Law Commission

Reforming the law

Evidence in sexual offences prosecutions: a final report

HC 1156

Law Com No 420

Law Commission
Reforming the law

Evidence in sexual offences prosecutions: a final report

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965.

Ordered by the House of Commons to be printed on 21 July 2025.

HC 1156

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This publication is available at https://lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/.

Any enquiries regarding this publication should be sent to us at evidence.rasso@lawcommission.gov.uk.

ISBN 978-1-5286-5875-1

E03396006 07/2025

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of His Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 4 June 2025.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

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Glossary

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

Achieving Best Evidence ("ABE") interview

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

Acquittal

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

Adduce (evidence)

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

Admissible (evidence)

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

Adversarial

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

Advocate

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

Barrister

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

Charge

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

Complainant

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

Conviction

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

Credibility

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

Criminal Cases Review Commission ("CCRC")

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

Criminal Injuries Compensation Authority ("CICA")

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

Criminal Practice Directions ("CrimPD")

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

Criminal Procedure Rules ("CrimPR")

The CrimPR, alongside the CrimPD, are rules about court procedure in criminal proceedings.

Cross-examination

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

Crown Court Compendium

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

Crown Prosecution Service ("CPS")

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

Defence

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

Defendant

A person formally charged with committing a criminal offence.

Directions (see **Judicial directions**)

Discharge (a juror/the jury)

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

Disclosure

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

European Convention on Human Rights ("ECHR")

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

European Court of Human Rights ("ECtHR")

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

Enhanced relevance

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

Examination in chief

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

Expert evidence

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

Ground Rules Hearing ("GRH")

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

Independent Sexual Violence Adviser ("ISVA")

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

Interlocutory

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

Intermediary

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

Judicial College

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

Judicial directions

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

Jurisdiction

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

Law Commission

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

Legal Aid

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

Legal Professional Privilege ("LPP")

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

National Police Chiefs' Council ("NPCC")

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

Plea and Trial Preparation Hearing ("PTPH")

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

Practitioner

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

Prejudicial effect

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

Preparatory hearing

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

Pre-trial hearing

A hearing that takes place prior to the trial.

Probative value

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

Prosecution

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

Public Interest Immunity ("PII")

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

Rape and Serious Sexual Offences ("RASSO")

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

Re-examination

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

Relevance

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

Sexual Behaviour Evidence ("SBE")

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

Sexual Violence Complainants' Advocate ("SVCA")

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

Solicitor

A lawyer who provides advice, conducts litigation, and represents their client in court, usually in the lower courts and in other contexts such as the police station. The distinction between a solicitor and a barrister is that whilst barristers also provide advice and representation, they specialise in advocacy, usually appear in the higher courts, and do not generally conduct litigation.

Stakeholder

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

Suspect

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

Testimony

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

Third party

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

Third-party material or records

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

Twin myths

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

Unused material

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

VAWG

An acronym for violence against women and girls.

Verdict

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

Victim

A person against whom an offence has been committed.

Witness

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

Witness Care Unit ("WCU")

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

Witness Service

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

Chapter 1: Introduction

INTRODUCTION

1.1 The purpose of this project is to review the law, practice, guidance and procedure in sexual offences cases and to make recommendations for reform to improve the understanding of consent and sexual harm, improve treatment of complainants, and ensure that defendants receive a fair trial. The issues in this report are polarising, inspiring strong feeling and fierce debate. In this chapter, we outline why reform is necessary, namely to address the risk that myths and misconceptions about sexual violence[1] continue to permeate the trial process and to influence jurors' deliberations. We then provide an overview of the scope and origins of this project; our approach to terminology; our methodology for dealing with consultation responses and stakeholder feedback; an overview of the report, our recommendations and common themes which emerged during consultation.

The case for reform

1.2 As we noted in the consultation paper, rape and serious sexual offences are amongst the most significant criminal offences and are predominantly committed by men.[2] A large number of sexual offences are either not reported to the police or once reported, do not proceed. Each year, around "128,000 adults – over 90% of them women" are estimated to have experienced rape (including attempts) according to the Crime Survey for England and Wales ("CSEW"),[3] and over the last decade, the number of

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1 The term sexual violence is not intended to suggest that sexual offending is always accompanied by physical force or violence. In Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259") p 39, we explain that this is a myth or misconception. Rape Crisis England and Wales ("RCEW") acknowledges this myth, and explains that it uses the term sexual violence to describe "any sexual activity that happened without consent" because in its view this term "does a good job of explaining the serious and lasting impact that non-consensual sexual activity and acts can have". See RCEW, *What is sexual violence?*.

2 CP 259, para 1.1. For example, responses to the Crime Survey for England and Wales (CSEW) indicate that 98% of alleged perpetrators of rape or assault by penetration (including attempts) were men. See Office for National Statistics ("ONS"), *Nature of sexual assault by rape or penetration, England and Wales* (18 March 2021) Tables 3 and 4.

3 CP 259, para 1.1, citing HM Government, *The end to end rape review report on findings and actions* (June 2021) ("End-to-End Rape Review") p 3; R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report* (HM Government, June 2021) ("End-to-End Rape Review Research Report") p 29, drawing on data from the CSEW year ending March 2018 to the year ending March 2020. The Research Report also notes (p 29) that the true incidence may be higher as not all victims will disclose to CSEW, police or other bodies. Based on current data, 150,000 adults experience rape (including attempts) each year. See CSEW, *Sexual offences prevalence and victim characteristics, England and Wales* (Year ending March 2022) Table 7.

such reports has increased.[4] Since 2015, in rape cases,[5] with some fluctuations, there have been overall increases in the following measures, but these numbers remain relatively low compared to CSEW data: the number of crimes recorded by the police;[6] the number of suspects the Crown Prosecution Service ("CPS") has authorised to be charged;[7] and the number of cases received at the Crown Court.[8] In the same period, the proportion of complainants who declined to support an investigation has remained much higher during the investigation than at trial.[9] The proportion of cases which from charge to case completion resulted in a completed trial has remained steady and relatively high.[10] Recent research has identified a range of potentially overlapping reasons given by complainants for not proceeding with an investigation such as the impact on their mental health, feeling unsupported, how officers treated them, police wanting their personal records and data such as mobile phones, fear of the suspect

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4 ONS, *Crime in England and Wales: year ending December 2024* (April 2025). It states: "although there is year-to-year volatility in these estimates, over the last 10 years there has been an increase in sexual assault, after previously decreasing from [year ending ("YE")] March 2005 to YE March 2014. In the YE March 2024 survey, 2.6% of people aged 16 to 59 years had experienced sexual assault (including attempted offences), compared with 1.5% in YE March 2014 survey".

5 The data cited concerns adult complainants.

6 HM Government, *Criminal justice system delivery data dashboard* (May 2025). In 2015/2016, police recorded 22,882 crimes. This figure increased, dipping slightly in 2020/2021 before starting to increase again and reaching 48,340 in 2023/2024. The ONS caveats police recorded data as follows "trends in police recorded sexual offences should be interpreted with caution as improvements in recording practices and increased reporting by victims have contributed to increases in recent years". See ONS, *Crime in England and Wales: year ending September 2024* (January 2025)

7 HM Government, *criminal justice system delivery data dashboard* (May 2025). In 2015/2016, the annual volume of suspects charged was 2,270, dropping to 908 in 2018, and steadily increasing to 2,773 by 2023/2024. Based on Crown Prosecution Service ("CPS") data, "in 2023/24 there were 2,283 prosecutions, 51.9% higher than in 2022/23". *See* House of Lords Library, *Rape: Levels of prosecutions* (January 2025) p 4, citing CPS, *CPS data summary: Quarter 4 2023–2024* (18 July 2024).

8 HM Government, *Criminal justice system delivery data dashboard* (May 2025). In 2015/2016 annual receipts were 2,240, they dropped to a low of 826 in 2018/2019, before increasing to 2,903 in 2023/2024.

9 HM Government, *Criminal justice system delivery data dashboard* (May 2025). Between 2015 and 2024, the proportion of complainants who refused to support a prosecution on the day of trial was 0.3-0.8%, and the proportion of investigations closed because the complainant declined to support them was 44-62%.

10 HM Government, *Criminal justice system delivery data dashboard* (May 2025). Between 2015 and 2024, the proportion of cases which from charge to case completion resulted in a completed trial was in the range 59-72%, for all offences the figure was 14-27%. This data is the "percentage of defendants who enter a 'not-guilty plea' and have a completed trial at the Crown Court". See also HM Government, *Criminal Justice System (CJS) Delivery Data Dashboard for all-Crime and Recorded Adult Rape Offences: Data Quality Note* (May 2025) p 52.

and impact on family.[11] Finally, in the same period, the rate of guilty pleas remained relatively low.[12]

1.3 The challenges which this report seeks to address are evident in the historical development of the law, practice and procedure, which has led to very distinct treatment of sexual offences cases. In the consultation paper, we charted this background noting the gendered nature of these offences, their interplay with wider societal attitudes, and their resulting historical characterisation as "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent".[13] We noted that consequently, rape has "long been treated differently from other crimes".[14] Differences in treatment included the presence of juror instructions to treat the complainant's evidence with caution, requirements for it to be corroborated, and the fact that the complainant's sexual behaviour was historically seen as relevant.[15] We explained that in England and Wales by the 1970s, steps were taken to rectify women's systemic disadvantage in the prosecution of rape cases.[16] However, one of the key challenges was "the operation and persistence of what were called 'rape myths'".[17] Further efforts to modernise occurred in the 1990s and 2000s[18] including removal of the compulsory corroboration warning and the introduction of limitations on when the warning could be given;[19] the introduction of a more developed model for restricting sexual behaviour evidence; a suite of measures to assist witnesses when giving evidence;[20] and reform of the substantive definitions of sexual offences.[21]

1.4 The challenges we seek to address are exacerbated by a gap between the application of the law in practice and what is set out in the legal framework. Therefore, we

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11 Operation Soteria researchers surveyed 1,968 complainants of rape or sexual assault using a non-randomised self-selected sample between January and June 2023. See K Hohl, A-K Reid, S Molisso, M Pullerits, *Operation Soteria Bluestone Rape and sexual assault survivors' experience of the police in England and Wales. Survey Report I: January – June 2023* (September 2023) pp 13, 17-19, and 37.See also Claire Waxman, Independent Victims' Commissioner for London, *The London Victim Attrition Review Reflections and Recommendations* (July 2025) which, based on Home Office and CPS data for London, notes that for adult sexual offences and adult rape, attrition rates are 50% and 69% respectively, which is higher than for other offences. It adds that for adult sexual offences withdrawal occurs later in the criminal process than for other offences reflecting "the length of investigations for sexual offences, and the demands placed on [complainants] throughout this process".

12 HM Government, *Criminal justice system delivery data dashboard* (May 2025). Between 2015 and 2024, the rate of guilty pleas for rape was in the range 14-29%, and for all offences the range was 61-73%.

13 Sir Mathew Hale, *History of Pleas of the Crown* (1736) p 635. This notion persisted well into the 20th century. See CP 259, paras 1.27-1.29.

14 CP 259, para 1.32.

15 CP 259, para 1.32.

16 CP 259, para 1.33. For example, the Sexual Offences (Amendment) Act 1976 brought in anonymity for complainants and limited the use of sexual behaviour evidence.

17 CP 259, para 1.35.

18 CP 259, paras 1.45-1.54.

19 See Criminal Justice and Public Order Act 1994, s 32; *R v Makanjuola and R v Easton* [1995] 1 WLR 1348.

20 Via the Youth Justice and Criminal Evidence Act 1999 ("YJCEA 1999").

21 Via the Sexual Offences Act 2003.

explained in the consultation paper that non-legislative changes are needed to supplement legal reform. Guidance and training for judges and prosecutors is already available.[22] For example, guidance on myths and misconceptions has been developed for use by prosecutors,[23] and to assist judges there are example directions, which they can adapt and convey to jurors to ensure they fairly evaluate the evidence before them untainted by myths.[24] There is also specialist training for prosecution practitioners and judges on conducting sexual offences cases. However, we concluded that despite this, there remain problems in the application of the law.[25]

1.5 A further challenge arises because sexual offences have unique evidential features. Professor Anne Cossins notes the absence of direct supporting evidence (such as witnesses, forensic evidence, or medical evidence), and the fact that the complainant may display counter-intuitive post-incident behaviours leave a gap which may be filled in by jurors "relying on their biases and misconceptions".[26]

1.6 Finally, the risk that myths and misconceptions about sexual violence influence jurors' deliberations is an ongoing challenge. In this report, we use the terms "myths and misconceptions" and "rape myths" interchangeably. We explained in the consultation paper that these terms refer to beliefs which are genuinely and sincerely held, but which are factually incorrect and based on stereotypes. We added that researchers have identified four broad categories of misconceptions:[27]

> beliefs that blame the victim for their rape; disbelief in claims of rape; beliefs that tend to exonerate the perpetrator; and beliefs that only certain types of women are raped.[28]

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22 CP 259, paras 1.69-1.70.

23 CPS, *Legal Guidance, Rape and Sexual Offences*, "Annex A - Tackling Rape Myths and Stereotypes" ("CPS Annex A") (May 2021).

24 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) ("Crown Court Compendium") 20-1, "Sexual offences – The dangers of assumptions".

25 CP 259, paras 1.55-1.62. We noted that problems regarding the application of the law were apparent based on stakeholders' reports of disproportionate scrutiny of complainants "not found in other comparable contexts" (para 1.61); rates of attrition (paras 1.67-1.68); and a recent comprehensive academic review of the research in this area which confirmed that "challenges remain and change can take decades" (para 1.73, citing A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) pp 12). As a result, some 20 reviews and strategies from just the last five years do not appear to have produced meaningful change, leading to "review fatigue" and a "weariness of incremental change" (paras 1.68 and 1.91-1.92).

26 CP 259, para 1.64, citing A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) pp 97 and 102.

27 CP 259, para 2.1.

28 CP 259, para 2.4 citing S Dinos, N Burrowes, K Hammond and C Cunliffe, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 37, citing G Bohner et al, "Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator" in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) pp 17-45, 18-19. More recently see G Bohner et al, "Modern Myths About Sexual Aggression: New Methods and Findings" in M A H Horvath and J M Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (2023) pp 159-171.

We provided a non-exhaustive list of examples of such myths., These included perceptions such as rape "is most commonly perpetrated by a stranger"; "always involves physical force"; "will always be physically and/or verbally resisted"; "always results in physical injury"; "will always be reported promptly"; "after rape, all victims react in the same way"; "only gay men rape other men"; "only gay men get raped"; and "allegations of rape are commonly false".[29] This project considers the extent to which societal views on these matters are present in, and unfairly impact on, the criminal process via participants such as the police, legal practitioners, judges, and also because they unfairly influence jurors and their deliberations.[30]

1.7 In the consultation paper, we extensively surveyed the available literature and empirical evidence. We examined research regarding the prevalence and impact of rape myths amongst police officers and investigations.[31] We also considered their impact on prosecutors and charging decisions.[32] At the trial stage, we considered their influence on the conduct of the case by the prosecution and their role in developing trial strategies to address myths; the evidence base concerning defence advocates' reliance on myths and misconceptions in lines of questioning and speeches; and the role of judges in countering them via judicial directions.[33]

1.8 Finally, we considered the position for jurors. We acknowledged the lack of consensus regarding the available evidence, and that each of the research models used has limitations. On one hand, research with mock jurors indicates that myths impact jurors' evaluations, a view confirmed by a 2015 systematic review of the empirical literature.[34] Meanwhile a post-trial attitudes survey conducted with real jurors found no support for the claim that "juror bias" is "widespread".[35] In New Zealand, where unlike England and Wales, researchers are permitted to ask jurors about their deliberations, a recent study "supports the view that at least some significant degree of illegitimate reasoning does occur" in jury decision-making.[36] Taking all of this into account, we concluded that in spite of strategies to minimise their effects, the evidence "points to a likelihood that myths and misconceptions have some impact on juries" and "it is right

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29 CP 259, para 2.6 and accompanying table.

30 CP 259, para 2.1.

31 CP 259, paras 2.10-2.13.

32 CP 259, paras 2.14-2.20.

33 CP 259, paras 2.27-2.36. We further examined prosecution and defence advocates' reliance on myths at trial in CP 259, paras 9.29-9.59.

34 CP 259, para 2.40, citing L Ellison and V Munro, "Reacting to rape: Exploring mock jurors' assessments of complainant credibility" (2009) 49 *British Journal of Criminology* 202 and S Dinos, N Burrowes, K Hammond and C Cunliffe, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 44 and 47.

35 CP 259, paras 2.41-2.42, citing C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987; C Thomas, "A response to 'The Jury is Still Out'" [2021] *Criminal Law Review* 772.

36 CP 259, para 2.43 citing Y Tinsley, C Baylis and W Young, "'I think she's learnt her lesson': Juror use of cultural misconceptions in sexual violence trials" (2021) 52 *Victoria University of Wellington Law Review* 464, 470.

that we consider and propose measures to counter the risk that rape myths will affect sexual offences trials".[37]

1.9 Since publication of the consultation paper, research continues to reveal the same breadth of sources of myths, and the same lack of consensus about their impact on the criminal process, and on jurors. A recent CPS study exploring public attitudes to rape myths concluded that:[38]

> clear themes emerged showing that the public hold narratives around stranger rape involving physical violence as the primary model; beliefs about what 'real rape' looks like and how victims should behave; and a tendency to want to exonerate the accused, find reasons for their actions or set them apart from 'ordinary' men.[39]

It added that "the response of young people, especially young men, in upholding the dominant view [based on myths and misconceptions] was also striking".[40]

1.10 Also, Operation Soteria[41] researchers found some improvements regarding CPS lawyers' conduct of cases and case preparation. However, they concluded there is a "disconnect between what lawyers understand, in theory, regarding trauma reactions and the danger of reliance on myths and stereotypes, and the way in which some cases were understood and evaluated in practice".[42] In addition, mock jury studies have continued to reveal rape myth acceptance ("RMA"). One such study has underlined that participants' desire to give socially desirable answers has led to increasingly subtle expressions of RMA. Participants who self-reported low levels of RMA when tested via RMA scales, went on to express higher levels of RMA when responding to more open ended qualitative questions which were not directed to RMA.[43] Another has noted some positive findings, that "some jurors were able to identify and reject explicit myths surrounding the propensity to consent narrative and the perceived relevance of sexual history evidence".[44] However, it also revealed

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37 CP 259, para 2.51.

38 It explored public attitudes to 24 "attitudinal and/or knowledge statements and two multiple-choice questions" provided to 3,000 UK adults. It also conducted five public focus groups with 30 participants. CPS and Equally Ours, *Research into the public understanding of Rape and Serious Sexual Offences (RASSO) and consent Summary report: Rape and serious sexual offences: public understanding and attitudes and Reframing Rape: Effective Communication about rape* (January 2024) p 8.

39 Above, p 16.

40 Above, p 16.

41 Operation Soteria is a policing and research programme aimed at increasing "the number of adult rape and serious sexual assault cases reaching charge, and, in addition, deliver[ing] sustained improvement in the criminal justice whole system response". See *Operation Soteria – Transforming the Investigation of Rape*.

42 A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants Summary Briefing from Independent Academic Research* (December 2023) p 6. This research has been used to shape the new CPS operating model in rape cases. See CPS, *The National Operating Model for Adult Rape Prosecution* (July 2023).

43 M Zidenberg et al, "Lost in translation: A quantitative and qualitative comparison of rape myth acceptance" (2022) 28 *Psychology, Crime and Law* 179. Zidenberg acknowledges the study's limitations; it was an exploratory study, based on a limited vignette, and the demographic of its participants was insufficiently representative to draw wider conclusions.

44 L Herriott, *Sexual History Evidence: Is the Jury Out?* (2023) p 97. The study involved 119 volunteers watching a video based on a realistic trial simulation, and evaluated deliberations (see p 18).

"increased subtlety and nuance towards rape myth endorsement, relying on wider, stereotypical ideals of heteronormativity".[45]

1.11 On the other hand, a recent large-scale trial observation study[46] found that "blatant and overt appeals to rape myths … simply were not observed" adding its impression that:

> There were somewhat veiled and vague appeals to what might conceivably be construed as rape myths in a small number of trials. Such references were generally contained in closing speeches, rather than in cross-examination, and they tended to arise – where they arose at all – in cases where the evidence against a defendant was particularly strong… Crucially, it was not a defence that appeared to work. Evidentially compelling cases resulted in convictions, regardless of defence counsels' potential attempts to harness rape myths in closing speeches. Similarly, in the rape and serious sexual offences trials that resulted in either an acquittal or a hung jury, there were clear and obvious evidential weaknesses that gave rise to reasonable doubt regarding the guilt of the accused. These bona fides evidential difficulties provide a more persuasive explanation for the failure to secure a conviction than appeals to the routine operation of rape myths on jurors.[47]

1.12 Commentators have also continued to challenge the conclusions reached about the prevalence and impact of myths amongst jurors because of the research methods employed.[48] Though in the consultation paper, we noted that such research is inevitably constrained in England and Wales because researchers are prohibited from speaking to jurors about their deliberations.[49]

1.13 Finally, it is notable that evidence given to the Scottish Parliament's Criminal Justice Committee by key researchers in this field, Professor Cheryl Thomas, Professor

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45 L Herriott, *Sexual History Evidence: Is the Jury Out?* (2023) pp 97-98.

46 Of 40 trials observed, 25 were RASSO cases, of which around 18 took place in England and Wales, across five court centres, with three in Northern Ireland, three in Scotland and one in Ireland. Trial transcripts were obtained and examined for 23 out of the 40 trials using linguistic analysis. The research team conducted 60 interviews, of which 29 were in England and Wales across four or five court centres made up of 10 judges, 10 advocates, and 9 intermediaries. J Jackson, J Doak, C Saunders, D Wright, D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (February 2024) pp 6, 34, and 33 Table 2.1; and C Saunders, "Myths and reality: an empirical challenge to false beliefs about courtroom practice in rape and serious sexual offence cases" [2025] *Criminal Law Review* 396, 399.

47 J Jackson, J Doak, C Saunders, D Wright, D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (February 2024) p 118. The report does not give further detail regarding the specific data underpinning this conclusion. Based on the same data, in C Saunders, "Myths and reality: an empirical challenge to false beliefs about courtroom practice in rape and serious sexual offence cases" [2025] *Criminal Law Review* 396, 401, Saunders rejected the argument that juries "only convict in certain types of rape cases: Namely, those involving 'ideal victims', 'real rape' scenarios". For example, Saunders stated that convictions were observed in stranger and acquaintance rape cases; cases where injury was present and was absent; cases which were immediately reported and which involved delayed reporting; cases where the complainant was intoxicated and cases where they were sober; and where the complainants were from a range of backgrounds.

48 For example, S Waiton, "What do we know about 'rape myth' research and the claim that there is 'overwhelming evidence' that juries are prejudiced in rape trials?" [2023] *The International Journal of Evidence and Proof* 1-24. See also our commentary on the limitations of the various research methods in CP 259, paras 2.37-2.45.

49 CP 259, para 2.45.

James Chalmers and Professor Vanessa Munro, was described by the committee in the following terms.

> researchers felt that the difference between their research may be overstated. They felt it may be advisable to consider the whole body of evidence in the field of jury research before reaching conclusions. Overall, it may be the case that all jury research is subject to some limitations, to varying degrees and in different ways. There are questions therefore as to whether the academic evidence cited by the Scottish Government as underpinning its views is as clear as sometimes suggested.[50]

1.14 Overall, there is nothing in this new research or commentary that leads us to change the views we expressed in the consultation paper. It is not necessary for us to conclude in favour of one strand of research or the other; we derive our approach from the evidence base when looked at in the round. Therefore, it is prudent for us to proceed on the basis that there is a risk that jurors may inadvertently be influenced by myths and misconceptions and reform strategies should try to minimise such risks. Our recommendations for reform should be viewed in this context. We further develop these themes and the particular arguments in favour of reform in each of the chapters that follow.

1.15 Finally, we wish to address one significant point which arose in consultation. Consultees strongly rejected the driving up of convictions as an objective for law reform.[51] Their concern was that focussing on conviction rates may overlook and compromise fair trial rights. We reiterate that increasing conviction rates is not an objective of this project, as we noted in the consultation paper.

> The reasons for the level of crime and the conviction rate are many and complex. In this project, rather than focus on increasing conviction rates or decreasing attrition rates, we are looking at the trial process with three goals in mind – goals that have underpinned much of the work that has preceded this project: improving the understanding of consent and sexual harm that informs the substance, practice and

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50 Scottish Parliament Criminal Justice Committee, *Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report* (29 March 2024) para 1255. See also the summary of the evidence it heard at paras 1092-1116.

51 The following comments are illustrative. The London Criminal Courts and Solicitors Association ("LCCSA") stated: "these cases are often very difficult cases for juries as often they do rely on one person's word against another's. The complainant can completely genuinely feel that they are the victim of rape, whilst the defendant may properly be able to rely on a defence of reasonable belief of consent. The concerns about conviction rates in sexual offence are valid, but it is right that we value a high burden of proof before we convict defendants. A zeal to improve conviction rates should not come at the expense of an increase in the risk of miscarriages of justice occurring. The right to a fair trial is supposed to be cornerstone of our justice system and it is vital it remains so". The Criminal Bar Association ("CBA") said: "we are very concerned that the purpose behind this consultation is an effort to 'increase' the low conviction rates in these cases by removing juries, who, it is said, cannot be trusted to come to decisions based on the evidence, in favour of Judge only trials. It is doubted that anyone has troubled to ask the Judiciary. A 100% conviction rate for any crime can never be the desired outcome because it would demonstrate that the prosecution only ever pursued cases in which conviction was certain. In our criminal justice system, the prosecution must make the jury sure of the two-fold test already described. That might be a distinction between rape and some other criminal allegations, but the burden and standard of proof remain essential constants and should never be diluted".

application of the law; improving the treatment of complainants; and ensuring that defendants receive a fair trial.[52]

1.16 In relation to conviction rate data, in the consultation paper, we noted that Professor Thomas' research has found that:

> when rape charges are put to juries to deliberate on in England and Wales, juries convict defendants of rape more often than they acquit them, this has consistently been the case for 15 years, and the jury rape conviction rate is increasing alongside an increase in prosecutions. These are findings that are not consistent with a widespread belief amongst serving jurors in false assumptions about rape and rape complainants.[53]

1.17 However, we explained that current conviction rate data "does not suggest our attention to rape myths and ways to combat and contain their influence is unwarranted".[54] The data cannot explain why the conviction rate figures are lowest for female complainants over 16.[55] It does not reveal how juries deliberate and whether and if so, how rape myths affect jury trials. Nor does it tell us about participants' experiences, or shed light on the patterns of underreporting or case attrition observed in sexual offences cases.[56] Conviction rate data is one strand of evidence, which is part of a wider body of research with real and mock jurors, that we take into account when evaluating the law, practice and procedure in sexual offences cases.

The defendant's right to a fair trial

1.18 In the consultation paper and its appendix on the case law of the European Court of Human Rights ("ECtHR") which we have replicated in full in this report,[57] we examined

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52 CP 259, para 1.2.

53 C Thomas, "Juries, rape and sexual offences in the Crown Court 2007-21" [2023] *Criminal Law Review* 200, 224. See also C Saunders, "Myths and reality: an empirical challenge to false beliefs about courtroom practice in rape and serious sexual offence cases" [2025] *Criminal Law Review* 396, 399, who found that among the 25 RASSO cases observed, "14 (56%) resulted in convictions. Seven (28%) resulted in not guilty verdicts. The jury could not agree a verdict in one case. In another, a mistrial was declared following the complainant's prejudicial outburst in cross-examination with the case relisted to start afresh some months later. The verdict in two further cases is unknown".

54 CP 259, Ch2, para 2.47 and n 127. In addition, recent data indicates a decreased conviction rate, alongside an increase in charging and prosecution and an increased volume of convictions. The House of Lords Library states that there "has been an increase in charging and prosecutions. In adult rape cases in the year 2023/24, the CPS charged 2,572 suspects, an increase of 34.4% on the 2022/23 figure of 1,914. CPS figures show that in 2023/24 there were 2,283 prosecutions, 51.9% higher than in 2022/23. While the conviction rate decreased, the volume of convictions increased. Overall, the conviction rate in 2023/24 was 53.4%, 1.6 percentage points lower than in 2022/23. In 2023/24 there were 1,220 convictions, 47.7% higher than in 2022/23". See House of Lords Library, Rape: Levels of prosecutions (January 2025) p 4 citing CPS, *CPS data summary: Quarter 4 2023–2024*, 18 July 2024.

55 Where the complainant is a female over 16, the conviction rates are 50.05% (charges under the Sexual Offences Act 2003) or 50.4% (charges under the Sexual Offences Act 1956). This contrasts with the higher rates in every other category: males over 16 (62.9% and 55.4%), females under 16 (63.2% and 65%), males under 16 (62.1% and 64%), and children under 13 (70.2% for females and 71.6% for males). Females over 16 make up 44.5% of complainants. See CP 259, para 2.49, citing C Thomas, "Juries, rape and sexual offences in the Crown Court 2007-21" [2023] *Criminal Law Review* 200, 220 (Table 8) and 206 (Table 1).

56 CP 259, paras 2.47-2.49.

57 See Appendix 1.

the defendant's right to a fair trial and the complainant's right to private life in the context of sexual offences cases.[58] We explained the absolute nature of the defendant's right to a fair trial. However, we noted that the subsidiary rights found within it[59] are not absolute and are "open to modification and restriction so long as this is not incompatible with the right to a fair trial".[60] Restriction of these subsidiary rights must pursue a legitimate aim and must use means proportionate to that aim.[61] Also, we noted Lord Steyn's words that "in respect of what the concept of a fair trial entails … account may be taken of the familiar triangulation of interests of the accused, the victim and society".[62] In addition, we explained that the way in which trial proceedings are conducted must reflect the state's positive obligation to ensure respect for the complainant's right to private life which requires enhanced protection during the trial. Cases should be conducted in a manner which protects sexual offences complainants from the risk of "secondary victimisation".[63] From this we concluded that

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

1.19 We adopt the same approach in our final report. Each chapter carefully considers the rights at stake, to ensure that our recommended reforms do not compromise the defendant's fair trial rights and appropriately respond to the complainant's privacy interests.[64] Our views on these rights are expressed in more detail in each chapter, cross referring to the appendix where necessary.[65]

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58 As enshrined in articles 6 and 8 of the European Convention of Human Rights ("ECHR").

59 Namely the rights described in ECHR, article 6(3)(d), for the defendant to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

60 CP 259, para 1.181 and paras 1.79-1.84.

61 CP 259, para 1.81.

62 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [38] (Lord Steyn). See also CP 259, para 1.82.

63 CP 259, para 1.83 and Appendix 1, para 1.21. Secondary victimisation is "victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim": Council of Europe, *Recommendation (2006) 8 of the Commission of Ministers to member states on assistance to crime victims*, para 1.3.

64 Appendix 1, paras 1.22-1.30 regarding the balancing of the right to a fair trial with the right to respect for private life. In the report, the phrase complainants' privacy rights or interests refers to their right to respect for their private life under article 8 of the ECHR.

65 We have reviewed the case law of the ECtHR, and no significant developments have occurred since publication of the consultation paper, therefore we continue to rely on CP 259, Appendix 2.

THE PROJECT'S BACKGROUND AND TIMELINE

1.20 This project arose from the Government's End-to-End Rape Review ("The End-to-End Rape Review"). The Review responded to the decline in prosecution and conviction rates observed since 2016 and sought to examine "evidence across the system … in order to understand what is happening in cases of adult rape and serious sexual offences".[66] One outcome of the Review was a request that the Law Commission consider the law, practice, procedure, and guidance in such cases.

1.21 Broadly, our terms of reference ask us to consider reform of: the law and guidance on countering myths and misconceptions about sexual violence including use of judicial directions, expert evidence and other juror education methods; the legal framework for restricting sexual behaviour evidence ("SBE"); rules regarding access, disclosure and admissibility of complainants' personal records; rules and procedure governing admission of evidence of the character of the defendant and complainant; and the framework governing the use of measures to assist complainants when giving evidence.[67] They exclude from our consideration: the trial process regarding sexual offences against children; reform of the law regarding complainants' anonymity in criminal proceedings; reform of the substantive sexual offences or the definition of consent; and extraction of evidence from the complainants' electronic devices.

1.22 We launched the project by publishing a background paper in February 2022.[68] We published a consultation paper containing 119 consultation questions in May 2023, accompanied by a summary consultation paper, which was available in English and Welsh, and an easy read version.[69] We held a four-month public consultation ending in September 2023. We received a total of 133 consultation responses, and conducted around 60 consultation events and meetings.

1.23 As we discuss above, the issues in this project are contentious and are the subject of ongoing debate. As such, since publication of the consultation paper, there has been further research, literature, reviews, cases, pilots and legislation in this area.[70] We

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

67 See terms of reference.

68 See project page; and Review of Evidence in Sexual Offences: A Background Paper.

69 See Evidence in sexual offence prosecutions: consultation summary (easy read); and Tystiolaeth mewn erlyniadau troseddau rhywiol – Crynodeb.

70 For example, see CPS, *The National Operating Model for Adult Rape Prosecution* (July 2023); A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants Final Findings from Independent Academic Research* (December 2023); K Hohl, A-K Reid, S Molisso, M Pullerits, *Operation Soteria Bluestone Rape and sexual assault survivors' experience of the police in England and Wales. Survey Report I: January – June 2023* (September 2023); K Hohl, M Pullerits, S Molisso and AK Reid, *Rape and sexual assault survivors' experience of the police in England and Wales Survey Report II: July 2023 - June 2024* (November 2024); Rt Hon. Sir Brian Leveson, *Independent Review of the Criminal Courts: Part 1* (July 2025); J Fisher KC, *Disclosure in the Digital Age: Independent Review of Disclosure and Fraud Offences* (March 2025); Office of Victims' Commissioner ("OVC"), *Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system* (March 2025); National Audit Office ("NAO"), Ministry of Justice ("MOJ") and HM Courts and Tribunals Service, *Reducing the backlog in the Crown Court* (5 March 2025); HMCPSI, *An inspection of early advice and pre-charge decision making in adult rape cases: A thematic inspection of the quality of the Crown Prosecution Service's early advice and pre-charge decision-making following implementation of the national operating model for prosecuting adult rape cases* (July 2025); Claire Waxman, Independent Victims' Commissioner for

refer to and take account of these where relevant in this introduction and throughout this report. This is a fast-moving area, and the debate and the publication of new materials will no doubt continue after our final report. We make our recommendations based on the currently available evidence. Where new evidence materialises subsequently, it will be for the Government to consider its impact when deciding whether to implement our recommendations and if so, how.

TERMINOLOGY AND APPROACH

1.24 In this report, we adopt the same approach to terminology as we used in the consultation paper. Our terminology was "chosen to be consistent with the legal process",[71] meaning:

> We will generally refer to a "complainant". It is important to note that the use of this terminology is not intended to convey any opinion regarding the truth of an allegation that has been made. It simply means the allegation has not yet been proven in court. In the event that there has been a conviction we will generally use the word "victim".[72]
>
> We will generally refer to a "defendant". This reflects the fact that a person has been charged with the offence and is to appear in court.[73] This reflects the presumption of

London, The London Victim Attrition Review Reflections and Recommendations (July 2025); Dr L Herriott, *Sexual History Evidence: Is the Jury Out?* (2023); E Dhawan and P Haggard, "Neuroscience evidence counters a rape myth" (2023) 7 *Nature Human Behaviour* 835; S Waiton, "What do we know about 'rape myth' research and the claim that there is 'overwhelming evidence' that juries are prejudiced in rape trials?" [2023] *The International Journal of Evidence and Proof* 1-24; CPS and Equally Ours, *Research into the public understanding of Rape and Serious Sexual Offences (RASSO) and consent Summary report: Rape and serious sexual offences: public understanding and attitudes and Reframing Rape: Effective Communication about rape* (January 2024); *X v Greece* App No 38588/21; *N.Ö. v. Türkiye* App No 24733/15; J Jackson, J Doak, C Saunders, D Wright, D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (February 2024); C Saunders, "Myths and reality: an empirical challenge to false beliefs about courtroom practice in rape and serious sexual offence cases" [2025] *Criminal Law Review* 396; Scottish Parliament Criminal Justice Committee, *Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report* (29 March 2024); J Chalmers, E Keane, F Leverick, V Munro, "Putting victims and witnesses at the heart of the justice system? The Victims, Witnesses and Justice Reform (Scotland) Bill" [2023] Crim LR 709; the Mayor's Office for Policing and Crime ("MOPAC") launched the *Sexual Violence Legal Advice Pilot* (December 2023); the Justice Committee received evidence concerning pre-recorded evidence *The use of pre-recorded cross-examination under Section 28 of the Youth Justice and Criminal Evidence Act 1999* (June 2023-May 2024); MOJ *Impact evaluation of pre-recorded cross examination* (March 2025); Victims and Prisoners Act 2024 ("VAPA"), s 28, inserting s 44A(3) into Part 2 of the Police, Crime, Sentencing and Courts Act 2022 ("PCSCA") after Chapter 3. Home Office, *Requests for Victim Information: Draft Code of Practice* (April 2025); Home Office, *Consultation on victim information requests: Code of practice and counselling services definition* (April 2025).

71 CP 259, para 1.10.

72 In the consultation paper, we also acknowledged "the term victim (rather than complainant) is often used when referring to complainants, acknowledging that the absence of a conviction does not mean there has not been a rape". We explained that occasionally, we use the term victim when describing pre-conviction issues, this is not intended to mean "every complainant is a victim, but simply to refer to a person who has been a victim of rape". See CP 259, para 1.11.

73 We explained that "prior to charge it would be appropriate to use the term 'suspect'. We do not use the term 'the accused' as that could potentially apply to a person before or after charge".

innocence of the defendant in criminal cases. If convicted, the term "offender" may be used.[74]

1.25 As is standard in Law Commission publications, in this report, we use gender-neutral language. However, as we did in the consultation paper, we continue to acknowledge "the gendered nature of rape and the vast prevalence of women as victims and men as perpetrators of sexual violence".[75]

1.26 This report considers rape and serious sexual offences. However, we sometimes use the word "rape" or "sexual offences" to mean all of the offences encompassed by the term "rape and serious sexual offences". As we explained in the consultation paper, we recognise that there are "clear and important differences" between offences in this category, but "we will often refer to rape as the relevant offence … for simplicity and clarity and because that is the term most frequently used in the literature we refer to". Further, the matters we address and the issues we consider "generally apply to prosecutions for rape in the same way they apply to other serious sexual offences".[76] We noted that RASSO (a term used to refer to rape and serious sexual offences) is not legally defined, is without an agreed definition and is a practical term often used to describe the structures for investigating and prosecuting.[77] We added that the term "sexual offences" does have a definition which we adopt.[78] We explained that when we use the term "serious sexual offences", we are concerned with sexual offences usually heard in the Crown Court.[79] This means that unless specified, in this report we do not consider or make recommendations regarding non-sexual offences or less serious sexual offences. Further, unless specified, our recommendations concern the complainant, the parties and the criminal process in rape and serious sexual offences cases.

1.27 In the consultation paper, we explained that we use the term attrition to refer to an allegation not resulting in a prosecution, guilty plea or trial. This might arise either because the allegation is not reported, because the complainant withdraws their support for the investigation or prosecution, or because the police or prosecution decide not to proceed with the case.[80]

1.28 In the consultation paper, we explained that because the complainant (as a witness) and the suspect/defendant (as a party whose liberty is at stake, who is facing the resources and powers of the state) have very distinct statuses, there is not equivalence between them. This is reflected in what we identified as the "principled

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74 CP 259, para 1.10.

75 CP 259, para 1.12.

76 CP 259, para 1.15.

77 CP 259, paras 1.14 and 1.16.

78 It includes offences under Part 1 of the Sexual Offences Act 2003 and human trafficking with a view to exploitation or sexual exploitation under Section 2 or 3(3) of the Modern Slavery Act. See YJCEA, s 62 and CP 259, para 1.16.

79 CP 259, para 1.17.

80 CP 259, para 1.2.

asymmetry" in the defendant's favour in the criminal process and in rules of evidence, as a safeguard against wrongful conviction. We explained that:

> while most visible in the "steeply asymmetrical" criminal standard of proof, beyond reasonable doubt, the rules of evidence may rightly exclude relevant evidence "thought to present unconscionable risks of unfair prejudice against the accused".[81]

1.29 We also added that principled asymmetry "does not mean that every imbalance is required to protect the innocent from wrongful conviction, but nor does it mean that remedying an inappropriate imbalance requires that the scales are evenly balanced".[82]

1.30 In this report we acknowledge the risk that participants may find engaging with the criminal process traumatising. This may be due to their previous experiences, personal circumstances, or background, or otherwise, where there are no prior factors.[83] The Equal Treatment Bench Book recognises the potential for individuals to experience difficulties, noting that they "may have distressing experiences in court as a result of an accumulation of procedural failures and the way they are questioned".[84] It affirms the role of judges in safeguarding the interests of these individuals and in making adaptations to facilitate their effective participation.[85] Above, we explain that the ECtHR characterises this obligation as a requirement for courts to ensure that cases are conducted in a manner which protects against the risk of secondary victimisation (which is also sometimes referred to as re-traumatisation).

1.31 The focus of this report is on practice and procedure at trial, but we continue to acknowledge that trial processes shape what occurs during the investigation and prosecution. Reform of the trial therefore has wider implications; it may impact on complainants' and defendants' experiences and engagement at earlier stages of the case.[86]

1.32 Finally, our glossary further explains terms and acronyms to which we regularly refer. Where we use terms other than as described above or as set out in the glossary, we explain our approach where the term appears in the text.

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81 CP 259, para 5.73, citing P Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review* 393; P Roberts and A Zuckerman, Roberts and Zuckerman's *Criminal Evidence* (3rd ed 2022) p 21 and para 5.145.

82 CP 259, para 5.106.

83 A helpful explanation of the meaning of trauma is: "Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being". See Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (July 2014) p 7.

84 Judicial College, *The Equal Treatment Bench Book* (May 2025) para 2-26.

85 Above, paras 2.26-2-50.

86 CP 259, paras 1.75-1.78.

METHODOLOGY

1.33 This report considers the law, procedure, practice and guidance in sexual offences cases. We draw on comments from consultees given in their consultation responses and at consultation events and meetings. In addition, it relies on academic commentary, empirical research and the reports of reviews and inspections in England and Wales. Where particularly relevant to our analysis and policy conclusions, it relies on literature, research and reviews from other comparable jurisdictions.

1.34 The broad approach we take for each topic is to summarise the problem and any proposed solution identified in the consultation paper, to set out a selection of consultees' views, and from this explain the rationale for our conclusion and any recommendation.

1.35 Our intention is to make this report as accessible as possible for our readers and to explain the reform we consider appropriate and why, based on the information we considered. Feedback from stakeholders at consultation events and written responses from consultees provided us with an evidence base made up of numerical data and detailed and considered qualitative content, which we used to inform our policy development and this report. We received a large volume of consultation responses and feedback at events, and although we reviewed it all, we do not refer to all of it in this report. We select and mention the qualitative information we received to give a clear picture of the views we heard and the responses we received. We also rely on it to provide examples and to illustrate and explain our policy development, conclusions and recommendations. We provide raw data regarding responses where it is available[87] and is relevant. Some of the responses were polarised between complainant and defence perspectives, we carefully considered the full spectrum of views on each issue. Unless it is needed to make sense of our conclusions, we do not set out in detail the history of the current legal framework, or the full range of possible reform options and analysis. Finally, this report does not deal with every question in the consultation paper. We have chosen not to set out a small number of questions or to cover them very briefly. Our policy conclusions or approach on certain consultation questions rendered other consultation questions redundant or less relevant. Although we considered these redundant or less relevant questions during our policy development, we do not include them in the report, or we refer to them in overview only.

1.36 We cite the names of consultees and stakeholders by reference to the individual or organisation name they submitted on their consultation response, or in accordance with the terms of engagement agreed for consultation events and meetings.

1.37 When we refer to a view given by a judge, we do not assume that it necessarily reflects the views of other judges. As we explained in the consultation paper, it follows that

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87 Not all consultation questions collected quantitative data because some only sought a qualitative response, and did not have a yes/no/other filter from which to generate quantitative data.

the view of one judge does not indicate the view of the senior judiciary generally and it is not therefore to be taken as an indication of the official position of the judiciary.[88]

1.38 In this report, we refer to consultation responses categorised as "other". This means consultees who selected "other" in response to a particular consultation question on our online form, or whose written response did not clearly indicate their support for or opposition to the question. We incorporate the data and qualitative comments of consultees whose response was categorised as "other" throughout our analysis. We sometimes refer to qualitative views separately, or more commonly, situate them with similar views expressed by other consultees in support or opposition.

