 1 charts the major reviews and reports conducted over the last four decades, and in Chapter 1, we note that whilst very substantial progress has been made, there is reason to treat this with caution. In that chapter, we go on to explain the critique offered by commentators and stakeholders, that although they are interested in the possibilities of reform, there are concerns that incremental change will not deliver justice.

12.8 Moreover, the measures that we consider in preceding chapters are interrelated and may overlap and interact in a myriad of ways. Changes that we discuss have the potential to cause a significant shift in the procedural and evidential landscape and overall criminal process. These may also indirectly impact other earlier parts of the process such as the investigation or prosecutorial decision-making.

12.9 A holistic approach requires us to examine the overall benefits of combining particular measures, but it does not necessarily mean sweeping reform. Rather, taking a holistic approach means we can approach the issues carefully. It also allows us to consider whether, in combination or cumulatively, measures may lead to unintended disadvantage to complainants or defendants.

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2 House of Commons Home Affairs Committee, *Oral Evidence: Investigation and Prosecution of Rape*, HC 193, Q85 (October 2021).

3 The Rt Hon Lady Dorrian, *Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (Scottish Courts and Tribunals Service, March 2021) ("Dorrian Review"), Recommendations 1-5.

4 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland*, (May 2019) ("Gillen Review"), Preface p iii.

5 Above, page 29.

12.10 With that in mind, the holistic approach that we adopt in this chapter involves examining the combined and cumulative impact of the measures we consider in earlier chapters.

RELEVANT FACTORS

12.11 There are different ways of holistically evaluating the measures we are considering. We set out below a non-exhaustive list of factors which may assist with this assessment:

(1) Positive impact on complainants' experiences

Some combinations of measures may be more effective in improving the treatment of complainants than any individual measures in isolation. They may also have the greatest impact on improving stakeholders' and public confidence in the trial process; encouraging complainants to report offences; sustaining their engagement with the process; increasing complainants' sense of agency; and reducing the risk of re-traumatisation.[6]

(2) Positive impacts elsewhere in the process

Some combinations of measures may create positive impacts elsewhere. For example, they may improve the quality of first instance decisions, minimising the number of appeals. Alternatively, proper consideration of an issue early in the criminal process may minimise its impact and the resources required to deal with it later in the proceedings or at trial.

(3) Negative impact on the defendant's right to a fair trial

For all chapters and measures, we have carefully considered the defendant's right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR") and concluded that they do not interfere with this right. In Appendix 2, we review the approach of the European Court of Human Rights ("ECtHR") in relation to these measures in greater detail. The ECtHR has a wide discretion to consider the fairness of the proceedings as a whole and to consider whether particular measures have rendered proceedings unfair or, conversely, have had no adverse impact on overall compliance with article 6. In this chapter, we seek consultees' views on whether certain combinations of measures could risk interfering with the defendant's right to a fair trial.

(4) Delay

For sexual offences cases, there are already significant delays in the investigation and court process. On average, it takes nearly two years for a case to get from the initial report to the police to trial.[7] Changes to procedural and evidential requirements may require judicial oversight, may increase the number and length of pre-trial hearings and may elongate the trial, leading to

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6 In relation to ILR and the use of specialist examiners, we explain that a psychologist and a psychotherapist told us that self-agency is a critical part of recovery from trauma. See Chapters 8 and 13.

7 See Chapter 6, footnote 17.

delays in sexual offences cases, with consequential impact on court resources and court time available for other types of offences.[8] Individually a single measure may have limited impact, but cumulatively, several measures may unacceptably increase delays when compared with their potential benefits.

(5) Costs

For the same reasons, additional procedural and evidential requirements and other additional needs such as training, facilities or technology will increase costs. Whilst some of these costs may be offset by savings elsewhere in the process,[9] cumulatively, these costs may be too great when compared with their potential benefits.

(6) Burdens on the parties (prosecution and defence), court, police, and complainants

Requirements for parties to prepare additional court applications, for the court to facilitate and conduct additional hearings and for parties to attend these hearings will inevitably create more work for the prosecution, defence, court, and police. It may also place additional strain on the complainant. Cumulatively, these burdens may be unacceptable relative to their intended benefits.

(7) Unintended consequences or side effects

For each chapter and consultation question, we have analysed and weighed up the likely impact of potential policy changes. However, the criminal trial process is procedurally, factually and legally complex and outcomes are dependent on the particular facts of each case. This means that when measures are combined, unintended disadvantages may arise. For example, we note in Chapter 3, when sexual behaviour evidence ("SBE") restrictions were introduced, requests for access and disclosure of personal records instead became the route for introducing material undermining the credibility and moral worth of the complainant.[10]

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8 For example, trial advocates and court staff have raised concerns about the impact of the roll-out of pre-recorded cross-examination (under the Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), s 28) for sexual offences and modern slavery complainants "on court resources and non-s.28 cases" due to various factors including listing difficulties, additional hearings to prepare for and record the evidence and further time spent playing the recording at trial. The Judicial Office also stated that "the use of Section 28 for intimidated witnesses in sexual offence or modern slavery cases (s.17(4)) has a significant and adverse impact on the operation of the Crown Courts, and the listing of all cases." See D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (April 2023) Ministry of Justice ("MoJ") and Ipsos UK p.22-23 and p 60-62.

9 For example, the SVCA Evaluation Report concluded that the costs of ILR could be offset by costs savings elsewhere, such as the costs of treating victims or preventing further sexual offending. O Smith and E Daly, *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme* (December 2020) ("SVCA Evaluation Report"), p 69 citing N Westmarland et al, *Cost-benefit analysis of specialist police rape teams. Phase three report* (2015) A report commissioned and funded by the Association of Chief Police Officers, Durham: Durham University.

10 W Larcombe, "The 'Ideal' Victim v. Successful Rape Complainants: Not What You Might Expect" (2002) 10 *Feminist Legal Studies* 131, 135-136, citing as one of the earliest to identify this E Sheey, "Legalizing

(8) Other ongoing reform

It is an important objective that when combined, measures complement and do not duplicate each other or other ongoing reform.[11] A range of measures may be used to achieve the same aim, leading to a crowded and over-complicated framework.

12.12 The above factors involve an overall review of the impact of combinations of measures. We address next how the economic impact of measures may be assessed, along with other wider impacts, and the type of data which may be relevant.

MEASURING IMPACT

12.13 The total financial cost to society for crimes of sexual violence is startling. The Home Office has estimated that in England and Wales in 2015/16, for rape the total cost to the public was £4.8bn and for other sexual offences was £7.4bn, making an overall total of £12.2bn.[12] This demonstrates the importance of understanding the economic impact of the measures we discuss including the costs of "physical and emotional harm", criminal justice system costs, costs to health and victims' services and costs of lost productivity due to absence from work.[13] It also illustrates that the benefits of increased investment in sexual offence proceedings extend beyond the obvious direct benefits to the individuals involved in each case – they may also result in significant costs savings elsewhere. They may, for example, reduce the potential for harm to complainants and consequently reduce costs incurred by health and victims' services.

12.14 Throughout this consultation paper we evaluate available data to examine the potential impact of our provisional proposals and questions, both in economic terms and more broadly. We have not yet carried out a full and comprehensive analysis of this information because it is most appropriate for us to do so, via a full impact assessment, when we make concrete recommendations for reform in our final report. However, at this stage, we do wish to understand consultees' views on impact, both positive and negative, and whether there is further data and information which may inform our eventual impact assessment.

Justice For All Women", in M Heenan (ed), *Legalizing Justice for All Women: National Conference on Sexual Assault and the Law* (1995) pp 8–28; see also L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall Law Journal* 251, 254, 259-260.

11 For example, the measures we consider overlap with other ongoing work including: the suspect-focussed approach to defendants' bad character in Operation Soteria (see Chapter 5); the nationwide roll-out of recorded evidence for sexual offence complainants (see Chapter 7); the CPS and National Police Chiefs' Council pilot on the use of expert evidence of psychological injury (see Chapter 10); and the pilot of enhanced specialist sexual violence support at certain Crown Courts (see Chapter 13).

12 M Heeks et al, Home Office, *The economic and social costs of crime Second edition, Research Report 99* (July 2018), Table 2, p 17. In 2021/22 prices, this equates to £5.5bn for rape and £8.5bn for other sexual offences, making a total of £14bn. The 2015/16 figures for total costs for other crimes of violence are as follows: homicide £1.8bn; violence with injury £15.5bn; and violence without injury £5.1bn.

13 The Home Office state that their calculations include: costs incurred "in anticipation of crime" such as "defensive expenditure" and "insurance administration"; "costs as a consequences of crime" such as "physical and emotional harm", "lost output", "health services" and "victim services"; and "cost in response to crime", namely policing costs and other criminal justice system costs. See above, Table 1, p 16.

12.15 To inform responses to our consultation questions below, we outline here some high-level starting points for estimating potential impacts.[14] First, estimating the overall economic costs of changes to practice, procedure and evidence requires an understanding of how many cases will be affected. In the context of sexual offences, the yearly volume of cases that are heard in the Crown Court is a useful measure. For example, the most recent government figures indicate that for January to December 2022, the number of cases of adult rape received in the Crown Court was 1,873, with a guilty plea rate of 18% and of which 1,196 were recorded as completed by way of guilty plea, conviction, or acquittal.[15]

12.16 A further important starting point is to understand impacts on court expenditure and litigators[16] and counsel's fees for both the prosecution and defence. Reform which requires additional hearings, more frequent use of current hearings and elongated hearings will invariably increase these costs. In terms of court expenditure, in 2018, the Law Society estimated that on average, one day of court time costs HM Courts and Tribunals Service ("HMCTS") £2,692, based on staffing costs, judge's salaries and buildings expenditure.[17] There is similar high-level information available regarding fees for litigators. For example, according to CPS Legal Guidance on claims for prosecution costs sought against convicted defendants, average CPS costs for a single Crown Court trial are between £2,800 and £4,200 excluding other costs such as for experts and counsel.[18] For counsel's fees, by way of illustration, for a case of rape, prosecuting counsel's trial fee would be between £3,710 and £4,270.[19] Their fees for attending other hearings such as admissibility, disclosure and ground rules hearings ("GRHs") would be between £131 for a half day and £240 for a full day.[20] Average legal aid costs for defence solicitors' fees, defence counsels' fees, disbursements such as experts' fees and VAT total approximately £11,000-£13,000 per sexual offence trial.[21]

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14 The figures we provide are illustrative snapshots only. When we carry out our full impact assessment of our final recommendations for reform, we will consider trends over several years and take account of external factors such as the impact of COVID lockdowns.

15 "A completed case means receiving any outcome, including guilty pleas, acquittals and convictions." Available via HM Government, criminal justice system delivery data dashboard, https://criminal-justice-delivery-data-dashboards.justice.gov.uk/chart-builder#table.

16 Namely, defence solicitors and the CPS.

17 Law Society, *Cost of a day in court* (July 2018), p1. https://www.lawsociety.org.uk/topics/research/cost-of-day-in-court-new-analysis-by-law-society. This is a high-level calculation "taking court running costs and dividing them by the number of court days per year ie. less weekends and public holidays, and by the number of courtrooms in use across the HMCTS estate."

18 Crown Prosecution Service ("CPS"), *Legal Guidance Costs - Annex 1* (September 2021).

19 Based on junior counsel conducting a five-day trial: £1,630 base fee + £520 daily fee or £2,190 base fee + £520 daily fee.

20 CPS, *Graduated Fee Scheme E*, *Annex 3 and 4*, (February 2020), https://www.cps.gov.uk/sites/default/files/documents/publications/Annex-3-Scheme-E-Rate-Tables.pdf; https://www.cps.gov.uk/sites/default/files/documents/publications/Annex-4-Scheme-E-Fixed-fees.pdf.

21 See Legal Aid Agency and MoJ, *Legal aid statistics England and Wales bulletin Oct to Dec 2022* (March 2023) viahttps://app.powerbi.com/view?r=eyJrIjoiMGQwNzY5MjQtYTUyZS00NWUzLWE4NzItYWFhN2U3ZDJlMz

12.17 We turn now to the economic impacts for more specific elements of our provisional proposals and questions. In relation to the use of expert evidence to address myths and misconceptions, for prosecution and publicly funded defence experts, rates for expert witnesses are set out in guidance and secondary legislation. They range from £70 to £107 per hour for preparation work and £346 to £500 for a full day's attendance at court.[22]

12.18 In Chapter 8, we explain that the SVCA Evaluation estimated the costs of rollout of legal advice and representation for sexual offence complainants in England and Wales to be £3.9 million annually. Notably the SVCA Evaluation concluded that these costs could be offset by costs savings elsewhere.

12.19 Finally, there are related non-financial factors which are equally valuable indicators of impact. For example, at paragraph 12.11 (4), we explain that there are significant delays in sexual offences cases being brought to trial. Measures which increase the current two-year delay will require very careful evaluation of their benefits. Rates of attrition are also a useful barometer for complainants' experiences of the criminal process. High rates of attrition are likely to indicate high levels of complainant distress, concern, and dissatisfaction and the converse may indicate more positive experiences. Recent government figures indicate that for the period January 2022 to December 2022, 62% of investigations were closed because the complainant withdrew their support; for the same reason, 19% of cases were stopped after the defendant was charged and 0.5% of cases were stopped on the day of trial.[23]

12.20 In the following sections we give some examples of questions which may arise when certain measures are combined, and we ask for consultees' views on these examples and any others they can identify. In Chapter 10, we also give a further example: we ask which additional methods of juror education, alongside judicial directions, should be prioritised and are likely to be the most effective combination.

INTRODUCTION OF MYTHS AND MISCONCEPTIONS

12.21 In the preceding chapters, we ask open questions and make provisional proposals designed to minimise the risk that myths and misconceptions are introduced into the trial and into jurors' deliberations. The avenues for the introduction of myths that we

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E1IiwidCI6ImM2ODc0NzI4LTcxZTYtNDFmZS1hOWUxLTJlOGMzNjc3NmFkOCIsImMiOjh9&chromeless=1&filter=true/ecf&pageName=ReportSection1446e34015e92705e5dc. Figures are for trials and cracked trials involving sexual offences against adults for counsels' fees and for adults and children for solicitors' fees (it is not possible to disaggregate) for the financial year 2019/20. A cracked trial is a trial which is stopped between the Plea and Trial Preparation Hearing and the first day of trial. The upper figure has been adjusted to reflect planned fee increases.

22 Criminal legal aid preparation rates for psychologists are £82.80 ph (London) and £107.64 ph (non-London) excluding VAT. See Criminal Legal Aid (Remuneration) (Amendment) Regulations 2022/848, Schedule 5, para 1. For attending court, an expert is paid for preparation work at £70 to100 ph and attendance at court (full day) at £346 to £500. See MoJ, *Guide to Allowances Under Part V of the Costs in Criminal Cases (General Regulations 1986* (September 2016), Appendix 2. The CPS pays preparation rates to psychiatrists (which is the nearest equivalent to a psychologist) of £70 to £100 ph and attendance at court (full day) at £346 to £500. See CPS, *Witness Expenses and Allowances Annex 2a* (August 2018), Expert Witnesses – Scales of Guidance (cps.gov.uk).

23 Available via HM Government, criminal justice system delivery data dashboard, https://criminal-justice-delivery-data-dashboards.justice.gov.uk/chart-builder#table.

identify are the use of personal records, SBE, Criminal Injuries Compensation ("CIC") claims and more generally, counsels' lines of questioning and speeches. We also examine the use of judicial directions, expert evidence and juror education tools as a means of addressing misconceptions held by jurors. In summary, the measures we discuss include:

(1) A provisional proposal at in Chapter 3 to introduce an enhanced relevance test as the threshold for production, disclosure[24] and admissibility[25] of complainants' personal records, adapted from the Canadian model. In that chapter, we also provisionally propose that a judge should be responsible for determining such applications.[26]

(2) A provisional proposal for an altered and clarified enhanced relevance admissibility threshold, with a structured discretion model, to allow the use of evidence and questions about SBE and CIC claims, referred to in Chapters 4 and 6.[27]

(3) A provisional proposal that the threshold for determining acceptable lines of questioning should continue to be relevance.[28] We also invite views on options for ensuring this threshold is properly applied. We ask whether this test should be codified and include a list of indicative factors. We seek views on whether the relevance threshold should be used to require advance approval of lines of questioning. We ask whether the Judicial College should consider a requirement for a direction to be given where a line of questioning is deemed irrelevant because it relies on myths and misconceptions. These are referred to in Chapter 9.

(4) In Chapter 9, an open question about whether the Judicial College should consider providing guidance to judges on how best to respond to generalisations which rely on myths and misconceptions, when they are raised in counsels' speeches.

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24 For compelled production and disclosure, we provisionally propose that the personal records must likely be relevant to an issue at trial or to the competence of a witness to testify; and access, production or disclosure must be necessary in the interests of justice. We also provisionally propose that a list of factors is considered to determine what is in necessary in the interests of justice. We also consider access by consent for which we provisionally propose that some measures (but not judicial scrutiny) should be put in place to ensure that complainants who are asked to consent to access have greater protection than is presently the case, and we invite views on whether judicial scrutiny might be among these measures.

25 We provisionally propose that the personal records are admissible if the evidence is relevant to an issue at trial or to the competence of a witness to testify; and it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. We also provisionally propose that to apply this test, a list of factors is considered.

26 Our provisional proposal relates to determinations of access, production and disclosure. Judges are already responsible for determining admissibility of evidence.

27 We provisionally propose that SBE and CIC claims questions and evidence should only be admissible if the evidence has substantial probative value and its admission would not significantly prejudice the proper administration of justice. We also invite views on whether a list of factors should be part of the framework.

28 Excluding CIC claims and SBE.

(5) We consider options for strengthening the existing use and content of judicial directions in Chapter 10. To encourage more consistent use of directions, we invite views about the use of a rebuttable presumption that a direction will be given, where certain triggering conditions are met.[29] We invite views on whether the Judicial College should consider amending existing example directions better to reflect empirical evidence.[30] We also ask whether the Judicial College should consider additional example directions.[31]

(6) In Chapter 10, we invite views on whether expert evidence of general behavioural responses to sexual violence should be admissible to address myths and misconceptions. We also ask for views on the use of juror education tools such as written juror information notices, juror education videos and an online interactive tool.

12.22 These provisional proposals and questions provide a strong basis for avoiding jurors hearing evidence and comment during the trial which introduces myths and misconceptions. Even if myths are stripped away from the evidence and from counsels' lines of questioning, comments and speeches, as we explain in Chapter 2, jurors may nevertheless inadvertently bring to their deliberations their own prejudices and misconceptions, leading them into error. Judicial directions are intended to address this risk and we explain above that we ask questions about possible improvements to the content and use of judicial directions.

12.23 However, we also go further, by examining other means by which pre-existing rape myth acceptance amongst jurors can be addressed as part of the trial process. We invite consultees' views on additional methods, which are not currently permitted or used, such as expert evidence of general behavioural responses to sexual violence and other education tools such as information notices, educational videos and online interactive tools.

12.24 In light of this, in our consultation question at paragraph 12.31, we invite views about the cumulative effect of the measures dealing with personal records, SBE, CIC claims, counsels' lines of questioning and speeches, and judicial directions, along with the use of expert evidence and/or other juror education tools. For example, some may take the view that:

(1) In combination, some or all of these measures will prevent the defendant from properly advancing their case.

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29 For example, the Scottish provisions create a presumption that a direction on certain myths must be given if particular evidence is adduced or a particular question asked or statement made, unless no reasonable jury would consider the evidence, question or statement material. This may apply for the following two myths: where the complainant delayed reporting or did not report the offence, or the complainant did not physically resist, or physical force was not used.

30 We invite views on amendment of example directions on delay and freezing and if there are any other example directions which the Judicial College should consider.

31 We also provisionally propose that the Judicial College consider an additional example direction for male complainants and ask whether it should consider an additional example direction for complainants with a mental health condition or learning disability.

(2) In combination, some or all of these measures give undue prominence to trial issues such as the complainant's credibility, which are for the jury to determine.

(3) Cumulatively, these measures will be effective in improving the treatment of complainants by preventing them from being subjected to humiliating cross-examination which relies on myths and misconceptions and by allowing the jury fairly to evaluate the evidence, without detriment to the defendant.

(4) Due to the prevalence and ingrained nature of rape myth acceptance, all, nearly all, or some, of the above measures are justified.

(5) Possible changes to personal records, SBE, CIC claims, counsels' lines of questioning and speeches, and judicial directions, mean that the additional costs and potential delays arising from the use of expert evidence are not justified.

(6) Given that there is only emerging evidence about the effectiveness of alternative juror education tools, priority should be given to strengthening already established methods, or methods where there is a better evidence base such as changes to personal records, SBE, CIC claims, counsels' lines of questioning and speeches, judicial directions, or expert evidence.

12.25 As we explain above, this example is intended only as a prompt to consultees. We invite consultees to find their own combinations and identify their own concerns and priorities and explain to us their reasons. We now move on to further examples.

RESOURCING AND DELAY

12.26 In earlier chapters, we invite views or make provisional proposals regarding measures which will involve new types of court applications and hearings, or which may elongate existing hearings. We also consider measures which will require additional technology or updated facilities.

12.27 These will undoubtedly place additional burdens on the parties, the court, the police and the complainant and will require additional resources. For example, for new types of hearings or more frequent use of existing hearings, legal representatives will be required to liaise with each other regarding disclosure of information and applications and to discuss matters in advance of hearings. Parties will be required to prepare for and attend hearings and courts will need to list and conduct them. As we provisionally propose that complainants should, in certain circumstances, have independent legal advice ("ILA") and independent legal representation ("ILR"), some of these burdens may extend to the complainant and their legal representatives.

12.28 In summary, our questions and provisional proposals of this type include:

(1) In Chapter 3, in relation to the pre-charge stage, we invite views on requiring an application to the court for production of the complainant's personal records. Post-charge, we provisionally propose an application to the court for production and disclosure of personal records.

(2) In Chapter 9, we provisionally propose the continued use of the relevance threshold to determine acceptable lines of questioning and invite views on how to improve compliance with this, including its codification and advance approval of lines of questioning by a judge, where they might invoke myths and misconceptions. We envisage that this issue will be discussed at a Ground Rules Hearing ("GRH") or other pre-trial hearing. In addition to this, in Chapter 7, we invite consultees' views on whether GRHs should be mandatory in all sexual offences cases or whether there should be a presumption that they should be used.

(3) In Chapter 8, we provisionally propose that complainants should have a right to be heard, with ILA and ILR in relation to requests and applications relating to personal records and SBE at pre-trial, and trial hearings in the absence of the jury. We also invite views about the complainant's legal representative attending the trial or parts of it, with or without the presence of the jury. The presence of an additional legal representative for the complainant may elongate hearings.

(4) In Chapter 4, we provisionally propose that judges should be required to provide written reasons for their decision on an application to admit SBE. This may elongate the process for such applications at both the pre-trial and trial stage.

(5) In Chapter 7, we provisionally propose that there is greater and more flexible opportunity for complainants to pre-record their evidence. We provisionally propose that complainants should be automatically entitled to record their evidence. This might include an Achieving Best Evidence ("ABE") interview, followed by a pre-recorded cross-examination or the recording of all their evidence at once pre-trial. This may elongate the pre-recording process or may require more pre-recording hearings to be listed.

(6) In Chapter 7, we provisionally propose that complainants should be automatically entitled to use an accessible entrance and waiting room that is separate from members of the public and the defendant.

(7) We invite views on the greater use of appeals in relation to admissibility rulings on personal records and SBE made before the trial has concluded and the verdict is given. In Chapter 11, we ask for views on whether there should be a right to appeal such applications for all parties to the application. We provisionally propose that complainants should have the same limited rights that the defendant currently has to appeal decisions regarding SBE or personal records, that is only where they arise from a preparatory hearing. We then ask for views on whether the complainant should be given rights of appeal beyond the current limited use of preparatory hearings. First, we ask whether there should be more extensive use of preparatory hearings for these types of applications. Second, we ask whether complainants should have any further rights of appeal, not limited to decisions made at preparatory hearings. Because they may put trial proceedings on hold, as well as causing delay in the immediate trial, new appeal rights have resource implications for both the Crown Court and Court of Appeal. Appeal rights may also incentivise earlier

applications on admissibility to avoid disproportionate delays to the trial that may arise if the decision were appealed.

12.29 There are obvious resource implications of additional and elongated hearings and a potential for these to cause delays both in individual cases, other sexual offences cases and for there to be consequential delays for other offences. In the consultation question at paragraph 12.31, we invite consultees' views on the following types of questions:

(1) Whether overall, burdens, delays and resource implications are justified by benefits or impacts or because of the underlying principle at stake.

(2) Whether, cumulatively, resource implications may be offset because of cost savings elsewhere.

(3) Whether, cumulatively, burdens and delays may be justified because of positive impacts elsewhere such as early, pre-trial identification of an issue reducing time spent on it at trial or improved decision-making minimising the number of appeals.

(4) Whether certain measures or combinations should be prioritised because they have more prospective impact or benefit.

(5) Whether, cumulatively, the implications of these measures in terms of delays and burdens are so great that there may be unjustifiable and unintended consequences elsewhere in the criminal process.

OVERALL CUMULATIVE EFFECT

12.30 In our final example, we highlight below some of the key possible changes we discuss throughout the consultation paper. We seek consultees' feedback on their cumulative effect, taking account of the factors we describe at paragraph 12.11 and their views on whether certain measures should be prioritised.

(1) As described above, we provisionally propose an enhanced relevance threshold for production and disclosure of personal records and invite views about whether there should be judicial scrutiny where access is consent-based.

(2) As described above, we provisionally propose an altered and clarified admissibility threshold with a structured discretion allowing the use of evidence and questions on SBE and CIC claims.

(3) In Chapter 5, we provisionally propose that where a complainant has no previous convictions or cautions then, if the trial judge decides that fairness demands it, there should be a jury direction that explains why the jury has heard no evidence of the complainant's good character and that no inference adverse to the complainant should be drawn from its absence.

(4) In Chapter 7, we provisionally propose that instead of being automatically eligible, as is the case at present, sexual offences complainants should be automatically entitled to certain measures to assist with giving evidence.[32]

(5) As described above, we provisionally propose that complainants should have a right to be heard and ILA and ILR in relation to requests and applications relating to personal records and SBE at pre-trial, and trial hearings in the absence of the jury.

(6) As described above, we invite views about using a rebuttable presumption that a direction will be given in relation to some myths and misconceptions.

(7) As described above, we invite views on whether expert evidence of general behavioural responses to sexual violence should be admissible and whether written information notices, education videos or online interactive tools should be used.

(8) As described above, we provisionally propose the continued use of the relevance threshold to determine acceptable lines of questioning and invite views on how to improve compliance with this, including codification and advance approval of lines of questioning by a judge.

(9) As described above, we request views about whether additional guidance to judges should be considered regarding how best to respond to generalisations made in counsels' speeches, which rely on myths and misconceptions.

(10) As described above, we invite views on the greater use of appeals in relation to personal records and SBE.

[32] These include their entitlement to: use a screen, so they cannot see the defendant; to use live link; to pre-record their evidence; exclusion of the public, while they give evidence, save for a member of the press; removal of wigs and gowns; presence of a supporter or ISVA; and accessible entrance and waiting room that is separate from the public and defendant where available.

Consultation Question 107.

12.31 Considering the measures on which we invite views or make provisional proposals throughout the consultation paper and taking account of the following factors, are there particular combinations of measures which are particularly impactful and beneficial? What are these measures and their impact?

(1) positive impacts on complainants' experiences of the trial process;

(2) positive impacts elsewhere in the criminal process;

(3) negative impacts on the defendant's right to a fair trial;

(4) delay;

(5) costs;

(6) burdens on the parties, court, police, and complainant;

(7) unintended consequences; and

(8) other ongoing reform.

12.32 Are there particular combinations of measures which are a cause for concern? What are these measures and their impact?

12.33 Are there any combinations of measures which should be prioritised? Why?

12.34 Is the data we describe above regarding costs, case volumes, case delays and rates of attrition accurate and is there any other available data which will assist?

CONCLUSION

12.35 In this chapter we look holistically at measures on which we have invited views or which we have provisionally proposed. We do so by considering their combined and cumulative effect. However, a holistic approach can also involve examining the wider context of possible reforms both inside and outside the criminal justice system.[33] Some commentators take the view that this involves recognising the limits of possible reforms due to their broader structural context. Without rethinking the broader structural context, changes may have limited effect. In relation to the use of special measures, Cossins notes that:

[33] For example, JUSTICE concluded that "that improving procedural practices alone would not sufficiently reduce the burden placed on the Criminal Justice System (CJS). Instead, a more holistic approach to sexual offences was required, that attempted to both prevent offending taking place and reduce rates of reoffending." See JUSTICE, *Prosecuting Sexual Offences*, (May 2019), para 7.1.

> the approach of reformers is to institute reforms that are based on *ameliorating* the effects of the adversarial trial rather than *changing* the adversarial system to prevent harm to vulnerable victims.[34]

12.36 Munro also states that "innovations" such as pre-recorded evidence, though welcome:

> may find themselves hampered in their ability to generate deep and consistent change by the fact that they will continue to operate in a context in which the courtroom remains too often a space for theatrics, with strategies by counsel orchestrated upon complainants' testimony to elicit sympathy or generate doubt in the minds of the jury… Indeed, efforts to shift the tone of cross-examination may always be apt to underwhelm unless we confront the background norms and dynamics of adversarialism.[35]

12.37 In the next chapter, we consider options for reform which attempt to confront some of these background norms.

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[34] A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 497.

[35] V Munro, "A Circle That Cannot Be Squared? Survivor Confidence in an Adversarial Justice System" in M Horvath and J Brown (eds), *Rape: Challenging contemporary Thinking – 10 years on* (2023), pp 203-217, 212.

Chapter 13: Radical reform

BACKGROUND

13.1 Throughout our work, stakeholders have been concerned that this project will form part of a long series of reviews and recommendations which tinker with sexual offences trials, creating a perception of change but without having any real impact.[1] According to Munro,

> despite decades of reform, meaningful progress in respect of rape justice has been painfully slow, with survivors often continuing to recount journeys marked by scepticism, disempowerment, re-traumatisation, and disillusionment.[2]

13.2 The Dorrian Review similarly observed that despite the passage of time since the introduction of the first "rape shield" legislation, "without profound reform there is a real possibility that our successors will be examining the same issues forty years hence".[3]

13.3 We are also concerned that the problems identified, particularly those relating to myths and misconceptions, are so intractable and ingrained that they may not be susceptible to resolution by our provisional proposals.

13.4 In our view, these concerns justify considering options for more radical reforms to sexual offences trials; these options have been raised with us as serious proposals, so we are dutybound to consider their use in this context. We will therefore consider five broad proposals for more significantly altering the criminal trial process for sexual offences. The first is to introduce specialist examiners and therefore to remove the examination of complainants from barristers. The second is to establish a specialist court for sexual offences. The third is to use rape myth acceptance scales to screen or train jurors. The fourth is to require reasoned verdicts. The fifth is to remove juries from sexual offences cases altogether.

13.5 Given the contentious nature of the issues and the limited feedback we have received from stakeholders, we make no provisional proposals for reform in this chapter. We instead ask open questions throughout. Where we take the view that some models are not viable, we have stated this, and ask whether consultees agree. Similarly, we ask whether consultees agree with a provisional conclusion we have reached in relation to one potential reform.

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1 See Appendix 1 for a history of reviews in this field.

2 V Munro, A Circle that Cannot be Squared? Survivor Confidence in an Adversarial Justice System, in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (2023) p 214.

3 The Rt Hon Lady Dorrian, *Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (Scottish Courts and Tribunals Service, March 2021) ("Dorrian Review") para 5.52.

SPECIALISATION

European Convention on Human Rights ("ECHR")

13.6 Article 6(3)(d) of the ECHR provides that anyone charged with a criminal offence has the right to:

> examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

In Chapter 7 and Appendix 2, we note that the European Court of Human Rights ("ECtHR") has found various measures which aim to facilitate the participation of complainants to be compliant with this provision, including giving evidence by live link and pre-recorded interviews. The ECtHR has recognised that special measures may be used to protect complainants' rights to respect for their private lives under article 8 of the ECHR.

13.7 In the case of *SN v Sweden*,[4] the applicant, who had been convicted of sexual offences, argued that article 6(3)(d) had been breached where the child complainant was only asked questions by a police officer, but never by the applicant's lawyer.[5] Nonetheless, the applicant's lawyer was able to ask for specific questions to be put to the complainant. The ECtHR ruled that this procedure did not violate the defendant's right to have the witness examined, and therefore was consistent with a trial which was fair overall.[6] The Court held that article 6(3)(d) "cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means".[7] As long as, when viewed as a whole, the defendant is able to challenge the complainant's account and credibility, then the defendant's lawyer being unable to examine the complainant personally will not be a breach of the defendant's right to a fair trial under article 6.

13.8 We have considered the fundamental importance of each element of a fair trial under article 6 of the ECHR, while also considering the need to protect complainants under article 8. We do not believe that the proposals considered below would infringe article 6, despite going beyond the measures considered previously in Chapter 7. They may assist in meeting the obligations to complainants under article 8 ECHR.

Specialist examiners

13.9 As Munro explains,

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4 *SN v Sweden* App No 34209/96 (2004) 39 EHRR 12.

5 The ECtHR accepted that the lawyer would have had no realistic opportunity of putting questions to the complainant because, under Swedish law, children have to be interviewed by someone with special training and children under 15 are overwhelmingly not called to appear at trial. Any exceptions were cases where the prosecution had asked for the presence of the children. See *SN v Sweden* (2004) 39 EHRR 12 at [26], [48].

6 *SN v Sweden* (2004) 39 EHRR 12. See A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 455.

7 *SN v Sweden* (2004) 39 EHRR 12 at [52].

it has been accepted that combative modes of adversarial engagement, which have become the conventional mechanism through which truth is excavated within the trial process, can do a disservice to traumatised or vulnerable participants.[8]

13.10 This highlights the fear that the process of defence counsel cross-examining complainants carries an inescapable risk of retraumatisation and harm. This concern justifies considering the use of specialist examiners to interview complainants rather than counsel, as suggested by Cossins. Aside from this risk, as we explored in Chapter 9, there may also be circumstances where myths and misconceptions are relied on in cross-examination.

13.11 Much of the law and commentary which we examine below relates to existing models of interviewing children and young people. These examples illustrate that there are contexts where the interests of justice require changes to usual practice, and they can also provide a useful basis for considering the practicalities of alternative provision for certain witnesses. Further, some of the concerns are similar, for example, concerns about the ability of complainants to recount events coherently and chronologically, though for children and young people this may be for developmental reasons rather than (or as well as) trauma.

13.12 We have borne in mind the significant differences which exist when considering provisions for adult complainants as compared to children, which include the extent to which trauma-informed practices could ameliorate the difficulties for adult complainants giving evidence while inherent developmental differences with children cannot be resolved in the same way.

Current law

Intermediaries

13.13 We invite views on intermediaries in Chapter 7 at paragraph 7.239.

13.14 In 1989, before the introduction of intermediaries in their current form, the Pigot Report[9] recommended that an "interlocutor" should be used in exceptional cases relating to children. This would be a third party through whom questions would be relayed.[10] The report recommended:

> 2.32… the judge's discretion… should extend where necessary to allowing the relaying of questions from counsel through the paediatrician, child psychiatrist, social worker or person who enjoys the child's confidence. In these circumstances nobody except for the trusted party would be visible to the child, although everyone with an interest would be able to communicate, indirectly, though the interlocutor.
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> 2.33 We recognise that this would be a substantial change and we realise that there will be unease at the prospect of interposing a third party between advocate and

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8 V Munro, A Circle that Cannot be Squared? Survivor Confidence in an Adversarial Justice System, in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (2023) p 208.

9 Home Office, *Report of the Advisory Group on Video Evidence* (1989) ("Pigot Report").

10 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 352.

witness. Clearly, some of the advocate's forensic skills, timing, intonation and the rest would be lost, and it is of course possible that a child might be confused by being subjected to testing questioning from someone regarded as a friend.[11]

13.15 While this recommendation was not implemented, the subsequent report *Speaking Up for Justice* considered a role for a communicator or intermediary, which would be more limited but could assist adults as well as children. This report gave rise to special measures in the Youth Justice and Criminal Evidence Act 1999 ("YJCEA 1999"), including intermediaries under section 29.[12]

13.16 Intermediaries were first used in 2004, and subsequently rolled out to all areas in England and Wales in 2007.[13] Section 29(1) of the YJCEA 1999 allows for examination "to be conducted through" an intermediary. Under section 29(2) of the YJCEA 1999, intermediaries may communicate with the witness on behalf of the court, by interpreting "questions put to the witness" and communicating "to any persons asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question".[14]

13.17 In practice, however, intermediaries usually have an advisory role only.[15] The Ministry of Justice and National Police Chiefs' Council Guidance on Achieving Best Evidence in Criminal Proceedings ("the ABE Guidance"), says that intermediaries explaining questions and answers "rarely happens in practice". Instead, intermediaries advise on how questions should be asked, and then intervene if there is a risk of miscommunication. For the initial interview, the ABE Guidance is clear that "the intermediary is there only to assist communication and understanding – they are not allowed to take on the function of investigator".[16] The orthodox statutory position is nevertheless given in Appendix B to the ABE Guidance, which notes that "certain vulnerable witnesses may give evidence through an intermediary", including during investigative interviews.[17] In court, the intermediary is allowed to explain questions and answers to enable communication, but does not decide what questions to put to the witness.[18]

13.18 Responding to an Australian Royal Commission, a Registered Intermediary ("RI") in England and Wales described her role as "passive" during interview, but more "advisory" during a trial, including alerting the judge to a risk of a communication

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11 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 352, citing the Pigot Report (1989).

