Law Commission
Reforming the law

Evidence in Sexual Offences Prosecutions

Summary of the Consultation Paper

This summary

This summary is intended to provide an overview of the key issues that we discuss in our Evidence in Sexual Offences Prosecutions consultation paper. It explains what the project is about and the issues that we address.

In it, we set out a number of consultation questions to which we are seeking responses. Some questions set out provisional proposals for law reform and ask whether or not you agree. Others are open questions in which we ask for your views. We will only reach our final conclusions and make recommendations for reform once we have received and considered all responses.

Our aim is that anyone should be able to read this summary and engage with the key issues we address, and respond to the consultation questions in this document. This may be particularly useful for members of the public who would like to share their views but may be less interested in engaging with the more detailed, technical discussions and questions.

Where individuals or organisations have particular interest or expertise in any or all of the areas we examine then we would encourage them to read the full consultation paper. It provides more detail and includes additional, more technical questions.

Responding to our consultation

Who we are 	The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.
What is it about? 	The Law Commission is 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 defendants receive a fair trial.
Why are we consulting? 	We are seeking views on whether and, if so, how the criminal law should be reformed. We want views on whether it should be reformed in the ways we provisionally propose, and where we ask open questions, how (if at all) the law should be reformed. Consultation is a crucial pillar of our work. We want any recommendations we ultimately make to have as strong an evidence base as possible.
Who do we want to hear from? 	We would like to hear from as many stakeholders as possible, including criminal law practitioners, law enforcement, people with experience of, or who have been victims of sexual offences, and the service providers who support them, court users, judges, and groups engaged with fair trial rights.
Where can I read the full CP? 	The full consultation paper is available at our website: **https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/**

What is the deadline? 	The deadline for responses is 29 September 2023.
How to respond 	If you are responding to the full-length consultation paper, we would appreciate responses using the online response form available at: **https://consult.justice.gov.uk/law-commission/evidence-in-sexual-offences** If you are responding to the summary consultation questions in this summary, we would appreciate responses using the online response form available at: **https://consult.justice.gov.uk/law-commission/summary-evidence-in-sexual-offences** Otherwise, you can respond: by email to **evidence.rasso@lawcommission.gov.uk** by post to: **Evidence in Sexual Offences Team, Law Commission, 1st Floor, 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 electronically).
What happens next? 	After analysing all the responses, we will make recommendations for reform, which we will publish in a report. It will be for Government to decide whether to implement the recommendations. For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality and anonymity of consultees' responses, please see the consultation paper.

Why is the Law Commission doing this project?

This Law Commission project flows directly from a recommendation made in the Government's End-to-End Rape Review of the Criminal Justice System's Response to Rape ("End-to-End Rape Review"). Responding especially to the decline in prosecution and conviction rates since 2016, the End-to-End Rape 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".[1] Reporting in June 2021, one of its outcomes was a request to the Law Commission to conduct a review of the law relating to evidence in serious sexual offences prosecutions.[2]

What does this project do?

The Government has asked us to review the 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 defendants receive a fair trial.

As our review is concerned with the use of evidence in trials, we generally do not consider matters that arise at other stages of the criminal justice process. That means we generally do not consider, for example, how complaints are handled by police, the investigation of complaints, how the police and Crown Prosecution Service ("CPS") work together, how charging decisions are made, applications for bail by defendants, or the sentencing of offenders. However, where there is a very close connection between something that occurs before the trial and what happens at the trial, or where reforms involving the trial process will have a wider impact, we will look more broadly. For example, examining potential reforms for the disclosure and admissibility of counselling records in a trial requires consideration of how and when those records are accessed during an investigation.

Prosecutions and the trial process

Sexual offences cases are tried in the Crown Court, which is generally where all serious offences are heard in England and Wales.

If a defendant pleads guilty then there will not be a trial and there will be no jury involved. Instead, a judge will hear arguments and consider evidence about what the appropriate sentence should be. The judge will then hand down a sentence. In rape cases, around 15% of defendants plead guilty.[3]

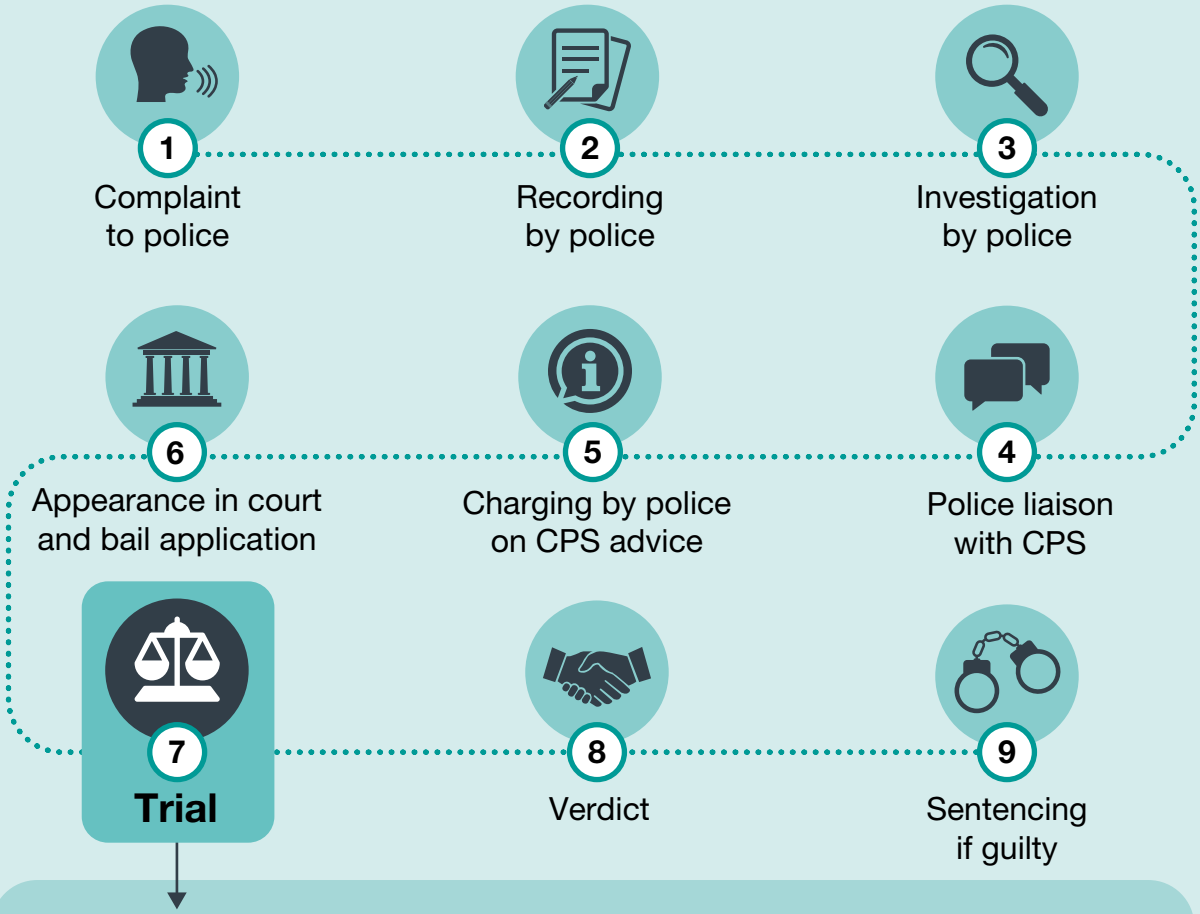
If a defendant pleads not guilty then the matter will go to trial in front of a judge and jury. The judge will determine how the trial proceeds, including deciding what evidence should be presented to the jury. The jury are the "finders of fact": they are asked to determine, on the evidence presented, where the truth of the matter lies. At the end of the trial, if they are sure that the defendant committed the offence then the jury will find the defendant guilty.

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

2 The End-to-End Rape Review (2021) p 17 and para 114.

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

The journey through the criminal justice system



Our review

- current law and guidance designed to counter misconceptions about sexual harm ("rape myths")
- personal records held by third parties (including counselling records)
- sexual behaviour evidence
- character evidence
- criminal injuries compensation claims and their relationship to criminal trials
- special measures used for giving evidence
- independent legal advice and representation for complainants
- the way that trials are conducted by judges and lawyers
- judicial directions, juror education and the admissibility of expert evidence to counter the risk juries will be influenced by rape myths
- rights of appeal
- holistic reform
- radical options for reform

What is not within the scope of this project?

This project will not review: the trial process in respect of sexual offences against children; the laws that govern the identification of a complainant or defendant in a sexual offences case; reform of the definition of consent that is used in the Sexual Offences Act 2003 or reform of the offences in that statute; or the extraction of evidence from complainants' digital devices (such as phones or computers), except to the extent that this arises in relation to sexual behaviour evidence or personal records.

Terminology

To reflect the legal process, including the presumption that anyone charged with an offence is innocent until proven guilty, we use the terms "defendant" and "complainant" when we consider the trial process. When someone is charged with an offence it means they have been formally accused by the police of committing a crime.

Context

Historically, rape largely went unpunished. Legal rules gave husbands immunity and were premised on false beliefs about rape and about women, making it challenging for victims of sexual violence to get justice. Since the 1970s changes to law and procedure have sought to make the experience of complainants when cases do go to trial less traumatic, and to ensure that only relevant evidence is admitted and its evaluation is uncontaminated by false beliefs, while retaining careful fair trial protections.

By 2002, it could be said that:

> 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.[4]

Yet, 20 years on, **a plethora of research, reports and reviews suggest that the progress made over five decades may be more fragile than had been hoped**. 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.

Victims remain reluctant to report rapes. There are still concerns about police responses to victims and the investigation of sexual offences.[5] There is an average of seven months between reporting a rape

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

5 B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022).

and the police referring the case to the CPS for a charging decision. It takes on average a further four months until a suspect is charged. It takes two years from reporting to the start of a trial.[6]

Within these historical and contemporary contexts, our review is limited to the criminal trial process and, within that, focussed significantly on a specific set of issues. However, 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, and ensuring that the complainant's best evidence is secured and tested in the least traumatic way possible, all while retaining fairness for the defendant.

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 changes have a positive effect on other aspects of complainants' engagement with the criminal justice system.