OVERVIEW OF THE REPORT AND OUR RECOMMENDATIONS

Chapters focused on evidential thresholds

1.39 In **Chapter 2 Personal records**, we conclude that a bespoke regime for complainants' personal records in sexual offences cases (including all of its constituent parts namely, procedures, and thresholds) should focus on access and compelled production. We focus the regime in this way to provide safeguards to complainants for the vast majority of instances where the evidence base suggests there are intrusions into their privacy rights. We further conclude that there should be a statutory framework for requests for access and production of personal records, 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. Our recommended threshold is part of a structured discretion model. It is made up of two limbs; the evidence must be likely to be relevant to an issue at trial or to the competence of a witness to testify; and access/production must be necessary in the interests of justice, with detailed factors to guide determinations of the latter. These factors are tailored to the particular considerations that arise in relation to the use of personal records in sexual offences cases, and they will assist decision makers in identifying issues that may be currently overlooked. The factors also guide decision makers about how to determine fair trial rights and privacy interests.

1.40 The aim of our regime is to fill a procedural gap and to offer greater clarity to parties via a formalised statutory framework. Where the complainant and/or the record holder dispute the basis or scope of a request, they will be able to insist that the police or prosecution apply for a court order to obtain access, without fearing that an investigation or prosecution will be prematurely terminated. The complainant will also have a right to be heard and to receive legal advice and representation in respect of such requests and applications.

1.41 We recommend that the bespoke regime should apply to records held by a professional third party in which the complainant has a reasonable expectation of privacy. We are of the view that a regime focused on therapy records is too narrow and fails to take account of overlapping information contained in therapy records and other records. We reject absolute prohibitions on accessing pre-trial therapy or complainant-support records because of the risk that this will deny the defence access to information necessary for a fair trial. We take the view that the unique

[88] CP 259, para 1.23.

considerations that arise when considering requests to access or produce such records will be accommodated by the threshold and factors.

1.42 In **Chapter 3 Sexual behaviour evidence**, we recommend a new structured discretion model for regulating the use of sexual behaviour evidence in trials. 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. We also make recommendations about factors that will help guide the discretion, supporting the model in producing more consistent, clear, and principled decisions. This includes consideration of the risk that the evidence will introduce myths and misconceptions, and the complainant's legal rights, including their right to privacy. To reflect the purpose of "rape shield legislation", we also recommend that the legislative framework should include an express prohibition on SBE where it seeks solely to support an inference that, by reason of the sexual nature of that activity, the complainant is less worthy of belief.

1.43 We also make recommendations that would extend the scope of the SBE regime to apply to SBE in criminal trials for all witnesses, whoever is seeking to adduce it, and in whatever context it arises. We recommend judges be required to provide written reasons to further improve consistency, clarity and scrutiny of decision making in this challenging area.

1.44 In **Chapter 4 Previous allegations of sexual offending,** we consider the way that evidence of previous allegations by the complainant of sexual assault is regulated. We examine first, evidence of a previous allegation sought to be adduced for its falsity (which we call false allegation evidence),[89] and secondly, evidence of a previous allegation where the defence are not suggesting it was false. We conclude that evidence of a previous allegation should be regulated by the SBE framework where the evidence sought to be adduced, or questions sought to be asked, fall within the necessarily broad definition of "sexual behaviour". We also conclude that there remains a role for the framework regulating the use of evidence of the bad character of a non-defendant where evidence of a false allegation does not fall within the definition of "sexual behaviour" but is being used as evidence of misconduct. In such cases, we recommend that the court must have regard, when considering the admissibility of false allegation evidence under the bad character framework, to the risks of the evidence introducing myths and misconceptions.

1.45 We consider the particular risk that myths about the prevalence of false allegations of sexual assault can improperly impact the way that false allegation evidence is assessed in sexual offence trials. To help ensure "falsity" is properly interrogated, we recommend that, on their own, the following should not constitute a "proper evidential basis" that a previous allegation of sexual offending is false: raising and not pursuing a complaint; a decision to take no further action, not to charge or not to prosecute; and acquittal.

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89 Although we refer to this type of evidence as false allegation evidence, we acknowledge that the falsity may remain in dispute.

1.46 In **Chapter 5 Criminal Injuries Compensation evidence**, we consider the use of evidence that the complainant has made a claim through the government-funded Criminal Injuries Compensation scheme as a victim of a violent crime. We explain the risk of prejudice associated with the use of such evidence in the context of sexual offences, and conclude that it should be subject to restriction. We recommend that a structured discretion model, similar to that which we recommend for the regulation of SBE, should apply to Criminal Injuries Compensation evidence.

1.47 In **Chapter 6 Character evidence**, we consider specific issues with the use of character evidence in sexual offences prosecutions. We examine the legal position where there is evidence that the defendant has engaged in previous misconduct, such as controlling or coercive behaviour, other forms of domestic abuse or sexual misconduct, but this misconduct has not resulted in a conviction. We recommend that there is no need to reform the existing legal framework governing the admissibility of this evidence. We also consider the differing positions of the admissibility of evidence of good character for defendants and complainants. We recommend that there should be no reform to the legal framework for admissibility of good character evidence for either defendants or complainants. Instead, we recommend that there should be an explanatory direction given to the jury when they have heard evidence of the defendant's character, but no evidence in relation to the complainant's character.

Chapters focused on process

1.48 In **Chapter 7 Independent legal advice and representation for complainants**, we conclude that complainants in sexual offences cases should have a right to be heard when applications are made for the compelled production (both pre- and post-charge) of their personal records and the admission of their SBE. We also recommend that this right should be paired with independent legal advice, assistance and representation. The rationale for this is to ensure that these applications – which engage complainants' privacy interests – are afforded greater scrutiny. Adequate public funding for these legal services is necessary to ensure that the benefits can be available to all complainants, and that their objectives can be achieved.

1.49 We make recommendations about the scope of independent legal representation ("ILR"). We recommend that ILR should include representation at court when applications for the admission of SBE and compelled production of personal records are determined, whether that is pre-trial or during the trial in the absence of the jury. We also recommend that the legal representative should have no role at trial in the presence of the jury. Additionally, we make recommendations with respect to the practical requirements necessary for independent legal advice ("ILA") and ILR to operate effectively. We recommend that the complainant's advisers and representatives should have access to documents necessary for them to provide full and frank legal advice, assistance and representation about applications relating to the admissibility of the complainant's SBE and compelled production of their personal records. We also recommend that the complainant's advisers and representatives should be permitted to engage directly with the police, prosecution and defence, and that only qualified legal professionals should be able to provide ILA and ILR.

1.50 In **Chapter 8 Right of appeal**, we recommend that complainants in sexual offences prosecutions should be able to appeal a ruling on the admissibility of their SBE that is made at a preparatory hearing. This right of appeal would be equivalent to the same

limited right of appeal that a defendant or the prosecution have against such decisions, and would ensure greater scrutiny of those applications when they arise. We also recommend that complainants should have a right to ILA and ILR when they have a right to appeal a judicial ruling relating to their SBE. We reject extending a right of appeal to complainants in respect of applications relating to their SBE and personal records that are made at other points. We also reject making better use of preparatory hearings in sexual offences prosecutions to decide SBE and personal records applications. We note that the Law Commission is currently undertaking a project on criminal appeals. Having taken a holistic view of the impact on the entirety of the criminal appeals system, we consider whether further expansion of this right is warranted.

1.51 In **Chapter 9 Measures to assist with giving evidence**, we make several recommendations for reform of eligibility for, and provision of, special measures. We recommend that the term "special measures" should be replaced with the more neutral and descriptive term "measures to assist with giving evidence". We recommend that complainants in sexual offences cases should have an entitlement to the use of the following standard measures to assist with giving evidence: screens; live link; pre-recorded evidence; exclusion of the public during the complainant's evidence (subject to a reformed exemption which would apply to 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. We recommend that complainants should be entitled to ILA on measures to assist with giving evidence. We also recommend that complainants should have an entitlement to live links and separate and accessible entrances and waiting rooms to facilitate their engagement with the trial process once they have given their evidence. Finally, we recommend that the Government should consider further review of the measures available to all defendants when they give evidence at trial.

1.52 In **Chapter 10 Juries**, we make several recommendations for the purpose of ensuring that jurors are provided with information about myths and misconceptions so that they can impartially consider the evidence before them. In order to ensure that directions on myths and misconceptions are given consistently, we recommend that the Judicial College should consider including guidance in the Crown Court Compendium that directions on myths and misconceptions should be given where there is a risk of the jury relying on myths and misconceptions unless, in the circumstances of the case, no reasonable jury would consider the evidence, question, or statement to be material. We also recommend that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion. This will ensure that judges continue to be able to tailor the direction to the facts of the case.

1.53 We recommend that the Judicial College should consider whether several additional example directions on myths and misconceptions should be added to the Crown Court Compendium, and that it should consider whether to amend several existing example directions. This will assist judges in effectively responding to myths and misconceptions in sexual offences prosecutions.

1.54 We also recommend that expert evidence of general behavioural responses to sexual violence should be admissible to address myths and misconceptions in particularly

complex sexual offences trials. This expert evidence would only be necessary (and therefore admissible) where the evidence is directed to something that is outside the knowledge and experience of the jury, and other forms of juror education, including judicial directions, would not provide sufficient help to the jury. This would enable jurors reliably to assess evidence of particularly complex responses to sexual offending.

1.55 Finally, we recommend that there should be further commissioning of, and permission for, research that engages real jurors and their deliberations. Accordingly, we recommend that researchers and juror participants should be exempt from section 20D of the Juries Act 1974, which currently makes it an offence to disclose information about jury deliberations or to solicit or obtain such information.[90] This would enable research to be conducted that would fill a significant gap in our current understanding of how juries operate.

1.56 In **Chapter 11 Conduct of the trial**, we consider a range of measures to improve the regulation of advocates' conduct in sexual offences cases to respond to concerns that myths and misconceptions continue to be introduced through lines of questioning and in opening and closing speeches. We recommend mandatory training for all legal practitioners on myths and misconceptions to ensure all practitioners working on sexual offences cases have appropriate training to identify myths and misconceptions and minimise the risk that they will be introduced to the jury. We also recommend that the Bar Standards Board considers amending its Code of Conduct to state explicitly that reliance on myths and misconceptions could result in professional misconduct consequences and that the use of generalisations based on myths and misconceptions is prohibited. Finally, we consider case management approaches to responding to the reliance on myths and misconceptions and recommend that the Judicial College considers introducing guidance for judges to assist in:

(1) identifying reliance on myths and misconceptions when assessing relevance;

(2) responding to generalisations which rely on myths or misconceptions where they are raised in advocates' speeches.

1.57 In **Chapter 12 Specialist courts and more radical reform**, we consider but make no recommendations regarding the more radical options for reform we set out in the consultation paper. We recommend the introduction of specialist courts for serious sexual offences trials, and make recommendations about the model that would most effectively realise the benefits of doing so. We recommend a model of specialisation within existing court buildings, with improved access to measures to assist with giving evidence, additional training for court staff on trauma-informed practice, and prioritised listing. We do not recommend an entirely separate specialist court. This pragmatic position aims to operationalise the recommendations made throughout this report in an effective and holistic manner.

1.58 We consider other suggestions for more substantially altering the trial process for sexual offences prosecutions. We do not recommend screening prospective jurors for acceptance of rape myths and misconceptions, and we make no recommendation that

[90] Juries Act 1974, s 20D.

juries should have to give reasons for their verdicts. We do not recommend the introduction of specialist examiners to conduct the questioning of complainants in sexual offences prosecutions.

1.59 We also consider calls to remove juries entirely from serious sexual offences trials, examining the concerns raised with the current position and the potential benefits of trials that would be conducted by a single judge, a panel of judges, or a panel made up of judges and lay assessors. We assess the potential benefits of such trials in the context of the aims of this project. We do not assess the use of the jury in the wider criminal justice system. We ultimately recommend the retention of juries in serious sexual offences prosecutions. We discuss the role of the jury in ensuring public confidence in the justice system, improving decision making through diversity and discussion, and enabling democratic participation in criminal justice. We do not consider that there is a sufficient evidence base to support removing juries in serious sexual offences prosecutions. We consider whether these concerns might be addressed through more limited reforms, such as a time-limited pilot scheme or voluntary election for a juryless trial by defendants. We do not recommend either approach.

1.60 In **Chapter 13 Pre-trial hearings**, we explain how pre-trial hearings can be effectively used to help streamline and give effect to our recommendations.

1.61 Finally, in **Chapter 14 Holistic reform**, we bring together some of the cross-cutting themes and describe how our recommendations can work together to improve the trial process for sexual offences. We consider the impact on resources and potential delay, as well as efficiency savings that arise from our recommendations.

Appendices

1.62 **Appendix 1 Fair trial rights in the case-law of the European Court of Human Rights** contains our analysis of the ECtHR case law we set out in the consultation paper, which for ease we replicate in full in this report. **Appendix 2 Evidence base regarding personal records** contains the additional background research and evidence base supporting the conclusions we reach in Chapter 2. Our final appendices are **Appendix 3 List of consultees**, and **Appendix 4 Terms of reference**.

COMMON THEMES

1.63 In response to several topics in this report, consultees rejected the creation of a separate legal framework and regime for sexual offences cases. Their overarching concern was that creating exceptionality for sexual offences causes an imbalance, undermining the burden and standard of proof. We disagree with this view and respond to their more specific topic-based concerns in the chapters that follow. More generally, we reiterate that exceptionality in sexual offences cases is neither in principle incompatible with the right to a fair trial protected by article 6 of the European Convention of Human rights ("ECHR"),[91] nor our own procedural traditions. Further, we explain above that owing to the lack of direct supporting evidence, sexual offences cases routinely involve significant and disproportionate focus on the complainant's

[91] See *SN v Sweden* App No 34209/96 (2004) 39 EHRR 12, para 47.

credibility. Due to the gendered nature of these offences and their interplay with wider societal attitudes, there remains a risk that participants in the criminal process and jurors respectively apply the law and procedure, and evaluate the facts by reference to myths and misconceptions. We continue to hold the view we expressed in the consultation paper that,

> The distinctiveness of rape as a crime warrants distinct measures to address that relationship between social attitudes and the legal process, while ensuring that fair trial rights are maintained.[92]

1.64 It is already accepted that there should be exceptionality for sexual offences via anonymity, automatic eligibility for special measures, judicial directions restrictions on SBE, and specialisation of judges.[93] Therefore, existing rules, and our recommendations either individually or when taken as a whole, do not undermine the burden and standard of proof in sexual offences cases. Rather, they respond to the exceptionality already present in their investigation, prosecution and the trial process.

1.65 Another repeated theme raised by consultees is the strained resourcing of the criminal justice system and the impact of this upon sexual offences cases. Consultees commented on the dearth of practitioners willing to undertake such cases.[94] Lack of practitioners impacts participants by for example, creating problems with the listing of cases and delays.[95] It also limits the pool of practitioners with specialist knowledge who might make up the next generation of Recorders and Circuit Judges, or who might be engaged to provide ILA and ILR for complainants. Secondly, they referred to the very real impact of delays on both complainants and defendants in sexual offences cases, whose lives are put on hold for lengthy periods of time waiting for the

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92 CP 259, para 1.94.

93 CP 259, paras 1.45-1.66 and 3.86.

94 The NAO has recently commented on reduced numbers of barristers and solicitors specialised in criminal law, it states "the number of criminal law barristers and criminal law duty solicitors has been reducing since at least 2017-18. The number of criminal law barristers that completed any public criminal work decreased by 10% between 2016-17 and 2021-22, while the number of criminal law duty solicitors contracted by the government to provide criminal legal aid reduced by 25% between 2017 and 2023. NAO, MoJ and HMCTS, *Reducing the backlog in the Crown Court (Summary)* (March 2025) p 10. Further, amongst the 780 respondents to CBA's 2024 RASSO survey, a large number of prosecution and defence barristers indicated they are unwilling to continue conducting RASSO cases. For example, two-thirds said: "they will not currently consider accepting more RASSO cases". See CBA, *RASSO Survey Results* (12 February 2024). HMCPSI note that the adult rape caseload of CPS lawyers has increased by 402.3% since 2019 and although the number of prosecutors has increased over the same period, "this has not matched the increase in volume of work…" Many prosecutors reported that their caseloads are "unmanageable". See HMCPSI, An inspection of early advice and pre-charge decision making in adult rape cases: A thematic inspection of the quality of the Crown Prosecution Service's early advice and pre-charge decision-making following implementation of the national operating model for prosecuting adult rape cases (July 2025) paras 3.21-3.23.

95 For example, see *R v BOD* [2024] EWCA Crim 1357 in which the Court of Appeal upheld a prosecution appeal against the refusal of their application to adjourn a trial of three counts of rape, where trial counsel was unavailable because her presence was required on another overrunning trial, and extensive enquiries revealed no suitable replacement. At [40], Lord Justice Holroyde commented that the case is "a stark illustration of the difficulties faced by the Crown Court at present. Judges and practitioners are working flat out in their efforts to deal with cases justly and as expeditiously as possible. We are acutely conscious of the consequent pressures on judges, barristers and solicitors".

final outcome.[96] For complainants and defendants, impacts may include diminished health and well-being, diminished quality of evidence, and lost confidence in the criminal process.[97] Consultees noted an additional concern that follows from this, namely that changes to the criminal process, such as prioritised listings for sexual offences cases, will compound these problems in all types of cases, not just sexual offences cases.[98] Thirdly, consultees commented on inadequate facilities within the court estate and technological challenges which currently affect participants' experiences and the effectiveness of measures to assist with giving evidence, and have the potential to undermine the impact of our recommendations. Therefore, we engage with these issues where they arise in each chapter. Moreover, we draw them together in our holistic chapter to demonstrate how our recommendations interact with each other and form a workable and effective package of measures.

1.66 A final theme which runs through our recommendations is the need for a trauma-informed approach regarding all participants in the criminal process in sexual offences cases. This is an objective found in other jurisdictions.[99] Our recommendations take account of the need for trauma-informed practice in the following ways. In Chapter 3, we examine ways in which the criminal process can take account of inconsistency in evidence which is the product of trauma concluding that these are best addressed by judicial directions, expert evidence (as we recommend in Chapter 10) and case

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96 A recent OVC report states that "at the end of September 2024, the average number of days between receipt and completion of a case at the Crown Court was 253…For some offences, the wait is even longer. For example, the latest data showed that adult rape cases took an average of 417 days to progress through the Crown Court". See OVC, *Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system* (March 2025) p 14, citing HM Government *Criminal court statistics*. On average, adult rape investigations and prosecutions can take nearly two years to complete and this figure is high relative to other offences (in part this might be explainable by evidential complexity and challenges in gathering evidence in rape cases). In April to June 2024, the average days from report to charge was 39 days for all "victim-based crime" and 317 for adult rape, and from charge to case completion was 262 days for all crime, and 393 for adult rape. See House of Lords Library, Rape: Levels of prosecutions (January 2025) p 6 citing HM Government, *Criminal justice system delivery data dashboard: overview*.

97 See OVC, *Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system* (March 2025) pp 7-8. The report focuses on the impact on complainants, but these impacts are equally relevant for defendants.

98 According to the NAO, "hearings in the Crown Court are taking longer … Publication of the government's end-to-end rape review in 2021 has resulted in more adult rape cases, which are often highly complex and take longer to conclude than other cases going to the Crown Court. The number of adult rape cases in the Crown Court outstanding caseload increased by 346%, from 625 on 31 December 2019 to 2,789 on 31 December 2023". NAO, MoJ and HM Courts and Tribunals Service ("HMCTS"), *Reducing the backlog in the Crown Court (Summary)* (March 2025) p 10.

99 For example, it is explicitly incorporated in the Victims, Witnesses and Justice Reform (Scotland) Bill. Professor Chalmers and his co-authors note that provisions in the Bill "mirror established or emergent best practice" and go further, notably including, "a requirement that trauma-informed practice informs all aspects" of sexual offences cases. See J Chalmers, E Keane, F Leverick, V Munro, "Putting victims and witnesses at the heart of the justice system? The Victims, Witnesses and Justice Reform (Scotland) Bill" [2023] *Criminal Law Review* 709, 709 and 715. They note that cl 24 of the Bill introduces a requirement that authorities should take account of the principle that the complainer or witness should be "treated in a way that accords with trauma-informed practice", and there is an accompanying skills framework. The Judicial Commission of New South Wales has published trauma-informed guidance for judicial officers, which covers how courts can take account of trauma including via the use of alternative measures for giving evidence and judicial directions regarding demeanour. See Judicial Commission of New South Wales, *Trauma-informed courts: guidance for trauma-informed judicial practices* (November 2022).

preparation and trial strategy, rather than changes to evidential thresholds. Our recommendations in Chapter 9 regarding measures to assist with giving evidence similarly examine and give effect to this objective. Facilitating best evidence and minimising the risk of harm to witnesses when giving evidence is at the heart of such measures. In addition, by providing complainants with greater agency and information, our recommendations in Chapter 7 regarding ILA and ILR also give effect to this objective. Finally, our recommendations in Chapter 12 regarding the use of specialist courts for sexual offences include all staff being trained in trauma-informed practice, and in Chapter 11 we also recommend mandatory training for all legal practitioners on myths and misconceptions.[100]

REFERENCES AND SOURCES

1.67 Citations for all published sources are provided in footnotes. Where major reports, codes of practice, guidance documents or the like are available from a reliable online source then we have generally provided a link. Where sources are subject to update then we have generally linked to the page where they are published rather than directly to a PDF file. All links were last accessed in July 2025.

ACKNOWLEDGEMENTS

1.68 We are very grateful to the individuals and organisations who generously gave up their time to provide consultation responses and/or to meet with us. Their knowledge and expertise are invaluable, and informs the policy and recommendations in this report.

1.69 We would additionally like to acknowledge the following individuals and bodies who gave their time by, for example, providing advance copies of their research, commenting on draft material, facilitating discussion and engagement with other stakeholders, speaking at our events, sharing their experiences of the criminal process, or inviting us to present the project at public events. Among them were: Paul Jarvis KC; Ben Newton KC; Martin Rackstraw; Professor Paul Roberts; Professor Joanne Conaghan; Professor Yvette Russell; Professor Yvette Tinsley; Tricia O'Sullivan; Dr Natalie Kyneswood; Lyndon Harris; Doughty Street Chambers; Russell-Cooke LLP; 6KBW College Hill; Kingsley Napley LLP; Esther Schutzer-Weissmann; Nicola Shannon KC; Farrhat Arshad KC; Rape Crisis England and Wales; three anonymous victim-survivors and their supporters; Dr Matthew Thomason; Dr Siobhan Weare; Dr Dominic Willmott; Dr Brian Brewis; Dr Paul Dargue; Maddy Millar; Eamon Keane; Northumbria University; the University of Glasgow; University College London; Queen's University Belfast; the British Association for Counselling and Psychotherapy; and the British Psychological Society.

1.70 The Commissioners would like to record their thanks to the following members of staff who worked on this report throughout, or at certain stages of its development: David Connolly (team manager); Jessica Skinns (lead lawyer); Roseanna Peck (senior team lawyer); Dr Andrea Preziosi, Dr Nicholas Hoggard, Dr Lawrence McNamara (team

[100] Training is the responsibility of the Lady Chief Justice and judges are already required to receive training specific to sexual offences and sexual violence before they can hear RASSO cases, and should repeat this training at least every three years. See Criminal Practice Directions 2023 (as amended 2024) paras 5.9.3-5.9.4.

lawyers, who reviewed drafts); Rachel Hughes (legal assistant); Grace Bowland, Claire Paton, Abigail Pope, and Miles Wright (research assistants).

Chapter 2: Personal records

INTRODUCTION

2.1 Personal records include records such as medical, counselling, education and social services records. They contain highly personal information engaging the privacy rights of the person who is the subject of the record. Such records are usually held by third parties and are sometimes referred to as third-party material (TPM).[1] In sexual offences cases, complainants' personal records may enter the criminal process because the police or prosecution request to access them or seek a court order for them to be produced. Once in the hands of the prosecution, where they consider them as assisting the defence case or undermining the prosecution case, they will then be disclosed to the defence, and if relevant and otherwise admissible, admitted at trial and used in lines of questioning.[2]

2.2 Particular problems are said to arise in sexual offences cases regarding access, disclosure and admissibility of complainants' personal records. The defence can legitimately seek them and rely on them at trial because they are relevant and necessary to advance their case. Without them, the defence may be denied vital exculpatory material. However, many consultees assert that personal records are disproportionately sought, infringing complainants' right to private life and causing re-traumatisation due to the fact of the request, the revelation of personal information to others (and in particular, to the defendant), or it being used at trial. This treatment of complainants' personal records is viewed as part of the wider pattern observed in sexual offences cases which we explain in Chapter 1, namely the disproportionate focus on the complainant's credibility. Consultees also frequently argue that such records are of limited value because they are not created for evidential purposes, and they are a potential vehicle for introducing myths and misconceptions into the trial process. They also note that complainants' concerns about the potential for such requests may lead to their therapy being compromised or delayed. This is because the complainant and/or therapist may be inhibited from speaking freely about the allegation, or they may decide to postpone therapy until the conclusion of the criminal case.[3]

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1 Third-party material ("TPM") is defined as "material held by a person, organisation, or government department other than the investigator and prosecutor". See Attorney General's Office, *Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (February 2024) (AG's Guidelines) para 28.

2 In the consultation paper, we explained the three main stages in the current framework. First, the police may decide to access records, sometimes with input from the prosecution. Generally, we use the term ""access" where police are able to obtain records by consent, whereas "production" is usually used where consent is refused and records are obtained following a court order". Secondly, disclosure concerns the prosecution's decision about whether to disclose the records to the defence. Thirdly, the term admissibility describes whether the record should be admitted at trial. Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259") para 3.9.

3 See CP 259, paras 3.123-3.128.

2.3 In this chapter, to address these issues, and in light of the responses we have received, we conclude that a bespoke regime for complainants' personal records in sexual offences cases (including all of its constituent parts namely, and procedures, thresholds) should focus on access and production. There are a number of reasons for this, chief of which is that the evidence base suggests that disproportionate requests, which breach the complainant's privacy rights,[4] arise at the point of access. Focusing the regime in this way will ensure that resources, including judicial scrutiny, are appropriately targeted to maximise their effect. It will provide safeguards for complainants in the vast majority of instances where it is suggested that there are intrusions into their privacy rights.

2.4 We further conclude that requests for access and production of personal records must meet an enhanced relevance threshold which we introduce through a structured discretion model, with judicial scrutiny reserved for compelled production pre- or post-charge. Our recommended threshold is made up of two limbs; the evidence must be likely to be relevant to an issue at trial or to the competence of a witness to testify; and access/production must be necessary in the interests of justice. Detailed factors would guide the decision-making in respect of the second limb. The threshold, factors and procedure will require careful evaluation of a request. They are tailored to the particular considerations that arise in relation to the use of personal records in sexual offences cases, identifying issues that may be currently overlooked.

2.5 The aim of this regime is to fill a procedural gap and to offer greater clarity to parties via a formalised statutory framework. Where the complainant and/or the record holder dispute the basis and/or scope of a request, they will be able to insist that the police or prosecution apply for a court order to obtain access, without fearing that an investigation or prosecution will be prematurely terminated. In Chapter 7, we explain that the complainant will have independent legal advice (ILA) and the right to be heard and independent legal representation (ILR) regarding such determinations.

2.6 The regime also sits alongside other recommendations in this report designed to minimise the risk of myths and misconceptions entering the trial process. At trial, where personal records contain sexual behaviour evidence (SBE), false allegations evidence (FAE), bad character evidence (BCE), or criminal injuries compensation evidence (CICE),[5] they will be further scrutinised by the judge using our recommended enhanced relevance admissibility thresholds and procedures.[6] Outside of these categories, in Chapter 11, we explain the most effective use of the judge's case management powers to ensure evidence and questioning is relevant.

2.7 In the sections below, we first explain our rationale for introducing a bespoke regime for access and production, along with the threshold and factors. We then explain the mechanics of the regime including the use of judicial scrutiny and the regime's parameters. Finally, we address residual matters including an accompanying framework and the appropriate inconsistency recorded on TPM.

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4 The phrase complainants' privacy rights or interests refers to their right to a private life under article 8 of the European Convention of Human Rights ("ECHR").

5 Records would reach this stage having first met the criteria for access and/or compelled production.

6 See Chapters 3, 4 and 5.

2.8 This is a complex topic that covers a wide range of law and procedure on which we received extensive consultation responses. As we explain in Chapter 1, although we reviewed all views, in order to keep our final report accessible for our readers, we do not refer to all of them in our report.

CURRENT LAW

Access and compelled production

2.9 In the consultation paper, we explained the thresholds that apply where the complainant consents to a police request to access to their personal records. The police have an obligation to "pursue all reasonable lines of inquiry"[7] pointing towards or away from the suspect, which may extend to identifying and obtaining relevant TPM and:[8]

> Material will be relevant if it appears to the police "that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case".[9]

2.10 We noted that access by consent is not unfettered. Guidance indicates that although police are afforded a "margin of consideration",[10] accessing TPM "should never happen as a matter of course", "there must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation".[11] Further, this guidance directs police to consider the necessity of their request, the least intrusive method, and where a request does "amount to an invasion of privacy, [whether it is] proportionate and justifiable".[12]

2.11 We then set out thresholds where the complainant or record holder does not consent, noting that these thresholds are higher than for access by consent.[13] The police may apply for a court order to compel production.[14] Before seeking such an order, the police and prosecution should consider "how the trial process could address the absence of material".[15] In addition, "a complainant who does not provide material may find that their complaint will not be further investigated or not prosecuted".[16] Pre-

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7 CPIA 1996 Code (2020) para 3.5; AG's Guidelines (2024) para 28; CPIA 1996, s 23(1)(a).

8 CP 259, para 3.12.

9 CP 295, para 3.13, citing Ministry of Justice, Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice ("CPIA Code") (September 2020) para 2.1.8.

10 CP 259, para 3.15, citing *R v Alibhai* [2004] EWCA Crim 681 at [62]-[63].

11 CP 259, para 3.14, citing AG's Guidelines (2022) para 30, citing *Bater-James and Mohammed* [2020] EWCA Crim 790, [2021] 1 WLR 725 at [77].

12 CP 259, paras 3.15-3.16 citing AG's Guidelines (2022) paras 30-32.

13 CP 259, paras 3.21-3.22. For example, to order a witness summons, "the document will not merely be relevant" but must be "likely to be material evidence".

14 CP 259, para 3.187. At para 3.17, we explained that consent may initially be sought from the complainant, but ultimately access is dependent on the consent of the record holder. A third party may provide their records without the complainant's consent as the record holder's confidentiality obligations may be breached in the public interest.

15 CP 259, para 3.17 citing AG's Guidelines (2022) para 13(f).

16 CP 259, para 3.17.

charge, police and prosecutors may use the Police and Criminal Evidence Act 1984 ("PACE") in very limited circumstances to seek production.[17] Post-charge, police and prosecutors may seek to compel the production of records by making an application for a witness summons.[18] In relation to the latter, the person to whom the evidence relates has a right to be notified of the application and to be heard.[19]

Disclosure

2.12 In the consultation paper, we explained that the prosecution has a continuing duty to disclose to the defendant "not only the evidence they will rely on to prove the case, but any "unused material" that meets the disclosure test".[20] That test requires disclosure of unused material that "might reasonably be considered capable of undermining the case for the prosecution… or of assisting the case for the [defendant]".[21] Guidance suggests that unused material which is likely to meet the test includes: a witness' previous account; material which undermines a witness' accuracy, reliability[22] or credibility; and material which the defence may use to support their defence, any legal submissions,[23] or for cross-examination.[24]

2.13 In sexual offences cases, guidance cautions prosecutors against "looking for 'corroboration' of the complainants' account or using the lack of "corroboration as a reason not to proceed".[25] Extra caution is also suggested when dealing with complainants who have been in care, who may "have information recorded about them … which would not otherwise have been documented".[26] For example, where trivial lies have been recorded, the prosecution should consider that this does not necessarily indicate that the allegation is fabricated and should look at the "overall

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17 CP 259, para 3.17. the police could seek a production order under the provisions for accessing "special procedure" or "excluded" material under Police and Criminal Evidence Act 1984 ("PACE"), s 9 and sch 1 or a warrant under the Bankers' Books Evidence Act 1879. We stated that we were not aware that these provisions are used.

18 A witness summons will be ordered if the court is satisfied that: "(a) a person is likely to be able to …produce any document or thing likely to be material evidence … and (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to … produce the documents or thing". See Criminal Procedure (Attendance of Witnesses) Act 1965, s 2(1) and CP 259, para 3.19.

19 CP 259, paras 3.18-3.20

20 CP 259, para 3.25 citing CPIA, ss 3(1), 7A(2) and 7A(5).

21 CP 259, para 3.25.

22 Such as relevant previous convictions or cautions.

23 Such as exclusion of evidence, stay of proceedings due to abuse of process, concerning breaches of Convention rights, and submissions of no case to answer.

24 CP 259, paras 3.26-3.29 citing AG's Guidelines (2022) para 84, CPIA Code (2020) para 6.6(e), (g) and Crown Prosecution Service ("CPS") *Legal Guidance, Rape and Sexual Offences, Chapter 3: Case Building* (15 July 2022) "Reviewing Third Party Material".

25 CP 259, para 3.28, citing CPS *Legal Guidance, Rape and Sexual Offences, Chapter 3: Case Building* (15 July 2022) "Reviewing Third Party Material".

26 CP 259, para 3.31.

credibility of the account", rather than focusing on "a particular aspect or aspects of the lies".[27]

2.14 Decisions about what satisfies the disclosure test are made by the prosecution. We explained that "the court will only be involved in disclosure decisions in two circumstances".[28] The first of these arises "on application by the defence for disclosure of material they have reasonable cause to believe is required to have been disclosed but has not been".[29] Such applications are known as Section 8 applications.[30]

2.15 The other occurs "on application by the prosecution to withhold material from the defence on the grounds that, though it meets the disclosure test, 'it is not in the public interest to disclose it because it would give rise to "a real risk of serious prejudice to an important public interest".[31] This is referred to as a public interest immunity ("PII") application.[32] The prosecution may deem a complainant's personal records to be sensitive material warranting a PII application where the complainant refuses to consent to disclosure.[33] In this instance, the court must balance the public interest in preserving patient confidentiality more generally, along with the defendant's right to a fair trial. We further explained that:

> Given the court is being asked to permit the prosecution to withhold from the defence material that may undermine the prosecution case or assist the defence case, the procedural and substantive thresholds are demanding… These reflect the decision in *R v H*, where the House of Lords set out a series of questions the court must address before there is any derogation from "the golden rule of full disclosure".[34]

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27 CP 259, para 3.31, citing CPS, *Legal Guidance, Rape and Sexual Offences, Chapter 3: Case Building* (15 July 2022) "Reviewing Third Party Material".

28 CP 259, para 3.32.

29 CP 259, para 3.32(1).

30 CPIA 1996, s 8.

31 CP 259, para 3.33, citing *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [36]; CPIA Code (2020) para 2.1.9; AG's Guidelines (2022) paras 117-122.

32 CP 259, para 3.32. In Consultation Question ("CQ") 1, we asked whether agreed facts are regularly used as a practical strategy to address PII matters and whether this poses any risks or concerns. Broadly, responses to this question revealed that on the rare occasions when they are used, agreed facts largely appear to be an appropriate mechanism for dealing with sensitive information in sexual offences cases. To the extent that they are not an appropriate measure, any risks can be addressed. Because responses revealed no particular issues, we do not examine this topic more fully below.

33 CP 259, para 3.34 citing HM Crown Prosecution Service Inspectorate ("HMCPSI"), *Disclosure of Medical Records and Counselling Notes: A review of CPS compliance with rules and guidance in relation to disclosure of complainants' medical records and counselling notes in rape and sexual offence cases*, (July 2013) ("Disclosure of Medical Records and Counselling Notes") paras 3.2, 3.4.

34 CP 259, para 3.36 citing *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [36]. Where there is a real risk of serious prejudice to an important public interest which on the face of it might justify withholding evidence, the court must examine the viability of alternatives (such as admissions, summaries, extracts, or use of special counsel). It is expected that derogation from the presumption of full disclosure is kept to a minimum. If limited disclosure will nevertheless result in an unfair trial when viewed as a whole, this may lead to the prosecution discontinuing the case.

Admissibility

2.16 We explained that "at present, there are no specific rules for the admission of TPM into evidence" and "the general framework for admissibility applies" meaning the threshold is commonly bare relevance.[35] We added that "if material is relevant to a fact in issue, it will be admissible unless the law imposes a higher threshold or there is an obligation or discretion to exclude it".[36] For example, higher thresholds may be applied for SBE and character evidence, or exclusion of TPM may occur where the material is subject to PII.[37]

THE CASE FOR A BESPOKE REGIME

2.17 As we explain above, our conclusion is that there are significant benefits of a bespoke regime limited to access and production (which retains the current regime for disclosure and admissibility) and such a regime can address concerns regarding exceptionality, disclosure failures and the impact on fair trial rights. The following section describes how we have arrived at this view and our responses to consultees' concerns.

Consultation paper

2.18 In the consultation paper we proposed there should be a bespoke and unified regime governing access, production, disclosure and admissibility of personal records held by third parties.[38] We referred to criticisms of the current framework of legislation and guidance[39] as on the one hand, "failing defendants when prosecutors have not disclosed records that could have assisted the defence", consequently risking fair trial rights. On the other hand, we noted concerns that complainants are being failed "due to broad and intrusive requests" and over disclosure of confidential or personal information. We commented on the resulting risk of traumatisation, and of introducing myths into the criminal justice process.[40]

2.19 We highlighted factors in favour of reform. First, there are inconsistencies in the existing framework; for example, there are different procedures and thresholds for

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35 CP 259, para 3.44.

36 CP 259, para 3.44.

37 CP 259, paras 3.45-3.46. We acknowledged that "with regard to PII, it seems that the prosecution would be unlikely to resist admissibility on these grounds".

38 CQ 2: "Our provisional view is that for sexual offences there should be bespoke provisions with a unified regime governing access, production, disclosure and admissibility of personal records held by third parties. Do consultees agree?", CP 259, para 3.88. Summary Consultation Question (SCQ) 1 and Easy Read CQ (ERCQ) 1 asked a similar question.

39 CPIA 1996. In CP 259, we noted that guidance includes the CPIA Code; AG's Guidelines (May 2022); and Crown Prosecution Service, *Disclosure Manual* (July 2022) ("CPS Disclosure Manual"). There is further guidance in other material, including: National Police Chiefs' Council, *Joint Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material* (2018); Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (December 2013) ("Judicial Protocol on Unused Material"); Crown Prosecution Service, *Legal Guidance Rape and Sexual Offences* (27 May 2022 with some chapters subsequently updated) ("CPS Legal Guidance, Rape and Sexual Offences").

40 CP 259, para 3.2. See also paras 3.57-3.58 (regarding disclosure failures; paras 3.59-3.62 (regarding intrusive inquiries); and 3.69-3.74 (regarding perpetuating myths).

compelled production and access by consent.[41] Secondly, the current framework sets low thresholds for access, disclosure and admissibility and this may provide an avenue for introducing myths.[42] Thirdly, we acknowledged there is a wider "public interest in complainants receiving treatment" and also the possibility that the current regime does not serve that interest.[43] Fourthly, we suggested that "heavy reliance on guidance rather than primary legislation is inappropriate where significant public interests and individual rights are in issue.[44] Finally, we remarked upon the absence of judicial scrutiny in most decision-making concerning complainants' personal records.[45]

2.20 We also noted factors against reform such as: that the law is already "well-understood and well-established";[46] "there is an abundance of guidance including the AG's Guidelines, which have recent updates on accessing TPM";[47] and reform risks disclosure failures and miscarriages of justice which "have been condemned for their effect on defendants".[48]

Consultation responses

2.21 A majority of consultees agreed that, in principle, there should be a bespoke regime for access, production, disclosure and admissibility of personal records held by third parties.[49] While there was a broad base of support for the proposal, the bulk of responses supported reform due to dissatisfaction with the existing regime (or its application in practice) rather than providing independent support for a bespoke regime for sexual offences. Comparatively few responses highlighted sexual offence-specific considerations in support. As foreshadowed in the consultation paper, consultees highlighted improving complainants' experiences, their ability to engage with therapy and with the criminal process as key objectives of reform.[50] They noted that the current framework further disempowers complainants who have already been

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41 CP 259, para 3.50. See also paras 3.76-3.83 and para 3.84.

42 CP 259, para 3.84.

43 CP 259, para 3.84.

44 CP 259, para 3.84.

45 CP 259, para 3.51.

46 CP 259, para 3.53.

47 CP 259, para 3.54.

48 CP 259, paras 3.57-3.58.

49 Out of 84 responses, 59 agreed with our proposal, 12 disagreed, and 13 gave an answer categorised as "other". Consultees who agreed included all Welsh police forces and Offices of the Police and Crime Commissioners ("OPCC"); Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences; HM Council of Circuit Judges; CPS; HMCPSI; Professor Vanessa Munro; Professor Clare McGlynn KC (Hon); Dr Olivia Smith; End Violence Against Women Coalition ("EVAW"); Rape Crisis England and Wales ("RCEW"); the Centre for Women's Justice ("CWJ"); British Association for Counselling and Psychotherapy ("BACP"); and Rt Hon Liz Saville Roberts MP. Consultees who disagreed included: the Law Society of England and Wales ("Law Society"); consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits"); the General Council of the Bar of England and Wales ("Bar Council"); and Dr Matt Thomason. Consultees whose responses were categorised as "other" included: the London Criminal courts Solicitors' Association ("LCCSA"); and the Criminal Bar Association ("CBA").

50 Including Blue Door Support Service CIC; CWJ; and RCEW.

disempowered; creates barriers to reporting; causes complainants to disengage with the criminal process; compromises or delays the provision of counselling and well-being services; jeopardises mental health and future recovery; and breaches privacy rights. Consultees also referred to the scope for a bespoke regime to address inconsistency in the current application and understanding of the current framework, and to prevent disproportionate requests.[51]

2.22 On the other hand, consultees, particularly practitioners, raised concerns about the potential impact of a bespoke regime on defendants and on their fair trial rights. These concerns were directed to three main issues. First, consultees stated that there is insufficient evidence of disproportionate requests to justify reform.[52] Dismissing some of the current research,[53] the Law Society of England and Wales ("the Law Society") disagreed that there was any "significant evidence to support the assertion that the police and the prosecution routinely seek too much third-party material that is not relevant". The Six Circuits of England and Wales ("the Six Circuits") also strongly disagreed with the sufficiency of the evidence base for asserting that disproportionate requests pose a "considerable risk to complainants" or that requests are in fact disproportionate. It acknowledged the "mismatch" between complainants' expectations about the trial process and the reality. However, it suggested that some level of distress is inevitable, adding that "there is nothing in the paper to support the conclusion that the fault lies in the trial process rather than the information provided to complainants".[54] It added that commentary on "poor justice outcomes" for defendants is absent from the consultation paper and leaves "untouched the well-evidenced and largely unaddressed systemic failings in disclosure".[55]

2.23 Secondly, some consultees raised concerns about exceptionality; they were of the view that a framework limited only to the personal records of complainants in sexual offences is not necessary or justified.[56] The debate about exceptionality in relation to sexual offence complainants emerges as a theme throughout this report. In the context of personal records, the concern was that a bespoke regime could lead to inconsistency between offences, particularly when other offences raise similar material. The General Council of the Bar of England and Wales ("the Bar Council") gave the examples of

> offences of violence, false imprisonment, kidnap, malicious communications – indeed any offence in respect of which a complainant or significant witness is said

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51 Including Professor Munro; Dr Smith; Solace Women's Aid; CWJ; CPS; HMCPSI. Consultees also noted inconsistency between and within police forces including ManKind Initiative; South Wales Police; Rachel Snaith, employee of OPCC for Northumbria; RCEW; and CWJ. Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually

52 Including Law Society; Six Circuits; and Dr Thomason.

53 It referred to the Home Office, *Third Party Material Case File Review Report* (April 2024) and Home Office, Police requests for Third Party Material: Consultation Response (2022).

54 See its introduction to its consultation response.

55 See its introduction to its consultation response.

56 Including Dr Oriola Sallavaci; Dr Amelia Shooter; Law Society; Bar Council; and CBA.

by a defendant to have made a false complaint or statement motivated by financial or other advantage to themselves.

2.24 Consultees also objected to creating a differentiated approach to access, disclosure and to admissibility suggesting it will create "asymmetry" between rape and serious sexual offences ("RASSO") cases and other criminal matters in respect of the protections afforded to defendants and complainants.[57] They also described it as a mechanism for eroding the "investigative burden" on the police or shifting the burden and standard of proof.[58] Finally, the Criminal Bar Association ("CBA") added a further concern about mixed RASSO and non-RASSO charges on the same indictment:

> The police will often investigate sexual offending that is said to have been committed alongside other types of offending - domestic abuse, assaults, controlling or coercive behaviour, kidnap, blackmail etc. and it would create unfairness and to have a different regime simply because one or more offences is labelled "sexual".