12 Above, 352.

13 Above, 355.

14 Youth Justice and Criminal Evidence Act ("YJCEA") 1999, s 29(2).

15 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 354.

16 Ministry of Justice and National Police Chiefs' Council, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* ("ABE Guidance 2022") (4th ed 2022) para 2.215.

17 ABE Guidance 2022, Appendix B, para B.9.27.

18 ABE Guidance 2022, Appendix B, para B.9.29.

breakdown. The judge might then ask for assistance in rephrasing the question, but it is always counsel who puts the question to the witness rather than the intermediary.[19]

Cross-examination

13.19 According to commentators, it is now recognised in England and Wales that questioning witnesses who are in need of assistance when giving evidence is a specialist skill.[20] Traditional "robust" cross-examination does not guarantee best evidence and risks traumatisation of the witness.[21] In *R v Lubemba*,[22] the Court of Appeal set out the modern expectations of advocates.

> … It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness (see for example paragraph 3E.4 of the Criminal Practice Directions).[23]

13.20 As we saw in Chapter 9 at paragraph 9.84, the Court of Appeal in *Lubemba* explained that the Criminal Practice Directions ("CrPD") recognise that a court may restrict an advocate from putting their case to a vulnerable witness.

13.21 In the more recent case of *Mark Le Brocq v Liverpool Crown Court*,[24] the Court of Appeal dealt with a wasted costs order imposed upon a defence barrister who in his closing speech had inappropriately criticised limitations placed on his cross-examination. The Lord Chief Justice commented on the proper role of cross-examination:

> …It is too frequently overlooked that the purpose of cross-examination is to elicit evidence. It ensures that the evidence of a witness is properly tested when in conflict with the case of the party cross-examining. It is not designed to be an opportunity for theatricality nor for an advocate to demonstrate robustness in the sense of being antagonistic or as the judge put it, engaging in "aggressive, repetitive and

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19 South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia*, Report 16, September 2021 ("SALRI Report 2021") paras 3.4.14-3.4.17, quoting from Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report, August 2017) Part VII p 46.

20 As we explained in Chapter 7, people attach different meanings to the word "vulnerable". We have attempted to limit its use here except where quoting directly, and where necessary for context. Instead, we refer to witnesses in need of assistance when giving evidence.

21 *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) ("*Rook and Ward*")28.02.

22 *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579.

23 *R v Lubemba* [2014] EWCA Crim 2064 at [45].

24 *Mark Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398, [2019] 4 WLR 108. See *Rook and Ward* (2021) 28.07.

> oppressive questioning" … The purpose of cross-examination is not to discomfort, harass or abuse a witness for the sake of it.[25]

13.22 Furthermore, as we saw in Chapter 9 at paragraph 9.85, in *R v Dinc*[26] the Court of Appeal reaffirmed that the judge controlling cross-examination or requiring a list of questions in advance is not inherently unfair, and in fact may ensure that cross-examination is more focussed and effective.[27] The courts are however aware of "the potential for prejudice if a defence advocate is wrongly prevented from pursuing a legitimate line of questioning."[28]

Trauma-informed approach

13.23 The Equal Treatment Bench Book confirms that the court has a responsibility to safeguard the interests of adults requiring support.[29] The best interests of the witness are paramount when it comes to decisions about pre-trial therapy,[30] and the court should adapt normal trial procedure to facilitate effective participation of witnesses by taking "every reasonable step".[31] There is a recommendation that a named individual has responsibility for the welfare of vulnerable people during a hearing, and that person should have a line of communication to the judge.[32] It is clear that the court is expected to be flexible:

> Just because a change does not coincide with the way we have always done things does not mean that it should be rejected… Do proposed changes cause unfair prejudice to the defendant? If so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective.[33]

13.24 Some examples of this flexible approach given in the Equal Treatment Bench Book include allowing RIs to relay answers to the court where witnesses would only whisper, or to relay answers where a witness gave evidence with her back to the live link camera.[34]

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25 *Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398 at [62].

26 *R v Dinc* [2017] EWCA Crim 1206, [2018] Crim LR 263.

27 *Rook and Ward* (2021) 28.25.

28 *R v Dinc* [2017] EWCA Crim 1206, [2018] Crim LR 263.

29 Judicial College, *The Equal Treatment Bench Book* (July 2022), para 2-28.

30 Above, para 2-31.

31 Above, para 2-41 and Criminal Procedure Rules ("CrPR"), r 3.8(3). See A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 427.

32 Judicial College, *The Equal Treatment Bench Book* (July 2022), para 2-30. See A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 580.

33 Judicial College, *The Equal Treatment Bench Book* (July 2022), para 2-44, citing the then-Lord Chief Justice, Lord Judge, in the 2013 Toulmin Lecture. See A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 580.

34 Judicial College, *The Equal Treatment Bench Book* (July 2022), para 2-183. See A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 581.

13.25 The Inns of Court College of Advocacy ("ICCA") delivers specialist training on examining witnesses in need of assistance when giving evidence, which Rook and Ward report as having been undertaken by approximately two thirds of criminal advocates.[35] The first principle of ICCA's 20 Principles of Questioning is that a Ground Rules Hearing ("GRH") is sacrosanct.[36] The Criminal Procedure Rules ("CrPR") govern GRHs. At a GRH, the scope and length of cross-examination can be confirmed. The judge will decide whether there will be an intermediary, their role, and how they should intervene if required.[37] Advocates may be expected to provide a list of cross-examination questions to the judge, which may be shared with the intermediary.[38] More detail on GRHs can be found in Chapter 7 at paragraphs 7.84-7.100.

13.26 There are many additional sources of guidance on examining witnesses in need of assistance when giving evidence,[39] which include toolkits accessible via the Advocate's Gateway,[40] training videos,[41] the CrPR and CrPD, and guidance from the Judicial College.[42]

13.27 The ABE Guidance contains advice on interviewing witnesses in need of assistance, including complainants of sexual offences. It says that a "trauma-informed approach" should be used, which includes consideration of how trauma could affect the emotional wellbeing, behaviour and memory of witnesses.[43] It is important to create a "safe and non-judgmental interview environment for the witness", so that the interview itself does not reinforce any abusive experiences.[44]

13.28 The ABE Guidance recognises that the main interviewer in a video-recorded interview needs "a special blend of skills". They should be able to establish rapport, communicate effectively with distressed witnesses, and understand the rules of evidence.[45] As "a person's perceived authority can have an adverse effect on the witness, especially with regard to suggestibility",[46] interviewers should consider how they present themselves.

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35 *Rook and Ward* (2021) 28.09, citing communication with the Bar Council.

36 Above, 28.46.

37 CrPR, r 3.8(7). See *Rook and Ward* (2021) 28.47-28.50.

38 *Rook and Ward* (2021) 28.50.

39 Above, 28.12.

40 The toolkits are available online at www.theadvocatesgateway.org.

41 Eg *A Question of Practice*, available online at Questioning Young and/or Vulnerable Witnesses – Criminal Bar Association, produced by the Criminal Bar Association, the Advocacy Training Council, the Crown Prosecution Service ("CPS") and the National Society for the Prevention of Cruelty to Children.

42 Eg Judicial College, *Bench Checklist: Young Witness Cases* (2012).

43 ABE Guidance 2022, paras 2.24-2.25.

44 Above, para 2.124.

45 Above, para 2.193.

46 Above, para 2.198.

13.29 Interviews should proceed at the witness's pace, including taking breaks and potentially spanning multiple sessions.[47] While extensive rapport-building might be needed, this should be documented to avoid suggestions of witness coaching.[48] The ABE Guidance also notes that trauma can interfere with memory, and that the risk of memory contamination increases with delay.[49]

13.30 Overall, "the basic goal of an interview with a witness is to obtain an accurate and reliable account in a way that is fair, is in the witness's interests and is acceptable to the court."[50] To achieve this, the ABE Guidance recommends an interview in four phases: establishing rapport; initiating and supporting a free narrative account; questioning; and closure.[51]

The Lighthouse

13.31 Following a 2016 report by the then Children's Commissioner Anne Longfield,[52] the UK's first "Child House" based on the Icelandic model of taking evidence from children[53] was set up in Camden, in London, and continues to operate. Named "The Lighthouse", it aims to offer support from multiple agencies to children and young people who are victims of sexual abuse. This includes provisions "to help ensure that children are provided with opportunities to give audio-visually recorded evidence in an emotionally and physically safe and conducive environment by staff with specific training in forensic interviewing."[54] Achieving Best Evidence ("ABE") interviews may be carried out by clinical psychologists.

13.32 It is recognised that this marks:

> a significant change from the interview being primarily police-led in a police interviewing room to being led by a specially trained clinical psychologist at the Lighthouse. The aim of this is to reduce the chance of retraumatisation and to improve the quality and consistency of these interviews.[55]

13.33 In more detail:

> [t]he ABE interview is audio and video recorded in a comfortable interview room at the Lighthouse… the clinical psychologists carry out a pre-interview assessment prior to undertaking the forensic interview later that day… The officer in the case (the police officer leading the investigation) works closely with the clinical

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47 ABE Guidance 2022, paras 2.234-2.236.

48 Above, paras 2.270-2.271.

49 Above, para 2.231.

50 Above, para 3.1.

51 Above, para 3.4.

52 A Longfield, *Barnahus: Improving the response to child sexual abuse in England* (2016).

53 This is discussed in more detail at paragraphs 13.66-13.69.

54 Home Office, Local Partnerships Guidance on the Child House Model of Multi-Agency Support to Children and Young People who have Experienced Sexual Abuse (September 2021), p 19.

55 Mayor's Office for Policing and Crime ("MOPAC"), Child House in a Box Toolkit (September 2022), para 11.56.

psychologist to agree the points to prove, supervises the interview and remains accountable for the interview throughout. A social worker may also observe the interview from a different room, by video link. Following the interview, the clinical psychologist completes an interview record and a form (MG11) setting out what support might be helpful in court.[56]

Stakeholders' views

13.34 An individual member of the judiciary told us that ABE investigators do not ask the most relevant questions, because they don't want to question the complainant's account. However, it would be better for any potential inconsistencies to come out at the ABE stage while the complainant is more relaxed, than for this to occur for the first time during cross-examination. The judge therefore suggested a system of follow-up ABE interviews, potentially with a more senior officer, to address any questions arising out of the original interview. This would allow the complainant to respond by tackling issues head-on, rather than them being framed negatively at trial, so would be fairer to the complainant. She also suggested that this practice would result in better answers, as complainants prepare for ABEs on the basis that the police are on their side and for cross-examination on the basis that defence barristers are against them, no matter how sensitively cross-examination is conducted.

13.35 A Recorder told us that she believed that even obligatory GRHs were not taken seriously and were rushed. She added that practitioners participate in GRHs on the basis that they already understand how to question a witness and what the rules should be. This is despite the lack of training for the judiciary and advocates about the most common mental disorders, or the impact of learning disabilities. An academic added that there needs to be a more trauma-informed approach taken throughout the criminal justice system, given that trauma affects everybody in different ways and so the behaviour of witnesses might indicate a response to trauma rather than lies.

13.36 Views on the use of pre-recorded cross-examination under section 28 of the YJCEA 1999 are explored in more depth in Chapter 7 at paragraphs 7.110 – 7.139. A victim and campaigner suggested that pre-recording cross-examination could be better for traumatised complainants, because it makes the process of giving evidence more controllable than at trial. Additionally, the former Victims' Commissioner Dame Vera Baird (speaking while she was the Victims' Commissioner) told us that section 28 is a positive step because it allows for taking all of the complainant's evidence at an earlier stage, when their memory is better.

13.37 However, some judges were less in favour of section 28. One commented that pre-recorded cross-examination is better suited to children, where it can helpfully lead to shorter and well-focussed cross-examinations. However, for adults who are capable of robust examination it will not save time. He also raised the prospect of defendants seeking new counsel at trial, where a different defence barrister would therefore seek to cross-examine differently. Another judge expressed the view that the use of section 28 neuters the process of cross-examination.

13.38 A third judge expressed the fear that if questions are controlled and sensitive, the jury might take the view that the complainant has not been properly tested on their

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[56] MOPAC, Child House in a Box Toolkit (September 2022), para 11.58.

evidence, so the jury will "do it themselves". This could lead to speculation and hypothesising that there are credibility issues in relation to the complainant which are not apparent on the facts of the case. She also took the view that cross-examination and re-examination should not both occur at the same time, as they are separate processes. It is confusing both to test the complainant and clarify their position for the prosecution in the same session.

Inspections, reviews and academic commentary

13.39 Cossins has forcefully argued for a "trauma-informed approach" to be adopted when obtaining complainants' evidence.[57] This system would "recognis[e] that its clients or participants are psychologically vulnerable, so that root and branch cultural change is required"[58] in order to deal with the "environmental trauma triggers that exist within the sexual assault trial and have the potential to undermine a complainant's ability to give her best evidence."[59]

13.40 Cossins recognises that a criminal trial cannot have a goal of helping complainants to recover from trauma,[60] and that legal personnel will not be able to identify specific mental health conditions such as PTSD. Nonetheless, as the phenomenon of retraumatisation is likely to impact complainants' mental health,[61] "best practice would treat all complainants of sexual assault as trauma survivors".[62] The guiding principle should be one of aiming "to do *no further harm*" to complainants' mental health.[63]

13.41 She also justifies her conclusions on the basis of the public interest in achieving best evidence:

> If… oral evidence can become inconsistent, skewed or inaccurate because of the *method* used to elicit that evidence during cross-examination, then the legitimate public interest in the goals of justice in relation to sexual assault are undermined.[64]

13.42 She is concerned that the types of evidence given when a complainant is unable to regulate the effects of trauma are likely to lead to fact-finders (whether juries or judges) interpreting the evidence negatively.[65] The symptoms of trauma, which can include impeded communication and issues with concentration, comprehension, and memory, are the very aspects of a complainant's evidence which can be "exploited by

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57 See Chapters 9-12 of A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020).

58 Above, p 436.

59 Above, p 533.

60 Above, p 535.

61 Above, p 539.

62 Above, p 560. She does not explicitly explain how this complies with the presumption of innocence, but as long as the jury is directed that the complainant's treatment does not affect their credibility and applies to all complainants of sexual offences, then the presumption of innocence will not be undermined (this is the same premise as is applied to special measures).

63 Above, p 539 (emphasis in original).

64 Above, p 438 (emphasis in original).

65 Above, p 544.

defence counsel and misinterpreted by the fact-finder as evidence of lack of veracity".[66] She regards the root of the problem as:

> the inherent culture of adversarialism which is to beat one's opponent, such that tactics designed to confuse and/or trap a witness into giving inconsistent evidence are long-accepted traditions.[67]

13.43 While noting the cultural change in cross-examination which has occurred due to the use of intermediaries, Cossins is sceptical of their current potential to do enough. She notes the absence of empirical research into how effectively intermediaries assess communication needs, and how the presence of an intermediary affects jurors' perceptions.[68] She is also concerned that the role is passive, as "without judicial cooperation, the intermediary's intervention would fail".[69]

13.44 Based on these concerns, Cossins suggests that:

> a wider role for intermediaries could be envisaged in order to remove the power differential between examiner and complainant. This might mean the intermediary becoming an advocate for protecting the complainant from abusive strategies within the adversarial trial or the intermediary becoming the examiner.[70]

13.45 Ultimately, she concludes that "[t]he use of a specialist examiner is the only way to ensure the necessary conditions of reliability when a vulnerable witness is being cross-examined on their evidence".[71] Specialist examiners would assess the communication abilities of a witness, vet defence questions, and then conduct the examination. Vetting would ensure that the questions align with trauma-informed principles and minimise retraumatisation.[72]

13.46 In her view, this proposed system would not impede the defendant's right to a fair trial, as the right to cross-examine is not absolute and cannot extend to attempts to produce inaccurate evidence. If the goal of cross-examination is to test the accuracy of the account given by the witness, this cannot be met when the process of questioning itself contaminates the evidence.[73]

13.47 Munro has also expressed concerns that, despite changes to cross-examination, "rape complainants continue to find the process extremely distressing". Questions which impugn their character or credibility "not only contribut[e] to complainants' sense of not having had the opportunity to tell their story, but to an experience of being

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66 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 547.

67 Above, p 469.

68 Above, p 463.

69 Above, p 613.

70 Above, p 565.

71 Above, p 613.

72 Above, p 587.

73 Above, p 614.

humiliated or revictimized within the courtroom."[74] She notes that a key factor which affects survivor confidence in the justice system:

> has been the extent to which complainants are able, or anticipate being able, to tell their story in court… it is also bound up with the formats of adversarial testimony-giving, where witnesses provide direct answers to questions sequenced by counsel, rather than having an opportunity to give an account in which they determine the scope, relevance and ordering.[75]

13.48 She therefore expresses concern that:

> efforts to shift the tone of cross-examination may always be apt to underwhelm unless we confront the background norms and dynamics of adversarialism, which encourage counsel to myopically present, through combative tactics as required, competing – and in rape cases, often polarised – accounts of what took place and of who is responsible.[76]

13.49 She has not, however, expressed the view that specialist examiners are necessary to resolve these issues.

13.50 As we explained in Chapter 9 at paragraph 9.28, there is dispute as to the extent of these tactics in modern practice.

13.51 According to Rook and Ward, while some advocates have started to master the requisite skills for interviewing witnesses in need of assistance, there are still concerns that best practice is not universally adopted.[77] A report from the NSPCC in 2018 concluded that the ability to deal with witnesses is improving, but "there is still a long way to go… the gap between the best and poorest advocacy is wider than it has ever been."[78]

13.52 In the view of Cooper and Mattison, "[u]nderstanding the specific needs and abilities of a vulnerable person is not something advocacy training can address."[79] They also note that intermediaries are not a panacea, due to the:

> issues which affect communication and participation which are outside the role's sphere of influence… an intermediary cannot mitigate the delay between an investigative interview taking place and a witness being cross-examined in court.[80]

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74 V Munro, "A Circle That Cannot Be Squared? Survivor Confidence in an Adversarial Justice System", in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking – Ten Years On* (2023) p 211.

75 Above, p 210.

76 Above, p 212.

77 *Rook and Ward* (2021) 28.05.

78 Above, 28.11, quoting NSPCC Update 2018.

79 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 364.

80 Above, 365.

13.53 Ultimately, Cooper and Mattison take the view that "the intermediary role continues to garner the support of police, judges and lawyers."[81] However, they are concerned that "[a]t present, there is a distinct lack of empirical research into the intermediary role, which limits the scope for rigorous evaluation, and indeed development, of the role".[82] They also note that:

> [i]t is striking how little research has been conducted into the completeness, accuracy and coherence of the evidence that intermediaries facilitate. There is huge potential for intermediary schemes to be used more widely in the pursuit of access to justice for vulnerable people in forensic investigations and hearings. However, justification for the ensuing costs may prove to be elusive without the backing of a substantial body of scientific research demonstrating a positive impact on the quality of a vulnerable person's evidence.[83]

13.54 Therefore, while they are supportive of the prospect of widening the role of intermediaries, the lack of evidential basis for this is a barrier.

13.55 An evaluation of outcomes from The Lighthouse was carried out, which included an analysis of criminal justice outcomes by comparing statistics with cases of child sexual abuse from North East London ("NEL") which had not gone through The Lighthouse. The Report found that:

> [e]xamining the two key outcomes (i.e., charge and conviction) there was almost no difference between the two groups. The Lighthouse cases had 7% (n=6) cases charged by the CPS [Crown Prosecution Service] and a 5% (n=4) conviction rate; compared to NEL who had 6% (n=4) charged by the CPS and a 4% (n=3) conviction rate. These results were not significantly different and further illustrate the very low levels of charge and conviction in such cases potentially pointing to a wider criminal justice issue.[84]

13.56 However, The Lighthouse had a slightly lower rate of complainant withdrawal and a higher proportion of cases submitted to the CPS for a charging decision than NEL cases.[85]

Comparative law

Scotland

13.57 The Dorrian Review took the view that the experience of complainants can be improved by adopting trauma-informed practices as sexual offence complainants face a higher risk of retraumatisation via the criminal justice system than victims of other crimes.[86] This would require complainants to give testimony in a context where

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81 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 366.

82 Above, 364.

83 Above, 367.

84 MOPAC, Evidence & Insight: The Lighthouse Final Evaluation Report (June 2021), p 44.

85 Above, p 45.

86 Dorrian Review (2021), para x.

additional stress is minimised, and personnel are guided by the principle of "do no harm".[87]

13.58 In Scotland, the Criminal Procedure (Scotland) Act 1995 provides for the special measure of taking evidence by a commissioner.[88] Here, evidence is pre-recorded and then played in court. According to the Dorrian Review the aim of this is to take evidence at an earlier stage, which will ensure best evidence and reduce trauma.[89] The witness can be questioned by both the prosecution and the defence, and the sessions are presided over by a commissioner, who is a judge. The commissioner is the ultimate decision-maker on permissible questions.

13.59 Before the evidence is taken, a GRH must occur to deal with practical arrangements. These include the best location and environment for recording, timings, the lines of enquiry to be pursued, the form of questions to be asked, and the extent to which the defence case will be put to the witness.[90]

13.60 During evidence taken by commissioner, the accused is not present but is entitled to watch and hear.[91] The court might ask the parties to prepare their questions in writing, but this will not necessarily preclude other questions as the expectation is that counsel will act in accordance with their professional responsibilities. It might sometimes be appropriate for an examining psychologist to be shown the proposed questions, so that they can give a view on the appropriate format. Overall, the examination is expected to be as quick and straightforward as possible, with regard paid to the best interests of the witness.[92]

13.61 Despite judges being motivated to make "evidence on commission" successful, examples of "poor and inappropriate practice" were still said to be too common.[93] The Dorrian Review therefore recommended the establishment of a specialised sexual offences court, where judges, staff, prosecutors and defence lawyers would be trained in depth by programmes to recognise and avoid retraumatisation.[94] At the end of 2019, a pilot was launched in Scotland for video-recorded interviewing, which used specially trained police officers known as sexual offences liaison officers ("SOLOs"). The bespoke training included cognitive interview methods, trauma-informed interviewing, forensic awareness, and how to obtain, present and test best evidence.[95]

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87 Dorrian Review (2021), para 3.29.

88 Criminal Procedure (Scotland) Act 1995, s 271I, amended by the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

89 Dorrian Review (2021), para ix.

90 Criminal Procedure (Scotland) Act 1995, s 271I(1ZD). See High Court of Justiciary Practice Note No.1 of 2017.

91 Criminal Procedure (Scotland) Act 1995, s 271I(3).

92 See High Court of Justiciary Practice Note No.1 of 2019.

93 Dorrian Review (2021), para 3.8.

94 Above, para 3.10.

95 Above, para 2.12.

Ireland

13.62 The O'Malley Review examined the role of intermediaries in Ireland, and concluded that a system like that in England and Wales, where the questioning at trial is conducted by the lawyer:

> seems like a more effective and acceptable model than one in which the intermediary is actively involved in putting questions to a witness at trial. The essential structure of the trial process remains intact, but both lawyers and judges have the benefit of expert advice in advance as to the most appropriate way of phrasing questions.[96]

13.63 Nonetheless, the Review considered it appropriate to retain the provision in section 14 of the Criminal Evidence Act 1992, which allows for the court to direct that any questions for a witness should be put through an intermediary, in case it would be advantageous for an intermediary to play a more active role.[97]

Israel

13.64 In Israel, "youth investigators"[98] have a very broad role, and are the only people permitted to question children and some specified adult witnesses.[99] They determine whether a child has competence as a witness and any relevant special measures. Children under the age of 14 are not subject to cross-examination, and instead the investigators relay the child's evidence to the court as a form of hearsay, with an explanation of why the child is not testifying.[100] No one may be convicted on an uncorroborated account of an investigator. If a witness is not permitted to testify, defence counsel can only challenge their account by testing the investigator's assessment of the witness's reliability.[101]

South Africa

13.65 In South Africa, there has been provision for intermediaries for child witnesses since 1993.[102] This role is relatively broad, with the intermediary communicating questions to the child witness and then communicating answers back to the court. Both the witness and the intermediary are located in a room outside the court, and the intermediary hears questions through an earpiece. The court can observe the witnesses, while the witnesses cannot see or hear what is happening in court.[103] This

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96 T O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (July 2020) ("O'Malley Review") para 8.15.

97 O'Malley Review (2020), para 8.15.

98 Law of Evidence Revision (Protection of Children) 1955 (Israel), s 9.

99 Tasmanian Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?*, Report 23, January 2018 ("TLRI Report 2018"), para 4.3.6.

100 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 454.

101 TLRI Report 2018, para 4.3.7.

102 Criminal Procedure Act 1977 (RSA), s 170A.

103 TLRI Report 2018, para 4.3.5.

system arose in part to eliminate misunderstandings arising through miscommunications in a country with multiple official and spoken languages.[104]

Norway

13.66 Norway deploys what is known as the "Barnahus model", or the Children's House model. All children under the age of 14 have their evidence recorded by an independent qualified expert, who will normally be a police officer. Questioning occurs under the control of a judge, who watches via CCTV along with the prosecutor and defence lawyers. The judge, prosecution and defence can ask the interviewer to put further matters to the child, and the interviewer then devises the appropriate questions. There is no separate cross-examination and the video then forms the child's complete evidence.[105] If the child is over the age of 15 the interview is conducted at the courthouse, but specialist interviewers still have sole responsibility.[106]

13.67 The interviewers are trained in procedures for eliciting complete and accurate evidence.[107] For children over the age of seven, police officers must have completed a 3-year bachelor's degree, a master's degree and a 1-year interviewing course. An additional year of training is required for interviewing children under the age of seven.[108]

13.68 The Norwegian approach is based upon the Icelandic model, established in 1998, where the investigative interviews are conducted by psychotherapists trained in forensic interviewing.[109] It is this model on which The Lighthouse in Camden is based, discussed above at paragraphs 13.31 to 13.33.

13.69 As we noted above, the ECtHR has ruled that a similar model in Sweden is compliant with article 6 ECHR.

Australia

13.70 The South Australia Law Reform Institute ("SALRI") conducted a review of communication assistance, where it noted a variance between jurisdictions in whether the role of intermediaries (who they term "communication partners") is to advise, intervene or interpret.[110] The SALRI Report split intermediaries into two broad models – one as a passive translator, and one with an advisory or interventionist role.[111] SALRI summarised various concerns raised about the role of interventionist intermediaries, which are that:

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104 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 453.

105 Above, p 454.

106 TLRI Report 2018, para 4.3.10.

107 Above, para 4.3.12.

108 Above, n 331.

109 Above, paras 4.3.15-4.3.16.

110 SALRI Report 2021, p xvi, n 83.

111 Above, para 15.1.3.

(1) the role undermines adversarialism;

(2) the role of counsel is usurped;

(3) the evidence of witnesses could be contaminated;

(4) the role adds little as modern judges and lawyers are well-equipped to deal with witnesses in need of assistance; and

(5) there is a risk of undermining the accused's right to a fair trial.[112]

13.71 While SALRI was told that counsel underwent significant training, it was also told by other respondents that not all lawyers could communicate as effectively as they believed.[113] Further, in its view, fears of undermining a fair trial or the adversarial process were unjustified, as the role of the intermediary:

> is not to convince a jury either way as to the credibility of the witness, but merely to ensure that they are questioned in a forensically safe way so as to preserve the accuracy and reliability of their evidence.[114]

13.72 The Tasmanian Law Reform Institute ("TLRI") also considered communication assistants. TLRI was concerned that:

> the conventions of cross-examination are so entrenched in, and intrinsic to, the adversarial trial and to conceptions of what fair trial principles demand, that they actually prevent trial judges and counsel from recognising or rejecting questioning that is unfair to people with communication needs. Lawyers' and judges' perceptions of proper questioning derive from long accepted adversarial tactics. These perceptions and the conventions that drive them are often in direct conflict with research findings concerning the types of questioning that are particularly inimical to eliciting evidence from children and witnesses with cognitive impairments fairly and to the best of their ability.[115]

However, TLRI suggests that one way of overcoming this is via pre-recorded evidence, as this promotes discussion about questioning both in advance and at the time of it occurring.[116]

13.73 TLRI took the view that the impact of intermediaries is positive when compared to relying purely on counsel or judges to deal with witnesses in need of assistance. Intermediaries are in a better position to know the individual witness, so can ensure that questioning is appropriate for that specific person.[117] However, it also noted

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112 SALRI Report 2021, p xx.

113 Above, n 121.

114 Above, para 3.6.2, quoting N Antolak-Saper and H MacPherson, "Vulnerable Witnesses and Victoria's Intermediary Pilot Program" (2019) 43 *Criminal Law Journal* 325, 355.

115 TLRI Report 2018, para 3.4.3.

116 Above, para 3.4.21.

117 Above, para 4.4.5.

ongoing concerns which include judicial over-reliance on intermediaries; deficits in intermediary interventions; and counsel failing to stick to agreed procedure.[118]

13.74 TLRI considered that:

> [g]iven the twin threats that inappropriate questioning poses to the quality of evidence and the well-being of people with communication needs, the question should now be considered whether there should be a requirement for those involved in the questioning of these people to be 'prequalified' in the proper techniques for doing so.[119] In Western Australia, a person can be appointed by the court to communicate and explain questions put to a child, and then to explain to the court the evidence given by a child.[120] However, this is rarely used,[121] and the role is interpretative, rather than interventionist or advisory.[122]

13.75 In South Australia, communication partners are used to ensure that communication with witnesses is as complete, accurate and coherent as possible.[123] These are volunteers approved by the court, who are given training by a non-governmental organisation. They must take an oath to communicate accurately with the witness and the court, but they do not otherwise owe duties to the court.[124]

13.76 In New South Wales, intermediaries have a duty to facilitate communication with the witness, to provide best evidence.[125] Their role is to communicate questions and provide answers, as well as explaining the questions and answers.[126] However, this interventionist approach occurs infrequently in practice. The relevant guidance advises that advocates are given an opportunity to rephrase questions before intermediaries do so.[127] Instead, the intermediary should intervene "only as necessary, in line with their statutory role and in accordance with any pre-trial directions".[128] Despite the statute, they are told that their role is not to put questions directly to the witness.[129]

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118 TLRI Report 2018, para 4.4.7.

119 Above, para 5.2.70.

120 Evidence Act 1906 (WA), s 106F.

121 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 458.

122 SALRI Report 2021, para 3.4.12.

123 Evidence Act 1929 (SA), s 14A.

124 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 458.

125 Above, p 460.

126 Above p 460, citing Criminal Procedure Act 1986 (NSW), sch 2 pt 29 s 88(1).

127 Above p 460, citing Victims Services, NSW Department of Justice, *Children's Champion (Witness Intermediary) Procedural Guidance Manual* (2016) at p 25.

128 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 460, citing Victims Services, NSW Department of Justice, *Children's Champion (Witness Intermediary) Procedural Guidance Manual* (2016) at p 17.

129 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 461.

13.77 In Victoria, intermediaries[130] take an active role by signalling to the judge when a question might be inappropriately phrased due to the particular communication needs of the witness.[131]

13.78 In Tasmania, TLRI recommended that consideration be given to establishing the Norwegian-style Barnahus approach, with all of the evidence of people with communication needs being elicited in judicially-supervised forensic interviews. It concluded that:

> [t]he Norwegian Barnehus model probably represents the optimum approach to enabling people with communication needs to participate to the best of their ability in the criminal justice process, yet enabling their evidence to be tested fully.[132]

13.79 However, it stopped short of directly recommending this model, given the major change this would represent. TLRI recognised that this was a long-term goal, likely to take significant time to be accepted by police officers, lawyers and the judiciary.[133] It also recognised that there were likely to be serious objections to taking direct examination of witnesses out of the hands of counsel.[134]

Analysis

Would specialist examiners assist?

13.80 Using specialist examiners entails taking responsibility for examination of the complainant away from counsel for the parties, and giving it instead to a specialist examiner. The specialist examiner would not only assist with the way in which questions are put, but also with the substance of the questions themselves. Therefore, this is a move away from the classical adversarial model. It is particularly radical in the context of cross-examination, as it would take away some of the role of running the defence case away from the defendant's counsel.

13.81 The two principal interlinked justifications for this proposal are minimising trauma and achieving best evidence.

(1) Trauma: the current approach to giving evidence is retraumatising, or creates an unacceptable risk of retraumatisation. Specialist examiners could encourage collaboration and help to create a safe space for complainants, rather than reimposing power structures which take agency away from the complainant. They could give the complainant more control over their account.[135]

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130 Criminal Procedure Act 2009 (Vic), s 389I.

131 SALRI Report 2021, paras 3.4.11 and 15.6.4.

132 TLRI Report 2018, para 5.3.22.

133 Above, p xii.

134 Above, para 5.3.22.

135 As we were advised by a psychologist and by a psychotherapist, research dealing with trauma emphasises the importance of self-efficacy in helping recovery. See eg SE Hobfoll et al, "Five Essential Elements of Immediate and Mid-Term Mass Trauma Intervention: Empirical Evidence" (2007) 70(4) *Psychiatry* 283,303 and UK Trauma Council, *Complex Trauma: Evidence-based principles for the reform of children's social care* (March 2022), https://uktraumacouncil.link/documents/UKTC-ComplexTrauma-Principles.pdf, p 6.

(2) Best evidence: the current approach to giving evidence does not necessarily achieve best evidence. It ignores research about the nature of human memory, and the impact of trauma on recollections. This is exacerbated by the stress of giving evidence. Further, the culture of adversarialism encourages defence counsel to try to catch complainants out, rather than trying to achieve the most accurate information. This may contribute to wrongful acquittals.

13.82 There are therefore some general advantages to be achieved by introducing a model of specialist examiners.

(1) A focus on trauma-informed practice.

(2) An improvement in the complainant's ability to communicate.[136]

(3) The current system in England and Wales relies on judges to monitor cross-examination. Cossins has suggested that judges too may be unconsciously influenced by myths and misconceptions.[137] Reliance on judicial intervention can result in an inconsistent, ad hoc approach depending on the styles of different judges.[138] She is also concerned that judges do not intervene as often as they should due to the need for neutrality between the parties, as intervening in cross-examination may lead to an appeal if the defendant is convicted.[139] While there is some evidence that the culture in relation to complainants and cross-examination is changing, reaching an acceptable stage could take decades, especially as judges who do not intervene where appropriate are unlikely to face consequences.[140]

(4) Ensuring appropriate questioning from the outset, rather than relying on an assessment after the fact once the judge has seen how the questions have unfolded.

13.83 There are also associated disadvantages, which include the following.

(1) The cost and availability of specialist examiners, along with the cost of the associated GRHs.

(2) The closest comparator for a specialist examiner in the current system is an RI. There is a lack of evidence about the impact of RIs, in terms of jurors'

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136 SALRI found that a vulnerable person's ability to communicate can significantly improve through the use of a communication partner: SALRI Report 2021, p xxii.

137 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 428.

138 Above p 430, referring to E Henderson, "Theoretically Speaking: English Judges and Advocates Discuss the Changing Theory of Cross-Examination" [2015] *Criminal Law Review* 929, 945.

139 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 429; TLRI Report 2018, para 3.4.2.

140 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 468.

perceptions and any improvement in the quality of witness' evidence.[141] For this reason, any introduction of specialist examiners would require a pilot.

(3) Dissatisfaction with the role of RIs, who can be perceived as unwelcome additional third parties, affecting the adversarial model of justice.[142]

(4) Existing concerns with RIs, such as their presence removing the onus on judges and parties to educate themselves, are not dealt with but in fact potentially exacerbated by introducing specialist examiners.

(5) There is a risk that specialist examiners would not probe the complainant's account sufficiently to satisfy the defendant's right to fair trial, or would be perceived as not doing so, or would generate a negative perception amongst the jury about the defendant and their advocate.

(6) Statistics from evaluating the criminal justice outcomes of The Lighthouse found no difference in charges and convictions from their model of examination.[143]

13.84 The arguments in favour of specialist examiners also have more weight when it comes to children, given the need to account for stages of development, along with those who have complex communication needs. They have less weight when it comes to assessing the entire class of people who are complainants of a sexual offence. It might be possible to implement trauma-informed practices to sufficiently cater for this class, without introducing specialist examiners.

13.85 These practices would include our provisional proposals throughout this paper, such as enhanced special measures. This could also include specialist courts, discussed below at paragraphs 13.118 to 13.159.

13.86 Examination by a specialist examiner would be guided by an agreed list of questions. However, this already happens within a GRH for witnesses in need of support giving evidence. The Dorrian Review took the view that with GRHs focusing on the content and form of questions, the eventual tone and content of questions can challenge the reliability and credibility of a witness in a way which is calm, measured and respectful, even when it is defence counsel conducting cross-examination.[144] The authors of Rook and Ward comment that recent case law and the pilot of pre-recorded cross-examination has highlighted the importance of GRHs and the twin benefits of ensuring that questions are asked appropriately and that cross-examination is made effective by confining it to what is relevant.[145] ABE interviews serving as evidence in chief also mean that advocates can plan their cross-examination in detail and write out questions in full, which helps to avoid unintentionally reverting to traditional methods

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141 See eg P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 364.