Myths and misconceptions

Many attempts at reform have been directed towards combatting or containing the risk that myths and misconceptions about rape and sexual harm may influence the criminal justice process, including criminal trials.

Misconceptions are, in simple terms, 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", which have been described as "attitudes and beliefs that are generally false but are widely and persistently held",[7] or "descriptive or prescriptive beliefs about sexual aggression that serve to deny, downplay or justify sexually aggressive behavior that men commit against women".[8,]

6 HMCPSI and HMICFRS, *Joint thematic inspection of the police and Crown Prosecution Service's response to rape: Phase 1* (2021) pp 46-47, Phase 2 (February 2022) p 82.

7 K Lonsway and L 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.

8 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.

Myths: the realities of rape

It has been commonplace for some years to identify myths and misconceptions in plain language and to provide evidence-based statements from social and psychological research that set out the contrasting reality.

Articulating them in this way helps counter unfounded stereotypes and myths that have underpinned commonly held views that if there has been a "real" rape then certain features will be evident. The table below sets out some of the common myths and what the evidence shows.[9]

Myth or misconception	What the evidence shows
Rape is most commonly perpetrated by a stranger. It typically occurs outside, at night, in secluded places.	The great majority of rapes are committed by persons known to the victim. Rape happens at any time of day. Most commonly, rape takes place indoors, and victims are often raped in their homes. (Sources: ONS; Kelly et al; Burrowes)
Rape always involves physical force.	Rape may or may not involve physical force. There may be threats of force. Rapists may use manipulative techniques to intimidate and coerce their victims. (Sources: ONS; Kelly et al)
Rape will always be physically and/or verbally resisted.	Many victims do resist, many freeze through fear or shock, or decide that resistance would be futile and/or dangerous. The victim may be afraid of being killed or seriously injured and so co-operate with the rapist to save their life. Victims may become physically paralysed with terror or shock and be unable to move or fight. Self-protection/defence can be through disassociation or freezing – any effort to prevent, stop or limit the event. (Sources: Kelly et al; Möller et al; Kozlowska et al; Murphy and Mason)

9 ONS, Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020 (18 March 2021); L Kelly et al, Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials (Home Office, 2006); N Burrowes, Responding to the challenge of rape myths in court. A guide for prosecutors (March 2013); A Möller et al, "Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression" (2017) 96 *Acta Obstetricia et Gynecologica Scandinavica* 932; K Kozlowska et al, "Fear and the Defense Cascade" (2015) 23 *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); G Walker, "The (in)significance of genital injury in rape and sexual assault" (2015) 34 *Journal of Forensic and Legal Medicine* 173; 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); J Molina and S Poppleton, *Rape Survivors and the Criminal Justice System* (Office of the Victims' Commissioner, October 2020); S Hodge and D Canter, "Victims and perpetrators of male sexual assault" (1998) 13 *Journal of Interpersonal Violence* 222; D Mitchell et al, "Attributions of Victim Responsibility, Pleasure, and Trauma in Male Rape" (1999) 36 *Journal of Sex Research* 369. See also: CPS Legal Guidance, Rape and Sexual Offences, (May 2021), Ch 4: Tackling Rape Myths and Stereotypes, Annex A; Crown Court Compendium, 20-1, "Sexual offences – The dangers of assumptions".

Myth or misconception	What the evidence shows
Rape always results in physical injury.	Rape doesn't always leave visible signs on the body or the genitals of the victim. A minority of reported rapes involve major external or internal injuries. (Sources: ONS; Walker; Kelly et al)
Rape will always be reported promptly.	Most rapes are never reported to the police. There are many reasons why people do not report or delay reporting, including trauma, feelings of shame, confusion, or fear of the consequences. (Sources: ONS; George and Ferguson; Burrowes; Kelly et al; Molina and Poppleton)
After rape, all victims react in the same way. Real rape victims will always be visibly distressed when describing what happened.	Reactions to rape vary greatly. Responses may include extreme distress, quiet control, shock, and denial. (Sources: Burrowes; Kelly et al; Murphy and Mason)
Only gay men rape other men. Only gay men get raped.	Men who rape other men are often heterosexual, and their victims are also often heterosexual. (Sources: Burrowes; Hodge and Canter; Mitchell et al)
Allegations of rape are commonly false.	False allegations are very uncommon. The evidence does not support a generalised suspicion of rape complainants. (Sources: Kelly, Lovett and Regan; Rumney and McCartan; Lisak et al; Saunders)

The effects of myths and misconceptions

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. They may be accepted by people working in and engaging with the criminal justice system, including by judges and lawyers, by defendants, by complainants and by jurors.

There have been important efforts made to address the risk that myths may have an influence in criminal trials. The CPS has extensive guidance for prosecutors, pointing to myths and realities, and the ways that myths may be countered in case building and advocacy.[10]

10 CPS Legal Guidance, Sexual Offences: Tackling Rape Myths and Stereotypes (May 2021).

The Judicial College's Crown Court Compendium provides an example judicial direction to the jury on avoiding assumptions about rape and other sexual offences:

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.

Crown Court Compendium, 20-4, Example 1

There is no one, single strategy for countering the influence of myths and misconceptions in trials for sexual offences. On the contrary, they must be tackled on multiple fronts, including by addressing the acceptance of myths and misconceptions in wider society.

In this consultation paper our principal focus is on the trial process. Where it appears that there is a risk myths and misconceptions may still have an effect despite attempts to prevent their influence, we seek to address that.

Juries

It is not clear to what extent rape myths affect the deliberations of juries and the decisions they reach. A challenge faced by researchers is that the law prohibits anyone asking jurors about how they reached their verdicts and prohibits jurors from revealing information about that. Given these limits, studies have used "mock juries" to test whether there are effects. An extensive body of research has concluded that rape myths do have effects. Consequently, the law has tried to counter the risk 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. There has been just one study with real jurors in England and Wales, which, the author argued, suggested that rape myths had far less influence than the mock jury studies indicate.[11] However, there are limits to the conclusions that can be drawn from that study – in particular, it was unable to shed light on how jurors deliberate.[12] It remains prudent to proceed on the basis that there are real risks that even conscientious, fair-minded juries with the best intentions may inadvertently be influenced by rape myths and reform strategies should try to minimise such risks.

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

12 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.

The defendant's right to a fair trial

The defendant's 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".[13] It is protected by the Human Rights Act 1998, which incorporates article 6 of the ECHR into domestic law.

Article 8 of the ECHR also obliges states to ensure respect for private life. Where a defendant's right to a fair trial and a complainant's right to respect for their private life conflict then courts will undertake a balancing exercise. This means that "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."[14]

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, **the right to a fair trial is protected by rigorous, substantive and procedural safeguards that enable a defendant to present and test evidence that is relevant to the facts in issue, without unnecessary trauma to the complainant**. The nature of sexual offences and giving evidence is such that the potential for retraumatisation will never be removed, but opportunities to minimise the risk should be taken where they do not undermine fair trial rights.

In every part of our consultation paper we have considered the defendant's right to a fair trial and whether any potential reforms would create a risk that the defendant's trial would not be fair. We have designed the reforms we provisionally propose so as to ensure that the defendant's right to a fair trial is respected.

Reform: individually and holistically

We consider the case for reform of separate, but connected, parts of the trial process and types of evidence. We are also interested in the reform landscape more holistically. In our consultation paper we have considered how some reforms in separate areas might need to be pursued together if they are to be effective, and how some may have cumulative effects, or possible unintended consequences. We are keen to hear from consultees their views on reform in the round. Accordingly we ask you to consider as you read the separate parts: how do they fit together; is there any impact, either positive or negative, of taking some or all of the reform ideas together; should any be prioritised? You can share your views in this regard by responding to Summary Consultation Question 28.

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

14 *SN v Sweden* App No 34209/96 at [47]; *Aigner v Austria* App No 28328/03 at [37].

Personal records held by third parties

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, records that contain such information about the complainant may need to be accessed by police and prosecutors, disclosed to the defendant, and used as evidence in a criminal trial.

Medical or counselling records are just one species of personal records that may be held by a third party. A third party is a person, organisation, or government department other than the investigator and prosecutor. Personal records held by third parties may also include records held by, for example, schools, immigration authorities, child and family services, and employers.

Terminology

"Access": records are provided to police and prosecution with the consent of complainant and record-holder ("access by consent"), or police and prosecution seek a court order to obtain the records so they can consider whether the records contain relevant information ("access by compelled production").

"Disclosure": where the records contain material the prosecution will rely on, or material that might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the defendant, then the records must be provided to the defence.

"Admissibility": the determination by the court that records may be used as evidence in the trial. Different types of evidence may be subject to different tests, or thresholds, to enable the court to make its determination.

Currently, there is no specific set of laws for sexual offences cases that govern the access to personal records by police and prosecution, disclosure of records to the defence, and the admissibility of records at trial. Rather, these matters are governed by a combination of different laws and guidance. The result is that there are gaps and inconsistencies in the legal framework, along with insufficiently high thresholds for admissibility, which risks myths and misconceptions having an effect. There are intrusions into complainants' privacy which are not always necessary, proportionate, or made with judicial scrutiny. There is a clear public interest in complainants receiving mental health treatment and yet it is unclear whether the current regime serves that interest well. There is a disproportionate focus on 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.

Summary Consultation Question 1

We provisionally propose that for sexual offences there should be a bespoke, unified regime governing police and prosecution access to complainants' personal records held by third parties, the disclosure of such records to the defence, and the admissibility of such records at trial. Do you agree?

We turn now to look what the features of a bespoke regime might be.

What records should be covered in a bespoke regime?

In some jurisdictions there are specific categories of personal records that have bespoke provisions. For example, in New South Wales and Ireland there are laws that apply only to counselling records. In Scotland there are specific provisions for "sensitive personal records". 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". These include medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries.

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.

Summary Consultation Question 2

We provisionally propose that any regime regulating the 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 you agree?

Should there be a complete ban on using complainants' counselling and therapy records?

Given that the above provisional proposal would cover a wide range of personal records, we consider whether there is a case for a complete prohibition on access to some records so that they will be immune from use in prosecutions of sexual offences.