2.25 Thirdly, consultees raised concerns about the potential impact of a bespoke regime on fair trial rights.[59] They suggested that a change in the law or further restrictions on access or disclosure will impact on charging decisions, increase the risk of disclosure failures, ultimately leading to miscarriages of justice. The Law Society said that a bespoke regime for one category of evidence and for one category of offences would add unnecessary complexity and risks confusion among police and prosecutors increasing the risk of disclosure failures. Dr Matt Thomason expressed a similar view, adding that the consultation paper understated the miscarriages of justice caused by disclosure failures. The Six Circuits pointed to the police and Crown Prosecution Service ("CPS") too frequently failing to apply the disclosure regime properly, and said that this has not been altered by reviews or appellate judgments. It therefore concluded that "adding further restrictions to a legal framework whose application is already inadequately understood is likely to compound the chances of injustice to defendants". Instead, those in charge of disclosure need to understand fully how the regime works. In light of this, some consultees concluded that the existing regime is fit for purpose and any issues of poor application should be addressed within the existing framework.[60]

Analysis

Evidence base justifying reform

2.26 We conclude that contrary to the views set out above, the relevant literature, empirical evidence and stakeholder feedback indicate that inappropriate determinations regarding complainants' personal records primarily arise at the point of access and production, rather than at the point of disclosure to the defence, or decision making about admissibility.[61] Despite improved guidance, recent empirical research has found

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57 Six Circuits; and Law Society.

58 CBA.

59 Including Law Society; Dr Thomason; Six Circuits; and Andrew Wilkins, barrister.

60 Bar Council; Law Society and LCCSA.

61 In Appendix 2, we set out the full evidence base we have received and considered.

that disproportionate requests for access and inconsistency persist.[62] This is mirrored by case studies provided to us by the Centre for Women's Justice ("the CWJ").[63] Requests for access may also be a factor in complainants declining to support an investigation.[64] Evidence regarding disclosure is limited and presents a mixed picture. It suggests that over-disclosure of complainants' personal records in sexual offences occurs in a limited proportion of cases.[65] Nevertheless, complainants are fearful that

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62 The Home Office Third Party Case File Review (2024) found that of 139 rape investigations, from eight police forces, typically started in 2021, evidence of requests that were not necessary and were disproportionate by reference to several measures. The majority of requests were initiated by the police and/or the CPS. Amongst 342 requests, 166 (49%) contained no recorded rationale. Amongst the 185 TPM forms that were reviewed, the majority lacked appropriate detail regarding the basis for the request. See Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024) p 3, paras 4.4, 4.2.2, and para 4.3, Table 7. A similar point was made by Professor Munro in her consultation response. See also A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants Summary Briefing from Independent Academic Research* (December 2023) p 3 and 5. This independent research engaged with 115 cases; it examined internal systems and materials including interview transcripts; conducted 146 stakeholder interviews; observed 36 Early Advice discussions, 15 Scrutiny Panels, 7 CPS/ISVA forums, and 4 RASSO training events; and reviewed 24 randomly selected case files. It concluded that current strategies were thought to reduce "expansive" requests. However, the CPS reported to researchers that police "were still routinely gathering disproportionate volumes of material" and police reported reviewing lawyers "setting parameters too widely". The consultation response of Dr Smith provided the following information. Her early 2022 Operation Soteria survey of 417 rape investigators across 13 forces found high levels of requests and confusion over TPM rules, which she partly attributed to "the piecemeal and complex legal framework governing use of TPM". 59% of respondents felt confident that they understood complainants' legal rights in relation to TPM, but 41% did not. She added that requests for access were made "in at least half of recent rape investigations, and almost a quarter of respondents said they had accessed TPM in every recent rape case".

63 The CWJ provided us with a summary of 11 case studies created in 2021 documenting disproportionate requests from the police or prosecution, taken from its own casework. These included "routine blanket requests for a broad range of materials, (therapy records, ISVA records, GP and other health records, social services and education records) and requests which constitute trawls for any matter relevant to credibility". In addition, it highlighted the injustice caused to complainants by the improper weighting of TPM in charging decisions, leading to cases not proceeding and there being no further opportunity for the relevance of the TPM (or lack thereof) to be determined, or for the jury to evaluate the complainant's account at trial. More broadly, such determinations may undermine the integrity of the criminal process and the public interest in securing justice for all participants.

64 An Operation Soteria survey of 1,968 sexual offences complainants found that 16% of participants said that police wanting their personal records and data such as mobile phones was a reason for their decision not to proceed. Other reasons given (which may be overlapping) included impact on mental health (60%); feeling unsupported (49%); fear of the suspect (38%); how officers treated them (37%); impact on family and loved ones (32%); other (21%); other things going on (17%). See K Hohl, A-K Reid, S Molisso, M Pullerits, *Operation Soteria Bluestone Rape and sexual assault survivors' experience of the police in England and Wales. Survey Report I: January – June 2023* (September 2023) p 37.

65 HMCPSI's consultation response rejected judicial scrutiny stating that based on its review of post-charge disclosure in 189 RASSO cases conducted in 2021-2022, TPM was appropriately dealt with in 69.3% cases, 15.3% of cases partially met the required standard, and 15.3% did not meet the standard. Its data was taken from (but not cited in) the HMCPSI, *Area Inspection Programme Composite Report of the base line assessments of the 14 Crown Prosecution Areas in England and Wales* (September 2023) para 4.52. In the consultation paper, we cited the findings of the 2021 Joint Inspection of the police and CPS' response to rape which "identified ongoing concerns that the disclosure process is not always well managed in sexual offences cases and specific concerns have been identified in relation to personal records". CP 259, para 3.60 citing HMICFRS and HMCPSI, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape – Phase 2: Post-charge* (Criminal Justice Joint Inspection, 2021) pp 76-78. Although outside the scope of their study, Operation Soteria researchers found that some stakeholders raised concerns about "the impact of, and legal professionals' support for, more delimited parameters of enquiry and disclosure during the trial process". However, judges' comments to them indicated the defence

their private information will be given to the defendant and may be mis-disclosed.[66] The evidence base regarding complainants' personal records being inappropriately used at trial is even more limited and does not suggest that this occurs routinely.[67] However, we again heard that fears about their records being used at trial may be a barrier to complainants reporting or continuing to support a prosecution.[68]

2.27 Overall, we therefore take the view that the reform of the regime for access and production (pre- or post-charge) is justified because that is where it is most needed, and will be most effective. Targeting the regime in this way will provide safeguards to complainants for the vast majority of instances where it is suggested that there are intrusions into their privacy rights, while addressing concerns about unjustified differentiated thresholds for disclosure and admissibility creating fair trial risks. It will also be less resource intensive and may reduce the risk of delays arising from the introduction of increased judicial scrutiny.

2.28 The LCCSA's response is illustrative of this point. It said that the Criminal Procedure and Investigation Act 1996 ("CPIA") regime is fit for purpose and is based on a clear test which is a sufficient safeguard against so-called fishing expeditions.

> Whilst there may be many requests being made, that may in fact be speculative in nature, it is not our experience that TPM is too readily disclosed, due to the safeguards offered by the CPIA Regime. Proactive and effective review of TPM by prosecutors should help prevent this occurring.

However, the LCCSA acknowledged that there is scope for reform at the "access" stage, and that stronger safeguards should protect complainants. In its view, "these shortcomings may best be addressed by more minor reform as opposed to a wholescale overhaul of the current regime".

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now make more targeted requests for TPM, such material is currently potentially being under-disclosed, is rarely adduced at trial, and can be "effectively delimited by judicial scrutiny as to relevance". See A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants Final Findings from Independent Academic Research* (December 2023) p 121 and 75.

66 The CWJ's response stated: "The primary concern for many victims is not that police officers and prosecutors will look at their private information, but that their private records may be put in the hands of the defendant, the very person who has harmed them, often a person they know well. Being told that material will not be disclosed to the defence unless a prosecutor deems this appropriate is no comfort, as they do not know what information might meet the disclosure test or whether prosecutors will carry out their role correctly".

67 Dr Natalie Kyneswood's consultation response cited her PhD research which involved trial observations of 36 cases conducted in 2019, including observations of pre-trial hearings. Amongst the 36 cases, four involved personal records and relied on what she considered to be irrelevant lines questioning. For example,, in case 18, defence counsel "used the fact that the complainant had received counselling to ask why the complainant had not reported the incident to their counsellor, though the therapy they received was for an entirely different reason". In case 35, the complainant was questioned about the accuracy of disclosures to their therapist, and this revealed other matters such as her relationship breakdown, family court proceedings and SBE (without any evident application to adduce it). In case 1, records were used to suggest the complainant was delusional. N Kyneswood, *The Application of Section 28 and Related Measures in Sex Offence Cases: Is Pre-recorded Cross-examination Achieving Best Evidence for Intimidated Complainants?* (November 2022) pp 202-203.

68 The Blue Door Support Service CIC told us that this barrier arises because complainants fear their records being "disclosed" and "pulled apart" by the defence".

2.29 Further, applying the new regime at the access and production stage will change working practices and shape decision-making at all stages of the process. It will also help to minimise the risk of over-disclosure. All material disclosed and used at trial would first have gone through the recommended new threshold for access and production. Once provided, it will be further scrutinised by the prosecution before onward disclosure to the defence. In addition, the new regime and working practices may deter disproportionate requests. The regime will ensure the defendant has access to material which is necessary for a fair trial, which we explain further below.

2.30 We acknowledge consultees' views that complainants are concerned about the defendant having and using their private information, and that the prosecution may disclose it even when the disclosure test is not met. However, we conclude that these concerns can be addressed in other ways. First, in Chapter 7, we recommend ILA and ILR; this will ensure that the complainant is able to engage with and understand the process and seek reassurance about what will happen to material which is obtained. Secondly, in Chapter 11, we explain the role of judicial case management in better ensuring advocates' lines of questioning adhere to the relevance threshold. Thirdly, where personal records meet the threshold for access and production and contain SBE, FAE, BCE, or CICE, their admissibility will be further scrutinised using an enhanced relevance threshold and structured discretion model (described in Chapters 3, 4, 5, and 6).

2.31 The following cases demonstrate how the courts currently consider SBE, FAE,[69] BCE, or CICE derived from TPM. Our recommendations will build on and develop this approach. Currently where TPM contains SBE, once obtained by the police and disclosed to the defence, the courts will then consider the defence's request to admit it via the gateways in section 41 of the y Evidence Act 1999 ("YJCEA"). For example, in *R v Wayne Lee Harris*, the Court of Appeal upheld the trial judge's refusal to allow the defence to cross-examine the complainant about entries in her medical and psychiatric records regarding which concerned her sexual behaviour under section 41(3)(c) of the YJCEA.[70] Similarly, where information on a third-party record is said to concern the complainant's credibility, for example, where the defence assert that record shows that the complainant lied (regarding an issue which is "not to do with the alleged facts of the offence")[71] this is required to meet the threshold for non-defendant bad character.[72] In *R v BVY*, the Court of Appeal upheld the trial judge's determination under section 100(1)(b) of the Criminal Justice Act ("CJA") 2003, that the complainant's comments to a teacher about a fabricated medical procedure on intimate parts of her body did not have substantial probative value regarding the complainant's credibility and the veracity of her criminal complaint that the defendant had made contact with intimate parts of her body.[73] Finally, where TPM is obtained and disclosed which reveals that the complainant has made a claim for compensation,

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69 For FAE, the BCE or SBE framework may apply, and we therefore do not provide a separate example below, although see for example, *Michael Hurley v R* [2025] EWCA Crim 642.

70 [2009] EWCA Crim 434.

71 CJA 2003, s 98(a). Therefore, where the defence assert that the complainant has lied because the TPM contains a retraction of their allegation, the BCE framework would not apply.

72 CJA 2003, s 100(1)(b).

73 [2024] EWCA Crim 1355.

the courts also subsequently scrutinise its admissibility. For example, in *North (Mark)* the Court of Appeal found that evidence from social services files of the complainant's CIC claim was admissible to rebut his assertion in evidence that he had not been told of his ability to make a claim.[74]

2.32 Under our new framework, in these scenarios, a request for TPM would first be considered under our new enhanced relevance threshold for access or production. If consent is given or the request for production is granted, after the material has been accessed or produced, and disclosed to the defence, when considering a request to adduce this material at trial, the court would apply the existing enhanced relevance admissibility threshold for BCE, and/or our recommended enhanced relevance thresholds for SBE, FAE and CICE. This means that for the majority of problematic categories of evidence, significant safeguards would be in place. A further common reason for requests for complainants' personal records is that they may contain evidence of inconsistency. We consider this below.

2.33 The more limited regime we recommend departs from what we proposed in the consultation paper. Our original proposal was directed at creating a unified regime that would apply at all stages of the process (access, production, disclosure and admissibility) to prevent inconsistency, confusion and complexity. However, the evidence base is only strong enough to warrant reform in relation to access and production. Moreover, below we go on to discuss the particular difficulties that may arise if the regime were to require judicial scrutiny and differentiated thresholds for disclosure and admissibility.

Justification for exceptionality

2.34 Contrary to some consultees' views, we conclude that fairness and consistency are achievable with two overlapping regimes. In Chapter 1, we explain our justification for exceptionality. In summary, exceptionality already exists, does not compromise fair trial rights, and is already present in the investigation and prosecution of sexual offences. Some consultees agreed with this, stating that exceptionality is workable and justified.[75] For example, Behind the Gown thought that a bespoke regime could more readily cater to the particular features of RASSO cases. It said, "that is not to say the CPIA regime should be overhauled; rather, a bespoke regime working in parallel with the CPIA could improve a key part of the trial process for prosecutions of this nature".

2.35 Secondly, we reiterate the point we made in the consultation paper,[76] that other jurisdictions manage this issue. The regimes in Canada and New South Wales ("NSW"), Australia introduce exceptionality and, contrary to consultees' concerns, manage the risk of inconsistency and unfairness. In Canada, the personal records

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74 [2011] EWCA Crim 88. We further described this case in CP 259, para 6.40. In addition, we note that records held by the Criminal Injuries Compensation Authority are TPM which might fall within the bespoke regime.

75 Behind the Gown (an organisation founded in 2017 to "combat sexual harassment and abuse of power at the Bar"); Dr Susan Leahy; and Professor McGlynn.

76 CP 259, para 3.85.

regime applies to mixed sexual and non-sexual offences charges[77] and the Supreme Court of Canada has approved the differentiated thresholds of the personal records regime.[78] It concluded that the personal records regime's objective of protecting complainants' privacy rights "may impose procedural burdens on defendants". However, this does not render documents inaccessible because "defendants can access records when the privacy infringement is proportionate, given the relevance of the record to the defence".[79] Similarly, the NSW Court of Criminal Appeal has confirmed validity of the constraints on the defence that the Sexual Assault Communications Privilege ("SACP") imposes regarding the production of documents. It found that protection of the complainant's privacy interests does not "deprive the accused of some source of information to which he is presumptively entitled". It noted various safeguards including that

> the apparently high threshold … may not be as difficult to overcome as first appears if the relevant application was supported by evidence identifying the accused's defence to the relevant allegation, what the accused expects will be obtained from the material sought to be produced or inspected and what other documents or evidence are or are not available relating to those issues and the material sought.[80]

2.36 Finally, an alternative to this type of exceptionality would be for the regime to apply to requests for personal records in all cases, whether sexual offences or otherwise. The framework for extracting information from electronic devices provides some precedent for this.[81] Further, in Chapter 3, we conclude that restrictions on the use of SBE should apply whenever SBE arises in any criminal case, not just sexual offences. This is because the rationale underlying the SBE regime applies to all prosecutions (though in sexual offences cases, the justifications for restriction may be stronger and SBE may arise more often). However, we conclude that the personal records regime should not apply in all cases. First, it would apply a procedural framework and enhanced relevance threshold in cases where it is not justified and could no longer be targeted to the exceptionality present in the investigation and prosecution of sexual offences cases. Secondly, the position for SBE is distinguishable because SBE is a category of evidence which is inherently problematic and at risk of leading jurors into error, whereas TPM may contain a range of information not all of which carries this risk. Thirdly, we received no responses suggesting personal records are being disproportionately sought or used in non-sexual offences cases and did not consult on

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77 It applies in any proceedings in which specified sexual offences have been charged or "in any proceedings in respect of two or more offences at least one of which is [a specified offence]". See Criminal Code (Canada), s 278.2(1).

78 *R v Mills* [1999] 3 SCR 668 found such a regime consistent with the constitutional principles of fundamental justice and trial fairness and the defendant's right to make full answer and defence.

79 *R v Quesnelle* 2014 SCC 46 at [14], [62]-[65].

80 *KS v Veitch (No 2)* [2012] NSWCCA, Basten J at [65]. The Supreme Court of Queensland reached a similar conclusion citing *KS v Veitch (No 2)*. See *MH v HJ* [2023] QSC 176 at [58]-[59]. Cooper J concluded that the effect of the SACP "may be to make it more difficult for an accused ... to defend himself". However, he also noted that PII and Legal Professional Privilege (LPP) are other areas which "justify exclusion of information from disclosure". At [59] he stated that the "apparently high threshold" can be addressed by the defence making a "difficult forensic choice", namely identifying their defence and material which supports their application for leave.

81 Police, Crime, Sentencing and Courts Act 2022 ("PCSCA 2022") ch 3.

this. Given that reform would lead to a significant change for a wide range of offences in magistrates' courts and the Crown Court, it would not be appropriate for us to recommend such an extension.

Further reasons for reform

2.37 Even though quite a number of consultees merely expressed dissatisfaction with the application of the current regime, in our view, there remains a case for change. The underlying rationale for those responses was that a new regime is not justified because the existing regime *could* work sufficiently well, for example, with more explicit guidance or increased funding. Therefore, if there is a problem, we should first try and improve the application of the existing regime.[82] We conclude that reform is necessary because there have been considerable efforts and resources deployed in recent years via initiatives such as Operation Soteria, CPS guidance and training, amendments to the Attorney General's Guidelines and the National Operating Model for Adult Rape cases.[83] Despite this, the most recent published evidence suggests disproportionate and inconsistent requests to access complainants' personal records persist. In our view, the lack of adherence to existing thresholds does justify change.

2.38 Some consultees commented that we understated the risk of disclosure failures in the present framework. In the consultation paper, we noted the critical role of the disclosure framework in preventing miscarriages of justice, and the very serious consequences of the failures in the Liam Allan case.[84] We explained that disclosure reviews "conducted as a result of Liam Allan's case led to acquittals or the collapse of prosecutions or investigations in 47 other cases".[85] Some reviews[86] and some limited[87] case law confirm more specifically that personal records are under-disclosed in sexual offences cases.[88]

2.39 There is significant evidence and empirical research concerning the ways in which the CPIA framework is poorly applied by the police and prosecution. This is said to lead to

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82 See Bar Council; Law Society; and LCCSA.

83 CPS, *National Operating Model for Adult Rape Prosecution* (July 2023).

84 CP 259, para 3.57-3.58.

85 CP 259, para 3.58. The CPS carried out a review of 3,637 live rape cases; during the period of the review 47 were stopped due to issues with disclosure: CPS, *Rape and serious sexual offence prosecutions: Assessment of disclosure of unused material ahead of trial* (June 2018) pp 3-4.

86 In a 2013 review, HMCPSI found that in five out of 37 sexual offences cases, medical and counselling records had not been appropriately disclosed to the defence. See HMCPSI, *Disclosure of medical records and counselling notes: a review of CPS compliance with rules and guidance in relation to disclosure of complainants' medical records and counselling notes in rape and sexual offence cases* (July 2013) paras 2.13-2.16. In 2018, amongst 3,637 cases, Chief Crown Prosecutors identified 47 that were stopped due to disclosure issues. Failure to identify and obtain relevant TPM was a feature in "some" of the stopped cases. CPS, *Rape and serious sexual offence prosecutions: Assessment of disclosure of unused material ahead of trial* (June 2018) p 6.

87 In part, this may be because the defence necessarily remain unaware of the fact that material has not been disclosed.

88 For example, in *R v Warren Blackwell* [2006] EWCA Crim 2185, the Court of Appeal concluded that a sexual assault conviction was unsafe because the prosecution had failed to disclose the complainant's medical and psychiatric history. Her records demonstrated her propensity to self-harm and, together with other evidence, suggested that injuries sustained during the offence were in fact self-inflicted, and her evidence was not credible or reliable.

under-disclosure of unused material to the defence, risking miscarriages of justice.[89] Commentators attribute this to the working culture and relative roles of these bodies within the adversarial process, and the allocation of an inquisitorial and legal function to the police, for which they are not suited or trained.[90] Professor Ian Dennis notes that more recent reviews[91] have recommended better application of the CPIA via training, leadership and better communication between the police and prosecution, but have failed to engage with these attitudinal barriers, leading to limited meaningful change.[92] A recent Home Office Review, also notes problems in its application stating "the structure and architecture of the CPIA is broadly sound, with problems crucially occurring in its practical application".[93]

2.40 It is against this backdrop that consultees raised very serious concerns about the potential for a bespoke regime to impact upon fair trial rights. We conclude that our recommended model addresses these concerns, while tackling the problem of disproportionate access to complainants' personal records and its impact on them. First, our recommended regime is confined to the part of the process where the evidence suggests that problems are most acute, namely requests to access and produce personal records. Secondly, below we explain how evidence which is necessary for a fair trial will meet our recommended threshold and will accommodate the fact that the defence is making requests for material which they have not seen. Thirdly, disclosure failures are not an inevitable consequence of a new or more restrictive regime; it is the clarity of guidance and legislation which is important, and has been emphasised as lacking at the moment.

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89 See I Dennis, "Prosecution Disclosure: are the problems insoluble?" Oct 2018 *Criminal Law Review* 10, 829; H Quirk, "The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work" (2006) 10 *International Journal of Evidence and Proof* 42; C Taylor, "Disclosure Strategies and Dilemmas within Routine Criminal Case Construction by UK Detectives" (2007); L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (2019) ch 9; T Smith, The "Near Miss" of Liam Allan: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice [2018] *Criminal Law Review* 711; and C Taylor, *Criminal investigation and pre-trial disclosure in the United Kingdom: how detectives put together a case* (2006).

90 For example, the police and prosecution are not well placed to review and identify material which assists the defence case. Dr Quirk's research found that despite their obligations to investigate matters pointing towards or away from the suspect, the police perceived themselves as "agents of the prosecution". Further, they are not legally qualified but are tasked with making "judgements about the legal significance of material". She also found the framework does not create a supervisory role for the CPS over the police. She concluded that prosecution is over-reliant on the police's evaluation of unused material and lacked experience of conducting defence work. However, she did find that prosecuting counsel acted as a safeguard to some extent. H Quirk, "The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work" (2006) 10 *International Journal of Evidence and Proof* 42, pp 46-55.

91 Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011); and HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, *Making It Fair, A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (2017).

92 I Dennis, "Prosecution Disclosure: are the problems insoluble?" Oct 2018 *Criminal Law Review* 10, 829, 840.

93 J Fisher KC, *Disclosure in the Digital Age Independent Review of Disclosure and Fraud Offences* (March 2025) para 17. It also provides a detailed chronology of the current regime, including notable disclosure failures that resulted in change. See paras 41-114.

Disclosure and admissibility

2.41 In concluding that the bespoke regime should attach only to access and production, we also draw on responses regarding our proposed thresholds for disclosure and admissibility. In the consultation paper, we rejected the NSW threshold for disclosure and admissibility, and proposed an adapted version of the Canadian thresholds.[94] Responses were mixed on these questions; a majority of consultees supported using our proposed version of the Canadian enhanced relevance thresholds for both disclosure and admissibility.[95] However, limited numbers of consultees provided their rationale. Consultees saw the value in amended thresholds because they believe the current regime insufficient to protect the complainant's privacy rights and to filter out requests which rely on myths.[96] They suggested a changed threshold will improve the scrutiny of applications,[97] and prevent unnecessary disclosure of complainants' personal records, striking an appropriate balance between the interests at stake.[98] On the other hand, consultees argued that that the proposed threshold will prevent materials being disclosed, impact deleteriously on fair trial rights, and risk miscarriages of justice.[99] They also said that the current disclosure regime is sufficient.[100]

2.42 Secondly, Dr Thomason provided another argument in favour of a regime focussed on access and production. He suggested that our proposals inappropriately aligned the

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94 CQ 15: "For disclosure to the defence, we provisionally propose adapting the Canadian approach to disclosure (discussed at paras 3.236 to 3.237 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties: • must be likely relevant to an issue at trial or to the competence of a witness to testify; and • access or production to the police or prosecution must be necessary in the interests of justice. Do consultees agree?", CP 259, para 3.256. SCQ 6 and ERCQ 3 asked a similar question. CQ 16: "For admissibility as evidence, we provisionally propose adapting the Canadian approach to admissibility (discussed at paras 3.238 to 3.241 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that material in personal records held by third parties is admissible if: • the evidence is relevant to an issue at trial or to the competence of a witness to testify; and • it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. Do consultees agree?", CP 259, para 3.259. SCQ 7 asked a similar question. This section is an overview of the responses we received regarding the disclosure and admissibility thresholds we provisionally proposed.

95 Out of 74 responses, 43 consultees agreed that for disclosure to the defence we should use be an adapted version of the Canadian threshold; 20 consultees disagreed; and 11 gave an answer categorised as "other". Similarly, out of 71 responses, 43 consultees agreed that for admissibility, we should use an adapted version of the Canadian threshold; 19 consultees disagreed; and 9 gave an answer categorised as "other".

96 Including Solace Women's Aid; and Behind the Gown.

97 HMCPSI; and Rachel Snaith.

98 CQ 15: including Rachel Snaith; ManKind Initiative; and Dr Leahy. CQ 16: including Rt Hon Dame Maria Miller; Dr Leahy; Professor McGlynn; Rachel Snaith; Solace Women's Aid.

99 CQ 15: including False Allegations Watch/Empowering the Innocent; Philipp Tanzer; Lyall Thompson, barrister; Six Circuits; Cardiff University Law School Innocence Project. CQ 16: including FACT; a Circuit Judge consultee; Law Society; Bar Council; Dr Thomason; False Allegations Watch/Empowering the Innocent; Lyall Thompson; Northumbria Centre for Evidence and Criminal Justice Studies.

100 CQ 15: including Bar Council; CBA; Tracy Harris, CPS prosecutor; LCCSA; Six Circuits; and a Circuit Judge. CQ 16: Tracy Harris, LCCSA, Six Circuits.

personal records and SBE admissibility thresholds[101] and procedural framework and he rejected a special admissibility regime for the former:

> I do have some concerns about whether TPM should be subject to a rule of admissibility at all. First, as with some other proposals throughout the paper, it would not make any sense to create this rule for sex offences only. Indeed, the Law Commission acknowledges this in its sexual behaviour proposals by proposing to expand the rule to apply to all offences (a sensible suggestion). But I am still struggling to accept the basis of the argument that this is necessary. Perhaps this is because I fundamentally disagree that non-epistemic reasons (such as privacy) can justify restrictions on defence evidence…To the extent that some TPM may lead to jury prejudice (and it is not obvious on the evidence that it does, the most that can be said is there is a risk) then this would be better handled with the educational tools for juries proposed later in the paper, and better directions. A heightened admissibility requirement on the defence seems an extreme option.

2.43 We were persuaded by Dr Thomason's concerns about creating a special threshold and procedural framework for the admission of personal records. This is because there is a distinction between personal records and other problematic categories of evidence such as SBE. The personal records framework focuses on where information is recorded, whereas special admissibility rules usually target particular categories of evidence that are particularly prone to distracting or prejudicing the jury against the defendant or a witness. As such, TPM is less likely to be a vehicle for introducing myths and misconceptions, is more likely to be relevant, and carries less prejudicial potential. In our revised view, where a piece of evidence is recorded is not a good proxy for identifying the risks associated with it and is not a helpful basis for a special disclosure and admissibility rule.

2.44 Thirdly, in our view it is not desirable or workable for the personal records thresholds to recognise the distinction with other more problematic categories of evidence. The gap between these thresholds would be small[102] and would add complexity without justification. While an aligned framework for personal records and other categories of evidence might be slightly clearer, and less burdensome, it would not address the concern about whether a higher threshold is justified.

THRESHOLD FOR ACCESS AND PRODUCTION

2.45 Having concluded that there is a clear evidence base for a bespoke regime for access and production, in this section we describe our recommended threshold. This threshold would be used when determining such requests. In the consultation paper,

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[101] We agree they are similar. We proposed 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". We proposed that "material in personal records held by third parties is admissible if: (1) the evidence is relevant to an issue at trial or to the competence of a witness to testify; and (2) it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". See CP 259, paras 4.196-4.199 and 3.259-3.261.

[102] It would have to be higher than current thresholds for disclosure and admissibility and lower than the SBE enhanced relevance threshold.

the threshold we provisionally proposed was based on the position in Canada.[103] We explained that to make an order for compelled production, section 278.5(1) of the Criminal Code of Canada requires the judge to be satisfied of various matters:

(1) The application must meet the relevant procedural requirements (including the "insufficient grounds" filter).

(2) The insufficient grounds filter sets out assertions by the defence which are insufficient on their own to justify the judge ordering production. We noted it is designed to "filter out unmeritorious requests" thereby reducing the risk of introducing misconceptions.[104] The insufficient grounds are:

    (a) that the record exists;

    (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

    (c) that the record relates to the incident that is the subject-matter of the proceedings;

    (d) that the record may disclose a prior inconsistent statement of the complainant or witness;

    (e) that the record may relate to the credibility of the complainant or witness;

    (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

    (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

    (h) that the record relates to the sexual activity of the complainant with any person, including the accused;

    (i) that the record relates to the presence or absence of a recent complaint;

    (j) that the record relates to the complainant's sexual reputation; or

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103 CQ 13: "For compelled production to police and prosecutors, we provisionally propose adapting the Canadian approach to production to the court (discussed at para 3.230 and 3.234 to 3.235 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties: • must be likely relevant to an issue at trial or to the competence of a witness to testify; and • access or production to the police or prosecution must be necessary in the interests of justice. Do consultees agree? 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… Are there factors we should remove, modify or add?". CP 259, paras 3.251-3.253. SCQ 6 and ERCQ 3 asked a similar question.

104 CP 259, para 3.232

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.[105]

(3) To order production, the judge must be satisfied that the record is "likely relevant to an issue at trial or to the competence of a witness to testify" and that production is "necessary in the interests of justice".

2.46 We explained that the combination of the "likely relevance" and "necessary in the interests of justice" limbs create an enhanced relevance threshold.[106]

2.47 The Code also outlines how judges should balance the interests at stake when making a ruling under section 278.5(1). It describes the need to consider the "salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness". The judge is required to take account of the following factors:

(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.

2.48 A majority of consultees supported our proposed threshold.[107] As with disclosure and admissibility, the reasons given in support were not particularly detailed, but some overall themes emerged. Arguments in favour focussed on dissatisfaction with the current threshold as being too open to interpretation and permissive[108] and the need to prevent unnecessary access to personal records, while striking the correct balance

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105 Criminal Code (Canada), s 278.3(4).

106 CP 259, para 3.234.

107 Out of 80 responses, 47 consultees supported our proposed threshold; 22 disagreed; and 11 gave an answer categorised as "other". Out of 68 consultees, 39 of 68 agreed with our proposed factors; 19 disagreed; and 10 gave an answer categorised as "other".

108 Solace Women's Aid; Behind the Gown; and Geraldine Hanna, Commissioner Designate for Victims of Crime in Northern Ireland; HMCPSI; Dr Leahy; and Behind the Gown.

between the rights and interests at stake.[109] Consultees also commented that the proposed threshold would improve complainants' confidence.[110] Objections focussed on the enhanced relevance test being too restrictive, risking miscarriages of justice and fair trial rights;[111] and that the current threshold for compelled production is sufficient to prevent unnecessary access to personal records.[112] Conversely, five consultees thought our proposed threshold too low and favoured the NSW threshold of substantial probative value.[113] We explain below how consultees' concerns can be addressed. In light of this analysis, we recommend the use of the Canadian threshold which we prefer over the NSW threshold (we provide further reasons for rejecting the NSW threshold below).

Suggested amendments to the threshold

2.49 In this section we discuss consultees' concerns about the wording of the threshold. Andrew Wilkins (barrister) stated that the requirement that the record is "likely relevant" should be replaced with "that the material may reasonably be relevant". Without this change, he thought that there may be cases where "relevant material is not properly considered". In the consultation paper, we explained that the Supreme Court of Canada defined the phrase "likely relevant" to mean "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify".[114] We consider this a helpful definition as it explains the threshold and reiterates the matters to which the evidence must be probative.

2.50 Professor Clare McGlynn KC (Hon) wrote that the test should be "whether they are highly relevant", adding that the "likely relevant" standard would result in requests being "put through on the nod" and that it "differs little from current practice". We conclude that a threshold that records "are" relevant would be very difficult to overcome (and that they are "highly relevant" would be all the more difficult to overcome). Since the defence, police and prosecution will not have seen the documents, it will be impossible for them to argue that the records definitively are relevant, or highly relevant. All that they will reasonably be able to say is that the records are likely to be relevant.

2.51 The Six Circuits rejected the interests of justice limb altogether, adding that it inappropriately expands the PII regime:

> PII is, for good reason, a very narrow set of categories, since material which is prima facie disclosable should only be withheld from the defence where the countervailing

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109 Rachel Snaith; and ManKind Initiative; South Wales OPCC; and Northumbria OPCC.

110 Dr Georgina Clifford, Clinical Psychologist; and nia (a service provider for women and girls who have been victims of sexual violence), though it favoured the NSW substantial probative value threshold.

111 Including Cardiff University Law School Innocence Project; Falsely Accused Day Steering Group; False Allegations Watch/Empowering the Innocent; and Lyall Thompson.

112 CBA; Law Society; and Bar Council.

113 Juries Understanding Rape is Essential Standard ("JURIES"); RCEW; Refuge; CWJ; and EVAW.

114 CP 259, para 3.234 citing *R v O'Connor* [1995] 4 SCR 411 at [22].The Supreme Court further explained that "when we speak of relevance to 'an issue at trial', we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case".

interests are sufficiently serious, significant and of such weight that they can justify what would otherwise be a breach of disclosure duties under the CPIA. To widen the ambit of non-disclosure of relevant material on the basis, not of the complainant's safety or any comparably grave interest, but of her privacy, or of policy considerations wholly unconnected with the trial itself, is absolutely unconscionable.

2.52 We do not think that the interests of justice limb is an expansion of the PII regime. This is because a similar interests of justice test already exists and can be used for requests for compelled production of complainants' personal records via a witness summons application.[115] In addition, the interests of justice test we recommend is distinct from the PII threshold.[116] Further, below, we explain that we do not recommend that the encouraging reporting and encouraging obtaining treatment factors should be included in the threshold. The other part of the Six Circuits' concern is that relevant evidence should never be outweighed by privacy interests; below we explain how evidence necessary for a fair trial will meet the threshold so that this concern will not arise.

2.53 The CWJ and Claire Waxman (Independent Victims' Commissioner for London) both suggested that the threshold should incorporate data protection requirements. The CWJ explained that our proposed threshold fails to engage with the data protection requirement that for the processing of sensitive data requests must not just be necessary and proportionate, but should be strictly necessary and proportionate. In our view the majority, but not all, requests for the TPM in sexual offences cases are likely to involve sensitive processing.[117] For example, sensitive processing would arise for therapy or medical records but might not arise for social services or education records. In light of this, it would not be workable directly to incorporate the strictly necessary and proportionate element into the threshold. This can instead be accommodated via the interests of justice test and factors, though these principles could be expanded on in guidance.

2.54 Dr Thomason argued that "the tests for production, disclosure, and admissibility should be increasingly more difficult to satisfy". We agree with his views, and are unpersuaded by the CWJ's view that "having different thresholds at different stages would over-complicate a process that is already complicated". The increasing thresholds reflect the state of the parties' knowledge, and their ability to argue the

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115 See Criminal Procedure (Attendance of Witnesses) Act 1965, s 2(1)(b). In the consultation paper we explained that in the context of a witness summons, the interests of justice requires the balancing of article 6 and 8 considerations. For example, Crim PR r 17.6(1)(b) identifies a ground of objection that: "even if it is likely to be material evidence, the duties or rights, including rights of confidentiality, of the proposed witness or of any person to whom the document or thing relates, outweigh the reasons for issuing a summons". See CP 259, para 3.22.

116 Above, we explain that that a claim to withhold disclosure on the basis of PII is an assertion that disclosure is not in the public interest because it would give rise to a real risk of serious prejudice to an important public interest. Where the PII concerns personal records, the court must balance the general public interest in preserving patient confidentiality and the defendant's right to a fair trial.

117 See Data Protection Act 2018, s 35(8) and Information Commissioner's Office, *Information Commissioner's Opinion: Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations* (May 2022) ("Information Commissioner's Opinion 2022") para 2.4.3. Sensitive processing means, for example, processing "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership"; "data concerning health" or "data concerning an individual's sex life or sexual orientation".

merits of access, disclosure, and admissibility. The fact that our threshold for access and production relies on likely relevance means that subsequent thresholds meet this objective.

Factors

2.55 In this section, we set out our views on each of the factors in light of the responses we received from consultees.[118] A common theme throughout was that the right to a fair trial should take precedence over all the other factors. We explain below how evidence that is necessary for a fair trial will meet the threshold and how the factors will accommodate this.

Factor (a) (extent to which the record is necessary to make full answer and defence)

2.56 There was broad support for and limited opposition to this factor amongst consultees. We remain convinced of its value. However, we conclude that the phrase "full answer and defence" should be replaced with *may* be necessary to ensure a fair trial. The "fair trial" phrasing is more familiar in England and Wales and has an important declaratory effect. Further, we were persuaded by Dr Thomason's view that the wording "the record *may* be necessary" reflects the fact that when deciding access and production, the parties have not seen the record, so do not know if it is necessary.

Factor (b) (probative value of the record)

2.57 Similarly, consultees broadly saw this factor as uncontroversial. As with factor (a), we were persuaded by Dr Thomason's view that this factor should reflect the fact that the parties have not seen the record at the point when the determination takes place. It should therefore refer to the record's likely probative value to an issue at trial.

Factor (c) (nature and extent of reasonable expectation of privacy)

2.58 The key theme from responses was the objection that this factor (and factor (e)) are unnecessary because the data protection framework already serves the same purpose.[119] In our view, data protection considerations provide only a baseline for decision making regarding access and production. There was also a misunderstanding of the role of this and other factors (including factor (e)); it was suggested that it should have no role in determining relevance.[120] However, the factors guide the determination of the interests of justice, not potential or likely relevance. We therefore conclude that this factor should be retained.

Factor (d) (request is based on discriminatory belief or bias)

2.59 Views on factor (d) were mixed. On the one hand, there was a sense that this factor would help to identify requests based on myths and misconceptions.[121] On the other, several consultees commented that its meaning is unclear, and it would be very

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118 We only collected qualitative views on the factors and therefore are not able to include quantitative data for responses regarding factors.

119 Six Circuits.

120 Andrew Wilkins.

121 Behind the Gown.

difficult to apply fairly.[122] Nevertheless, we conclude that this factor is still valuable. Without a factor framed in this way, one of the policy objectives of the bespoke framework would not be met. For consistency with our approach regarding SBE, this factor should also refer to the risk that the request may invoke or rely on myths. Requests founded on myths about sexual violence are a key, but not the only, risk concerning requests to access TPM. An additional risk arises in relation broader discriminatory beliefs which may be the underlying basis of requests for TPM such as misconceptions about medical or psychiatric conditions.

2.60 Scrutiny would be of the basis of the request, the reasons why the material is being sought, and how it may prejudice the instant proceedings. It would not concern the particular biases of the individuals concerned. However, it may be preferable not to define discriminatory belief or bias in legislation because the meaning of these terms is fact and context dependent, and such beliefs will change meaning such that over time the statutory definition would become outdated.

2.61 Courts and practitioners are already expected to identify myths and misconceptions (which are founded on discriminatory beliefs) when preparing cases, lines of questioning at trial and when identifying and drafting judicial directions based on the example directions. In Chapter 11, we make recommendations about how these elements of the trial process might be improved. These tasks involve similar considerations, and we therefore conclude that the parties and the judge can apply this factor fairly. To further address consultees' views that the meaning and application of this factor is unclear, further information should be provided in the accompanying code of practice and guidance (which we recommend below).

Factor (e) (potential prejudice to the personal dignity and right to privacy of any person to whom the record relates)

2.62 Consultees' objections to factor (e) were broadly the same as for factor (c) above, and having considered them, we conclude that factor (e) should be retained. This because as we explain above, data protection considerations only provide a baseline, and this factor does not play a role in determining potential or likely relevance. In addition, we acknowledge consultees' suggestion that this factor could be of value to take account of safeguarding needs, the impact of access/disclosure/admission on the complainant's mental health, and the particular needs of learning disabled or autistic complainants.[123] In addition, we note that this factor reflects the state's positive

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122 Including Philipp Tanzer; Six Circuits (which described it as "is "unworkably nebulous and vulnerable to lengthy ideological interpretation", it questioned whether it would be ""biased" for the defence to consider the possibility that a complainant is lying"); Bar Council (it said it "is not clear how it could apply" and irrelevant to the question to be determined); LCCSA (said it is "difficult to foresee how (d) applies in practice"); and Professor Susan Edwards.

123 Response to CQ 13c: Solace Women's Aid (it suggested that this is particularly important for "honour-based violence" where the release of certain records may lead to exposing information that puts the complainant or others at risk of harm).; South Wales OPCC (suggested consideration of safeguarding concerns for all parties referred to in the records). Response to CQ 15c: Pan-London Rape Crisis Centres Experts by Experience Panel (said special thought and consideration needs to be considered regarding the needs of learning disabled or autistic people); and Women's Aid (referred to adverse effect on the complainant's mental health).

obligation to ensure that the complainant's right to respect for their private life is effectively protected.[124]

Factor (f) (society's interests in encouraging reporting of sexual offences)

2.63 Consultees raised significant objections to factor (f) because they took the view that society's interests in the reporting of offences are irrelevant to the trial. Further, where used as a basis for denying access to material necessary to respond to an allegation they said it would adversely impact fair trial rights.[125] For example, Dr Thomason described factors (f) and (g) as "extrinsic policy aims which have no place in a legal test". Six Circuits said these factors "seek to subordinate the purpose of a criminal trial to matters which are irrelevant, remote and arguably political".

2.64 We received similar responses regarding using this factor as part of our SBE admissibility threshold. In the context of SBE, in Chapter 3 we reject this factor because it draws the decision maker into determining matters unrelated to the trial and because general framework change should achieve the policy objective of securing improvements regarding reporting. For the same reason, we reject this factor here.

Factor (g) (society's interests in encouraging the obtaining of treatment by complainants)

2.65 We received the same comments in respect of factor (f) and (g),[126] and reject factor (g) for the reasons given above. Our bespoke regime for personal records should satisfy this policy objective to some extent. Our recommended enhanced relevance threshold and structured discretion model, and judicial scrutiny of production, along with ILA and ILR should mean that complainants and record holders will have greater confidence that records will not be disproportionately sought or obtained. Therefore, this should minimise the risk that complainants decide to delay undertaking therapy or similar treatment, or that it is compromised.

Factor (h) (effect of the determination on the integrity of the trial process)

2.66 Factor (h) was broadly uncontroversial amongst consultees and from this we conclude it should be retained. We consider it a helpful factor because it encourages consideration of the wider objectives of the trial process in securing justice for all participants. The Supreme Court of Canada has interpreted this factor as

> requiring courts to consider, along with the other enumerated factors, whether the search for truth would be advanced by the production of the records in question; that is, the question is whether the material in question would introduce discriminatory biases and beliefs into the fact-finding process.[127]

2.67 Finally, we turn to the question of whether decision makers are expected to consider all of the factors. As we explain in more detail in Chapter 3, it is intended that decision

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124 Appendix 1, para 1.15 (originally CP 259, Appendix 2)

125 Including Dr Thomason; Six Circuits; Andrew Wilkins; Chief Constable Sarah Crew; Cardiff University Law School Innocence Project; and Bar Council.

126 Including Dr Thomason; Six Circuits; Andrew Wilkins; Chief Constable Sarah Crew; Cardiff University Law School Innocence Project; and Bar Council.

127 *R v Mills* [1999] 3 SCR 668 at [754].

makers would consider all our recommended factors in all cases. However, it would be open to them in individual cases to consider other additional factors where relevant.

Fair trial concerns

2.68 Consultees raised generalised concerns about the impact of the threshold on the right to a fair trial. We are satisfied that evidence necessary for a fair trial will meet the threshold. The first limb (likely relevance to an issue at trial or to the competence of a witness to testify) sets a relatively low threshold. Therefore, when considering the second limb (whether production is in the interests of justice), where evidence is necessary for a fair trial, the court would order production, taking account of factor (a) (extent to which the record may be necessary for a fair trial). The other factors would carry less weight where that were the case. Conversely, evidence which is likely to be relevant may not in fact be necessary for a fair trial, and the court would not order production where any of the countervailing factors outweigh factor (a). For example, the defence might request relevant parts of the psychiatric records of a complainant who has diagnosed bipolar disorder to confirm the defendant's account that injuries the complainant sustained arose from self-harm, rather than from the defendant's actions. This assertion establishes the likely relevance of the information requested by the defence. However, the judge might conclude that in light of factor (d) (whether the request for access to or production of the record is based on a discriminatory belief or bias or may invoke or rely on myths and misconceptions),[128] it is not in the interests of justice to order production where the defence cannot point to any particular instances of self-harm or reason to believe that the complainant may have self-harmed, and instead is relying on an assumption that anyone with bipolar disorder self-harms and/or is not a credible witness.