142 See eg SALRI Report 2021, p xx.

143 MOPAC, Evidence & Insight: The Lighthouse Final Evaluation Report (June 2021), p 44.

144 Dorrian Review (2021), para 2.17.

145 *Rook and Ward* (2021) 28.28. For more analysis of GRHs, see Chapter 7. We have invited views on whether GRHs should be mandatory in sexual offences cases.

of questioning.[146] There is therefore some suggestion that the current system offers ways to resolve the concerns raised by Cossins. In Chapter 9 at paragraphs 9.83 to 9.98, we discuss the use of GRHs and consider their expansion in order to approve lines of questioning in all sexual offences cases. Further, in Chapter 12, we consider whether combinations of measures could have a synergistic approach, which might consequently remove the concerns about retraumatisation and the quality of evidence which are the basis for considering specialist examiners.

13.87 Additionally, as we explained in Chapter 9, the concerns about the incentives of the adversarial model and the retraumatisation of complainants may not be borne out in practice. We explained there the findings and limitations of trial observation studies which give examples of bad practice.

13.88 Williams has proposed a "fair treatment model", to supplement the existing model of achieving evidence, which she terms a "best evidence model" and regards as an improvement from "traditional" cross-examination.[147] The improvements which she recommends include the addition of welfare checks, increased interventions, and more breaks to alleviate the complainant's distress.[148] She rejects the dichotomy of "robust" and "vulnerable" witnesses and requires that the system instead accounts for the general emotional wellbeing of every witness, by implementing the lessons from training on vulnerable witnesses in all circumstances, in relation to both defendants and complainants.[149]

13.89 This model is informed by the relational theory of procedural justice, and therefore emphasises respect and dignity for participants, beyond basic civility.[150] It rejects some aspects of traditional cross-examination by prohibiting intimidation and questions which promote confusion, stereotypes, and irrelevant or inadmissible evidence.[151] While many such questions are already impermissible, Williams advocates an approach which would remove any "playing to the jury", whether or not evidential rules are complied with.[152] Consideration and introduction of Williams' fair treatment model might therefore offer an alternative route to deal with the concerns about the questioning of complainants which would otherwise justify the introduction of specialist examiners.

13.90 As we discussed in Chapter 7 at paragraph 7.21, Fairclough has drawn attention to a "humane treatment" approach to taking evidence, emphasising the principle that witnesses should not be subjected to disproportionate distress or poor treatment in the criminal justice system. She argues that a measure which helps to achieve humane treatment contributes to a valuable outcome, regardless of the impact on the quality of the witness' evidence, and thus supports a move away from purely instrumental

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146 *Rook and Ward* (2021) 28.41.

147 A Williams, *Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials*, University of the West of England PhD thesis (2020) p 9.

148 Above, p 38.

149 Above, p 39.

150 Above, p 40.

151 Above, p 43.

152 Above, p 319.

evaluations.[153] Our provisionally proposed changes to special measures might address some witnesses' needs for support while giving evidence. Further, the presence or advice of a legal representative, as we provisionally propose in Chapter 8, could further support complainants, as could measures to ensure that cross-examination is relevant as proposed in Chapter 9. Given these potential alternatives to changing the person who takes the complainant's evidence, and the cumulative impact of our provisional proposals throughout this consultation paper, we invite views on whether a pilot of specialist examiners would be valuable.

Consultation Question 108.

13.91 We invite consultees' views on whether a pilot of specialist examiners should be introduced.

When should specialist examiners be used?

13.92 Specialist examiners could be used solely for cross-examination, or they could take all of the complainant's evidence as occurs in Norway. The process of taking all of the complainant's evidence could occur in one interview or in multiple sessions.

13.93 The bulk of Cossins' concerns appear to apply to cross-examination. She attributes evidence becoming inaccurate or inconsistent to the method used to elicit evidence during cross-examination.[154] In her view, defence counsel attempt to confuse or trap the complainant,[155] while the prosecution do not have this incentive. Further, the complainant's evidence in chief is often pre-recorded as an ABE interview, and is governed by ABE Guidance which discusses the need for a trauma-informed approach to interviewing and emphasises the importance of creating a safe environment for the complainant.

13.94 However, it is possible that using specialist examiners will change the approach taken to obtaining evidence to such a degree that the distinction between evidence in chief and evidence given in cross-examination will become artificial. If the complainant is encouraged to give a free-flowing account, then cross-examination as a separate element might be redundant. There is also a risk that if specialist examiners were only used for cross-examination, the complainant would be aware that this evidence was being elicited for the defence and would become wary or stressed, to some degree defeating the point of introducing a specialist examiner.

13.95 That being said, a model whereby a specialist examiner takes all of the complainant's evidence at once may not be possible in this jurisdiction. As the then Children's Commissioner explained:

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153 S Fairclough, "The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment" (2021) 41 *Oxford Journal of Legal Studies* 1066, 1068.

154 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 438.

155 Above, p 469.

> Investigative interviews in the Barnahus also serve as court testimony. They are undertaken after the alleged perpetrator is charged with an offence and before they have been indicted. The alleged perpetrator therefore has legal representation and is able to contribute to the forensic interview via video link/earpiece. Consequently, it is necessary to interview the child only once. However, in England, the decision to charge an alleged perpetrator is taken according to the evidential test… and the public interest test… The decision to charge the [alleged] perpetrator may rest upon the quality of the evidence available from an interview with the victim. In order for an interview to also serve as court testimony, with an opportunity for the alleged perpetrator's legal representative to put questions to the victim via the forensic interview, it would be necessary to charge the [alleged] perpetrator first. A minimum of two interviews would therefore be necessary in many cases.[156]

13.96 Therefore, in the system in England and Wales where a suspect might only be charged after the complainant has been interviewed, a specialist examiner would not be able to test the complainant's evidence fully in their first interview. The defendant's legal representative would not be fully briefed until after the defendant has been charged and the prosecution evidence has been disclosed. This would be likely to necessitate a second interview. Further, if taking all of the evidence in one session resulted in an increase in free narrative, ABE interviews would require more editing in order to be accessible and relevant to juries. This could itself create problematic disconnects in how the events appear to have been related by the complainant.

13.97 In Chapter 7, we provisionally propose a flexible model for recording evidence, including the possibility of recording evidence in chief at a pre-trial hearing, with or without an ABE interview. A specialist examiner might therefore be needed for both evidence in chief and cross-examination.

13.98 There is therefore a spectrum of possible models, from specialist examiners taking all of the complainant's evidence in as few sessions as possible, to the specialist examiner only taking on what is currently cross-examination undertaken by defence counsel. In between these options is a more flexible model which would vary on a case-by-case basis.

Consultation Question 109.

13.99 We invite consultees' views on the best model for a pilot of specialist examiners:

(1) specialist examiners taking all of the complainant's evidence;

(2) specialist examiners undertaking what is currently cross-examination; or

(3) no fixed approach, with the amount of evidence taken by specialist examiners varying with the requirements of a particular case.

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156 A Longfield, Report of the Children's Commissioner, *Barnahus: Improving the Response to Child Sexual Abuse in England* (2016), p 9.

Who should be specialist examiners?

13.100 There are two primary options for personnel to be specialist examiners. The first is to use communication experts, including people who are currently intermediaries. The other is to use lawyers, who would be independent counsel not already instructed in the case.

13.101 Cossins supports the idea of specialist examiners being "speech therapists, social workers and other professionals employed as intermediaries", as these are not "imbued with adversarial modes of interacting with witnesses", unlike defence counsel. These examiners would then act on instructions from the defence.[157] Currently, intermediaries come from "a wide variety of professional backgrounds, including speech and language therapy, psychology and social work… Each intermediary brings to the role specific expertise and skills in facilitating communication".[158]

13.102 The concerns in relation to trauma are that this can impede complainants recalling events coherently or chronologically; that the process of giving evidence could itself retraumatise complainants or trigger a trauma response; and that these can render complainants susceptible to misleading questions or attempts to discredit them which are not based upon genuine credibility issues. Approaches grounded in speech and language therapy could be a useful way of overcoming this.

13.103 In contrast, Hoyano takes the view that intermediaries have a limited perspective of the criminal justice system and evaluate formulations of questions created by others, rather than developing a line of questioning themselves. Ultimately, they cannot take on this additional role as they are not advocates.[159] In Cossins' view, however, if this conclusion means resorting to defence counsel questioning complainants then this "is to ignore nearly two decades of research on the damaging impact of defence cross-examination on the accuracy of complainants' cross-examination answers."[160]

13.104 Some advantages of using communication experts as specialist examiners include the following.

(1) They are trained in facilitating communication.

(2) They are trained in adapting to the individual witness.

(3) There are existing statutory provisions allowing for questions to be put through intermediaries, which could encompass this role.

(4) They are not part of the adversarial system, so this could reduce the risk of retraumatisation.

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157 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 471.

158 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 355.

159 In A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 471, quoting from L Hoyano, "Reforming the adversarial trial for vulnerable witnesses" [2015] *Criminal Law Review* 107, 113.

160 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 455.

13.105 However, some disadvantages of using communications experts as specialist examiners include the following.

(1) Despite the wording of the statute, intermediaries do not frequently take on an interventionist role or pose questions to witnesses, so this would constitute a significant change.

(2) There is a risk of non-legal specialists contaminating evidence.

(3) They are not trained in developing a line of questioning, which could impede the defendant's right to a fair trial.

(4) They are not familiar with the law, rules of evidence or court processes. This could pose practical problems, as well as making the role difficult given the power dynamics within a courtroom.

13.106 Sections 34 to 36 of the YJCEA 1999 prohibit certain defendants from personally cross-examining witnesses, which include complainants of sexual offences. Where a defendant does not arrange their own legal representation, the court may appoint a qualified legal representative to cross-examine the witness. This representative will act in the defendant's interests, but is not responsible to the defendant.[161] Their role is limited to the proper performance of cross-examination.[162] There is therefore already provision within the context of sexual offences cases for counsel who does not represent the defendant to conduct cross-examination on behalf of the defendant. However, this is likely to arise infrequently and primarily with uncooperative defendants, rather than defendants who wish to be represented by their chosen counsel.

13.107 If independent counsel were used as specialist examiners, some advantages would be:

(1) a knowledge of the criminal justice system, including the ability to follow up relevant points and develop a line of questioning; and

(2) this could be less likely to undermine the underlying adversarial process.

13.108 However, some disadvantages include:

(1) lawyers do not have expertise in facilitating communication and reducing trauma;

(2) even an independent lawyer could still be perceived as in a position of authority when compared to the complainant, so the damaging power dynamics highlighted by Cossins could still exist; and

(3) this might not improve upon the current position, where lawyers cross-examine complainants.

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161 YJCEA 1999, s 38.

162 *Abbas v CPS* [2015] EWHC 579 (Admin), [2015] 2 Cr App R 11 at [48].

13.109 One way of potentially harnessing the benefits of both approaches would be a hybrid approach, either by making use of lawyers who are already trained in communication skills, or providing such training to lawyers. Anyone working as a specialist examiner would have to be trained regardless of their original expertise, and this training could be targeted to include facilitating communication. A hybrid approach could also recognise that not all complainants would require the same level of support in communication, in which case a lawyer might be more appropriate.

13.110 There is a further option – using police officers. This is the approach taken in Norway, and in this jurisdiction police officers frequently take the complainant's evidence in chief by conducting ABE interviews. However, as the police are aligned with the prosecution, this would heighten the risk to the defendant's fair trial rights. It would also constitute a big step from the current role of a police officer to pursue reasonable lines of enquiry, instead to facilitate a line of questioning suggested by the defendant. We therefore do not regard this as a viable model.

13.111 In order to appear at court and to examine witnesses, a specialist examiner might need to be qualified with a practising certificate under the Legal Services Act 2007,[163] in addition to having some form of regulatory oversight. Independent counsel would already have both practising certificates and a regulator. RIs, while not apparently having practising certificates, are overseen by the Witness Intermediary Scheme and subject to Ministry of Justice Codes of Practice and Ethics.[164] Depending on the personnel chosen to be specialist examiners, a regulatory overseer and system of certification could be developed in order to gain the benefits of oversight and the requirement of compliance with professional obligations.

Consultation Question 110.

13.112 We invite consultees' views on whether communication experts or lawyers should be used as specialist examiners.

13.113 Should any alternative professions be considered?

13.114 Should there be a hybrid approach, which would vary depending on the context and the complainant?

Legal professional privilege

13.115 If the specialist examiner had confidential communication with the defendant or their legal representation, this could theoretically cause problems with legal professional privilege. However, the models which we are considering would involve all communication occurring in front of a judge. The specialist examiner could be

[163] Legal Services Act 2007, sch 2 para 3(1).

[164] Criminal Practice Directions ("CrPD") (2015) 3F.8. Ministry of Justice, *Registered Intermediary Procedural Guidance* (September 2020), pp 6-8.

considered a court-appointed expert. There is some precedent for a model like this, with court-appointed psychiatrists.[165] Confidential communication should not be necessary, as the specialist examiner would be appointed on the basis of the defence statement, and where appropriate, any agreed questions which have arisen out of a GRH.[166] The defence are already required to disclose their case pre-trial, for example under section 5 of the Criminal Procedure and Investigations Act 1996. The communications between the defendant and their lawyers would remain confidential. This approach should allow the specialist examiner to be sufficiently reactive to explore fully the defence case in light of the complainant's answers. If necessary, a reactive element could be included within the system, for example by taking breaks in questioning where the parties could submit additional questions or lines of questioning to the judge. On this basis, we take the view that introducing a specialist examiner would not pose any issues for legal professional privilege.

13.116 Nonetheless, a defence practitioner has highlighted that there is a potential risk that the defendant would suffer some forensic disadvantage, if the defence invited questioning on a specific topic which the judge or the specialist examiner refused to endorse. In those circumstances the defence would have indicated the desired direction of their case but would be unable to follow up on it.

Consultation Question 111.

13.117 Do consultees agree that the model of specialist examiners considered would not pose issues for legal professional privilege? If not, please give details of the foreseen issues.

Specialist courts

13.118 One way of addressing concerns about sexual offences cases would be the introduction of specialist sexual offences courts. This could consist either of dedicated courts which only process sexual offences, or of designating rooms within existing courts to deal with sexual offences. In the words of the New Zealand Law Commission ("NZLC"),

> arguably it is appropriate to deal with an area of the law that raises particular complexities or sensitivities by a specialist court, which can better recognise, and target, those complexities and sensitivities. Participants in the court process can refine their skills by accruing specialist expertise. Court cases can be handled more consistently, more efficiently, or more appropriately, depending on the inherent

[165] The court may commission a medical report under CrPR, r 3.10 (for non-sentencing purposes) and CrPR, r 28.8 (for sentencing purposes).

[166] We discuss specifying lines of questioning as part of a GRH in Chapter 7 and Chapter 9, as well as above at para 13.86.

features of those difficult cases and the barriers that they might otherwise encounter in the courts.[167]

13.119 A specialised sexual offences court would require training all personnel, including court staff, in trauma-informed practices. This training would aim to alleviate some of the concerns raised about the complainant's experience and the risk of retraumatisation, along with tackling myths and misconceptions to ensure best evidence. A specialised court would also ensure physical and technological capabilities, such as appropriate equipment to allow for the effective use of special measures, and separate entrances and exits for complainants and defendants.

Current law

13.120 There are several systems of specialised courts in England and Wales, such as youth courts and family courts. These have designated a section of proceedings, both criminal and civil, and handle them separately with specific procedures and training appropriate to each specialisation.

13.121 Additionally, in England and Wales, specialised courts to deal with domestic violence ("SDVCs") were rolled out in 2005, following a consultation paper on domestic violence.[168] There were 138 such courts by 2013. SDVCs are a special form of magistrates' court, with the same limited sentencing powers but the ability to commit cases to the Crown Court. The majority of hearings in front of SDVCs are to receive pleas and to conduct trial preparation hearings for criminal trials relating to domestic abuse. They also deal with bail and take decisions to accept pleas to a lesser charge.

13.122 A study found that these enhanced the effectiveness of court and support services, improved advocacy, improved information sharing, and increased victim participation and satisfaction with a consequent effect on public confidence.[169]

13.123 SDVCs still operate in some areas, for example there are two such courts in Waltham Forest. According to the borough's website,[170] SDVCs offer specially trained court personnel, prosecutors and police, special measures including separate entrances, exits and waiting areas, and tailored advice from Independent Domestic Violence Advisors ("IDVAs"). In February 2021, it was confirmed that HMCTS does not hold data on the number of operational SDVCs.[171]

13.124 While the government has stopped collecting data on SDVCs, there have been some qualitative assessments of their efficacy, most recently in a report evaluating the performance of SDVCs in the Midlands in 2020. This made multiple recommendations

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167 New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence*, Report 136 (December 2015) ("NZLC Report 136 (2015)") para 5.4.

168 Home Office Consultation Paper, *Safety and Justice* (June 2003).

169 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland*, (May 2019) ("Gillen Review") para 2.140.

170 Specialist domestic violence court (SDVC) | London Borough of Waltham Forest.

171 Domestic Abuse Commissioner, *Understanding Court Support for Victims of Domestic Abuse* (June 2021), p 12.

for improvement, commenting on a lack of support and training for staff,[172] and a lack of effective special measures.[173]

13.125 While there are positive aspects identified from the use of SDVCs, a specialised court for sexual offences would be significantly different, given that it is predominantly procedures in the Crown Courts which would need to be specialised.

Reviews, inspections and academic commentary

13.126 We were told by one Recorder that she was in favour of specialist courts presided over by specialist judges, given the current diverse experience of judges trying these very serious cases.

13.127 The Dorrian Review considered the use in Scotland of specialised Preliminary Hearing judges, and based on this identified:

> the benefits of placing a particular type of work into the hands of selected judges, and clerks, all duly trained for the task. It might therefore reasonably be anticipated that if the conduct of sexual offence cases was placed in the hands of judges and staff who had been trained thoroughly and in depth, assisted by prosecutors, and defence lawyers who had similarly been trained, in programmes which inter-linked in terms of identifying and developing good practice in a way which recognises and seeks to avoid retraumatisation… then we would see real benefits for witnesses, complainers and the accused in the way in which such cases are conducted, resulting in improvements to the criminal justice system as a whole.[174]

13.128 The review found that the problems within the system and the volume of cases meant that prioritising listing alone would not be sufficient.[175] It considered the advantages of specialism to be better equipping practitioners to deal with complainers; enhancing complainer experience; encouraging greater information sharing; and reducing delay. The review also reviewed experiences with different types of specialist courts in Scotland, South Africa and England and Wales, which had reported positive results.[176]

13.129 Nonetheless, it surveyed the disadvantages, which include the potential risk of trauma for practitioners; perceived partiality; and the fact that it might take some time to alleviate delays in practice.[177] While it noted the concern about the resource implications of introducing specialist courts, the review highlighted that much of the work would entail transferring existing caseloads and using existing buildings, resulting in resources being managed more efficiently.[178]

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172 C Hannon, *Specialist Domestic Violence Courts (SDVC) – How Special Were They In 2020?* (August 2022) Recommendation 2, p 6.

173 Above, Recommendation 15, p 9.

174 Dorrian Review (2021), para 3.10.

175 Above, para 3.11.

176 Above, para 3.13.

177 Above, para 3.14.

178 Above, para 3.23.

13.130 The Gillen Review also gave an overview of arguments in favour of specialist courts, which include the potential to reduce delay; better equipping personnel to recognise and address rape myths; and the opportunity to target support for complainants.[179] The arguments against specialist courts include the risk of burnout, trauma or cynicism for practitioners; perception of a loss of impartiality between offences; and defendants' concerns that they would not receive a fair trial.[180]

13.131 While specialisation has been recommended as one way of reducing delays, a report by the Ministry of Justice in 2014 noted a view of the former Lord Chief Justice that:

> specialist courts could lead to unintended consequences, such as greater waiting times if venues were limited to specialist centres that would limit courtrooms, judges and staff able to deal with the cases.[181]

13.132 The NZLC took the view that due to the distinctive impacts of sexual offences,

> victims of sexual violence come to the courts with needs of a different order than victims of other kind of criminality. Court staff may need training and education to ensure complainants feel they are being dealt with sensitively. So too may training and education be required to overcome cultural conceptions or "myths" which tend to accumulate around acts of sexual violence… Judges, lawyers, and court staff that are not aware of such myths and misconceptions are less well-equipped to interact appropriately with victims and may be less able to handle cases in an impartial manner.[182]

13.133 It suggested three models of specialisation, which were a separate court list, a separate court, and specialisation of judges and lawyers.[183] The advantages of a separate list were that cases would be afforded proper priority; that they would be scheduled in courtrooms with appropriate facilities; and that they would be heard by judges with experience and training.[184]

13.134 Nonetheless, the NZLC highlighted the need for specialisation among counsel. Untrained defence counsel might not know the best way to test evidence while minimising harm to a complainant, and prosecutors also need to be aware of inappropriate forms of cross-examination.[185] It drew attention to the need to carefully

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179 Gillen Review (2019), para 9.98.

180 Above, para 9.99. "A loss of impartiality" refers to the risk that having different procedures would create a perception that juries or other decision-makers regard the defendants as more dangerous than other defendants or the offences as more serious than other offences, or that the defendants are more likely to be guilty. This may impact on how the fairness of proceedings is perceived by defendants and by the public.

181 Ministry of Justice, *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014), para 37, referencing letter from Lord Chief Justice of 26 July 2013.

182 NZLC Report 136 (2015), para 5.8.

183 Above, para 5.30.

184 Above, para 5.32.

185 Above, para 5.54.

manage defence counsel training, "given the need to avoid infringing on the rights of a defendant to consult and instruct a lawyer of their choice".[186]

13.135 For a specialist court, the NZLC highlighted rules and procedures to expedite cases, govern cross-examination, and facilitate alternative methods of giving evidence. It did not consider it essential to have a separate physical facility.[187]

> In essence, the specialist sexual violence court should seek to, and should be designed to, bring specially trained judges and counsel together in a venue that enables robust fact-finding without retraumatising the complainant. The court must facilitate a coordinated and integrated approach among the various people who deal with complainants in sexual violence cases.[188]

13.136 In England and Wales, a report by the Criminal Justice Joint Inspection into how well the criminal justice system serves complainants of sexual offences recommended that the Ministry of Justice should deal with cases of adult rape in specialist courts, to help to reduce the backlog.[189] In its view, it is "unacceptable that victims are waiting for years post-charge for a court date".[190]

13.137 Beyond this interim recommendation, the review also considered specialist courts in general.

> We found that there was support for consideration of a specialist sexual offences court. The overwhelming view was that victims would only benefit from having trained and informed court staff, and judicial oversight to guide the trial appropriately.[191]

13.138 In June 2022, the Ministry of Justice announced a pilot of "enhanced specialist sexual violence support" at existing Crown Courts.[192] This support would be in three locations (Leeds, Newcastle and Snaresbrook (London)), and would have features including all court staff, police and prosecutors having received specialist trauma training. There would also be expert at-court support available for complainants, such as Independent Sexual Violence Advisors ("ISVAs"), and the courtrooms would be equipped with new video technology. One aim would be to tackle the backlog and increase the volume and speed of sexual offences cases being processed, so the locations were selected given their higher-than-average number of sexual offences cases. Nonetheless, the courts would continue to hear other cases. We await the outcomes with interest.

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186 NZLC Report 136 (2015), para 5.55.

187 Above, para 5.38.

188 Above, para 5.71.

189 Criminal Justice Joint Inspection, *Joint Thematic Inspection of the Police and Crown Prosecution Service's Response to Rape, Phase 2: Post-Charge* (February 2022), Recommendation 4.

190 Above, p 97.

191 Above, p 81.

192 Ministry of Justice, *New pilots to boost support for rape victims in court*, Press Release (June 2022).

Comparative law

South Africa

13.139 Specialised sexual offences courts were first established in South Africa in 1993, and evaluated positively.[193] They declined over time, in part due to concerns that they were better resourced than other courts which infringed the constitutional right to equal protection of the law.[194] However, in 2013 it was recommended by an advisory team that they be reintroduced due to "compelling need".[195] They "are mainly intended to address the victim's special needs, reduce and eliminate secondary traumatization… as well as improve the case cycle times and the outcomes of the case."[196] The research conducted by the team found the courts to be:

> successful in the establishment of a victim-centred criminal justice system, reduction of secondary victimisation, improvement of skills of court personnel, reduction of the cycle time in the finalization of sexual offences cases, and have generally contributed to the efficient prosecution and adjudication of these cases.[197]

13.140 The team recommended establishing two different types of specialised courts.

> The first type is referred to as the Sexual Offences Court as it relates to a regional court that deals exclusively with sexual offences cases. The report identifies the establishment of these courts as the ultimate goal that the Department should strive to achieve.
>
> However, in court buildings where the Sexual Offences Courts cannot be established due to infrastructural limitations, the Model introduces the establishment of a Hybrid Sexual Offences Court. The latter type differs from the former in that it caters for a mixed court roll, but gives priority to the prosecution and adjudication of sexual offences cases.[198]

13.141 Current government figures suggest that there are now 116 sexual offences courts, with the majority being hybrid.[199]

Québec, Canada

13.142 In November 2021, the National Assembly in Québec passed Bill 92[200] with broad cross-party support, which created a branch of specialised courts to deal with sexual assault and domestic violence on a pilot basis. This followed a December 2020 report

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193 NZLC Report 136 (2015), paras 5.19-5.21.

194 Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, *Report on the Re-Establishment of Sexual Offences Courts* (August 2013), p 9.

195 Above, p 12.

196 Above, p 10.

197 Above, p 12.

198 Above, p 11.

199 Department of Justice and Constitutional Development, Justice/Criminal/MATTSO Courts List, as updated on 29 April 2022.

200 Loi visant la création d'un tribunal spécialisé en matière de violence sexuelle et de violence conjugale [An Act to create a court specialised in sexual violence and domestic violence].

on rebuilding trust in the justice system.[201] In January 2022, the courts for the pilot were announced, and in May 2022 it was launched in one of the courthouses. The features include screens, reserved rooms, video-conferencing and testimonial assistance services, aimed to give complainants more support in the process. There is a support service at every step, and the same prosecutor throughout, and judges have to undergo a training course.[202]

New Zealand

13.143 In December 2016, pilot sexual violence courts were established in two districts in New Zealand. The features which made these courts specialised included: guidelines for best practice; designated training judges; greater front-loaded case management; dedicated sexual violence case managers; earlier allocation of cases; earlier trial scheduling; more frequent special measures; tighter cross-examination constraints; separate court entrances; and opportunities for complainants to meet the judge and counsel.[203] The training which judges underwent has now been rolled out to other District Court jury judges.[204]

13.144 In 2019, an evaluation of the New Zealand pilot was conducted. It found that the pilot was considered to be successful, with the aims of improved timelines and improved practices being met.[205] For timelines, it found that

> [t]he overall time for cases entering the pilot (at the case review stage) to the start of the trial is considerably shorter: in Auckland this time reduced by 30% (110 days on average), and for Whangarei by 39% (201 days on average).[206]

13.145 In other areas, it found that:

> [t]rial management has benefited from changes to the timing of the presentation of evidence, greater use of alternative modes of evidence and close attention to application of the guidelines to cross-examinations. Contrary to stakeholders' expectations, these practices do not appear to have a detrimental effect on non-pilot cases.
>
> Complementing these practices, the use of separate court entrances and secure waiting spaces, communication assistants, pre-trial meetings with the presiding judge and existing practices of pre-trial court education visits, assistance from independent victims' advocates and support from SVVAs operating within the court,

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201 Rapport du comité d'experts sur l'accompagnement des victims d'agressions sexuelles et de violence conjugale [Report of the expert committee on the accompaniment of victims of sexual and domestic violence], *Rebatir la confiance [Rebuilding trust]* (December 2020).

202 Government of Québec, Specialist courts webpage: À propos du tribunal spécialisé | Gouvernement du Québec (quebec.ca).

203 Dorrian Review (2021), paras 3.17-3.18.

204 Above, para 3.18.

205 Gravitas report for the Ministry of Justice, *Evaluation of the Sexual Violence Court Pilot* (June 2019), pp 2-3.

206 Above, p 4.

have reduced the risk of secondary victimisation through the justice process for complainant witnesses.[207]

13.146 It found unanimous support among stakeholders for the sexual violence court pilot to be rolled out nationally.[208]

13.147 McDonald has however noted some limitations of the New Zealand sexual violence court pilot. In her view, it:

> operated more as a separate list court, with the benefits arising from fast-tracking, designated senior judges, firm commitment to the case management process… well-funded complainant support, modern courtrooms and buy-in from most participating lawyers.

This meant that:

> the impact of cross-examination was (understandably) largely unchanged and so the experience of the complainants as witnesses has varied little, although complainants in the pilot courts certainly appreciated the increased prosecutorial and judicial interaction and support.[209]

13.148 McDonald analysed the pilot by conducting trial studies which compared cases heard in the pilot courts (the "pilot" study) to cases heard in non-specialised courts (the "principal" study). She found that there was a positive difference in how complainants were treated within the courtroom.[210] She also found greater attentiveness to complainants' emotional states, which resulted in a lower proportion of cases where complainants became severely distressed while giving evidence.[211]

13.149 McDonald noted the importance of complainants' interactions with professionals, as complainants reported feeling better-prepared and more resilient when they felt supported by staff.

> How [complainants] are treated by agents in the criminal justice system, including in the courtroom, can also help complainants to experience a degree of procedural justice or ameliorate some of the worst aspects of experiencing or reporting rape.[212]

13.150 Nonetheless, she observed aspects of the trial process which still concerned her, including rape myths surrounding matters perceived as relevant to consent.[213] She therefore concluded that:

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207 Gravitas report for the Ministry of Justice, *Evaluation of the Sexual Violence Court Pilot* (June 2019), p 3.

208 Above, p 99.

209 E McDonald, *In the Absence of a Jury* (2022), p 4.

210 E McDonald, *Rape Myths as Barriers to Fair Trial Processes* (2020), p 59.

211 Above, p 75.

212 Above, p 121.

213 Above, p 318.

> [w]hile the July 2019 evaluation of the Sexual Violence Court pilot identifies some very promising outcomes of the changes to pre-trial processes in particular, it is apparent that not all judges in the Pilot are willing to intervene in the questioning of adult rape complainants. More change is needed… In cases where the issue at trial is consent, rather than identification or occurrence, we observed relatively little difference in the scope and content of questioning between the cases in the principal research and those in the pilot study.[214]

Northern Ireland

13.151 The Gillen Review noted the positive outcomes of specialised courts but considered it unnecessary to introduce them in Northern Ireland. This was because "already a very large proportion of Crown Court trials involve serious sexual offences and accordingly in practice [specialised courts] would make little difference".[215]

Scotland

13.152 The Dorrian Review concluded that:

> the majority of the themes and issues identified in the course of this review could be resolved by the establishment of a specialist court, adopting the routine pre-recording of the evidence of complainers and using trauma-informed practices and procedure, with requisite training for all participants.[216]

13.153 It therefore recommended the creation of a national, specialist sexual offences court.[217] The review did not consider that there would be a problem with complainers having to travel, as in the majority of cases evidence would be given via pre-recording, so the complainer would not have to attend the trial.[218]

13.154 When considering training for advocates, the review noted that the system in England and Wales requires advocates to certify that they have absorbed materials on the Advocates Gateway before being entitled to participate in pre-recorded cross-examination.[219] The review thought that this "might be a bare minimum" but would not suffice in order to appear before a "truly specialised court".[220]

13.155 Following the recommendations of the Dorrian Review, the Scottish government conducted a consultation seeking views on developing a specialist sexual offences

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214 E McDonald, *Rape Myths as Barriers to Fair Trial Processes* (2020), pp 322-323.

215 Gillen Review (2019), para 2.141.

216 Dorrian Review (2021), para xi.

217 Above, Recommendation 2.

218 Above, para 3.47.

219 Above, para 3.55. See also CrPD (2023) 6.1.2, "Toolkits available through The Advocate's Gateway are a valuable resource. Advocates should consult and follow the relevant guidance whenever they prepare to question a young or otherwise vulnerable witness or accused. Judges should refer advocates to this material and use the toolkits themselves as an aid to case management."

220 Dorrian Review (2021), para 3.55.

court, as this would require primary legislation.[221] 82% of respondents agreed with the proposal to create a specialist sexual offences court to deal with serious sexual offences.[222]

Analysis

13.156 Pulling together the various comments of reviews and commissions, the advantages of a specialised court could include the following.

(1) Guaranteeing physical and technological capacity to facilitate the use of special measures.

(2) Ensuring trauma-informed practice, which can improve the complainant's experience and sense of procedural justice, reduce the risk of retraumatisation, and improve public confidence.

(3) Facilitating inter-agency communication, support and information sharing. A specialist court for sexual offences reflects the specialisation elsewhere in the system, such as in investigating and prosecuting.

(4) Reducing delays and dealing with the backlog (although this would depend on the number and capacity of the courts).

(5) Developing practitioner expertise in combatting myths and misconceptions, to maximise best evidence without harming the complainant or facilitating wrongful acquittals.

13.157 These potential advantages are underpinned by the positive evaluations of the sexual violence court pilot in New Zealand, and the experience in Scotland of specialised domestic abuse courts. There is also the positive feedback associated with SDVCs in England and Wales, though these utilised a very different model to what is currently being contemplated.

13.158 The disadvantages of a specialist court could include the following.

(1) The risk of traumatising practitioners and the judiciary by repeated exposure to sexual offences cases. Alternatively, practitioners and the judiciary might become cynical and "case-hardened" or be at enhanced risk of burn-out.

(2) A perceived loss of impartiality by singling out these offences, thereby having an apparent impact on the defendant's right to a fair trial, as explained above at paragraph 13.130.

(3) The resource implications involved. Even if existing courtrooms and capacity are used, training is inevitably resource-intensive. This is particularly significant when some of this work might duplicate work occurring elsewhere, given the

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221 Scottish Government, *Improving Victims' Experience of the Justice System: Consultation* (May 2022), Chapter 7.

222 K Orr and E Smith, *Improving Victims' Experience of the Justice System: Consultation Analysis* (December 2022).

level of training required of judges already, as commented on by the NZLC,[223] and the wider implementation of special measures, such as the roll out of pre-recorded cross-examination to all Crown Courts. There should be careful examination of whether the aims can be achieved using existing structures.

(4) Within existing capacity, the prioritisation of any offences entails the deprioritisation of others. Listing is a judicial function, and we were told that sexual offences are already prioritised in listing by not being "floating".[224] A 2019 JUSTICE report led by HHJ Peter Rook KC also emphasised the importance of ensuring that sexual offences cases are fixed.[225] Nonetheless, data from the Joint Inspection Report suggests that this is not being consistently achieved.[226]

(5) Depending on where specialist courts were established, inequality in access to services could be heightened. However, on the Dorrian Review's model, the expectation would be that complainants did not attend court at all, due to the use of pre-recorded evidence.

(6) There is some evidence from McDonald's study of New Zealand that specialised courts have not been effective at tackling the use of myths and misconceptions within sexual offences trials.

13.159 Additionally, compared to other jurisdictions, there is already a high degree of specialisation in sexual offences cases in England and Wales. The CPS use specialist prosecutors for rape and serious sexual offences ("RASSO") cases, judges must be specially trained, and there is an array of special measures which can be applied for. Despite this, some stakeholders told us that they believed further specialisation would be valuable. We therefore invite consultees' views on the question of specialist courts.

Consultation Question 112.

13.160 We invite consultees' views on whether specialist sexual offences courts should be introduced to deal with the delays and the content of sexual offences prosecutions.

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223 NZLC Report 136 (2015), para 5.75. The guidelines on prosecution are also considered favourably, at para 5.83.

224 A "floating" trial is where instead of one fixed court date being given, participants will be told a period which they should keep free. The case might begin at any point within that window.

225 JUSTICE, *Prosecuting Sexual Offences* (June 2019), para 5.98.

226 Criminal Justice Joint Inspection, *Joint Thematic Inspection of the Police and Crown Prosecution Service's Response to Rape, Phase 2: Post-Charge* (February 2022), p 85: "In most forces and CPS Areas we inspected, we were told that rape cases are still being listed as 'floaters', or 'backers', meaning that they can be moved or re-listed (re-scheduled) at the last minute, including on the day of trial." Similarly, Rape Crisis, *Breaking Point: The re-traumatisation of rape and sexual abuse survivors in the Crown Courts backlog* (March 2023), p 10: "Current data shows that the volume of rape and sexual offence cases listed as floater trials is at a record high, which is unacceptable. The volumes are not large, but no crimes of this seriousness should ever be listed as floater trials."

Consultation Question 113.

13.161 We invite consultees' views on the necessary features of a specialist court, including:

(1) specialist listing;

(2) specialisation within existing courts; or

(3) entirely separate courts.

JURIES

ECHR

13.162 Article 6 of the ECHR does not contain the right to be tried before a jury.

> [T]he Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of art.6 and there is no right under art.6(1) of the Convention to be tried before a jury… several Council of Europe Member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences… However, this is just one example among others of the variety of legal systems existing in Europe and it is not the Court's task to standardise them.[227]

13.163 In the case of *Twomey v UK*, the applicants challenged their convictions by a judge alone, where the jury had been discharged due to jury tampering (discussed further below). The ECtHR held that "all that was to be determined was whether the trial should continue before a judge sitting alone or a judge sitting with a jury, two forms of trial which are in principle equally acceptable under art.6."[228]

13.164 When considering juries not providing reasoned verdicts, the ECtHR has observed that:

> The Convention does not require jurors to give reasons for their decision and… Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.[229]

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227 *Twomey, Cameron and Guthrie v United Kingdom* (2013) App Nos 67318/09 and 22226/12 (admissibility), at [30].