In the full consultation paper we look in detail at different categories of records, including whether access to complainant-support records should be prohibited. This would include records held by professionals who support complainants and witnesses in trials, like Independent Sexual Violence Advisers (who provide support and guidance to victims of sexual violence including, but not limited to, at court), witness supporters (who support witnesses during court proceedings) and intermediaries (who provide advice and support for witnesses who need communication assistance to participate effectively at court). In this summary, however, we consider only the category of records which has been most often addressed by campaigning groups and about which there are many concerns: **records of counselling or therapy**.

It has long been documented that survivors of sexual violence experience feelings of guilt and self-blame, even though they are blameless. 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. As Gotell has put it, 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 [and] reflects a non-legal conception of rape that describes feelings of violation".[15]

In the absence of a prohibition on the use of therapy records, which is the current position, complainants may elect not to have therapy, to delay 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.

There are measures in place to minimise those risks. CPS guidance is that "the health and wellbeing of the complainant should always be the determinative factor in whether, when and with whom they seek pre-trial therapy", and that "[t]here is no requirement to delay therapy on account of an ongoing police investigation or prosecution". The guidance also stipulates that there should be no speculative inquiries and only the minimum amount of material should be requested.[16] However, a majority of respondents to a recent Home Office consultation stated that requests are sometimes disproportionate and unnecessary.[17]

15 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.

16 CPS Legal Guidance, Sexual Offences: Pre-trial Therapy (May 2022).

17 Home Office, *Police requests for third party material: consultation response* (2022) p 4.

In only one jurisdiction (Tasmania) is there a prohibition on using records of pre-trial therapy. Other jurisdictions use higher thresholds and procedural requirements to limit what may be accessed and when. In our pre-consultation engagement, 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.

Our provisional conclusion is that a complete prohibition is not appropriate and that, as we explain below, the better path lies in stronger protections through process, scrutiny and thresholds. The problem with a complete prohibition is that 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.

Summary Consultation Question 3

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 cases. Do you agree?

Procedure

The procedure for personal records begins with the police and prosecution obtaining records. This may occur on the basis of consent or following a court order that compels a record holder to produce the records. After this, there will be consideration of disclosure to the defence and admissibility as evidence in a trial.

In reviewing the processes for access, production and disclosure, the full consultation paper sets out the existing regimes, approaches taken in other jurisdictions, and stakeholder comments from pre-consultation engagement. It asks several questions in relation to the different stages. We encourage readers with particular interest or expertise in this area to read and respond to the detailed discussion. In this summary we briefly outline some of the key themes and questions.

Access to records by consent

At present, where a complainant consents to the police and prosecution having access to third-party material then – unless the record holder objects – police will obtain the records. There is no process for a judge to scrutinise the request. The position will be the same pre-charge and post-charge. The position is similar in comparable jurisdictions. Stakeholders have raised concerns that consent may be given in circumstances where complainants are traumatised and where refusing consent may result in the police not pursuing an investigation further or a suspect not being charged.

We welcome views about whether there should be measures that would provide greater protection to complainants. Our provisional conclusion is that there should be some measures, and these may take the form of legislative requirements rather than guidance, better support for record holders,[18] legal support for complainants, or some combination of measures. We do not provisionally propose judicial scrutiny because this would place considerable resource demands on courts, but we do not discount the potential value of it.

Summary Consultation Question 4

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?

Access to records by compelled production

At present, compelled production is sought using a witness summons procedure under the Criminal Procedure (Attendance of Witnesses) Act 1965. Police and prosecutors can only seek compelled production after a suspect has been charged. This includes circumstances where a complainant has consented to access but a record holder refuses access. In the full consultation paper we ask questions about whether police and prosecutors should be able to seek compelled production pre-charge and post-charge. We provisionally conclude that once a defendant has been charged then if there is good reason to think that evidence that could help prove their innocence exists then there is an obligation on the state to secure and review that evidence.

Our provisional view is that the power to access records by compelled production 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).

Disclosure to the defence

Decisions about disclosure of third-party material are presently made by the prosecution. There is no scrutiny by a judge unless the complainant and/or the record-holder has refused consent. In those instances, 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.

Our provisional view is that increasing the involvement of judges is important. It could help ensure consistent, transparent and appropriate evaluations of the relevance of the evidence, and balancing of all interests engaged by the use of personal records. Further, our provisional view is that consent to access or to disclosure should not displace the requirement for judicial permission. Judicial authorisation helps limit the risk that third party material 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.

18 An example is the **Subpoena Survival Guide** published for record holders in New South Wales (Legal Aid NSW and Women's Legal Service NSW, 2016).

Summary Consultation Question 5

We provisionally propose that disclosure of personal records held by third parties should require judicial permission. Do you agree?

We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent to access or to disclosure. Do you agree?

What should the threshold be?

One of the most significant concerns raised by stakeholders is that the existing laws do not provide for enough scrutiny of whether the material in personal records is relevant and, if so, of sufficient probative value to warrant production, disclosure or admissibility in all the circumstances. In short, the argument is that the bar is set too low and that what might be called an "enhanced relevance" test would be more appropriate than the existing test of simple relevance. We have reviewed the law in other jurisdictions and found the Canadian approach persuasive. It provides for judicial scrutiny at each stage and sets out factors that provide a structure for the exercise of judicial discretion. The judicial involvement is significant but, as a Canadian judge observed, "as time consuming a task as that may be" it is necessary for the balancing of the different rights and interests.[19]

We note that a parliamentary review in that country found the laws there had reduced patterns of inappropriate requests and struck "an appropriate balance between the competing interests of complainants and defendants in the unique context of sexual offence trials".[20]

Our provisional proposals are based on the Canadian laws. The first relates to compelled production and disclosure. The second relates to admissibility.

19 Hansard (NSW Legislative Council), 22 October 1997, pp 11329 (Hon A G Corbett), citing *R v KAD*, unreported, Ontario Court of Justice – Provincial Division, 29 July 1994, cited in A Cossins and R Pilkinton, "Balancing the scales: the case for the inadmissibility of counselling records in sexual assault trials" (1996) 19 *University of New South Wales Law Journa*l 222, 254.

20 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 13.

Summary Consultation Question 6

For **compelled production** to police or prosecutors (or for **disclosure to the defence**), we provisionally propose 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
- compelled production to police or prosecutors (or disclosure to the defence) must be necessary in the interests of justice.

Do you agree?

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 you agree? Are there factors we should remove, modify or add?

Summary Consultation Question 7

For **admissibility** as evidence, we provisionally propose 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 you agree?

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

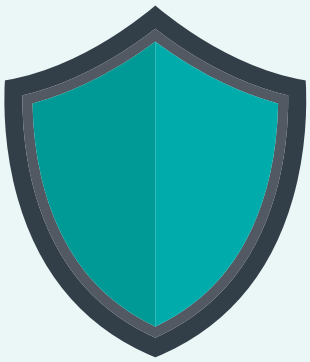
i) any other factor that the judge considers relevant.

Do you agree? Are there factors we should remove, modify or add?

Sexual behaviour evidence

Evidence of the complainant's sexual behaviour (sexual behaviour evidence or "SBE") may be relevant evidence in a sexual offences trial; it can be necessary for a defendant to properly advance their case or challenge the prosecution evidence to present SBE or to question the complainant about an element of their sexual behaviour. However, SBE risks introducing myths and misconceptions about the complainant's credibility, consent and moral worthiness because of their sexual behaviour, distorting the truth and potentially influencing decision-making. For example: SBE could be used to suggest that because the complainant had previously consented to sexual activity, they must have consented to sex with the defendant. Or it could be used to suggest that a complainant is sexually experienced and therefore is less likely to be a reliable witness. It can also involve subjecting the complainant to unnecessarily intrusive and humiliating questioning. This is contrary to the interests of justice.

Therefore it is considered necessary to restrict the use of SBE to mitigate its harmful and prejudicial impact while allowing evidence that is necessary for a fair trial. Restrictions on SBE in this jurisdiction date back to 1887.[21] Currently it is restricted by the provisions in section 41 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999 (referred to as "section 41"). Provisions restricting the use of SBE are also common in many comparable jurisdictions and are often referred to as "rape shield legislation".



Rape shield legislation: law that restricts the use of evidence of a complainant's sexual behaviour because of the risk it will introduce myths and misconceptions which influence decision-making, and expose the complainant to disproportionately intrusive questioning.

Section 41 prohibits the use of SBE (either by admitting evidence or questioning the complainant about it) on behalf of the defendant, unless the evidence is relevant and probative and fits one of four "gateways":

1. **Not an issue of consent**: this allows SBE to be admitted if it is not being used as evidence that the complainant consented to the sexual activity with the defendant. It does permit SBE used to support a defendant's reasonable belief in the complainant's consent. It also permits SBE to be used, for example, as evidence that a complainant has reason to lie, or as alternative explanation for a pregnancy or STD that the prosecution claim was a result of the alleged offence.

21 *R v Riley* (1887) 18 QBD 481.

2. **Similarity:** this allows SBE to be admitted if it is used as evidence that the complainant consented, if the SBE is "so similar" to the behaviour in the alleged offence, or to behaviour said to have taken place at or about the same time, that the "similarity cannot reasonably be explained as coincidence". The test under this gateway has been judicially interpreted to enable evidence to be admitted if it is so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.[22]

3. **Contemporaneity:** this allows SBE to be admitted if it is used as evidence that the complainant consented, if it relates to sexual behaviour that occurred "at or about the same time" as the alleged offence.

4. **Rebuttal:** this permits SBE to be admitted if it is used only to rebut evidence presented by the prosecution.

The defence must apply to the court to present evidence, or question the complainant, related to their sexual behaviour. The court will only give permission if that evidence meets the criteria for one of these gateways **and** relates to a specific instance or instances **and** the court is satisfied that not to admit the evidence might make the jury reach an "unsafe" conclusion on any relevant issue in the case. SBE cannot be admitted under gateways 1 to 3 if the purpose, or main purpose, of introducing the evidence is to suggest that the complainant should not be believed.

While there is general recognition that some form of restriction is necessary, the current framework has been subject to much scrutiny. Significant reviews have concluded that section 41 is working appropriately.[23] However, it has also been criticised on the basis that it is both too broad (too much SBE is being admitted) and too restrictive (the framework doesn't allow for evidence necessary for a fair trial to be admitted), as well as overly complex and thus applied inconsistently in practice. We think these concerns are sufficiently troubling that we should consider options for reform.