2.69 The factors direct the judge to weigh the various interests. This approach fully accords with European Convention of Human Rights ("ECHR") principles we described in the consultation paper which require balancing of the countervailing rights, alongside the provision of safeguards to protect the interests of the defendant.[129] We explained that the European Court of Human Rights ("ECtHR") has found the defendant's entitlement to relevant evidence is not an absolute right because

> in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.[130]

2.70 We added, however, that restrictions on the entitlement to disclosure must be "strictly necessary". Any "difficulty caused to the defence … must be counterbalanced by the

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128 Other countervailing factors may also have a role in the determination.

129 CP 259, paras 3.5-3.6, and Appendix 1, paras 1.81-1.91.

130 Appendix 1, para 1.83, citing *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [61].

procedures followed by the judicial authorities". The judicial authorities' procedures must ensure equality of arms and protect the defendant's interests.[131]

Resolving the defence's disadvantage

2.71 In the consultation paper, we commented that the Canadian model does not resolve the concern that in production and disclosure applications, "the defence may be making submissions on the relevance of materials that they have not seen".[132] Consultees echoed this point. Dr Thomason commented that the regime will "hinder both the police and the defence, potentially leading to both fewer prosecutions and greater risks of miscarriages of justice" because it will be impossible to know what material is relevant until it is reviewed. Behind the Gown argued it may be difficult for the defence to demonstrate that disclosure is in the interests of justice without having seen the material. Because the defence "will not have seen the material which they seek to be disclosed, it may be more difficult to argue how probative a record will be… or show that the request is not based on bias". The Bar Council and Six Circuits made a similar point in respect of the preliminary filter, arguing it would be difficult to satisfy it.

2.72 We acknowledge that when requesting access or making an application for production, the defence may be making submissions regarding the likely relevance of materials they have not seen and sometimes cannot be sure exist. They are also likely to be asserting that production of this material is necessary for a fair trial. However, there are safeguards built into the framework to address this issue, the first of which is the threshold itself; it is framed as likely relevance (rather than something more demanding). This appropriately reflects the state of the parties' knowledge at the time the application is made. At the time the application is made, the records – if they existed – would be in the hands of the third party, therefore all of the parties may only have limited knowledge of what they contain. The complainant (because it is their record) and their representative may have some limited knowledge of the materials but not necessarily their precise content, and they may or may not have conveyed these details to the police/prosecution. The defence will be unlikely to have any knowledge of the materials. However, where the police or prosecution have made enquiries or have related information (and this meets the threshold for disclosure), they are obliged to provide it to the defence.[133] Further, the defence may of their own initiative seek information from the police/prosecution (without seeking the material itself) to guide its requests. A comparison can be made with requests for disclosure of material from family proceedings into criminal proceedings. The police are entitled to request information (not the material itself) from the Local Authority and use this to inform their subsequent substantive request for material.[134]

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131 Appendix 1, para 1.83, citing *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [61]-[62].

132 See CP 259, para 3.249.

133 For example, this may be provided via the schedule of unused material, the Disclosure Management Document, or correspondence or informal discussions between legal representatives.

134 See *Disclosure of information between family and criminal agencies and jurisdictions: 2024 protocol | The Crown Prosecution Service*, para 2.3.

2.73 Ultimately, all materials which the defence considers relevant will not be in the possession of, or sought by, the police/prosecution. This may be because the police/prosecution are not aware of the existence of the material, or because the police have powers and resources to investigate that the defence do not and take the lead, or the police may interpret relevance differently to the defence or may misapply it. For example, if the complainant retracted their allegation to a friend, that friend may never come forward as a witness, and may not be discovered through other channels. Similarly, a complainant may not reveal that they have received therapy. The burden and standard of proof, and principled asymmetry of the criminal process reflect this and are intended to act as a corrective.[135]

Preliminary filter

2.74 In the consultation paper, we asked for views on the use of a preliminary filter, which we describe above.[136] It is designed to filter out unmeritorious requests and sets out assertions by the defence which would be insufficient on their own to justify production. Consultees' responses regarding this question were mixed.[137] Responses in support focussed on potential benefits such as preventing speculative requests, minimising trauma to complainants[138] and more consistent application of the rules.[139] However, arguably these are benefits which might be achieved in other ways, such as via the introduction of a bespoke regime, the amended threshold itself, judicial scrutiny of production, and ILA and ILR. For example, the Bar Council wrote that there is no need for a separate filter "provided that the test for requiring the production of records is adequately understood".

2.75 The reasoning provided by consultees who rejected the filter was more compelling; they focused on the fact that it is too restrictive, potentially impacting fair trial rights.[140] Dr Thomason criticised our failure properly to acknowledge widespread disclosure failures, adding that he is

> wholly unconvinced we need to RAISE the standard for disclosure here, the obvious consequences … of which will be even more miscarriages of justice caused by disclosure failings (except, in these new cases, they will have been legitimised by the proposed heightened legal tests!).

2.76 The Six Circuits was the only consultee to comment specifically on the list of insufficient grounds. It stated regarding factor (e) (that the record may relate to the

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135 For further detail on principled asymmetry, see below and see Ch 1.

136 CQ 14: "For disclosure to the defence, the Canadian regime lists grounds that are, on their own, "insufficient grounds" for a defence application asking the court to require records to be produced to the court for the first stage of review (set out at paras 3.231 to 3.233 above). These are designed to prevent speculative requests. Is a preliminary filter of this kind valuable and are the grounds appropriate? Are there any other grounds we should consider?", CP 259, paras 3.254-3.255.

137 Out of 23 responses, 12 consultees agreed with the use of a preliminary filter similar to the Canadian model; seven disagreed, and four were categorised as "other".

138 Dr Leahy; West Mercia Police; Chief Constable Sarah Crew; nia; Pan-London Rape Crisis Centres Experts by Experience Panel; and Muslim Women's Network UK.

139 CPS.

140 Cardiff University Law School Innocence Project; Dr Thomason; Andrew Wilkins; and Six Circuits.

credibility of the complainant or witness) that the defence should be entitled to disclosures where "the records requested may reasonably contain material relevant to an issue in the case… including the complainant's credibility". We also note that factor (d) contrasts with the position currently adopted by the CPS in relation to inconsistency. CPS guidance states that even taking into account the impact of trauma on memory, evidence containing inconsistencies is likely to meet the test for disclosure and could mean that a prosecution will not proceed.[141]

2.77 In addition, two consultees suggested that that it would be difficult for a defendant to provide sufficient specificity to satisfy the filter without having seen the record in question. The Six Circuits stated that defendants cannot provide "specificity in respect of material they have not seen… since that defeats the purpose of the request". The Bar Council similarly commented that there is an issue with "requiring the defence to identify with greater particularity precisely what is contained within records to which, self-evidently, they have not had access".

2.78 In light of these responses, our conclusion is not to recommend a preliminary grounds filter because it risks adding unnecessary complexity by duplicating what should already occur when the judge applies the threshold and factors. Further, we accept that the defence may be disadvantaged by the preliminary filter in the way described by the Six Circuits and the Bar Council due to their lack of knowledge of the materials. In the consultation paper, we noted that the Supreme Court of Canada has explained that "the defendant is not prevented from relying on an assertion which would otherwise be an insufficient ground "where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance". Further, "where the defendant does point to an evidentiary or informational foundation to an assertion, this does not necessarily mean 'that likely relevance is made out'".[142] A requirement for the defence to assert an evidentiary or informational foundation or to specify what they expect to be obtained from the record is too prescriptive. It is not a satisfactory way of addressing these concerns because it does not reflect the fact that the defendant has not seen the record and it may be difficult for them to satisfy it with sufficient specificity.

2.79 This should not be taken to mean that the defence has unfettered access to TPM on a speculative basis merely because it might contain something relevant to credibility or consistency. The threshold and factors, particularly the likely probative value of the record, and whether the request may invoke or rely on myths and misconceptions, will ensure that the defence request is tied to the facts of the case. First, requests which assert matters covered by the insufficient grounds are very unlikely to meet the likely relevance threshold. For example, the defence will not be able to establish likely relevance where their request relies merely on the fact that the record exists. Secondly, the defendant will have to assert something that will allow the judge to engage with the factors, meaning that the request must be as fully particularised as possible taking account of the stage of the case and the state of the defence's knowledge given that they have not seen the record. For example, there may be evidence that the defence can point to which supports their request. This might

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141 CP 259, para 3.264 citing CPS Legal Guidance: Pre-Trial Therapy (2022), "Potential impact of therapy on memory, Inconsistencies".

142 CP 259, para 3.233, citing *R v Mills* [1999] 3 SCR 668 at [120].

include information from a defence witness or other defence evidence (such as ongoing communications with the complainant), or something they can point to on the prosecution evidence including the Achieving Best Evidence interview ("ABE"), that they have picked out which has not occurred to the prosecution as a reason to look at the records. A request which asserts that there is something specific in the record, rather than an assertion of something that is an issue in the case is more likely to meet this requirement.

2.80 Thirdly, the use of judicial scrutiny of production is another reason why an insufficient grounds filter is not needed. The expectation is that judges should reject requests which are fishing expeditions, and they would therefore tend to reject requests which are bare assertions of the matters set out in the list of insufficient grounds.[143] Fourthly, our recommendation that complainants have a right to be heard and ILA and ILR is a further safeguard.

Current thresholds

2.81 Three consultees argued that the current and proposed thresholds are similar; it follows from this that reform is unnecessary or would make little difference.[144] Contrary to these views, we see our recommended threshold as a significant change and improvement. This is because it is a specialist threshold, with tailored factors and a structured discretion model that gives greater guidance to decision makers and introduces increased judicial scrutiny.

2.82 We note that since the consultation paper was published, the Victims and Prisoners Act ("VAPA") 2024 received Royal Assent. It stipulates that a request for TPM may only be made where "the information sought is relevant to a reasonable line of enquiry", and it is "necessary and proportionate" to the objective of preventing, detecting, investigating or prosecuting crime.[145] Where the request concerns counselling records, the information sought must be "likely to have substantial probative value to a reasonable line of enquiry".[146] The Government has yet to decide whether to implement these provisions.

2.83 In our view, our threshold and framework offer greater safeguards and clarity than VAPA 2024 and are more conducive to proper evaluation of both the complainant's and defendant's rights. First, our recommended framework more clearly sets out its terms. It defines the meaning of a personal record along with any exemptions,[147] whereas the meaning of a counselling record is yet to be determined. VAPA 2024 also lacks exemptions, meaning requests for some information held within counselling

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143 In the context of witness summons applications, commentators note that "it is not permissible for an applicant to embark speculatively on an application for disclosure in the hope that something helpful may emerge—i.e. to embark on a fishing expedition… Strict compliance with the CPR should enable an applicant to avoid the accusation that they are "fishing". If the application is properly made and the material sought of importance to the person making it, then the judge is likely to find that it is in the interests of justice to issue the summons…" See P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) ("Rook and Ward") ,18.87-18.88

144 Kate Goold, solicitor; Law Society; and Dr Thomason.

145 VAPA 2024, s 28, inserting s 44A(3) into Part 2 of the PCSCA 2022 after Chapter 3.

146 VAPA 2024, s 28, inserting s 44A(4) into Part 2 of the PCSCA 2022 after Chapter 3.

147 See below.

records will be inappropriately subjected to an enhanced relevance threshold.[148] Further, the tests of whether the records are likely to be relevant and whether access and production are in the interests of justice are clear and easy to understand, as are the accompanying factors, and these will all be set out in statute. They direct the decision maker to consider the range of interests that are involved including the complainant's privacy interests and the fact that evidence necessary for a fair trial must be made available to the defence. In contrast, the phrase "likely to have substantial probative value to a reasonable line of enquiry" focuses only on imposing an enhanced level of relevance without any acknowledgement of the interests that should be considered. The threshold itself and its purpose are not fully articulated in the statute; the full meaning has to be derived from the legislation and the accompanying (draft) code of practice.[149] Thirdly, VAPA 2024 only applies an enhanced relevance threshold to counselling records, which is one narrow category of records. This ignores the fact that overlapping information may be contained across a range of records which are routinely requested.[150] Fourthly, the factors in our recommended threshold are tailored to the particular considerations that arise in sexual offences cases and expressly set out the interests at stake guiding decision-makers as to how to balance them. As such, it will provide greater transparency and more robust decision making. However, the VAPA 2024 thresholds apply for all types of offences and so do not contain this nuance.[151] Finally, our recommended model provides for judicial scrutiny of production both pre- or post-charge,[152] which is a significant protective factor that is entirely absent from VAPA 2024.

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148 The term counselling record is said to relate to records of "a person who provides counselling services of a description specified in regulations". See VAPA 2024, s 28, inserting s 44A(5) into Part 2 of the PCSCA 2022, after Ch 3. The Government is currently consulting on how to define the term counselling services. See Home Office, *Consultation on victim information requests: Code of practice and counselling services definition* (8 April 2025).

149 See Home Office, *Requests for Victim Information: Draft Code of Practice* (April 2025) paras 76-90. In the draft code, on which the Government is consulting, the phrase "substantial probative value to a reasonable line of inquiry" is defined to include a rebuttable presumption against accessing counselling records. The draft code also sets out grounds which are on their own insufficient for access. Above], we reject the latter component as duplicative and as posing risks to fair trial rights. Further, below, we reject the use of the rebuttable presumption model found in NSW.

150 For further explanation see below.

151 It applies to anyone believed to be "a victim" or "at risk of being a victim". See VAPA 2024, s 28, inserting s 44A(2) into Part 2 of the PCSCA 2022 after Chapter 3

152 For further explanation see below.

Recommendation 1.

2.84 We recommend that for access by and compelled production to the police or prosecution, personal records held by third parties

(1) must be likely to be relevant to an issue at trial or to the competence of a witness to testify; and

(2) such access and production must be necessary in the interests of justice.

2.85 For the purposes of this recommendation, the phrase "likely to be relevant" means a reasonable possibility that the information sought is logically probative to an issue at trial or the competence of a witness to testify.

2.86 When deciding what is necessary in the interests of justice, the following factors should be considered:

(1) The extent to which the record may be necessary to ensure a fair trial.

(2) The likely probative value of the record to an issue at trial.

(3) The nature and extent of the reasonable expectation of privacy with respect to the record.

(4) Whether the request for access to or production of the record is based on a discriminatory belief or bias or may invoke or rely on myths and misconceptions.

(5) The potential prejudice to the personal dignity and right to privacy of any person to whom the record relates.

(6) The effect of the determination on the integrity of the trial process.

JUDICIAL SCRUTINY

2.87 In the previous section we concluded that the bespoke regime will apply for access and production but not for disclosure and admissibility. We also concluded that that the regime will apply an enhanced relevance threshold based first on the likely relevance of the record, and secondly, with factors to guide decision makers when determining whether access or production is in the interests of justice. The regime will also sit alongside other recommendations in this report designed to minimise the risk of myths and misconceptions entering the trial process. At trial, where personal records contain SBE, FAE, BCE or CICE, they will be further scrutinised by the judge using our recommended enhanced relevance admissibility thresholds and procedures

2.88 In this section we turn to the mechanics of how the threshold would operate. Here we set out our views on judicial scrutiny and in the next section we outline the regime's parameters. In relation to scrutiny, we consider who, in principle, should provide external scrutiny of decision making regarding TPM.

External scrutiny should be provided by a judge

2.89 In the consultation paper we examined the relative merits of prosecutors, independent counsel and judges scrutinising the production and disclosure of TPM.[153] For prosecutors, we noted stakeholders' views that "the prosecution should be trusted to examine records and make disclosure decisions", and are best placed to provide oversight because of their knowledge of the case as it develops.[154] We acknowledged that despite efforts by the CPS to address concerns about decision making in sexual offences cases, problems remain. We concluded that this provides a reason for introducing external scrutiny, and judicial scrutiny would ensure that the privacy and confidentiality of the complainant's data is appropriately protected.[155]

2.90 We said the use of judges "may be seen as a departure from existing practice and the traditional role of the judge", and will have an impact on resourcing and delay.[156] Not having the prosecutor's knowledge of the case, judges "may not recognise the materiality of certain records", and unless they are the trial judge, cannot provide ongoing oversight.[157] However, judges already take on this role at present when determining witness summons, defence disclosure, and PII applications, which also require judges to keep their disclosure decisions under review.[158]

2.91 In light of this, we reached the provisional view that external scrutiny should be provided by a judge.[159] We suggested two ways to minimise the burden on judges: someone conducting a preliminary filter of materials; and the use of a revised threshold for production of records, which might reduce the number of disproportionate requests.[160]

2.92 There was strong numerical and qualitative support for our proposal that the external person determining applications should be a judge.[161] The key arguments provided in support were that judges are authoritative and suitably qualified;[162] that using judges will lead to better evaluation of and engagement with the complainant's rights,

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153 We did not consider admissibility because judges will always scrutinise admissibility.

154 CP 259, para 3.148.

155 CP 259, para 3.149.

156 CP 259, para 3.152.

157 CP 259, para 3.152.

158 CP 259, para 3.153.

159 CQ 7: "We provisionally propose that where an external person is responsible for deciding whether personal records held by third parties should be produced to police and prosecution, or should be disclosed to the defence, then that external person should be a judge. Do consultees agree? We provisionally propose that the police and prosecution (rather than independent counsel) should filter material before it is examined by a judge. Do consultees agree? Should the judge making the determination be the trial judge (as is the position in Canada)?", CP 259 paras 3.159-3.161.

160 CP 259, para 3.158.

161 Out of 29 responses, 20 agreed that where there is external scrutiny of production or disclosure it should be by a judge; one consultee disagreed; and eight gave an answer categorised as "other". Out of 26 responses, eight consultees thought the judge determining production and disclosure should be the trial judge, five thought it should not be the trial judge; and 13 gave an answer categorised as "other".

162 HM Council of Circuit Judges; nia; CPS; Dr Leahy; and Law Society (it did not support the creation of a new bespoke regime, but stated that if one is created, a judge is the correct external person).

alongside those of the defendant;[163] that involving judges will increase confidence in the system, particularly if accompanied by ILR;[164] and that initial pressures on the judiciary will reduce over time as judicial oversight and improved thresholds will disincentivise disproportionate requests.[165] A small number of consultees rejected our proposal. However, those objections came from judicial and practitioner stakeholders experienced in conducting such cases, The core concern was that it will reduce judicial capacity to hear cases, cause severe delays and that judges will be unwilling to undertake a new quasi-judicial role.[166]

2.93 We conclude that the arguments in support of external scrutiny being provided by a judge are persuasive. However, this conclusion is dependent on the stage at which judicial scrutiny is utilised. Given we conclude that the bespoke regime should be targeted at access and production, concerns of judicial and practitioner stakeholders about creating a new quasi-judicial role, resourcing and delay can be addressed. First, the role of the judge will be more limited than we originally proposed. The judge will have no new role in vetting records or overseeing the disclosure of records to the defence. We envisage the following steps, which involve additional judicial involvement only at the second step, and thus show that resource and delay concerns should be limited.

(1) The prosecution or defence make an application for production.[167] There are no materials for anyone to review at this stage, as they are with the third party. The complainant is entitled to their records at this stage (or any stage) due to data protection,[168] unless the record holder has a reason to withhold them.

(2) The court hears arguments from the prosecution, defence, the complainant/their ILR, and the third party, if it wishes to be heard.[169] If persuaded that the

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163 Dr Smith (where there is ILR); and CWJ (who cited various case studies of current poor engagement).

164 nia; CWJ; and Richard English, barrister.

165 nia; attendees at a victims' groups event.

166 Northumbria Centre for Evidence and Criminal Justice Studies; prosecution practitioner stakeholders; and two circuit judges.

167 The defence would only be permitted to apply post-charge. We note that the Criminal Cases Review Commission ("CCRC") has powers to obtain TPM which would fall outside of the bespoke regime. These powers are conferred on it by the Criminal Appeal Act 1995, ss 17 and 18A, the latter of which requires a court order. CCRC guidance discourages disproportionate requests. For example, see CCRC, *Case Work Policy Accessing Medical Records CW-POL-18* (July 2021). Citing M Burman, O Smith, O Brooks-Hay and Y Brunger, *Digital Communications as Evidence (DCE) in Sexual Offence Applications to the Criminal Cases Review Commission* (April 2025), Dr Olivia Smith told us that her research on 119 CCRC sexual offences case files "shows frequent access and consideration of TPM relating to rape complainants [by the CCRC]. These files were specifically focused on using such TPM as a 'victim credibility check' and did not consider the relevance of informing victims about this access other than for medical records (and none of the 119 case files showed victims actually being informed about the very extensive access that occurred). Once more, part of this issue is about a lack of detailed understanding of the complex balance of different rights at play for different types of TPM".

168 In Chapter 7, we discuss the operation of LPP, which attaches to confidential communications between a complainant and their legal adviser or representative and whether the adviser or representative would be required to disclose information capable of undermining the case against the defendant.

169 The third party should have a right to be heard as it may have interests separate to the complainant, for example, where the records contain sensitive information that they do not want the complainant to see.

threshold is met, the court orders the third party to provide the records to the police/prosecution and the complainant/their legal adviser or representative.

(3) The third party provides materials to the police/prosecution and the complainant/their legal adviser or representative.[170]

(4) The police/prosecution review the materials, disclosing to the defence information which meets the threshold for disclosure under the CPIA, provided they are not sensitive materials which should be withheld on the basis of public interest immunity.

(5) Information from the personal records may be adduced by the prosecution or the defence as evidence or may be the basis of lines of questioning at trial, subject to them being relevant and any exclusionary rule, and subject to any restriction such as those arising for SBE, FAE, BCE, and CICE.

2.94 Secondly, as consultees suggested, concerns about resourcing and delay will to some extent be addressed by higher thresholds disincentivising disproportionate requests. Over time, judicial rulings should generate a body of good practice and case law which will inform requests at all levels and stages of the process. That said, there will be new work for judges, and this will create fresh resourcing challenges. Our impact assessment will take account of this, and we acknowledge that additional resources may be required in order to implement a new model of judicial oversight effectively.

2.95 We acknowledge that some concerns will remain about the police/prosecution retaining decision-making for disclosure to the defence. In our view, given their training, experience, knowledge of the case and ethical obligations, the police/prosecution are well placed to carry out this role. Concerns that their expertise may be lacking can be addressed by ensuring there is accompanying training and guidance, which we describe below. Further, in Chapter 7, we recommend that the complainant should have a right to be heard and ILA and ILR in respect of such requests. The ability of the legal adviser or representative to engage directly with the parties regarding such requests and to appear at hearings determining production is a further protective factor.

2.96 We now consider whether the *trial* judge should have responsibility for determining requests. There was limited numerical support for this.[171] Only three consultees provided reasons. They said that the use of the trial judge will ensure consistency and ongoing oversight as the case develops at trial. In addition, they thought that if a different judge had previously made rulings then, when allocated, the trial judge would not wish to be bound by the previous judge's decision.[172] There was similarly limited numerical support for the opposite view.[173] The main objection was that reliance on

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170 The third party would not provide materials directly to the defence, even if the defence made the application.

171 Eight out of 27 responses.

172 JURIES; Richard English; and Dr Susan Leahy.

173 Five out of 27 responses.

the trial judge will lead to problems with judicial capacity and listings, and will cause delay.[174]

2.97 We conclude that it will be unworkable to require the trial judge to determine an application for production in every instance because much will depend on when the application is made. For applications made at the pre-charge or early pre-trial stage, the trial judge will not have been allocated. Further, as the CBA pointed out, experienced judges would be "well equipped" to deal with such applications. For applications which occur nearer to trial, it should be possible for the trial judge to determine the application. Where allocated, due to their knowledge of the case, the trial judge is the preferred option, unless there are exceptional reasons to use a different judge. In light of this, we conclude that when a trial judge has been allocated then they should determine an application. However, when a trial judge has not yet been allocated, an available judge should be used as appropriate so as to avoid delaying an application.[175]

Recommendation 2.

2.98 We recommend that a judge should continue to be responsible for deciding whether personal records held by third parties should be produced via compelled production to the police and prosecution.

2.99 We recommend that when allocated, the trial judge should determine such applications. However, when a trial judge has not yet been allocated, an available judge should be used where appropriate, to avoid delaying an application.

Access by consent

2.100 In the previous section, we concluded that, in principle, where there is external scrutiny of requests for personal records, this should be by a judge. Here, we consider whether judicial scrutiny should be used for all requests or should be reserved only for certain types of requests. We consider the role of consent from both the complainant and the third party. We then explore the different procedures that should apply, first where there is consent to access, and secondly where consent is refused. For the latter, we also review the different considerations which arise where production occurs pre- and post-charge. Finally, we examine the role of judicial scrutiny regarding disclosure.

2.101 In the consultation paper, we asked whether there is a case for judicial scrutiny where access is sought by consent. We noted that despite attempts to limit them, the police routinely request TPM pre-charge and there are concerns about disproportionate requests. We commented that consent may be given in circumstances where the complainant is traumatised or concerned that refusal will impact the case.[176] Where

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174 RCEW; Bar Council; and a Circuit Judge.

175 Applications might be determined in a magistrates' court (by magistrates or by a District Judge) or in the Crown Court.

176 CP 259, para 3.63.

there is consent, we explained that there will be no judicial scrutiny and record holders must navigate complex legal and practical issues.[177]

The role of consent since VAPA 2024

2.102 In the consultation paper, the premise of our proposed framework for accessing the complainant's personal records was that that the complainant and/or the record holder may or may not consent to such a request from the police or prosecution. However, the CWJ criticised "the premise that TPM are accessed on the basis of consent by the data subject (survivor), which is the current practice". It interpreted the Information Commissioner's Opinion (2022) and VAPA 2024 to mean that consent-based access is "no longer relevant and any future regime for TPM must be based on the assumption that consent will no longer be the legal basis for access".[178]

2.103 We explain above that VAPA 2024 creates a statutory duty to ensure that requests for TPM are necessary and proportionate and a new procedural framework for such requests. We acknowledge that, if brought into force, VAPA 2024's procedural framework (which is also in line with policing best practice)[179] does to some extent move away from consent-based access. It instead requires that complainants are notified of requests and approached for their views and objections.[180] However, we do not agree with the CWJ's view that the Information Commissioner's Opinion (2022) rejects the complainant's consent as a lawful basis for processing data, rather the Opinion rejects the general or broad consent found in now defunct Stafford statements.[181] The Opinion recommends "ceasing the invalid use of "consent" broadly, using Stafford statements". Its rationale was that "the conditions required for consent to be a sufficient justification for processing, including it being freely given and specific, are unlikely to be met. This is due to the context of a victim being asked to provide access to a wide range of unspecified materials".[182] The Opinion also points to factors which make obtaining valid consent challenging in the context of a criminal investigation.[183] These include the fact that trauma may impact on the complainant's ability to make informed decisions; the perceived power imbalance between the

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177 CQ 8: "We provisionally propose that some measures (but not judicial scrutiny) should be put in place to ensure that complainants who are asked to consent to access have greater protection than is presently the case, both pre-charge and post-charge. Do consultees agree? Providing that the record holder also consents to access, if protective measures are to be put in place for complainants who consent to access, what should those measures be? (Although our provisional proposal does not include judicial scrutiny, we do not exclude it from responses to this question.)", CP 259, paras 3.185-3.186. SCQ 4 asked a similar question.

178 The Information Commissioner's Opinion considered the processing of complainants' personal data in RASSO investigations and made recommendations to improve it. Information Commissioner's Office, *Information Commissioner's Opinion: Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations* (May 2022).

179 See National Police Chief's Council ("NPCC"), *Third-Party Material Request Form*.

180 See PCCSA 2022, ss 44A(3)(b), (4) and (5), as inserted by VAPA 2024, s 28.

181 Stafford statements are consent forms giving police access to unlimited data, which are no longer used. For further explanation, see CP 259, para 8.18.

182 Information Commissioner's Office, *Information Commissioner's Opinion: Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations* (May 2022) para 4.1.1.

183 Above, p 26.

complainant and the authorities; their perception that refusal will impact on the case; and the absence of the ability to withdraw consent.[184] However, the Opinion does not completely rule out consent as a valid basis for processing data.

2.104 In any event, under VAPA 2024, even if the police do not directly seek consent, when the views and objections of the complainant and the record holder are sought, they may express objections regarding a request for access, which ought to trigger judicial scrutiny. The process for seeking views and objections regarding a request, or on electing or waiving judicial scrutiny is very similar to obtaining consent. Indeed, it would be concerning were this not the case, as it could otherwise increase the risk of the complainant's wishes being overlooked. Therefore, although we recognise that sometimes consent may not be valid, we maintain the view that a framework for access and production premised on the presence or absence of consent *to a specific request* is sound. The views of Dr Olivia Smith further illustrate this point. Referring to her Operation Soteria research, she notes that the consultation paper discussed whether consent can be meaningful but states that consent is a "moot point in many cases", adding that:

> Several police officers (including some ranked DI)[185] have expressed the view that victims do not need to be involved or informed about decisions to access TPM. Indeed, we have heard expressed multiple times that the ICO guidance that consent shouldn't be the legal basis for processing TPM data means that victims should not be told about access at all.

2.105 Basing the framework on consent is also appropriate given that in Chapter 7, we recommend that the complainant should receive ILA and ILR regarding their decision and valid consent may therefore be more achievable.

Consent as the basis for access

2.106 In the consultation paper, we suggested that the comparative law position demonstrates that TPM may be obtained by consent in other jurisdictions, without judicial scrutiny. For example, in Ireland, complainants may waive their entitlement to judicial scrutiny. However, there is evidence that this has undermined the effectiveness of the scheme.[186]

2.107 We therefore provisionally proposed that the only exception to the requirement for judicial scrutiny should be where both the complainant and record holder consent to access. We were reluctant to provisionally propose the introduction of judicial scrutiny for access to records by consent (either pre- or post-charge) due to the resource demands this would place on the courts.[187] We also asked consultees to comment on changes which might ensure appropriate protections are in place where there is consent, including:

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184 Above, p 26.

185 Detective Inspector.

186 CP 259, para 3.173.

187 CP 259, para 3.183.

(1) Judicial scrutiny (albeit that we did not propose this).

(2) Replacement of existing guidance with primary legislation, with the same or different threshold.

(3) Enhanced procedures in guidance or in legislation (such as in Scotland, or the code for extracting data from electronic devices in the Police, Crime, Sentencing and Courts Act ("PCSCA 2022").

(4) Statutory duties such as the one now found in VAPA 2024.

(5) Legal support for complainants.

(6) Public information or support for record holders, such as found in NSW.[188]

2.108 Responses regarding the use of judicial scrutiny were numerically mixed and finely balanced. Seventeen consultees rejected judicial scrutiny where there is consent.[189] On the other hand, our proposal received significant objections from consultees; 15 supported judicial scrutiny.[190]

2.109 Nevertheless, we remain of the view that there should be no judicial scrutiny for access by consent (pre- or post-charge). First, the opinions of judges and practitioners about resourcing concerns arising from judicial scrutiny where there is consent are persuasive. Practitioners and judges explicitly objected to judicial scrutiny, with some confirming their agreement with our rationale, that where there is consent to access, judicial scrutiny raises significant concerns about resourcing and delay. For example, the CPS was uneasy about the "resource implications and adverse impact on the overall timeliness" of investigations. These views are particularly persuasive because we conclude below that the regime should apply not just to therapy records (as suggested by stakeholders who supported judicial oversight), but to personal records more broadly. In our view, where there is consent, judicial scrutiny is an unjustified use of resources, particularly when the complainant will receive legal advice about their decision (see below). In contrast, where access is refused, there is likely to be a dispute regarding the scope and/or validity of a request and this warrants judicial oversight of the interests at stake.

2.110 Secondly, it is notable that even though the waiver of judicial scrutiny has been overused in Ireland, Dr Susan Leahy[191] agreed with us that where consent is the basis

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188 CP 259, para 3.183.

189 Dr Smith; Durham Police and Crime Commissioner's Office; HM Council of Circuit Judges; Professor Edwards; West Mercia Police; Professors Joanne Conaghan and Yvette Russell; Chief Constable Sarah Crew; LCCSA; a Circuit Judge; HMCPSI. In addition, some rejected protective measures more generally: Law Society (though it did support ILA); CBA; Six Circuits; Bar Council; and Circuit Judge.

190 Cardiff University Law School Innocence Project; JURIES; RCEW; Dr Shooter; nia; CWJ; CPS; Rights of Women; Claire Waxman, Independent Victims' Commissioner for London; Daniel Prout, academic, health professional, third-party record holder; BACP; Rt Hon Liz Saville Roberts MP; an anonymous victims' organisation; EVAW; and Gwent Police.

191 An academic who is based in Ireland and has conducted research there.

for access then other protective measures are appropriate in place of judicial scrutiny. She stated:[192]

> The issue of consent is a challenging one. As the experience in Ireland has demonstrated, where consent acts as a complete waiver of the application of the regime, it can effectively mean that the scheme has little practical impact.

2.111 However, she nevertheless concluded that in addition to a statutory framework and accompanying code similar to the PCSCA 2022,[193] the solution lies with ensuring complainants' autonomy. In our view, her suggestions regarding complainants' autonomy could be given effect via ILA and ILR:

> It is vital that complainants' autonomy is respected and protected, whilst ensuring that they do not waive their rights in this area lightly, without a full comprehension of the implications of giving access to their personal records.

2.112 Thirdly, we are of the view that the other protective measures we describe below are an appropriate alternative. In particular, we do not agree with consultees' suggestions that ILA is an insufficient tool to address the absence of judicial scrutiny for requests by consent.[194] In our view, ILA and ILR is a good and less resource-intensive alternative to judicial scrutiny (a view shared by other consultees),[195] particularly when coupled with a statutory framework, accompanying code of practice, and enhanced guidance for all participants, which we discuss below. The legal representative will be able to advise the complainant on their options, liaise with the third party, and engage with the police/prosecution to obtain information and make representations regarding the scope and validity of their request. Moreover, with a clear (pre- and post-charge) statutory framework and guidance, the complainant and their legal representative, and the third party should feel more confident in raising objections about requests, and suggesting that the police instead seek a court order, rather than terminating the investigation or prematurely reaching a charging decision.

Access by compelled production

Pre-charge

2.113 In the consultation paper, we stated that where there was no consent to access records, a court order would be required to compel production. We explained that at present, in very limited circumstances, the police may use the Police and Criminal Evidence Act 1984 ("PACE 1984") powers pre-charge to seek compelled access to TPM.[196] We examined two routes for pre-charge production: first where the complainant refuses consent, and secondly where the complainant consents and the third party refuses.

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192 Citing S Leahy, *The Realities of Rape Trials in Ireland: Perspectives from Practice* (2021).

193 See Home Office, *Extraction of information from electronic devices: code of practice* (October 2022).

194 Including CWJ; RCEW; and Rights of Women.

195 Including a Circuit Judge.

196 CP 259, para 3.17 and n 26.

2.114 We did not reach a provisional view on pre-charge compelled access where the complainant refuses consent.[197] We stated that on the one hand, such a power may be needed where all avenues have been exhausted and there is insufficient evidence for an investigation to proceed and for charges to be brought. On the other, we thought that it may "encourage requests by police"; may "perpetuate the opportunity for requests without sufficient reason"; and provide a platform for TPM being "given an inappropriate weight in charging decisions".[198] However, we added that these concerns could be mitigated by the use of an appropriately high threshold. Moreover, we noted that the additional protective measures we proposed for consent-based access "may reduce the need for compelled access".[199]

2.115 Similarly, we did not reach a provisional view on pre-charge compelled access where the complainant consents and the third party refuses.[200] We stated that on the one hand, the third party may have good reason for declining access; for example, they may have "concerns about the complainant's well-being, the circumstances in which consent has been sought", or a fear that access will result in no charges being brought. On the other, we noted that access might be required if it is believed that the evidence might be destroyed or lost, despite a request to the third party to preserve it.[201] We suggested that there is "arguably a stronger case for a power in this instance" because if the complainant has consented it would be inappropriate to deny access. This is particularly so where the third party's refusal may prevent charges being brought, causing injustice to the complainant.[202]

2.116 Despite the fact that we did not reach a provisional view, there was strong quantitative and qualitative support for pre-charge applications for production where the complainant refuses access. A high proportion of consultees and stakeholders supported the police and prosecution being permitted to apply to court for production pre-charge.[203] They articulated two main rationales for this, which are persuasive.[204] They said that without a pre-charge power, first, there may be insufficient evidence, and investigations might not proceed to charge. Secondly, wrongful charging

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197 CQ 9: "Prior to charge, if the complainant refuses consent to access, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced? If so, should this be limited to specific circumstances and, if so, to which special circumstances?", CP 259, paras 3.198-3.199.

198 CP 259, para 3.194.

199 CP 259, para 3.194.

200 CQ 10: "Prior to charge, where the complainant consents to access but the record holder does not consent, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced? If so, should this be limited to specific circumstances and, if so, to which special circumstances?", CP 259, paras 3.200-3.201.

201 CP 259, para 3.196.

202 CP 259, para 3.197.

203 Out of 28 responses, 21 consultees thought that where a complainant has refused access, police and prosecution should be permitted to apply for production pre-charge; five consultees thought that there should be no pre-charge power; and two consultees gave an answer categorised as "other".

204 Claire Waxman; nia; HMCPSI; Cardiff University Law School Innocence Project; Dr Thomason; Law Society; Richard English; Six Circuits of England and Wales; Dr Leahy; and CBA.

decisions may be made with profound consequences for the defendant and complainant, potentially leading to unfair trials or post-charge case attrition.

2.117 The quantitative and qualitative support for pre-charge production was even stronger where the complainant consents to access but the third party does not. The vast majority of consultees believed that there should be a pre-charge power in these circumstances.[205] Consultees gave the same main rationales set out above. They also gave additional and stronger justifications which accorded with the views we expressed in the consultation paper. These included first that subject to certain provisos (such as the complainant having given free and informed consent), the third party should not be able to override the complainant's stated wishes as this may cause injustice to the complainant[206] or may frustrate the investigation.[207] Secondly, there may be valid reasons for the third party's refusal, justifying intervention by the court. These included clinical reasons;[208] wider public interest concerns about protecting confidentiality;[209] concerns about the validity of the complainant's consent;[210] or because "it may be easier for a practitioner to ethically justify disclosure with a court order".[211]

2.118 A key objection came from the CPS; it stated that a new pre-charge power is unnecessary because in its experience, current post-charge powers are rarely used because the "vast majority" of prosecutions take place with the support of the complainant. In our view, the fact that current powers are rarely used is not a particularly strong argument compared to the effective investigation and prosecution and fair trial rationales cited above.

2.119 Other consultees expressed a related concern that a new power to seek production might override the wishes of the complainant.[212] The Bar Council was undecided on this issue more generally, but its objection is illustrative of this point:

> if the complainant chooses not to consent to the obtaining of third-party records that may support their case (and hence inform a positive decision to charge that would otherwise not be made), they should be allowed that control over their personal data, provided they are properly informed that if it is not obtained then proceedings may not be instigated. There would be no adverse impact on the fairness of the investigative process resulting from that position.

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205 Out of 28 responses, 24 consultees thought that where the complainant consents to access, but the record holder refuses, the police and prosecution should be permitted to apply for production pre-charge; two consultees thought there should be no pre-charge power; and two consultees gave an answer categorised as "other".

206 Dr Leahy; Dr Shooter; CPS; Law Society; Pan-London Rape Crisis Centres Experts by Experience Panel.

207 West Mercia Police.

208 Daniel Prout.

209 nia.

210 Professor Edwards.

211 Daniel Prout.

212 Supported pre-charge production: HMCPSI; and Pan-London Rape Crisis Centres Experts by Experience Panel. Categorised as "other": Bar Council; and Professor Edwards.

2.120 We agree that the complainant's wishes will play an important role in the judge's decision to grant an application for production, and we identify two mechanisms for ensuring their consideration. First, in Chapter 7, we recommend that the complainant should have ILA. They will receive advice on the scope and validity of a request and whether to agree to access, or whether to insist that a court order should be sought to consider these issues (where they will also have a right to be heard and ILR). Secondly, the criteria for making an application should require the judge to consider the complainant's views. This will be of particular importance if an application has been made contrary to the complainant's express wishes, rather than because the complainant wishes to test the scope and/or validity of a request.

2.121 We therefore conclude that there should be a pre-charge power for the police/prosecution to seek production either where the complainant raises objections, or where the complainant supports access, but the third party refuses.[213]

2.122 We now turn to the question of whether there should be limitations on the use of such a pre-charge power. In the consultation paper, we suggested that if a pre-charge power were introduced, it would be "impractical and potentially unwise to establish a general judicial scrutiny regime" pre-charge. We therefore found "a strong case for limiting any power so that other than in specified, limited circumstances (such as when records are needed for a charging decision), all requests for production of personal records would be made post-charge".[214]

2.123 We received some quantitative[215] and qualitative support for specified limitations on the use of a new pre-charge production power. Amongst those that supported limitations, several agreed that like in Scotland, the power should be used where information is required to reach a charging decision; where other avenues have been exhausted; to "cure an otherwise insurmountable insufficiency of evidence"; or that it should be used only when absolutely necessary.[216] We note that there is further reason to believe that a threshold framed in this way would be useful. There is evidence that prosecutors currently see charging decisions as dependent on requests for TPM which are in fact unnecessary, and which would not meet such a threshold.[217]

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213 We note that the Civil Procedure Rules ("CPR") permit applications to the court in similar circumstances, albeit with a different purpose. For example, CPR r 31.16 permits an application to the court for disclosure before proceedings have started provided it is supported by evidence. To make an order the court must be satisfied that the application concerns individuals likely to be parties; the applicant would be entitled to disclosure had proceedings begun; and disclosure is desirable to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings, or to save costs.

214 CP 259, para 3.195.

215 In response to CQ 9, out of 15 responses, 10 consultees supported limits; four thought there should be no limits; and one was categorised as "other". In response to CQ 10, out of 14 responses, eight consultees supported limits; four thought there should be no limits; and two were categorised as other.

216 HMCPSI; Durham Police and Crime Commissioner's Office; LCCSA; Dr Leahy (quoted); the Bar Council.

217 When reviewing the standard of charging advice, HMCPSI found inappropriate requests or an inappropriate absence of requests for evidence in 71.4% reviewed cases. It noted that: "Where there were issues, the most common were not setting out parameters for an action to get information from the complainant's digital devices, and making requests for third-party material (such as education, medical or Social Services records) that were not necessary". See HMCPSI, *2019 rape inspection: a thematic review of rape cases* (December 2019) para 5.50.

2.124 On the other hand, HM Council of Circuit Judges raised one objection; it was concerned that "potential injustice" would arise if there are prescriptive and specified gateways. We agree that a prescriptive gateways approach would not be workable or desirable and a threshold with factors is preferable. A further key objection was raised by Dr Thomason, who thought that an application should be permitted for *any* information relevant to a charging decision. We take the view that this is too broad, and it would not appropriately limit applications.[218] Further, the purpose of our proposed threshold is to decide whether the police or prosecution are entitled to make an application. It is not a substantive determination of whether the request itself is necessary and proportionate; the mechanism for that determination is the threshold for access and production that we describe above. However, Dr Thomason's point does underline that the threshold regarding the entitlement to make an application and the substantive threshold for access and production should safeguard against wrongful charging decisions. Wrongful decisions are damaging to complainants[219] and to defendants.[220]

2.125 We conclude from this that the Criminal Procedure Rule Committee should consider drafting criteria for the court to consider. These limit the power for the police or prosecution to apply for production pre-charge based on whether the record is needed for a charging decision, which cannot wait. In light of our comments above regarding data protection, the threshold should take account of the police and prosecution's data processing obligations.[221] The threshold should be accompanied by a non-exhaustive list of factors. Factors indicating that an application is absolutely necessary[222] because information is required to reach a charging decision include:

(1) That the information is needed "to cure an otherwise insurmountable insufficiency of evidence".[223]

(2) "There are reasonable grounds to believe that the records may contain information which would cure that deficiency".[224]

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218 For example, it would permit a pre-charge application for information of peripheral relevance to a charging decision, where other avenues for obtaining that information had not been exhausted.

219 Where a case wrongfully does not proceed to charge or wrongfully proceeds, and is later terminated.

220 Where exculpatory material is overlooked leading to wrongful charges, providing stronger grounds to refuse bail, risking an unwarranted guilty plea or, if the disclosure failure persists, wrongful conviction.