228 Above, at [36].

229 *Taxquet v Belgium* (2009) App No 926/05 (Grand Chamber) at [90]. See also *Legillon v France* (2013) App No 53406/10 at [53] and *Lhermitte v Belgium* (2016) App No 34238/09 (Grand Chamber) at [67].

13.165 These procedural safeguards may include judicial directions on the relevant legal issues or evidence, and precise questions put to the jury to form a framework for the verdict.[230]

13.166 The ECtHR has not considered views held by jurors in the context of myths and misconceptions in sexual offences cases. It has, however, ruled on jurors' personal convictions and the impact of the media on the defendant's rights to be tried by an impartial tribunal and to be presumed innocent.[231] The ECtHR has held that "a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused."[232] However, the ECtHR has observed that judges, unlike juries, possess appropriate experience and training to enable them to resist any outside influence, including from the media.[233]

13.167 The ECtHR has also confirmed that it is the duty of the judge to deal with any situation where suspicions arise about a juror not being impartial. In *Remli v France*, the ECtHR held that the judge had failed to investigate allegations made by a juror that another juror held racist views, in a trial of a French national of Algerian origin. This was held to violate the defendant's right to a fair trial.[234]

Jury screening

13.168 In the words of *The Decriminalisation of Rape*, a joint report by four civil society organisations that all work with and support complainants and victims:

> We do not 'vet' potential jurors in this jurisdiction, nor is any specialist expertise or understanding required to serve on a jury, no matter what the nature of the case. This… is a long-standing tradition… however, it has been widely accepted by criminal justice bodies that many members of the public continue to believe in long-standing 'myths and stereotypes' relating to rape, which do not correspond with reality, result in disbelief of victims/survivors, and are now out-dated in the eyes of the law. One very significant obstacle for the prosecution when seeking to prove its case is therefore that juries may arrive at court with preconceptions – about how a 'true' victim will behave in the aftermath of a rape, for example – which may be based on stereotype rather than evidence.[235]

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230 *Taxquet v Belgium* at [92]; *Legillon v France* at [54]; *Lherrrmitte v Belgium* at [75]-[85].

231 The requirement of impartiality applies to both judges and juries. See *Hanif and Khan v United Kingdom* (2011), App Nos. 52999/08 and 61779/08 at [138]-[140].

232 *Beggs v United Kingdom* (2012) App No 15499/10 at [123], citing *Akay v Turkey* (2002) App No 34501/97, among others.

233 *Craxi v Italy (No. 1)* (2002) App No 34896/97 at [104].

234 *Remli v France* (1994) App No 16839/90 at [47]-[48]. See also *Tikhonov and Khasis v Russia* (2021) App Nos 12074/12 and 16442/12 at [48]-[53] concerning the court's failure to deal with an accusation made by a juror to a journalist that some jurors exerted undue pressure to convict the defendant.

235 Centre for Women's Justice ("CWJ"), End Violence Against Women Coalition ("EVAW"), Imkaan, Rape Crisis England and Wales ("RCEW"), *Decriminalisation of Rape: Why they justice system is failing rape survivors and what needs to change* ("*Decriminalisation of Rape*"), p 23.

13.169 This section therefore considers whether it is possible to "vet" jurors in sexual offences cases by considering their level of rape myth acceptance (RMA), in order to ensure a fair and impartial assessment of the evidence.

Current law

13.170 In order to be summoned for jury service in England and Wales, a prospective juror must be eligible[236] and not disqualified.[237] In certain circumstances jurors may be excused from jury service,[238] and police officers and prosecution lawyers may only serve as jurors in certain circumstances.[239]

13.171 The Lord Chancellor is responsible for arrangements to determine the summoning of jurors and must prepare lists of jurors for court sittings, known as panels.[240] Jurors are randomly selected for each trial from the panel using a ballot, where the jurors' names are drawn and announced in court.[241]

13.172 In very limited circumstances, parties may challenge the jury selection process[242] before the potential jurors are formally sworn.[243] There is also a common law power to challenge a juror on the basis of "presumed or actual bias", where a juror has expressed hostility to one side, given an opinion about the result of the trial, or is connected to one of the parties.[244]

13.173 Prior to the Criminal Justice Act 1988, the defence had a right of "peremptory challenge", which allowed jurors to be challenged without cause. This right was

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236 To be eligible, the potential juror must be registered as an elector; between 18 and 76 years old; and have been resident in the UK for at least 5 years since the age of 13. See Juries Act 1974, s 1.

237 A potential juror is disqualified where they are subject to the Mental Health Act 1983 or Mental Capacity Act 2005; on bail in criminal proceedings; convicted of certain criminal offences relating to juries and courts; or have received certain sentences. See Juries Act 1974, s 1(d), (3), sch 1.

238 A potential juror may be excused where they have recently undertaken jury service; where they are a serving member of the armed forces; where there is a "good reason". See Juries Act 1974, ss 8 and 9. See also s 10: where it appears that due to "insufficient understanding of English there is doubt as to his capacity to act effectively as a juror, the person may be brought before the judge, who shall determine whether or not he should act as a juror and, if not, shall discharge the summons".

239 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* ("*Blackstone's Criminal Practice*") (2022) D13.27, referring to *Abdroikov* [2007] UKHL 37, [2008] 1 All ER 315: "The House of Lords identified the appropriate question to be whether a fair-minded observer would perceive a possibility of bias, albeit unconscious, as inevitable when a juror was professionally committed to only one side of an adversarial trial process."

240 Juries Act 1974, ss 2 and 5.

241 Juries Act 1974, s 11 and CrPR 25.6.

242 Parties may challenge the array of jurors "for cause" on the basis that the person responsible for summoning them "is biased or has acted improperly". See Juries Act 1974, s 12(6). Particular jurors may also be challenged on the basis that they are "not qualified to serve" as jurors. See Juries Act 1974, s 12(4).

243 Jurors formally become jurors after taking an oath or affirmation to "faithfully try the defendant and give a true verdict according to the evidence", see CrPR 25.9.

244 Known as *propter affectum*. Blackstone's Criminal Practice D13.28 states that "[M]ost authorities on challenges to the polls *propter affectum* are old, and reflect the very different social and legal conditions of their time."

abolished by section 118.[245] The prosecution right to challenge jurors without cause was retained when the defence right was abolished but it is recognised that this is an exceptional power, and the Attorney General issues guidance on its use.[246] The prosecution has the right to "stand-by" a juror on the basis of bias in their beliefs which may "seriously influence [their] impartial performance of [their] duties".[247] This may arise for national security cases where evidence heard in private could be used improperly, and for trials of terrorism offences "in which a juror's extreme beliefs could prevent a fair trial".[248] The beliefs referred to are those which:

> are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors.[249]

13.174 In those circumstances, Security Service records may be checked following authorisation by the Attorney General.[250] After this check, prosecution counsel may use the right to stand-by where the Attorney General personally authorises, and where there is "strong reason for believing that a particular juror might be a security risk, be susceptible to improper approaches or be influenced in arriving at a verdict".[251]

13.175 The prosecution right to stand-by may also arise where "a person is about to be sworn as a juror who is manifestly unsuitable and the defence agree". The example given is where a juror in a complex case is found to be illiterate.[252]

13.176 Before potential jurors are sworn the court can ask questions, after consulting with the barristers about the questions to ask. Potential topics for questioning given in the Criminal Procedure Rules include juror availability, familiarity with the defendant or witnesses and familiarity with the location.[253] A juror may then be excused where they are personally connected with the facts of the case or closely connected with a prospective witness, or where there are valid objections to the prospect of a juror sitting on a particularly lengthy trial.[254]

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245 D Willmott, *An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials*, University of Huddersfield PhD thesis (2018), p 19. This section did not apply to Northern Ireland, where peremptory challenge was not abolished until 2007.

246 AGO, *Jury Vetting: Right of Stand By Guidelines* (November 2012). Stand-by refers to ordering a juror to stand back until the panel has been gone through. If 12 jurors have not been sworn before the panel is exhausted then any stood-by jurors will be recalled, though this is rare.

247 Above, Jury Checks para 6.

248 Above, Jury Checks para 4.

249 Above, Jury Checks para 5b.

250 Above, Jury Checks para 6.

251 Above, Jury Checks para 11.

252 Above, Guidelines para 5.

253 CrPR r 26.4(1).

254 CrPR r 26.4(3).

13.177 The judge has a residual common law discretion to discharge a juror who is "not competent" from serving,[255] but this must be exercised with caution and may not be used to exclude jurors from particular sections of the community or otherwise "to influence the overall composition of the jury."[256] It is doubtful that questioning or excluding jurors on the basis of their acceptance of myths and misconceptions is covered by the current guidance.

Stakeholders' views

13.178 Dr Dominic Willmott told us that, for many jurors, myths and misconceptions are so deeply ingrained that it is unlikely that juror education will prevent them from creeping into deliberations. While there is some evidence that education works for a subset of jurors, some jurors are unlikely to be able and/or willing to set aside attitudes and belief systems which underpin their decision-making at trial. He suggested that RMA operates psychologically similarly to racist attitudes, where it would not be expected that judicial directions or a video would be sufficient to change these beliefs. The beliefs are deeply-held, developed over a long period of time, and are often shared with peers. He also explained that there are evidential problems unique to rape cases, given that there are often only two witnesses with no corroborative evidence, in a context where society has significant factual misconceptions. This makes the job of a juror harder, and myths and misconceptions are more likely to be drawn upon in order to navigate evidential gaps.

13.179 Dr Willmott has also observed that because jurors are asked to remain silent throughout the trial and not to discuss the case until all of the evidence has been heard, there is no opportunity for juror bias to be recognised and reported. Further, the Juries Act 1974[257] prohibits jurors from disclosing their deliberations, so even once the trial has concluded it is unlikely that prejudice or bias will be revealed.[258]

13.180 Following studies using mock jurors, Dr Willmott has found that higher levels of RMA result in an increased tendency to acquit, and a greater belief in the defendant's account.[259] Based on his research findings and literature "which displays how widely rape myth acceptance permeates throughout society… English jurors should therefore be screened and determined to be 'rape trial eligible' before hearing evidence in such cases", in order to recognise and reduce the problem of rape bias in jury decision-

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255 See *Mason* [1981] QB 881 at [887G-H]: "trial judges, as an aspect of their duty to see that there is a fair trial, have had a right to intervene to ensure that a competent jury is empanelled. The most common form of judicial intervention is when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors for whom taking part in a long trial would be unusually burdensome are often excluded from the jury by the judge."

256 CrPD (2023) 8.1.1. See also *Ford* [1989] QB 868 at [872A], where Lord Lane said that this discretion "is to be exercised to prevent individual jurors who are not competent from serving. It has never been held to include a discretion to discharge a competent juror or jurors in an attempt to secure a jury drawn from particular sections of the community, or otherwise to influence the overall composition of the jury."

257 Juries Act 1974, s 20D. Disclosing deliberations may be either contempt of court or a criminal offence. There are limited exceptions in ss 20E-G.

258 D Willmott, *An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials*, University of Huddersfield PhD thesis (2018), p 19.

259 Above; C Lilley, D Willmott and D Mojtahedi, "Juror Characteristics on Trial" (2023) 13 *Frontiers in Psychiatry* (available online).

making.[260] He has therefore proposed a jury selection process which would filter potential jurors based on their responses to validated questionnaires testing their acceptance of rape myths. In his system juries could complete questionnaires either in writing or online, which would then qualify them to serve on sexual offences cases. Given his research on the impact of RMA on jury verdicts, Dr Willmott regarded this screening approach as an obvious solution.

13.181 In his view,

> [w]hilst clearly such a process will have cost implications and involve some level of disruption to historic English jury procedures, where evidence of a direct relationship is displayed between certain juror characteristics and the verdict decisions jurors made during trial, and that deliberation had no significant influence upon such a predispositional relationship, the need to assess the extent to which such bias is problematic remains paramount.[261]

13.182 He regards this as particularly crucial given that "the underlying premise of the jury model of delivering justice is that use of lay persons as ultimate decision makers are perceived to constitute a fairer means of determining guilt."[262]

13.183 However, he acknowledges academic comment (such as by Munro) that the effectiveness of screening procedures may be over-estimated.[263]

13.184 A psychologist was similarly convinced that jurors' myths and misconceptions are so ingrained that any proposed way of addressing them is unlikely to work. However, she was opposed to jury screening because of concerns about who would be left in the pool of jurors permitted to serve on sexual offences trials. If RMA is truly so endemic then this solution is unlikely to work. She also doubted that it would create a mindset change in police and prosecutors in terms of their perceptions of what will work in court, which is a part of the problem.

13.185 A psychotherapist also told us that she doubted that jury screening would work as intended, as people would be able to answer the questions in a socially acceptable way. The idea of screening is premised on people not knowing that their beliefs are myths, and instead thinking of them as objective truths. In her view, most people do in fact know that their views are myths, but it is easier to subscribe to them than to confront the fact that sexual offences occur with this frequency and in these contexts.

Reviews, inspections and academic commentary

13.186 Cossins has also explored the idea of screening jurors for RMA, given that "there is a positive correlation between relatively high levels of RMA and a tendency to acquit in

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260 D Willmott, *An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials*, University of Huddersfield PhD thesis (2018), p 207.

261 Above, p 206.

262 Above, p 206.

263 See D Willmott, D Boduszek, A Debowska and L Hudspith, "Jury Decision Making in Rape Trials: An Attitude Problem?" in G Towl and D Crighton (eds), *Forensic Psychology* (2021), referring to V Munro, "Judging Juries: The Common Sense Conundrums of Prosecuting Violence Against Women" (2019) 3 *New Zealand Women's Law Journal* 13.

sexual assault trials".[264] She has observed that "while jury decision-making is imperfect, it is not randomly so". The systemic biases of jurors extend beyond rape myths to include ideas of justice and fairness.[265]

13.187 She suggests that the pressure to reach a unanimous group decision in an out-of-the-ordinary situation leads to a tendency for jurors to consider information which supports the group's pre-existing preferences. Further, "it is hypothesised that groups are more susceptible to extra-legal information, such as racial or sexist biases, and other misconceptions because of the persuasive nature of jury deliberation".[266]

13.188 In practice, she notes that juries cannot be truly diverse and representative, and even if diversity is present,

> the phenomenon of group conformity means that group members may adopt others' incorrect decisions or interpretations… the extent to which individual jurors adhere to particular rape myths may lead to quick, heuristic judgements and dominant group norms based on these rape myths.[267]

13.189 This is problematic as:

> [c]ompared to other criminal trials, sexual assault trials are more likely to be close cases because of a lack of the type of corroborating evidence that is typically admitted in other criminal trials… sexual assault cases give rise to numerous doubts which are likely to be filtered through jurors' misconceptions about women, children and sexual assault.[268]

13.190 Because "hard evidence" is uncommon in sexual offences, "it can be expected that jurors will rely on extra-legal factors (myths, biases and misconceptions) in deciding a case with ambiguous evidence such as a word-against-word case."[269] Ultimately, Cossins suggests that "the criminal justice system is prosecuting rape in a rape-supportive culture with few procedures to guard against jurors' adherence to rape-supportive beliefs."[270]

> If, as it appears, men are more likely to identify and sympathise with the offender and are more likely to judge the victim's character, this has 'immense implications for the criminal justice system' … in terms of wrongful acquittals.[271]

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264 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 589, referring to DN Stewart and KM Jacquin, "Juror Perceptions in a Rape Trial" (2010) 19 *Journal of Aggression, Maltreatment and Trauma* 853; and S Dinos, N Burrowes, K Hammond and C Cunliffe, "A Systematic Review of Juries' Assessment of Rape Victims" (2015) 43 *International Journal of Law, Crime and Justice* 36.

265 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 109.

266 Above, p 110.

267 Above, p 112.

268 Above, p 113.

269 Above, p 121.

270 Above, p 177.

271 Above, p 199, citing M van der Bruggen and A Grubb, "A Review of the Literature Relating to Rape Victim Blaming" (2014) 19 *Aggression and Violent Behavior* 523, 527.

13.191 She therefore suggests one possible solution of "compulsory online surveys to measure levels of RMA of all jurors called up for jury duty".[272]

> Jurors with high levels of RMA could then be excluded from being assigned to juries in sexual assault trials, since what is the point of running trials where the evidence is filtered through inaccurate and discriminatory beliefs about women and children who are sexually assaulted?[273]

13.192 However, Munro has expressed discomfort about the idea of screening to "exclude the less enlightened". This is due to:

> the substantial inroads that such an intervention would make into the role and function of the jury as a vehicle for democratic participation in the administration of justice, and the wider ramifications that this may have… it may also significantly overstate the accuracy with which such screening could ever be achieved. Whilst research in social psychology has substantially improved the subtlety and nuance of rape myth acceptance questionnaires, the discursive and deliberative dynamics of the jury room are multi-faceted and the task facing jurors is far more complicated than a simple "yes" or "no" response… a screening process… will fail to touch the potentially vast number of additional jurors who do not score highly on such scales but who nonetheless also rely on problematic or ill-informed views within the deliberation process.
>
> This is not simply because people are increasingly adept at identifying what is the socially desirable response to attitudinal prompts about sexual behaviour. The reality is that while it is one thing to renounce a problematic view in the abstract, it is quite another to stick to it in a context in which you are being asked to be sure, beyond reasonable doubt, of the guilt of a person, to reach that conclusion on the basis of competing narratives replete with gaps or inconsistencies, and to not only express that perspective to peers but to convince them of its merits.[274]

13.193 She therefore concludes that to regard screening jurors "as a reliable solution to any difficulties regarding how juries approach their deliberations in rape cases would… be overly optimistic."[275]

Comparative law

13.194 The Gillen Review noted that in Northern Ireland jurors are only asked questions to assess their suitability in exceptional cases, and there would have to be "good cause to deselect". Questions have the purpose of eliminating the risk of unintended bias.[276] The Review recommended an expansion of this approach so that judges should, on a

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272 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 592.

273 Above, p 592.

274 V Munro, "Judging Juries: The Common Sense Conundrums of Prosecuting Violence Against Women", (2019) 3 *New Zealand Women's Law Journal* 13, 31-32.

275 Above, p 33.

276 Gillen Review (2019), paras 6.110-6.112.

case-by-case basis, carefully consider appropriate questions to disclose signs of acceptance of myths and misconceptions before the jury is empanelled.[277]

13.195 The Gillen Review also considered the jury selection process used in the United States. In the United States, the parties and the judge may ask jurors whether they have been victims of a crime similar to the alleged crime, and may also ask questions specific to the case. Judges in Boston and New York reported to the Review that the jury selection process was an effective mechanism for addressing myths and misconceptions.[278]

13.196 The process for jury selection in the United States is known as "voir dire" and varies by state. In California, the jury selection process can include assessment of RMA. Attorneys are able to make a "challenge for cause" argument to the judge as to whether a juror's particular background or beliefs make them biased and therefore unsuitable for jury service:

> During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court.[279]

13.197 In general, the voir dire is regarded as the time to start to educate jurors and dispel relevant myths regarding sexual assault. The National Centre on Domestic and Sexual Violence has published a guide entitled *Voir Dire and Prosecution Tips for Sexual Assault Cases*. This covers myths related to victim reporting, inconsistency, trauma response, delayed complaints, appearance, force, consent, alcohol, opportunity, and the victim's responsibility:[280]

> Before you pick a jury, review the myths and facts about sexual assault, and reacquaint yourself with the preconceived ideas our society members operate out of every day. Design your voir dire to address, and hopefully dispel, the myths which are affecting your case.

13.198 While in a very different context, the US operates another form of jury screening. In some states with the death penalty, the jury must be "death-qualified" in capital cases. All members who categorically object to capital punishment are removed, so that the jury would be willing to pass a death sentence if the crime warranted it. The jurors are therefore questioned during voir dire about their views on capital punishment, to determine their eligibility to serve. This practice has been ruled constitutional by the US Supreme Court.[281]

13.199 However, this has been subject to significant criticism, not least because research shows that death-qualified juries are more likely to convict defendants than jurors

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277 Gillen Review (2019), Recommendation No. 54.

278 Above, para 6.65.

279 Trial Jury Selection and Management Act 2007 (CA), s 223.

280 Available online at http://www.ncdsv.org/publications_prosecution.html. This is excerpted from *The Ending Violence Against Women Training Manual*, by the Colorado Coalition Against Domestic Violence.

281 See *Witherspoon v Illinois* (1968) 391 US 510 and *Lockhart v McCree* (1986) 476 US 162.

generally.[282] This form of screening also results in racially and gender imbalanced juries, by disproportionately excluding black jurors and women.[283]

Analysis

13.200 There are a range of models which involve screening jurors for their RMA. These include:

(1) Using an RMA questionnaire to exclude potential jurors from sexual offences cases.

(2) Using an RMA questionnaire to form the basis for additional judicial questions of jurors and to target judicial directions.

(3) Using an assessment of the level of RMA in order to target non-judicial intervention, by providing relevant educational material and/or expert evidence.

13.201 All of these models have practical and financial implications, particularly where targeted intervention would follow. There would also be an overarching question of how to validate and ensure the reliability of any scale used. Further, if jurors were screened for their RMA, this could lead to arguments that other participants in the legal system should similarly be screened, such as police officers and prosecutors, or that jurors should be screened for trials of other offences where myths and misconceptions might be prevalent, such as those involving allegations of domestic abuse.

13.202 Excluding jurors on the basis of their RMA scores could limit the number of jurors who hold prejudicial beliefs sitting in sexual offences cases. However, there are limitations on the effectiveness of RMA scales in identifying those who hold prejudicial beliefs.[284] There is no guarantee that those with low scores would not go on to express myths and misconceptions during deliberations, or be influenced by other jurors who did so. Further, given the apparent prevalence of RMA among the general public, the use of such a scale might very significantly limit the available pool of jurors.

13.203 Additionally, filtering out jurors based on RMA scales is far-removed from the established common law powers to discharge jurors who are not competent, and the process whereby discharging jurors is discussed between the parties and the judge. The current system supports transparency and fairness, as the parties are permitted

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282 See eg WC Cowan, CL Thompson and PC Ellsworth, "Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation" (1984) 8 *Law and Human Behavior* 53. The increased conviction rate has been attributed to selecting members who are "conviction prone" to begin with, along with the concern that questioning jurors about their views on sentencing before the trial has begun suggests that there will inevitably be a sentencing phase, thereby implying that the defendant is guilty.

283 See eg R Salgado, "Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green" (2005) 2 *Brigham Young University Law Review* 519; C Haney, A Hurtado and L Vega, ""Modern" death qualification: New Data on its Biasing Effects" (1994) 18 *Law and Human Behavior* 619; M Allen, E Mabry and D-M McKelton, "The impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment" (2004) 22 *Law and Human Behavior* 715; M Lynch and C Haney, "Death Qualification in black and white: racialized decision making and death-qualified juries" (2018) 40 *Law and Policy* 148.

284 V Munro, "Judging Juries: The Common Sense Conundrums of Prosecuting Violence Against Women" (2019) 3 *New Zealand Women's Law Journal* 13, 31-32.

to make submissions about which questions should be asked and to hear prospective jurors' replies. The use of RMA scales without this discussion may be perceived as weighting the jury against the defendant. It may also lead to the exclusion of jurors from certain sections of the community, which is currently forbidden by the Criminal Practice Directions.[285] For example, research suggests that there is greater RMA amongst men in older age brackets, so this form of screening may lead to older male jurors being excluded.

13.204 If more detailed questions were asked by the court based on the result of an RMA analysis, this could amount to asking jurors how they would decide the eventual case and thus predispose the jury towards conviction. This concern is substantiated by the experience of jury exclusion in death penalty cases in the USA. A more comprehensive jury screening process with more judicial questioning, as in the USA, is likely to add complexity, delay and expense.

13.205 Further, asking jurors questions about their acceptance of rape myths prior to being empanelled risks similar limitations as if RMA scores themselves excluded jurors. There is no guarantee that those selected would not proceed to express myths and misconceptions, or be influenced by others who did so. There may also be a strong incentive for jurors to give what they regard as a socially acceptable answer, rather than a truthful one.[286]

13.206 Finally, there is a lack of coherence in suggesting that RMA scales should instead be used to target interventions, as the premise of screening jurors is that current methods are insufficient to deal with ingrained myths and misconceptions. The suggestion that more targeted interventions could do so is therefore speculative.

13.207 In conclusion, we do not regard jury screening to be a viable approach to tackling myths and misconceptions held by jurors in sexual offences cases.

Consultation Question 114.

13.208 Do consultees agree that jury screening would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions? If not, which model of jury screening would consultees support?

Reasoned jury verdicts

13.209 In 2001, the Auld Report concluded that:

[285] See CrPD (2023) 8.1.1.

[286] See the discussion in Chapter 2 about the risk of social desirability bias when using questionnaires to assess juror attitudes.

> the time has come for judges, where they consider it appropriate, to require juries to identify their process of reasoning by seeking from them answers to specific questions fashioned to the particular circumstances of the case.[287]

13.210 This was supported for several reasons, including that this would reduce perverse verdicts; increase honesty and openness; encourage more structured deliberations and thus reduce the influence of prejudice; identify the impact of evidence which was admissible but controversial; and lead to better informed appellate decisions.[288]

13.211 For sexual offences cases specifically, McDonald has discussed the benefits of reasoned decisions.

> [W]ritten reasons ensure easier consideration of the reasonableness of the outcome and the appropriate application of the law at an appellate level, but there is also an arguable benefit for a complainant to be able to understand (particularly) an acquittal, or at least see the reasons for the verdict.[289]

13.212 However, there are significant practical issues in requiring juries to give reasons. In Scotland, the Dorrian Review concluded that a requirement for jurors to give reasons for their verdicts would be highly impractical for the Scottish system of 15 jurors. Based on the experiences of Belgium and Spain, it found that a requirement to add reasons could lead to confusion, call the verdict into question, lead to longer trials and increase the number of appeals.[290] Similarly, in New Zealand McDonald considered that "the jury system in its present form could not support the provision of reasons".[291]

13.213 In addition to these concerns, we are not persuaded that reasons in the form of "yes/no" answers to questions, in line with the suggestion in the Auld Report, would be useful in addressing the reliance on myths and misconceptions in sexual offences cases. Where myths have infiltrated deliberations subtly, for example by affecting the jury's assessment of the complainant's credibility, a reasoned verdict will not necessarily highlight this. The jury could simply indicate that they believed the defendant's account and did not believe the complainant's account. Requiring any further detail about the basis for that belief to determine whether it was influenced by misconceptions would be far more burdensome. In light of these difficulties, we do not propose to require juries to provide reasons for their verdicts.

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287 Auld Report, *Review of the Criminal Courts of England and Wales* (September 2001), Chapter 11, para 52.

288 Above, Chapter 11, para 53.

289 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 12.

290 Dorrian Review (2021), paras 5.24-5.26.

291 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 314.

Consultation Question 115.

13.214 Do consultees agree that a requirement for juries to provide reasons for their verdicts would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions?

Juryless trials

13.215 When considering reforms such as pre-recorded cross-examination, Munro has observed that such reforms:

> may find themselves hampered in their ability to generate deep and consistent change by the fact that… the courtroom remains too often a space for theatrics, with strategies by counsel orchestrated upon complainants' testimony to elicit sympathy or generate doubt in the minds of the jury… That this is a terrain marked by a battle for the hearts and minds of jurors, as laypeople called on to apply their common experience and to serve as the ultimate arbiters, must also be confronted.[292]

13.216 Cossins has also noted what she regards as a contradiction within reform attempts.

> The jury is the metaphorical elephant in the room that seems to be an intractable problem that is not able to be reformed. Paradoxically, the myths and misconceptions of jurors are allowed to sit side-by-side the many reforms in Australia and [England and Wales] that have focused on defining children and sexual assault complainants as "vulnerable witnesses".[293]

13.217 The Dorrian Review confronted this issue, remarking that:

> The traditional arguments in favour of juries are met by equally compelling arguments for trial by judge alone, which cannot be left unexamined and ignored… The fact that a system has been sanctified by usage may make it difficult to change, but it should not make it exempt from thorough examination of its suitability.[294]

13.218 The question of juryless trials recurs, both in conversations with stakeholders and in the academic literature. We will therefore consider the ongoing role of the jury in sexual offences cases.

Current law

13.219 The right to trial by jury has been established in England and Wales for centuries[295] and is regarded as a fundamental feature of the adversarial process for serious

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292 V Munro, A Circle that Cannot be Squared? Survivor Confidence in an Adversarial Justice System, in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (2023), p 212.

293 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 494.

294 Dorrian Review (2021), para 5.52.

295 The first documented English jury trial took place in 1220, although it was not routine for ordinary citizens until the 18th century. See D Willmott, *An Examination of the Relationship between Juror Attitudes,*

crimes, though its use has decreased in the context of civil trials and coroners' inquests. The principles underpinning the right to a jury trial include the right for the defendant to be tried by their peers on matters of community importance; democratic participation; oversight of the court process as a protection against oppression; and developing public awareness about the legal process.[296]

13.220 For criminal cases which are heard in the Crown Court, jury trial is generally available. In relation to all criminal cases, there will not be a jury trial in the following circumstances:

(1) Where the defendant pleads guilty.

(2) For offences which may be tried either in the magistrates' court or the Crown Court (either way offences), where the defendant elects not to be tried by jury.

(3) Where the defendant is accused of an offence which is insufficiently serious to be tried in the Crown Court (summary only offences tried in the magistrates' court).

(4) Where the defendant is to be tried in the Youth Court (a form of magistrates' court for defendants aged between 10 and 17).

> [A]lthough it has been held that the Youth Court should never accept jurisdiction in a rape case, some rape trials will now take place without a jury. Recent guidance has emphasised the expansion of the range of sexual offences following the Sexual Offences Act 2003, and indicated that certain sexual offences may be properly dealt with within the Youth Court jurisdiction.[297]

If the Youth Court retains jurisdiction for the case instead of sending it to the Crown Court, then it will be heard without a jury.

(5) Where there is a danger of jury tampering, or the jury has been discharged because of jury tampering.[298]

(6) At a preparatory hearing the prosecution may apply for a trial of some counts on an indictment to occur without a jury, where the number of counts would render

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Psychological Constructs, and Verdict Decisions within Rape Trials, University of Huddersfield PhD thesis (2018), p 17, citing S Kadri, *The Trial: A History from Socrates to OJ Simpson* (2006).

296 See also NZLC Report 136 (2015), paras 6.3-6.6.

297 J McEwan, "Vulnerable defendants and the fairness of trials" [2013] *Criminal Law Review* 100, 105, referring to the 2010 Protocol on Sexual Offences in the Youth Court, issued by the Senior Presiding Judge. "Historically, the position was that the Youth Court should never accept jurisdiction in a rape case. More recent developments in case law and the wider definition of rape under the Sexual Offences Act 2003 now mean that certain rape cases may not fall within the grave crime exception and can appropriately be tried in the Youth Court." (para 7). The procedure to be followed in such cases is set out in CrPD (2023) 5.15.

298 CJA 2003, ss 44-46.

jury trial impracticable, the counts which the jury try are sample counts, and it is in the interests of justice to do so.[299]

(7) If the defendant pleads double jeopardy in the form of "*autrefois convict*" or "*autrefois acquit*", this is determined by a judge alone.[300]

13.221 Legislation was enacted permitting trial without a jury for allegations of serious and complex fraud with multiple defendants, but these powers were never used and were repealed in 2012.[301]

13.222 The result of this is that only around 1% of criminal cases in England and Wales are decided by jury, though these are designated the most serious offences and attract the most severe sentences.[302] Further, as noted by Cossins:

> [J]ury trials are still relatively common in the prosecution of sex offences in the UK since Thomas… found that juries in England and Wales were more likely to return a verdict in relation to a sex offence than any other type of offence so that 'the single largest proportion of jury verdicts are for sexual offences (31%)', partly because defendants were more likely to plead not guilty to a sex offence compared to all other charges (except [those related to] homicide and proceeds of criminal conduct).[303]

13.223 The jury tampering exception has been applied in the context of a rape case, in *R v McManaman*.[304] The complainant alleged that she had not consented to intercourse and had no recollection of the event, while the appellant alleged that sex was consensual. The appellant's nephew had been in the public gallery and contacted a juror. The judge found that his motivation was to intimidate the juror or to interfere with the judicial process, and therefore concluded that there had been jury tampering. He discharged the jury and used his powers under section 46 of the Criminal Justice Act (CJA) 2003 to continue the trial without the jury. The defendant appealed this decision

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299 Domestic Violence, Crime and Victims Act 2004, s 17. Where the defendant is subsequently convicted on a sample count, a judge may give a verdict on the other counts. Where the court convicts the defendant, the court must give a judgment stating the reasons for the conviction. See s 19. This was based upon a Law Commission recommendation in Effective Prosecution of Multiple Offending (2002) Law Com No 277. However, it does not appear to have been widely used and case law indicates how restrictive the conditions are. See eg *R v Hartley* [2011] EWCA Crim 1299, [2012] 1 Cr App R 7 at [22].

300 See *Connelly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276. This is an example of the double jeopardy rule, and involves the defendant pleading that they have already been convicted or acquitted of the same offence.

301 CJA 2003, s 43, repealed by Protection of Freedoms Act 2012, ss 113 and 120, sch 10, pt 10.

302 D Willmott, *An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials*, University of Huddersfield PhD thesis (2018), p 18, citing C Thomas, *Are Juries Fair?* MoJ research series no 1 of 10 (2010). Approximately 97% of cases are dealt with at magistrates' courts, and approximately two thirds of defendants in the remaining cases plead guilty. These statistics reflect all crimes, rather than sexual offences specifically.

303 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 96, citing C Thomas, *Are Juries Fair?* MoJ research series no 1 of 10 (2010), pp 26-28. The data from Thomas' latest research show that the proportion of jury verdicts which are in relation to a sexual offence has increased, with these verdicts constituting 33.8% of all verdicts in the period between 2007 and 2021: C Thomas, "Juries, rape and sexual offences in the Crown Court 2007-21" [2023] *Criminal Law Review* 200, 215.

304 *R v McManaman (Carl)* [2016] EWCA Crim 3, [2016] 1 WLR 1096.

under section 47 of the CJA 2003, which provides for appeals against decisions to proceed with a trial without a jury if permission is granted by the judge or by the Court of Appeal.

13.224 Lord Thomas, then the Lord Chief Justice, held that the appeal should be dismissed and that the appellant had had a fair trial despite the absence of the jury.

> [29] We accept that the present case was a case where there was little independent evidence as to whether the complainant consented to sexual intercourse…
>
> [30] In our view, the judge was right to be satisfied it was fair to the defendant that the trial continue without a jury and the interests of justice did not require him to terminate the trial. The assessment of credibility of witnesses is an ordinary part of a judge's duty. Furthermore, a defendant has under section 48(5) of the CJA 2003 the additional protection of the requirement of a reasoned judgment. Thus where credibility is assessed by a judge the assessment must be justified by careful reasoning. If the decision is adverse to the defendant, this court can subject that reasoning to careful analysis and scrutiny. The position of the defendant was therefore fully protected. It was entirely fair and in the interests of justice to continue the trial without the jury.

13.225 *R v Leslie Allen*[305] was also a case of jury tampering where the jury was discharged, though not a sexual offences case. The defendant argued that trial by jury was protected by article 6 of the ECHR, but the Court of Appeal disagreed.

> [34] That last point is clearly wrong. Many criminal trials across the Convention countries are conducted without a jury. In this jurisdiction the majority of criminal trials are conducted before lay magistrates. The broad submission that the Court should give the desirability of jury trial pre-eminent weight in a case under section 46(3) cannot be sustained…

13.226 In *R v Twomey*,[306] which appears to be the first case where the jury tampering provisions led to a judge-alone trial, the Court of Appeal observed that:

> Trial by jury is described as a "right" in order to emphasise the importance that is attached to it, but it is a right which can be and from time to time is circumscribed by statute. This is most clearly demonstrated by statutory provisions by which, from time to time, trials for criminal offences which could formerly be tried on indictment by judge and jury should be tried summarily. Statutory provisions permit a number of judge only trials to be heard on indictment… In short the right to trial by jury may be created, extended, amended, reduced or abolished by statute. It is not a right protected by the European Convention on Human Rights, nor does its removal involve interference with the rights to liberty or property or fair process protected both at common law and by the Convention.[307]

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305 *R v Leslie Allen* [2019] EWCA Crim 1256, [2020] Crim LR 92.

306 *R v Twomey* [2011] EWCA Crim 8, [2011] 1 WLR 1681.

307 Above at [34].

Stakeholders' views

13.227 A suggestion to remove juries from sexual offences trials did not arise until relatively late in our research. We therefore did not ask for views from many stakeholders on this issue. Where views were expressed, therefore, they often came from those who support juryless trials, while those in favour of retaining juries would not necessarily have indicated this to us without our asking a question about it.