Options for reform

We have considered a range of options for reform including:

1. A complete ban on the use of SBE. This would ensure a consistent approach and removes the risk that SBE introduces myths. However, some SBE is necessary for a fair trial, so a complete ban is inappropriate.

2. A "broad discretion" model (as used in Ireland and some US states). This would enable judges to consider on the facts of each case whether it is appropriate to admit SBE, regardless of the type of evidence it is or what its purpose is. This is a very flexible model which addresses concerns that section 41 is too restrictive and complex. However, with such a wide discretion, there is concern that the approach to SBE will be inconsistent and not sufficiently focussed on its potential harm. Before section 41, there was a broad discretion model in England and Wales.[24]

22 *R v A* (No 2) [2001] UKHL 25, para 46, per Lord Steyn.

23 MoJ and AGO, "Limiting the use of complainants' sexual history in sex cases", December 2017 and L Hoyano, "The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: view from the barristers' row: An independent empirical study commissioned by the Criminal Bar Association" (2018).

24 Sexual Offences (Amendment) Act 1976, s 2.

There was sufficient concern with it that it was ultimately reformed, leading to the introduction of section 41.

3. A "structured discretion" model (as used in Canada and Scotland), with a broad prohibition unless the SBE meets a suitably high threshold.

Structured discretion model: a framework that restricts the use of SBE by establishing a threshold for admission, with a set of factors that must be considered when deciding if that threshold is met in each case.

While recognising the challenges of each reform option, we provisionally consider that a structured discretion model may better address the difficulties inherent with this evidence. We provisionally propose that SBE 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.

This approach requires judges to consider both the probative value of SBE and the risk of prejudice.

A structured discretion model could also specify factors the court should consider when reaching a decision on admissibility. In Canada, for example, these factors include the interests of justice, the defendant's right to a fair trial, the complainant's dignity, and the risk of perpetuating myths and misconceptions. We invite views on whether the court should be required to consider these, or any factors, when determining if SBE should be admissible.

Such a structured discretion model should lead to clear, more consistent decision making, and robust analysis. To enhance this, we provisionally propose that judges should be required to provide written reasons for SBE decisions. We recognise that this requires additional court time; this may have particularly acute impact on trial proceedings in the rare instances when a decision is needed mid-trial. However, in our provisional view, it is proportionate given the benefits of transparency and consistency.

Summary Consultation Question 8

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 you agree?

Summary Consultation Question 9

When the judge is deciding whether sexual behaviour evidence has substantial probative value, and 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:

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;
4. the risk of introducing or perpetuating myths or misconceptions; and
5. any other factor that the judge considers to be relevant to the individual case.

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?

In the full consultation paper we explore further issues of procedure, interpretation, and applicability. For example, we ask for views on what should be considered "sexual behaviour" and therefore subject to any restriction. We also discuss when a framework restricting SBE should be engaged and whether it should apply to evidence sought to be presented by both the prosecution and defence.

We also ask for consultees' views on whether the restrictions should apply when SBE is sought to be presented in offences other than sexual offences.

Character

Evidence of a person's good or bad character may sometimes be admissible in a criminal trial.

What will be evidence of bad character?

Evidence of bad character will be either "evidence of … misconduct" or "evidence of … a disposition towards misconduct". "Misconduct" is defined as "the commission of an offence or other reprehensible behaviour". (Criminal Justice Act 2003, ss 98 & 112)

Credibility: evidence of good (or bad) character might be used to suggest a person should (or should not) be believed.

Propensity: evidence of good (or bad) character might be used to suggest a person has (or does not have) a tendency to conduct themselves in a particular way.

We consider three issues in relation to character evidence.

Defendant bad character

Evidence that a defendant has engaged in coercive or controlling behaviour, other forms of domestic abuse, violence or sexual misconduct, but has not been convicted of such offences, will be evidence of "reprehensible conduct" that constitutes bad character. It might suggest the defendant has a propensity to behave in the way that has been alleged in the current prosecution, or should not be believed when claiming they have not behaved in the way that has been alleged.

We provisionally conclude that this kind of "non-conviction" evidence is currently admissible under the Criminal Justice Act 2003, where appropriate, and so we do not make provisional proposals for legislative change. However, it appears that applications to admit such evidence are not made consistently and, where made, the evidence is not always admissible. This may be because proving that the defendant committed the alleged misconduct will require "satellite" hearings that lengthen trials and distract from the key questions that the jury must answer. It may be, though, that earlier evidence gathering and case building has not been conducted in ways that give prosecutors sufficient grounds on which to make an application or that give judges sufficient basis on which to admit the evidence. In this regard, we seek views about whether greater legal clarity would be helpful.

Summary Consultation Question 10

Our provisional view is 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. Do you agree?

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? If so, which body should publish such guidance?

Complainant good character

Secondly, we examine the rules governing the admissibility of good character evidence, especially with regard to evidence of the complainant's good character.

What will be evidence of good character?

Evidence of the defendant's good character will be evidence that they have no previous convictions or cautions and no other reprehensible conduct has been alleged, admitted or proven. A defendant who has old, minor or irrelevant convictions and/or cautions might also be seen as having good character. (*R v Hunter* [2015] EWCA Crim 631)

Evidence of the complainant's good character has not usually been admissible and it is less clearly defined. However, the case law indicates it will include evidence that the complainant has no previous convictions (*R v Mader* [2018] EWCA Crim 2454). It could also include evidence that, for example, the complainant "gets on well with her brothers and sisters, did well at school, is very polite and quiet [and] respects people" (*R v Tobin* [2003] EWCA Crim 190).

It has long been observed that a defendant can introduce evidence of their own good character. We do not propose any reform to reduce the defendant's entitlement to good character evidence because restrictions would risk infringing fair trial rights.

It is rare that the prosecution can present evidence of the complainant's good character. We do not propose that the law as set out in *Mader* should be expanded to enable complainant good character evidence to be admitted more frequently because that would risk watering down the defendant's fair trial rights.[25] We do, however, make a provisional proposal in relation to directions by a judge to the jury when the jury has heard no evidence of the complainant's good character.

Summary Consultation Question 11

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, the judge should direct the jury explaining why the jury has heard no evidence of the complainant's good character and that the jury should not draw any inference adverse to the complainant from its absence. Do you agree?

25 We recognise that Parliament may prefer legal change over additional jury directions and so in the full consultation paper we set out what we see as the limits of potential legislative measures in this area so that the right to a fair trial is not infringed.

Complainant bad character

Making false allegations would ordinarily constitute reprehensible conduct (and potentially criminal conduct) and evidence of doing so may be evidence of bad character. 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.

As the myths and misconceptions table above indicates, the proposition that allegations of rape are commonly fabricated is a myth and has no foundation in reality. This is not to say that false allegations are never made or to minimise the effects on persons falsely accused. Nor is it to say that evidence that a complainant has previously made a false allegation of sexual assault should not be admissible. Rather, as research suggests there is a risk that the myth may affect jury deliberations, there is a case for great care and caution before admitting such evidence.

Our provisional view is that any questioning about false allegations should be subject to the same admissibility thresholds that are applied to SBE. This is because 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.

Whether or not there is questioning about the complainant's sexual behaviour, this category of bad character evidence 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." Accordingly, our provisional view is that the higher threshold protections are appropriate.

In the full consultation paper we discuss this area of the law in depth and pose several consultation questions; we encourage consultees with interests in this issue to consider that more detailed analysis.

Summary Consultation Question 12

We provisionally propose that where the defendant seeks to present 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 you agree?

Criminal Injuries Compensation claims

A claim for compensation is a request for money to acknowledge injury or suffering. Sexual offence complainants are entitled to make a claim for compensation from a government-funded organisation called the Criminal Injuries Compensation Authority (CICA). Where claims meet certain criteria, and regardless of whether criminal proceedings take place or the defendant is convicted, the CICA may award compensation to complainants who sustained physical or psychological injury as a direct result of a sexual offence. Academics and stakeholders say that compensation schemes provide important recognition and financial redress to complainants, which they can use to assist with their recovery, for example to fund therapy.

What are the myths?

Using evidence and questioning complainants at court about compensation claims is a further way in which myths and misconceptions may be introduced into the trial process, potentially tainting and influencing juror deliberations.

Stakeholders have told us that the existence of a criminal injuries compensation (CIC) claim is used at trial to undermine the complainant's credibility and to suggest that their allegation is false and for the purpose of financial gain during cross-examination (when the complainant gives evidence at trial and the lawyer for the defendant questions them). The use of evidence and questions on this topic does not inevitably rely on myths, and in some circumstances may be relevant. However, some stakeholders took the view that CIC claims evidence is only rarely relevant and plays to juror prejudices.

Jurors may over-estimate the frequency of false complaints and assume that a 'real' victim would not seek compensation. Because of this, CIC claims evidence has a unique prejudicial potential.

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."

Geraldine Hanna, Victims of Crime Commissioner in Northern Ireland and former CEO of Victim Support in Northern Ireland[26]

26 R Killean et al, *Sexual Violence on Trial* (Northern Ireland) (2021), Ch 5 Supporting victims through the trial process p 65.

What is the problem with the framework?

We have been told that there are difficulties with the operation of the time limits and eligibility criteria for making CIC claims. The legal framework requires complainants to lodge their claim as soon as possible after the date of the incident and, in any event, within two years. Prompt claims are encouraged and, due to backlogs in the criminal courts, are often made before the criminal proceedings have come to an end. The two-year time limit may be extended by the CICA but only where there are exceptional circumstances. Complainants do not necessarily know if they will meet this requirement. As a result, complainants are left with two unsatisfactory options. They can make their application at the conclusion of the criminal proceedings, without knowing whether the time limit will be extended. Alternatively, they can make their application within the time limit, with the risk that they are cross-examined on it and myths introduced at trial. This problem is unique to sexual offences cases because CIC claims are frequently used against complainants in these types of cases but not for other offences, and because of their highly prejudicial potential.

Options for reform

We do not propose that the CICA consider extending the time limits for claims, to allow them to be made after the trial has finished. This would delay compensation claims for sexual offences complainants, to which they are entitled, which other complainants receive promptly. Nor do we think that judicial directions alone would be sufficient to address the prejudice that may arise when irrelevant CIC claims evidence is introduced, as the effectiveness of directions is disputed and once this has occurred, it is difficult to mitigate its impact on jurors' views.