221 The Information Commissioner's Opinion (2022) describes these in the following terms: that "the processing is necessary for the performance of a task carried out for the law enforcement purpose by a competent authority": para 2.4.2. For sensitive data, we note that the Opinion explains that "if they are proposing to seek access to materials that meet the criteria for sensitive processing (for example medical records), then they need to meet the further conditions associated with strict necessity": para 3.3.1.

222 Including the Bar Council and CPS, which said the application should only be made where absolutely necessary.

223 Dr Leahy.

224 In CP 259, para 3.191, citing Crown Office and Procurator Fiscal Services ("COPFS"), *Sensitive Personal Records Policy* (August 2022) para 9, we explained that in Scotland, "the starting point is a police request for access by consent, which should generally only be made when: "there is judged to be insufficient evidence to prove a serious offence; there are reasonable grounds to believe that the records may contain information which would cure that deficiency; and all other avenues of investigation have been exhausted".

(3) That all other avenues have been exhausted.[225]

(4) It is believed that the record will not be preserved, or will be destroyed or lost.[226]

2.126 In light of our comments about the need to take account of the views of others with an interest in the application such as the complainant, factors relevant to that include:

(1) The complainant's[227] and the third party's views[228] of the application. These may be conveyed by their legal representative.

(2) The suspect's views of the application, where known, or where obtaining them is reasonably practicable and would not prejudice the investigation.[229]

(3) The necessity of the application when the case is proceeding without the complainant's evidence.[230]

(4) The necessity of the application when the complainant does not have capacity to provide consent.[231]

Recommendation 3.

2.127 We recommend that prior to charge, if the complainant refuses consent to access, then police and prosecutors should be permitted to apply to the court for an order for personal records held by third parties to be produced.

2.128 We recommend that prior to charge, where the complainant consents to access but the record holder does not consent, then police and prosecutors should be permitted to apply to the court for an order for personal records held by third parties to be produced.

2.129 We recommend that the Criminal Procedure Rule Committee consider the need for rules setting out a threshold with factors, which would limit the entitlement to apply for production pre-charge to when an application is absolutely necessary because information is required to reach a charging decision.

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225 LCCSA.

226 Law Society.

227 Including HMCPSI which stated that "there should be evidence of the complainant's informed consent and that advice on this has been given".

228 HMCPSI; and Dr Leahy.

229 As the application occurs pre-charge, the suspect would not be a party to it.

230 HMCPSI.

231 HMCPSI.

Post-charge

2.130 In the consultation paper we proposed retention of the current post-charge compelled production powers.[232] We stated that post-charge, the police, prosecution and defence may seek compelled access, usually via a witness summons.[233] Our provisional view was that this power should be retained. We noted its fair trial rights rationale; that where "there is good reason to think that exculpatory evidence may exist then there is an obligation on the state to secure and review that evidence".[234] We explained that in NSW, an equivalent power is not available in relation to "preliminary proceedings of bail and committal".[235] We noted objections to this: such material may have a bearing on bail; may be relevant to discontinuance or dismissal/stay applications; or be needed for case preparation purposes and for a timely and effective Plea and Trial Preparation Hearing ("PTPH").[236]

2.131 There was strong numerical[237] and qualitative support for permitting the police, prosecution and defence to seek compelled production post-charge. Consultees gave a clear rationale for this grounded in fair trial rights,[238] and the need to meet ongoing police and prosecutorial duties and efficient case progression.[239] No consultees objected to the current power continuing. A majority of consultees[240] also took the view that applications should be permitted at an early stage of proceedings. They thought that early investigation, disclosure and resolution of issues is advantageous and to be welcomed for all parties and the complainant.[241]

2.132 From this we conclude that the current power for the police, prosecution and defence to apply for production post-charge should be retained and give effect to our recommended threshold for access. In addition, there should be no bar on applications at an early stage of proceedings.

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232 CQ11: "We provisionally propose that after a suspect has been charged, police, prosecutors and defence should continue to be permitted to apply to the court for an order for personal records held by third parties to be produced. Do consultees agree? If so, should there be any restrictions on permission to apply in the early stages of proceedings?", CP 259, paras 3.207-3.208.

233 See CP 259, paras 3.18-3.23 for a description of the witness summons framework.

234 See CP 259, para 3.203.

235 Criminal Procedure Act 1986 (NSW), ss 297-298.

236 See CP 259, para 3.205.

237 Out of 26 responses, 24 agreed that that post-charge powers of production should be retained; no consultees disagreed; and two consultees gave an answer categorised as "other".

238 Including Cardiff University Innocence Project; and JURIES.

239 Including CPS; and a law enforcement consultee.

240 Out of 21 responses, 16 consultees said that there should not be restrictions on permission to apply in the early stages of proceedings, three consultees stated that there should be restrictions; and two consultees gave an answer categorised as "other".

241 Including Dr Thomason; Dr Leahy; Six Circuits of England and Wales; Bar Council; CPS; HM Council of Circuit Judges; and Chief Constable Sarah Crew, NPCC lead for Adult Sexual Offences.

Recommendation 4.

2.133 We recommend that at any time post-charge, if the complainant refuses consent to access to their personal records held by third parties, then police, prosecutors and the defence should be permitted to apply to the court for an order for those records to be produced.

2.134 We recommend that at any time post-charge, where the complainant consents to access to their personal records held by third parties but the record holder does not consent, then police, prosecutors and the defence should be permitted to apply to the court for an order for those records to be produced.

Disclosure

2.135 Above, we concluded that the bespoke regime should apply only to access and production, and note that it follows that reform of judicial scrutiny is also not justified beyond that stage. We received the following responses specific to judicial scrutiny of disclosure, which affirms our views.

2.136 In the consultation paper, we noted that unless a PII application is made,[242] the prosecution decides what materials are disclosed to the defence, without judicial scrutiny. We explained that we had heard no views suggesting that there should be less scrutiny, and our focus was on whether there should be more.[243] Our provisional view was that judicial permission should be required for disclosure, not displaced by complainant consent.[244] We gave various reasons for this. We explained that increased judicial oversight is needed for consistent evaluation of relevance and balancing of interests. We noted that judicial authorisation limits the risk of unnecessary disclosure and the risk that myths will be deployed at trial. We commented that "judicial permission poses no risk to the defendant's fair trial rights". Finally, we stated that the complainant's consent is important, but "there is a public interest in confidentiality of patients' records and that is more effectively served by requiring judicial authorisation in all circumstances".[245]

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242 A PII application could be made by the prosecution, where the complainant refuses to consent to disclosure of their medical or counselling records to the defence. See CP 259, para 3.34, citing HMCPSI, *Disclosure of Medical Records and Counselling Notes: A review of CPS compliance with rules and guidance in relation to disclosure of complainants' medical records and counselling notes in rape and sexual offence cases*, (July 2013) paras 3.2 and 3.4. For further details regarding the overall disclosure framework see CP 259, paras 3.24-3.42.

243 CP 259, paras 3.209-3.210.

244 CQ 12: "We provisionally propose that disclosure of personal records held by third parties should require judicial permission. Do consultees agree? We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent. Do consultees agree? Should there be any restrictions on disclosure in the early stages of proceedings?", CP 259, paras 3.217-3.219. SCQ 5 asked a similar question. This section focuses on the main question about whether disclosure of personal records held by third parties should require judicial permission.

245 CP 259, para 3.215.

2.137 There was strong numerical[246] and qualitative support for judicial oversight of disclosure of personal records held by third parties to the defence. Consultees identified a number of clear potential benefits. These included that it would limit unnecessary disclosure; ensure proper consideration of fair trial and privacy rights; reduce the risk of inappropriate reliance on myths; reduce the risk of traumatising complainants; and improve complainants' confidence in the process.[247] For example, Behind the Gown said it will "focus minds", bring "a degree of accountability", and coupled with a "prescribed threshold for disclosure will ensure requests properly underpin the issues in the case". Rachel Snaith an employee of the Office of the Police and Crime Commissioner ("OPCC") for Northumbria noted that it could lead to fewer complainants "feeling like they have to make a choice between engaging in the criminal justice process or engaging in therapy".

2.138 However, the views of consultees who objected provided a mixed and finely balanced picture. A smaller number of stakeholders with relevant expertise objected including practitioner groups and judges who have direct experience of conducting trials. First, they described judicial scrutiny as impractical, unworkable, and unsustainable, leading to listing difficulties, delays and judges being unwilling to undertake a new quasi-judicial role.[248] Conversely, consultees who supported judicial scrutiny argued that initial pressures on the judiciary may reduce over time because changes in working practices may disincentivise disproportionate requests.[249] Secondly, consultees who rejected judicial scrutiny noted that the disclosure and PII regimes already offer sufficient protection and are fit for purpose.[250] We agree that the PII framework can and should provide a mechanism in certain cases to safeguard complainants' personal records and provide judicial scrutiny of their disclosure to the defence. Thirdly, these consultees also described judicial authorisation as an unwarranted interference with prosecutorial decision-making.[251] In our view, this concern is less persuasive; judges already take a role in the disclosure process in PII and section 8 applications.[252]

2.139 Overall, as distinct from compelled production, we conclude that judicial scrutiny of disclosure is not justified. First, given the serious concerns about the impact of judicial scrutiny of disclosure on resourcing and delay, and the evidence about where the problem lies, we are of the view that it should be targeted where it will have the

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246 Out of 78 responses, 49 consultees agreed that disclosure of personal records held by third parties should require judicial permission; 18 consultees disagreed; and 11 consultees gave an answer categorised as "other".

247 Including Muslim Women's Network UK; Dr Leahy; HM Council of Circuit Judges; BACP; Gwent Police; JURIES; Rachel Snaith; Richard Gunner; Blue Door Support Service CIC; and South Wales Police.

248 Bar Council; Six Circuits; Andrew Wilkins; Tracy Harris; an anonymous consultee; Lyall Thomson; three Circuit Judges; Professor Dufraimont; CPS, HMCPSI; Dr Thomason; South Wales Police; an anonymous law enforcement consultee; and Dr Kyneswood.

249 RCEW; nia; and Behind the Gown

250 Six Circuits; Law Society; an anonymous consultee; Dyfed-Powys OPCC; and Dyfed-Powys Police.

251 The Law Society; CBA; Tracy Harris; and Six Circuits.

252 See above for our explanation of these terms. We acknowledge that in PII applications, the prosecution ultimately retain discretion. Even if a judge concludes that sensitive material should be disclosed in the interests of a fair trial, the prosecution may refuse to disclose it and instead discontinue proceedings.

greatest effect. The greatest benefits will be secured by reserving judicial scrutiny for production.

2.140 Secondly, our recommended framework will fill a current gap at the point in the process where there is evidence of least adherence to current guidelines. Judicial scrutiny is currently only possible in limited circumstances via a patchwork of provisions and a non-bespoke framework.[253] Our model therefore offers greater clarity for complainants and record holders. Where they contest the scope and/or basis of a request, the existence of a formalised statutory framework will empower them to insist on a court order pre- or post-charge. They will do so in the knowledge that their refusal should not cause the investigation to be prematurely terminated.

2.141 Finally, one of the arguments we have heard in favour of the regime applying to disclosure is that complainants are fearful of their records being disclosed to the defendant or that the prosecution will mis-disclose their private information. This may also deter them from seeking or continuing with therapy.[254] Judicial scrutiny at the point of access offers some reassurance to complainants because determinations at the point of access will shape what occurs at later stages of the case.

PARAMETERS

2.142 In the previous sections, we concluded that there should be a bespoke personal records regime focused on requests for access and production. We also concluded that judicial scrutiny of requests should be reserved for compelled production, both pre- and post-charge. This might arise where the complainant and/or the record holder dispute the basis and/or scope of a request. Complainants will be entitled to legal advice regarding their decision. Where the complainant and/or the record holder consent to the records being accessed, they will voluntarily provide them to the police and there will be no judicial scrutiny.

2.143 In this section we consider the limits of the bespoke regime. This includes matters we rule out, namely absolute prohibitions in relation to therapy and complainant-support records, along with the scope of the regime. Describing the scope of the regime also entails defining the term personal records, so it is clear which records fall inside the regime, attracting an enhanced relevance threshold and bespoke procedural framework. Finally, it requires us to identify the types of records that fall outside of the regime, to which the specialised framework does not apply, which are instead governed by the current general framework for access and production.

No absolute prohibitions

Pre-trial therapy records

2.144 In the consultation paper, we noted that the therapeutic relationship is confidential and founded on the essential relationship of trust between the therapist and their patient. However, commentators refer to the "inherent contradiction" within the current framework for access, disclosure, and admissibility of such records, which "simultaneously recognises that survivors' access to therapy is vital, yet, in practice,

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253 Judicial scrutiny is available for a production order or witness summons, described above.

254 See above.

counselling notes remain subject to disclosure".[255] We explained that what follows from this is that the risk that their therapy records may be used in the criminal process may affect whether, when and how RASSO complainants seek and undergo therapy, with potential impacts on their wellbeing. We also referred to this risk deterring complainants from reporting an offence, or engaging with the investigation or prosecution.[256]

2.145 Despite this, we provisionally proposed that there should not be an absolute ban on the use of pre-trial therapy records to address these concerns.[257] The difficulty with an absolute prohibition is that the defendant's fair trial rights may require access, review, disclosure and admission of such records. Moreover, we noted that a ban would conflict with fundamental CPIA principles to pursue reasonable lines of inquiry and provide to the defence material satisfying the test for disclosure. A ban would also conflict with the established principle and practice that health professionals may disclose records without the patient's consent if breaching confidence is in the public interest.[258]

2.146 The majority of consultees who responded to this question agreed with our provisional proposal.[259] Consultees pointed to the potential relevance of pre-trial therapy records.[260] HM Council of Circuit Judges said there are cases in which consistent or inconsistent accounts are given to therapists, which can relevantly affect the assessment of a complainant's credibility. The CPS agreed with the example we gave in the consultation paper of a circumstance where undisclosed information could jeopardise a fair trial. It said this could arise where a complainant had retracted their allegation during discussions with their therapist. Moreover, consultees considered that an absolute prohibition raises fair trial concerns.[261] Dr Leahy said that while pre-trial therapy records are generally not good evidence and should not be routinely used, there may be cases where this evidence is genuinely relevant and where its exclusion would prejudice the defendant's fair trial rights. In light of this, we recommend that there should not be an absolute prohibition on access, disclosure or admissibility of pre-trial therapy records.

2.147 However, consultees suggested exploring other means of restricting the use of therapy records. This is because such records are not forensically sound given that the purpose of therapy and of the notes is not to gather evidence, and given the lack of understanding of therapeutic techniques. They also highlighted the disincentivising effect on complainants accessing therapy and engaging with the criminal process, along with the pressure on therapists and the potential to reduce the effectiveness of

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255 CP 259, para 3.122, citing RCEW, CWJ and EVAW, *Keep Counselling Confidential: The Problems and Solutions with Disclosure of Counselling Notes* (October 2022) p 2.

256 CP 259, para 3.112.

257 CQ 5: "Our provisional view is that there should not be a complete prohibition on the access, disclosure or admissibility of pre-trial therapy records in sexual offences prosecutions. Do consultees agree?", CP 259, para 3.137. SCQ 3 and ERCQ 2 asked a similar question.

258 CP 259, para 3.134.

259 Out of 83 responses, 58 consultees agreed, 11 disagreed and 10 gave an answer categorised as "other".

260 Including HM Council of Circuit Judges; Six Circuits; Bar Council; CBA; Law Society; and CPS.

261 Including Dr Thomason; Lyall Thompson; JURIES; RCEW; CWJ; and Dr Leahy.

therapy.[262] We agree that there are unique considerations regarding therapy records, and we discuss below mechanisms for addressing this,[263] but conclude that an absolute prohibition is not justified given the risk to fair trial rights.

Recommendation 5.

2.148 We recommend that there should not be a complete prohibition on access, disclosure or admissibility of pre-trial therapy records.

Alternative to prohibition

2.149 Some consultees explicitly supported the NSW model as an alternative mechanism for addressing the unique considerations that arise for therapy records.[264] The NSW threshold is a rebuttable presumption that counselling records will not be produced or admitted, unless:

(1) the record will "have substantial probative value";

(2) alternative documents or evidence are not available; and

(3) "the public interest in preserving the confidentiality [of the record] ... and protecting [the complainant] from harm is substantially outweighed by the public interest in admitting [the record] into evidence".

It specifies factors that must be taken into account when determining the public interest (but contains no factors for any other elements of the test).[265] It has four factors based on society's interests which are similar to the ones we reject above: the need to encourage complainants to seek counselling; that the effectiveness of counselling is dependent on the maintenance of the confidentiality of the counselling relationship; the public interest in ensuring complainants receive effective counselling; and that the disclosure of such records is likely to damage or undermine the counselling relationship. The remaining two factors are directed mainly to the complainant's interests: whether the request is founded on discriminatory belief or bias; and that adducing the evidence is likely to infringe a reasonable expectation of privacy.[266]

2.150 These consultees further supported the NSW model because it would apply pre-charge, where the majority of requests occur. They described other key components as: a court determining whether release of the information is of crucial evidential

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262 Including Claire Waxman; Dr Smith; HMCPSI; Behind the Gown; Solace Women's Aid; and CWJ. Consultees who supported a complete prohibition raised similar concerns.

263 Consultees suggested a combination of enhanced relevance thresholds, judicial scrutiny, judicial approval of lines of questioning, written reasons, ILA or ILR, and rights of appeal. We consider these matters elsewhere in chapter, and in Chs 7, 8 and 11.

264 EVAW; RCEW; CWJ; Refuge; and Rights of Women.

265 CP 259, paras 3.242-3.243.

266 Criminal Procedure Act 1986 (NSW), s 299D(2).

value; complainants being able to highlight highly sensitive information to the court via "confidential harm statements"; and complainants being legally represented. They took the view that the NSW model would not be unduly burdensome because it would create a body of case law and practice guiding decision making at all stages of the process, discourage disproportionate requests, and create consistency. In response to later consultation questions concerning our proposed thresholds, consultees also described the NSW substantial probative value threshold as stricter and as offering greater protection to the complainant's privacy rights.[267]

2.151 In the consultation paper, we rejected the NSW model, concluding that the Canadian model that we describe above is preferable. We noted that the Canadian threshold is demanding because it is an enhanced relevance test, and with the factors creates a detailed structured discretion designed to filter out requests focussed on myths.[268]

2.152 We continue to reject the NSW model for similar reasons; contrary to the views of consultees above, we do not consider the NSW approach to be more protective of complainants' rights. First, the NSW approach applies only to counselling records, a narrow subset of TPM, whereas the Canadian regime applies more broadly to records in which the complainant has a reasonable expectation of privacy. We explain below why we reject the narrow NSW approach. Secondly, the NSW and Canadian thresholds are similar because they are both a statutory enhanced relevance threshold. The NSW model introduces an enhanced relevance test (via a presumption in favour or preserving the confidentiality of the record, which needs to be substantially outweighed by the public interest in admitting it), whereas the Canadian threshold requires that the record is likely to be relevant to an issue at trial or to the competence of a witness to testify *and* that access or production of the record is necessary in the interests of justice. Thirdly, the wording of the Canadian threshold is clearer, it directs decision makers to consider to what the material sought should be likely to be relevant, namely it must be logically probative to an issue at trial or the competence of a witness to testify.[269] The NSW threshold merely says the material sought must have substantial probative value.[270] Fourthly, the Canadian structured discretion factors offer greater clarity for decision makers. The NSW threshold only has factors for determining the public interest in preserving the confidentiality of the record, so they are necessarily narrow. Beyond wider societal considerations (which we reject above), the factors focus only on the complainant's privacy interests and whether the request is founded on myths or bias. The NSW threshold also does not provide factors or guidance to decision makers regarding when the public interest in confidentiality might be substantially outweighed. In contrast, the Canadian threshold

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267 Including JURIES (in response to CQs 13 and 14); nia; Refuge; BACP; EVAW; RCEW (in response to CQs 15 and/or 16).

268 CP 259, para 3.245.

269 As we explain above, this includes "evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case". See *R v O'Connor* [1995] 4 SCR 411 at [22].

270 It has been explained that this requirement means that "use which might be made of the documents … must the focus of the court's determination". See *KS v Veitch (No 2)* [2012] NSWCCA, Basten J at [30]. Basten J at [37] also noted that "the concept of "substantial probative value", accepting that it extends to questions or evidence relevant to the credibility of the complainant, must nevertheless be concerned with admissible material".

has more detailed and broad ranging factors which are directed to the weighing of the interests at stake. In addition to the complainant's privacy interests and whether a request is based on myths or bias, it directs consideration of whether the record is necessary for a fair trial, its probative value, and the effect of the determination on the integrity of the trial process.

2.153 Overall, in our view, consultees' arguments in support of the NSW model do not outweigh the benefits of the Canadian model. Moreover, some of the other benefits they identify will in any event flow from the model we recommend. These include judicial scrutiny pre- and post-charge, greater consistency, reduced volumes of disproportionate requests, and complainants being legally represented and having the opportunity to provide their views.

Complainant-support records

2.154 In the consultation paper, we identified concerns regarding access, disclosure and admissibility of complainant-support records similar to counselling records. We referred to Home Office Guidance stating that Independent Sexual Violence Adviser ("ISVA") records may be examined for details about the allegation to determine whether they meet the test for disclosure. Similar guidance exists for witness supporters and intermediaries.[271] We explained that ISVA notes should not be "amenable to requests because, according to guidance about their role, ISVAs should not take an account of the alleged offence".[272] However, we noted that a prohibition may not be appropriate because there is a possibility that such notes will contain relevant information needed to safeguard fair trial rights, or may be needed to rebut an assertion that a CIC claim has been made for financial gain by establishing that the claim was prompted by the ISVA.[273] We therefore asked whether there should be a complete prohibition on access, disclosure or admissibility of such records.[274]

2.155 In line with the views expressed regarding therapy records, the majority of consultees rejected an absolute prohibition.[275] Legal practitioner, academic, and victims' rights consultees argued that prohibition poses a risk to fair trial rights. It is possible that the complainant may make disclosures to their ISVA about the allegation, despite being advised that they are not able to discuss it. We reach this view because ISVAs told us that where the complainant makes such a disclosure, there are protocols for providing this information to the police. HM Council of Circuit Judges argued that information of importance to the prosecution or the defence should be "capable of seeing the light of

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271 CP 259, para 3.138 citing Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements*, (September 2017) para 3.5; MoJ and NPCC, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (January 2022) paras 4.24-4.26, 4.75-4.76; and MoJ, *Registered Intermediary Procedural Guidance* (September 2020) p 7; CPIA Code (2020) Principle 12.

272 CP 259, para 3.138.

273 CP 259, para 3.139.

274 CQ 6: "Should there be a complete prohibition on the access by compelled production, disclosure or admissibility of any complainant-support records, such as records held by Independent Sexual Violence Advisers, witness supporters and intermediaries? If so, or if not, for what reason?", CP 259, paras 3.140-3.141.

275 Out of 29 responses, 26 thought there should not be a prohibition, 3 thought there should be a prohibition, and none gave an answer categorised as "other".

day". The CPS reiterated that as with therapy records there may be "rare occasions" when obtaining them is necessary "such as where a complainant retracts their allegation".[276] Consultees who supported a complete prohibition noted that complainant-support records are of limited evidential value; that complainants may otherwise be deterred from accessing support; and access compromises the support that ISVAs can offer.[277]

2.156 We are persuaded of the fair trial concerns raised by consultees and conclude that there should not be an absolute prohibition. In our view, concerns about the absence of a prohibition can be addressed by our recommended threshold and through guidance. There are fewer requests for support records than for other types of personal records. However, this does not justify a prohibition on these records. Guidance directs ISVAs not to discuss the criminal complaint with their client, making such requests less likely, and the Home Office Third-Party Case File Review (2024) found them in a very limited proportion of case files.[278]

2.157 Although consultees rejected a prohibition, they supported robust thresholds restricting access, disclosure and admissibility of complainant-support records.[279] Further, some consultees responded favourably to a question we canvassed in the consultation paper; whether, instead of a prohibition, a rebuttable presumption against access, disclosure and admissibility (perhaps limited to ISVA records) might be appropriate.[280] Dr Leahy agreed that there may be reason to access support records, but a presumption would signal that they "should only be sought in the most exceptional circumstances". The CWJ thought that a presumption would reflect Home Office guidance that ISVAs should not discuss the evidence with the complainant. We do not think a presumption appropriate because our recommended threshold and factors can accommodate the particular considerations that arise for support records. Our recommended threshold and factors would therefore achieve the same objective as a presumption. In addition, a separate threshold based on a presumption would result in unnecessary complexity and inconsistency. There was also limited commentary or support for it amongst consultees.

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276 Including Six Circuits, Bar Council; HM Council of Circuit Judges; Northumbria Centre for Evidence and Criminal Justice Studies; Law Society; RCEW; CPS; CBA, LCCSA, and CWJ.

277 Including Durham Police and Crime Commissioner's Office; and Pan-London Rape Crisis Centres Experts by Experience Panel.

278 Across the 139 rape investigation files the Home Office reviewed, there were 342 TPM requests. 29% of the 342 requests were for GP records; 19% for social services; 18% for education; 12% for counselling; 10% for hospital; 4% for SARC; and 3% for ISVA records. See Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024) para 4.2.1, Table 2. A large proportion of the files concerned child complainants (50 out of 139); the remaining 89 files related to adult complainants.

279 Including Dr Smith; Chief Constable Sarah Crew; and West Mercia Police.

280 Claire Waxman; Dr Leahy; and CWJ.

Recommendation 6.

2.158 We recommend that there should not be a complete prohibition on access, disclosure or admissibility of support records.

Records which are necessary for a fair trial

2.159 HM Crown Prosecution Service Inspectorate ("HMCPSI") submitted a further alternative to prohibition;[281] it suggested a Tasmanian-style prohibition on requests for counselling records,[282] accompanied by defined exceptions. We do not think this suggestion appropriate because it will be difficult to identify in advance all possible factual scenarios which the threshold would need to accommodate. This may lead to strained interpretations of the exceptions along with the possibility that they are both too broad and too restrictive. This is a problem which we identified with the current SBE gateways model[283] which our recommendations seek to address, and we are not inclined to replicate it in the context of TPM.[284]

2.160 However, HMCPSI's suggested exceptions and similar responses from other consultees provide useful examples of circumstances in which fair trial rights could justify the police or prosecution accessing personal records including support records:[285]

(1) A retraction of the allegation by the complainant.

(2) A suggestion by the complainant that their account is fabricated.

(3) Evidence which is to be adduced as rebuttal.

(4) A suggestion that the complainant has committed an offence.[286]

(5) Evidence that the complainant has made the allegation against someone else.

(6) A statement which is "unambiguously at odds with the allegations".

(7) Evidence of recent complaint or pre-police investigation report. Below, we recommend that this should be an exception to the regime.[287]

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281 It made this suggestion in respect of therapy records and complainant-support records.

282 There is a complete prohibition in respect of a narrow category of material, namely counselling communications that occur after the alleged offence, for "communications about harm arising from the alleged offence (though it would be narrower if applied only to communications about the allegation itself)". See CP 259, para 3.132.

283 In YJCEA 1999, s 41.

284 CP 259, paras 4.68-4.97.

285 Including CPS, Six Circuits; Bar Council; nia; and RCEW in their responses to CQs 5 and 6.

286 Such as perverting the course of justice or perjury.

287 This was the only such suggestion by nia; and RCEW.

2.161 We explain above how our threshold and factors accommodate requests which are necessary for a fair trial, while preventing disproportionate requests.

Records within the regime

Reasonable expectation of privacy

2.162 In the consultation paper, we set out our provisional views on the scope of the bespoke regime and the records that should fall within it. We noted that some jurisdictions have specific categories of personal records which are covered by bespoke provisions, for example counselling records in NSW[288] and Ireland, and sensitive personal records in Scotland.[289] In contrast, we suggested that Canada's regime governing personal records is not based on categories but instead captures "any form of record that contains personal information for which there is a reasonable expectation of privacy".[290]

2.163 We rejected the narrow category-based approaches in NSW and Ireland as "too narrow in scope when measured against their rationales".[291] We found the Canadian approach to the scope of a personal records regime persuasive, because an application in relation to a complainant's personal records engages their right to privacy, "regardless of where or by whom that private information is recorded".[292] We suggested that focusing on where the private information is recorded might create an artificial distinction between types of records (and potentially inconsistent decisions), if the same information were recorded on both medical records and counselling records, for example. We said that "the focus of the regime should be the reasonable expectation of privacy, not the type of record", and therefore provisionally proposed that a personal records regime should apply to records in which the complainant has a reasonable expectation of privacy, though we limited this to professional personal records held by third parties.[293]

2.164 A large majority of consultees agreed with our proposal that a regime regulating professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy.[294] Consultees provided

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288 We stated that the definition has been broadly interpreted. We explained that "the courts have found that the privilege attaches to the records of a wide range of service providers, not limited to medical and counselling services but including accommodation services and alternative health practitioners. Examples of protected communications include not only counselling notes but also medical notes, diagnostic medical records including blood tests, ambulance records, mental health records, drug and alcohol records, and financial counsellor records". CP 259, para 3.101 citing SACP Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016) pp 26 and 28.

289 At para 3.101, we explained that they "include, but are not restricted to medical, psychiatric, psychological, counselling, social work, education or employment records" citing COPFS, *Sensitive Personal Records Policy*, (August 2022) para 2.

290 CP 259, para 3.102 citing Criminal Code (Canada), s 278.1.

291 CP 259, para 3.103

292 CP 259, para 3.104.

293 CQ 3: "We provisionally propose that any regime regulating the access, production, disclosure and admissibility of professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy. Do consultees agree?", CP 259, para 3.105. We asked a similar question in SCQ 2.

294 Out of 78 responses, 50 agreed, 10 disagreed, and 18 gave an answer categorised as "other".

persuasive arguments concerning why our proposed definition is the best means of ensuring consistent application and future proofing the regime.[295] HM Council of Circuit Judges described a broad definition as "inevitable" given the nature of the material. Dr Leahy thought a broad definition is important to avoid gaps, and some records being "disclosed or used inappropriately". The CPS observed that "in addition to counselling notes, disclosures made about sexual abuse can be recorded in other forms of TPM including medical records and social services records". Consultees also noted that disproportionate requests for TPM compound disadvantage for complainants whose backgrounds have been documented on a wide variety of records.[296] They gave the examples of children who have been in contact with social services, children from minoritised ethnic backgrounds who are more likely to be criminalised, and individuals with disabilities.

2.165 There were two main objections to our proposal. First, consultees who disagreed reiterated previous generalised concerns about the risk to fair trial rights of introducing a new evidential threshold.[297] Above, we set out how evidence necessary for a fair trial will meet our recommended threshold. Secondly, consultees advocated for the bespoke regime to apply only to counselling records, which we address in the section below.

Distinct treatment of therapy records

2.166 Consultees suggested that there is a unique form and function to therapy records that justifies distinct treatment. This includes the fact that: they have a distinctive confidential nature; they often contain exploration of feelings of self-blame; they are not intended to gather evidence; and the prospect of access and disclosure creates a deterrent to taking up therapy.[298] We maintain our view that focusing the regime only on therapy records is too narrow, and fails to take account of overlapping information contained in therapy records and other records. We prefer an approach based on content rather than form and/or where the information is stored.[299] First, we note that the strict categories approach in NSW has led to a very broad interpretation of the term "counselling communication". We explained in the consultation paper that

> the courts have found that the privilege attaches to the records of a wide range of service providers, not limited to medical and counselling services but including accommodation services and alternative health practitioners. Examples of protected communications include not only counselling notes but also medical notes, diagnostic medical records including blood tests, ambulance records, mental health records, drug and alcohol records, and financial counsellor records.

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295 Including the Bar Council (though it rejected the introduction of a bespoke regime more generally); JURIES; Behind the Gown; Rachel Snaith; Refuge; Dr Leahy; HM Council of Circuit Judges; and CPS.

296 Including Pan-London Rape Crisis Centres Experts by Experience Panel and, in response to CQ 2, CWJ and EVAW.

297 Including the Law Society; and Six Circuits.

298 EVAW response to CQ 2 and CWJ response to CQ 14.

299 CP 259, paras 3.103-3.105.

In our view, this wide interpretation is understandable but is undesirable. This is because it may lead to uncertainty about which records will fall within the definition or outside of it, making the law less accessible and comprehensible.

2.167 Secondly, it could follow that the unique nature of therapy records and the deterrent effect of access and disclosure on uptake of therapy should result in a complete prohibition. However, we explain above that there are very good reasons for not introducing a complete ban. Thirdly, a regime focused only on counselling records would not address the problem. The Home Office Third Party Case File Review (2024) found requests for a variety of TPM amongst the 139 case files it reviewed, with GP and therapy records (which are routes for the same or similar information) the most commonly requested.[300] Finally, in our view, the threshold and factors can take account of the particular considerations that arise for therapy records.

Conclusion

2.168 We therefore maintain the view we expressed in the consultation paper, that the regime should apply to professional personal records in which the complainant has a reasonable expectation of privacy, subject to the following two clarifications.

2.169 First, we are persuaded by consultees' suggestions that an accompanying, non-exhaustive list of records falling within the definition would be useful to avoid inconsistencies or misunderstandings.[301] The phrase "reasonable expectation of privacy" is open textured and a description of the types of records which fall within the definition will be helpful to guide decision-makers. We note that the Canadian definition lists examples including medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption, and social services records, as well as personal journals and diaries and records containing personal information.[302] It also excludes "records made by persons responsible for the investigation or prosecution of the offence".[303] Further, consultees commented that a list "may be helpful in providing preliminary guidance"[304] and should rule out "broad interpretations which circumvent the protective intent of these measures".[305] Similarly, the CWJ expressed concern that the phrasing could cause confusion as "it may not be clear to some whether records by a social services department, an educational establishment or an employer do or don't raise a reasonable expectation of privacy, particularly if the records are not generated in a welfare context".

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300 Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024) para 4.2.1 and Table 2. A large proportion of the files concerned child complainants (50 out of 139) the remaining 89 files related to adult complainants. It stated that, "the most commonly requested type of TPM within the sample were GP records, which were requested in 99 (71%) of the 139 cases. Counselling/therapy notes were requested in 29% of cases, followed by hospital records (25%) and [ISVA] notes (7%)".

301 Including Solace Women's Aid; nia; Behind the Gown; Dr Kyneswood; Dr Leahy; CWJ; RCEW; and EVAW.

302 Criminal Code (Canada), s 278.1 discussed at paras 3.102-3.104, CP 259.

303 This exclusion applies where such records relate to the "offence at issue". It does not apply to "police occurrence reports made in the course of unrelated investigations". See *R v Quesnelle* 2014 SCC 46 at [47] and [49].

304 Dr Leahy.

305 nia.

2.170 Secondly, a Canadian academic told us that certain records, such as diaries, have a high expectation of privacy but as they are not professionally created would fall outside of our proposed regime. In our view, where these types of complainant-created records are in the hands of professional third parties, they fall within the intent of the regime, even though they were not created by the third party. Where a professional third party is in possession of a record created by the complainant, it is likely to have come into their possession for reasons related to their professional relationship. Such material is also likely to be subject to the third party's professional obligations. Therefore, we conclude that a private record created by the complainant which is in the hands of a professional third party should fall within the regime because similar considerations apply regardless of whether the third party or the complainant created it.

Recommendation 7.

2.171 We recommend that the regime regulating access and compelled production of personal records should apply to records created by a professional third party or the complainant which are held by a professional third party, in which the complainant has a reasonable expectation of privacy.

Records outside the regime

Medical records related to physical evidence associated with events

2.172 In the consultation paper, we suggested that physical evidence associated with the events that are the subject of the criminal complaint might remain subject to the general CPIA disclosure regime. We drew on the position in Scotland, where the enhanced requirements of the Sensitive Personal Records Policy do not apply when the police "are seeking a discrete portion of medical records as evidence of the fact that a complainer received treatment for a physical injury which arose from the allegation". The policy also does not apply where the police are "seeking records of a forensic medical examination that has been carried out to gather evidence".[306]

2.173 We noted that these provisions underscore some "potential practical investigatory issues",[307] and that there could be "a case to carve out specific exceptions to a bespoke regime".[308] We therefore asked whether medical records relating to physical evidence associated with the events which are the subject of the complaint should be excluded from a bespoke regime despite being records in which the complainant has a reasonable expectation of privacy.[309]

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306 CP 259, para 3.107, citing COPFS, *Sensitive Personal Records Policy*, (August 2022) para 3.

307 CP 259, para 3.108.

308 CP 259, para 3.108.

309 CQ 4: "Should medical records related to physical evidence associated with the events that are the subject of the complaint fall outside of the scope of a bespoke regime and remain within the existing general framework? If so, or if not, for what reason?", CP 259, paras 3.109-3.110.

2.174 More than half of consultees agreed that such records should fall outside the scope of a bespoke regime meaning they remain within the existing general framework.[310] They provided persuasive arguments in support of their views. Consultees described this type of evidence as central, highly relevant, or likely to be relied on by the prosecution as part of its case.[311] They added that requiring this type of material to meet the bespoke regime will unnecessarily delay investigations, charging decisions and prosecutions.[312] They also noted that requests for this type of evidence are not currently driving concerns about breaches of complainants' privacy.[313]

2.175 There were limited objections to our proposed exclusion. The CBA commented that "it is difficult to see the logic in separating 'types' of records where the aim is to ensure that all relevant material is obtained and disclosed". We explain above how our framework is needed to address disproportionate requests to access complainants' personal records, and it will ensure that evidence necessary for a fair trial is accessed.[314] A consultee with direct experience of the criminal justice system suggested that such an exclusion may deter complainants from engaging with the prosecution. However, in light of comments from consultees that this type of evidence is not usually the source of breaches of complainants' privacy rights, it does not appear to us that this concern will necessarily be borne out.[315] We therefore conclude that such records should be excluded from the bespoke regime, meaning that they remain within the existing general framework for access, disclosure and admissibility.

2.176 We conclude that there should be an exclusion for medical records related to physical evidence directly associated with the events that are the subject of the criminal complaint, meaning they remain within the existing general framework.[316] We now address two further points of clarification brought to our attention by consultees. First, some consultees expressed qualified support stating that the exclusion should be defined very narrowly, such as applying only to notes of the Forensic Medical Examiner ("FME") or only to evidence *directly* associated with the events.[317]

2.177 In our view, applying the exclusion to a narrower sub-set of records, namely FME records, is to some extent justifiable. This is because FME records have been generated with a view to investigation and prosecution whereas other types of records have not. However, limiting the exclusion in this way would not necessarily be useful or workable. Given that medical evidence related to the event is likely to be important, and may be found on a range of records such as GP and hospital records, access is likely to be sought. We acknowledge that there is a greater risk that records not

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310 Out of 27 responses, 15 agreed, 3 disagreed, and 9 gave an answer categorised as "other".

311 HM Council of Circuit Judges; nia; Dr Leahy; Law Society; and RCEW.

312 Including CPS; West Mercia Police; Chief Constable Sarah Crew; and HMCPSI.

313 RCEW; JURIES; and CPS.

314 We note that frameworks which require different levels of scrutiny for requests for different categories of personal records already exist, for example, see VAPA 2024.

315 An anonymous consultee.

316 Where a party inappropriately seeks to introduce or introduces such evidence to demonstrate absence of injury, this will be addressed via the mechanisms we discuss in Chs 10 and 11 such as case management and judicial directions.

317 Dr Smith; Daniel Prout; CWJ; and Pan London Rape Crisis Centres Experts by Experience Panel.

created for the purpose of investigation and prosecution will contain extraneous information. Extraneous information would fall within the regime and mixed information will be protected in the way we describe below. Moreover, the Scottish Sensitive Personal Records Policy exclusion does not contain such a limitation[318] and a Scottish practitioner told us that they knew of no issues in Scotland with the medical records exclusion, and such records are routinely requested by the prosecution.

2.178 We agree that the exclusion should apply only to evidence *directly* associated with the events, as suggested by the CWJ and other consultees.[319] Otherwise, the exclusion might be taken to apply to extraneous content found in the records. The CWJ explained that:

> sometimes there is evidence about gynaecological matters such as abortions and sexually transmitted diseases in records that could date from a long time before or after the offence under investigation and may or may not be a reasonable line of enquiry.

2.179 This should also help to address a related concern that consultees raised about mixed records. This will arise where records related to physical evidence associated with the events contain other personal information.[320] They suggested that steps should be taken to address this, to ensure the latter information is appropriately protected. Chief Constable Sarah Crew said that:

> during Forensic Medical Examination victims are often asked for an extensive medical and sexual history to assist the medical examiner. Some of the resultant information contained within the records is therefore not relevant and should not be disclosed.

2.180 We conclude that where medical records related to physical evidence directly associated with the events that are the subject of the criminal complaint are mixed with other extraneous information, the extraneous information can be identified and dealt with via our recommended bespoke regime. The presence of a clearly worded exclusion focused on whether evidence is *directly* associated with the events will guide the parties and the third party about the appropriate parameters for requests, making it clear that requests to access unrelated personal information must meet the bespoke framework. This framework will also act as a guide where mixed materials are inadvertently produced, so the police/prosecution are able to take steps to rectify this. In addition, to reinforce the parameters of the exclusion, guidance should be provided to those conducting examinations about recording evidence gathering information separately from background personal information. Dr Leahy suggested this approach, highlighting the need for FMEs to take notes carefully and not to "include extraneous information which is not relevant and may inadvertently unnecessarily breach the privacy of the complainant". In our view, personal

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318 COPFS, *Sensitive Personal Records Policy*, (August 2022) para 3. The policy does not apply to requests for "a discrete part of medical records required to evidence treatment for a physical injury" arising from the allegation.

319 See n 317317, above.

320 Dr Leahy; Chief Constable Sarah Crew; and LCCSA.

information (which is not physical evidence directly associated with the events) should as a result be more readily identifiable.

Recommendation 8.

2.181 We recommend that medical records related to physical evidence directly associated with the events that are the subject of the criminal complaint should fall outside of the bespoke regime and should remain within the existing general framework.

Further exclusions

2.182 The Medical Defence Union ("MDU") identified a further category of personal record which should potentially be excluded from the bespoke regime. It suggested that medical records describing the incident which is the subject of the criminal complaint should be exempted stating:

> where an allegation is made of a sexual assault in a clinical setting, these medical records are a record of the alleged incident. They are vital to a proper and balanced consideration of the allegation, and not simply to a doctor's defence [of the criminal allegation].

It suggested that, as with medical records related to physical evidence directly associated with the events, records of the criminal complaint may be relied on by the prosecution as part of their case. Further, such records are distinguishable from unused material[321] sought by the defence for the purpose of challenging the complainant's credibility.

2.183 We identify below some noteworthy features of the type of record described by the MDU, from which we conclude that there should be a further exclusion for information contained in the complainant's personal records where it is a contemporaneous record of the incident which gave rise to the criminal complaint. First, given such records are central, direct and contemporaneous evidence describing the events that are the subject of the criminal complainant,[322] they are likely to be easily identifiable[323] and highly relevant. They may relate to a matter in issue in the trial. For example, they may be a contemporaneous record of the circumstances of the allegation such as when and where it occurred and who was present, or the complainant or defendant's words or actions. The prosecution or defence may rely on them to support or undermine the reliability or credibility of the complainant or defendant's account of the incident. It should be clear to the complainant why the record is being sought.

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321 Unused material is material which is not relied on by the prosecution to prove its case. It must be disclosed to the defence where it "might reasonably be considered capable of undermining the case for the prosecution … or of assisting the case for the [defendant]". See CPIA 1996, s 3(1) and CP 259, para 3.25.

322 This can be contrasted with physical evidence records, which are indirect (because they are merely associated with the events) and are not contemporaneous (they are recorded subsequently).

323 Above, we describe our views on mixed records and how concerns about accessing extraneous personal information can be addressed.

Consequently, they are likely to be routinely and legitimately sought by police. Requiring them to meet the bespoke framework would create a disproportionate and unnecessary procedural burden. This exception would apply in a limited number of cases, namely where the criminal allegation concerns a professional's dealings with the complainant and the complainant's personal records describe that interaction.

2.184 Secondly, such material will be a record concerning the complainant which is held by a third party but usually originally created by or accessible to the defendant as part of the interaction which gave rise to the criminal complaint. Even though the defendant may have created or had access to the record, that may not remain the case. The MDU gave examples of access ceasing because the defendant is a locum doctor who only had temporary access to the record; patient complaint protocols which usually prohibit subsequent access; or the patient and their records transferring elsewhere.

2.185 Thirdly, access to such records may be required in relation to a range of professionals. The MDU commented that access to such records is a particular concern for doctors who, "by the nature of their work, can be more readily exposed to potential allegations of sexual assault than other citizens". We agree that there may be a particular risk of sexual offence allegations against doctors or nurses, particularly those conducting intimate examinations. However, we envisage that access to records may be required where an allegation is made against other professionals such as other healthcare professionals, social workers, or teachers.