13.228 A psychologist told us the only way of dealing with the ingrained myths and misconceptions held by jurors is to remove jurors altogether. She added that everybody working within the criminal justice system is preparing for an eventual jury trial, so the harm caused by ingrained myths is pushed into all stages of the process. If we moved away from jury trials then this downstream effect would change, because lots of barristers' tactics would no longer be effective. A further issue which she identified is the fact that jurors do not have to give reasons for their verdicts. In her view, whatever decision-maker replaced a jury would have to justify their decision in law, which would better serve justice.

13.229 She was also concerned that jurors are being traumatised in trials and their wellbeing is not adequately supported. She told us that it is unfair that jurors are told they have a major civic responsibility but are then not supported in carrying it out.

13.230 A psychotherapist similarly told us that she would support the removal of juries from sexual offences trials. She echoed the concern about the trauma faced by jurors, including the fact that getting juries to confront the fact of complainant vulnerability and that apparently credible defendants are actually sex offenders, is deeply traumatising.

13.231 The Survivors Trust told us that mechanisms for addressing juror prejudice are not effective, given the length of time over which prejudicial attitudes are held. We were also told that barristers will always try to appeal to the jury, so the removal of juries could result in trials which are both fairer and shorter.

13.232 Dame Elish Angiolini told us that she has come round to the way of thinking that there should not be juries for sexual offences trials. In her view, there will be a fundamental underlying issue no matter how much the system is tinkered with. She noted that in Europe, many other systems beyond jury trials are used. She added that we considered juryless trials for fraud cases due to their complexity, and sexual offences could potentially be considered more complex due to the myths and the psychological components.

13.233 Several police officers also supported juryless trials. They told us of cases which they regarded as very strong but where juries nonetheless acquitted the defendant. They were also concerned that jurors often fall asleep, are disengaged, or struggle to comprehend what is happening in a trial. We note that these concerns are not limited to sexual offences cases, but they may have additional weight in this context where the risk of myths and misconceptions affecting decision-making is greater, and where public confidence may be adversely affected.

13.234 While a victim and campaigner told us that in her ideal system there would be a jury, she is concerned that currently complainants deserve better from the system than

juries can give. She added that the CPS don't appear to trust juries, and this is responsible for lots of damaging decision-making.

13.235 However, a Recorder told us that the prospect of dispensing with the jury trial is scary and requires a lot more research. She took the view that it would not happen in the foreseeable future. Sir John Gillen noted the existence of a strong lobby in favour of the removal of juries, with one reason being the prevalence of rape myths. He added that while he thinks juries should be kept, he is not blind to the frailties of the system.

Reviews, inspections and academic commentary

13.236 The *Decriminalisation of Rape* recommended an evaluation of the efficacy of juries in rape trials, and the consideration of temporary judge-alone trials to address the backlog of cases.[308]

13.237 The Gillen Review considered the arguments for and against jury trials. Among the arguments against trial by jury, the Review mentioned the difficulty for jurors to understand the complexities of sexual offences cases; the presence of myths and stereotypes among jurors as compared to the ability of trained judges to be more objective; and a lack of a reasoned verdict in jury trials.[309]

13.238 The Dorrian Review also considered the possibility of juryless trials in sexual offences cases. It noted the "strong historical and emotional attachment to trial by jury",[310] but took the view that the low conviction rate for rape might mean that public confidence in jury trials is lower for sexual offences. Rather than increasing conviction rates as an objective in itself, the Review took the policy objective to be to "prevent juries from giving undeserved acquittals out of prejudice against the complainer, rather than on an objective view of the evidence".[311]

13.239 The NZLC found there to be two main objections to jury trials in sexual offences cases. One is doubts about:

> the ability of a group of 12 laypersons to make decisions about sexual violence, an area which is often the subject of misunderstandings and misconceptions. The second is that the presence of a jurors at a sexual violence trial may cause harm to complainant witnesses who must, among other things, tell their story to 12 strangers and in a forum which is foreign and alienating.[312]

It refers to these as the "decision-making problem" and the "harm problem".[313]

13.240 For the decision-making problem, the NZLC considered that:

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308 *The Decriminalisation of Rape* (Nov 2020), p 78.

309 Gillen Review (2019), paras 16.100-16.101.

310 Dorrian Review (2021), para 5.2.

311 Above, para 5.5, quoting *MM v HM Advocate* 2005 1 JC 102, Lord Gill at [7].

312 NZLC Report 136 (2015), para 19.

313 Above, para 6.11.

> the problem is not necessarily individual juror prejudice or sexist views; rather it is the idea that "common sense" and experience can be applied to the facts of a specific form of criminal offending which, because of its distinctive features, is at risk of illegitimate reasoning and incorrect decision-making when handled by people who have no prior expertise in the area.[314]

13.241 For the harm problem, the NZLC included:

> the nature of the questions asked by defence lawyers in the presence of the jury. Questions may draw on rape myths and stereotypes, seeking to engage juror misconceptions… The presence of the jury may exacerbate the problem because jurors can bring pre-existing, misconstrued knowledge about sexual violence into the court room, which defence lawyers can use to benefit their client's case.[315]

13.242 The NZLC considered the losses of the core benefits of the jury trial, in its democratic, participatory and educative functions. It also considered criticisms levied at juries, including that they are not necessarily representative of the community; that they may be improperly influenced by irrelevant matters; and that some cases are too complex for jurors.[316] While the loss of the jury would result in the loss of the benefits identified, the NZLC considered that a judge-alone trial would be shorter, which would be better for complainants and could reduce costs.

> [I]t would obviate the need for the complex evidential rules that are required to insulate juries from certain evidence. Trial by judge-alone tends to be faster and therefore potentially less trying for complainants (and a speedy trial also has advantages for defendants).[317]

13.243 Judge-alone trials would reduce the need for the more theatrical elements of a jury trial, which could avoid retraumatising the complainant. It could be expected:

> that the "theatre" of the trial would be minimised or eliminated if counsel knew that they were presenting the case to a fact-finder who was educated about the statistics of sexual violence and who could in principle be relied upon to make their decision uninfluenced by prejudices or misconceptions.[318]

13.244 However, McDonald conducted trial analysis to determine the impact of judge-alone trials in New Zealand. Contrary to her expectations, she found that there was "no discernibly different approach taken by counsel to the task of cross-examination".[319] Therefore, she concluded that "the most significant difference in trial dynamics, cited

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314 NZLC Report 136 (2015), para 6.16.

315 Above, para 6.23.

316 Above, paras 6.3-6.6; 6.39.

317 Above, para 6.36.

318 Above, para 6.38.

319 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 309.

by advocates and law reformers in support of rape trials without a jury, does not exist."[320]

13.245 She takes issue more broadly with the model of adversarialism used.

> While we might not wish the role of rape complainant on anyone we love, at the same time nor do we want anything less than a robust defence to be available for a family member accused of a serious crime. While we ask for a trauma-informed criminal justice process, we know that many defendants do not come to the courtroom free of a difficult past and may be facing an unfamiliar place, unfamiliar language and unfamiliar rules and customs. In the end, and bearing in mind that increasingly we know more about the nature of human trauma, memory, observation, recovery, decision-making, bias and communication, it just might be that the adversarial criminal trial is not, nor has ever been, the best way of determining truth and providing resolution.[321]

13.246 Cossins highlighted the special features of sexual offences, which raise:

> inherent shortcomings associated with using laypeople as the triers-of-fact in the type of trial where a complainant's testimony is likely to be uncorroborated because of the very nature of how sexual assault is perpetrated. Typically, this means that in sexual assault trials there will be:
>
> i. no ear- or eyewitnesses;
>
> ii. a delayed complaint;
>
> iii. no forensic evidence of the alleged sexual act, or the inability of forensic evidence to prove lack of consent;
>
> iv. no confirmatory medical evidence of the sexual act;
>
> v. the consumption of alcohol and/or drugs by the complainant and/or the defendant;
>
> vi. counter-intuitive responses by the victim during and after the sexual assault; and
>
> vii. word against word oral evidence.
>
> As a result, the jury will be reliant on the inexact 'science' of credibility assessments to determine guilt/innocence.[322]

13.247 Cossins has also highlighted a number of features of jury decision-making which have arisen out of research. These include the "liberation effect", which is that "in trials with ambiguous evidence (the typical situation in a sexual assault trial), juries are 'liberated' from trial constraints and rely on their commonsense assumptions and

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320 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 310.

321 E McDonald, *Rape Myths as Barriers to Fair Trial Processes* (2020), p xvi.

322 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 96.

beliefs to resolve doubts".[323] The "majority effect" is that "the majority verdict of jurors prior to deliberation bec[omes] the final verdict", which has the effect that "the ability of some jurors during deliberation to counteract the impact of issues such as gender and RMA on individual opinions may be limited".[324]

13.248 This "majority effect" is contrasted with the "leniency asymmetry effect", whereby a "majority that favours acquittal is more likely to prevail than an equivalent majority that favours conviction".[325] She suggested that "sexual assault trials with little or no supporting evidence are particularly prone to the leniency effect due to widespread rape-supportive beliefs within Western cultures and the influence of RMA on jury outcomes".[326]

13.249 Based on her assessment of the jury research literature, she concluded that it:

> invites the difficult question as to whether the decision-making capacities of laypeople as jurors are inadequate for the complex tasks required of them in sexual assault trials, since almost every aspect of the realities of sexual assault are in conflict with 'commonsense' beliefs about victims and perpetrators.[327]

13.250 Munro has noted that the legal system's relationship with the jury trial has often been "marked by a romanticisation of the jury, as much for what it symbolises and enigmatically refuses to reveal, as for its actual role in administering justice or its effectiveness in doing so."[328] It is hard to evaluate the jury, because of "the secrecy that continues to surround jury deliberations… it is easy to *presume* that a process which is veiled from scrutiny "works"".[329] In her view, "having a deliberative "black hole" at the heart of our criminal justice system is…untenable."[330]

13.251 She nonetheless sees the solution as obtaining increased information in order to deliver an evidence-based approach for improvement, rather than abandoning the system, which at this point would be "premature".[331]

> [T]he importance of having lay participation – in the form of the jury – at the heart of our justice system should not be dismissed lightly; and certainly not until it is clear – based on rigorous and transparent research – that its flaws are too substantial to be

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323 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 99.

324 Above, p 101.

325 Above, p 102.

326 Above, p 109.

327 Above, p 225.

328 V Munro, "Judging Juries: The Common Sense Conundrums of Prosecuting Violence Against Women" (2019) 3 *New Zealand Women's Law Journal* 13, 16.

329 Above, 18.

330 Above, 19.

331 Above, 29.

overcome. There is still… a good deal more that we could do to ensure that we have given the jury a fair opportunity to dispense justice in rape cases.[332]

Comparative law

13.252 The Gillen Review in Northern Ireland discussed the benefits and deficiencies of trial by jury in sexual offences cases. It concluded that in Northern Ireland courts recognise the ability of juries to act properly and fairly. It regarded the jury trial is a "cornerstone" of the justice system, "enshrined in our unwritten constitution".[333] While jury trials were removed for those charged with scheduled offences in Northern Ireland,[334] this was in exceptional circumstances and now applies to only a small fraction of criminal trials.[335] Because of the political and historical context in Northern Ireland, there is a further exception to the right of jury trial where there is a threat to the integrity of the process due to the "presence of violent proscribed organisations".[336]

13.253 The Gillen Review acknowledged the growing number of "credible voices" questioning the use of jury trials in sexual offences cases, along with the increasing trend in other common law jurisdictions to permit juryless trials. However, the Review also noted the particular political context in Northern Ireland which requires public participation and transparency within the criminal justice system. The Review was concerned that any amendments to the jury trial be based upon clear empirical evidence, which it considered to be "incipient" at best.[337]

13.254 The Review therefore concluded that sexual offences should continue to be tried by a judge and jury, with the possibility for a defendant to apply for a judge-alone trial if it is in the interests of justice.[338] Sir John Gillen added that "[w]hilst at the moment I still lean towards maintaining juries even in cases of serious sexual offences, it is perhaps the area where I entertain most misgivings about the current law."[339]

13.255 In Scotland, the Dorrian Review considered options for alternatives to a jury trial. A panel of judges could make the decision-making more diverse than if taken by a single judge, but there would be resource implications as more judges would be required. This would also have a knock-on effect for the appeals process, as a panel of three judges at trial might require a panel of five judges to hear an appeal.[340]

13.256 The Review also considered a combined judge and lay panel, which would increase the diversity of the panel as well as keeping a dimension of input from laypeople. Lay

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332 V Munro, "Judging Juries: The Common Sense Conundrums of Prosecuting Violence Against Women" (2019) 3 *New Zealand Women's Law Journal* 13, 29.

333 Gillen Review, paras 16.4-16.7.

334 Known as "Diplock courts", introduced by the Northern Ireland (Emergency Provisions) Act 1973 and abolished by the Justice and Security (Northern Ireland) Act 2007.

335 Gillen Review (2019), paras 16.8.

336 Above, paras 16.1-16.2. See Justice and Security (Northern Ireland) Act 2007 s 1.

337 Above, paras 16.106-16.112.

338 Above, Recommendations 237 and 238.

339 Above, paras 16.114.

340 Dorrian Review (2021), para 5.28.

members could be drawn from a trained panel, as occurs for children's hearings, or Justices of the Peace could be used.[341] It was suggested that hearings might take longer using lay members, who might feel intimidated by the judge. However, the Review was not convinced by this argument given other areas of the law where lay members sit with judges, such as in the Employment Appeals Tribunal.[342]

13.257 Overall, the panel of experts on the Review team were divided[343] so the Review recommended that consideration:

> be given to developing a time-limited pilot of single-judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way.[344]

This pilot of judge-alone trials is now included in the Victims, Witnesses, and Justice Reform (Scotland) Bill.

13.258 This table is taken from the Gillen Review and illustrates the multiplicity of approaches taken to modes of trial internationally.[345]

Judge/s plus lay assessors	Multi-judge panel	Non-jury trial on application (defendants right to elect)	Non-jury trial on application (judge who decides if it is in the interest of justice)	Jury trials only
Denmark (three judges + six-person jury of lay judges)	**Iceland** (three judges)	**Australia** (South Australia, Australian Capital Territory [except rape])	**UK** (only where there is a danger of jury tampering [NI terrorism])	**Australia** (Victoria, Tasmania, Northern Territory)
France (three judges and nine-person jury in the cour d'assises)	**Netherlands** (three judges)	**US**	**Australia** (Western Australia, New South Wales, Queensland)	
Germany (judge and two lay assessors)			**New Zealand** (only if long and complex or intimidation of jurors [excludes rape])	
South Africa (judge + two lay assessors)			**Ireland** (terrorist or organised crime offences)	
Sweden (judge + two lay assessors)			**Canada** [excluding murder]	

341 Justices of the Peace in Scotland are broadly similar to magistrates in England and Wales. They are laypeople who volunteer their time to hear less serious criminal cases and have limited sentencing powers.

342 Dorrian Review (2021), para 5.20.

343 Above, para 5.3.

344 Above, Recommendation No.5.

345 Gillen Review (2019), para 16.14.

13.259 In Ireland, there is some provision for judge-alone trials for specified terrorist and organised crime offences, but rape and aggravated sexual assault are indictable offences which must be tried before a judge and jury.[346]

13.260 In South Australia, the defendant has the right to elect a judge-alone trial. In Western Australia and Queensland, the defendant can apply for a judge-alone trial but the judge has discretion whether to grant it, by considering the interests of justice.[347] In New South Wales, if the defence and prosecution agree that there should be a judge-alone trial then the judge is obliged to grant this.[348]

13.261 In Victoria, judge-alone trials were introduced for six months in 2020 to accommodate COVID-19 restrictions. However, these were not often used and only ten applications relating to sexual offences cases were made during this period.[349]

13.262 The Victorian Law Reform Commission ("VLRC") suggested that a judge-alone trial would be a way of avoiding the concern that jurors hold misconceptions about sexual offences, along with the potential benefit of complainants finding such a trial less frightening.[350] However, most of the submissions to the VLRC opposed changing the role or nature of the jury system, due to fears that judges have their own misconceptions. Other arguments included that juries play an important role in representing the community; research suggests that juries take their roles seriously; a properly instructed jury makes better decisions than a single judge; and there is no evidence that a judge-alone trial would result in a better experience or in fewer acquittals.[351] Some respondents thought that a group of people who regularly sat as jurors in sexual offences cases ("professional jurors") could be useful as a way to address misconceptions and the complexity of sexual offences cases. The Criminal Bar Association opposed this, as they believed such jurors would be biased in favour of complainants.[352] Overall, the VLRC concluded that any changes required stronger evidence and more careful scrutiny.[353]

> Some features of Victoria's criminal justice system, such as the jury system, serve fundamental purposes. Changes require caution and strong evidence that they will achieve their aims… We are persuaded that it is not clear that replacing the jury, either with a judge or with professional jurors, would deal with juror misconceptions. There are serious risks that would require further study, such as the impacts of this change on a fair trial. We see juries as an important feature of the criminal justice

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346 Gillen Review (2019), paras 16.23-16.25. See Criminal Procedure Act 1967 and Criminal Law (Rape) (Amendment) Act 1990.

347 Above, paras 16.27-16.29.

348 Criminal Procedure Act 1986 (NSW), s 132(2).

349 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (2021), para 20.10 and footnote 8 (p 431).

350 VLRC, *Improving the Response of the Justice System to Sexual Offences* (2021), para 20.11.

351 Above, para 20.13.

352 Above, para 20.14.

353 Above, para 20.15.

system. They represent the community and contribute to public trust in the system. At this stage, the case for a major change has not been made.[354]

13.263 In Canada, trial by jury is a constitutionally protected choice for the defendant for serious offences, including serious sexual offences.[355] Research suggests that most defendants in Canada select trial by judge-alone.[356] There is a perception that justice may be speedier, cheaper and more lenient in the lower criminal courts.[357]

13.264 In South Africa, juries were abolished by the Abolition of Juries Act 1969. For serious cases including rape and sexual assault, cases are heard by a judge and two lay assessors. The assessors must have experience in the administration of justice, or a special skill in a matter relating to the case. They assist the judge in assessing the facts, while the judge determines and applies the law. The judge confers with the assessors in determining the verdict.[358] South Africa therefore provides an example of a panel of decision-makers which does not rely on a judge-alone system, but includes lay-assessors.

13.265 In New Zealand, the defendant has the right to be tried by jury for any criminal case with a penalty of more than two years' imprisonment, under the Bill of Rights Act 1990.[359] However, the Criminal Procedure Act 2011 enables trial by a judge alone in cases which are likely to be long and complex, except where there is a maximum penalty of more than 14 years' imprisonment.[360]

13.266 According to the NZLC, most sexual violence offences are tried by judge-alone, unless the defendant elects trial by jury.[361] McDonald's research suggested that "most counsel advise their client to elect a jury trial in a case where the key factual findings to be made relate to credibility and reliability,"[362] while "where propensity evidence would be admitted, a judge-alone trial is preferred."[363]

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354 VLRC, *Improving the Response of the Justice System to Sexual Offences* (2021), para 20.15.

355 Criminal Code (Canada), s 553 and Charter s 11(f). Exceptions in s 469 of the Criminal Code.

356 According to R Schuller and N Vidmar, "The Canadian Criminal Jury" (2011) 86 *Chicago-Kent Law Review* 497, 500: "It is difficult to obtain nationwide statistics on the absolute number of criminal jury trials or what percentage of accused persons elect for jury trial when they have that option. However, in 1994 in Ontario, the largest province with a population of eleven million persons (approximately one-third of Canada's entire population), there were 1,018 criminal jury trials in the general Division Court, a superior court. In contrast, there were 1,368 nonjury trials. Some of the jury trials involved murder or other offenses that are required to be tried by judge and jury." Citing Ontario Law Reform Commission Consultation Paper on the Use of Jury Trials in Civil Cases (1994).

357 Gillen Review (2019), paras 16.32-16.33.

358 Above, paras 16.42-16.44.

359 NZLC Report 136 (2015), para 6.1; s 24(e).

360 Above, para 6.6; s 102.

361 Above, para 6.10.

362 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 16.

363 Above, p 17. As we saw in Chapter 5, propensity evidence is evidence of a person's reputation, character or conduct which could suggest that they would be more likely to act in a certain way again.

13.267 When considering alternatives to jury trial, the NZLC thought that while judges might be susceptible to bias, it would be more practical to train judges than to train juries afresh each time.[364] Alternatively, if a panel of assessors were used in place of a jury then there would be an element of community oversight but it would still be simpler and shorter than using a jury.[365] The lay members could be drawn from a specially selected panel, or be trained and be "professional jurors", or Justices of the Peace could be used.[366]

13.268 Ultimately, the NZLC recognised the argument for moving to juryless trials in sexual offences cases, observing that the "nature of sexual violence is such that, as a form of criminal offending, it is not well suited to fact-finding by a jury comprised of 12 laypersons."[367] However, it stated that the design for this required careful consideration, and would need to be "justified as a reasonable limit on the right to jury trial" enshrined in the New Zealand Bill of Rights.[368]

Analysis

13.269 Broadly, the objections to juryless trials are that:

(1) The right to a jury trial is a sacrosanct element of the adversarial trial in England and Wales for which there is significant public support.[369] To remove it would be a very significant inroad into this constitutionally protected right, even if it was limited to sexual offences cases.[370]

(2) The considerable public support for the use of jury trials, means that removing juries may undermine overall public confidence in the criminal justice system.[371] Further, removing juries for serious sexual offences risks undermining faith in jurors being true to their oaths and adhering to judicial directions in other cases.[372]

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364 NZLC Report 136 (2015), para 6.37.

365 Above, para 6.46.

366 Above, paras 6.44-6.45.

367 Above, para 6.32.

368 Above, para 6.49.

369 Contrary to the Gillen Review (2019) at para 16.102, which observed that "worldwide, even in the common-law countries, the purity of trial by jury is conceptually no longer sacrosanct in the modern era."

370 The status of jury trial is evidenced by the fact that if a prospective juror does not attend court once summoned, they may themselves be prosecuted for contempt of court. See Juries Act 1974, s 20. D Willmott, An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials, University of Huddersfield PhD thesis, p 18.

371 Gillen Review (2019), paras 16.100-16.101. Public polls show that more than 80% of British citizens strongly advocate use of the jury system. D Willmott, An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials, University of Huddersfield PhD thesis, p 18, citing Bar Council press release *Public Backing for Jury 'Rock Solid', New Poll Shows* (2002) and C Thomas *Diversity and Fairness in the Jury System*, MoJ Research Series (2007).

372 Gillen Review (2019), para 16.100. The NZLC acknowledged this concern at para 6.29 but considered that the specific features of sexual violence which make jury trials less suitable are not inherent in other offending.

(3) Removing the jury would remove the right of the defendant to be tried by a diverse body of people, made up of their peers and members of their community.

Nonetheless, despite jurors being randomly selected, juries are not always diverse.[373] Those who are working may provide legitimate reasons why they cannot carry out jury service, leaving the pool of jurors to be made up of people who are more likely to be retired or unemployed.[374] Additionally, full time carers and new parents who are more likely to be female can give reasons not to carry out jury service. The Dorrian Review also noted that the participation of the public was intended to guard against prejudice, which the research indicates is not being achieved in the case of RMA.[375]

(4) Judges may become "case-hardened", while juries come to their role with fresh eyes.[376]

(5) The jury has an important role in a democracy to make the criminal justice system transparent and to act as a check on oppression. While sexual offences are not generally considered to be political crimes, [377] in an oppressive regime any crime could be prosecuted for the purpose of political persecution. Openness and transparency may be particularly significant considerations if public attendance at serious sexual offences cases is restricted.[378]

(6) Removing the right to jury trial for sexual offences could result in progressive erosion into other types of offences, thereby reducing the fundamental safeguards which form part of the constitution. After the CJA 2003 introduced the jury tampering exception, no further offences were added, though the exception itself appears to have been used very rarely.

(7) It will never be possible to remove prejudice from the system altogether, and there is no guarantee that replacing the jury with a judge or a panel of judges would produce more objective deliberations.

However, this could be mitigated by carrying out a pilot to assess the impact, using professional trained judges, and could be further mitigated by a duty to give reasons for a verdict.

(8) The responsibility of a single judge to weigh up the evidence and apply the law would be significant, and might result in error without external scrutiny. Civil judges already carry out this role, and the risk could be mitigated by use of full

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373 NZLC Report 136 (2015), para 6.6.

374 Above, para 6.27.

375 Dorrian Review (2021), para 5.8.

376 Gillen Review (2019), paras 16.100-16.101. D Willmott, D Boduszek, A Debowska and L Hudspith, "Jury Decision Making in Rape Trials: An Attitude Problem?" in G Towl and D Crighton (eds), *Forensic Psychology* (3rd ed 2021) also suggest that judges may over-convict due to pressures to increase conviction rates, at p 22.

377 Dorrian Review (2021), para 5.11.

378 Gillen Review (2019), para 16.100.

rights of appeal, on both the law and on the facts.[379] Nonetheless, appeal rights may make the process overly complex, cause further delays and cause additional stress through a lack of finality for the complainant and the defendant.

(9) Given the radical nature of this proposal, it would only be appropriate to consider removing the jury after all of the other options for dealing with rape myth and misconception acceptance have been explored, such as amendments to directions, juror education, expert evidence and methods of jury selection. There would also need to be a very carefully developed and evaluated pilot.

13.270 The arguments in favour of juryless trials are:

(1) The nature of the majority of sexual offences is that jurors are deciding based on limited evidence, increasing the likelihood that they rely on extra-legal reasoning.[380] Due to their training and experience, professional judges are less likely to hold entrenched views. This means decisions may be based on a more objective examination of the facts than that conducted by jurors who consciously or subconsciously bring prejudicial misconceptions.[381]

(2) It is more practical and resource-efficient to train a pool of judges than to train juries each time.[382]

(3) There are a number of other jurisdictions which permit sexual offences trials to take place without a jury. This has not been found to breach the defendant's right to a fair trial under the ECHR, nor has the lack of jury trial for jury tampering been seen as a breach of the ECHR.[383] Therefore, the right to a fair trial does not depend upon the presence of the jury and it would be possible to preserve a defendant's fair trial rights without a jury.

(4) Successive attempts to deal with rape myths and misconceptions via alternative methods do not appear to have had a concrete impact on their apparent prevalence among jurors.

(5) Successive reforms have not dealt with the concern that complainants may be harmed by giving evidence in front of a jury.[384] In front of a judge, reduced and more-focussed cross-examination away from the "theatre of the trial" could reduce the potential for harm and retraumatisation of complainants. There may be less incentive for advocates to target prejudicial beliefs, as judges would be trained and experienced to ignore irrelevant information and not be influenced by such arguments.

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379 Dorrian Review (2021), para 5.14.

380 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 225.

381 Gillen Review (2019), paras 16.100-16.101; Dorrian Review, para 5.17; NZLC Report 136 (2015), paras 6.36-6.39.

382 NZLC Report 136 (2015), paras 6.12-6.24.

383 *Twomey, Cameron and Guthrie v United Kingdom* (Admissibility) (2013), App Nos 67318/09 and 22226/12.

384 NZLC Report 136 (2015), 6.12-6.24.

Nonetheless, McDonald's research indicates that this is not an inevitable result.[385]

(6) Juryless trials would be less time-consuming and would reduce delays, as there would be no need for complex directions or managing listing to accommodate jurors' availability. It would also be less disruptive for people who would otherwise be jurors.

However, administrative convenience and managerialism are not persuasive factors in the context of deciding on the availability of constitutional rights.

(7) Juryless trials would be less traumatic for people who would otherwise be jurors and would prevent "jury stress".[386]

However, this argument could be made for all serious and violent offences, and would not justify a removal of trial by jury in the case of sexual offences alone.

(8) A trial by judge or a panel of judges could easily give reasons for their verdict, which could assist defendants and complainants to understand the outcome.[387]

(9) Untrained jurors may struggle to follow complex issues of law and fact in sexual offences cases.[388] For example, understanding the proper uses and limitations of forensic evidence and expert witness evidence.[389]

(10) Removing jurors would eliminate appeals based on jury directions or errors in summing up.[390]

(11) Arguably, trials without a jury would be fairer to defendants charged with stigmatised offences or those who fit negative stereotypes.[391]

Consultation Question 116.

13.271 We invite consultees' views on the mandatory removal of juries from sexual offences trials currently heard in the Crown Court.

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385 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 309.

386 See eg TL Hafemeister and WL Ventis, "Juror Stress: What Burden Have We Placed on our Juries?" (1992) 16 *State Court Journal* 35. In England and Wales, see eg Dr Joselyn Sellen speaking after being a juror for the trial of the murder of 4 year old Logan Mwangi. Logan Mwangi: Juror traumatised by murder trial evidence - BBC News (30 June 2022).

387 Gillen Review (2019), paras 16.100-16.101; Dorrian Review (2021), para 5.10.

388 Gillen Review (2019), paras 16.100-16.101.

389 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 304, quoting W Larcombe, "Rethinking Rape Law Reform: Challenges and Possibilities" in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017), p 149.

390 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022), p 149.

391 Above, p 149.

13.272 Some of the concerns about removing juries would be alleviated by having the presence or absence of a jury being at the defendant's choice, as in Canada and New Zealand. Similarly, in England and Wales, for either-way offences defendants can elect to have a trial in the magistrates' court without a jury, or to have a Crown Court trial before a jury. Allowing defendants to elect to face a trial without a jury in the context of sexual offences could therefore be seen as an extension of this principle.

Consultation Question 117.

13.273 We invite consultees' views on the defendant being able to elect to have a sexual offences trial without a jury.

Consultation Question 118.

13.274 We invite consultees' views on the best model for a juryless trial:

(1) a single judge;

(2) a panel of judges; or

(3) a panel with a combination of judges and lay assessors.

CONCLUDING REMARKS

13.275 In his foreword to Joyce Plotnikoff and Richard Woolfson's *Intermediaries in the Criminal Justice System*, Lord Thomas CJ remarked:

> It is a truism that change is not just about having a new framework and new legislation in place, but about the change in culture necessary to make the new legislation and framework a reality. It is evident in 2015 that some of the ideas that would have seemed radical at the outset of the intermediary pilot have been absorbed into the culture of criminal proceedings. There have been tangible advances in the way advocates and judges deal with vulnerable witnesses and, while there is much yet to be done, I do believe that we have achieved real change.[392]

13.276 The question this chapter asks is whether more fundamental change than has thus far been attempted or proposed is needed, in order to meet our aims of improving the understanding of consent and sexual harm within the substance, practice and application of the law, improving the treatment of complainants and ensuring that defendants receive a fair trial. We have therefore asked for views on a range of radical changes to the trial process for sexual offences. These are: introducing specialist examiners to take a complainant's evidence; introducing specialist courts for sexual

[392] *Rook and Ward* (2021), para 27.136, citing J Plotnikoff and R Woolfson, *Intermediaries in the Criminal Justice System* (2015) p xiii.

offences; and removing juries in sexual offences cases. We have also rejected the possibility of screening jurors for their acceptance of myths and misconceptions.

Chapter 14: Consultation Questions

Consultation Question 1.

14.1 Are agreed facts regularly used as a practical strategy for addressing public interest immunity matters?

14.2 Does the use of agreed facts in this context pose any risks or concerns?

Paragraph 3.41

Consultation Question 2.

14.3 Our provisional view is that for sexual offences there should be bespoke provisions with a unified regime governing access, production, disclosure and admissibility of personal records held by third parties.

Do consultees agree?

Paragraph 3.88

Consultation Question 3.

14.4 We provisionally propose that any regime regulating the access, production, disclosure and admissibility of professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy.

Do consultees agree?

Paragraph 3.105

Consultation Question 4.

14.5 Should medical records related to physical evidence associated with the events that are the subject of the complaint fall outside of the scope of a bespoke regime and remain within the existing general framework?

14.6 If so, or if not, for what reason?

Paragraph 3.109

Consultation Question 5.

14.7 Our provisional view is that that there should not be a complete prohibition on the access, disclosure or admissibility of pre-trial therapy records in sexual offences prosecutions.

Do consultees agree?

Paragraph 3.137

Consultation Question 6.

14.8 Should there be a complete prohibition on the access by compelled production, disclosure or admissibility of any complainant-support records, such as records held by Independent Sexual Violence Advisers, witness supporters and intermediaries?

14.9 If so, or if not, for what reason?

Paragraph 3.140

Consultation Question 7.

14.10 We provisionally propose that where an external person is responsible for deciding whether personal records held by third parties should be produced to police and prosecution, or should be disclosed to the defence, then that external person should be a judge.

Do consultees agree?

14.11 We provisionally propose that the police and prosecution (rather than independent counsel) should filter material before it is examined by a judge.

Do consultees agree?

14.12 Should the judge making the determination be the trial judge (as is the position in Canada)?

Paragraph 3.159

Consultation Question 8.

14.13 We provisionally propose that some measures (but not judicial scrutiny) should be put in place to ensure that complainants who are asked to consent to access have greater protection than is presently the case, both pre-charge and post-charge.

Do consultees agree?

14.14 Providing that the record holder also consents to access, if protective measures are to be put in place for complainants who consent to access, what should those measures be? (Although our provisional proposal does not include judicial scrutiny, we do not exclude it from responses to this question.)

Paragraph 3.185

Consultation Question 9.

14.15 Prior to charge, if the complainant refuses consent to access, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced?

14.16 If so, should this be limited to specific circumstances and, if so, to which special circumstances?

Paragraph 3.198

Consultation Question 10.

14.17 Prior to charge, where the complainant consents to access but the record holder does not consent, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced?

14.18 If so, should this be limited to specific circumstances and, if so, to which special circumstances?

Paragraph 3.200

Consultation Question 11.

14.19 We provisionally propose that after a suspect has been charged, police, prosecutors and defence should continue to be permitted to apply to the court for an order for personal records held by third parties to be produced.

Do consultees agree?

14.20 If so, should there be any restrictions on permission to apply in the early stages of proceedings?

Paragraph 3.207

Consultation Question 12.

14.21 We provisionally propose that disclosure of personal records held by third parties should require judicial permission.

Do consultees agree?

14.22 We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent.

Do consultees agree?

14.23 Should there be any restrictions on disclosure in the early stages of proceedings?

Paragraph 3.217

Consultation Question 13.

14.24 For compelled production to police and prosecutors, we provisionally propose adapting the Canadian approach to production to the court (discussed at paras 3.230 and 3.234 to 3.235 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties:

- must be likely relevant to an issue at trial or to the competence of a witness to testify; and
- access or production to the police or prosecution must be necessary in the interests of justice.

Do consultees agree?

14.25 We provisionally propose setting out the Canadian list of factors to be considered when the court decides what is necessary in the interests of justice, which are:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

Do consultees agree?

14.26 Are there factors we should remove, modify or add?

Paragraph 3.251

Consultation Question 14.

14.27 For disclosure to the defence, the Canadian regime lists grounds that are, on their own, "insufficient grounds" for a defence application asking the court to require records to be produced to the court for the first stage of review (set out at paras 3.231 to 3.233 above). These are designed to prevent speculative requests.

Is a preliminary filter of this kind valuable and are the grounds appropriate?

14.28 Are there any other grounds we should consider?

Paragraph 3.254

Consultation Question 15.

14.29 For disclosure to the defence, we provisionally propose adapting the Canadian approach to disclosure (discussed at paras 3.236 to 3.237 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties:

- must be likely relevant to an issue at trial or to the competence of a witness to testify; and
- disclosure to the defence must be necessary in the interests of justice.

Do consultees agree?

14.30 We provisionally propose setting out the Canadian list of factors to be considered when the court decides what is necessary in the interests of justice, which are:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

Do consultees agree?

14.31 Are there factors we should remove, modify or add?

Paragraph 3.256

Consultation Question 16.

14.32 For admissibility as evidence, we provisionally propose adapting the Canadian approach to admissibility (discussed at paras 3.238 to 3.241 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that material in personal records held by third parties is admissible if:

- the evidence is relevant to an issue at trial or to the competence of a witness to testify; and
- it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Do consultees agree?

14.33 We provisionally propose setting out the Canadian list of factors to be considered when the court decides whether the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. These factors are:

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(e) the need to remove from the fact-finding process any discriminatory belief or bias;

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(i) any other factor that the judge …. considers relevant.

Do consultees agree?

14.34 Are there factors we should remove, modify or add?

Paragraph 3.259

Consultation Question 17.

14.35 We invite consultees' views on how our provisional proposals for compelled production and disclosure should respond to inconsistencies evident on a complainant's personal records which may be the product of trauma.

Paragraph 3.266

Consultation Question 18.

14.36 We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence.

Do consultees agree?

14.37 We provisionally propose that there should not be a complete ban on the admission of third-party sexual behaviour evidence.

Do consultees agree?

Paragraph 4.194

Consultation Question 19.

14.38 We provisionally propose that sexual behaviour evidence should only be admissible if:

(1) the evidence has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

Do consultees agree?

Paragraph 4.196

Consultation Question 20.

14.39 When the judge is deciding whether sexual behaviour evidence:

(1) has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice,

and therefore can be admitted, which, if any, of the following factors should they consider:

(a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

(b) the interests of justice including the defendant's right to a fair trial;

(c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and

(d) the risk of introducing or perpetuating myths or misconceptions.

14.40 Are there any other factors that should be included in the legislation that the judge should consider when deciding whether to admit sexual behaviour evidence?

14.41 Should the list include "any other factor that the judge considers to be relevant to the individual case"?

Paragraph 4.197

Consultation Question 21.