Instead, we tackle the underlying issue, namely the use of this material at trial. We provisionally propose the use of restrictions on the admissibility of evidence of and cross-examination on CIC claims. We suggest that a judge must give permission in advance, before CIC evidence is introduced, applying a test similar to the SBE enhanced relevance and structured discretion model described above. This aims to prevent reliance on myths while ensuring that the defendant can introduce relevant evidence necessary for a fair trial. Some Australian states place similar or even greater restrictions on the admissibility of CIC claims than the model we propose, including a complete ban. However, we dismiss the use of a complete ban on the use of evidence and questions about CIC claims, as this may prevent the defendant from introducing relevant evidence and may interfere with their right to a fair trial.

Summary Consultation Question 13

We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require permission from the trial judge and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence.

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 you agree?

Summary Consultation Question 14

When the judge is deciding whether evidence of a criminal injuries compensation claim has substantial probative value, and 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:

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;
4. the risk of introducing or perpetuating myths or misconceptions; and
5. any other factor that the judge considers to be relevant to the individual case.

Are there any other factors that should be included in the legislation that the judge should consider when deciding whether to admit evidence of a criminal injuries compensation claim?

Special measures

In sexual offence cases, complainants often serve as the main witness at trial. This means that complainants need to give oral evidence: first they will be asked questions by the prosecutor ('examination in chief'), then by the representative for the defendant ('cross-examination'), they may then be asked questions by the prosecutor again to clarify any matters that have arisen in cross-examination ('re-examination').

"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."[27]

When a witness has a particular vulnerability, this effect can have an even greater impact on their willingness or ability to engage in proceedings and to give their best evidence. To protect against this, YJCEA 1999 provides for a number of "special measures": trial modifications and practical support for witnesses giving evidence. These measures are available to witnesses considered "intimidated" or "vulnerable".[28] Complainants in sexual offences cases are currently automatically eligible for special measures: they are classed as "intimidated witnesses"[29]

27 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.

28 Witnesses are classed as "intimidated" when they suffer fear or distress in relation to testifying (YJCEA 1999, s 17). Witnesses can be classed as "vulnerable" due to age, physical disability or disorder, mental disorder or impairment of intelligence and social functioning (YJCEA 1999, s 16).

29 YJCEA 1999, s 17(4).

because of the nature of the offence.

Special measures are intended to improve the quality of witnesses' evidence by reducing any fear or distress. It is this impact on the quality of evidence that forms the basis of the statutory provision.

The current framework establishes categories of witnesses who are eligible for measures to assist them to give evidence; the court then has to determine whether to make an order for the measures sought. Therefore, while complainants in sexual offences are automatically eligible for measures to assist them to give evidence, the court still has to decide whether to make a direction by first determining whether any available special measure (or combination) is likely to improve the quality of the complainant's evidence,[30] then which measure(s) would be likely to maximise so far as practicable the quality of such evidence.[31] While not included in the statutory test, another key part of the development of special measures is the protection against inhumane treatment they can offer witnesses in what might otherwise be a disproportionately stressful or traumatic experience in court.

A note on terminology

The terminology "special measures" has been criticised as it can connote an organisation that is failing or suggest that complainants may be given an unfair advantage at trial. We provisionally propose that the more neutral term "measures to assist with giving evidence" should be used.

In addition, the labelling of complainants as either "vulnerable" or "intimidated" has been criticised as not reflective of their lived experience, or presentation at trial. 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". Instead, a separate category for witnesses who are entitled to certain measures because they are complainants in sexual offence prosecutions is preferable.

30 YJCEA 1999, s 19(2)(a).

31 YJCEA 1999, s 19(2)(b).

Moving to a framework of "automatic entitlement"

Applying for a direction for special measures can be an intrusive and largely unnecessary process since the vast majority of applications are unopposed and even when opposed, are successful. We therefore provisionally propose that complainants in sexual offence prosecutions should be automatically entitled to standard measures to assist them giving evidence, with the ability to apply to the court for additional measures.

This would also ensure that measures necessary to protect the complainant against inhumane treatment at trial are provided, without requiring assessment of the impact on the quality of their evidence.

A model of automatic entitlement would mean that a complainant would need only to decide, and then inform the court, which of the standard measures, if any, they want. There would be no need for further assessment. This would create greater consistency for, and confidence amongst, complainants. The more streamlined process would also be less resource intensive.

What should be standard measures?

Screens	The complainant gives evidence from behind a screen so they are shielded from seeing the defendant.
Live link	The complainant gives evidence live from outside the courtroom via a video link, either from another room within the court building or another suitable location.
Recorded evidence	The complainant gives their evidence (both examination-in-chief and cross-examination) before the trial in the absence of the public and the defendant. This is recorded and then played to the jury during the trial.
Attendance of a supporter	A complainant is accompanied by a supporter (such as an Independent Sexual Violence Adviser) while they give their evidence.
Excluding the public	The public are excluded from the court while the complainant's evidence is given, except for one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the complainant.
Removal of wigs and gowns	Judges and barristers in the court remove traditional court dress while the complainant gives evidence.
Separate entrances	The complainant can use an accessible entrance and waiting room that is separate from members of the public and the defendant.

We have considered the range of measures already available to complainants upon application under the YJCEA 1999: screens, live link, recorded evidence, excluding the public, and removal of wigs and gowns. There is evidence that supports the benefit of each measure for complainants, should they wish to use them. We provisionally propose, therefore, that all measures currently available to complainants upon application, should be available to complainants as standard measures to which they are automatically entitled.

Courts currently have the power to allow a supporter to sit with the complainant while they give evidence. The YJCEA 1999 only makes express provision for supporters when the complainant gives evidence via live link. We have heard that supporters can be of positive assistance to complainants however they give evidence, but provision can be inconsistent. We provisionally propose that including supporters in the statutory framework as a standard measure would ensure greater consistency in their use and formalise their status. We have also heard that separate, accessible entrances and waiting areas, where court facilities allow, can be important to ensure complainants' safety, anonymity and privacy when attending court to give evidence. We think this should also be a standard measure, where court facilities allow.

We now expand on our rationale for three measures that may be of particular interest. More detailed discussion of all measures is available in the full consultation paper.

Giving evidence in private, also called "excluding the public". We are the only jurisdiction in the UK that routinely requires complainants to give evidence in public. A power to exclude the public means that complainants can give evidence without additional stress and concern about being observed, and possibly identified, by strangers, family and friends of the defendant, or multiple reporters and bloggers. This is particularly important given the sensitive nature of the evidence they will be giving and the questions they will be asked. We fully recognise the importance of open justice, and note that the power to exclude the public from court is already available with exemptions that enable a member of the press to attend and report.[32] Therefore we provisionally propose that complainants be automatically entitled to an order excluding the public from observing the trial while they give evidence, with the same exemptions currently in place.

Pre-recorded evidence, sometimes called "section 28" (the section of the YJCEA 1999 that provides for pre-recorded cross-examination). A recent evaluation of pre-recorded evidence reported benefits of better recall (as it usually takes place closer to the event than the trial does) and that complainants have preferred the distance it gives them from the defendant and courtroom while giving evidence.[33] However, it requires a separate hearing earlier in the trial process and we note there are concerns about the impact this has on court resources and delays elsewhere. On balance we do think it is appropriate that all complainants should be automatically entitled to pre-record their evidence before trial, should they wish to.

32 YJCEA 1999, s 25(3).

33 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.

Currently, the use of an **intermediary** is available to vulnerable witnesses. Intermediaries assist witnesses with particular communication difficulties to ensure that they understand what they are being asked, and the court understands their evidence. We do not think intermediaries need to be a standard measure as they will not be appropriate for all complainants. They should remain available as a measure that requires an application to the court with evidence as to the impact on the quality of evidence.

In the full consultation paper we also make provisional proposals about individual measures, for clarification or amendment as to how they operate in practice. For example, when a measure should prevent the defendant from seeing the complainant (as opposed to preventing the complainant from seeing the defendant), and in which hearings, in addition to the trial, measures should be available.

Summary Consultation Question 15

We provisionally propose that complainants in sexual offence prosecutions should be automatically entitled to the following standard measures to assist them giving evidence, with the ability to apply to the court for additional measures:

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;
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.

Do you agree?

Are there any other measures that should be made available as standard to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence?

We think the benefits of automatic entitlement would be further supported by earlier identification of the need for measures, and better information and advice for complainants on what is available. One way of achieving this would be to provide complainants with independent legal advice and assistance ("ILA") to help with what measures are available and which, if any, might be of benefit in their individual case. We discuss the potential operation of ILA more broadly below.

Summary Consultation Question 16

We provisionally propose that complainants in sexual offences prosecutions should have access to independent legal advice and assistance in relation to their right to measures to assist them to give evidence. Do you agree?

We discuss other measures to ensure early identification of the need for measures to assist complainants to give evidence in the full consultation paper.

Special measures for defendants

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.

Chapter IA of the YJCEA 1999 provides for the use of live link[34] and intermediaries[35] 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".[36]
2. Are over 18 and suffer from a mental disorder,[37] or have a "significant impairment of intelligence and social function", and are therefore unable to participate effectively by giving oral evidence.[38]

The courts also have powers to make other modifications at trial to ensure that vulnerable defendants can engage with the proceedings. However, there is an imbalance between vulnerable witnesses and defendants in respect of their eligibility for statutory measures in sexual offence cases.

Summary Consultation Question 17

Should there 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.

34 YJCEA 1999, s 33A.

35 YJCEA 1999, s 33BA.

36 YJCEA 1999, ss 33A(4)(a), 33BA(5).

37 Within the meaning of the Mental Health Act 1983.

38 YJCEA 1999, ss 33A(5)(a) and (b), 33BA(6)(a) and (b).

Independent legal advice and representation for complainants

The criminal justice process in England and Wales is "adversarial"; it is based on opposing parties (the prosecution and defence) attempting to convince the judge or jury of the strength of their case. The prosecution brings the case against the defendant on behalf of the state, the defendant puts forward their case and challenges the prosecution. To do so, the defendant has the right to independent legal representation under article 6 of the ECHR. The complainant is not a party to the criminal proceedings. If they have a formal role, it is usually as the prosecution's witness. The prosecution represents the interests of the state and the general public. Although the complainant's interests are an important part of the state's interest, they are not overriding.