Records of recent complaint

2.186 A further similar category of record which may be highly relevant is a recent complaint by the complainant. A recent complaint is the complainant's account of the allegation, given to someone else.[324] In the context of personal records, a recent complaint may be described in TPM such as therapy, social services, or education records. In our view, there should also be an exception for a record of recent complaint given to a professional third party. First, whilst such a record is not immediately contemporaneous, it is a confined category of material related to the facts of the alleged incident, often, but not invariably, recorded in close proximity to that incident. This type of material may be an important piece of evidence which is therefore usually sought by police and relied on by the prosecution as part of its case on a matter in issue.[325]

2.187 Secondly, where a recent complaint is made to a non-professional witness such as a friend or family member or to the police, a witness statement is usually obtained and disclosed to the defence, or the record of the complainant's initial police report is disclosed. Even though the record of a recent complaint detailed in TPM is of a

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[324] The CJA 2003, s 120(7)(c), creates an exception to the rule against hearsay for recent complaint evidence which it defines as "a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence".

[325] The CPS notes that the first complaint can be an "important" piece of supporting evidence regarding the complainant's account. CPS, *Legal Guidance, Rape and Sexual Offences, Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences* (21 May 2021).

distinct nature,[326] imposing the additional procedural burden of the bespoke regime is not justified. Evidence of the complaint will be identifiable,[327] highly relevant, and is likely to be sought. Requiring this type of material to meet the requirements of the bespoke framework will unnecessarily delay investigations and prosecutions in circumstances where a request would inevitably be granted. Victims' rights stakeholders acknowledged that it may be necessary to access evidence of a recent complaint.[328] Further, according to Robyn Gilbert (Senior Solicitor at the SACP Service, Legal Aid NSW), such requests are common,[329] and are a frequent reason for the complainant consenting to access.[330] In addition, Robyn Gilbert stated that complainants "are often ok with their report of the sexual assault being disclosed", and it is the prospective disclosure of "previous traumas, relationship problems, or other private and irrelevant matters" that causes upset.[331] We therefore conclude that a further exception should arise for complainants' personal records where they document a recent complaint, meaning they are governed by the general framework.

2.188 Thirdly, given the evidence base regarding disproportionate requests to access complainants' personal records, an exception could become an avenue for such requests. The risk is that parties may argue on a speculative basis that the exemption applies, circumventing the bespoke regime. However, the Home Office Third Party Case File Review (2024) found that although requests to access this type of information are regularly made, they tended to be more focussed on the specifics of the allegation than requests concerning reliability/credibility.[332] In addition, guidance and judicial scrutiny can underline the fact that the exemption should not be used to facilitate speculative requests.

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326 Evidence of recent complaint recorded on TPM may be a distinct category because it may be mixed with other unrelated content, was not recorded for evidence gathering purposes, and was recorded in circumstances of confidentiality.

327 Above, we describe our views on mixed records and how concerns about accessing extraneous personal information can be addressed.

328 nia stated that disclosure may be necessary where an ISVA is "the first to take a report or where there are relevant reports pre police report". RCEW expressed the same view.

329 Although she did not support evidence of recent complaint being exempted, Robyn Gilbert, stated that in in NSW amongst the 150-200 referrals received each year, half of them arise "because the prosecution want the complainant to be advised about whether to disclose his or her counselling material – this is nearly always because the first complaint was made to a counsellor". R Gilbert, *Change is Possible: Keep Counselling Confidential Virtual Briefing to UK Parliament regarding the Victims and Prisoners Bill* (December 2022) p 4.

330 Robyn Gilbert told us that complainants' consent to access in about 50% of all cases, usually based on legal advice, and commonly where the information sought is a first report of a non-recent allegation.

331 R Gilbert, *Change is Possible: Keep Counselling Confidential Virtual Briefing to UK Parliament regarding the Victims and Prisoners Bill* (December 2022) p 2.

332 The Review found that amongst the case files where a rationale was provided, 36% of requests for third-party material were made to see if the record supported an incident having occurred; 24% were made "to establish a separate account of the incident"; 4% were made "to establish the facts of an incident"; 10% "to establish the perceived reliability" of the complainant; 22% to establish the complainant's "perceived credibility"; and 4% were for other reasons. Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024) p 11, Table 3. A much higher proportion of requests which had a rationale "clearly linked to specifics of a case" were found amongst requests focussed on the incident, compared to requests focussed on perceived reliability or credibility. Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024) p 12, Table 4.

Recommendation 9.

2.189 We recommend that if there is a criminal complaint about a professional's interactions with the complainant, where the complainant's personal records are a contemporaneous record of the allegation, this part of the records should fall outside of the bespoke regime and should remain within the existing general framework

Recommendation 10.

2.190 We recommend that, where the complainant's personal records concern the complainant's recent complaint, namely a complaint made by the complainant about conduct which would, if proved, constitute the offence or part of the offence, this part of the records should fall outside of the bespoke regime and should remain within the existing general framework.

Other records or information

Records or information held otherwise than by third parties

2.191 The Six Circuits suggested that our proposals "create an inexplicable inconsistency between the disclosure/admissibility tests for private data held by third parties and those for private data held by the complainant or defendant". It explained that:

> The complainant's right to privacy is unwaveringly relied upon to justify the proposed restrictions for TPM. This concern seems entirely absent in respect of the disclosure and admissibility of private data (which may be at least as intrusive and intimate in its nature as TPM) which is held by the complainant and/or defendant.

2.192 The Six Circuits were correct to point out this potential gap in our proposed framework.[333] However, given our conclusion that the bespoke regime for personal records should attach only to access and production, and not to disclosure or admissibility, this concern will not be borne out. The relevance threshold will continue to apply to admissibility determinations, unless a higher threshold applies due to the nature of the material. Therefore, the relevance threshold will apply to private data regardless of its source, whether it is derived from TPM or otherwise from material or information held by the complainant or defendant.[334] Moreover, where private information is adduced which is also SBE, CICE, FAE or BCE, the relevant enhanced admissibility threshold will apply regardless of the source of that evidence.

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333 The Canadian framework was amended to fill it in part. In 2018, the admissibility restrictions for personal records and SBE were extended to personal records relating to the complainant in the possession of the defendant. See S Friedman and V Garcia, "*For the Record" Section 278.92 of the Criminal Code*, 2019 CanLIIDocs 3867.

334 For example, private information or personal records might be adduced at trial because they are within the complainant and/or defendant's knowledge or possession, rather than having been derived from third-party materials.

2.193 Elsewhere, consultees suggested the use of an enhanced relevance threshold for lines of questioning concerning the complainant's health, including mental health conditions, learning disabilities, or neurodiversity.[335] For example, Dr Smith argued this should apply to cross-examination of counselling, therapy and mental ill-health and that there is trial observation evidence that where the complainant has depression it may be used "to suggest a lack of credibility, because it was said to cause paranoia or be a motive for false accusations". She emphasised there is not "any evidence that a diagnosis of depression is likely to increase either of these things".[336] In Dr Ellen Daly's trial observation study, she gives examples of the use of medical evidence at trial to undermine the complainant's credibility and to play into myths about hysterical women. In one example, the evidence came from messages exchanged between the complainant and the defendant, and a toxicology report exhibited to the jury to confirm lack of capacity to consent due to alcohol consumption (according to Dr Daly, the complainant's use of anti-depressants was irrelevant to that issue).[337]

2.194 We note that where lines of questioning concerning the complainant's health are derived from TPM, our bespoke regime offers additional protection, including through its enhanced relevance threshold and structured discretion model for access and production and through judicial scrutiny. However, where questions are raised by the defence based only on personal information or personal records within their knowledge or possession (which are derived otherwise than from TPM), protections are present but are more limited.[338] Safeguards are limited to those that arise generally at trial including the judge's case management powers, prosecution challenge, judicial directions, the use of expert evidence to explain the complainant's presentation,[339] or the use of agreed facts explaining these matters. To further address this concern, in Chapter 10, we recommend an example direction to address the presentation and particular myths relating to complainants with a mental health condition, learning disability or neurodiversity.

2.195 In light of the limited consultation responses we received we conclude that more intrusive procedural safeguards such as a requirement to seek leave or prior approval of lines of questioning, or an enhanced relevance threshold are not justified. They would also add undue complexity. The underlying concerns about lines of questioning

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335 Dr Smith; CWJ; RCEW; and Pan-London Rape Crisis Centres Experts by Experience Panel (responses to CQ 77).

336 Based on experiences in other jurisdictions, in some circumstances, evidence of a health condition may meet an enhanced relevance threshold. JURIES' response to CQs 13, 15 and 16 noted that according to the NSW SACP Service, the NSW substantial probative value threshold is generally met where the complainant "has a psychiatric condition characterised by delusions". See RCEW, EVAW, CWJ and Rights of Women, *Joint written evidence submitted to the Victims and Prisoners Bill Committee VPB09* (June 2023) para 24.

337 E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 128. The study observed 10 trials, and interviewed judges, advocates depute, and defence counsel.

338 We acknowledge that framing the bespoke regime in this way may incentivise the defence to pursue lines of questioning regarding the complainant's health without first having sought access to the complainant's personal records. However, examining a witness without knowledge of the relevant underlying evidence would be a risky trial strategy and would be open to challenge.

339 Expert evidence of a witness's mental health condition may be admissible "as a background against which the jury may judge the consistency and veracity" of their account and to "explain the witness's presentation when giving evidence". See CP 259, para 10.116 citing *R v Zubair Anwar* [2012] EWCA Crim 1478 and *R v Mulindawa* [2017] EWCA Crim 416.

regarding the complainant's health are twofold. First, that questioning may invoke myths and misconceptions. Secondly, it may be derived from information or records which are not forensically sound because they were created for therapeutic rather than evidence gathering purposes. As such, they attempt to establish inconsistency and challenge reliability or credibility when there are a range of explanations, not just lack of veracity.[340] It is for these reasons that we conclude that our example direction regarding the presentation and particular myths relating to complainants with a mental health condition, learning disability or neurodiversity appropriately addresses these risks. This direction could be used by judges for lines of questioning concerning a mental health condition, learning disability or neurodiversity, whatever their source, whether derived from TPM or otherwise.

Defendants' personal records

2.196 This project's terms of reference direct us to consider reform of the regime for access, disclosure and admissibility of complainants' personal records, and do not extend to consideration of defendants' records. Nevertheless, a number of consultees advocated for parity regarding the treatment of the defendant's records, suggesting that the regime should apply in the same way to records pertaining to the defendant as to the complainant.[341] In this section, we consider parity regarding a bespoke regime for access and production.[342] Above, we discuss the difficulties of creating differentiated thresholds for disclosure and admissibility in respect of complainants' and defendants' personal records.

2.197 There is precedent for the need for equivalence when accessing the complainant's and defendant's records. In NSW, the SACP applies "equally to records of complainants, witnesses and accused persons".[343] In England and Wales, the statutory framework for extracting information from electronic devices applies to complainants, witnesses and suspects/defendants.[344] However, police must take into account and accord appropriate priority to their other powers and duties in relation to the latter. The accompanying code of practice states:

> Where the power is being exercised for the purposes of preventing, detecting, investigating, or prosecuting crime, this will commonly (but not exclusively) be a victim or a witness to a crime. … the Act does not prohibit making a request to a suspect to volunteer a device and agree to the extraction of information from it. In most cases where the device user is a suspect it is likely that any device will be seized using other lawful powers, such as those under PACE, to prevent the loss or

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340 See below.

341 In response to CQ 2, including Falsely Accused Day Steering Group; Richard Gunner; an anonymous health professional; and an anonymous interest group. Similar responses were received in respect of other CQs. These included, in response to CQ 3, Cardiff University Law School Innocence Project; False Allegations Watch/Empowering the Innocent; an anonymous interest group; Richard Gunner; and Pan-London Rape Crisis Centres Experts by Experience Panel who said in response to CQ 9 that if pre-charge applications to the court for compelled production is permitted "it needs to work both ways with the accused too".

342 We do not consider parity regarding requests to access the records of witnesses other than the defendant or the complainant. This is because consultees did not raise this as an issue.

343 E Hulme, *The Sexual Assault Communications Privilege Review of legislation, case law and practical guidance on seeking SACP material* (September 2021).

344 PCSCA 2022, ch 3.

> destruction of evidence and to ensure compliance with CPIA and disclosure principles. In all cases, it is for the authorised person to determine the appropriate power…[345]

2.198 We reject the need for precise equivalence between the framework and threshold for accessing complainants' and defendants' personal records. This is because, first, the complainant (as a witness) and the suspect/defendant (as a party whose liberty is at stake) have very distinct statuses. This is reflected in what we identified in the consultation paper as the "principled asymmetry" (in the defendant's favour) in the criminal process and in rules of evidence, as a safeguard against wrongful conviction. We explained that

> while most visible in the "steeply asymmetrical" criminal standard of proof, beyond reasonable doubt, the rules of evidence may rightly exclude relevant evidence "thought to present unconscionable risks of unfair prejudice against the accused".[346]

The caveat in the electronic devices extraction framework above further illustrates this point and leads us to our next reason for rejecting the need for parity. There are already powers and procedures in place for the police to investigate suspects and defendants and to obtain their personal records. A third-party might provide such records to the police voluntarily with the defendant's consent, or without the defendant's consent relying on the public interest exception to the common law duty of confidentiality.[347] Alternatively, the police may be able to seek such records by applying for a search warrant;[348] a production order where it is pre-charge;[349] or a witness summons where it is post-charge.[350] Additional powers (which are unavailable in respect of complainants) arise where personal records are in the possession of the suspect; the police may search for them and seize them within certain parameters and subject to an exclusionary rule.[351] Further, the defence are usually entitled to records held by a third party, with the defendant's consent. Therefore, existing procedures take account of the particular considerations that arise in relation to the rights of suspects and defendants and the duties of the police/prosecution and third parties.

2.199 Finally, as we have not consulted on this issue, we have received no evidence from stakeholders that defendants' personal records are currently disproportionately sought

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345 Home Office, *Extraction of Information from electronic devices: code of practice* (October 2022) para 50.

346 CP 259, para 5.73, citing P Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review* 393; P Roberts and A Zuckerman, Roberts and Zuckerman's *Criminal Evidence* (3rd ed 2022) p 21.

347 In exceptional circumstances, a record holders' duty of confidentiality may be outweighed by a countervailing public interest in disclosure, such as where a patient poses a real risk of danger to the public. See *W v Egdell* [1989] EWCA Civ 13 at [16].

348 Under PACE, s 8.

349 Under PACE, s 9 and sch 1, where the record is considered "excluded material" or "special procedure material". See CP 259, para 3.17 for further explanation.

350 Criminal Procedure (Attendance of Witnesses) Act 1965, s 2(1). See CP 259, paras 3.18-3.20 for further explanation.

351 Additional powers include, for example, PACE s 18 (search after arrest), s 19 (general power of seizure when police officer is lawfully on premises), s 20 (power of seizure for computerised information); s 32 (search on arrest); and s 78 (permits exclusion of unfair evidence).

or that the current framework for accessing them in sexual offences cases is insufficient. However, in our 2020 report on Search Warrants, we noted difficulties with the framework and access conditions for applications for search warrants for personal records.[352] These concerns are also relevant to applications for production orders because the access conditions for search warrants and production orders are the same. In particular, we noted that the overly restrictive nature of the access conditions acts as a bar on such applications and has led to an undesirable reliance on the voluntary provision of records to police[353] in circumstances when requests for such records are common.[354] In light of this, in our Search Warrants report we recommended that the Government consider[355]

> whether the law governing access to confidential personal records … under the Police and Criminal Evidence Act 1984 strikes the right balance between (1) the prevention and investigation of serious crime; and (2) the protection of the confidentiality of health and counselling records, and whether the law ought to be reformed.[356]

2.200 From this it appears to us that defendants' records may be being sought and obtained on a voluntary basis without appropriate scrutiny and formalised statutory criteria. Therefore, the Government may wish to consult on whether this is a problem specifically in the context of defendants' personal records in sexual offences cases.

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352 In the context of search warrants, personal records are a form of specially protected "excluded material". See PACE, ss 11 and 12.

353 When voluntarily providing records, third parties rely on the public interest exception to the common law duty of confidentiality.

354 Search Warrants (2020) Law Commission Final Report No 396, paras 12.88-12.90.

355 Although we considered the "case for reform to be a strong one", we did not "make a firm recommendation for reform" because making changes to the access conditions for search warrants "would also change the law for production orders" which we noted are more frequently used. Further, our focus was on medical records, and we had received no evidence about other types of personal records covered by the definition in PACE, s 12, namely "counselling and spiritual records". See Search Warrants (2020) Law Commission Final Report No 396, paras 12.109-12.110.

356 Above, para 12.111.

Recommendation 11.

2.201 We recommend that the Government consider the following matters:

(1) whether in sexual offences cases, defendants' personal records are currently disproportionately sought by the police/prosecution;

(2) whether the current framework for accessing defendants' personal records is insufficient; and

(3) whether our recommended personal records regime should be extended to defendants' personal records (adapted to the particular considerations that arise for accessing defendants' records).

ACCOMPANYING FRAMEWORK

2.202 In the sections above we concluded that requests for access and production of personal records must meet an enhanced relevance threshold which we introduce via a structured discretion model, with judicial scrutiny reserved for compelled production pre- or post-charge. Our recommended threshold is made up of two limbs; the evidence must be likely to be relevant to an issue at trial or to the competence of a witness to testify; and access/production must be necessary in the interests of justice.

2.203 We also discussed the regime's parameters concluding that there should be no absolute prohibition on accessing complainants' pre-trial therapy records. We explain that the regime will apply to records created by a professional third party or the complainant which are held by a professional third party, in which the complainant has a reasonable expectation of privacy. We recommend that certain types of record should be exempted from the bespoke regime, meaning that they are instead governed by the current general framework for access and production. Exempted records include medical records related to physical evidence directly associated with the events that are the subject of the criminal complaint, and of the complainant's recent complaint. Finally, we considered the position for records or information held otherwise than by third parties. We also recommend that the Government considers the position in relation to defendants' personal records.

2.204 We bring this chapter to a close by considering in this section, the legislative and the non-legislative framework which should accompany the bespoke regime. In the next section, we consider how the framework for personal records should address inconsistencies which are evident on the complainant's personal records which may be the product of trauma.

2.205 In the consultation paper,[357] we explored protective measures as an alternative to judicial scrutiny of requests by consent. Consultees indicated broad support for a statutory framework setting out the thresholds, obligations and procedures for the bespoke regime. For example, based on the Interim Findings Report of the CPS

[357] CQ 8.

Operation Soteria research, Professor Vanessa Munro commented that there are also "likely to be benefits to placing the regime within a more structured, statutory framework that clearly underscores the nature of professionals' obligations to consider proportionality, probative significance and privacy". To maximise consistency and compliance, Dr Leahy favoured legislation and an accompanying code, similar to the PCSCA 2022 code for extracting information from electronic devices. In our view, a statutory framework will have an important declaratory effect, will maximise the effectiveness of the regime and will be consistent with the position for electronic devices in the PCSCA 2022 and TPM in VAPA 2024. We note that for both of these frameworks, primary legislation requires an accompanying code of practice to be drafted and describes who should be consulted during its preparation.[358]

2.206 There was broad and persuasive support regarding the use of guidance. In the consultation paper, we suggested that enhanced procedures could be set out in guidance, as is done in Scotland, with which two consultees agreed.[359] More broadly, consultees suggested guidance to complainants should be directed at generating informed consent and explaining the impact of consent/refusal.[360] In relation to the police and prosecution, consultees commented that guidance should be practical, support implementation and reiterate their obligations. We note that these could extend to their data protection obligations.[361] For record holders, it was suggested that guidance and public information should not create additional burdens and could focus on what can be appropriately requested and disclosed, with the aim of generating more consistent and timely responses from record holders.[362] Record holder consultees also described to us the considerable variation in the way therapy notes are taken, retained and shared.[363] The following topics emerged for any guidance to record holders: the role and status of clinical versus process notes; for medical examiners, the role and status of evidence gathering and background information; protections for video and audio-recorded counselling sessions; what information should be provided to complainants from the outset; how therapists should manage the process of seeking the complainant's views regarding a request to access their notes; expectations regarding engagement with the police and prosecution; and timescales for responding to requests. We note that the Home Office Review of Disclosure makes a number of detailed recommendations regarding training and guidance on disclosure.[364]

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358 See Home Office, *Extraction of information from electronic devices: code of practice* (March 2023), pursuant to PCCSA 2022, s 45(2); and Home Office, *Requests for Victim Information Draft Code of Practice* (December 2023) pursuant to PCCSA 2002, s 44D as inserted by VAPA 2024 s 28 and Home Office, *Requests for Victim Information: Draft Code of Practice* (April 2025).

359 Dr Shooter; and LCCSA.

360 HMCPSI; and LCCSA.

361 HM Council of Circuit Judges; and Claire Waxman.

362 Attendees at British Psychological Society ("BPS") event; HMCPSI; Dr Clifford; and law enforcement stakeholders.

363 Daniel Prout; BACP; and attendees at BPS event.

364 J Fisher KC, *Disclosure in the Digital Age Independent Review of Disclosure and Fraud Offences* (March 2025) pp 184-191. For example, Recommendation 15 suggests a "cross-agency disclosure learning standard for investigators and disclosure officers". Recommendation 35 invites the "Judicial College to

2.207 Finally, based on her Operation Soteria research, Dr Smith argued that there should be "dip-sampling of TPM applications to check compliance with best practice, and regular thematic inspections by HMCPSI on TPM and disclosure practices". In our view, collection of data and evaluation of compliance with the new framework will be very valuable, as will thematic inspections by HMCPSI. Further, there is precedent for this in VAPA 2024, which requires the Government to prepare a report on the operation of counselling information requests after three years.[365]

Recommendation 12.

2.208 We recommend that there should be a statutory code of practice to accompany our statutory framework explaining our recommended threshold and procedures, and the duties of the parties and the police.

2.209 We recommend the Government drafts non-statutory guidance on the same topics directed to complainants, third parties, and the defence.

2.210 We recommend that the Government collects data evaluating compliance with our recommended framework.

2.211 We recommend that HMCPSI considers conducting thematic inspections regarding the CPS' compliance with our recommended framework.

INCONSISTENCY

2.212 In the consultation paper, we asked how the personal records framework should respond to trauma.[366] We explained that there is "well-established evidence base regarding the ways trauma may impact on the ability of a witness to recall and cogently describe an incident".[367] However, there is a contradiction because "the adversarial process is predicated on … inconsistencies" being indicative of lack of veracity and/or credibility.[368] We added that it is difficult to distinguish between the following:

(1) "Inconsistencies which are the product of trauma (and not relevant to credibility)".

consider specific training on judicial case management of disclosure matters … and the use of a new Consolidated Guidance"; Recommendation 38 suggests consolidation of "the Attorney General's Guidelines and Judicial Protocols into a refined single guidance document referenced in legislation".

365 VAPA 2024, s 30.

366 CQ 17: "We invite consultees' views on how our provisional proposals for compelled production and disclosure should respond to inconsistencies evident on a complainant's personal records which may be the product of trauma". CP 259, para 3.266.

367 CP 259, para 3.263, citing CPS Legal Guidance: Pre-Trial Therapy (2022), "Potential impact of therapy on memory, Inconsistencies".

368 CP 259, para 3.263.

(2) "Inconsistencies which are relevant to credibility".[369]

We noted that fundamentally, "these are matters for the jury to decide". The Crown Court Compendium's example direction on inconsistent accounts acknowledges this; it directs jurors to keep in mind that trauma may have an effect on memory.[370] We added that CPS guidance also reflects this. It states that even taking into account the impact of trauma on memory, evidence containing inconsistencies is likely to meet the test for disclosure and could mean that a prosecution will not proceed.[371] Finally, we commented that our proposed thresholds and factors may assist in drawing the above distinction.[372]

2.213 Seven stakeholders supported reform of thresholds to assist with correctly identifying inconsistency which is the product of trauma.[373] The main argument that emerged in support of reform was the over reliance on inconsistency in the criminal process and the failure to take account of the impact of trauma. However, seven consultees rejected changes to thresholds that might restrict evidence of inconsistency being put before the jury.[374] Their arguments, explained below, were more compelling and from these we conclude that there should be no change to thresholds to respond to inconsistency that may be the product of trauma.

2.214 First, consultees who rejected change argued persuasively that where the complainant gives an inconsistent account, it is a matter for the jury to evaluate that inconsistency, taking account of evidence and commentary from the defence and prosecution, and directions from the judge. In their view, there are range of possibilities for the jury to consider when evaluating inconsistency, including: the inconsistency being the product of the allegation, the complainant being traumatised by something else, the complainant being untruthful about the allegation, and the complainant being untruthful about the trauma.[375] The judge restricting the scope of this evaluation risks usurping the role of the jury.

2.215 Secondly, more practically, as we explained in the consultation paper, distinguishing inconsistency which is the product of trauma from inconsistency which is indicative of lack of veracity is difficult. This would be a complex and onerous task for a judge. HM Council of Circuit Judges suggested that the judge might need assistance with this task via an explanation from the complainant. Moreover, two consultees suggested that assistance would be required from an expert.[376] However, we think it more likely

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369 CP 250, para 3.264.

370 CP 259, para 3.264 citing Judicial College, *The Crown Court Compendium*, Part I: Jury and Trial management and Summing Up (June 2022) 20-7, Example 4.

371 CP 259, para 3.264 citing CPS Legal Guidance: Pre-Trial Therapy (2022), "Potential impact of therapy on memory, Inconsistencies".

372 CP 259, para 3.265.

373 A law enforcement consultee; CPS; HM Council of Circuit Judges; JURIES; CWJ; Claire Waxman; and Dr Clifford.

374 Cardiff University Innocence Project; Dr Thomason; CBA; Six Circuits; Law Society; Bar Council; Andrew Wilkins.

375 Six Circuits; and attendees at BACP event.

376 West Mercia Police; and LCCSA.

that an expert would indicate that there are a range of possible responses to trauma, rather than a single response.

2.216 Thirdly, change is not justified when there are alternative options which are less risky, such as judicial directions (which encourage jurors to carefully evaluate inconsistency), expert evidence of general behavioural responses and the police and prosecution adopting a more nuanced approach to inconsistency in their case preparation and trial presentation strategies.[377]

2.217 Fourthly, our bespoke regime and amended threshold should also provide some assistance in responding to this issue. Two consultees made suggestions about how thresholds should prevent unwarranted reliance on inconsistency. In our view, our new threshold will provide judges with the tools to evaluate properly the scenarios suggested by these consultees.[378] JURIES suggested that only very pronounced inconsistencies should be disclosed. The CWJ said there should be a specific basis for thinking that inconsistencies exist.

> We believe that the mere fact that some account of the offence was given by the survivor to the therapist, which could potentially be mined for inconsistencies, should not be sufficient to meet the threshold, unless there is a specific reason for believing that there are inconsistencies present. This search for 'inconsistencies' is at the heart of the process at present.

2.218 Finally, amending thresholds in this way raises a wider concern about parity between defendants and complainants in relation to reliance on inconsistency. The Six Circuits said:

> If the possibility of trauma is an adequate basis for excluding inconsistencies in a complainant's account, then the Commission will presumably extend the same reasoning to inconsistencies in the account [of] any defendant who asserts that he has been traumatised by being subject to a false allegation of rape.

2.219 The Bar Council made the same point but gave further detail:

> Defendants, when giving evidence, frequently depart from their significant comments upon arrest, or add flesh to the bones of an interview, or even provide a gloss on a defence statement settled with the assistance of counsel. They are quite properly cross-examined on any inconsistencies, which are sometimes compelling evidence

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377 Under the current National Operating Model, RASSO training for CPS lawyers involves a "2-day RASSO induction course, as well as a 1-day session on Disclosure Management and a half day session on the Impact of Trauma on Memory". A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants: Final Findings from Independent Academic Research* (December 2023) pp 115-116. In addition, in January 2024, the CPS updated its legal guidance on rape and sexual offences including the impact of trauma on memory. HMCPSI note that this "recognised that it is crucial for prosecutors to understand the impact so that case strategies challenging assumptions on such matters can be robustly developed and for the prosecution case to be presented at trial in a way that contextualises and explains this for a jury". See HMCPSI, *An inspection of early advice and pre-charge decision making in adult rape cases: A thematic inspection of the quality of the Crown Prosecution Service's early advice and pre-charge decision-making following implementation of the national operating model for prosecuting adult rape cases* (July 2025) para 3.14.

378 JURIES; and CWJ.

> of guilt and on other occasions are easily explicable as the product of, inter alia, confusion, panic or intoxication. The same should apply to complainants who have given inconsistent accounts, some of which may be explicable on grounds of trauma, or similar panic or confusion, and some of which may be evidence of confabulation or unreliability.

We share consultees' concerns about giving complainants greater leeway regarding inconsistency than defendants. This is a further reason to reject changes to the thresholds which respond to inconsistency. Overall, we conclude that judicial directions and expert evidence which we recommend in Chapter 10 and case preparation and trial presentation strategies are appropriate mechanisms for addressing inconsistency which may be the product of trauma. Addressing this issue by changing evidential thresholds is not justified and would not be workable.

Chapter 3: Sexual behaviour evidence

INTRODUCTION

3.1 Sexual behaviour evidence ("SBE") is evidence of, or questioning about, a complainant's sexual behaviour. The behaviour could have happened before or after the sexual activity that is the subject matter of the trial.[1] It could be with the defendant, with another ("third-party SBE"), or without anyone else. The term "sexual behaviour" is intentionally wide and covers a range of behaviours and experiences that are sexual. SBE includes secondary evidence of sexual behaviour, for example, evidence of pregnancy or sexually transmitted disease ("STD").

3.2 Having evidence of one's sexual behaviour introduced in court and being cross-examined on it can be highly distressing, humiliating, and in some cases traumatising.[2] Evidence of sexual behaviour is intrinsically personal and its use in the trial process is an interference (though not necessarily unlawful interference) with the complainant's qualified right to respect for private life under article 8 of the European Convention on Human Rights ("ECHR").[3]

3.3 In a trial that is concerned with determining whether a particular instance of sexual behaviour occurred as alleged, detail of unconnected sexual behaviour is often also irrelevant, for reasons summarised by Lady Hale in *R v C*:

> It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time in this place.[4]

3.4 Given this, it will be rare for evidence about sexual behaviour at a different time, in a different context, or with a different person, to be relevant to the issues that a court has to determine in a sexual offences trial. However, its use in trials has over the years led to criticism that its relevance is insufficiently interrogated.[5] When it is used in a trial, it can also be highly prejudicial. There are longstanding concerns that SBE evokes or reinforces what are known as the "twin myths": that a complainant who is

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1 See, for example, *R v Evans* [2016] EWCA Crim 452 which included consideration of sexual behaviour that occurred after the alleged rape.

2 There is no single agreed definition of trauma, in this report we generally use the term to describe the serious negative impact on a person's emotional, mental and physical health caused by a distressing event or series of events. See Ch 1.

3 "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". European Convention on Human Rights ("ECHR"), art 8. We refer to this generally as "privacy rights" or a "right to privacy". For further discussion of art 8, see paras 1.12 to 1.21 of Appendix 1.

4 [2009] UKHL 42; [2009] WLR (D) 272 at [27].

5 See, for example, J Conaghan and Y Russell, *Sexual History Evidence and the Rape Trial* (2023) p 160.

sexually active is (i) more likely to consent to sex in general, and (ii) less worthy of belief.[6] Because of the risk of prejudice and harm to the complainant, combined with its irrelevance in many trials, the admission of SBE has been restricted in some form in sexual offences trials since the 1880s.[7] Such provisions are sometimes referred to as "rape shield legislation" as they operate to protect complainants from unnecessary and intrusive questioning about their sexual behaviour.

3.5 In the consultation paper we summarised the history of restrictions on the use of SBE, including repeated changes to the law, followed by extensive criticism of each model in turn.[8] We considered criticisms of the current law (under section 41 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999) and concluded that there was a case for reform. We then reviewed different models of regulating the admission of SBE and provisionally concluded that a structured discretion model would best meet the challenges of admitting SBE, while militating against the most problematic aspects of regulation. We proposed a threshold with two stages, based on Canadian legislation,[9] that would restrict the use of SBE unless (1) it has substantial probative value and (2) its admission would not significantly prejudice the proper administration of justice. Such a threshold would ensure that all evidence necessary for a fair trial would be admissible.[10] We provided a list of factors, also drawing from Canadian legislation, that could help guide judicial decision making. We also made proposals designed to improve how applications are made and decided, and to extend the scope of the framework so that it applies to the prosecution as well as the defence, and in cases other than sexual offences where SBE is sought to be adduced.

3.6 From the evidence we received in consultation, it is clear that this remains a highly complex and nuanced issue. We heard powerful evidence from consultees about the harm that questioning about sexual behaviour can cause complainants. We have also heard concerns that SBE is routinely admitted without the required scrutiny, and examples of seemingly irrelevant but nevertheless prejudicial SBE being introduced by defence advocates. We also heard about good practice and positive changes, reflecting greater understanding of the risks associated with SBE. Consultation responses also reiterated the importance of ensuring that evidence necessary for a fair trial is admissible. In explaining the rationale for our recommendations for reform, we will not set out each of the consultation responses in detail, though we will make reference to examples that help to illustrate our policy development.

3.7 In this chapter we recommend a structured discretion model to regulate the admission of SBE. We make recommendations about factors that will help guide the discretion supporting the model in producing more consistent, clear, and principled decisions. We also make recommendations extending the scope of the SBE regime to apply to

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

7 *R v Riley* (1887) 18 QBD 481. The subsequent changes to rape shield legislation in this jurisdiction follow shifting criticism of the use of SBE in trials, and concern about the efficacy of the earlier provisions. They also reflect the changing societal context and understanding of consent. See also Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper 259 ("CP 259"), paras 4.7-4.13.

8 For a fuller discussion of the current law, historical developments, and analysis of alternative options, see CP 259, Ch 4.

9 Criminal Code (Canada), s 276.

10 CP 259, para 4.176.

SBE in criminal trials for all witnesses, whoever is seeking to adduce it, and in whatever context it arises. We recommend that the current process for making and determining applications remains largely unchanged, with the addition of a requirement for judges to provide written reasons to improve consistency, clarity and scrutiny of decision making[11] in this complex and challenging area.

3.8 Our recommended framework also sits alongside other recommendations in this report designed to minimise the risk of myths and misconceptions inappropriately influencing the trial process. The framework we describe in this chapter is the basis for our recommendations in relation to false allegations evidence (FAE) and criminal injuries compensation evidence (CICE).[12] Where SBE arises from content in a personal record, the access to that material will be restricted by our recommendations in Chapter 2. In Chapter 10 we outline judicial directions and the use of expert evidence that can help ensure juries assess evidence in an appropriate way. Finally, in Chapter 11, we explain the most effective use of the judge's trial management powers to ensure evidence and questioning is relevant.

3.9 Throughout this chapter we provide examples to help explain our recommendations and illustrate how they would operate. As we explore below, the relevance of SBE is highly fact specific. This means that our examples are necessarily fact specific. They are illustrative only and we do not suggest that the contexts we use would be or should be commonplace.

CURRENT LAW

3.10 The current "rape shield legislation" for England and Wales is in section 41 of the YJCEA 1999 ("section 41"). Described as a "gateway approach", section 41 restricts all SBE sought to be adduced or asked about on behalf of the defence, unless it meets the criteria for one of four gateways. In addition, the evidence must relate to a specific instance or instances of sexual behaviour[13] and the court must be satisfied that not to admit the evidence might make the jury reach an "unsafe" conclusion on any relevant issue in the case.[14] The four gateways are:

(1) Not an issue of consent: SBE can be admitted as evidence of something other than the complainant's consent to the sexual activity with the defendant. This gateway permits SBE to be admitted to support the defendant's claim of reasonable belief in the complainant's consent. It also permits SBE to be admitted as evidence that the complainant has a motivation for fabricating the allegation, as an alternative explanation for particular knowledge of a sexual act, or as an alternative basis for a pregnancy or STD that the prosecution claim was a result of the alleged offence.[15]

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11 Such scrutiny may be by the parties themselves when considering the outcome and reasons for the decision, and an appeal court where applicable.

12 See Chs 4 and 5.

13 Youth Justice and Criminal Evidence Act ("YJCEA") 1999, s 41(6).

14 YJCEA 1999, s 41(2)(b).

15 YJCEA 1999, s 41(3)(a).

(2) Similarity: SBE can be admitted 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".[16] In the House of Lords, this gateway was interpreted in a way that enables SBE to be admitted if it is so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.[17]

(3) Contemporaneity: SBE can be admitted as evidence that the complainant consented if it relates to sexual behaviour that occurred "at or about the same time" as the alleged offence.[18]

(4) Rebuttal: SBE can be admitted if it is used only to rebut evidence presented by the prosecution.[19]

3.11 To be admissible under gateways (1) to (3), the use of the SBE must not have the purpose, or main purpose, of impugning the complainant's credibility.[20]

3.12 Section 41 was introduced after the Home Office report "Speaking up for Justice" recommended new rape shield legislation. The predecessor to section 41, in section 2 of the Sexual Offences (Amendment) Act 1976, gave judges a wide unstructured discretion to admit SBE. There was growing criticism of the way SBE was admitted and used in trials.[21] However, section 41 itself has faced criticism since its introduction. In the consultation paper, we described the main themes of such criticism:

(1) Too restrictive. The gateways approach has been criticised for being unduly restrictive as it requires SBE to meet specific criteria to be admissible. As the relevance of SBE is so fact-dependent and case-specific, this can result in important evidence being excluded.[22] Some have argued that the gateways themselves are too narrow to permit all evidence necessary for a fair trial.[23]

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16 YJCEA 1999, s 41(3)(c).

17 *R v A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1, para 46, (Lord Steyn). For further discussion of this gateway, and the case of *R v Evans* [2016] EWCA Crim 452, another high-profile case involving the similarity gateway, see CP 259, paras 4.30-4.39.

18 YJCEA 1999, s 41(3)(b).

19 YJCEA 1999, s 41(5).

20 YJCEA 1999, s 41(4).

21 See, for example, M Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice ("Archbold")* (2022) 8-289; Jenny McEwan, "Law Commission Dodges the Nettles in Consultation Paper No. 141" [1997] *Criminal Law Review* 93, 102; and *Re A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1 at [28], (Lord Steyn).

22 See, for example, L Hoyano, The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: view from the barristers' row", Criminal Bar Association (2018); and D Birch "Untangling sexual history evidence: a rejoinder to Professor Temkin" [2003] *Criminal Law Review* 370, 379.

23 L Marsh and J Dein, "Serious Sex Offences in England and Wales: defending the indefensible" in R Killean, E Dowds and AM McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (2021) p 52.

(2) Too broad. Some have argued that section 41 is too lenient and an inappropriately high number of applications to admit SBE are successful.[24] There is also criticism of the gateways themselves, with some arguing that the gateway permitting SBE as evidence of reasonable belief in consent is inherently problematic.[25] There are also concerns that section 41 is not working as intended as it is interpreted too widely,[26] and too often not applied at all to SBE adduced at trial.[27]

(3) Too complicated. One of the more consistent criticisms of section 41 is that it is too complex. An unduly complex model can lead to inconsistency in application, a lack of transparency in decision making, and mistrust. A range of stakeholders raised with us concerns about the complexity of section 41, including lawyers, a judge, and academics.[28]

3.13 We concluded that these criticisms justified considering a new approach to SBE.[29]

A PRINCIPLED APPROACH TO SEXUAL BEHAVIOUR EVIDENCE

3.14 To be effective, any framework for restricting SBE needs to achieve the following aims: address the risks of perpetuating myths, of impermissible reasoning and of causing undue harm to complainants; uphold the integrity of the trial process; and ensure the defendant can receive a fair trial. We have identified four conditions that should be met for an SBE framework to achieve those aims. A framework for SBE admissibility should:

(1) facilitate a proper interrogation of relevance;

(2) have a threshold for admissibility that is higher than bare relevance;

(3) not amount to a complete ban of all SBE; and

(4) allow evidence to be admitted if it is necessary for a fair trial.

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24 See, for example, C McGlynn, "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367, 374.

25 See, for example, C McGlynn "Rape Trials and Sexual History Evidence; Reforming the Law on Third-Party Evidence" (2017) 81 *Journal of Criminal Law* 367; and L Kelly, J Temkin and S Griffiths, "Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials" (Home Office Online Report 2006).

26 See, for example, F Page and D Birch, "Evidence: Rape-Youth Justice and Criminal Evidence Act 1999, s. 41" [2004] *Criminal Law Review* 373 at 375.

27 See, for example, CP 259, para 4.82. Further section 41 applies only to evidence sought to be adduced by the defence, there are no restrictions specific to SBE for evidence sought to be adduced by the prosecution.

28 CP 259, para 4.93.

29 CP 259, para 4.158.

Relevance

3.15 All evidence must be relevant to be admissible in any trial. In a previous report, the Law Commission explained that, to be relevant, evidence must have "some probative value on a matter in issue in the proceedings".[30] We refer to this as "bare relevance".

3.16 Within this definition of "bare relevance" are two concepts of relevance: "logical relevance" and "legal relevance". As one key textbook on criminal evidence explains, logical relevance takes a common-sense and binary approach: does Y make X more or less likely? In the context of a trial this means does Y (the evidence sought to be adduced) make it more or less likely that X (a matter in issue to be determined by the fact finder in a trial) is true? To have an impact on X, Y must have some logical, common-sense connection to X.[31] It is binary, in that Y either has an impact on X, however small, or it does not. Legal relevance, however, considers the size of the impact: does Y have *enough* of an impact on whether X is true or not, to be worthy of admission?[32] This can be seen in the "probative value" part of the description of relevance above. "Some" probative value is not a high threshold.

3.17 Courts in England and Wales approach questions of bare relevance for the admission of evidence as a combination of logical and legal relevance. Relevance is not determined in isolation; courts will consider relevance in the context of the matters in issue in the trial, what the purpose of admitting the evidence is, and what other evidence there is.[33]

3.18 SBE is often irrelevant to the issues the court has to determine. The facts that are "in issue" in a criminal trial are the elements of the offence that the prosecution must prove, and any elements of a defence that the defendant bears the burden of proving.[34] The prosecution and defence may adduce evidence about facts or matters that help to establish whether the elements of the offence are made out or not.[35]

3.19 As the quote from Lady Hale above explains, sexual activity and consent to sexual activity is person and time specific. On that basis, details of any sexual activity that is not the subject matter of the trial will usually be irrelevant. If the complainant and defendant had consensual sex before the alleged rape, without other relevant details, the fact of that previous consensual sex neither helps prove nor disprove that the complainant consented on the following occasion or that the defendant reasonably

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30 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 5.7.

31 For example: evidence of the size of a defendant's feet is logically relevant to the question of whether the defendant left shoe marks at the scene of a crime. Evidence of what the defendant ate the previous day is not logically relevant to whether the defendant left the shoe marks.

32 P Roberts and A Zuckerman, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) pp 109-118.

33 For example, in the scenario in footnote 31 above, evidence of what the defendant ate the previous day may become relevant if food remnants were discovered in the mark from the tread of the shoe.

34 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2025) F1.1. For example: in a trial for an offence of sexual assault (Sexual Offences Act 2003, s 3) the facts in issue that the prosecution must prove include that the defendant intentionally touched the victim, that the touching was sexual, that the victim did not consent to the touching and that the defendant did not reasonably believe that the victim consented.

35 This may include, for example, evidence of motive, or evidence that enables the jury to evaluate other evidence (including evidence as to the credibility of a witness or expert evidence). Such evidence allows the defence or prosecution to make their case before the jury.

believed they consented. Questions of relevance are particularly acute in the context of third-party SBE (that is, evidence that the complainant engaged in sexual activity with someone other than the defendant). In most circumstances, the fact that the complainant had sex with someone else on a separate occasion is not logically relevant to the question of whether the complainant consented to sexual activity with the defendant, or whether the defendant reasonably believed they consented.

3.20 There are, however, circumstances in individual cases that mean SBE is relevant to a fact in issue. For example, in a case where a complainant alleges that they contracted an STD during a rape, evidence that the complainant was being treated for an STD the week before the alleged rape is logically relevant to the question of whether or not the STD was a result of the rape. The prosecution have to prove that sexual intercourse did take place between the defendant and the complainant (that is one of the "facts in issue"). Whether or not the complainant contracted an STD from the defendant is relevant to that fact in issue.

3.21 This evidence would be irrelevant if that fact was not in issue. Consider now that the defendant accepts there was sexual intercourse with the complainant on the relevant occasion when the STD was transmitted but claims the sex was consensual. The question of whether an STD was transmitted by the defendant or another person is no longer relevant to the issues the prosecution have to prove. Evidence that the complainant was being treated for an STD before the alleged rape is therefore no longer relevant and should not be admissible.