14.42 We provisionally propose, as is currently required, that applications to admit sexual behaviour evidence should be made in writing and that the application should include: detail of the evidence sought to be admitted; the purpose for which its admission is sought; and drafts of any proposed questions.

Do consultees agree?

14.43 We provisionally propose that the judge should be required to provide written reasons for their decision on an application to admit sexual behaviour evidence.

Do consultees agree?

14.44 We provisionally propose that the written reasons should address all of the factors judges are required to consider.

Do consultees agree?

Paragraph 4.203

Consultation Question 22.

14.45 Are consultees aware of any more modern forms of communication that are not currently covered by the definition of sexual behaviour in section 41 of the Youth Justice and Criminal Evidence Act 1999, that should be covered by any restrictions on sexual behaviour evidence?

14.46 Should the legislation defining sexual behaviour include explicit reference to forms of communication and social media as a form of sexual behaviour?

Paragraph 4.210

Consultation Question 23.

14.47 Should the restrictions on sexual behaviour evidence also apply to evidence relating to clothing worn by the complainant, or behaviour such as dancing, even when such evidence does not fall within the definition of sexual behaviour?

Paragraph 4.215

Consultation Question 24.

14.48 Are consultees aware of any evidence that suggests the definition of "sexual behaviour" in section 42 of the Youth Justice and Criminal Evidence Act 1999 is interpreted differently to, or at odds with, the definition of "sexual" in section 78 of the Sexual Offences Act 2003?

14.49 Should the definition of "sexual" in section 78 of the Sexual Offences Act 2003 apply to any definition of "sexual behaviour" for the purposes of restricting sexual behaviour evidence in criminal proceedings?

Paragraph 4.220

Consultation Question 25.

14.50 We provisionally propose that relationship evidence that is relevant as explanatory or background evidence only, should not be within the scope of any framework that restricts sexual behaviour evidence.

Do consultees agree?

14.51 We invite consultees' views on whether there should be any restrictions on relationship evidence to ensure that it is only admitted as background or explanatory evidence, and what form those restrictions should take.

Paragraph 4.227

Consultation Question 26.

14.52 Should the framework that restricts sexual behaviour evidence apply whenever sexual behaviour evidence is sought to be admitted, rather than being limited to a particular class of offences?

Paragraph 4.233

Consultation Question 27.

14.53 We provisionally propose that any framework that restricts sexual behaviour evidence should apply to evidence sought to be admitted on behalf of both the defendant and the prosecution.

Do consultees agree?

Paragraph 4.246

Consultation Question 28.

14.54 We invite consultees' views on whether complainants, where they do not have a right to be heard as is currently the case, should be informed of an application to admit sexual behaviour evidence:

(1) when it is made;

(2) only when it is decided regardless of outcome; or

(3) only when it is successful.

Paragraph 4.251

Consultation Question 29.

14.55 We provisionally propose that the bad character provisions of the Criminal Justice Act 2003 do not require amendment to accommodate non-conviction evidence of previous sexual violence, non-sexual violence, or controlling or coercive behaviour by the defendant. This is because:

(1) Where a defendant has been charged with rape or a serious sexual offence then non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour may be admissible under gateways (c) and (d) of section 101(1) of the Criminal Justice Act 2003.

(2) Where gateway (c) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour:

(a) against the complainant; or

(b) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.

(3) Where gateway (d) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence against the complainant or against another person.

Do consultees agree?

Paragraph 5.70

Consultation Question 30.

14.56 Is there a need for guidance about the law to assist prosecutors in case building and making applications and judges in determining applications regarding the admissibility of non-conviction bad character evidence?

14.57 If so, which body should publish such guidance?

Paragraph 5.71

Consultation Question 31.

14.58 We provisionally propose that the defendant's right to introduce good character evidence and the associated law relating to directions should be retained.

Do consultees agree?

Paragraph 5.150

Consultation Question 32.

14.59 We provisionally propose that, if the jury has heard no evidence about the complainant's good character and the complainant has no prior convictions then, if the trial judge decides that fairness demands it, there should be a jury direction that explains why the jury has heard no evidence of the complainant's good character and that no inference adverse to the complainant should be drawn from its absence.

Do consultees agree?

Paragraph 5.154

Consultation Question 33.

14.60 We provisionally propose there should be no substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in R v Mader.

Do consultees agree?

Paragraph 5.158

Consultation Question 34.

14.61 Where the jury has heard evidence of the complainant's good character should there be guidance about directions?

14.62 What should be the content of any guidance?

Paragraph 5.159

Consultation Question 35.

14.63 We provisionally propose that if there is to be a substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in *R v Mader*, such expansion should be limited to:

(1) Where the complainant has no previous convictions or has no previous convictions relevant to credibility or propensity, then that may be admitted into evidence.

(2) Other good character evidence may be admissible where the trial judge is of the view it is appropriate.

(3) A determination regarding admissibility should take account of the following:

(a) the relevance of the evidence;

(b) risks to the complainant's well-being;

(c) the risk of unfairness to the defendant if such good character evidence is admitted;

(d) the risk of a disproportionate advantage to the defendant if such good character evidence is not admitted; and

(e) whether bad character evidence may be introduced to counter the good character evidence.

(4) The complainant should have a right to be heard before any evidence of their good character is admitted.

(5) Where any evidence of the complainant's good character is admitted then it should be accompanied by a direction to the jury that explains its relevance.

Do consultees agree?

Paragraph 5.165

Consultation Question 36.

14.64 We provisionally propose that where the defendant seeks to adduce evidence that the complainant has made false allegations of sexual assault on previous occasions, the admissibility threshold should be the same as that used for sexual behaviour evidence.

Do consultees agree?

Paragraph 5.220

Consultation Question 37.

14.65 Should the Judicial College consider introducing an example judicial direction for cases where false allegations are introduced that addresses the myth that complainants commonly make false complaints of rape?

14.66 If so, what should be the content of such a direction?

Paragraph 5.222

Consultation Question 38.

14.67 We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require leave and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence.

14.68 This would require that evidence and cross-examination about criminal injuries compensation claims would only be admissible if:

(1) the evidence has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

Do consultees agree?

14.69 Which, if any, of the following factors should the judge consider when deciding whether to admit evidence or permit cross-examination about criminal injuries compensation claims:

(1) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

(2) the interests of justice including the defendant's right to a fair trial;

(3) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and

(4) the risk of introducing or perpetuating myths or misconceptions.

14.70 Are there any other factors that the judge should consider when deciding whether to admit evidence of a criminal injuries compensation claim?

14.71 Should the list include "any other factor that the judge considers to be relevant to the individual case"?

Paragraph 6.51

Consultation Question 39.

14.72 We provisionally propose that the Judicial College consider whether judicial directions should be used:

(1) where permission is given to adduce evidence and cross-examine regarding a criminal injuries compensation claim; or

(2) to address the risk of jurors relying on misconceptions if inadmissible evidence of a criminal injuries compensation claim is introduced or prohibited cross-examination on such a claim occurs.

Do consultees agree?

Paragraph 6.56

Consultation Question 40.

14.73 We provisionally propose that in sexual offences prosecutions, the term "measures to assist with giving evidence" should be used instead of "special measures".

Do consultees agree?

Paragraph 7.25

Consultation Question 41.

14.74 We provisionally propose that complainants in sexual offences prosecutions should not be included in the categories of "vulnerable" or "intimidated" witnesses under sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999. Instead they should be automatically entitled to measures to assist them giving evidence solely on the basis that they are complainants in sexual offence prosecutions.

Do consultees agree?

Paragraph 7.40

Consultation Question 42.

14.75 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to standard measures to assist them giving evidence, with the ability to apply to the court for additional measures.

Do consultees agree?

14.76 If complainants are automatically entitled to standard measures to assist them to give evidence, it could be of benefit to require the prosecution to indicate on an application form which of the measures the complainant wants and which they do not want, without requiring any information or evidence in support. We invite consultees' views on this.

14.77 We invite consultees' views on additional provisions that may facilitate individualised consideration of complainants' wishes and needs in relation to assistance with giving evidence:

(1) A statutory obligation for enquiries to be made about complainants' requirements.

(2) Police Witness Care Units having primary responsibility for assessing complainants' needs and facilitating assistance measures.

(3) Better use of Ground Rules Hearings to identify complainants' requirements (see from paragraph 7.183 of the consultation paper for further detail of the use of Ground Rules Hearings in this context).

(4) Consistent use of court witness familiarisation visits for complainants to see how the measures work in practice at court.

(5) Consistent use of meetings between complainants and the CPS to identify and discuss required measures.

Paragraph 7.74

Consultation Question 43.

14.78 We provisionally propose that time limits for special measures applications should not be changed or removed.

Do consultees agree?

Paragraph 7.83

Consultation Question 44.

14.79 We invite consultees' views on the role of Ground Rules Hearings in sexual offences prosecutions. In particular:

(1) The benefits and costs of having Ground Rules Hearings in every sexual offences prosecution.

(2) Whether they should be mandatory, or whether there should be a presumption that Ground Rules Hearings should be used in all sexual offences prosecutions where a complainant is required to give evidence.

(3) Whether the role and purpose of Ground Rules Hearings should be made clearer in guidance, training or legislation.

(4) Any other views on how courts and practitioners can be encouraged to utilise Ground Rules Hearings in all cases where they may be useful.

Paragraph 7.101

Consultation Question 45.

14.80 We provisionally propose that a complainant in a sexual offences prosecution should be automatically entitled to the use of a screen so that they cannot see the defendant while they give evidence in court.

Do consultees agree?

Paragraph 7.106

Consultation Question 46.

14.81 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use a live link to join the trial proceedings and give evidence.

Do consultees agree?

Paragraph 7.109

Consultation Question 47.

14.82 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to pre-record their evidence.

Do consultees agree?

Paragraph 7.134

Consultation Question 48.

14.83 We provisionally propose that, for complainants in sexual offences prosecutions, evidence in chief, cross-examination and re-examination should all be able to be pre-recorded before trial and should not depend on there being an admissible Achieving Best Evidence (known as "ABE") interview.

Do consultees agree?

Paragraph 7.140

Consultation Question 49.

14.84 When a direction is made for the use of a measure to assist the complainant in a sexual offences prosecution to give evidence, should the defendant be able to see the complainant when:

(1) the complainant gives evidence behind a screen;

(2) the complainant gives evidence using a live link;

(3) the complainant is pre-recording their evidence;

(4) the complainant's pre-recorded evidence is disclosed to the defence; and

(5) the complainant's pre-recorded evidence is played in court.

Paragraph 7.157

Consultation Question 50.

14.85 We provisionally propose that, where a defendant has a vulnerability or impairment that requires them to watch someone speaking in order to understand what they are saying, provision should be made to allow them to see the complainant while they give evidence. This should be allowed even if the complainant has chosen to use a measure to assist them give evidence that would otherwise prevent the defendant from seeing them.

Do consultees agree?

Paragraph 7.158

Consultation Question 51.

14.86 We provisionally propose that where a screen, live link, or pre-recorded evidence is used for a complainant in a sexual offences prosecution to give evidence, it should include measures to prevent the complainant from being seen by the public observing the trial.

Do consultees agree?

Paragraph 7.166

Consultation Question 52.

14.87 If measures prevent the complainant in a sexual offences prosecution from being seen by the public in the court when they use a screen or live link to give evidence or when their pre-recorded evidence is played, but the public are still able to hear the evidence, should there be an exemption to allow:

(1) a member of the press; or

(2) any other individual or group

to see the complainant?

Paragraph 7.167

Consultation Question 53.

14.88 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the exclusion of the public from observing the trial while they are giving evidence, whether in court or by live link, or while their pre-recorded evidence is played. As is currently the case under section 25 of the Youth Justice and Criminal Evidence Act 1999, exclusion of the public would not apply to: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, all of whom would still be permitted to attend.

Do consultees agree?

Paragraph 7.186

Consultation Question 54.

14.89 If the public are excluded from observing the trial while a complainant in a sexual offences prosecution is giving evidence, whether in court or by live link, or while their pre-recorded evidence is played, should there be an exemption to allow the attendance of any other individual or group, in addition to those listed in the Consultation Question above?

Paragraph 7.187

Consultation Question 55.

14.90 We provisionally propose that the current powers to direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant should continue.

Do consultees agree?

14.91 We invite consultees' views on whether, for sexual offences prosecutions, there should be a power to direct the exclusion of the public with the exception of: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, from observing the following:

(1) The whole trial.

(2) The verdict and sentencing hearing.

(3) When the victim personal statement is read.

14.92 If so, should this power be discretionary, or should the complainant be automatically entitled to such a direction?

14.93 If there is a direction for the public to be excluded from observing the whole trial, the verdict or sentencing hearing or when the victim personal statement is read, should there be an exemption, in addition to those listed above, to allow the attendance of any other individual or group?

Paragraph 7.189

Consultation Question 56.

14.94 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to have wigs and gowns removed while they are giving evidence.

Do consultees agree?

Paragraph 7.198

Consultation Question 57.

14.95 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of a supporter when they are giving or recording their evidence at court or remotely.

Do consultees agree?

Paragraph 7.208

Consultation Question 58.

14.96 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of an Independent Sexual Violence Adviser as a supporter when they are giving or recording their evidence at court or remotely.

Do consultees agree?

Paragraph 7.212

Consultation Question 59.

14.97 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use an accessible entrance and waiting room that is separate from members of the public and the defendant.

Do consultees agree?

Paragraph 7.217

Consultation Question 60.

14.98 We invite consultees' views on how the current legislation and practice of the use of intermediaries is working in respect of complainants in sexual offences cases with disabilities and disorders.

14.99 We invite consultees' views on how the current process might be improved.

14.100 For complainants in sexual offences prosecutions who have experienced trauma, we invite consultees' views on whether, and if so, how the impact of that trauma could best be reflected in the assessment and use of intermediaries.

Paragraph 7.239

Consultation Question 61.

14.101 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the use of live link or screens to facilitate their attendance at the verdict and sentencing hearing.

Do consultees agree?

Paragraph 7.247

Consultation Question 62.

14.102 Are there any other measures that should be made available to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence?

14.103 If yes, should they be available:

(1) as a "standard measure" to which the complainant is automatically entitled; or

(2) as a measure for which, as is currently the case, the complainant is automatically eligible to apply on the grounds that it would improve the quality of their evidence?

Paragraph 7.251

Consultation Question 63.

14.104 We invite consultees' views on whether there should be specific, or different, provisions for measures to assist defendants in sexual offences prosecutions to give evidence, beyond those currently available for all vulnerable defendants.

Paragraph 7.279

Consultation Question 64.

14.105 We provisionally propose that the Judicial College consider providing training to the judiciary on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court.

Do consultees agree?

14.106 We provisionally propose that legal professionals receive training on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court.

Do consultees agree?

Paragraph 7.287

Consultation Question 65.

14.107 We provisionally propose that complainants should have a right to be heard in respect of applications relating to the admission of their personal records or sexual behaviour evidence.

Do consultees agree?

Paragraph 8.137

Consultation Question 66.

14.108 We provisionally propose that complainants in sexual offences cases should have access to independent legal advice, assistance, and representation in respect of requests and applications relating to personal records and sexual behaviour evidence.

Do consultees agree?

14.109 If consultees do not agree that complainants should have access to independent legal advice, assistance, and representation, we invite consultees' views on whether complainants should have access to:

(1) Independent legal advice only?

(2) Independent legal advice and assistance only?

(3) Independent legal representation only?

(4) None of these?

Paragraph 8.157

Consultation Question 67.

14.110 We provisionally propose that independent legal representation for complainants in sexual offences prosecutions should include representation at court when applications for admission of such evidence are determined, whether that is pre-trial or during the trial in the absence of the jury.

Do consultees agree?

Paragraph 8.159

Consultation Question 68.

14.111 We provisionally propose that independent legal advice and assistance should include, where appropriate, legal information leaflets, online and telephone advice, and in-person advice and assistance.

Do consultees agree?

Paragraph 8.160

Consultation Question 69.

14.112 We provisionally propose that legal advisers and representatives should be permitted to access documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence.

Do consultees agree?

Paragraph 8.161

Consultation Question 70.

14.113 We provisionally propose that legal advisers and representatives should be permitted to engage directly with police, prosecutors and defence counsel where necessary. This is in order to obtain trial documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence.

Do consultees agree?

Paragraph 8.162

Consultation Question 71.

14.114 We invite consultees' views on whether the independent legal representative for the complainant should be permitted to:

(1) attend the trial and, not in the presence of the jury, make representations to the judge in respect of compliance with the order permitting the relevant evidence to be admitted;

(2) attend and make representations only while the complainant is giving evidence relating to their personal records or sexual behaviour, including during cross-examination, whether at trial (including in the presence of the jury) or during a pre-trial hearing at which their evidence is recorded; or

(3) make representations to the court during the whole trial in the presence of the jury.

Paragraph 8.165

Consultation Question 72.

14.115 We provisionally propose that independent legal advice and independent legal representation for complainants in sexual offences cases should only be provided by qualified legal professionals.

Do consultees agree?

Paragraph 8.171

Consultation Question 73.

14.116 How should the role of independent legal advisers and representatives be defined?

14.117 Would written guidance, such as a code of conduct, be useful? If so, what should it include?

Paragraph 8.173

Consultation Question 74.

14.118 We provisionally propose that complainants in sexual offences cases should have access to independent legal advice and assistance in relation to their right to measures to assist them give evidence (currently called “special measures”).

Do consultees agree?

Paragraph 8.181

Consultation Question 75.

14.119 Should it be mandatory for practitioners to undergo training on myths and misconceptions in order to work on sexual offences cases?

Paragraph 9.26

Consultation Question 76.

14.120 We provisionally propose that, in sexual offences prosecutions, the test for determining acceptable lines of questioning of a witness on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour or claims for criminal injuries compensation.

Do consultees agree?

Paragraph 9.78

Consultation Question 77.

14.121 We invite consultees' views on whether there are any types of potentially highly prejudicial material or factual scenarios beyond sexual behaviour and claims for criminal injuries compensation where evidence and cross-examination should be subject to an enhanced admissibility threshold rather than the relevance threshold?

Paragraph 9.79

Consultation Question 78.

14.122 We invite consultees' views on how the situation can be improved so that the requirement for lines of questioning to be relevant is considered and adhered to in each case. Some possibilities include:

(1) codification of the relevance threshold;

(2) a requirement that lines of questioning are discussed and approved by a judge at a hearing in advance;

(3) that the Judicial College consider whether a direction should be given where a line of questioning is deemed irrelevant because it relies on myths.

Paragraph 9.101

Consultation Question 79.

14.123 Should the Judicial College consider providing guidance to judges on how best to respond to generalisations which rely on myths or misconceptions where they are raised in counsels' speeches? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

(3) suggesting that delayed reporting, in itself, makes complainants less credible.

Paragraph 9.127

Consultation Question 80.

14.124 Should the Judicial College consider providing guidance to judges on warning advocates about the potential for professional misconduct consequences to follow from their reliance on myths and misconceptions in the conduct of a sexual offences case?

Paragraph 9.144

Consultation Question 81.

14.125 Should the Bar Standards Board consider making explicit reference in its Code of Conduct to the potential for professional misconduct consequences to arise from reliance on myths and misconceptions in sexual offences cases?

Paragraph 9.145

Consultation Question 82.

14.126 Should the Bar Standards Board consider explicitly stating in its Code of Conduct that generalisations relying on myths and misconceptions about sexual offences in advocates' speeches are prohibited as they constitute a breach of the duty not to mislead the court? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

(3) suggesting that delayed reporting, in itself, makes complainants less credible.

Paragraph 9.150

Consultation Question 83.

14.127 Should the Judicial College consider providing guidance to judges on warning advocates about the possibility of a wasted costs order where reliance on myths and misconceptions in their conduct of a sexual offences case has caused costs to be wasted?

Paragraph 9.161

Consultation Question 84.

14.128 Should there be a rebuttable presumption that a direction on myths or misconceptions will be given?

14.129 If so, what should be the triggering conditions for a presumption in favour of a direction? For example, these could be that evidence is or will be led, questions are or will be asked, or an application by the parties.

Paragraph 10.69

Consultation Question 85.

14.130 Should the test for rebutting the presumption be where no reasonable jury would consider the evidence, question, or statement to be material, as it is in Scotland?

Paragraph 10.71

Consultation Question 86.

14.131 In relation to which myths or misconceptions should there be such a rebuttable presumption? Some examples from other jurisdictions are:

(1) delay;

(2) absence of resistance; and

(3) inconsistency.

Paragraph 10.72

Consultation Question 87.

14.132 Are there any myths or misconceptions for which the decision to give the direction should remain entirely at the discretion of the judge? If so, in relation to which myths or misconceptions?

Paragraph 10.73

Consultation Question 88.

14.133 We provisionally propose that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion. Do consultees agree?

Paragraph 10.75

Consultation Question 89.

14.134 Should the Judicial College consider amending the Crown Court Compendium example directions on delay and freezing better to reflect the empirical evidence about complainants' responses?

Paragraph 10.84

Consultation Question 90.

14.135 Are there any example directions other than those on delay and freezing which do not reflect the empirical evidence, and therefore the Judicial College should consider amending?

Paragraph 10.85

Consultation Question 91.

14.136 We provisionally propose that the Judicial College should consider whether additional example directions are needed in order to address the particular myths and misconceptions relating to male complainants. Do consultees agree?

Paragraph 10.93

Consultation Question 92.

14.137 Should the Judicial College consider an additional example direction to address the presentation and particular myths and misconceptions relating to complainants with a mental health condition or learning disability?

Paragraph 10.94

Consultation Question 93.

14.138 We invite consultees' views on the effectiveness of the example directions on:

(1) the prevalence of acquaintance rape as opposed to stranger rape; and

(2) distress shown by the complainant when giving evidence?

Paragraph 10.95

Consultation Question 94.

14.139 Are there any other groups of complainants or myths and misconceptions which are not currently addressed by example directions and should be?

Paragraph 10.96

Consultation Question 95.

14.140 We provisionally propose that the Judicial College consider training about the use and benefits of split directions and split summing up for myths directions. Do consultees agree?

Paragraph 10.99

Consultation Question 96.

14.141 Should expert evidence of the general behavioural responses to sexual violence be admissible to address myths and misconceptions in sexual offences trials?

Paragraph 10.164

Consultation Question 97.

14.142 We invite consultees' views on the use of written juror information notices to address myths and misconceptions amongst jurors?

Paragraph 10.190

Consultation Question 98.

14.143 We invite consultees' views on the use of education videos to address myths and misconceptions amongst jurors?

Paragraph 10.191

Consultation Question 99.

14.144 We invite consultees' views on the use of online interactive tools to address myths and misconceptions amongst jurors?

Paragraph 10.192

Consultation Question 100.

14.145 Are there any other methods for addressing myths and misconceptions amongst jurors that we should consider?

Paragraph 10.193

Consultation Question 101.

14.146 Should there be further commissioning of, or permission for, research that engages real jurors? If so, what criteria should govern access and what conditions should be placed on research?

14.147 Should researchers and juror participants be given a statutory exemption from section 20D of the Juries Act 1974 that makes it an offence intentionally to "disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or to solicit or obtain such information"?

Paragraph 10.205

Consultation Question 102.

14.148 Which of the following methods should be prioritised for introduction and which is likely to be the most effective combination to address myths and misconceptions, alongside judicial directions?

(1) expert evidence of general behavioural responses to sexual violence;

(2) a written information notice;

(3) an education video; or

(4) an online interactive tool.

Paragraph 10.210

Consultation Question 103.

14.149 Should there be a right, for all parties to the relevant application, to appeal the decision on an application to admit evidence relating to either the complainant's personal records or sexual behaviour?

Paragraph 11.68

Consultation Question 104.

14.150 We provisionally propose that complainants who have a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant. This will only occur where the decision is made at a "preparatory hearing" (a hearing that can be ordered by a judge pursuant to section 29 of the Criminal Procedure and Investigations Act 1996).

Do consultees agree?

Paragraph 11.89

Consultation Question 105.

14.151 We invite consultees' views on the following:

(1) Could preparatory hearings be better used to determine applications regarding the admissibility of evidence relating to the complainant's personal records or sexual behaviour?

(2) Should the complainant have any further right of appeal against decisions regarding the admissibility of evidence relating to their personal records or sexual behaviour that is not limited to decisions made at preparatory hearings? If so, should that right of appeal be:

(a) Limited to decisions that are made before the trial commences; or

(b) Not limited so that the right includes a right to appeal a judicial ruling on admissibility made during the trial?

Paragraph 11.90

Consultation Question 106.

14.152 We provisionally propose that complainants should have access to independent legal advice and representation when they have a right to appeal a judicial ruling relating to evidence of their sexual behaviour or personal records.

Do consultees agree?

Paragraph 11.91

Consultation Question 107.

14.153 Considering the measures on which we invite views or make provisional proposals throughout the consultation paper and taking account of the following factors, are there particular combinations of measures which are particularly impactful and beneficial? What are these measures and their impact?

(1) positive impacts on complainants' experiences of the trial process;

(2) positive impacts elsewhere in the criminal process;

(3) negative impacts on the defendant's right to a fair trial;

(4) delay;

(5) costs;

(6) burdens on the parties, court, police, and complainant;

(7) unintended consequences; and

(8) other ongoing reform.

14.154 Are there particular combinations of measures which are a cause for concern? What are these measures and their impact?

14.155 Are there any combinations of measures which should be prioritised? Why?

14.156 Is the data we describe above regarding costs, case volumes, case delays and rates of attrition accurate and is there any other available data which will assist?

Paragraph 12.31

Consultation Question 108.

14.157 We invite consultees' views on whether a pilot of specialist examiners should be introduced.

Paragraph 13.91

Consultation Question 109.

14.158 We invite consultees' views on the best model for a pilot of specialist examiners:

(1) specialist examiners taking all of the complainant's evidence;

(2) specialist examiners undertaking what is currently cross-examination; or

(3) no fixed approach, with the amount of evidence taken by specialist examiners varying with the requirements of a particular case.

Paragraph 13.99

Consultation Question 110.

14.159 We invite consultees' views on whether communication experts or lawyers should be used as specialist examiners.

14.160 Should any alternative professions be considered?

14.161 Should there be a hybrid approach, which would vary depending on the context and the complainant?

Paragraph 13.112

Consultation Question 111.

14.162 Do consultees agree that the model of specialist examiners considered would not pose issues for legal professional privilege? If not, please give details of the foreseen issues.

Paragraph 13.117

Consultation Question 112.

14.163 We invite consultees' views on whether specialist sexual offences courts should be introduced to deal with the delays and the content of sexual offences prosecutions.

Paragraph 13.160

Consultation Question 113.

14.164 We invite consultees' views on the necessary features of a specialist court, including:

(1) specialist listing;

(2) specialisation within existing courts; or

(3) entirely separate courts.

Paragraph 13.161

Consultation Question 114.

14.165 Do consultees agree that jury screening would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions? If not, which model of jury screening would consultees support?

Paragraph 13.208

Consultation Question 115.

14.166 Do consultees agree that a requirement for juries to provide reasons for their verdicts would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions?

Paragraph 13.214

Consultation Question 116.

14.167 We invite consultees' views on the mandatory removal of juries from sexual offences trials currently heard in the Crown Court.

Paragraph 13.271

Consultation Question 117.

14.168 We invite consultees' views on the defendant being able to elect to have a sexual offences trial without a jury.

Paragraph 13.273

Consultation Question 118.

14.169 We invite consultees' views on the best model for a juryless trial:

(1) a single judge;

(2) a panel of judges; or

(3) a panel with a combination of judges and lay assessors.

Paragraph 13.274

Appendix 1: Reviews, reports and legislation

1.1 This appendix sets out many of the major reviews, inspection reports, strategy and policy documents relating to rape and serious sexual offences in England and Wales.

1.2 It is not exhaustive; it does not include every review or report that informed reforms. It primarily lists reviews and reports that have been undertaken or commissioned by government (including agencies or bodies such as the police and Crown Prosecution Service) or parliament.

1.3 It includes a small number of reports or reviews by civil society or professional bodies in England and Wales, and a small number done by or for devolved governments. These are included because they are either significant points of reference in England and Wales in stakeholder discussions or provide substantial relevant analysis and reform options.

1.4 It also includes some material relating to matters outside our terms of reference (eg, extraction of data from electronic devices, the definition of consent under the Sexual Offences Act 2003, and other sexual offences under this Act). These are included because they constitute a part of the background to this consultation.

1.5 We have interspersed some of the major statutory reforms concerning RASSO since 1976 to position the reviews and policy changes within the legislative developments. In some instances, we have identified specific aspects of statutes, especially where those have been enacted to implement recommendations of preceding reports. We have also marked the commencement of Operation Soteria as an outcome of recent reviews.

Year of Report	**Report/Review**	**Commissioning or publishing bodies**
1976	Report of the Advisory Group on the Law of Rape (1975) Cmnd 6352 (“The Heilbron Report”)	Home Office
1976	Sexual Offences (Amendment) Act 1976 Section 2: Sexual history evidence Section 4: Anonymity for Complainants	
1986	Home Office Circular 69/1986 on violence against women	Home Office
1992	S Grace, C Lloyd, LJF Smith, *Rape: from recording to conviction* (Home Office Research and Planning Unit paper 71, 1992)	Home Office

1993	Report of the Royal Commission on Criminal Justice ("The Runciman Commission") (1993) Cm 2263	Royal Commission
1996	Criminal Procedure and Investigations Act 1996	
1998	Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998)	Home Office
1999	J Harris and S Grace, *A question of evidence? Investigating and prosecuting rape in the 1990s* (Home Office Research Study 196, 1999)	Home Office
1999	Youth Justice and Criminal Evidence Act 1999 Sections 16-33: Special measures Sections 34-40: Defendant not permitted personally to cross examine the complainant Section 41: Sexual history evidence	
2000 (July)	Home Office, *Setting the boundaries: Reforming the law on sex offences, Volume 1* (July 2000)	Home Office
2002 (April)	HM CPS Inspectorate and HM Inspectorate of Constabulary, *Joint inspection into the investigation and prosecution of cases involving allegations of rape* (April 2002)	HM CPS Inspectorate HM Inspectorate of Constabulary
2002 (July)	Home Office, Court Service, CPS, *Action Plan: to implement the recommendations of the HMCPSI/HMIC joint investigation into the investigation and prosecution of cases involving allegations of rape* (July 2002)	Home Office Court Service Crown Prosecution Service
2002 (November)	Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences (2002) Cm 5668	Home Office
2003	Sexual Offences Act 2003	
2006	Office for Criminal Justice Reform, *Convicting rapists and protecting victims – justice for victims of rape: a consultation paper* (2006)	Home Office Office for Criminal Justice Reform

2006	L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office Online Report 20/06, 2006)	Home Office
2007 (January)	HM CPS Inspectorate and HM Inspectorate of Constabulary, *Without Consent: A report on the joint review of the investigation and prosecution of rape offences* (January 2007)	HM CPS Inspectorate HM Inspectorate of Constabulary
2007 (November)	Home Office and Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (November 2007)	Home Office Office for Criminal Justice Reform
2010	Baroness Stern, *The Stern Review: Independent review into how rape complaints are handled by public authorities in England and Wales* (Home Office and Government Equalities Office, 2010)	Government Equalities Office Home Office
2014	Ministry of Justice, *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014)	Ministry of Justice
2015	Dame Elish Angiolini, *Report of the independent review into the investigation and prosecution of rape in London* (2015)	Metropolitan Police Service Crown Prosecution Service
2016	Crown Prosecution Service, *CPS Guidance: Speaking to Witnesses at Court* (2016)	Crown Prosecution Service
2017	Limiting the use of complainants' sexual history in sex cases - Section 41 of the YJCEA: the law on the admissibility of sexual history evidence in practice (2017) Cm 9547	Ministry of Justice Attorney General's Office
2018 (January)	National Police Chiefs' Council and College of Policing, *National Disclosure Improvement Plan* (January 2018)	National Police Chiefs' Council College of Policing

2018 (March)	Crown Prosecution Service, *CPS Guidance: Speaking to Witnesses at Court* (Revised: 27 March 2018)	Crown Prosecution Service
2018 (October)	National Police Chiefs' Council and College of Policing, *National Disclosure Improvement Plan Phase One report* (October 2018)	National Police Chiefs' Council College of Policing
2018	L Hoyano, *The operation of YJCEA 1999 section 41 in the courts of E&W: views from the barristers' row* (Criminal Bar Association, 2018)	Criminal Bar Association
2019 (May)	Sir John Gillen, *Gillen Review: Report into the law and procedure in serious sexual offences in Northern Ireland* (Department of Justice, Northern Ireland, May 2019)	Department of Justice, Northern Ireland Criminal Justice Board, Northern Ireland
2019 (July)	Mayor of London Office for Policing and Crime, *The London Rape Review: A review of cases from 2016* (July 2019)	Mayor of London Office for Policing and Crime (MOPAC)
2020 (June)	Information Commissioner's Office, *Mobile phone data extraction by police forces in England and Wales* (June 2020)	Information Commissioner's Office
2020 (October)	J Molina, S Poppleton, *Rape survivors and the criminal justice system* (Victims' Commissioner, October 2020)	Victims' Commissioner
2020 (November)	The Centre for Women's Justice, End Violence Against Women coalition, Imkaan, Rape Crisis England and Wales, *Decriminalisation of Rape: why the justice system is failing rape survivors and what needs to change* (November 2020)	Centre for Women's Justice End Violence Against Women coalition Imkaan Rape Crisis England & Wales

2020 (December)	O Smith and E Daly, *Evaluation of the Sexual Violence Complainants' Advocates Scheme* (PCC for Northumbria, December 2020)	Police and Crime Commissioner for Northumbria, funded by the Home Office
2021 (March)	*Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (Scottish Courts and Tribunals Service, March 2021) ("The Dorrian Review")	Scottish Courts and Tribunals Service
2021 (March)	National Police Chiefs' Council and College of Policing, *National Disclosure Improvement Plan Phase Two report* (March 2021)	National Police Chiefs' Council College of Policing
2021 (May)	Victims' Commissioner, *Next steps for special measures: a review of the provision of special measures to vulnerable and intimidated witnesses* (May 2021)	Victims' Commissioner
2021 (May)	College of Policing, *Authorised Professional Practice: Extraction of material from digital devices* (May 2021)	College of Policing
2021 (June)	HM Government, *The end-to-end rape review report on findings and actions* ("End-to-End Rape Review") (June 2021) R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report* (HM Government, June 2021)	Home Office Ministry of Justice
2021 (July)	Criminal Justice Joint Inspection, *A joint thematic inspection into the police and CPS response to rape – Phase One* (July 2021)	HM Inspectorate of Constabulary and Fire & Rescue Services HM CPS Inspectorate
2021 (September)	Operation Soteria	
2021 (December)	Ministry of Justice, *Delivering justice for victims: A consultation on improving victims' experiences of the justice system* (December 2021)	Ministry of Justice

2021 (December)	HM Government, *Rape Review Progress Update* (December 2021)	Home Office Ministry of Justice
2021 (December)	Mayor of London Office for Policing and Crime, *The London Rape Review 2021: An examination of cases from 2017 to 2019 with a focus on victim technology* (December 2021)	Mayor of London Office for Policing and Crime (MOPAC)
2022	*Police, Crime, Sentencing and Courts Act 2022* Part 2, Chapter 3: Extraction of information from electronic devices	
2022 (February)	Criminal Justice Joint Inspection, *A joint thematic inspection into the police and CPS response to rape – Phase Two* (February 2022)	HM Inspectorate of Constabulary and Fire & Rescue Services HM CPS Inspectorate
2022 (February)	Crown Prosecution Service, *Rape Strategy update* (February 2022)	Crown Prosecution Service
2022 (February)	Review of Evidence in Sexual Offences: A Background Paper (February 2022), Law Commission	Law Commission of England and Wales
2022 (April)	Inquiry into the Investigation and Prosecution of Rape, Report of the Home Affairs Committee (2021-22) HC 193	Home Affairs Committee
2022 (May)	Scottish Government, *Improving victims' experiences of the justice system: consultation* (May 2022)	Scottish Government
2022 (May)	Attorney-General's Office, *Annual Review of Disclosure* (May 2022)	Attorney General's Office
2022 (June)	HM Government, *Delivering justice for victims: Consultation response* (June 2022)	Ministry of Justice
2022 (June)	Home Office, *Government consultation: Police requests for third party material* (June 2022)	Home Office

2022 (October)	CPS and National Police Chiefs' Council, *Police-CPS Joint National Rape Action Plan* (October 2022)	Crown Prosecution Service National Police Chiefs' Council
2022 (October)	HM Inspectorate of Prosecution in Scotland, *Inspection of COPFS practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995* (October 2022)	HM Inspectorate of Prosecution in Scotland
2022 (December)	HM Government, *Rape Review progress update* (December 2022)	Home Office Ministry of Justice
2022 (December)	Home Office, *Operation Soteria Bluestone Year One Report, 2021-2022* (December 2022)	Home Office National Police Chiefs' Council
2023 (January)	Home Office, *Police requests for third party material: consultation response* (January 2023)	Home Office

Appendix 2: Fair trial rights in the case-law of the European Court of Human Rights

INTRODUCTION

2.1 This Appendix expands on the right to a fair trial in relation to the prosecution and trial of sexual offences, adding further depth to the human rights frameworks introduced in each chapter. The aim of this Appendix is to examine the impact of rules of evidence and procedure in sexual offences proceedings on the defendant's right to a fair trial. In particular, this Appendix will focus on the relationship between the right to a fair trial and the protection of complainants of sexual offences during criminal proceedings. The overarching purpose of this enquiry is to provide guidance about the compatibility with the human rights framework of both the existing rules of evidence and procedure in sexual offence proceedings and our provisional proposals for reform.

