

EVIDENCE IN SEXUAL OFFENCES PROSECUTIONS – OVERVIEW OF KEY RECOMMENDATIONS IN THE FINAL REPORT

Introduction

The Law Commission of England and Wales is an independent body established by statute to make recommendations to the Government to reform the law in England and Wales.

As part of its End-to-End Rape Review, the Government asked us to review the law, guidance and practice relating to the use of evidence in prosecutions of sexual offences. Our project has three goals: improving the understanding of consent and sexual harm; improving the treatment of complainants; and ensuring that defendants receive a fair trial. While the End-to-End Rape Review considers the decline in conviction rates since 2016, that is not our focus.

In 2023 we published a [consultation paper](#) with provisional proposals for reform. We consulted with stakeholders and members of the public and received over 130 written responses to our proposals. We have now analysed those responses and evidence gathered since the consultation paper to inform our final policy development. In this report we give our final recommendations to the Government for law reform that we conclude will best meet the three goals of this project.

What are the key themes and recommendations?

The defendant's right to a fair trial and the complainant's right to respect for their private life

Defendants in England and Wales have a right to a fair trial. This is an absolute right protected by the European Convention on Human Rights and recognised throughout the criminal justice process. The prosecution of sexual offences also engages the complainant's right to respect for their private life, for example when using their private information as evidence or during cross-examination. The European Court of Human Rights has decided that "measures may be taken for the purpose of protecting the [complainant], provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence". Throughout our report we carefully consider how the rules of evidence and procedure can be reformed to improve the treatment of complainants and ensure that the jury can evaluate the issues in the case uninfluenced by myths and misconceptions about sexual violence, and ensuring that the defendant's right to a fair trial can be effectively exercised in every case.

Rape myths

One issue particularly detrimental to a fair and effective trial of sexual offences is the risk that rape myths can permeate the criminal process, influencing jurors' deliberations. Rape myths are genuine and sincere beliefs about sexual violence that are factually incorrect and derived from stereotypes. For example, there is a myth that rape will always be reported promptly – the reality is that most rapes are never reported, and delay is common. We acknowledge that the extent to which rape myths influence jurors' deliberations is debated. However, based on the available evidence considered in the round, we believe it is prudent for us to proceed on the basis that there is a risk that jurors may be influenced by rape myths. Therefore, we have considered reforms that can help minimise that risk.

Evidential thresholds

In the first part of our report, we consider restrictions on certain types of evidence that carry the most risk of either introducing rape myths or infringing the complainant's right to privacy and dignity. Our recommendations are a proportionate way of targeting the most problematic evidence by improving scrutiny of access and admissibility. Our recommendations will introduce a structured discretion model where the judge has discretion to permit access to or to admit evidence that meets a certain threshold, plus factors they must consider, structuring the discretion and improving consistency and clarity of decision making. The factors ensure that the risks associated with such evidence are always considered, that the complainant's rights are taken into account, and evidence necessary for the defendant to have a fair trial can be accessed or admitted. In particular, we recommend:

- (1) For **complainants' personal records, including counselling records**, a bespoke statutory regime for requests for access and compelled production, accompanied by a code of practice and guidance. Such requests must meet an enhanced relevance threshold, with judicial scrutiny reserved for compelled production pre- or post-charge. We recommend the enhanced relevance threshold should be a structured discretion model made up of two limbs: (1) the evidence must be likely to be relevant to an issue at trial or to the competence of a witness to testify; and (2) access/production must be necessary in the interests of justice, with detailed and tailored factors to guide determinations of the latter. This should help protect against unjustified access to deeply personal material which could later be disclosed to the defence and deployed at trial to traumatic effect.
- (2) For **evidence of the complainant's sexual behaviour** ("SBE"), an enhanced relevance threshold using a structured discretion model. We recommend repealing the current framework (section 41 of the Youth Justice and Criminal Evidence Act 1999) which is complicated, and both too broad and too restrictive. Instead, we recommend a two-stage framework that prohibits the use of SBE unless: (1) it has substantial probative value in relation to a matter in issue in the proceedings, which is of substantial importance in the context of the case as a whole; and (2) its admission would not significantly prejudice the proper administration of justice. Factors to guide discretion should include the risk of introducing or relying on myths, and the legal rights of the defendant and complainant. Introducing SBE at trial risks reliance on myths about the complainant's credibility, consent and moral worth and subjecting them to unjustified intrusive and humiliating questioning. This principled framework will more effectively and consistently protect the trial process and the complainant against these long-standing concerns with the use of SBE.
- (3) For **evidence that the complainant has made a claim for Criminal Injuries Compensation**, an enhanced relevance threshold using a structured discretion model, similar to that which we recommend for the regulation of SBE. This will respond to concerns that this evidence is employed even when irrelevant to issues in the trial, and that it relies on a myth that allegations of sexual violence are commonly fabricated for financial gain.
- (4) For **evidence that a complainant has made a previous false allegation of sexual offending**, the SBE provisions should apply where the evidence falls within the definition of "sexual behaviour", otherwise the bad character provisions should still apply. The court must have regard, when considering admissibility under the

bad character provisions, to the risks of the evidence introducing myths and misconceptions.

Improving the process

In the second part of our report we consider reform to features of the trial process. Our recommendations ensure a fair trial process that will improve treatment of complainants, further mitigate the risk of myth-infected reasoning, and improve understanding of consent and sexual harm while maintaining the defendant's right to a fair trial. In particular, we recommend:

- (1) A move to an entitlement to standard **measures to assist with giving evidence for complainants**. Complainants would no longer have to justify their request, promoting consistency of provision, and clarity for the complainant to ensure they can make an informed decision about how they give evidence. Standard measures include screens; live link; pre-recorded evidence; exclusion of the public during the complainant's evidence (with a reformed exemption, reflecting the importance of open justice, for persons directly involved in proceedings, representatives of news gathering or reporting organisations, academic researchers and a supporter for the complainant); removal of wigs and gowns; presence of a supporter; and separate and accessible entrances and waiting rooms.
- (2) A **right to be heard** supported by **independent legal advice and representation** for complainants when applications are made for the compelled production (both pre- and post-charge) of their personal records and the admission of their SBE. This will ensure these applications – which engage complainants' privacy interests – are appropriately scrutinised.
- (3) To ensure that advocates' conduct does not result in impermissible rape myths infecting the decision-making process, **mandatory training for all legal practitioners** on rape myths and greater clarity on professional misconduct consequences of deliberate deployment of rape myths.
- (4) The introduction of **guidance for judges** to assist in identifying and responding to reliance on rape myths, and on the use of **directions to the jury to address rape myths** where appropriate. We also recommend **additional and amended example directions** that address specific rape myths.
- (5) That **expert evidence of general behavioural responses to sexual violence**, which is outside the knowledge and experience of the jury, should be admissible to address rape myths in particularly complex sexual offences trials, where other forms of juror education including judicial directions are not sufficient.

Specialist courts, more radical reform and holistic reform

Taken together, our recommendations on evidential thresholds and procedures would create an improved trial process for all, and ensure that individual reforms can be properly embedded and their full intended impact realised. In the final part of our report, we recommend the introduction of **specialist courts for serious sexual offences trials**; this would be a model of specialisation within existing court buildings, with improved access to measures to assist with giving evidence, additional training for all court staff on trauma-

informed practice, and prioritised listing. This recommendation aims to operationalise the recommendations made throughout this report in an effective and holistic manner.

We have considered calls to remove juries entirely from serious sexual offences trials, assessing concerns raised with the current position against the project's objectives of improving the treatment of complainants, countering rape myths, and safeguarding fair trial rights. Ultimately, we **recommend that juries be retained** for these cases as there is not a sufficient evidence base to support their removal in serious sexual offences trials. We also considered whether the concerns about removal might be addressed through more limited reforms, such as a time-limited pilot scheme or voluntary election for a juryless trial by defendants, but do not recommend either approach.