Complainants in sexual offences prosecutions are more likely than witnesses of other offences to have their sensitive personal information used as evidence in trial, to be asked humiliating and intrusive questioning, and be subjected to broad disclosure requests for their personal records. The private nature of the evidence presented in applications to admit SBE[39] or personal records[40] triggers the complainant's right to respect for their private life under article 8 of the ECHR, yet they are usually unable to respond to the application when the court considers it. This raises the question whether complainants in sexual offences prosecutions should be given a right to participate, supported by independent legal advice or representation to help them navigate the process and appropriately challenge decisions that impact on their rights.

At present, complainants may seek independent legal advice (ILA) if they instruct and pay for a solicitor privately, but the adviser may not engage with the other parties or see all the documents or evidence. Complainants do not generally have the right to independent legal representation (ILR) either in anticipation of, or during, court proceedings.

Legal advice is advice provided by an independent, qualified legal professional to an individual about a particular issue, question or case based on their instructions. In some cases, the advice may include "assistance" which involves engaging with material, other parties or organisations on behalf of the individual where it is permitted.

Legal representation involves a legally qualified person acting on behalf of an individual either in anticipation of, or during, court proceedings by taking instructions, giving advice, and making representations to other parties or the court on their behalf.

39 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 (August 2020) p 16.

40 *WF v Scottish Ministers* [2016] CSOH 27.

While the prosecution can raise arguments on behalf of the complainant, they are not obliged to and their position may in fact be at odds with that of the complainant. If complainants had a right to participate in applications concerning their SBE or personal records, they would be able to advance their position to the court directly. They could also provide vital contextual information to the court about their own records and history that no other party can. A right to participate would also afford complainants the opportunity to directly challenge inappropriate requests and applications. While most criminal cases involve only two parties, the prosecution and defence, there are occasions when a third party has the right to participate in criminal proceedings.[41] Indeed, complainants have a limited right to make representations to the court in some cases where a witness summons is sought in respect of their personal records.[42]

Alongside the case for a right to participate, we think there is clear benefit to the complainant in having both ILA (to help them understand their rights, the application and procedure) and ILR (to most effectively represent their interests and challenge inappropriate applications). We note that comparable jurisdictions already provide ILA and ILR to some extent.[43] ILA and ILR from early stages of proceedings could help empower and inform complainants, aiding early identification and resolution of issues relating to disclosure and admissibility of their sensitive personal information.

It could ensure that the court has all relevant information and arguments regarding the complainant's privacy rights, that these applications are appropriately scrutinised and that these difficult, sensitive decisions are appropriately informed.

The benefits of advice and representation by a legal professional acting in the interests of the complainant could have a wider positive impact on the trial process. A pilot scheme provided adult rape complainants in Northumbria with ILA in respect of their privacy rights and general information about the legal process. An evaluation of the pilot found that ILA could improve the complainant's experiences of the criminal justice system, reducing the number of cases in which complainants withdraw their complaint, and improving the culture and practice of personal record requests.[44]

41 For example, in confiscation proceedings under the Proceeds of Crime Act 2002, applications on press and reporting restrictions, and applications for non-disclosure due to public interest immunity.

42 Criminal Procedure Rules, r 17.5(3), 17.5(4), following *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin).

43 Including Scotland, Ireland, Northern Ireland, Canada and New South Wales.

44 O Smith, and E Daly, Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme, (December 2020).

However, there are concerns that introducing a right to participate with ILA and ILR would be too great a change to the adversarial system, and could result in the defendant effectively facing two prosecutors. In our provisional view, a limited right to participate in specific applications only, and clear scope and role for legal representatives, would help manage this risk so any impact on the adversarial system is proportionate and the defendant's right to a fair trial is protected.

Extending provision of ILA and ILR could lead to delay and costs. Where a third party has a right to participate and be represented, time is needed to instruct a lawyer, and for the lawyer to prepare and present in court. ILA and ILR would require adequate public funding to ensure that the benefits are available to all complainants in a timely way to help minimise delay. While resources are often limited, we are reassured from the pilot study that the cost of providing an ILA and ILR scheme in a limited way is not substantial.[45] ILA and ILR may also create efficiencies elsewhere; lawyers currently examine a disproportionate volume of personal records which could be avoided.

We provisionally conclude that a targeted approach to providing a right to participate, ILA and ILR best ensures the benefits described while minimising any negative impact on the adversarial model, delay and cost. To achieve this balance, we think there is a justifiable case for giving complainants a right to participate only in applications concerning their personal records and SBE, and the extension of publicly funded ILA and ILR by qualified legal professionals to give this effect. In our provisional view, giving the complainant full party status making them an equal party to the prosecution and defence would be disproportionate.

ILA and ILR could include a mix of information leaflets, online and telephone advice and in-person advice, assistance and representation where necessary and appropriate. In the full consultation paper we explore this, and further practical considerations, to help design a model of ILA and ILR that is comprehensive, proportionate, effective, and cost-effective, and in which the role of the advisor and representative is well defined and understood.

Summary Consultation Question 18

We provisionally propose that complainants in sexual offences proceedings, in respect of applications and requests relating to their personal records and sexual behaviour evidence, should have:

1. access to independent legal advice and assistance;
2. the right to participate in applications to the court relating to the admission of personal records and sexual behaviour evidence; and
3. access to independent legal representation when they have a right to participate in applications whether they arise before the trial, or during the trial in the absence of the jury.

Do you agree?

45 The pilot evaluation 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: O Smith, and E Daly, Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme, (December 2020).

Limitations on the conduct of sexual offences trials

At trial, advocates for both the prosecution and defence will want to ask the witnesses questions and make a speech to the jury. When they do this, it is important that they don't rely on myths or misconceptions about sexual offences. That could mean that the jury makes a decision which is influenced by those myths or misconceptions, rather than a decision based on a fair assessment of the evidence. It is also important for the witnesses and for public confidence that complainants are not asked questions which are irrelevant. Questions based on myths and misconceptions might infringe the complainant's right to respect for their private life under article 8 of the ECHR. However, defendants must be supported in putting forward their case so that they have a fair trial, which is protected under article 6 of the ECHR.

Training

All judges and most advocates will have been trained specifically about myths and misconceptions before they work on a sexual offences case. However, the training isn't mandatory for advocates, and some won't have been specifically trained. Training on myths and misconceptions might reduce the extent to which they are relied on at trial, particularly where this happens through inexperience or ignorance. In other legal contexts, like in the Youth Court, specific training is compulsory before practitioners can take on cases.

Some possible risks of training are that it wouldn't have a significant effect, and the courses would need to be checked and updated to make sure that they weren't perpetuating stereotypes. Where reliance on myths and misconceptions doesn't arise from a lack of knowledge, training might not help. Further, there are significant financial, regulatory and administrative burdens on barristers, and a training requirement might mean that advocates refuse to take on publicly-funded sexual offences cases.

Summary Consultation Question 19

Should practitioners have to be trained on myths and misconceptions before they can work on sexual offences cases?

Conduct

Barristers can only ask a witness questions which are **relevant** to the case. If the questions are irrelevant, then the judge should stop the questions. In this context, questions might be irrelevant because they are based on myths and misconceptions about sexual offences. Some trial observation studies, where researchers attend real trials and make notes about what happens, have reported barristers relying on myths and misconceptions at trial. It is important to be careful when considering this evidence, as the studies have small sample sizes and the observers don't have access to the case papers or to pre-trial applications, so they cannot know some important details. Nonetheless, it is worth considering ways to ensure that myths and misconceptions are not relied on at trial.

One way of dealing with this could be to ban lines of questioning on certain topics. However, sometimes a line of questioning will be relevant on the facts of a specific case, where it would be irrelevant in another case. For example, if a complainant was asked why they waited for two weeks to report an offence to the police, that would be irrelevant. Evidence shows that lots of people delay reporting an offence. Delay doesn't affect whether the report is true or not.

However, sometimes a question like that could be relevant. For example, if the defendant says that the complainant has made up the allegation because they were angry after a fight, and that was when they made the allegation. The defendant's barrister could ask why the complainant waited for two weeks to go to the police.

It would be relevant to the defence's case that the complaint was false and was made out of anger. The barrister should therefore be allowed to ask the question, so that the defendant can have a fair trial and the jury can properly assess the defence case. Therefore, we don't think that some lines of questions should be banned altogether.

Some types of evidence have a higher standard than relevance applied to them. This includes evidence about sexual behaviour, and we have provisionally proposed that it includes evidence about compensation claims. Beyond these categories of evidence, we provisionally propose that relevance remains the threshold for acceptable questions. This is because other myths and misconceptions which might arise in questions are harder to define, might have less of a prejudicial effect on the trial and on the jury, and the evidence might be relevant on the facts of a specific case.

Currently	**Provisional proposal**
All questions which barristers ask witnesses have to be relevant. Evidence relating to SBE has to be relevant AND has to be admissible under s 41.	All questions which barristers ask witnesses have to be relevant. Evidence relating to SBE has to be relevant AND has to be admitted under our structured discretion model. Evidence relating to CIC has to be relevant AND has to be admitted under our structured discretion model.

Even though we provisionally propose that relevance remains the threshold, it is very important that judges and barristers properly consider whether questions are relevant. There are several ways that this could be encouraged. One possible way could be that the relevance threshold is put into a statute, with a list of factors which judges should consider to help them to decide whether a line of questioning is relevant. There could also be a requirement for judges and counsel to discuss lines of questioning before the trial, which might involve the judge approving of certain lines of questioning or restricting others.

There are advantages and disadvantages to these suggestions to encourage application of the relevance threshold. Putting the threshold into a statute might not make any difference, given that relevance is the current test. Also, requiring judges to approve lines of questioning in advance might add delays to trials, and burdens to judges.

Summary Consultation Question 20

Do you agree that barristers should be allowed to ask questions which might relate to myths and misconceptions if they are relevant, rather than using a higher threshold as we propose for sexual behaviour evidence or compensation claims?

How do you think the application of the relevance standard could be improved?