2.2 This Appendix is not intended to provide a comprehensive account of every aspect of the right to a fair trial and the rights of the complainants in sexual offences proceedings. Rather, it will focus on issues which are relevant to our review of the use of evidence in sexual offences proceedings, namely: addressing rape myths and misconceptions, the use of special measures, the disclosure and admissibility of personal records, character evidence, restrictions on the use of evidence of the sexual behaviour of the complainant and whether the complainant should be a party to the application to admit evidence of their sexual behaviour. We will also discuss additional issues of independent legal representation and juryless trials in sexual offence cases that arose from our pre-consultation engagement with stakeholders.

2.3 The analysis will focus primarily on the provisions contained in the European Convention on Human Rights ("ECHR"), as interpreted by the European Court of Human Rights ("ECtHR"). When relevant, references will be made to other international human rights instruments and the case law of other human rights bodies in order to broaden the analysis of applicable provisions in International Human Rights Law.

2.4 The interpretation of Convention rights given by the ECtHR plays a significant role in guiding the interpretation of domestic provisions by courts in England and Wales. This is made clear in section 2 of the Human Rights Act 1998, which requires courts and tribunals in the UK to take into account the case law of the Strasbourg organs when deciding issues which arise in connection with a right set out in the ECHR. In addition, section 3 of the Act specifies that legislation must be interpreted, so far as it is possible to do so, in a way which is compatible with Convention rights.

THE RELEVANT HUMAN RIGHTS FRAMEWORK

2.5 Given that we will discuss not only the right to a fair trial, but also the interrelationship between this and the protection of complainants in sexual offences proceedings, we

will consider article 6 (right to a fair trial) and article 8 (right to respect for private and family life) of the ECHR.[1]

2.6 It is important to note that, in criminal proceedings, article 6 and article 8 apply in different ways. The criminal limb of the right to a fair trial[2] applies to those "charged with a criminal offence" (defendants and suspects in a criminal investigation).[3] Complainants, as well as witnesses, do not enjoy fair trial rights, but they are afforded protection to their right to respect for their private and family life in criminal proceedings by virtue of article 8. However, article 8 might also apply to defendants and suspects, for example when a violation of the right to a fair trial results in a failure to protect the right to respect for their private life. Since the ECtHR is the "the master of the characterisation to be given in law to the facts of a case",[4] when the applicant relies on both articles 6 and 8 the Court is free to decide under which article(s) the complaint should be examined.[5]

2.7 In the following sub-sections, we will provide an overview of the scope of article 6 and article 8 of the ECHR, as relevant for the discussion in this Appendix.

The right to a fair trial

2.8 Article 6 of the ECHR contains a set of guarantees aimed at ensuring the defendant's fair trial, including the right to a public hearing, the right to equality of arms, the right to be informed promptly of the nature and cause of the accusation, the right to have adequate time and facilities for the preparation of the defence, the right to defend oneself in person or through legal assistance, the right to examine or have examined witnesses, and the right to an interpreter. The ECtHR has observed that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) restrictively".[6] Due to the serious consequences that criminal proceedings might have on a defendant's liberty, the right to a fair trial requires a greater protection in the sphere of criminal law than in civil proceedings.[7]

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1 Both articles are incorporated in sch 1 to the Human Rights Act 1998.

2 Article 6(1) of the ECHR applies to both criminal and civil proceedings, whereas article 6(2) and (3) apply only to criminal proceedings.

3 As clarified by the ECtHR, "criminal charge" for the purpose of article 6 has an autonomous meaning, independent of the categorisation employed by national laws: *Blokhin v Russia* App No 47152/06 (Grand Chamber decision) at [179]. Even though not formally charged, a person arrested or questioned on suspicion of having committed a criminal offence enjoys the protection of article 6: *Heaney and McGuinness v Ireland* App No 34720/97 at [42]; *Aleksandr Zaichenko v Russia* App No 39660/02 at [42]-[43].

4 *Söderman v Sweden* App No 5786/08 (Grand Chamber decision) at [57].

5 For example, in *Anghel v Italy* App No 5968/09 at [69] the ECtHR found that the complaint raised under article 6 was closely linked to the complaint under article 8, but decided to examine the case under the latter. Conversely, in *McMichael v UK* App No 16424/90 at [91] the ECtHR held that the particular circumstances of the case justified the examination of the same set of facts under both articles 6 and 8.

6 *Perez v France* App No 47287/99 (Grand Chamber decision) at [64].

7 *Moreira Ferreira v Portugal (No. 2)* App No 19867/12 (Grand Chamber decision) at [67].

2.9 The case law of the ECtHR has clarified that what constitutes a "fair" trial cannot be determined in the abstract but depends on the circumstances of each particular case.[8] In assessing whether a trial has been fair, the general approach has been to evaluate the fairness of the proceedings as a whole, rather than focussing on isolated considerations.[9] The Court has increasingly framed this evaluation by considering whether, "notwithstanding" the failure to comply with a particular right in article 6, the proceedings as a whole were fair.[10] However, there are instances in which a specific failure may be so decisive as to undermine the overall fairness of the proceedings.[11] This means, in practice, that the ECtHR usually retains a quite wide discretion in deciding whether a single failure to comply with a particular right in article 6 has rendered the proceedings unfair or, conversely, has had no adverse impact on the overall compliance with article 6. As a result, it is often difficult to infer general principles from the case law on article 6, since decisions are inextricably tangled with the singularities of each proceeding under scrutiny by the ECtHR. In that respect, Malcolm Birdling has questioned "whether there is now any coherent guidance" at all in the case law on article 6.[12]

2.10 The ECtHR's general approach of evaluating the overall fairness of the proceedings has been applied also to issues related to the admissibility of evidence. The Strasbourg Court has repeatedly stressed that:

> While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.[13]

2.11 For the ECtHR, a fundamental aspect of the overall fairness of the proceedings in relation to the use of evidence concerns the safeguarding of the rights of the defence. The defendant must be provided with the opportunity to challenge the authenticity of the evidence, oppose its use and cast doubt on its reliability and accuracy.[14] The

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8 *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [250]; *O'Halloran and Francis v UK* App Nos 15809/02 and 25624/02 (Grand Chamber decision) at [53].

9 *Ibrahim v UK*, para 250; *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [101].

10 See *Beuze v Belgium* No 71409/10 (Grand Chamber decision) at [130]. This approach has been criticised for ambiguity, vagueness and (with respect to article 6(3) rights) as providing "a blank cheque for the domestic courts": *Murtazaliyeva v Russia* No 36658/05 (2018) at [71] (dissenting opinion of Judge Pinto de Albuquerque); R Goss, *Criminal Fair Trial Rights* (2014) pp 124ff.

11 *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [251].

12 M Birdling, "Self-incrimination Goes to Strasbourg: O'Halloran and Francis v United Kingdom" (2008) 12 *International Journal of Evidence and Proof* 3.

13 *Khan v UK* App No 35394/97 at [34]; *Allan v UK* App No 48539/99 at [42].

14 *Bykov v Russia* App No 4378/02 (Grand Chamber decision) at [90].

ECtHR has developed several principles applicable to the use of evidence and fair trial rights, that will be discussed in the appropriate sections below.

The right to respect for private life in criminal proceedings

2.12 Article 8 of the ECHR provides for the right to respect for private and family life:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

2.13 To understand why article 8 of the ECHR is engaged in criminal proceedings, it is important to examine the meaning of "private life".[15] As the ECtHR has held, the concept of "private life" under article 8 is very broad and "not susceptible to exhaustive definition".[16] In general terms, "private life" covers the physical and psychological integrity of a person,[17] as well as the individual's physical and social identity (including the ability to establish relationships with other human beings).[18] More specifically, the concept encompasses also aspects of private life relevant to the individual's sexual sphere, such as sexual orientation and sexual life,[19] individual reputation[20] and the right to personal development and autonomy.[21] In general, the ECtHR has found that the rights of victims of criminal offences fall within the ambit of article 8.[22]

2.14 Article 8 protects individuals against arbitrary interferences with private life by public authorities. However, the right to respect for private life is a qualified right, since restrictions of its enjoyment are allowed provided that they are in accordance with the law, necessary in a democratic society and pursue the legitimate aims explicitly mentioned in paragraph 2 of article 8, namely: national security, public safety, the economic well-being of the country, prevention of disorder or crime, protection of health or morals and the protection of the rights and freedoms of others. Therefore, article 8 imposes upon states a negative obligation (non-interference with the right), unless interferences comply with the requirements of article 8(2).

2.15 The case law of the ECtHR has clarified that not only must states abstain from interfering with the right to respect for an individual's private life, but they must also

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15 Article 8 mentions "private and family life". For the purpose of this Appendix, we will focus only on private life.

16 *Pretty v UK App* No 2346/02 at [61].

17 *X and Y v The Netherlands* App No 8978/80 at [22].

18 *Mikulić v Croatia* App No 53176/99 at [53].

19 *Dudgeon v UK* App No 7525/76 at [41]; *Sousa Goucha v. Portugal* App 70434/12 at [27].

20 *Axel Springer AG v Germany* App No 39954/08 (Grand Chamber decision) at [83].

21 *Christine Goodwin v UK* (Grand Chamber decision) App No 28957/95 at [90].

22 *JL v Italy* App No 5671/16 (translated from French here and in subsequent references) at [119].

take positive action to ensure that the right is effectively protected. Therefore, article 8 imposes positive obligations upon states.[23] However, as the ECtHR has observed, "the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition".[24] This is demonstrated by the fact that, in practice, the principles applicable to both negative and positive obligations are similar, since "in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation".[25]

2.16 Scholars have often questioned the theoretical and practical significance of the distinction between negative and positive obligations.[26] As Dickson has observed, there is "some potential for a lack of clarity in this context. In reality, while the distinction between negative obligations and positive obligations may seem attractive, the dichotomy is a false one".[27] He further noted that "negative obligations can easily be restated as positive obligations (and vice versa), and all rights can just as readily be described as having correlative obligations that are both positive and negative".[28] Even rights that are not traditionally construed as imposing positive obligations, such as the right to a fair trial, might be seen from the perspective of both positive and negative obligations, because "a right to a fair trial means that the state must not stack the odds against a claimant or defendant during a trial but, in addition, it must also ensure that others do not create such an imbalance either".[29]

2.17 The lack of clarity regarding such a distinction raises more than just theoretical problems and has potentially far-reaching implications in relation to article 6. This is because the more the ECtHR extends the scope of the positive obligations to protect the right to respect for private life in criminal proceedings, the more there will be a tension with fair trial rights. Since the confines of the positive obligations to protect the right to respect for private life are not clearly demarcated, it might be often unclear how far states should go in ensuring the rights of the complainant to the detriment of the defendant, and vice versa.

2.18 The positive obligations to enhance the protection afforded by article 8 to complainants and witnesses in sexual offence proceedings can be divided in two categories.

2.19 First, article 8 imposes positive obligations to protect victims of sexual offences, which requires states to ensure an effective response against perpetrators. To this end, the

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23 *Kroon v The Netherlands* App No 18535/91 at [31]; *Lozovyye v. Russia* App No 4587/09 at [36].

24 *Kroon v The Netherlands* at [31].

25 *Kroon v The Netherlands* at [31].

26 A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); L Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2017).

27 B Dickson, "Positive Obligations and the European Court of Human Rights" (2010) 61 *Northern Ireland Legal Quarterly* 203.

28 Above.

29 Above.

ECtHR has held that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions".[30] In addition, there is a procedural obligation upon states to carry out an effective investigation into alleged sexual offences to safeguard the individual's right to respect for their private life.[31] The investigation should be capable of leading to the establishment of the facts and to the identification and punishment of those responsible. To do so, the authorities must take reasonable steps to secure the evidence and conduct the investigation expeditiously.[32]

2.20 Since the obligation to investigate is one of means, it follows that article 8 does not ensure a right to obtain a prosecution or conviction where there are no culpable failures by the State in seeking to hold perpetrators of criminal offence accountable.[33]

2.21 Second, article 8 requires states to protect witnesses and victims in the course of the investigation and trial of criminal offences. "Witness" in the ECHR includes the alleged victim of a crime.[34] The ECtHR has held that states "must organise their criminal proceedings in such a way as not to unjustifiably imperil the life, liberty and security of witnesses, and in particular of the victims called upon to testify".[35] States are under an obligation to protect victims of sexual offences, because "criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant".[36] The Strasbourg Court has emphasised on multiple occasions that states must adopt measures to protect victims of sexual offences from "secondary victimisation" in criminal proceedings.[37] In the sections below we discuss in more detail the case law regarding measures to protect victims and witnesses.

Balancing the right to a fair trial with the right to respect for private life

2.22 While the right to respect for private life is a qualified right and can be subject to restrictions,[38] the right to a fair trial is an unqualified right.[39] The wording and the structure of article 6 of the ECHR do not provide for any explicit restriction on the safeguards contained therein, with one exception: the requirement of a public hearing may be restricted on certain grounds.[40] In practice, however, the safeguards

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30 *MC v Bulgaria* App No 39272/98 at [150].

31 *MP v Bulgaria* App No 22457/08 at [109]; *MC v Bulgaria* at [152].

32 *CAS. and CS v Romania* App No 26692/05 at [70].

33 *Brecknell v UK* App No 32457/04 at [66].

34 *Romanov v Russia* App No 41461/02 at [97].

35 *JL v Italy* App No 5671/16 at [119]; *Doorson v The Netherlands* App No 20524/92 at [70].

36 *Y v Slovenia* App No 41107/10 at [103].

37 *Y v Slovenia*, para 104; *JL v Italy* App No 5671/16 at [141]; *A and B v Croatia* App No 7144/15 at [121]. Secondary victimisation is "victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim": Council of Europe, *Recommendation (2006)8 of the Commission of Ministers to member states on assistance to crime victims*, para 1.3.

38 See para 14 of this appendix above.

39 As also recognised in *Ibrahim v UK* at [250].

40 See also paras 53 to 59 of this appendix below.

contained in article 6 have been interpreted in the case law on grounds "that do not immediately transpire from a textual interpretation of the particular provision".[41]

2.23 Among such grounds, the case law has included the need to protect victims and witnesses. In *Doorson v the Netherlands*, a case concerning potential witness intimidation, the ECtHR noted that:

> [i]t is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of article 8 of the Convention.[42]

The applicant in *Doorson*, convicted of drug-trafficking, argued that his article 6 rights were violated where witnesses had anonymity as he could not question them directly. The ECtHR held that maintaining anonymity would not violate article 6 "if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities"[43] and any conviction "should not be based either solely or to a decisive extent on anonymous statements".[44] The ECtHR reiterated that its task under the Convention was to determine whether the "proceedings as a whole" were fair.[45] In doing so the Court concluded that "none of the alleged shortcomings" of the trial, considered in isolation or together, rendered the proceedings as a whole unfair.[46]

2.24 It is evident that, since article 8 imposes upon states positive obligations to protect victims and witnesses in criminal proceedings, measures adopted to ensure the right to respect for private life might conflict with the defendant's rights to a fair trial. Article 6 might need to be balanced against article 8 to a certain extent.

2.25 The ECtHR has used the logic of balancing to reconcile the tension between the two articles:

> In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention.[47]

2.26 The necessity of balancing fair trial rights with the interests of the victims has been specifically emphasised where sexual offences are concerned:

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41 Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009) p 81.

42 *Doorson v The Netherlands* App No 20524/92 at [70].

43 *Doorson v The Netherlands* App No 20524/92 at [72].

44 *Doorson v The Netherlands* App No 20524/92 at [76].

45 *Doorson v The Netherlands* App No 20524/92 at [67]; see also paras 10 to 11 of this appendix above.

46 *Doorson v The Netherlands* App No 20524/92 at [83].

47 *PS v Germany* App No 33900/96 at [22]; *Doorson v The Netherlands* App No 20524/92 at [70].

> In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.[48]

2.27 To reconcile protection of victims with the defendant's fair trial, "the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours".[49]

2.28 Even though the need to balance the two competing rights seems unavoidable, the position of the ECtHR is not entirely unproblematic. Scholars have warned that subjecting the right to a fair trial to competing considerations risks weakening the protection afforded to the defendant. Ashworth has observed that, unlike some qualified Convention rights (including article 8), article 6 is a "strong right" and "any rationale for curtailing a strong right must, at a minimum, be more powerful than the kind of 'necessary in a democratic society' argument that is needed to establish the acceptability of interference with one of the qualified rights".[50] Similarly, Choo has warned that the right "might lose its symbolic significance, and in time actually become devalued, if it can simply be 'balanced away' on an apparently ad hoc basis".[51] In applying the logic of balancing, the difficulty is heightened by the existence of two simultaneous, and often conflicting, obligations incumbent upon states: the obligation to secure the defendant's right to a fair trial[52] and the positive obligations to protect victims and witnesses in criminal proceedings.

2.29 Further, in the absence of a clear hierarchy of rights, the risk is that an arbitrary priority of one right over the other is established.[53] As scholars have noted, the ECtHR's jurisprudence does not provide a clear methodology to answer the question of which right should be accorded priority, whose answer seems to be found in a case-by-case assessment.[54] In that respect, Professor Laura Hoyano comments that

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48 *SN v Sweden* App No 34209/96 at [47]; *Aigner v Austria* App No 28328/03 at [37].

49 *SN v Sweden* App No 34209/96 at [47]; *Doorson v The Netherlands* at [72]; *D v Finland* App No 30542/04 at [43].

50 A Ashworth, "The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence" in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) p 147.

51 A L-T Choo, "'Give Us What You Have' – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right" in P Roberts and J Hunter (above) p 251. While these concerns are mostly related to cases in which the right to fair trial is balanced with public interests (for example, national security or public order), the risk that fair trial rights might be weakened exists also when article 6 is balanced against article 8 considerations. See also para 65 of this appendix below in relation to the right to confront witnesses.

52 This is a general obligation stemming from article 1 of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

53 M Daniele, "Testimony Through a Live Link in the Perspective of the Right to Confront Witnesses" [2014] *Criminal Law Review* 189, 194.

54 L Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] *Criminal Law Review* 4; A L-T Choo, "'Give Us What You Have' – Information, Compulsion and the

it is becoming increasingly difficult to predict how the ECtHR will determine the content of the right to a fair trial when competing considerations are at stake.[55]

2.30 We will discuss in the following sections how balancing of article 6 and article 8 has been applied in the context of sexual offences proceedings.

MYTHS AND MISCONCEPTIONS

2.31 In this section, we discuss whether, and to what extent, embedded myths and misconceptions in sexual offences cases may violate the rights protected by article 8 and, more generally, international human rights law.

The case law of the ECtHR regarding myths and misconceptions

2.32 Since myths and misconceptions may affect the complainant in sexual offences cases, the right to respect for private life (article 8) may be engaged. As we noted above, article 8 covers issues related to a person's sexual sphere, including sexual life, sexual orientation, reputation and autonomy, whose enjoyment might be undermined by the existence of myths and misconceptions in the prosecution and trial of sexual offences cases.[56]

2.33 The ECtHR has dealt with myths and misconceptions in sexual offences cases. In *JL v Italy*,[57] the applicant (a rape complainant) argued that the judgment of the domestic appellate court, which acquitted seven defendants of charges of gang rape, was based on passages in the court's judgment that were guilt-inducing, moralising and conveyed sexist stereotypes. The applicant contended that the proceedings as a whole had caused severe distress to her and that she had been subject to secondary victimisation, resulting in a violation of article 8 of the ECHR.

2.34 In relation to the examination of witnesses and the conduct of the proceedings, the ECtHR underscored the need to balance the protection afforded by article 6 to defendants and the protection afforded by article 8 to victims. States must strike:

> a fair balance between the interests of the defence, in particular the right of the defendant to examine or have examined witnesses pursuant to Article 6(3), and the rights ensured to the victim by Article 8. The manner in which alleged victims of sexual offences are questioned must ensure that a fair balance is achieved between the victim's personal integrity and dignity and the defendant's rights. Even though the defendant must be able to defend themselves by challenging the credibility of the alleged victim and potential contradictions in their testimony, the cross-examination must not be used as a means to intimidate or humiliate the victim.[58]

Privilege Against Self-Incrimination as a Human Right" in P Roberts and J Hunter (above) p 251; A Ashworth, "The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence" in P Roberts and J Hunter (above), pp 160-161.

55 L Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] *Criminal Law Review* 4, 5.

56 See para 13 of this appendix above.

57 *JL v Italy* App No 5671/16.

58 *JL v Italy* App No 5671/16 at [128].

2.35 In relation to the content of judgments, several passages in the appellate court's judgment were found by the ECtHR to give rise to a breach of article 8. These included statements made by the appellate court regarding the red underwear shown by the applicant during the incident, her bisexuality, her past casual sexual relationships (including with one of the defendants), her "ambivalent attitude towards sex" and her "non-linear life" (mostly inferred from the applicant's involvement in artistic activities). The appellate court concluded that the applicant's choice to lodge a complaint of rape against the defendants was the result of her wish to condemn the events and to repudiate a "moment of fragility and weakness".[59] The ECtHR observed that these comments were regrettable and irrelevant for the purpose of assessing the applicant's credibility and the defendants' criminal liability.[60] Therefore, the ECtHR concluded the interference with the applicant's private life and image had not been necessary to ensure the defendants' right to a fair trial.[61]

2.36 The ECtHR held that:

> The positive obligations to protect presumed victims of gender-based violence also impose a duty to protect their image, dignity and private life, including through the non-disclosure of personal information and data that were unrelated to the facts. This obligation is moreover inherent in the judicial function and arises from national law as well as from various international texts. Accordingly, judges' entitlement to express themselves freely in decisions, which is a manifestation of the judiciary's discretionary powers and of the principle of judicial independence, is limited by the obligation to protect the image and private life of persons coming before the courts from any unjustified interference.[62]

2.37 In finding a violation of article 8, the ECtHR concluded that:

> Criminal proceedings and penalties play a crucial role in the institutional response to gender-based violence and in combatting gender inequality. It is therefore essential that the judicial authorities avoid reproducing sexist stereotypes in court decisions, playing down gender-based violence and exposing women to secondary victimisation by making guilt-inducing and judgmental comments that are capable of undermining victims' trust in the justice system.[63]

2.38 In line with the established case law, the ECtHR reiterated that article 8 not only imposes negative obligations upon states (abstaining from arbitrary interferences with private life), but also positive obligations. In sexual offence cases this includes protecting the victim from secondary victimisation.[64] However, the lack of clarity in the distinction between positive and negative obligations is apparent in the judgment.[65] As Ilieva has observed, the ECtHR's positioning of the sexist remarks as a violation of a

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59 *JL v Italy* App No 5671/16 at [136].

60 *JL v Italy* App No 5671/16 at [136].

61 *JL v Italy* App No 5671/16 at [138].

62 *JL v Italy* App No 5671/16 at [139].

63 *JL v Italy* App No 5671/16 at [141].

64 *JL v Italy* App No 5671/16 at [117]-[119]; see para 21 of this appendix above.

65 See paras 16 to 17 of this appendix above.

positive obligation is doubtful, as judicial stereotyping could have been seen as a breach of a negative obligation not to interfere with the victim's sexual integrity.[66] While framing the analysis from the perspective of positive obligations, the Court itself termed the sexist remarks as a violation of the obligation to protect victims from "unjustified interference".[67]

The case law of the ECtHR regarding gender-based stereotypes

2.39 Outside the issue of rape myths in the prosecution and trial of sexual offence cases and more generally, the ECtHR has ruled on other occasions that gender-based stereotypes are contrary to the rights ensured by the Convention, including article 8 rights.

2.40 In *Carvalho Pinto de Sousa Morais v Portugal*, the ECtHR found that the comments made by the Portuguese court perpetuated gender-based discriminatory stereotypes regarding women.[68] In the judgment, the court had reduced the amount of damages awarded to a woman left disabled after a gynaecological operation because she was already fifty years old and had children, thus her sexuality was not as important as in her younger years.[69] The ECtHR observed that such an assumption:

> reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality in the specific case of the applicant.[70]

2.41 The increased attention devoted by the ECtHR to these themes and gender-based stereotypes over the years is a reflection of the evolutive interpretation of the ECHR or, to use the Strasbourg Court's terminology, the interpretation of the Convention as a "living instrument which… must be interpreted in the light of present-day conditions".[71] In interpreting Convention rights, the ECtHR takes account of the evolving consensus among states regarding pressing issues that deserve the protection of the human rights framework.[72] Among these issues, the ECtHR has explicitly included the protection of sexual autonomy. In *M.C. v Bulgaria*, it held that legislation criminalising rape should focus on the issue of consent, rather than on violence or threat, emphasising that:

> [h]istorically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a clear and steady trend in Europe and some other parts of the

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66 M S Ilieva, "J.L. v Italy: A Survivor of Trivictimisation – Naming A Court's Failure to Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation", *Strasbourg Observers* (6 September 2021).

67 *JL v Italy* App No 5671/16 at [139].

68 *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 at [54].

69 *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 at [49]-[50].

70 *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 at [52].

71 *Tyrer v UK* App No 5856/72 at [31].

72 K Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" (2011) 12 *German Law Journal* 1730.

world towards abandoning formalistic definitions and narrow interpretations of the law in this area.[73]

2.42 Since the victim's physical resistance is no longer a key element of the offence of rape, the law and practice must reflect "the evolution of societies towards effective equality and respect for each individual's sexual autonomy".[74]

The United Nations Committee on the Elimination of Discrimination against Women

2.43 Other human rights treaty bodies have dealt with myths and misconceptions in the prosecution and trial of sexual offences. In this section, we discuss the case law of the United Nations Committee on the Elimination of Discrimination against Women ("the Committee"), which is the body in charge of overseeing states' compliance with the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[75]

2.44 Relevant to the issue of myths and misconceptions in sexual offence cases are article 2 and article 5 of CEDAW. Article 2 reads:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: […]
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

Article 5 reads:

> States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; […]

2.45 *Vertido v Philippines*[76] is a landmark case decided by the Committee which addresses myths and misconceptions in sexual offence cases. The applicant complained of the defendant's acquittal of rape charges. She alleged that the national court's decision was based on several myths and stereotypes, including the belief that a rape victim must try to escape and that there must be evidence of a direct threat. The decision

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73 *MC v Bulgaria* App No 39272/98 at [156].

74 *MC v Bulgaria* App No 39272/98 at [165].

75 Adopted in 1979 and entered into force in 1981. The UK ratified it in 2004.

76 *Vertido v Philippines* Comm No 18/2008.

also speculated on the submissive character of the victim and on the inability of the defendant to rape her due to his age as a man in his sixties.[77]

2.46 In its consideration of the merits, the Committee:

> [s]tresse[d] that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.[78]

2.47 On the issue of (for example) the victim's failure to resist and her character, the Committee found that the national court disregarded:

> the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the [applicant], who was perceived by the court as not being "a timid woman who could easily be cowed". It is clear from the [national court's] judgement that the assessment of the credibility of the [applicant's] version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation.[79]

2.48 The Committee concluded that "there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence".[80]

2.49 The Committee identified other stereotypes in the national court's decision:

> Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the [applicant] and the [defendant] knew each other, constitute a further example of "gender-based myths and misconceptions".[81]

2.50 In finding a violation of articles 2 and 5 of CEDAW, the Committee stressed that the applicant had suffered "moral and social damage and prejudices", caused "by the

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77 *Vertido v Philippines* Comm No 18/2008, para 3.1.5-3.1.8.

78 *Vertido v Philippines* Comm No 18/2008, para 8.4.

79 *Vertido v Philippines* Comm No 18/2008, para 8.5.

80 *Vertido v Philippines* Comm No 18/2008, para 8.5.

81 *Vertido v Philippines* Comm No 18/2008, para 8.6.

revictimization through the stereotypes and gender-based myths relied upon in the judgement".[82]

SPECIAL MEASURES

2.51 In Chapter 7, we discussed special measures available in sexual offences trials in England and Wales and the related safeguards to ensure the defendant's right to a fair trial. In this section, we discuss the ECtHR's case law regarding a broad range of measures that courts can impose to protect the rights of witnesses and complainants. For consistency, we refer to these measures as "special measures", even though the case law does not always employ this terminology.

2.52 The compatibility of special measures with the ECHR can be assessed from two different angles. On the one hand, the issue arises of the compliance of special measures with the defendant's fair trial rights (whether a given measure has breached article 6 of the ECHR). On the other hand, the issue arises of whether failure to adopt special measures has breached the positive obligation under article 8 to protect victims and witnesses. As we noted above, "witness" in the ECHR includes the alleged victim of crime.[83] Accordingly, in this section any reference to witnesses in the case law must be understood as also including the complainant in a sexual offences case.

Exclusion of the public and the press from the hearing

2.53 Article 6(1) of the ECHR expressly states that in criminal proceedings "everyone is entitled to a fair and public hearing" and that "judgment shall be pronounced publicly". The ECtHR has stressed the importance of publicity, holding that:

> This public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[84]

2.54 Ordinarily, a trial complies with the requirement of publicity when the public is able to obtain information about the date and place of the hearing and the courtroom is capable of accommodating spectators.[85] The ECtHR has also emphasised the importance of the press in a democratic society, holding that the press has a duty to impart information and ideas on all matters of public interest, provided that it respects the reputation and rights of others and prevents the disclosure of information received in confidence.[86] In addition, the ECtHR has clarified that:

> it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or

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82 *Vertido v Philippines* Comm No 18/2008, para 8.8.

83 See para 21 of this appendix above.

84 *Riepan v Austria* App No 35115/97 at [27].

85 *Riepan v Austria* App No 35115/97 at [29].

86 *Bédat v Switzerland* App No 56925/08 (Grand Chamber decision) at [50].

amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. However, consideration must be given to everyone's right to a fair hearing as secured under article 6(1) of the Convention, which, in criminal matters, includes the right to an impartial tribunal and the right to the presumption of innocence.[87]

2.55 However, the right to a public hearing is not absolute. Article 6(1) of the ECHR authorises the exclusion of the press and the public from a hearing on a number of different grounds, including where "the protection of the private life of the parties so require".[88] The ECtHR has clarified that derogations from the right to a public hearing must be "strictly required by the circumstances of the case"[89] and that in criminal proceedings "there is a high expectation of publicity".[90] Even though the general approach adopted by the ECtHR is to scrutinise the fairness of the proceedings as a whole, the ECtHR has held that the right to a public hearing can be violated irrespective of the overall compliance of criminal proceedings with fair trial rights.[91] The approach adopted by the ECtHR is to scrutinise the reasons for the decision to hold a hearing in camera (ie, in closed court) and assess, in light of the facts of the case, whether those reasons are justified.[92] Lack of reasons as to why a hearing in private is strictly necessary will inevitably result in the breach of article 6(1).[93]

2.56 The ECtHR has recognised that the vulnerability of some witnesses (in particular, juveniles) might require courts to impose limitations on the open and public nature of proceedings in order "to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice"[94] and ensure that witnesses "feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment".[95] In addition, the ECtHR has recognised that some degree of flexibility might achieve the aim of protecting juveniles charged with criminal offences, for example by employing "a modified procedure providing for selected attendance rights and judicious reporting", rather than excluding the press and the public from the entirety of the proceedings.[96] Depending on the actual circumstances of a case, the same approach is likely to be followed by the ECtHR in

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87 *Bédat v Switzerland* App No 56925/08 (Grand Chamber decision) at [51].

88 Other grounds are the interests of morals, public order, national security, the interests of juveniles or where publicity would prejudice the interests of justice.

89 *Martinie v France* App No 58675/00 (Grand Chamber decision) at [40]; *Welke and Białek v Poland* App No 15924/05 at [74].

90 *B and P v UK*, App Nos 36337/97 and 35974/97 at [37].

91 *Kilin v Russia* App No 10271/12 at [111]-[112].

92 *Yam v UK* App No 31295/11 at [55].

93 *Chaushev v Russia* App Nos 37037/03, 39053/03 and 2469/04 at [24].

94 *B and P v UK* App Nos 36337/97 and 35974/97 at [37].

95 *B and P v UK* App Nos 36337/97 and 35974/97 at [38].

96 *T v UK* App No 24724/94 at [85].

cases where an adult victim in a sexual offences trial is deemed vulnerable to the scrutiny of the public or the press and therefore should be afforded some protection.[97]

2.57 With regard to whether measures to exclude the public and the press from the hearing must be imposed as part of the state's obligations to protect the rights of both defendants and victims, the ECtHR has stated that courts "are not obliged, but have the right to order hearings be held in camera if they consider that they warrant such a restriction".[98] Nonetheless, in one instance the ECtHR has found a violation of article 8 in relation to a defendant. There was a violation because the national court's refusal to order an in camera hearing had resulted in the disclosure of the applicant's confidential medical records to the public, without the disclosure being necessary for the examination of the merits.[99] Therefore, it appears that, in the ECtHR's view, courts may, and in some circumstances will, be obliged to impose limitations on the publicity requirement to protect the private life of a party to criminal proceedings.

2.58 The ECtHR has also found that a national court's failure to exclude the press and the public from proceedings can constitute a breach of article 6. In *T v UK*, the ECtHR found the measures adopted by the national court insufficient to protect the fair trial rights of the defendant (a minor), holding that:

> Although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.[100]

2.59 In sum, failure to order the exclusion of the public and the press from criminal proceedings might have an adverse impact on the right to a fair trial, at least in some circumstances, in so far as it might hinder the participation of a vulnerable defendant to the trial. This is true also regarding complainants and witnesses, whose right to respect for their private life might be undermined by the presence of the public or the press at the hearing.

Use of video-link technology

2.60 The use of video-link technology in criminal proceedings has been scrutinised by the ECtHR in relation to two distinct aspects of the right to a fair trial. First, the ECtHR has considered the use of video-link technology as a means to ensure the defendant's effective participation in criminal proceedings. Second, with specific regard to sexual

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97 For example, In *JL v Italy* App No 5671/16 at [131]-[133], the president of the court had ordered that some hearings be held without the press, even though the complainants had not made such a request. The ECtHR did not rule specifically on this point, which was not raised in the complaint, but accepted that the national court had taken measures to protect the right to respect for private life of the complainant, including by excluding the press.

98 *Toeva v Bulgaria* App No 53329/99 (admissibility).

99 *Frâncu v Romania* App No 69356/13, paras 62-75 (translated from French).

100 *T v UK* at [88].

offence proceedings, the ECtHR has dealt with the testimony of complainants and witnesses via video-link technology and its impact on the defendant's fair trial rights.

Defendant's participation

2.61 The ECtHR has held that the defendant's participation by video-link is not to article 6 of the ECHR, provided that the measure serves a legitimate aim and the arrangements for the giving of evidence are able to ensure the defendant's due process.[101] To comply with article 6, the video-link link must ensure that the defendant is able to hear and see what is said during the proceedings, to be heard and seen by other parties (including the judge and witnesses), and has the opportunity to make a statement and confer confidentially with the defence lawyer present in the courtroom.[102] A defendant's refusal to appear via video-link might be construed as a waiver of the right to take part in the hearing.[103]

Witness testimony

2.62 Article 6(3)(d) of the ECHR provides that anyone charged with a criminal offence has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". As part of the general approach to assessing the fairness of the proceedings as a whole, the ECtHR will take into consideration also the way evidence was obtained, having regard to the rights of the defence as well as the interest of the public and victims in seeing crime properly prosecuted and, finally, the rights of witnesses.[104]

2.63 Although not expressly provided for by the text of article 6(3)(d) of the ECHR, the right to examine or have examined witnesses can be subject to exceptions. These exceptions:

> Must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[105]

2.64 Due to the importance of the rights of the defence in ensuring the defendant's fair trial, any restriction must be strictly necessary and a less restrictive measure should be applied whenever possible.[106]

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101 *Marcello Viola v Italy* App No 45106/04 at [67]; *Asciutto v Italy* App No 35795/02 at [64] (in French); Sakhnovskiy v Russia App No 21272/03 (Grand Chamber decision) at [98].

102 *Marcello Viola v Italy* at [73]-[75]; *Asciutto v Italy* at [69]-[71]. In *Sakhnovskiy v Russia* App No 21272/03 (Grand Chamber decision) at [104], the ECtHR found a violation of article 6 ECHR because the video-link did not ensure confidential communications between the defendant and the lawyer.

103 *Dijkhuizen v The Netherlands* App No 61591/16 at [60].

104 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [101].

105 *Al-Khawaja and Tahery v the United Kingdom* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [118]; see also para 34 of this appendix above.

106 *Graviano v Italy* App No 10075/02 at [38]; *Van Mechelen v The Netherlands* App Nos 21363/93, 21364/93, 21427/93 and 22056/93 at [58].