3.22 There are also circumstances where SBE that has no relevance on its face can subsequently become relevant. Take the first example in paragraph 3.19 above, and assume that the defendant argues that they reasonably believed, based on their previous consensual sex the day before, that the complainant consented. As the defendant asserts that their reasonable belief in consent is based on the previous consensual sex, the fact of that previous consensual sex would now be logically relevant to one of the questions the court has to determine, namely whether the defendant had a genuine belief in consent, (and if it was genuine, then whether it was reasonable).[36] This does not mean that such evidence should always be admissible.[37]

Encouraging a proper interrogation of relevance

3.23 SBE, like all evidence, must be relevant to be admissible (to meet the "bare relevance" threshold). Relevance is not always clear; it can depend on a number of

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36 More specifically, in order to find the defendant guilty, the jury would have to be sure that the defendant did not have a genuine belief in consent, or that the defendant's genuine belief in consent was not a reasonable belief.

37 It is an established principle in criminal trials that a fair trial does not require all relevant evidence to be admissible. Relevant evidence can be prohibited within a fair trial, for example hearsay evidence and bad character evidence are subject to enhanced relevance thresholds requiring greater probative value than "bare relevance". Relevant prosecution evidence can also be excluded under section 78 of the Police and Criminal Evidence Act 1984 ("PACE") if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". A number of factors can influence whether relevant evidence ought to be admitted or not; as *Roberts & Zuckerman's Criminal Evidence* explains, the limits on trial length and amount of information a jury can effectively absorb can all influence whether relevant evidence is admitted: P Roberts and A Zuckerman, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 112.

factors, and this can change as the case develops. Relevance can also be skewed by misconceptions. For example, if one believed that the twin myths considered above were true, any SBE that showed the complainant was "unchaste" could be considered logically relevant to issues of consent and credibility. However, if one recognises that the twin myths are false, then the relevance of SBE going to the chasteness of the complainant is, as a generality, irrelevant to the questions of consent and credibility.

3.24 A number of consultees raised the fact that SBE is often just irrelevant to the matters in issue in sexual offences trials.[38] Given that consent is person and situation specific, any claim that one consensual sexual encounter is relevant to the question of consent in a separate situation requires thorough probing. Professors Joanne Conaghan and Yvette Russell have argued that assertions of logical relevance can be influenced by generalised assumptions based on "gendered inequalities of power" even if they do not amount to "myths" as such.[39] In our view it is therefore imperative that any framework regulating SBE must ensure that the relevance of the evidence is properly interrogated.

More than bare relevance

3.25 Relevance alone is not a sufficiently high threshold for SBE given the risks to the trial process it presents. As we explained in the consultation paper:

> [relevance] is not a sufficiently robust enquiry for SBE due to its inherent risk of introducing or perpetuating myths and misconceptions, and the negative impact of invading the privacy and dignity of complainants.[40]

3.26 The current SBE framework and its predecessors all impose a higher threshold on SBE than bare relevance before it can be admitted in sexual offences trials. This reflects the problems identified with SBE since it was first restricted in the 1880s; the law has ever since ensured it is subject to greater scrutiny through a different threshold than other types of evidence that do not carry such problematic risks to the trial process. Further, SBE is similar to other types of evidence that can be potentially prejudicial including bad character evidence and hearsay evidence. Those types of evidence are also subject to a threshold higher than bare relevance. Where there is a specific threshold for evidence that is higher than the general bare relevance threshold, it provides the opportunity for proper interrogation of relevance as part of the analysis of its probative value. This is particularly important for SBE where there are significant risks that myths about sexual violence and sexual behaviour improperly influence its perceived probative value. We conclude that any new framework should similarly ensure that the evidence has greater probative value than bare relevance ("some" probative value) before it can be considered admissible. Below we consider what the higher threshold should be.

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38 Including The Pan-London Rape Crisis Centres Experts by Experience Panel and Rape Crisis England and Wales ("RCEW").

39 J Conaghan and Y Russell, *Sexual History Evidence and the Rape Trial* (2023) p 148.

40 CP 259, para 4.167 citing P Rook and R Ward*, Rook and Ward on Sexual Offences: Law and Practice (6th ed 2021) ("Rook and Ward")* 26.182.

Not a complete ban

3.27 In the consultation paper we considered both a complete ban on SBE and a partial ban on third-party SBE. We provisionally concluded that, while there are risks associated with admitting SBE, its admission should be neither completely nor partially prohibited as its admission will sometimes be essential to ensure a fair trial.[41] We gave examples of (1) SBE involving the defendant and (2) SBE involving a third party:

(1) D is charged with rape of C. While giving evidence C tells the court that they have never engaged in consensual sexual activity with D before. There is evidence from C's phone records that they had told mutual friends of a previous consensual sexual relationship with D. D wishes to adduce that phone record to rebut C's evidence.

(2) In a trial for rape, the prosecution asserts that C had never had sexual intercourse before the alleged rape and that a resulting pregnancy (that was later miscarried) was evidence of the offence. The defence case is that D has never had sexual intercourse with C. The defence has evidence that C had consensual intercourse with another person a week before the alleged rape. As an alternative explanation for the pregnancy, it is relevant evidence with significant probative value.[42]

3.28 The majority of responses agreed that the admission of SBE should be neither completely[43] nor partially banned.[44] Consultees agreed that even a partial ban would limit the defendant's right to a fair trial.[45]

3.29 Despite general support for this approach, consultees emphasised the importance of restricting the admission of SBE. They argued that cases that warrant the admission of such evidence are likely to be very rare.[46] In our view, this supports our conclusion that an effective framework for SBE is one that prevents the admission of SBE when appropriate to do so, and admits it when necessary for a fair trial.[47] We therefore conclude that there should not be a complete ban on all SBE, or on any one category

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41 Consultation Question 18: "We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence. Do consultees agree? We provisionally propose that there should not be a complete ban on the admission of third-party sexual behaviour evidence. Do consultees agree?".

42 CP 259, paras 4.105-1.108.

43 34 out of 39 responses, 2 disagreed, and 3 gave an answer categorised as "other".

44 31 out of 36 responses, 2 disagreed, and 3 gave an answer categorised as "other".

45 CP 259, paras 4.105-4.108.

46 Including Dr Charlotte Herriott; the CPS; Dame Maria Miller; HMCPSI; Dr Susan Leahy; Professors Joanne Conaghan and Yvette Russell; and RCEW.

47 This approach is further supported by the jurisprudence from the European Court of Human Rights ("ECtHR"). The ECtHR has found approaches to SBE that allow consideration of both the defendant's right to a fair trial under art 6 and the complainant's right to respect for their private life under art 8 to be compatible with the ECHR. From this we concluded that the ECtHR would not accept a complete ban on SBE as it would not allow for consideration of art 6. See Appendix 1, paras 1.92-1.99; and the ECtHR caselaw: *JL v Italy* App No 5671/16; and *Y v Slovenia* App No 41107/10.

of SBE. Instead, we consider how to ensure a framework that allows some SBE to be admitted can achieve these aims.

Recommendation 13.

3.30 We recommend that there should not be a complete ban on the admission of sexual behaviour evidence.

Necessary for a fair trial

3.31 We have established that some SBE can be relevant to a matter in issue. Indeed, as we describe in the above paragraphs, some SBE may be necessary to ensure the defendant receives a fair trial under article 6 of the ECHR. A complete ban on SBE would, therefore, be incompatible with article 6. Therefore, any framework must allow such evidence to be admissible. This principle is best illustrated by the decision of the House of Lords in *Re A (No 2)*.[48] In that case, the Law Lords considered the admissibility of SBE under section 41 in light of the defendant's right to a fair trial. They concluded that section 41 can be interpreted in a way that is compatible with article 6 by allowing evidence that is necessary for a fair trial to be admitted through the gateways. This has been called the "safety valve" of section 41.[49]

A NEW FRAMEWORK FOR SBE

3.32 In the consultation paper, we explained that section 41 is criticised as too restrictive, not restrictive enough, and, most compellingly in our view, too complex.[50] These features of section 41 have led to inconsistency, uncertainty, and opaque decision making. The focus of section 41 is on neither the risks of admitting such evidence, nor whether its admission is necessary for a fair trial.[51] This analysis was supported by a number of consultees.[52] For example, the Bar Council stated, "we also agree that the present system is both too restrictive in certain respects and too permissive in others". Evidencing the difficulties for practitioners, the Crown Prosecution Service ("CPS") submitted that the "current legislative framework featuring multiple gateways is complex and is challenging for practitioners to interpret consistently".

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48 [2001] UKHL 25.

49 *Rook and Ward* (2021), 26.23. We note that the House of Lords decision in *Re A (No 2)* has been subject to criticism for its approach to compatibility with the ECHR under s 3 of the Human Rights Act 1998. See, for example, A Samuels, "Human Rights Act 1998 Section 3: A New Dimension to Statutory Interpretation?" (2008) 29(2) *Statute Law Review* 130.

50 CP 259, paras 4.158.

51 Instead, the House of Lords had to "subordinate the niceties" of the statutory language of section 41 to ensure it permits the admission of evidence necessary for a fair trial: *R v A (No 2)* [2001] UKHL 25 at [45].

52 Including Dame Maria Miller; Geraldine Hanna, Commissioner Designate for Victims of Crime in Northern Ireland; Claire Waxman, Independent Victims' Commissioner for London; Juries Understanding Rape Is Essential Standard (JURIES), RCEW; Professor Vanessa Munro; and Solace Women's Aid. See also B Brewis and P Dargue, "Sexual Behaviour Evidence in the Court of Appeal (Criminal Division): Presenting the need for reform", p 18, accepted for publication in (2025) 85, *Journal of Criminal Law*. We note that support was not universal; 4 consultees and 2 judges told us that the current provisions are working satisfactorily.

3.33 Having considered the issues further in light of evidence received during consultation, we maintain our view that these concerns justify reform. As we described in the consultation paper, all frameworks for managing SBE present challenges. However, we consider that section 41 generates sufficient concerns to warrant a new approach. The model that we provisionally proposed, described in more detail below, moves away from the restrictive "gateways" approach that has led to much of the criticism and challenges in practice. Instead, we recommend a more logical, flexible framework with a suitably high threshold. This will help ensure greater consistency and appropriate scrutiny of SBE considering all of its risks, and a clearer route for admission when it is necessary for a fair trial. In the following sections we outline this structured discretion model.

A two-stage threshold

3.34 We recommend that all SBE should be subject to a threshold that requires the evidence to meet a two-stage test for admission. SBE should only be admissible if:

(1) the evidence has substantial probative value;[53] and

(2) its admission would not significantly prejudice the proper administration of justice.

3.35 This is the two-stage test we proposed in the consultation paper, which we define as a structured discretion model.[54] It provides a threshold for admission based on the qualities of the evidence. This gives judges the discretion to consider each piece of SBE in the context of the individual facts of the case. The structured discretion model will not separate categories of SBE. It does not try to foresee all the scenarios in which SBE should be admissible, as the current gateway model does. Instead, by recognising the multitude of categories, purposes, and factual scenarios involving SBE in sexual offences, the model will appropriately filter all SBE using the same threshold.

3.36 As we explained in the consultation paper, our phrasing of this test utilises terminology already familiar in this legal context.[55] "Substantial probative value" is part of the bad character framework in the Criminal Justice Act 2003.[56] The wording we use to describe the second stage comes from the House of Lords decision in *Re A (No 2)* where the Law Lords were explicitly considering the compatibility of SBE restrictions with fair trials. Lord Hope said of section 41:

> The element of judicial discretion has been reduced to the minimum. There are risks involved in that choice. It has deprived the judge of the opportunity, in the last resort, of preventing unfairness to the defendant in circumstances where to do this would not significantly prejudice the proper administration of justice.

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53 As we explain below from para 3.56, this substantial probative value must be in relation to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole.

54 Consultation Question 19.

55 CP 259, para 4.175.

56 Criminal Justice Act 2003, ss 100(1)(b) and 101(1)(e).

3.37 We also proposed a list of factors to consider when determining if the threshold is met. The factors would help structure the discretion, ensuring a fairer, more consistent and transparent decision making process.

3.38 A majority of consultees agreed with our proposed model.[57] However, we also received a number of concerns and suggestions for improvement. In this section, we address some of those and explain how we have refined our proposal to add clarity and structure to ensure a more robust framework. Most of the comments we received related to the individual stages, or the factors we proposed to help structure the discretion. We address those under each stage below. First, however, we explain our overall approach to the threshold.

Structured discretion

3.39 Consultees who supported the threshold argued, for example, that it was "preferable to a system of gateways for admissibility".[58] HMCPSI stated that in their view:

> The structured discretion model with a suitably high threshold for admission and a list of factors that must be considered is the best way to achieve the aims of rape shield legislation in a manner consistent with the defendant's right to a fair trial.

3.40 There were, however, concerns raised about a return to a discretionary model. Consultees suggested that the discretionary nature of the model risks inconsistency in decision making. For example, Centre for Women's Justice were concerned the proposed model gives "judges significantly more leeway and [will] result in more sexual behaviour evidence being admitted, as well as greater inconsistency". Dr Oriola Sallavaci suggested the proposed model "will lead to an inconsistent approach regarding SBE" and noted it could be considered a return to the regime prior to section 41.

3.41 We remain of the view that the structured discretion model is the most appropriate framework. We are alert to the risks posed by unfettered discretion; section 41 was introduced to replace a wide discretion model.[59] Similarly, we note concerns raised about the inconsistent approach to admissibility under the discretionary model in New Zealand.[60] However, unlike the predecessor to section 41 and the New Zealand model, our recommended model is one of *structured* discretion. Our revised list of factors and guidance explained below will more effectively structure the discretion, aiding consistency.

The two stages

3.42 We have described this model as having two stages. At stage 1, SBE must meet the threshold of "substantial probative value". This is an assessment of the probative value of the evidence itself. If it does not meet this threshold, it cannot be admitted.

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57 48 out of 88. 17 disagreed and 23 gave an answer categorised as "other".

58 HM Council of Circuit Judges.

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

60 E McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (2020) p 150.

SBE with just "some" probative value (bare relevance) will not be admissible.[61] If the evidence does have substantial probative value, the court must then also be satisfied that its admission would not significantly prejudice the proper administration of justice (stage 2). This is an assessment of the evidence in the wider context of a fair and just trial. If it would significantly prejudice the proper administration of justice, it will not be admissible. This means that SBE that has substantial probative value can still be inadmissible.

3.43 Our intention is that the two-stage test will operate to ensure that whenever SBE is necessary for a fair trial, it will be admissible. First, all evidence necessary for a fair trial will meet stage 1 as it will have substantial probative value in order to be necessary for a fair trial. Secondly, the proper administration of justice would be prejudiced if evidence necessary for a fair trial were not admitted.[62] Therefore, such evidence would not be prohibited by stage 2. In fact, its admission would be guaranteed by stage 2.

3.44 Some consultees queried whether stage 2 was needed, suggesting that stage 1 is a sufficiently high threshold, because no admission of evidence with substantial probative value would prejudice the proper administration of justice.[63] We disagree. While substantial probative value is a high threshold (discussed further below from paragraph 3.54), assessing the impact of the SBE on the proper administration of justice involves broader considerations than its probative value (for further discussion of what those considerations are, see paragraph 3.65 below). The admission of evidence that has substantial probative value can still prejudice the proper administration of justice. An example may assist to illustrate how stage 2 would operate.

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61 See para 3.54 below for analysis of "substantial".

62 CP 259, para 4.176.

63 Including Andrew Wilkins, barrister; Richard English, barrister; and Dr Samantha Fairclough.

Example 1:

The complainant has alleged the defendant violently raped her. The defence's case is that it was consensual rough sex, that the complainant enjoys rough sex but is now lying because other people found out and she is embarrassed by that. The complainant made a statement that she does not enjoy engaging in rough sex and would not consent to it. The defence wish to adduce two pieces of SBE to dispute this. The first is a series of text messages between the complainant and the defendant where they mutually discuss engaging in consensual rough sex highly similar to the acts in the alleged rape. The second is a video recorded by a previous partner. In the video the complainant is seen engaging with the previous partner in highly similar rough sex. The complainant's case is that in neither situation was she truly consenting although accepts they both appear to show she does. Both pieces of SBE could have substantial probative value in relation to whether the prosecution's case that the complainant does not enjoy, and therefore would not consent to, rough sex, is credible. However, the video of her with the previous partner has a much higher risk of causing unjustified distress and humiliation to the complainant. Further, as the complainant denies she was consenting in that video, it risks distracting the jury with a satellite issue, as well as necessitating disproportionate court time in establishing consent in an event involving third parties that is unconnected to the matter being tried. The judge could conclude that it would prejudice the administration of justice to admit the video. Under the test we recommend, the court could therefore exclude the video, and admit the text messages. This would not infringe the defendant's right to a fair trial.

3.45 Further, case law demonstrates that probative value is not the only relevant consideration for the proper administration of justice. In *Wilson* the Court of Appeal accepted that SBE that has substantial probative value could be excluded in some circumstances, without raising potential article 6 concerns. In that case, Lord Justice Edis clarified:

> There may be some cases, perhaps, where although the evidence is of substantial probative value on a relevant issue in the case, it should nevertheless be excluded because the accused or his counsel actually seeks to adduce it in order to attack the credibility of the complainant rather than for that legitimate purpose.[64]

3.46 This holding aligns with our analysis that not all evidence with substantial probative value will be necessary for a fair trial. In *Musone* the Court of Appeal considered circumstances in which evidence of bad character was found to have substantial probative value, but nonetheless was excluded by the court to ensure the fairness of proceedings.

3.47 Lord Justice Moses explained:

[64] *R v Wilson and Anor* [2024] EWCA Crim 1514 at [45].

> Nonetheless, there will be cases, of which the instant appeal is an example, where the only way in which the court can ensure fairness is by excluding evidence, even when it reaches the quality described in section 101(1)(e) [that the evidence has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant].[65]

This case concerned fairness between two defendants and is therefore limited in its application to the issues as they present between the complainant as a prosecution witness and the defendant. However it is notable that the court distinguished procedural fairness from the probative value of the evidence.[66] This is also reflected in section 78 of the Police and Criminal Evidence Act 1984 which provides for the exclusion of evidence (including evidence with substantial probative value) sought to be adduced by the prosecution:

> if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

3.48 Some consultees queried whether the two parts of the test should be balanced against each other, instead of taking a staged approach.[67] The structured discretion model SBE provisions in Canada and Scotland both balance probative value with prejudicial effect.[68] However, we remain of the view, explained in the consultation paper, that relying on a balance "risks reducing the complex issues to a binary approach",[69] pitting the defendant's right to a fair trial against the complainant's right to privacy, in which the right to a fair trial will always prevail.

3.49 A further benefit of this two-stage test is that it encourages consideration of the complainant's article 8 right as a relevant factor in its own right, not only where it is in direct competition with the defendant's right to a fair trial under article 6. Article 8 is engaged by an application to admit private sexual information; it is appropriate that a framework restricting SBE addresses that right. Indeed, the European Court of Human Rights ("ECtHR") has clarified that States have a positive obligation under article 8 that includes "the protection of the rights of victims in criminal proceedings and these obligations require measures to be taken to avoid secondary victimisation".[70] In some

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65 *R v Musone* [2007] EWCA Crim 1237; [2007] 1 WLR 2467 at [60].

66 We acknowledge that *Musone* is fact-specific, as emphasised in *Phillips* [2011] EWCA Crim 2935.

67 Including Dr Matt Thomason and The Police and Crime Commissioner for West Midlands. In contrast, our proposal for a two-stage test that does not require two limbs to be balanced was supported by academics Professors Conaghan and Russell in their consultation response.

68 In Canada the significant probative value must not be substantially outweighed by the danger of prejudice to the proper administration of justice: Criminal Code (Canada), s 276(2). In Scotland, the significant probative value must be likely to outweigh any risk of prejudice to the proper administration of justice: Criminal Procedure (Scotland) Act 1995, s 275(1)(a)-(c).

69 CP 259, para 4.177.

70 *X v Greece* App No 38588/21 at [68]. See also *Daugaard Sorensen v Denmark* App No 25650/22 at [64]. The ECtHR has also clarified that art 3 as well as art 8 place a positive obligation on states to protect victims of sexual violence from inhuman or degrading treatment. For further analysis of ECtHR case law, Appendix 1.

cases, upholding the complainant's article 8 right might require the court to refuse the admission of SBE, but only where the evidence is not necessary for a fair trial. Our recommended two-stage test facilitates this.

3.50 To address the main risks associated with SBE, the two-stage test will provide that a judge can refuse the admission of SBE that is not necessary for a fair trial if it:

(1) does not have substantial probative value; or

(2) has substantial probative value, but:

(a) disproportionately interferes with the complainant's article 8 rights; and/or

(b) disproportionately risks introducing or perpetuating myths and misconceptions about sexual violence within the trial.

Factors

3.51 In Consultation Question 20, we asked about a range of factors that judges should consider when determining whether the threshold is met. We did not specify at which stage of the test those factors should be considered. Consultation responses suggested the need for greater clarity as to how the factors would work within a two-stage test.[71] We now recommend that there should be guiding factors to assist with stage 1 (the "substantial probative value" stage); the factors we proposed in the consultation paper should assist with stage 2 (the "would not significantly prejudice the proper administration of justice" stage). We expand on these in turn below.

Stage 1 with guiding factors

3.52 To meet the threshold for admissibility, the SBE must have "substantial probative value". As explained above, all evidence must have "some" probative value to be relevant (bare relevance), but that is too low a bar for SBE. This test reflects one already well known to the courts as part of the admissibility threshold for bad character evidence, which was based on previous work by the Law Commission.[72]

3.53 Consultees were concerned that:

(1) substantial probative value sets too high a standard;[73] and

(2) there is a lack of clarity on the meaning of substantial probative value and to what it relates.[74]

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71 Including Professor Susan Edwards; Dr Matt Thomason.

72 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273. For clarity, we think this is beneficial as it is a test the court is used to addressing; we do not suggest that evidence of someone's sexual behaviour is evidence of bad character. See Ch 6 for further discussion of these provisions.

73 FACT; Cardiff University Law School Innocence Project.

74 Including Feminism, Law and Gender ("FLAG") research cluster at the Open University Law School; Martin Rackstraw, solicitor; Dr Matt Thomason; Rt Hon Liz Saville Roberts MP; Dr Samantha Fairclough.

Substantial

3.54 We disagree that "substantial" is too high a threshold. We explain above that bare relevance is not a suitable threshold for SBE. The risks that such evidence will introduce myths into the trial process, inappropriately influence jury decision making, and cause disproportionate distress and humiliation for complainants justify a higher threshold for admissibility. We think that "substantial probative value" is suitable for stage 1 of the test as it is an existing threshold for a type of evidence that also carries a risk of prejudice, namely evidence of bad character.[75] It is already used and understood by practitioners and judges. It builds on the concept of legal relevance described earlier – the size of the impact that evidence Y can have on fact X.[76] Case law has emphasised the importance of applying the ordinary meaning of "substantial".[77] We intend "substantial" to raise the threshold above bare relevance ("some probative value") in a meaningful way. It should not be enough for the evidence to have slightly more than the "some" probative value required for bare relevance; the probative value in relation to X has to be substantial.

3.55 The recent Court of Appeal decision in *Wilson*[78] further illustrates the suitability of this stage as part of a framework for admitting SBE. In that case, the Court assessed the admissibility of SBE under the YJCEA 1999, sections 41(3)(c) (the similarity gateway) and 41(2)(b) (SBE should not be admitted unless refusing to allow admission might render "unsafe a conclusion of the jury"[79]). The Court identified one way in which exclusion of evidence may render a conclusion unsafe: when that evidence has substantial probative value in relation to a matter in issue in the proceedings and is of substantial importance in the context of a case as a whole. This is based on the bad character provisions for non-defendants in section 100 of the Criminal Justice Act ("CJA") 2003. The Court noted the effectiveness of that test in "protecting witnesses" and the judgment demonstrates that it can be a useful threshold in the context of SBE.[80]

Matter in issue

3.56 As we explained in the consultation paper, we have based stage 1 of the test on the similar provision for admission of bad character in the CJA 2003 based on our recommendations in the bad character report.[81] Consultees suggested we clarify the

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75 The Court of Appeal have clarified that the purpose of the test of "substantial probative value" in respect of non-defendant bad character "is to ensure as far as possible that the probative strength of the evidence removes the risk of unfair prejudice": *R v BVY* [2024] EWCA Crim 1355 at [29]. In this context the risk of prejudice is to the jury's decision-making process. This is distinct from the wider concept of prejudice we discuss in relation to stage 2 below, which is to the proper administration of justice and also incorporates the legal rights of the defendant and complainant.

76 See para 3.16 above.

77 *R v Platt* [2016] EWCA Crim 4 at [26].

78 *R v Wilson and Anor* [2024] EWCA Crim 1514.

79 YJCEA 1999, s 41(2)(b).

80 *R v Wilson and Anor* [2024] EWCA Crim 1514 at [40]. See also HHJ Peter Rook KC, guest comment "Sexual History Evidence" (19 February 2025) *Criminal Law Week*, Issue 6; the author welcomes the decision for its coherence and notes that the test used is a "familiar enhanced test".

81 CP 259, paras 4.168 and 4.175.

issue to which the probative value must relate.[82] As Dr Matt Thomason suggested, without these words it is not clear "what issue(s) the SBE must be substantially probative of", rendering the threshold less robust than the bad character provisions.[83] We agree it is worth being explicit that the test includes the same clarification as in the bad character threshold: that the substantial probative value must relate to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole. This was also used in the case of *Wilson*, above, in the context of SBE.

3.57 This element has two parts; we draw here on our analysis from our previous report on bad character that led to the current provision in the CJA 2003. First, to have probative value the evidence has to relate to a matter (fact) in issue in the case. As explained above the matters or facts in issue are the elements of the offence that the prosecution must prove (for example that the complainant did not consent) or an element of a defence where the defendant has the burden of proof. A party could adduce evidence of a fact if it helps prove the truth or falsity of one of the facts in issue.[84]

3.58 Secondly, it has to relate to a matter that is of substantial importance to the case as a whole. In our bad character report we explained this element of the test:

> The value of evidence is made up of its relevance to a matter in issue and the importance of that matter in issue in the context of the case as a whole... For example, a fact may have substantial relevance to the credibility of a person whose credibility is in issue, and thus to the matter in issue on which she gives evidence, although that matter is not of substantial importance in the context of the case as a whole. If the matter on which she gives evidence is of only marginal relevance to the central issues in the case, then no amount of relevance to her credibility can ever amount to substantial importance in the context of the case as a whole.[85]

3.59 This does not mean that SBE that is relevant to the complainant's credibility can never have substantial probative value. Indeed, credibility evidence can be admitted under the character provisions with this threshold.[86] Instead, this helps ensure that the value of credibility evidence (and any other type of SBE) is assessed in the context of the facts that are important to the case as a whole.

Guiding factors for assessing probative value

3.60 As outlined above at paragraph 3.51, we conclude that the factors for structuring discretion that we discussed in the consultation paper best relate to stage 2 of the test. A different approach to structure is needed for stage 1. As Dr Samantha

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82 Including Dr Samantha Fairclough and in a consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

83 See, for example, M Thomason, "The Law Commission's 'structured discretion' rape shield: a critique" [2023] 10 *Archbold Review* 4.

84 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 10.7.

85 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 9.38.

86 See, for example, *R v BVY* [2024] EWCA Crim 1355 at [26].

Fairclough contended, our proposal would be "more helpful if it provided guidance as to how barristers and judges should decipher what constitutes 'substantial probative value'". Guiding assessment of probative value will ensure the test facilitates a thorough interrogation of bare relevance,[87] as well as supporting the application of the higher threshold for admission of SBE.

3.61 Dr Thomason has suggested the following list of factors (based on the current gateways in section 41 and the bad character provisions) for assessing whether SBE has substantial probative value:

(1) the nature and number of the events, or other things, to which the evidence relates;

(2) when those events or things are alleged to have happened or existed;

(3) the nature and extent of the similarities and the dissimilarities between each of the alleged instances of sexual behaviour;

(4) the extent to which the evidence is necessary to rebut or explain prosecution evidence;

(5) the extent to which the evidence may distract the factfinder from the main issues in the case; and

(6) the risk of the evidence introducing or perpetuating myths or misconceptions.[88]

3.62 We agree that consideration of these factors could assist with assessing probative value. In our view they would be most helpful as potential features of SBE that can be used in appropriate cases to assess probative value, rather than factors which if present amount to substantial probative value and the absence of which indicates less than substantial probative value. They will not all be applicable in every SBE application. Below, we expand on and explain how each factor could be used to assess the probative value of SBE for use in stage 1.

(1) *The nature and number of the events, or other things, to which the evidence relates*. If for example the evidence is being used to argue propensity to behave in a certain way (to prove or disprove a fact in issue such as consent or reasonable belief in consent), as evidence of a material inconsistency in the complainant's evidence, or as evidence suggesting the current allegation is false, the nature and number of things to which the SBE relates can help assess its probative value. Consider for example, SBE that is evidence of a previous conviction for perverting the course of justice in relation to multiple false allegations of sexual assault. If there is evidence of multiple false allegations (that led to the conviction) by the complainant in similar circumstances to the current allegation (in the same year, made in the same way and to the same people), that would have greater probative value in

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87 One of the principles for an SBE framework as described above at para 3.23.

88 M Thomason, "Excluding sexual behaviour evidence: back to first principles" [2024] *Criminal Law Review* 692, 705.

relation to the question of whether the current allegation is false or true, than if the SBE was of a conviction for a single false allegation of a different nature.

(2) *When those events or things are alleged to have happened or existed*. Similarly, the timing of the facts to which the SBE relates affects its probative value. Events that happened closer in time to the current allegation will generally be of greater probative value than events that happened at a different time in the complainant's life.

(3) *Where it is suggested that the SBE has probative value by reason of similarity between it and the sexual behaviour alleged to have occurred, the nature and extent of the similarities and the dissimilarities between the SBE and the sexual behaviour alleged to have occurred*. This does not suggest that any sexual behaviour considered similar to the alleged sexual behaviour will have substantial probative value. Instead, it recognises there may be cases which are so factually specific that the similarity of the previous sexual behaviour can help prove or disprove an issue in the case. For example, the complainant has alleged that the defendant carried out a particular sex act on her to which she did not consent. The defendant's case is that an entirely different, and consensual, sexual act took place at the alleged time and that he does not engage in the sex act alleged. The prosecution wish to adduce evidence of a previous occasion when the defendant performed the same sex act, using a video recorded consensually between the defendant and complainant. The video showing the previous act could have substantial probative value in relation to proving that the act alleged by the complainant is an act in which the defendant engages, if, for example, it shows the same act between the same people, in the same month, in the same location. There would need to be high levels of pertinent similarity to meet the threshold of substantial probative value, bearing in mind the principle articulated by Lady Hale in *R v C* (at paragraph 3.3 above) that consent is not given generally but is specific to the person, context and time.[89]

(4) *The extent to which the evidence is necessary to rebut or explain evidence adduced by another party*. This guides interrogation of probative value in relation to other evidence adduced in the trial. Evidence that is *necessary* to rebut or explain something already before the jury will have substantial probative value. This invites consideration of that necessity; it does not mean that any SBE that may rebut or explain other evidence will automatically have *substantial* probative value.

(5) *The extent to which the evidence may distract the factfinder from the main issues in the case*. Courts should always be alert to the risks of distraction, information overload and "satellite litigation".[90] This may also arise when there

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89 [2009] UKHL 42; [2009] WLR (D) 272 at [27].

90 See, for example, P Roberts and A Zuckerman, *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 113: "the more side issues that the parties are permitted to raise, the more likely it becomes that the trier of fact will be distracted from focusing squarely on the main issues. And with wandering concentration and a loss of 20-20 vision come heightened risk of adjudicative error and potential miscarriages of justice".

is a risk that the importance of the SBE will be significantly overestimated by the jury, inappropriately skewing their assessment of the evidence.

(6) *The risk that the probative value of the evidence relies on myths or misconceptions*. This guides interrogation of whether the value of the SBE is based on the specific facts of the case, or if the relevance and probative value relies on assuming that a myth or misconception must be true. Where the justification for the relevance of SBE is based entirely on a myth,[91] it will not have any probative value and is therefore irrelevant. This is distinct from the "myths and misconceptions" factor for consideration under stage 2, discussed further below and in the consultation paper. Under stage 2 the consideration is about the risk that the evidence once admitted may introduce or perpetuate myths or misconceptions such that the jury will use improper reasoning when assessing the facts of the case.

Stage 2 with factors

3.63 When deciding on an application to admit SBE, if the court has determined that the evidence has substantial probative value in relation to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole, it will then turn to consider whether its admission would significantly prejudice the proper administration of justice. If so, then it must not be admitted.

3.64 As we explained at paragraph 3.42 above, stage 2 requires consideration of the evidence in the wider context of a trial that is fair and just. In the consultation paper, we clarified that the proper administration of justice includes "the impact on both the prosecution and defence case, the risk to a fair trial, the prejudicial effect of introducing myths, and the effect on the complainant".[92]

3.65 Justice is only properly administered if the defendant receives a fair trial pursuant to article 6 of the ECHR. The proper administration of justice requires not only a fair trial for the defendant, but also: ensuring that necessary evidence is before the jury; that the jury are not unduly prejudiced; that the jury do not engage in impermissible reasoning; that the rights and welfare of witnesses are respected; that witnesses are supported to give their best evidence; that delay does not hinder justice. This is reflected in many ways throughout the criminal justice system. Consider for example the overriding objective for criminal trials in the Criminal Procedure Rules, rule 1.1:

(1) The overriding objective of this procedural code is that criminal cases be dealt with justly.

(2) Dealing with a criminal case justly includes—

(a) acquitting the innocent and convicting the guilty;

(b) treating all participants with politeness and respect;

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91 For example, the defence make an application to admit evidence that the complainant is a sex worker on the basis that it makes the complainant inherently untrustworthy and more likely to consent to sex in general.

92 CP 259, para 4.176.

(c) dealing with the prosecution and the defence fairly;

(d) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;

(e) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;

(f) dealing with the case efficiently and expeditiously;

(g) ensuring that appropriate information is available to the court when bail and sentence are considered; and

(h) dealing with the case in ways that take into account—

(i) the gravity of the offence alleged,

(ii) the complexity of what is in issue,

(iii) the severity of the consequences for the defendant and others affected, and

(iv) the needs of other cases.

Significant prejudice to the proper administration of justice

3.66 Consultees raised the following concerns with stage 2:

(1) an assessment of the "proper administration of justice" is too vague and allows too wide a discretion;[93]

(2) the term "proper administration of justice" should focus on the interests of justice in the trial, rather than the administration of justice;[94]

(3) the term "significantly" sets the threshold too low;[95] and

(4) the interpretation of the factors proposed relies on judges' "knowledge and expertise on sexual abuse and trauma, and how inequalities play out – especially in regard to gender and race, which vary massively".[96]

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93 The Criminal Bar Association; Professor Susan Edwards; Rt Hon Liz Saville Roberts MP.

94 The Bar Council; the Criminal Bar Association.

95 Gwent Police (Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually); Dr Matt Thomason; Tricia O'Sullivan, solicitor.

96 The End Violence Against Women Coalition. Similar concerns were raised by HMCPSI and RCEW.

3.67 For the latter concern, throughout this report we consider ways to improve understanding of sexual harm, including for judges. Measures such as judicial training and trauma-informed practice should support this.[97]

3.68 We recommend factors to guide this discretion from paragraph 3.72 below; we consider that these will ensure the discretion is not so wide that it risks injustice or disproportionate inconsistency.

3.69 As we explain above, requiring that the admission of the SBE must "not significantly prejudice the proper administration of justice" is based on the landmark House of Lords case on SBE, *A (No 2),* and features in the Canadian and Scottish structured discretion models. In *A (No 2),* Lord Hope said of section 41:

> The element of judicial discretion has been reduced to the minimum. There are risks involved in that choice. It has deprived the judge of the opportunity, in the last resort, of preventing unfairness to the defendant in circumstances where to do this would not significantly prejudice the proper administration of justice.[98]

3.70 A few consultees suggested removing the word "significantly", arguing that any amount of prejudice to the administration of justice would be inappropriate. We are not persuaded by this argument. Prejudice cannot be fully removed from trial processes. There are various restrictions on evidence that carries prejudice, including bad character. Similarly, as explained above, section 78 of the Police and Criminal Evidence Act ("PACE") 1984 allows the court to exclude prosecution evidence if it would have "*such* an adverse effect on the fairness of the proceedings that the court ought not to admit it" (emphasis added). Those rules allow for some evidence to be admitted even when it will, or will risk, prejudice or some unfairness. As described above at paragraph 3.65, there are a range of matters that contribute to the proper administration of justice. Infringement of some of these matters may be proportionate or necessary; doing so does not automatically make a trial unfair. We conclude that "significant" is an appropriate qualifier in the circumstances.

3.71 Finally, we have explained that evidence necessary for a fair trial is required for the proper administration of justice; therefore such evidence would be admitted under stage 1 and stage 2 of this framework. That does not mean that only evidence necessary for a fair trial will be admitted under stage 2. If the evidence that has substantial probative value is not necessary for a fair trial and does not significantly prejudice the proper administration of justice, it will be admissible.

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97 Judges are already required to receive training specific to sexual offences and sexual violence before they can hear RASSO cases: Criminal Practice Directions 2023 (as amended 2024) 5.9.4. For more detail see Chs 10 and 14.

98 [2001] UKHL 25; [2001] 3 All ER 1 at [103]. This terminology uses the word "prejudice", but as it is to the concept of the administration of justice, "prejudice" here incorporates wider considerations than just the prejudicial impact on the jury.

Factors

3.72 In the consultation paper we asked for consultees' views on the following factors to structure the discretion in the two-stage test:[99]

(a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

(b) the interests of justice including the defendant's right to a fair trial;

(c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions;

(d) the risk of introducing or perpetuating myths or misconceptions; and

(e) any other factor that the judge considers to be relevant to the individual case.

3.73 We incorporated factors from structured discretion models in Scotland and Canada,[100] and provided the following rationale:

(1) The complainant's dignity and privacy are important justifications underlying the rationale for restricting such evidence.

(2) The defendant's right to a fair trial is a fundamental component of stage 2. As explained above, a feature of our model is that evidence necessary for a fair trial will be admissible.

(3) Society's interest in encouraging the reporting of sexual assault offences is important for the legitimacy of the criminal justice system.

(4) The risk of introducing or relying on myths and misconceptions is also a key justification for restricting SBE. Whether evidence supports rape myths will be a relevant consideration "even when evidence is not admitted with the intention or purpose of introducing such myths or misconceptions".[101]

(5) Finally, we also considered including a "catch all" provision that would provide judges with a level of flexibility to consider any other relevant factors.

3.74 In the following section, we refine the factors in light of consultees' views.

Protection of the complainant's legal rights, including respect for the complainant's private life and dignity

3.75 The majority of consultees who responded to this question supported including it in the list of factors for the court to consider when assessing the admissibility of the

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99 Consultation Question 20, CP 259, para 4.197.

100 Criminal Procedure (Scotland) Act 1995, s 275(2); Criminal Code (Canada), s 276(3).

101 CP 259, para 4.189.

evidence.[102] Consultees emphasised the value of recognising the rights of the complainant.

3.76 However, some consultees contended that although the complainant's dignity and privacy are important, they do not warrant restrictions on the admission of evidence.[103] Dr Thomason has argued that

> [it] is difficult to imagine situations where trial judges will then go on to decide that the complainant's right to privacy overrides the defendant's right to adduce the substantially probative SBE … [this factor] is therefore unlikely to have much, if any, influence over admissibility determinations.[104]

3.77 We agree that the complainant's dignity and privacy will not justify the exclusion of evidence that is necessary for a fair trial. In particular, we acknowledge that cross-examination in the context of a sexual offences trial in an adversarial system will usually be distressing to a degree. Some level of distress and privacy infringement may be unavoidable. However, there is still a role for considering the impact on the complainant's dignity and privacy, as protected by article 8, of the use of SBE to ensure that any such impact is limited, where possible, and proportionate. Further, distress during cross-examination is just one way in which a complainant's legal rights may be infringed by the use of SBE. As we explained in the consultation paper, the complainant's right to privacy and dignity is engaged by the use of highly sensitive and personal information.[105] In addition, intrusive questioning can lead to traumatisation.

3.78 Some consultees raised particular concerns about the impact of SBE on the welfare of complainants with certain characteristics. For example, Rape Crisis England and Wales ("RCEW") emphasised the impact of SBE for those who are or have been in a relationship with an abusive partner. Its use could increase the risk of experiencing additional violence and abuse outside of the courtroom after the trial.[106] RCEW, Muslim Women's Network UK and Solace Women's Aid suggested this was also a particular concern for complainants experiencing so-called honour-based violence. Similarly, End Violence Against Women Coalition provided the example of potential harm to LGBT+ complainants where the evidence would reveal their sexuality.

3.79 We share the concerns expressed about the particular risks that evidence of a sexual nature may pose to the wellbeing and safety of some complainants. We think that this factor does allow for consideration of this type of potential harm. Indeed, as described above, there are positive obligations under article 8 for the State to protect victims and

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102 55 out of 70.

103 Including Dr Matt Thomason; Philipp Tanzer.

104 M Thomason, "The Law Commission's 'structured discretion' rape shield: a critique" [2023] 10 *Archbold Review* 4, 7.

105 CP 259, para 8.27.

106 For example, for a complainant who is currently in an abusive relationship or family environment, SBE could demonstrate that the complainant has been sexually active when they may have hidden that from their family for their own protection (for example if at risk of so-called honour-based violence). In some abusive relationships the abuser may retaliate when they are reminded of their victim's previous sexual partners, or when the SBE demonstrates the complainant has had other sexual partners during or since that abusive relationship.

witnesses in criminal proceedings.[107] It could be helpful to ensure that these risks are included in guidance or training on the use of this model. Measures already built into the trial process can also help to protect complainants when such risks are present, even when SBE is admitted.[108]

3.80 We provisionally proposed this factor using wording based on the text in the Canadian Criminal Code.[109] Here we have worded the factor[110] to better reflect the legal context in this jurisdiction, and to clarify that the complainant's legal rights include their right to a private life and dignity (under article 8 ECHR).[111]

The interests of justice including the defendant's right to a fair trial

3.81 There was majority support for including this factor.[112] Consultees emphasised the critical importance of the defendant's fair trial rights to such determinations.

3.82 There were a number of submissions on the interaction between the factor concerning the complainant's legal rights, and the defendant's right to a fair trial. Many suggested that the model will essentially lead to judges balancing the rights protected by articles 6 and 8, and that the article 6 rights of the defendant will always prevail.[113] Dr Thomason argued that as a result, the inclusion of the complainant's privacy as a factor "may well serve an expressive function, but equally its inclusion is likely to provide false hope to complainants seeking the exclusion of their SBE".[114]

3.83 Conversely, Dr Charlotte Herriott argued that the protection of the complainant should not be seen as being "at odds with the defendant's [right to a] fair trial; but that instead, both are prioritised and managed alongside one another".

3.84 As we have explained in the consultation paper[115] and throughout this chapter, admission of evidence necessary for the defendant to receive a fair trial is built into our recommended approach. We acknowledge the risk that, in practice, the right to

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107 See also *Doorson v Netherlands* App No 20524/92 which considered the compatibility of witness security measures with the right to a fair trial.

108 Particularly, measures to assist the complainant to give evidence can provide additional security. See Ch 9 for further discussion of protecting complainant's safety and wellbeing while giving evidence.

109 In the consultation paper we referred to this factor as "protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights" based on factors (f) and (g) in the Canadian legislation (Criminal Code (Canada), s 276 (3).

110 "Protection of the complainant's legal rights, including respect for the complainant's private life and dignity".

111 The complainant's legal rights also include the right to protection from inhuman and degrading treatment under art 3 of the ECHR. This article places an obligation on States to effectively investigate allegations of inhuman and degrading treatment, including allegations of sexual violence. See *DSD and NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 at [211]-[225], [134], [276].

112 56 out of 70.

113 See also M Thomason, "The Law Commission's 'structured discretion' rape shield: a critique" [2023] 10 *Archbold Review* 4, 7, citing Andrew Sanders, "Involving Victims in Sentencing: A Conflict with Defendants' Rights" in E Cape (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004), p 99.

114 M Thomason, "The Law Commission's 'structured discretion' rape shield: a critique" [2023] 10 *Archbold Review* 4, 7.

115 CP 259, para 4.185.

privacy and the right to a fair trial will be weighed against each other. This is because they naturally fall into opposing sides, with privacy rights likely to be used in support of restricting SBE and fair trial rights likely to be used in support of admission of the SBE. Further, article 8 rights are qualified, whereas the right to a fair trial is unqualified.[116] As the Criminal Bar Association explained, the complainant's right to privacy is "an important consideration, subject to qualification in accordance with law", and article 6 should be treated as an "overarching consideration which being unqualified should take primacy". This is indeed what we intend our model to achieve. It will be for the judge to consider, on a case-by-case basis, the extent to which a piece of evidence may impact on fair trial rights and privacy rights (or other legal rights of the complainant). Including both factors has more than an expressive function; it provides the framework for addressing how both rights are engaged in each case.