Jury decision making

In sexual offences trials, juries are the ultimate decisionmakers of the facts and are tasked with determining the guilt of the defendant.

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. Myths and misconceptions surrounding sexual violence may therefore be unintentionally deployed by jurors when considering the facts of the case, and the reliability of the complainant's or defendant's account. As a result, a false but sincere belief held by jurors can contaminate the decision-making process and inadvertently lead a jury into error despite their best intentions.

We have therefore considered how information should be directly conveyed to jurors, during sexual offences trials, to ensure that they fairly evaluate the evidence before them without the influence of myths and misconceptions. We pay particular attention to three methods: judicial directions, expert evidence, and various alternative juror education tools.

In seeking to address myths and misconceptions via judicial directions and juror education, the defendant's right to a fair trial and the complainant's right to respect for their private life found respectively in articles 6 and 8 of the ECHR are both engaged. Judicial conduct of the trial and regulation of cross-examination must fairly balance the interests of the defendant in challenging the evidence against them and the complainant's personal integrity and dignity.[46]

46 *J.L. v Italy* (2021) App No 5671/16 (translated from French), para 128.

Judicial directions

During a sexual offences trial, judges are encouraged to give various directions to the jury. Directions are instructions that a judge gives to the jury on matters of law or procedure. Some directions are specifically designed to counter the commonly held misconceptions which could prevent the jury from properly considering the evidence before them. Various example directions are contained within the Crown Court Compendium. For instance, there is an example direction explaining why a complainant may delay in making a complaint.

As well as a general direction about not making assumptions, the example directions for adult complainants cover the topics of:

- delayed reporting;
- a complaint made for the first time when giving evidence;
- consistency or inconsistency between accounts;
- emotion or distress when making a complaint or giving evidence;
- clothing;
- intoxication;
- previous sexual activity with the defendant;
- lack of resistance or injury; and
- the defendant being in a relationship.

The specific directions given by the judge will be tailored to the issues raised in the case.

Academics and stakeholders who we spoke to disagreed about whether or not judicial directions are effective. Directions can be hard for jurors to understand, judges may use them inconsistently, or they may be incapable of addressing deeply ingrained beliefs regarding myths and misconceptions. Nevertheless, some judges told us that, when properly tailored to the evidence in a particular case, judicial directions worked well and were adequately understood by jurors. Given their widespread use in England and Wales and the support they have from many stakeholders, as well as judges, we would like to know how directions could be improved to more effectively address myths and misconceptions amongst jurors.

One way to make improvements is for the existing example directions to be amended better to reflect research about responses to sexual violence. For example, the directions on delay in reporting and freezing have been criticised as not reflecting the results from studies about sexual offences.

Another way to improve the current directions would be to extend them to other myths or categories of complainants which are not already covered, such as male complainants or complainants with a mental health condition or a learning disability.

Summary Consultation Question 21

Should any directions be amended or added to the existing example directions?

Currently, judges have discretion about whether to give a direction, though they have an ongoing duty to give directions where this is appropriate and would assist the jury. To improve consistency in the way that judges use the example directions, we invite views about whether, as is the case in Scotland, for certain myths, it should be presumed that the judge will give the relevant direction, unless there is a good reason for them not to do so.[47]

Even if there were a presumption that a direction should be given, we do not suggest that there should be any presumption about the content of the direction that the judge gives. We think that it should remain entirely down to the judge to tailor the content of the direction to best fit the facts of the case.

Summary Consultation Question 22

Should there be a presumption in favour of judges giving a judicial direction about myths, unless there is a good reason not to do so?

Expert evidence

Expert evidence may be admitted to assist the judge and jury in understanding a variety of different subjects. The courts have decided that expert evidence is only admissible if it is necessary to provide helpful information which is likely beyond the judge or jury's knowledge and experience.

In trials of sexual offences, expert evidence may be used to provide DNA analysis and explanations of injury. However, expert evidence explaining the general behavioural responses of and psychological effects on victims of sexual violence, both during and after the assault, is not allowed.

The courts have concluded that where the jury does need assistance to understand myths and misconceptions, the appropriate way of dealing with this is to use a judicial direction.

However, various commentators agree that juries do in fact need assistance to understand victims' responses to sexual trauma to fairly assess the evidence before them, untainted by misconceptions. We provisionally agree with this, as general responses to sexual violence are complex physical and psychological processes, which are largely outside the knowledge and experience of the jury. There is also a growing evidence base regarding the effectiveness of expert evidence which is used in a number of other jurisdictions.

For example, where a complainant has delayed in reporting, general expert evidence could explain 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. However, it 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 the expert unfairly bolstering the complainant's account. We invite views on whether expert evidence of general behavioural responses to sexual violence should be used at trial to address myths and misconceptions amongst jurors.

Summary Consultation Question 23

Should expert evidence of general behavioural responses to sexual violence be used at sexual offences trials?

47 Criminal Procedure (Scotland) Act 1995, ss 288DA and 288DB.

Juror education tools

Beyond the use of judicial directions and expert evidence, there are other methods for educating jurors regarding myths and misconceptions. These include using written juror information notices and juror education videos, or an online interactive tool.

In all courts in England and Wales, jurors are given a compulsory information notice at the start of the trial titled "Your Legal Responsibilities as a Juror". Research has been conducted which demonstrates the effectiveness of this juror information notice at enhancing jurors' understanding of their role and responsibilities. Whilst a juror information notice addressing myths and misconceptions would only provide general information, it could nevertheless aid jurors' understanding in sexual offences trials.

General information regarding jurors' roles and responsibilities is also currently permitted via an educational video. A video specifically aimed at countering myths and misconceptions could provide a more engaging, accessible, and consistent way of addressing myths and misconceptions amongst jurors. However, the evidence base surrounding the effectiveness of juror education videos remains limited.

An online tool containing interactive tasks may assist with reducing the acceptance of myths and misconceptions amongst jurors. 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.

Since there is currently limited evidence regarding the effectiveness of juror information notices, educational videos, and online interactive tools at addressing rape myths and misconceptions, we are interested in your views on their potential use. We would also like to know if there are any other methods for addressing myths and misconceptions amongst jurors that we should consider.

Finally, as there are a number of tools for educating juries, this raises a question about which combinations are likely to be the most effective to address myths and misconceptions, and which should be prioritised, alongside judicial directions.

Summary Consultation Question 24

What are your views on methods for educating jurors including the use of information notices, videos and online interactive tools. In particular, which methods are the most important, or is there a best combination of methods?

Right of appeal

Issues concerning the admissibility of evidence such as SBE and the disclosure of personal records are both complex and sensitive. They engage the complainant's right to respect for their private life and are particularly vulnerable to the risks of introducing myths and misconceptions. The outcome of these rulings significantly impacts the complainant's experience and willingness to engage with the proceedings as well the public confidence in and legitimacy of the prosecution of sexual offences. A right of appeal from these decisions could be particularly important, providing a level of oversight to help ensure robust, consistent and appropriate decisions.

These decisions impact what evidence is heard at trial and are therefore preliminary decisions, made before the conclusion of the trial. If it is appropriate to appeal these decisions, the appeal would need to take place and be decided before that evidence is given at trial.

At present, only the prosecution and defence are able to appeal rulings on disclosure or admissibility of evidence regarding the complainant's personal records or SBE: the complainant has no right of appeal.

The rights of appeal for the prosecution and defendant are limited. The defendant can only appeal admissibility rulings if they are made at a **preparatory hearing**.[48] Preparatory hearings are rare,[49] and an appeal before the conclusion of the trial from these rulings is only "justified" where the point does not involve a factual dispute.[50] Fact-sensitive rulings such as those determining the admissibility or exclusion of SBE or personal records are therefore unlikely to be regarded as fit for such an appeal.

The prosecution has a general right of appeal against preliminary rulings, including rulings on the admissibility of evidence such as personal records and SBE.[51] However, to do so they must make an "acquittal agreement", informing the court that they agree that the defendant should be acquitted if the leave to appeal is not granted or the appeal is abandoned.[52] The prosecution may therefore appeal against a ruling that ends the case, or has the effect of doing so.[53] In rare cases, the prosecution may also choose to enter into an acquittal agreement to appeal a ruling even if the prosecution could continue despite the ruling. Case law has determined that the threshold for leave to be granted is high and it must be "seriously arguable" that the ruling was an unreasonable exercise of the judge's discretion.[54]

48 Criminal Procedure and Investigations Act 1996, ss 35, 31(3). Preparatory hearings are a type of pre-trial hearing. Unlike other pre-trial hearings, preparatory hearings for case management can only be ordered by a judge in either serious fraud cases or where the case is complex, lengthy or serious: s 29. "Substantial benefits" must also arise from ordering the hearing such as identifying material issues, assisting juror comprehension or managing the trial.

49 *R v Lear* [2018] EWCA Crim 69, [2018] 2 Cr App R 11, at [51].

50 *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10, at [21]. The point must also be "discrete, novel [and] certain to arise".

51 Criminal Justice Act 2003, s 58.

52 Criminal Justice Act 2003, s 58(8)-(9). S 62 introduces a power for the prosecution to appeal against evidentiary rulings without an acquittal agreement, but this has not yet come into force.

53 For example, where the judge has ordered the exclusion of a key piece of prosecution evidence.

54 *R v B* [2008] EWCA Crim 1144.

The limitations of these existing provisions mean that appeals prior to the conclusion of the trial of rulings on SBE and personal records are currently very rare. Appeal rights from judicial rulings on SBE and personal records would provide additional judicial oversight of these complex and sensitive issues. This could lead to better-reasoned decisions in the first instance as well as better quality argumentation. There could therefore be an appeal right that attaches to the applications regarding SBE and personal records, rather than just to one type of hearing at which such applications may be decided. This would enable all parties to the application to appeal the ruling before the conclusion of the trial.

However, appeals against rulings before the conclusion of the trial have the potential to cause significant delay and disruption as they also need to be determined before the trial can conclude. Appeals from judicial rulings in the Crown Court need to be listed and heard at the Court of Appeal; this can take time. The case halts while the appeal is determined, risking delay and adding to court backlog. The impact of this is greatest if the appeal arises after the trial has commenced (as the relevant applications may be made during the trial, although best practice is for the matters to be determined before trial). In light of these concerns, we need more evidence to determine the benefit of appeals compared to the risks.