2.65 Against this general background, allowing the testimony of a witness via video link might be seen as weakening the defence's ability to put questions to the witness while assessing the witness's behaviour and credibility in the courtroom. Scholars have observed that "physicality", albeit not strictly speaking indispensable, is an important element of the right to confront witnesses, warning that measures resulting in a limitation of this right should not be adopted lightly.[107] Similarly, the ECtHR has stressed multiple times the importance of observing the behaviour and credibility of a witness.[108] First, confronting the witness in the presence of a judge is a fundamental fair trial right, because it is the judge who will eventually decide the case and therefore their observations of the witness's behaviour and credibility carry significant consequences for the defendant.[109]

2.66 At the same time, allowing a witness to testify via video-link is a way to limit the exposure of a witness to what the ECtHR has repeatedly described as the "ordeal" of sexual offence proceedings,[110] in particular by avoiding direct confrontation of the witness with the defendant. In these circumstances, the use of video-link technology is a technique by which states might seek to comply with the positive obligation to protect the witness's private life during sexual offence proceedings. Even though not expressly framed in the case law as a positive obligation, the ECtHR has acknowledged that the use of video link technology is an option, alone or in combination with other measures, available to courts to ensure that the witness's rights are adequately protected while at the same time guaranteeing the right of the defence to examine the witness.[111]

Pre-recorded interviews of witnesses

2.67 The ECtHR has dealt on multiple occasions with pre-recorded interviews of witnesses. Playing a pre-recorded interview during the trial raises issues similar to those already discussed in the previous section: on one hand, a pre-recorded interview may affect the defendant's ability to examine witnesses; on the other hand, it constitutes a measure to protect the witness from a direct confrontation with the defendant during the trial.

2.68 In general terms, the ECtHR has observed that:

> The use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his

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107 I Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] *Criminal Law Review* 255; M Daniele, "Testimony Through a Live Link in the Perspective of the Right to Confront Witnesses" [2014] *Criminal Law Review* 189.

108 *Bocos-Cuesta v The Netherlands* App No 54789/00 at [71].

109 *Graviano v Italy* at [38] (in French). This does not entitle the defendant to personally cross-examine the witness: *Y v Slovenia* App No 41107/10 at [106].

110 *Y v Slovenia* App No 41107/10 at [103]; *JL v Italy* App No 5671/16 at [119]; *Aigner v Austria* App No 28328/03 at [37].

111 *WS v Poland* App No 21508/02 at [61]; *SN v Sweden* App No 34209/96 at [49].

statements or at a later stage of the proceedings. However, Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness.[112]

2.69 In *Al-Khawaja and Tahery v UK* the Grand Chamber addressed, among other things, a statement made to the police by a complainant of indecent assault who had then committed suicide and therefore could not have been called to testify at the hearing. The Grand Chamber held that:

> Article 6(3)(d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[113]

2.70 The Grand Chamber added that two general standards of scrutiny apply:

> Firstly, there must be a good reason for the non-attendance of a witness. Secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule").[114]

2.71 On the first of these, a witness's fear of testifying (even when their fear is not directly attributable to threats made by the defendant) might constitute a good reason for non-attendance. However the trial court must determine "firstly, whether or not there are objective grounds for that fear, and, secondly, whether those objective grounds are supported by evidence".[115] Since the absence of a witness during the trial negatively affects the rights of the defence, admitting a witness statement in lieu of live evidence at trial must be a measure of last resort that the court must adopt when other special measures are impracticable.[116]

2.72 On the second, the "sole or decisive rule" was explained further in *Schatschaschwili v Germany* where the Grand Chamber observed that "the more important the evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair".[117] Among these counterbalancing factors will be:

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112 *Bocos-Cuesta v The Netherlands* App No 54789/00 at [68].

113 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision at [118].

114 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [119].

115 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [124].

116 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [125].

117 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [116].

(1) the existence of a video-recording of the absent witness's questioning at the investigation stage that allows the court, the prosecution and the defence to observe the witness's demeanour and form their own impression of their reliability;[118]

(2) in cases where a witness is absent and cannot be questioned at the trial, the possibility offered to the defence to put questions to the witness indirectly, for instance in writing, in the course of the trial;[119]

(3) the fact that the defence counsel had the opportunity to question the witness during the investigation stage.[120]

2.73 As a general rule, when live testimony at the trial does not take place:

> the defendant must further be afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness. Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation.[121]

2.74 These principles have been applied also to sexual offence proceedings. The ECtHR, having emphasised that a pre-recorded interview of a witness constitutes a measure to protect the witness, has nonetheless found a violation of article 6(3)(d) of the ECHR in cases where the defendant had not been afforded the possibility to put questions to the witness either during the trial or at the investigation stage.[122] In the ECtHR's words:

> By way of viewing the videotape the courts, as well as the applicant, were able to listen to [the witness]'s own account of the alleged events. The recording also enabled them to observe the manner in which the interviews were conducted and to assess for themselves, at least to a certain degree, the credibility of [the witness]'s account. It was open to the applicant to contest and comment on the evidence produced before the trial courts. While the Court acknowledges the significance of such a recording as evidence, it cannot alone be regarded as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account has been afforded by the authorities.[123]

2.75 By contrast, the ECtHR has found no violation of article 6(3)(d) of the ECHR where the defendant's counsel was able to ask questions of the complainant of sexual offences during the pre-trial investigation and the recorded interview was shown at the trial.[124] For the ECtHR, these measures were sufficient to enable the applicant to

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118 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [127].

119 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [129].

120 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [130].

121 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [131].

122 *D v Finland* App No 30542/04 at [50]-[52]; *AL v Finland* App No 23220/04 at [41]-[45].

123 *D v Finland* at [50]; *A.L. v Finland* at [41].

124 *SN v Sweden* App No 34209/96 at [48]-[54].

challenge the witness's statement and credibility in the course of the criminal proceedings.[125]

Use of two-way mirrors

2.76 The ECtHR has ruled on the compatibility with article 6 of the use of mirrors to protect the victim during the testimony in sexual offence proceedings. In *Accardi v Italy*,[126] the victims (two minors), assisted by a psychologist, were heard in the courtroom while the defendants, the lawyers and the prosecutor were allowed to follow their testimony behind a two-way mirror in an adjacent room. At some point during the hearing, the investigating judge also moved to the adjacent room because one of the witnesses replied that she was too ashamed to talk. The ECtHR found no violation of the right to a fair trial since the defendants were able to hear the questions and the replies of the witnesses, observe their demeanour and put questions to them through the intermediary of the investigating judge.

2.77 In *W.S. v Poland*,[127] the ECtHR has suggested that a two-way mirror could have been a less invasive method than direct questioning to enable the parties to test the reliability of a vulnerable victim in sexual offence trials.

PERSONAL RECORDS

2.78 In Chapter 3, we discussed the issue of disclosure in sexual offences proceedings of the complainant's personal records that are held by third parties.

2.79 The ECtHR has stressed on several occasions that personal information, including medical data, falls within the scope of article 8. In *Mockutė v Lithuania*, the ECtHR held that respecting the confidentiality of personal data, including medical data, is crucial not only to respect patients' privacy, but also to preserve their confidence in the medical profession and in the health services. Without such protection, those in need of medical assistance might be deterred from revealing information of a personal and intimate nature which might be necessary to receive appropriate treatment. Therefore, the domestic law must afford appropriate safeguards to prevent disclosure of health data which might be inconsistent with article 8.[128] Furthermore, the ECtHR has added that information about a person's sexual life, moral integrity and mental health is highly sensitive and thus also attracts the protection of article 8.[129]

2.80 In discussing the issue of disclosure of personal records in sexual offences proceedings, the ECtHR has distinguished between personal records already in the possession of the prosecution and personal records still held by third parties.

Personal records already held by the prosecution

2.81 When the prosecution is in possession of the complainant's personal records, it is possible that it might seek to withhold the evidence on public interest grounds.

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125 *SN v Sweden* App No 34209/96 at [52]; see also *B v Finland* App No 17122/02 at [44]-[50].

126 *Accardi v Italy* App No 30598/02 (admissibility decision).

127 *WS v Poland* at [61].

128 *Mockutė v Lithuania* App No 66490/09 at [93] (with references to other cases).

129 *Mockutė v Lithuania* App No 66490/09 at [94] (with references to other cases).

Whether the prosecution may seek to withhold personal records on public interest grounds has never been dealt with in Strasbourg's jurisprudence, especially since the content of undisclosed evidence (and whether it includes personal records) is usually not known to the ECtHR.[130] However, some general principles on the disclosure of evidence might be inferred from the case law which might help understand whether, and to what extent, disclosure of personal records affects the defendant's fair trial rights and the right to a private life in respect of the complainant of sexual offences.

2.82 Article 6 of the ECHR does not explicitly mention disclosure of evidence in criminal proceedings. However, the case law has stressed that disclosure of evidence is fundamental to ensure an adversarial trial and equality of arms between the prosecution and defence, both of which "must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party".[131] Furthermore, the ECtHR has linked disclosure of evidence with article 6(3)(b), that provides the right of the defendant "to have adequate time and facilities for the preparation of his defence". As explained by the ECtHR, "the accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings".[132]

2.83 In *Rowe and Davis v UK*,[133] the Grand Chamber laid down some ground rules governing disclosure that can be summarised as follows:

(1) Article 6 requires that the prosecution disclose to the defence all material evidence in their possession for or against the accused.[134]

(2) The entitlement to disclosure of relevant evidence is not an absolute right, because "in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest".[135]

(3) However, in order to comply with article 6, measures restricting the entitlement to disclosure must be "strictly necessary". In order to ensure the defendant's fair trial, any difficulty caused to the defence as a result of the limitations on disclosure must be counterbalanced by the procedures followed by the judicial authorities. Decisions by the judicial authorities must ensure the requirements

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130 See also para 10 of this appendix above.

131 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [60].

132 *Leas v Estonia* App No 59577/08 at [60].

133 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision).

134 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [60].

135 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [61].

of adversarial proceedings and equality of arms to protect the interests of the accused.[136]

2.84 The principles developed by the ECtHR confirm that the logic of balancing countervailing rights applies also in relation to disclosure (and non-disclosure) of evidence in criminal proceedings. Even though the Grand Chamber does not explicitly refer to the protection of complainants and witnesses in criminal proceedings, it nonetheless recognises the aim of preserving "the fundamental rights of another individual" as a ground to justify non-disclosure. As is usually the case with the Strasbourg jurisprudence,[137] the fairness of the proceedings as a whole does not depend on a single instance of non-disclosure, but on the overall measures that courts have adopted to ensure the defendant's fair trial.

2.85 Following these principles, the Grand Chamber in *Rowe and Davis* decided that the prosecution's decision to withhold certain evidence on the basis of public interest immunity breached article 6, since the prosecution itself assessed the importance of the evidence and weighed it against the public interest without notifying the judge. The Court of Appeal had the opportunity of reviewing the undisclosed evidence and hearing the prosecution's submission on the matter. However this procedure was not sufficient to remedy the unfairness of the trial as a whole, since the Court of Appeal had to assess the relevance of the undisclosed evidence on the basis of the transcripts of the Crown Court hearing and of the prosecution's arguments alone.[138]

2.86 In *Jasper v UK*,[139] using an amended framework, the prosecution had made an *ex parte* application to the trial judge to withhold material in its possession on the basis of public interest immunity. The defence was notified of the application, without the content of the undisclosed evidence being revealed, and permitted to make submissions. In finding no violation of article 6, the Grand Chamber observed that the undisclosed material formed no part of the prosecution case and was never put to the jury, and that the defence was allowed to participate in the decision-making.[140] Furthermore, it emphasised that "the fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld".[141]

2.87 What transpires from these judgments is that non-disclosure of evidence must be accompanied by sufficient safeguards, among which scrutiny by the trial judge and participation of the defence play a fundamental role. Provided that these safeguards are in place, it is open to the prosecution to argue that evidence such as the

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136 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [61]-[62].

137 See para 10 of this appendix above.

138 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [63]-[67]. The ECtHR reached a similar conclusion in *Atlan v UK* App No 36533/97 at [42]-[46].

139 *Jasper v UK* App No 27052/95 (Grand Chamber decision).

140 *Jasper v UK* App No 27052/95 (Grand Chamber decision) at [55].

141 *Jasper v UK* App No 27052/95 (Grand Chamber decision) at [56].

complainant's personal records should be withheld to protect the complainant's rights in criminal proceedings, including the right to respect for their private life.

Personal records held by third parties

2.88 Where the records are in possession of a third party then an issue arises of whether parties not involved in the proceedings should disclose these records in the course of criminal proceedings (to the prosecution or by court order) or whether the disclosure would breach the complainant's right to respect for their private life.

2.89 The ECtHR has ruled on the compatibility of the disclosure of medical records in criminal proceedings with article 8. In *Avilkina v Russia*, the applicants (subject to an enquiry by the prosecution but not formally charged) submitted that the information requested by the prosecutor was confidential medical information which was disclosed to the prosecutor by the medical institutions without their consent.[142] The ECtHR, having recognised that disclosure of medical records constitutes an interference with the right to respect for private life within the meaning of article 8(2), held that such interference pursued the legitimate aim of law enforcement.[143] However, the ECtHR held that the interference was not proportionate to the aim pursued, since it was not necessary for the purpose of the enquiry conducted by the prosecution and no safeguard was in place to prevent unauthorised disclosure of the records.[144] Referring to the balancing technique, the ECtHR stated that it

> discern[ed] no mention in the text of the judgments of any efforts by the national authorities' to strike a fair balance between the applicants' right to respect for their private life and the prosecutor's activities aimed at protecting public health and individuals' rights in that field. Nor did the authorities adduce relevant or sufficient reasons which would have justified the disclosure of the confidential information.[145]

2.90 In *Z v Finland*, it was the witness in sexual offence proceedings who complained about the court's order to disclose her medical records.[146] The applicant, an HIV carrier, was a witness in the proceedings against her husband, also HIV-positive, who was charged with deliberately trying to infect other women. The ECtHR held that the interference with the witness's private life pursued the legitimate aims mentioned in article 8(2), namely the prevention of crime and the protection of the rights and freedoms of others.[147] In that respect, the ECtHR held that "the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings where such interests are shown to be of even greater importance".[148] The Court concluded that the inclusion of medical records in the prosecution file was proportionate, since records constituted relevant evidence and

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142 *Avilkina v Russia* App No 1585/09 at [28].

143 *Avilkina v Russia* App No 1585/09 at [40].

144 *Avilkina v Russia* App No 1585/09 at [47]-[54].

145 *Avilkina v Russia* App No 1585/09 at [51].

146 *Z v Finland* App No 22009/93.

147 *Z v Finland* App No 22009/93 at [76].

148 *Z v Finland* App No 22009/93 at [97].

the witness was given the opportunity to be heard and challenge the disclosure order.[149] However, the ECtHR found that the disclosure of the witness's name and her HIV status in the judgment was an unlawful interference with her private life, observing that her anonymity should have been ensured in light of her opposition to the disclosure of the medical records.[150]

2.91 In light of these decisions, it appears that disclosure of complainants' personal records, including medical records, might be necessary in the presence of overriding public interests, such as the prosecution of crime and the protection of the rights and freedoms of others. In any event, complainants must be given the opportunity to make submissions and challenge the disclosure. Even though the ECtHR has to date not had the opportunity to deal specifically with potential conflicts between non-disclosure of personal records and the right to a fair trial, arguably the key principle to reconcile the right of the complainant with the right of the defendant is to be found in the balancing technique. For example, it can be argued that the disclosure of personal records in sexual offence proceedings is a legitimate interference with the complainant's private life in order to protect the defendant's right to a fair trial (one of "the rights of others" mentioned in article 8(2)), provided that such disclosure is relevant and effective safeguards are in place. In such a case, as Leahy has argued, that the ECHR jurisprudence requires that the legislature "ensure that the law is sufficiently robust to protect complainants' privacy by limiting disclosure of personal information to where this is strictly necessary".[151] The balance to be struck and whether disclosure is required will depend on a case-by-case assessment of the set of measures adopted by judicial authorities to ensure the overall fairness of the proceedings.

SEXUAL BEHAVIOUR EVIDENCE

2.92 In Chapter 4, we observed that the UK courts have acknowledged that section 41 of the Youth Justice and Criminal Evidence Act 1999, which restricts the admissibility of evidence regarding the complainant's sexual behaviour, could potentially have an adverse impact on the defendant's fair trial rights.

2.93 The issue of the compliance of evidentiary restrictions on sexual behaviour evidence with article 6 has not been examined by the ECtHR to date. However, on a few occasions, the Strasbourg Court has dealt with questioning regarding the complainant's sexual behaviour during criminal proceedings and its compliance with the complainant's right to respect for their private life.

2.94 In *JL v Italy*, the applicant invoked article 472(3bis) of the Italian Code of Criminal Procedure, according to which, in sexual offences proceedings, "questions regarding the complainant's private and sexual life are prohibited, unless they are necessary for the reconstruction of the facts of the case".[152] This case concerned both the investigation stage of the proceedings as well as the trial. The applicant argued that

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149 *Z v Finland* App No 22009/93 at [106]-[110].

150 *Z v Finland* App No 22009/93 at [113].

151 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 230.

152 Italian Code of Criminal Procedure, art 472(3bis) (translated from Italian).

the defendants' lawyers had asked her questions regarding her private and sexual life that were not pertinent to the facts and whose aim "was not to clarify the facts, but to show that her lifestyle and her sexual choices were anomalous".[153]

2.95 The ECtHR emphasised that "the existence of two contradictory versions of the events unavoidably requires an appreciation of the credibility of the statements made by each party, which must be duly verified".[154] It falls on the judicial authority to strike the right balance between the interests of the defence and the need to protect the rights of the alleged victim.[155] The Court observed that defence lawyers had tried to undermine the applicant's credibility, by putting personal questions to her (often unrelated to the facts in issue) regarding her family life, her sexual orientation and her sexual choices.[156] However, the Court noted that both the prosecutor and the president of the first-instance court had taken measures to protect the applicant's private life, intervening whenever defence lawyers had asked questions which were discrediting or unrelated to the facts, with a view to preventing distress to the applicant as much as possible. In addition, the president of the court had prohibited the press from filming the examination of the applicant in order to protect her private life and had ordered some recesses so that she could regain her composure. Even though the ECtHR recognised that the applicant's experience during the investigation and trial had been inevitably upsetting, it concluded that there was no violation of her right to respect for her private life.[157]

2.96 It is important to note that the ECtHR did not assess the suitability, in the abstract, of the Italian law to strike the correct balance between the defendant's right to a fair trial and the complainant's right to respect for their private life. Rather, the focus of the Court's reasoning is on whether the judicial authorities, in the concrete case, had struck the correct balance, concluding that they did so. This means, in practice, that the ECtHR accepted that some intrusive questions regarding the complainant's sexual behaviour might be relevant to the facts at issue, and that it is the duty of the judicial authority to ensure that such questions remain relevant throughout the examination of the complainant.

2.97 Ilieva has criticised the decision, arguing that the mere fact that judges had interrupted the lawyers when they asked irrelevant questions regarding the applicant's sexual life was not sufficient to prevent her "public courtroom harassment" and noting that "the trial symbolically replicated the original violence: intrusive lawyers ganged up, unhindered by the weakly reactive judges".[158] Ilieva argues that the duty towards

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153 *JL v Italy* App No 5671/16 at [96].

154 *JL v Italy* App No 5671/16 at [127].

155 *JL v Italy* App No 5671/16 at [128].

156 *JL v Italy* App No 5671/16 at [132].

157 *JL v Italy* App No 5671/16 at [96], [133].

158 M S Ilieva, "J.L. v Italy: A Survivor of Trivictimisation – Naming A Court's Failure to Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation", *Strasbourg Observers* (6 September 2021).

victims of violence should be to "actively minimise the harm, not merely not actively compound it".[159]

2.98 In contrast to *JL*, the ECtHR held in *Y v Slovenia* that the judicial authorities had failed adequately to protect the right to respect for private life of the applicant (an alleged victim of rape) during her questioning at the trial.[160] As in *JL,* the president of the court had at times intervened to prohibit some questions of personal nature put to the applicant and had ordered occasional adjournments. However, on this occasion it was considered insufficient by the ECtHR, especially in light of the fact that the defendant (a family friend) was often allowed to put questions directly to the applicant, even though he was represented by a lawyer.[161] The ECtHR noted that, even though the president of the court had prohibited irrelevant questions, the defendant's:

> [o]ffensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction [the president's intervention]. Considering the otherwise wide scope of cross-examination afforded to [the defendant], in the Court's opinion curtailing his personal remarks would not have unduly restricted his defence rights. Yet such an intervention would have mitigated what was clearly a distressing experience for the applicant.[162]

The ECtHR concluded that the judicial authorities had not struck the right balance between article 6 and article 8 because the manner in which proceedings had been conducted "substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial".[163]

2.99 Therefore, it appears that the main difference between *JL* and *Y* concerns the degree of intervention by the judicial authority to prevent the types of questions that might undermine the protection afforded to the complainant by article 8. The ECtHR requires courts actively to supervise the examination of the complainant and oversee the nature of the questions asked by the defence. Since balancing plays a key role as part of this supervision, it can be argued that the ECtHR would not accept a complete ban on questions regarding the applicant's sexual behaviour, since such a ban would negate the very logic of balancing and restrict unacceptably the right to a fair trial. Rather, courts must perform the balancing exercise between article 6 and article 8 on a case-by-case basis, prohibiting questions which bear no connection with the facts in issue. As McGlynn observed, "the right to a fair trial neither takes precedence over

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159 M S Ilieva, "J.L. V. Italy: A Survivor of Trivictimisation – Naming A Court's Failure to Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation", *Strasbourg Observers* (6 September 2021).

160 *Y v Slovenia* App No 41107/10 at [101]-[116].

161 *Y v Slovenia* App No 41107/10 at [107].

162 *Y v Slovenia* App No 41107/10 at [109].

163 *Y v Slovenia* App No 41107/10 at [114].

other interests nor requires admission of all relevant evidence".[164] Balancing article 6 and article 8 rights seeks to ensure that neither is unduly restricted.

CHARACTER EVIDENCE

2.100 The ECtHR has ruled on character evidence only in a limited number of cases. The case law appears to deal with evidence regarding the defendant's character at the sentencing and appeal stages, rather than referring specifically to the type of character evidence adduced at trial that we discussed in Chapter 5.

2.101 The ECtHR has clarified that the right to be presumed innocent (article 6(2) of the ECHR) does not apply to allegations made about the defendant's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge".[165]

2.102 On many occasions, the ECtHR has reiterated that, where the appellate court is competent to modify, including increasing, the sentence imposed by the lower court and when the appeal proceedings raise issues involving an assessment of the defendant's personality, character and state of mind at the time of the offence, it is essential to the fairness of the proceedings that defendants are able to be present at the hearing and afforded the opportunity to participate in it.[166] Where the assessment of the defendant's personality and character is at issue in the appellate proceedings, the court cannot examine the case properly without having heard the defendant directly and gaining a personal impression of them.[167]

INDEPENDENT LEGAL REPRESENTATION

2.103 This section will discuss whether a right to Independent Legal Representation ("ILR") for complainants exists under human rights law. For the purpose of the discussion, we will consider a general right of ILR, without restricting the analysis to specific instances in which such a right could be introduced.

2.104 Keane and Convery have proposed the introduction in the Scottish criminal system of independent legal representation ("ILR") to assist complainants in sexual offences cases.[168] The authors do not propose a general right to ILR but suggest that ILR should be confined to cases in which an application is made to introduce evidence regarding the complainant's sexual behaviour or character, pursuant to section 275 of the Criminal Procedure (Scotland) Act 1995.[169]

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164 C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *The Journal of Criminal Law* 367, 377.

165 *Phillips v UK* App No 41087/98 at [35]; *Bikas v Germany* App No 76607/13 at [57].

166 *X v The Netherlands* App No 72631/17 at [45]; *Talabér v Hungary* App No 37376/05 at [128].

167 *Zahirović v Croatia* App No 58590/11 at [57]; *Cooke v Austria* App No 25878/94 at [42]; *Kremzow v Austria* App No 12350/86 at [67].

168 E P H Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020).

169 Above, pp 2-3.

2.105 Keane and Convery identify article 8 of the ECHR as a possible legal basis for the introduction of the right to ILR. They rely on the established case law of the ECtHR, mentioned throughout this Appendix, according to which states are under positive obligations to protect complainants in sexual offences cases (in particular, their right to respect for their private life) and protect them from secondary victimisation. The authors also refer to the established case law regarding the need to balance the right to a fair trial with the right to respect for the private life of complainants and witnesses.[170] They note that the balancing exercise to be performed by courts is rendered difficult if the complainant is not given the opportunity to be heard and properly participate in the process.[171] The prosecution, in the authors' view, cannot adequately represent the interests of the complainant.[172]

2.106 The possibility for complainants of sexual offences to be provided with legal representation can be construed as a way through which states might seek to discharge their positive obligations to protect complainants in sexual offence cases (and indeed in criminal proceedings more generally). It must be recalled, however, that states enjoy a certain margin of appreciation in choosing the measures aimed to comply with the positive obligation to ensure respect of article 8. It follows that states might choose to introduce ILR for complainants of sexual offences, but there is no obligation to do so under the ECHR.

2.107 In the ECHR, there is no explicit *right* to ILR (or otherwise a *right* to legal representation for alleged victims of criminal offences). In criminal proceedings, only those "charged with a criminal offence" have a right to legal representation (article 6(3)(c)). The ensuing implication is that complainants have no legal entitlement to ILR under the ECHR, thus the absence of specific provisions in national laws regarding legal assistance to complainants of sexual offences would not arguably constitute a breach of article 8. However, in our pre-consultation engagement, Professor David Harris told us that he doubted that the positive obligation under article 8 to protect complainants would be interpreted by the ECtHR as requiring the introduction of ILR in the absence of a proven consensus among Convention states in their practice. Conversely, providing complainants of sexual offences with ILR might be a means through which states seek to protect article 8. That is to say that ILR is an option that states might consider, but not a right that states must ensure.

2.108 In addition, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention)" places an obligation on contracting states to "provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law" for complainants of gender-based violence, including complainants of sexual offences.[173] The extent of

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170 E P H Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) pp 16-17.

171 Above, pp 20-21.

172 Above, pp 18-19.

173 "Violence against women" and "domestic violence" include also physical, sexual and psychological harm (article 3(a) and (b) of the Istanbul Convention). Sexual violence and rape thus fall within the scope of the Convention (article 36). "Gender-based violence against women" means "violence that is directed against a woman because she is a woman or that affects women disproportionately" (article 3(d)). This could include a male complainant.

this obligation is unclear. Article 57 does not specify whether the right to legal assistance should encompass also legal assistance during criminal proceedings, including the trial. In addition, the right should be exercised in accordance with national laws. The Convention was ratified by the UK on 22 July 2022 and entered into force as regards the UK on 1 November 2022. Arguably, states are under an obligation to ensure some form of legal assistance (including free legal aid) to complainants, but it is for the national law to spell out the concrete modes through which such a right should be exercised.

JURYLESS TRIALS OF SEXUAL OFFENCE CASES

2.109 The Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Part ("Gillen Review")[174] discusses in detail the benefits and deficiencies of trial by jury in sexual offence cases, concluding that sexual offences should continue to be tried by a judge and a jury, with the possibility for a defendant to apply for a judge-alone trial if it is in the interests of justice.[175] Among the arguments against trial by jury, the Review mentions the difficulty for jurors to understand the complexities of sexual offence cases; the presence of myths and stereotypes among jurors as opposed to the ability of trained judges to be more objective (including vis-à-vis information contained in the media); and the lack of a reasoned verdict in jury trials.[176]

2.110 In this section, we discuss whether some of these arguments against jury trials might raise human rights concerns.

2.111 The starting point is that states enjoy "considerable freedom" regarding the organisation of their judicial systems, so long as they comply with the requirement of ensuring a fair trial.[177] It follows that article 6 does not contain a right to be tried before a jury.[178] The existence of lay jury systems is "guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences" and "a State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention."[179]

2.112 On multiple occasions the ECtHR has dealt with the lack of a reasoned verdict by the jury and its relevance to fair trial. As a general rule, the ECtHR has observed that:

> The Convention does not require jurors to give reasons for their decision and … Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial

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174 Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (May 2019).

175 Above, p 562.

176 Above, pp 549-553.

177 *Twomey, Cameron and Guthrie v UK* App Nos 67318/09 and 22226/12 (admissibility decision) at [30].

178 *Twomey, Cameron and Guthrie v UK* App Nos 67318/09 and 22226/12 (admissibility decision) at [30].

179 *Twomey, Cameron and Guthrie v UK* App Nos 67318/09 and 22226/12 (admissibility decision) at [30].

to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.[180]

2.113 Procedural safeguards against arbitrariness are, for example, directions or guidance provided by the presiding judge to the jurors on the relevant legal issues or evidence and precise, unequivocal questions put to the jury by the judge to form a framework on which the verdict is based in order to sufficiently offset the fact that no reasons are given for the jury's verdict.[181]

2.114 In addition, the ECtHR has stressed the importance of safeguards to allow defendants to exercise their right to appeal against the judgment.[182] When multiple defendants are tried, the ECtHR requires the questions put by the judge to the jury to be specific enough to allow each defendant to understand the factual and legal basis on which they had been convicted.[183] In *Judge v UK*, the Court emphasised that "in Scotland the jury's verdict is not returned in isolation but is given in a framework which includes addresses by the prosecution and the defence as well as the presiding judge's charge to the jury",[184] concluding that appeal rights available under Scottish law are sufficient to remedy any improper verdict by the jury.[185]

2.115 Although the ECtHR has not tackled the issue of myths and misconceptions in sexual offence cases in relation to jurors, it has ruled on multiple occasions regarding jurors' personal convictions and the impact of the media on them. The issue is relevant to fair trial rights, namely because article 6(1) and (2) of the ECHR provides for the right to be tried by an impartial tribunal and the right to be presumed innocent.[186] In that respect, the ECtHR has held that "a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused".[187]

2.116 The Court has observed that, unlike juries, judges possess appropriate experience and training enabling them to resist any outside influence (including from the press).[188] In *Beggs v UK*, the ECtHR found that the judge had appropriately warned the jury to disregard any extraneous material which had come to their attention (referring explicitly to material in the press and on television), thus concluding that the applicant

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180 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [90]. See also *Legillon v France* App No 53406/10 at [53]; *Lherrmitte v Belgium* App No 34238/09 (Grand Chamber decision) at [67].

181 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [92]; *Legillon v France* App No 34238/09 (Grand Chamber decision) at [54]; *Lherrmitte v Belgium* App No 34238/09 (Grand Chamber decision) at [75]-[85].

182 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [92].

183 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [96]-[100] (finding a violation of article 6).

184 *Judge v UK* App No 35863/10 (admissibility decision) at [36].

185 *Judge v UK* App No 35863/10 (admissibility decision) at [38].

186 The requirement of impartiality applies to both judges and juries: *Hanif and Khan v UK* App Nos. 52999/08 and 61779/08 at [138]-[140].

187 *Akay v Turkey* App No 16849/12 (admissibility decision).

188 *Craxi v Italy (No 1)* App No 34896/97 at [104].

had failed to demonstrate that the jury could not have been relied upon to follow the judge's instructions.[189]

2.117 When suspicions arise as to the lack of impartiality of a juror, it is the duty of the judge to deal with the matter in the appropriate manner to dispel any appearance of lack of impartiality. For example, in *Remli v France*, the ECtHR found that the judge, during a trial against a French national of Algerian origin, had failed to investigate the allegations (made by a juror who overheard a conversation) that one of the jurors harboured racist beliefs.[190]

2.118 In *Sander v UK*, another case concerning racial bias within a jury, the ECtHR accepted that "although discharging the jury may not always be the only means to achieve a fair trial, there are certain circumstances where this is required by Article 6(1) of the Convention".[191] In this case the applicant complained that he was tried by a "racially prejudiced" jury in violation of article 6(1) of the ECHR.[192] The applicant, an Asian man, believed the jury was not impartial after a juror complained that at least two of the other jurors had been making "openly racist remarks and jokes" about Asians.[193] Another juror, after being confronted with these allegations, notably admitted to making such racist jokes. In response, the judge "redirected the jury in a clear, detailed and forceful manner" and "sought and received an unequivocally positive assurance from them as to their impartiality."[194] In finding a violation of article 6(1), the ECtHR held that the judge "should have reacted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence".[195] The serious allegation that the applicant "risked being condemned because of his ethnic origin" coupled with the open admission by one of the jurors to making racist remarks necessitated further action beyond a direction and a written assurance from the jury.[196]

2.119 These cases concern racist beliefs of jurors and we note the Court said it:

> considers this to be a very serious matter given that, in today's multicultural European societies, the eradication of racism has become a common priority goal for all Contracting States.[197]

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189 *Beggs v UK* App No 15499/10 (admissibility decision) at [128]; see also *Abdulla Ali v UK* App No 30971/12 at [92]-[99].

190 *Remli v France* App No 16839/90 at [92]-[99]. See also *Tikhonov and Khasis v Russia* App Nos 12074/12 and 16442/12 at [44]-[53] (regarding the court's failure to deal with an accusation made by a juror, interviewed by a journalist, alleging that some jurors exerted undue pressure to convict the defendant).

191 *Sander v UK* App No 34129/96 at [34].

192 *Sander v UK* App No 34129/96 at [24].

193 *Sander v UK* App No 34129/96 at [11].

194 *Sander v UK* App No 34129/96 at [20].

195 *Sander v UK* App No 34129/96 at [34].

196 *Sander v UK App* No 34129/96 at [34].

197 *Sander v UK App* No 34129/96 at [23].

To the extent that the same might be said of tackling sexual violence, the approach in *Sander* and *Remli* may arguably be applicable to other prejudicial beliefs, including prejudicial attitudes towards rape complainants.

CONCLUSION

2.120 From the overview of the case law, it emerges that the ECtHR has increasingly recognised the importance of ensuring the complainant's right to respect for their private life in criminal proceedings (including sexual offences proceedings). The ECtHR has developed the doctrine of positive obligations to enhance the protection afforded to complainants by article 8. It is now established that it is not sufficient for states to abstain from interfering with the complainant's private life, because the effective protection of complainants in criminal proceedings requires positive actions. This is key in relation to sexual offence proceedings, given the vulnerability of complainants in such cases and the distressing experience of the investigation and trial.

2.121 The ECtHR's primary concern is that national courts should strive to accommodate as much as possible the complainant's right to respect for their private life and the defendant's right to a fair trial. To reconcile the possible tension between the rights, the ECtHR has resorted to the logic of balancing: courts must find an equilibrium between private life and fair trial to ensure that neither is unduly compressed. However, there is no hard-and-fast rule on how such a balance should be achieved. The logic of balance does not explain, in a more generalisable way, whether a right should have priority over the other in a given circumstance. Rather, the answer is usually dependent upon a multitude of factors at issue in each individual case. The assessment of whether a defendant has received a fair trial, and whether the complainant has been sufficiently protected during the trial, should usually be conducted by looking at the proceedings as a whole. In most cases, it is the sum of measures adopted by courts which will determine whether the right to a fair trial has been unduly compromised to protect the complainant's rights or, on the contrary, the complainant's rights have been sacrificed in the name of a fair trial.

2.122 Nonetheless, some general principles can be inferred from the case law. Firstly, with regard to special measures, it appears that the ECtHR usually accepts that measures to protect the complainant's rights in sexual offence proceedings might be required. Unless the defendant is put in a position of substantial disadvantage by the imposition of special measures, the ECtHR in most cases understands these measures as an effective means to achieve the required balance between the right to a fair trial and the right to respect for private life.

2.123 Secondly, with regard to personal records and sexual behaviour evidence, the ECtHR appears to have adopted a rather flexible position. Usually, relevance seems to play a key role in assessing whether personal records should be disclosed and whether questions regarding the complainant's sexual behaviour should be admitted. In that respect, there must be procedural requirements in place to act as safeguards. The most important one is that it is the duty of the court to establish relevance. It is not for the parties to the trial, either the prosecution or the defence, to determine whether disclosure of records, or some types of questions, are relevant to the facts. In addition, regarding personal records, the complainant must be afforded the opportunity to

oppose the disclosure and to be heard before the court makes a determination. Regarding these two issues, the logic of balance seems to play a limited role: when relevance is established, it tilts the balance strongly in favour of the defendant's right to a fair trial.

2.124 The only instance in which the logic of balance finds no application concerns the introduction of myths and stereotypes. The ECtHR has made it clear that no exigency of ensuring a fair trial can ever justify the incorporation of myths and stereotypes into the content of judicial decisions. However, in making decisions about the conduct of the case and to regulate cross-examination, a fair balance must be struck between the defendant's rights under article 6 and the victim's right to respect for their private life under article 8.

2.125 Regarding issues such as ILR and juryless trials, arguably their introduction in England and Wales might further enhance the protection afforded to the complainant's right to respect for their private life in sexual offence proceedings. In that respect, they can be seen as policy choices to consider in order to discharge the State's positive obligation to ensure that article 8 is protected. Being policy choices, and not legal obligations, their unavailability in the current criminal justice system implies that complainants in sexual offence cases have no enforceable right to ILR or to juryless trials under the ECHR.

2.126 In conclusion, reform of the law in England and Wales with respect to most of the issues discussed in this Appendix could usefully specify the extent of the positive obligations to ensure the rights of the complainant in sexual offence cases. However, reform should avoid inflexible solutions that might disregard the need to balance the rights of both the defendant and the complainant. Such a balancing exercise, as the ECtHR has made clear, ultimately has to be carried out by the court in light of the multitude of factors at issue in each case. Put simply, any reform of the law should seek to achieve clarity regarding the positive obligation to ensure respect for the complainant's private life, while at the same time afford enough flexibility to allow the court to retain the power to decide how best to reconcile the complainant's right to respect for their private life with the defendant's right to a fair trial.