Summary Consultation Question 25

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?

Appeal rights for complainants

Complainants in sexual offence cases do not have a right to appeal decisions on admissibility of SBE or personal records. Although the prosecution could bring an appeal, the prosecution and the complainant's interests do not always align. These applications specifically engage the complainant's right to privacy; we explain above why we think therefore that complainants should have a right to participate in such applications. If they have a right to participate, we think they should also have a right to appeal the decision that risks breaching their privacy rights. Granting 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 presented during the trial.

There are already provisions for the right of appeal to be extended to third parties in certain criminal proceedings. In particular, an appeal against a reporting restriction or an order excluding the public allow those impacted – for example journalists or media organisations – to challenge it prior to the conclusion of the trial.[55]

Granting complainants a right of appeal would have the benefit of resolving issues before substantial harm is done to their privacy interests. However, we are aware of the concerns of delay and disruption and that both the prosecution and defence themselves enjoy only a limited right of appeal before the verdict is given. Therefore we provisionally propose that complainants should be extended the same limited right of appeal that is currently available to defendants: a right of appeal from decisions regarding their SBE or personal records made at preparatory hearings.

55 Criminal Justice Act 1988, s 159.

Summary Consultation Question 26

We provisionally propose that complainants who have a right to participate in 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 from decisions made at a preparatory hearing. Do you agree?

Further extension?

Limiting appeal rights for such sensitive and difficult issues to decisions made at preparatory hearings means that the timing of an application dictates whether there is an appeal right or not. It is our understanding that even in cases where preparatory hearings may be ordered, they are rarely used. The prosecution have additional rights to appeal judicial rulings not made in preparatory hearings. While the defendant has no further right to appeal judicial rulings, they can, if convicted, challenge a ruling that arguably led to that conviction being unsafe. These rights of appeal are not available to the complainant yet it is their privacy that may have already been breached by the decision to admit the evidence.

We therefore ask whether it is appropriate to extend rights of appeal for complainants beyond that currently available to defendants and the prosecution from rulings made at rarely used preparatory hearings.

There are 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 complainants' personal records 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 not limited to decisions made at preparatory hearings.

Summary Consultation Question 27

We invite 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? This would increase the number of applications regarding complainants' SBE and personal records that would have a right of appeal for the complainant, as well as for the defendant and prosecution.
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?

Holistic reform

Throughout our consultation paper we invite feedback by considering issues and asking open questions about reform options and in some cases, making provisional proposals for change. However, we also wish to hear your views more comprehensively regarding the combined and cumulative effect of these measures, and which measures should be prioritised. In other words, we wish to examine matters holistically.

A holistic perspective is necessitated by the very broad nature of our terms of reference, and similar reviews in other jurisdictions have also adopted this approach. Without a holistic approach, our overall objectives may not be met. Further, incremental change in relation to isolated elements of the trial process may not lead to meaningful system-wide change in relation to what is a complex issue.

Examining the combined and cumulative effects of measures requires evaluation of their impact on the trial process, parties and complainants. Impact may determined by reference to a variety of measures including court expenditure and parties' costs, as well as non financial factors such as delays in proceedings and the number of cases which are withdrawn because the complainant no longer supports the prosecution.

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".[56]

Professor Vanessa Munro

56 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, 208 and 214.

Options for reform

We would like to hear your views about which combinations of measures are particularly impactful and beneficial, which are a cause for concern, and which should be prioritised, with reference to the following types of factors and any others you think are relevant:

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. Improvements might include increasing complainants' confidence in the process, encouraging reporting and sustaining their engagement.

Positive impacts elsewhere in the process

Some combinations of measures may create positive impacts elsewhere by ensuring proper consideration of an issue early in the trial process or by improving the quality of decisions at the trial.

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 ECHR and concluded that they do not interfere with this right. We seek your views on whether certain combinations of measures could risk interfering with this right.

Delay

Individually, a single measure which changes procedural and evidential requirements may have limited impact, but cumulatively, several measures may unacceptably increase delays when compared with their potential benefits.

Costs

Cumulatively, additional procedural and evidential requirements will increase costs and these costs may be too great when compared with their potential benefits.

Burdens on the parties (prosecution and defence), court, police, and complainants

Where there is greater use of hearings or additional or elongated hearings, this 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.

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, because the criminal trial process is procedurally, factually and legally complex, when measures are combined, unintended disadvantages may arise.

Other ongoing reform

A range of measures may be used to achieve the same aim, leading to a crowded and over-complicated framework.

Summary Consultation Question 28

Taking account of the above factors, what are your views on how our reform proposals work together? For example: are there particular combinations of measures which are particularly impactful and beneficial? Are there any unintended consequences if more than one reform option is implemented? Are there any options that should only be implemented together rather than separately? Are there any that should take priority if resources are too limited to reform all aspects? Is there any available data which will assist us in measuring impact?

Radical reform

Lots of effort has gone into trying to improve sexual offences trials over many decades. However, we are aware of concerns that not enough progress has been made, and that the problems are too significant to be dealt with by small adjustments to the trial process. We have heard and considered some more radical changes to the trial process for sexual offences. We haven't made any provisional proposals for such radical reforms, but we are asking open questions to get feedback on some possible significant changes.

Specialist examiners

Some academics have argued that the way complainants are asked questions needs to change. This is because the process of giving evidence in court might be retraumatising. Also, in an adversarial system like ours, there is a risk that the defendant's lawyer might focus on their client's acquittal, instead of the complainant giving their best evidence to get to the truth of what happened.

A suggestion to deal with this is that the complainant would not be asked questions by the defendant's lawyer. They could be asked questions by an expert in communication, or by a different, independent lawyer. This happens in some other countries when children are giving evidence, to deal with their developmental differences to adults and to make sure that questions are appropriate.

However, for adult complainants this might be too much interference with the defendant's ability to ask the complainant questions about their case, and could risk jeopardising a fair trial if the examiner did not probe enough into the complainant's account. It also might confuse the jury, or create a negative perception of the defendant or their lawyer.

If the complainant was asked questions by a different lawyer it might not be an improvement on the current position, but if the complainant was asked questions by a communications expert they might not be familiar enough with legal processes so could contaminate the evidence. Further, involving another professional could add time and expense.

Summary Consultation Question 29

Do you think that someone other than the defendant's lawyer should ask the complainant questions? If so, who?

Specialist courts

Another option would be hearing sexual offences cases in specialised courts. This would mean that everyone working in those courts had training about sexual offences and trauma, so that they could best support everyone involved in the trial. The court would be technologically equipped for sexual offences cases, including with equipment to ensure that measures which assist with giving evidence will be effective, and separate entrances and exits for complainants and defendants. A specialised court could also mean specialised listing for trial, where sexual offences are prioritised to try to reduce delays. Finally, a specialised court could be just one room in an existing courthouse, or it could be an entirely separate building which only dealt with sexual offences cases.

Everyone working in the court would have training about sexual offences and trauma.

The court would be technologically equipped for sexual offences cases, including with equipment to ensure that measures which assist with giving evidence will be effective.

A specialist court could be one room in an existing courthouse, or an entirely separate building only dealing with sexual offences cases.

With a specialist court, sexual offences could be prioritised in listing, to try to reduce delays.

However, there are some potential risks with this. If all sexual offences had to go through a small number of courts or courtrooms, this could increase delays rather than decreasing them. Additionally, judges, barristers and court staff could become burnt out and jaded by constantly dealing with sexual offences cases. Sexual offences are already treated differently in the criminal justice system and prioritised in listing, so a specialised court might not make that much difference, especially as judges in these cases already have to be specially trained. There would also be significant resource implications. Finally, having an entirely separate court might imply that defendants in sexual offences cases are more dangerous or more likely to be guilty than other defendants, and might make people think that defendants are not getting a fair trial.

Summary Consultation Question 30

Do you think that sexual offences trials should take place in a specialised court or courtroom?

Juryless trials

In England and Wales, juries are used in serious criminal cases. The jury gives the verdict and decides the facts, while the judge determines any legal questions and will sentence the defendant if they are convicted. Jury trials can contribute to defendants having a fair trial under the ECHR, but they are not required, and a trial can be fair without a jury. There are already contexts where defendants don't face juries in England and Wales. These include less serious offences tried in the magistrates' court, when a defendant pleads guilty, offences tried in the Youth Court, and cases where there is a danger of jury tampering.

Some academics and stakeholders have suggested that juries are not the best way of reaching a verdict in sexual offences cases. Studies with mock jurors have found that levels of "rape myth acceptance" among jurors affect their verdicts. This means that jurors will be more or less likely to convict based on pre-existing ideas about sexual offences, rather than their decision being based on the evidence in the case. This reduces the chance of a fair trial. Further, it might be especially traumatising for complainants to have to give evidence in front of 12 laypeople, and advocates might be encouraged to play to the jury or support stereotypes.

To deal with this, juries could be removed for sexual offences cases. Instead, a judge, a panel of judges, or a judge with some lay assessors (non-judges) could hear cases. They would give reasons for their verdicts, which would give clarity to all participants. Rather than having to train new juries on myths and misconceptions for every trial, training could be targeted at the judges (and lay assessors).

Approximately 1% of criminal trials in England and Wales are decided by a jury. A defendant who pleads not guilty to a criminal offence will have a jury trial where:

The offence is an "either-way" offence, and the defendant elects Crown Court trial **Or** The offence is an "indictment only" offence and the trial must take place in the Crown Court	**unless**	The defendant is tried in the Youth Court **Or** There is a danger of jury tampering **Or** The number of counts is impracticable for jury trial **Or** The defendant pleads double jeopardy (which means that they have already been tried before for the same or similar charge)

However, juries are treated as fundamental to a fair criminal justice system in this jurisdiction and studies have shown significant public support for juries. Removing juries might have an impact on public confidence in the justice system. This could also send a signal that juries can't be trusted in other cases, beyond sexual offences. Judges might also be affected by myths and misconceptions, and might become jaded or "case-hardened" by only dealing with sexual offences cases. Finally, juries are a check against oppression by the state in prosecutions. Removing juries might therefore affect openness and transparency.

Summary Consultation Question 31

Do you think we should keep or remove juries in sexual offences cases?