3.85 Finally, we note that, while it remains vital that the defendant's right to a fair trial is determinative and that all evidence necessary for a fair trial will be admissible, this factor allows courts to consider any aspect of the interests of justice, if relevant to the case. We maintain our view that this is an important factor for judges to consider when assessing the potential for prejudice to the administration of justice.

The benefits of encouraging victims to report and provide evidence for sexual assault prosecutions

3.86 There was majority support for including this factor.[117] For example, Professors Joanne Conaghan and Yvette Russell argued that it is legitimate "to take account of the state's responsibility to citizens generally and not just to the defendant in the context of governing the criminal trial." RCEW advised that Independent Sexual Violence Advocates in their network emphasised to them the importance of this factor. This is because of the "real risk that victims and survivors will be deterred from reporting or will decide to drop out of the criminal justice process if there is a risk that they will be cross examined on their sexual behaviour/history".

3.87 However, others raised significant concerns about this factor.[118] For example, HM Council of Circuit Judges stated that while they recognised the importance of societal issues generally, the impact on future complainants is indirect.

3.88 Dr Thomason was strongly opposed to this factor because it "uses the defendant as a means to an end, and is antithetical to any rational, liberal conception of criminal process." He stated, "it is 'nothing short of monstrous' to suggest that a current defendant's liberty must be balanced against the potential future interests of complainants (or anyone, for that matter)".[119] The framework proposed in the consultation paper, and recommended in this report ensures that SBE necessary for a fair trial would be admitted. This factor would not operate to exclude such evidence.

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116 For further discussion, see para 2.22 of Appendix 1.

117 45 out of 70.

118 Including Cardiff University Law School Innocence Project; Criminal Bar Association; Phillip Tanzer; Dr Matt Thomason; Professor Findlay Stark; Polly Hernandez.

119 M Thomason, "The Law Commission's 'structured discretion' rape shield: a critique" [2023] 10 *Archbold Review* 4, 8 quoting J Spencer, "'Rape Shields' and the Right to a Fair Trial" (2001) 60(3) *Cambridge Law Journal* 452, 454.

3.89 As we explained in the consultation paper, "a criminal justice system that discourages complainants from reporting crimes and giving evidence to support prosecutions loses legitimacy".[120] We agree however that the potential impact on future complainants is too remote a consideration to apply coherently to a decision on the admissibility of a specific piece of SBE. In light of the responses received, we do not think the objective of encouraging victims to report crimes and give evidence should be achieved through explicit inclusion in the framework itself. It is however an important aspect of any properly functioning criminal justice system that victims have confidence in the process and members of society are not discouraged from reporting serious crime. We think that our recommendations will result in a suitably robust framework for restricting the use of SBE, encouraging transparent and consistent decision making. The impact of this should reassure future complainants that decisions as to SBE will be carefully and appropriately considered and that their right to privacy and dignity will be a core part of that consideration.

3.90 We do not recommend, therefore, that "the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions" should be a separate factor in the SBE framework.

The risk of introducing or perpetuating myths or misconceptions in the trial

3.91 There was majority support for including this factor.[121] It reflects the general concern that SBE poses a significant risk of introducing or perpetuating myths and misconceptions in the trial. It is therefore appropriate to consider this risk when determining admissibility. This is distinct from the consideration of myths and misconceptions under stage 1. At stage 1 the consideration is whether the probative value relies on a myth or misconception. At stage 2 the risk is whether, despite the individual piece of evidence having substantial probative value, it nevertheless carries a risk that because of the sexual nature of the evidence, it will introduce or perpetuate in the trial myths about sexual violence. For example, if the piece of evidence is that the complainant is a sex worker, it may have substantial probative value for explaining the circumstances in which the offence took place. However, there is a significant risk that myths and misconceptions about sex workers, the validity of their consent and their moral worthiness may unfairly impact the jury's decision making even though the probative value of the evidence does not relate to such myths.

3.92 Consultees who rejected this factor described it as ambiguous and likely to cause inconsistency.[122] Pan-London Rape Crisis Centres Experts by Experience Panel stated that this factor could be problematic depending on the individual judge's beliefs about rape myths. Office of the Police and Crime Commissioner for Gwent emphasised that judges need "to be well trained around the myths/misconceptions and how these play a vital contribution when influencing the jury." We acknowledged in the consultation paper (and explain further in Chapter 12) that judges, like all members of the public, may be influenced by myths and misconceptions. Judges, however, receive training and are experienced in decision making in accordance with

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120 CP 259, para 4.187.

121 47 out of 70.

122 Including the Criminal Bar Association; False Allegations Watch/Empowering the Innocent; Philipp Tanzer; FLAG; Martin Rackstraw.

the law. As we explain below at paragraph 3.191, our recommendations throughout this report, which include further training for judges working in sexual offences trials, would help support this.

3.93 While acknowledging risks that arise from ambiguity, we do not think it would be appropriate to specify or define in legislation the type of myths and misconceptions that should be considered within stage 2 of the test. First, there is the risk that it would be under inclusive. Greater specificity risks unjustifiably limiting the potential myths that would be considered, depending on the facts of the case. Secondly, myths develop and change over time so statutory definitions can become outdated with little scope for efficient update. There are sources of guidance detailing common myths about sexual violence that can provide clarity and support consistency. This includes CPS guidance[123] and the Crown Court Compendium.[124]

3.94 We remain of the view that this is appropriate to include as a factor for determining the extent of prejudice to the administration of justice.

Any other factor that the judge considers to be relevant to the individual case

3.95 In response to this, consultees noted that the other factors are broad enough to allow for the most relevant circumstances to be considered.[125] We agree with the CPS who suggested that this factor "may undermine the clarity and consistency of reasoning that the other listed factors provide". Consultees did not identify any other relevant factor. We agree that including a "catch all" could undermine the integrity of the framework which is intended to provide factors that must be considered in all cases. Therefore, we do not recommend that the structured discretion model include "any other factor that the judge considers to be relevant to the individual case". This would not prevent a judge considering another factor if in an individual case something relevant arises that is not covered by the first three factors, although we think this would happen rarely.

Conclusion

3.96 For stage 2 of the test, we recommend that the judge must consider the following factors:

(a) protection of the complainant's legal rights, including respect for the complainant's private life and dignity;

(b) the interests of justice, including the defendant's right to a fair trial; and

(c) the risk of introducing or perpetuating myths or misconceptions.

3.97 For clarity, these factors should be considered in all applications where it has been established that the SBE has substantial probative value. The purpose of these mandatory factors is to ensure the mind of the court is turned to each. They may be

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123 CPS, *Legal Guidance, Rape and Sexual Offences, Chapter 4, Tackling Rape Myths and Stereotypes, Annex A* (21 May 2021).

124 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) at 20-5.

125 Including JURIES; the CPS; nia.

more or less relevant depending on the specifics of the SBE and the facts of the case. It could be appropriate in some cases for the judge to consider, for example, that the evidence poses no risk of introducing or perpetuating myths. They may also consider that there is some risk, but that it does not amount to significant prejudice. The factors could suggest that the admission of the evidence either would or would not prejudice the administration of justice and if it would, to what degree. It is the overall impact on the administration of justice that the judge will determine at stage 2.[126]

3.98 Some consultees suggested that the term "proper administration of justice" should focus on the interests of justice in the trial, rather than the administration of justice.[127] This is the intended effect of our recommended stage 2: the factors that we recommend all focus on the relevant interests of justice in the trial and its participants.

[126] For clarity, as explained at para 3.43 above, this test will operate to ensure evidence necessary for a fair trial is admissible.

[127] The Bar Council; the Criminal Bar Association.

Recommendation 14.

3.99 We recommend that sexual behaviour evidence should only be admissible if:

(1) the evidence 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 ("stage 1"); and

(2) its admission would not significantly prejudice the proper administration of justice ("stage 2").

3.100 For stage 1, we recommend that the following factors should guide assessment of the probative value of the evidence:

(1) the nature and number of the events, or other things, to which the evidence relates;

(2) when those events or things are alleged to have happened or existed;

(3) where it is suggested that the evidence has probative value by reason of similarity between it and the sexual behaviour alleged to have occurred, the nature and extent of the similarities and the dissimilarities between the evidence and the sexual behaviour alleged to have occurred;

(4) the extent to which the evidence is necessary to rebut or explain evidence adduced by another party;

(5) the extent to which the evidence may distract the factfinder from the main issues in the case; and

(6) the risk that the probative value of the evidence relies on myths or misconceptions.

3.101 For stage 2, we recommend that the judge must consider the following factors when determining if admission of the sexual behaviour evidence would significantly prejudice the proper administration of justice:

(a) protection of the complainant's legal rights, including respect for the complainant's private life and dignity;

(b) the interests of justice, including the defendant's right to a fair trial; and

(c) the risk of introducing or perpetuating myths or misconceptions within the trial.

Other aspects of the framework

3.102 In this section we consider other aspects of the framework that sit alongside the threshold itself. We first address the definition of sexual behaviour and the type of

evidence that will be subject to the threshold. We then consider the additional features that work alongside the gateways to further refine the restrictions.

Definition of sexual behaviour

3.103 The term "sexual behaviour"[128] in section 41 has been interpreted broadly. A wide definition ensures that all evidence relating to sexual behaviour is brought within the scope of the regime and is subject to judicial scrutiny.

3.104 In the consultation paper we considered whether modern forms of sexual behaviour, such as behaviour on social media, are appropriately covered by this definition. Professor Clare McGlynn and Dr Susan Leahy have proposed that the definition of "sexual behaviour" should more clearly include sexual communications.[129] Case law suggests the current definition is flexible enough to encompass sexual communications on social media.[130] In the consultation paper we considered whether express inclusion of sexual communication would be beneficial, noting commentary contending that it is unnecessary.[131]

3.105 We asked:

(1) Are consultees aware of any more modern forms of communication that are not currently covered by the definition of sexual behaviour in section 41 of the Youth Justice and Criminal Evidence Act 1999, that should be covered by any restrictions on sexual behaviour evidence?

(2) Should the legislation defining sexual behaviour include explicit reference to forms of communication and social media as a form of sexual behaviour?[132]

3.106 We did not receive evidence that any modern forms of communication are excluded from the definition of "sexual behaviour". There was support for ensuring that modern forms of sexual behaviour, including sexual messaging and conduct in virtual reality settings, are protected in the same way as more traditional sexual behaviour.[133]

3.107 There were mixed responses to the suggestion that the statutory definition of sexual behaviour should include explicit reference to modern forms of communication and social media.[134] Those in support suggested, for example, that it would "dispel

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128 Defined as any sexual behaviour or other sexual experience, whether or not involving the defendant or other person but excluding (except for the similarity gateway) anything alleged to have taken place as part of the event which is the subject matter of the charge: YJCEA 1999, s 42(1)(c).

129 CP 259, para 4.209.

130 For example, answering questions on a sexually explicit online quiz: *R v Ben-Rejab* [2011] EWCA Crim 1136.

131 Rook and Ward (2021), 26.218.

132 Consultation Question 22, paras 4.210 and 4.211.

133 Dr Charlotte Herriott shared findings from a mock jury study that found that "evidence of sexting was in many cases more prejudicial for jurors than evidence of previous sexual intercourse": C Herriott, *Sexual History Evidence in Rape Trials, Is the Jury Out?* (2023).

134 12 out of 24 consultees agreed with an explicit reference, 10 disagreed, 2 gave an answer categorised as "other".

doubt"[135] and "provide a helpful clarification".[136] However, some argued that the definition is already sufficiently broad to include modern forms of sexual behaviour.[137] Further, some consultees were concerned that if there is explicit reference to only one type of behaviour or an exhaustive list, this could be more limiting and risks becoming outdated (for example as technology changes).[138]

3.108 We are satisfied that the current definition of sexual behaviour covers more modern forms of sexual behaviour including online behaviour,[139] and that explicit reference to some types of behaviour may introduce unnecessary limitations. The legislation must be sufficiently broad to account for future technologies, for example. We also acknowledge there may be a risk of ambiguity about the extent to which online behaviour should be considered sexual, and what the risk of myths and misconceptions are with online forms. Non-legislative guidance can assist with clarity. For example, the CPS guidance on section 41 already specifies that online sexual communication can be considered "sexual behaviour".[140] The example directions for judges to provide to jurors could also reflect the evidence[141] on myths specific to online sexual behaviour.

3.109 We now turn to the "sexual" aspect of the definition. The term "sexual" is not defined in the context of "sexual behaviour" under section 42 of the YJCEA 1999. In the absence of a statutory definition, courts have interpreted it broadly, taking a "common sense"[142] approach.

3.110 Section 78 of the Sexual Offences Act 2003 provides a definition of "sexual" in relation to all the sexual offences within that Act. Section 78 provides that activity is "sexual" if a reasonable person would consider that:

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

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135 Professors Conaghan and Russell.

136 RCEW.

137 Including Six Circuits; the Bar Council; HM Council of Circuit Judges.

138 Including nia and Professor Findlay Stark.

139 In the consultation paper we concluded that "case law in this jurisdiction suggests the current definition is flexible enough to include more modern forms of sexual behaviour, such as sexual communications on social media" (CP 259, para 4.209). We were not alerted to any problems in this regard during the consultation.

140 CPS, *Legal Guidance, Rape and Sexual Offences, Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999, "sexual behaviour"* (21 May 2021).

141 For example, the research on rape myths by the CPS and Equally Ours reported that participants "applied pre-existing misconceptions and assumptions about rape in a digital context". They also reported mixed views about whether consent given in a digital forum was "binding" in person. 14% of respondents agreed that "if a person says online that they want to meet up and have sex, that means they have consented to having sex when they meet": CPS and Equally Ours, *Research into the public understanding of Rape and Serious Sexual Offences (RASSO) and consent - Stage 1*, (January 2024), 82 to 83. For further discussion, see Ch 10.

142 Citing *Mukadi* [2003] EWCA Crim 3765 at [14] (Sir Edwin Jowitt).

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

3.111 In the consultation paper we asked if this definition produced a different result than the judicial interpretation of "sexual" under section 41. We also asked whether the definition in section 78 should be included in the SBE regime.[143]

3.112 The evidence we received does not suggest a problematic difference in the way that "sexual" is interpreted in section 41 and the Sexual Offences Act 2003 despite only the latter having a statutory definition. Most consultees who responded noted that both enabled an appropriately broad approach to "sexual".

3.113 There were mixed views on whether the definition of sexual found in section 78 should be used in the context of SBE.[144] Some suggested that consistency would be beneficial.[145] The Criminal Bar Association, for example, submitted that "simplicity is always desirable and a single definition would be of assistance to all". However, those who disagreed suggested that the approach to sexual in the context of SBE is sufficiently clear and understood, such that there is no need to align the definitions.[146] Further, some consultees expressed concern that the definition in section 78 serves a different purpose and using it for SBE could cause unnecessary complexity.[147] Section 78 defines sexual for the purpose of establishing whether a sexual offence has occurred. It introduces an objective test by incorporating the views of a "reasonable person". Professors Conaghan and Russell argued that this would be inappropriate in the context of SBE which may necessarily need a subjective approach.

3.114 We have concluded above that the current definition of "sexual behaviour" should be retained as it is suitably broad and flexible. We do not think it is necessary to align the definition of "sexual" in "sexual behaviour" with the definition of "sexual" in section 78 of the Sexual Offences Act 2003. It would not provide any additional clarity and could potentially add unnecessary complexity.

Evidence of clothing and dancing

3.115 Evidence of clothing and dancing can be used to suggest a complainant's promiscuity in sexual offences trials. For example, the defence may seek to adduce evidence that the complainant answered the door to the defendant on the night in question wearing only underwear, to suggest that the complainant welcomed the sexual activity. Such evidence carries risks similar to all forms of SBE; it could perpetuate the myth that "provocative" behaviour is indicative of the complainant's moral worth and their likelihood of consenting to sex. In the consultation paper we explained that it is therefore important to scrutinise the use of this type of evidence. Currently, when evidence of clothing and dancing is relied on to suggest "sexual reputation or activity",

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143 Consultation Question 24, paras 4.220-4.221.

144 19 consultees responded to this question, 10 were in favour of including the definition, 9 disagreed with the suggestion.

145 Including The Law Society of England and Wales ("Law Society") and the CPS.

146 Including the Bar Council and Six Circuits.

147 Including Professor Findlay Stark; Professors Conaghan and Russell; and Martin Rackstraw.

it may meet the definition of "sexual behaviour" under section 41.[148] In the consultation paper we considered whether all evidence of clothing and dancing should be subject to the same threshold as SBE.[149] We asked:

> Should the restrictions on sexual behaviour evidence also apply to evidence relating to clothing worn by the complainant, or behaviour such as dancing, even when such evidence does not fall within the definition of sexual behaviour?[150]

3.116 A small majority of consultees who responded were in favour of further restrictions on evidence of clothing and dancing.[151] Those in support argued that the same restrictions should apply due to the risk of perpetuating myths, in particular the risk that the complainant's clothing or dancing could be used to imply consent.[152]

3.117 Those who disagreed with the suggestion argued that the current mechanisms already effectively address such evidence, whether through the general relevance threshold, judicial intervention, or directions.[153] For example, the Bar Council argued that "judicial direction should be sufficient to ensure juries are not overly preoccupied with evidence such as clothing/ dancing and do not stray into the twin myths".[154] Consultees also emphasised that there will be occasions when clothing and dancing will be important contextual or explanatory evidence and therefore should not be unduly restricted.[155]

3.118 We remain of the view that evidence of clothing and dancing can carry similar risks as those associated with SBE, and that it is appropriate to scrutinise such evidence. We have heard evidence from consultees, including the CPS, that in their experience, myths relating to the complainant's clothing and dancing are persistently used at trial. There is also evidence from academic research that the use of clothing and dancing

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148 CP 259, para 4.213.

149 We acknowledged that including "dancing or clothing" within the definition of "sexual behaviour" may itself perpetuate the myth that "provocative" dancing or clothing suggests a tendency towards certain sexual behaviour. Therefore, we suggested that the same framework as SBE could apply, without including dancing and clothing within the definition of sexual behaviour.

150 Consultation Question 23, para 4.215.

151 19 out of 34 consultation responses, 8 rejected the suggestion, 7 gave an answer categorised as "other".

152 Including Durham Police and Crime Commissioner's Office; Dr Charlotte Herriott; Professor Susan Edwards; Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences; Claire Waxman. Polly Hernandez raised the fact that there can be a gendered element to the myths associated with clothing and dancing. For example, there is a myth that clothes will act as a physical barrier to assault for male complainants. We discussed this in further detail in the consultation paper: CP 259, para 10.87.

153 Including HM Council of Circuit Judges; the Law Society; the Bar Council Dr Susan Leahy.

154 The Crown Court Compendium currently includes an example direction for "clothing worn by the complainant said to be revealing or provocative". The example states that "questioning on this subject should have been restricted, but there will be occasions where such evidence has emerged": Crown Court Compendium, Part 1, 20-9.

155 Including Criminal Bar Association; FLAG; Dr Olivia Smith. For example, clothing worn during the incident may be important contextual information. CCTV showing important moments before the alleged assault may incidentally show the complainant's clothing or dancing.

evidence is problematic.[156] While evidence of "provocative" clothing and dancing may no longer be used by advocates to state overtly that the complainant was "asking for it",[157] risks remain with more subtle deployment and when the evidence is adduced for a legitimate purpose. We note that evidence that includes clothing and dancing may be necessary and important for the jury to consider depending on the facts of the case.

3.119 We believe that the current mechanisms referred to at paragraph 3.117 can appropriately address the concerns with this type of evidence. We do not think that explicitly including all evidence of clothing and dancing within the SBE regime is therefore necessary. The type of clothing and dancing evidence that poses the greatest risk (because it is being used as evidence of sexual behaviour) will already be subject to the SBE regime. Consultees submitted that this is the most appropriate type of evidence to be subject to a higher threshold.[158]

3.120 Consultees pointed out that evidence of clothing and dancing is often either not relevant or is rarely relevant.[159] The bare relevance threshold, as described above, should therefore operate to ensure irrelevant clothing and dancing evidence is not admitted. Adherence to the bare relevance threshold can be assisted by better training and awareness of the risks of myths and misconceptions with such evidence, and proactive scrutiny from all parties when such evidence is sought to be admitted.[160] Where such evidence is admitted outside the SBE regime, the risk of jurors drawing myth-inflected inferences from it can be addressed by judicial directions.

Relationship evidence

3.121 A significant number of sexual offences trials involve a complainant and defendant who are known to each other.[161] If there is a relationship of any kind between the complainant and defendant, that information can help the jury understand the context of the case and interpret the evidence. As we summarised in the consultation paper,

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156 CPS and Equally Ours, *Research into the public understanding of Rape and Serious Sexual Offences (RASSO) and consent,* 2024, p 68 and 83; S Reid et al, *Scottish Social Attitudes Survey 2019: Attitudes to Violence against Women in Scotland,* (December 2020); R Ormston et al, *Scottish Jury Research: Findings from a Large Scale Mock Jury Study* (October 2019); S Cowan et al, *The Use of Sexual History Evidence and 'Sensitive Private Data' in Scottish Rape and Attempted Rape Trials* (2024). Dr Charlotte Herriott also cited a number of studies that show evidence about a complainant's clothing and behaviour "is regularly used erroneously at trial to advance rape myth narratives, that both place blame on the complainant and attempt to exonerate the defendant": O Smith, *Rape trials in England and Wales: Observing justice and rethinking rape myths* (2018); J Temkin, JM Gray, and J Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study', *Feminist Criminology*, 2018, 13(2); and E Daly *Court observations of English rape and sexual assault trials: an intersectional analysis* (2021).

157 J Jackson et al, *Mapping the Changing Face of Cross-Examination in Criminal Trials*, (2024).

158 Including Centre for Women's Justice ("CWJ") and Six Circuits.

159 Dr Leahy and Dr Herriott.

160 For further discussion, see Ch 14.

161 The Office for National Statistics have reported that between October 2021 and March 2022, in 57% of rape and assault by penetration offences the defendant was a partner or ex-partner of the victim. Sexual offences prevalence and victim characteristics, England and Wales: year ending March 2022.

relationship evidence is therefore "important explanatory evidence" that is usually admitted to provide context.[162]

3.122 Relationship evidence can implicitly or explicitly include sexual behaviour between the complainant and defendant.[163] Some relationship evidence will therefore fall within the scope of the SBE framework and be subject to a higher threshold than mere relevance. Currently, relationship evidence that falls within the scope of section 41 can be admitted by the prosecution without having to go through section 41. If the defence wish to adduce it, however, section 41 can prevent them doing so, leading to criticism that section 41 is too restrictive. Indeed, some have argued that section 41 was not designed to prevent background relationship evidence from being admitted.[164]

3.123 In the consultation paper we explained that evidence that a relationship exists between the defendant and complainant is important explanatory background evidence and adduced for a different purpose than other forms of SBE. We are concerned that if all relationship evidence is subject to the SBE framework, it would be unduly restrictive. It may lead to practitioners being forced to use creative methods to adduce it, undermining the credibility and clarity of the SBE framework. One reason for this concern is that evidence that is relevant because it provides juries with important background information, to enable them to understand the context of the case, is distinct from evidence that is relevant because it goes to a matter in issue in the case. Purely background evidence therefore cannot have substantial probative value in relation to a matter in issue.[165] This is reflected in the non-defendant bad character provisions in the CJA 2003, where there are separate gateways for admission depending on whether the character evidence has explanatory value or probative value in relation to a matter in issue.[166]

3.124 Another concern is that, on the basis that relationship evidence has a different character and purpose, it would be disproportionately burdensome to require parties to apply under the SBE framework to adduce it. We therefore provisionally proposed that relationship evidence that is purely background explanatory evidence should be excluded from the SBE framework.[167]

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162 CP 259, para 4.90 citing *Re A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1 at [10] and Rook and Ward (2021), 26.21.

163 It can also include or imply misconduct (where the relationship is said to be violent or abusive, for example).

164 D Birch "Untangling sexual history evidence: a rejoinder to Professor Temkin" [2003] *Criminal Law Review* 370, 375; M Thomason, "Previous sexual history evidence: A gloss on relevance and relationship evidence" (2018) 22(4) *The International Journal of Evidence and Proof* 342; and the House of Lords in *Re A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1.

165 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 10.7.

166 CJA 2003, s 100(1)(a) and (b) respectively.

167 Consultation Question 25: "relationship evidence that is relevant as explanatory or background evidence only, should not be within the scope of any framework that restricts sexual behaviour evidence". We also asked for views on whether there should be any restrictions on relationship evidence to ensure that it is only admitted as background or explanatory evidence, and what form those restrictions should take.

3.125 The majority of consultees who responded to this proposal agreed that explanatory background relationship evidence should not be subject to the SBE framework.[168] Consultees agreed with our analysis that it is important explanatory background evidence that should not be unduly restricted, and that it would be disproportionately burdensome to require such evidence to go through the SBE framework.

3.126 A core concern is that the SBE framework, both currently under section 41 and under our recommended alternative model described above, is not designed to admit evidence that has explanatory value only. Evidence with explanatory value only logically requires a different approach, or it risks undermining and confusing the main framework.

3.127 Secondly, we remain persuaded that it would place an undesirable burden on the system if an application was needed to adduce background explanatory relationship evidence. This is particularly pertinent in light of our recommendation that the prosecution is also subject to the SBE framework.[169]

3.128 We maintain our view that it is appropriate that the SBE framework will not apply to relationship evidence, if, and only if, it is being admitted as important explanatory background evidence. If instead evidence of a relationship would be used to put before the jury particular sexual behaviours of the complainant, to suggest what was "normal" sexual behaviour between the defendant and complainant, or as evidence going to a matter in issue in the case, it should remain subject to the SBE framework.[170] The existing scrutiny of evidence that is admitted outside specific evidential thresholds should operate to ensure this exclusion is properly adhered to.[171]

3.129 When making our provisional proposal, we acknowledged the risk that relationship evidence may be used to introduce myths or misconceptions about sexual behaviour. We argued that:

> where relationship evidence goes beyond [the purpose as background or explanatory evidence] and seeks to, or risks, introducing or relying on a myth or misconception, or being treated as evidence of an issue in the case, it should instead be within the scope of the restrictions as SBE.[172]

3.130 Echoing the analysis in the consultation paper, consultees expressed concern that relationship evidence can still perpetuate harmful myths, especially about the role of

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168 19 out of 29, including the Criminal Bar Association; the CPS; the Bar Council; the Law Society; and HMCPSI.

169 Currently, the prosecution is not subject to s 41 and can introduce SBE and relationship evidence without needing to make an application. As the prosecution are responsible for presenting the case, they will often need to present all important background explanatory evidence.

170 Similarly, where background evidence includes evidence of misconduct such as violence or abuse between the complainant and defendant, that should remain subject to the bad character provisions.

171 Judges have an ongoing role in ensuring that only relevant evidence is admitted, and that evidence that should be subject to a separate application is not adduced without an application. The parties themselves also have a role in challenging evidence that is adduced outside the appropriate mechanism, see Ch 11 for further detail on how this can be better achieved in sexual offences trials.

172 CP 259, para 4.224. We also highlighted that where the relationship evidence includes elements of bad character evidence, the relevant admissibility threshold for bad character should apply to that evidence.

consent in the context of a relationship.[173] Dr Herriott's work also found that mock jurors highlighted evidence of the complainant's previous sexual history "as a potential marker of an increased likelihood that she was consenting due to the 'relationship context' in which it occurred".[174]

3.131 We share concerns that relationship evidence can perpetuate myths, particularly about consent in the context of relationships. However, we think that the likelihood the jury will draw improper assumptions as a result of relationship evidence, which is purely explanatory, is much lower than with other types of SBE. Given its explanatory value, restricting its admission on the basis of the risk of myths is not proportionate. Instead, we think that existing measures, including the example direction on relationship evidence,[175] should operate to mitigate the risks.

Recommendation 15.

3.132 We recommend that relationship evidence that is relevant as explanatory or background evidence only should not be within the scope of any framework that restricts the admissibility of sexual behaviour evidence.

Unsafe conclusion

3.133 Currently, under section 41(2)(b) of the YJCEA 1999, the court may not give leave to admit SBE unless it is satisfied that "a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case".

3.134 Some consultees suggested that the same provision should be included in our proposed framework.[176] Professor Findlay Stark, for example, described this part of the test as being "of vital importance to improving the law on this topic".[177]

3.135 However, Dr Thomason has argued that:

> A test based on determining whether excluding the evidence might lead to the jury rendering an "unsafe" verdict must also be rejected as being inappropriate, as it

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173 Including Dr Olivia Smith and Professor Findlay Stark.

174 C Herriott, *Sexual History Evidence in Rape Trials: Is The Jury Out?,* 2023, p 87. For further discussion of this mock jury research, see Ch 1.

175 Example 10, Crown Court Compendium. See Ch 10 for further discussion of directions.

176 Including FLAG; Professor Findlay Stark; Northumbria Centre for Evidence and Criminal Justice Studies; Six Circuits.

177 F Stark, "Bringing the Background to the Fore in Sexual History Evidence" [2017] 8 *Archbold Review* 4. Professor Stark's views on the use of s 41(2)(b) as a means of improving the application of s 41 have been amplified by inclusion in *Rook and Ward*, 26.125.

requires the trial judge to utilise the test used for criminal appeals and engage in speculation about risks of appeal.[178]

3.136 We agree that a test of "safety" is not the most appropriate test for this type of admissibility decision in a first instance trial, and we did not propose its retention.[179] Evidence which would render a jury's conclusion unsafe would clearly be necessary for a fair trial and therefore admissible. In *Wilson*, the court explained that the purpose of section 41(2)(b) is "to protect the defendant from an unfair trial".[180] As set out at paragraph 3.43 above, our recommended framework would already ensure such evidence is not excluded and would protect the defendant from an unfair trial. We think this is a more appropriate way of achieving the same aim as section 41(2)(b); it utilises a test familiar at the trial stage to ensure the necessary evidence is admitted, rather than incorporating a test most often used at the Court of Appeal.[181]

A "twin myths" restriction

3.137 Modern understandings of rape shield legislation have developed from the "twin myths" that we note earlier in this chapter. The Canadian case *R v Seaboyer* described these as the myths "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief".[182] Such thinking is now discredited. Evidence that relies solely on such a myth (ie appeals only to the generalised concept of chastity, moral worth and credibility) is irrelevant in a criminal trial.

3.138 We heard from stakeholders that there would be benefit in expressly including reference to the prohibited twin myths in the SBE legislative framework. For example, Dr Charlotte Herriott suggested our structured discretion model should include a similar provision to the Canadian legislation, which explicitly prohibits SBE used to infer the twin myths.[183]

3.139 Such a prohibition would have two limbs. It would prohibit sexual behaviour evidence where it seeks solely to support an inference that, by reason of the sexual nature of that activity, the complainant:

(1) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

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178 M Thomason, "When Should Relevant Sexual Behaviour Evidence be Admissible?: Constructing a Rule of Evidence from First Principles" (unpublished draft).

179 We note there was disagreement about the inclusion of this test in section 41 during the passage of the YJCEA 1999 in Parliament. Lord Thomas argued "The test of whether the conviction or conclusion is unsafe is that which applies to the Court of Appeal. In my view, it is wrong to introduce the concept of whether something is rendered unsafe into the discretion of the trial judge": *Hansard* (HL) 8 February 1999, vol 597, col 51.

180 *R v Wilson and Anor* [2024] EWCA Crim 1514 at [38].

181 For example, in deciding whether to grant a stay on the grounds of abuse of process, the judge will determine whether the defendant would be able to have a fair trial.

182 [1991] 2 SCR 577 at 604 (McLachlin J).

183 Criminal Code (Canada), s 276(1).

(2) is less worthy of belief.

3.140 The first is explicitly covered by our recommended threshold above. That threshold with factors provides scrutiny of evidence that relies on such a myth to establish relevance. There are also many other pertinent and pernicious myths that may be invoked by SBE. Our recommended threshold with factors applies scrutiny to SBE that may invoke the full range of myths.

3.141 While there may be some declaratory benefit in referencing one of the foundational justifications for restricting SBE, our recommended framework already explicitly frames the SBE provisions within the context of the dangers that the restrictions are designed to prevent.

3.142 We do, however, think that an express provision regarding SBE used to impugn the complainant's credibility is worth further consideration. We turn now to that matter.

Credibility restriction

3.143 One of the features of the current section 41 model is what is known as the "credibility restriction". SBE cannot be admitted under the first three gateways – "not an issue of consent",[184] "contemporaneity"[185] and "similarity"[186] – if:

> it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced (or asked) is to establish or elicit material for impugning the credibility of the complainant as a witness.[187]

3.144 This credibility restriction does not apply to the "rebuttal" gateway – it would be counterintuitive if it did so. The restriction has an important role in ensuring SBE is not used to perpetuate the myth that the mere fact a complainant has been sexually active makes them less credible (one of the "twin myths" described above). However, it applies more widely than that: it prohibits any evidence used to undermine the complainant's credibility, even if it is not based on a generalisation but instead directly undermines the complainant's credibility. This makes it necessary for the current model to include the separate rebuttal gateway so that evidence capable of rebutting prosecution evidence can still be admitted even when it is sexual in nature.

3.145 The current credibility restriction and its interaction with the gateways has been criticised for its complexity. First, as Rook and Ward have noted:

> [h]owever well-intentioned the subsection, problems arise because many serious sex cases turn on the credibility of the complainant and the defendant. As the Court of Appeal said in *Funderburk*, "where the disputed issue is a sexual one between

184 YJCEA 1999, s 41(3)(a).

185 YCJEA 1999, s 41(3)(b).

186 YJCEA 1999, s 41(3)(c).

187 YJCEA 1999, s 41(4).

two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point".[188]

3.146 Secondly, it has created a complicated structure of admissibility and exclusion within section 41 as described above at paragraph 3.10.

3.147 While we see the benefit of including a credibility restriction, we do not think the approach in section 41 is helpful. A complete restriction on all SBE that seeks to impugn the complainant's credibility is inappropriate. There will be cases where SBE is needed for the defence to support their case that the complainant is not credible. For example, evidence of previous similar allegations proven to be false can be important evidence for the jury to consider. The fact that it is evidence of sexual behaviour adds to its probative value in such a scenario. It would therefore be problematic if the SBE restrictions prevented such evidence being admitted merely because it is sexual.

3.148 Dr Thomason and Drs Brian Brewis and Paul Dargue proposed alternative models which included a restriction on SBE sought to be adduced to impugn the complainant's credibility (although these alternatives are framed in different ways).[189]

3.149 We see value in employing the credibility limb of the twin myths by instead introducing a prohibition on SBE sought to be admitted as evidence that the complainant is "unchaste" and therefore should not be believed. It should operate so that evidence sought to be admitted on that basis is prohibited without needing to consider the two stage threshold.

3.150 We think that this is more suitable than the current credibility restriction for problematic SBE aimed at impugning the complainant's credibility. It would allow for a clearer route of admissibility for necessary evidence relating to credibility, by distinguishing between SBE that relies on the sexual nature of the behaviour to impugn credibility (which would be restricted) and SBE that is specific to a credibility issue in the case (which could be admissible if it meets the threshold).

3.151 The following two examples illustrate the difference.

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188 (1990) 90 Cr App R 466. See also R v T [2002] 1 WLR 632 at 638.

189 Dr Matt Thomason suggested "… where the matter in issue is [the complainant's] credibility, the evidence or question will not have substantial probative value unless: the evidence or question concerns specific instances of [the complainant's] untruthfulness..." M Thomason, "Excluding sexual behaviour evidence: back to first principles" [2024] *Criminal Law Review* 692.

Drs Brewis and Dargue suggested: *"*For the purposes of subsection (2) no evidence or question shall be regarded as relating to a [matter in issue] in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.*"*: B Brewis and P Dargue, "Sexual Behaviour Evidence in the Court of Appeal (Criminal Division): Presenting the need for reform", p 20, accepted for publication in (2025) 85, *Journal of Criminal Law*.

Example 2:
In a rape trial, the alleged incident is said to have occurred after the defendant and his friend B met the complainant in a bar. In their evidence in chief, the complainant states that they did not know B or the defendant before. The defence wish to adduce evidence from a dating app that shows the complainant engaged in sexual messaging with B the week before the alleged incident, as evidence that the complainant is lying about knowing B and is therefore not a credible witness.

Example 3:
In the same rape trial, the complainant has given the same evidence in chief. The defence wish to adduce evidence from a dating app that shows the complainant engaged in immediate sexual messaging with someone they did not otherwise know on a dating app a week before the alleged incident. The defence seek to adduce the messages as evidence that the complainant is the type of person who engages sexually with people they don't know well and because of that sexual behaviour is not a credible witness.

3.152 In example 2 the SBE is not being adduced to rely on the twin myth relating to credibility, therefore it is not automatically prohibited and the threshold for admission should therefore be considered. In example 3, the SBE is being used to suggest that the complainant is sexually active and because of that, they are not credible. That evidence would be prohibited by this more refined credibility restriction.

Recommendation 16.

3.153 We recommend a prohibition on sexual behaviour evidence where it seeks solely to support an inference that, by reason of the sexual nature of that activity, the complainant is less worthy of belief.

"Specific instance of sexual behaviour"

3.154 Another feature of section 41 is that, for evidence to be admissible under one of the gateways, it must also "relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant".[190] Similar criteria are contained in both the Canadian and Scottish thresholds.[191]

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190 YJCEA 1999, s 41(6).

191 Criminal Code (Canada) s 276(2)(c); Criminal Procedure (Scotland) Act 1995, s 275(1)(a).

3.155 Drs Brian Brewis and Adam Jackson have suggested that the admissibility of SBE under any new framework should also be limited to where the "evidence or question relates to a specific instance (or instances) of the complainant's sexual behaviour".[192]

3.156 Limitations on the admissibility of SBE to permit only "specific instances" are intended to prevent generalised references to behaviour or evidence of sexual reputation rather than factual behaviour. This is an important limitation; such general references would have little probative value. "Reputational" evidence can be particularly problematic, as without factual incidents to explain to the jury, they would instead be asked to consider the way a complainant's behaviour is viewed and understood by others.

3.157 We agree therefore that the SBE framework should operate to limit such evidence. The threshold that we recommend should itself prevent such generalised evidence being admitted. Such evidence will have limited to no probative value, given its generalised nature and lack of factual basis. It would not meet the requirement of "substantial probative value to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole". Further, the reformed credibility restriction explained above will operate to exclude such evidence when it is used to support an inference that a complainant ought not to be believed, or is more likely to have consented to the sexual activity in issue, because of their sexual "reputation". However, we are conscious of the risk that the removal of this wording as part of the SBE threshold could suggest that such a restriction is no longer in effect. We therefore consider that if this risk could materialise, there would be value in retaining the "specific instance" restriction in our recommended new threshold.

PROCEDURE AND SCOPE

Scope

3.158 Currently section 41 applies to evidence sought to be adduced and questions sought to be asked by the defence about sexual behaviour of the complainant only, and only in trials involving certain offences.[193] While this ensures the protection of rape shield legislation applies to a large proportion of evidence that carries a risk of prejudice and infringes the complainant's privacy, those aspects of SBE are also present when SBE arises in other contexts. In this section we explain our recommendation to extend the application of the SBE framework to all cases in which SBE is sought to be adduced, including evidence sought to be adduced by the prosecution, and when the evidence relates to sexual behaviour of all witnesses and victims of homicide.

Prosecution and defence

3.159 As we explained in the consultation paper, SBE may be adduced by the prosecution where it has important probative value for the prosecution case. This may include evidence of an existing relationship between the defendant and complainant. The SBE may be part of other important evidence for the prosecution case, for example evidence of the defendant's previous bad character involving prior sexual violence

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192 B Brewis and A Jackson, "Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework" (2020) 84 *Journal of Criminal Law* 49.

193 YJCEA 1999, s 41(1) and s 62.

against the complainant.[194] Further, the prosecution may agree to adduce SBE even if it is not a key part of their case, either because doing so can have a protective effect for the complainant, or for practical reasons where the evidence is uncontroversial.[195] While it may be appropriate and necessary for the prosecution to adduce SBE in some circumstances, the nature of the evidence means there is still a risk that it will be humiliating and intrusive for the complainant, and that it may introduce or evoke myths in the decision making process. Our recommended threshold is designed to scrutinise SBE in order to minimise these risks. If these risks arise regardless of the identity of the party seeking to adduce the evidence and their purpose in doing so, arguably the same level of scrutiny should also apply.

3.160 Further, the prosecution does not represent the complainant and their interests. In order to protect their interests, including their right to privacy, the prosecution's use of SBE relating to the complainant should be subject to the same scrutiny as the defence.

3.161 We acknowledged in the consultation paper that extending the framework to apply to the prosecution would have a negative impact on court time and resources. In addition, we have not received evidence that shows a problematic use of SBE by the prosecution. We are encouraged by this latter point. It suggests that the prosecution are currently adducing SBE that is appropriate in the context of the case. As we explained in the consultation paper, we therefore expect such SBE would continue to be admissible under our recommended threshold.[196] We provisionally concluded that the additional burden on resources is justifiable given the risk posed by SBE and therefore proposed that the framework apply equally to SBE sought to be adduced by both prosecution and defence.[197]

3.162 The majority of consultees supported this proposal,[198] and agreed that the risks with SBE arise regardless of the party adducing it or their purpose.[199] Consultees argued that extending the scope of the SBE framework in this way encourages greater fairness between the defence and prosecution.[200] Professor Vanessa Munro described the benefits of a similar approach in Scotland:[201]

> [It] ensures careful advance thought regarding what material is put before the jury, how it will impact on case strategy, and what opportunities it might open up in terms of cross-examination, as well as the need for any re-examination of the witness. It

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194 Such evidence would be both defendant bad character evidence subject to the bad character framework in CJA 2003, s 101 and SBE relating to the complainant (as SBE includes non-consensual sexual activity).

195 CP 259, para 4.236.

196 CP 259, para 4.245. While our recommended threshold for SBE is necessarily high, it is also designed to operate to allow evidence necessary for a fair trial to be admitted. Therefore, necessary prosecution evidence would also continue to be admissible.

197 Consultation Question 27, para 4.246.

198 23 out of 31, 1 disagreed, 7 gave an answer categorised as "other".

199 Including JURIES; Northumbria Centre for Evidence and Criminal Justice Studies; and Dr Susan Leahy.

200 Including Martin Rackstraw and HMCPSI.

201 Criminal Procedure (Scotland) Act 1995, s 274.

will also allow a clearer understanding of the ways in which such evidence features in rape cases.

3.163 The CPS expressed concern about the "potential impact on resources and the timeliness of prosecutions" resulting from an extension of the restriction. They explained that "a large proportion" of cases involve the prosecution adducing SBE as important explanatory background evidence. We have recommended above an exception from the SBE framework for such background evidence which we anticipate will alleviate some of the resourcing impact. Where SBE sought to be adduced by the prosecution is not background evidence, our view remains that it is proportionate for the SBE threshold to apply.

3.164 The Criminal Bar Association noted that the prosecution is a public authority "governed by the necessity for compliance with [article 8 of the ECHR]." They suggested therefore that an alternative approach could be "to require the prosecution to consult with the complainant and determine the wishes of the complainant to ensure article 8 compliance". We do not consider this will always be sufficient for the protection of the complainant's article 8 rights. The prosecution can find out the complainant's wishes (for example their view on whether their SBE should be adduced by the prosecution) but article 8 does not require them to act in accordance with their wishes (for example they can choose to adduce the SBE regardless of the complainant's views). Under article 8(2), the complainant's right to privacy can be interfered with by a public authority so long as the interference is adequately prescribed by law, is in furtherance of a legitimate aim (such as the protection of the rights of others), and is necessary in a democratic society (which requires, at a minimum, that the interference was proportionate to the legitimate aim pursued.[202] What constitutes a lawful interference in the complainant's article 8 rights is thus a nuanced analysis that is not wholly answered by a prior consultation with the complainant. The prosecution are required to act in the public interest when prosecuting crimes on behalf of the state; considering the complainant's article 8 rights is therefore just one part of their duty. The prosecution consulting with the complainant is not a suitable alternative to judicial scrutiny of SBE applications, just as it is not a suitable alternative to the complainant having a right to be heard on those applications (see Chapter 7).

Recommendation 17.

3.165 We recommend that the framework for admitting sexual behaviour evidence should apply to sexual behaviour evidence sought to be adduced, and questions sought to be asked, by both the defence and prosecution.

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202 Under the ECHR, art 8(2): "There shall be no interference by a public authority with the exercise of this right [to a private life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". For further discussion, see Appendix 1.

Non-sexual offences

3.166 While it may more commonly arise in sexual offences cases, SBE can also arise in relation to non-sexual offences. For example, previous sexual violence against a complainant by the defendant may be relevant when the defendant is tried for domestic abuse offences involving the same complainant. In a case involving the so-called "rough sex defence", a defendant charged with murder may claim that the death occurred as a result of consensual physical harm (for example strangulation) in the context of consensual sexual activity. The defence may wish to adduce evidence of previous sexual activity of the deceased as evidence of their proclivity for physically dangerous sexual activity. In one homicide case (where a husband was convicted of murdering his wife) evidence of the deceased's sexual infidelity was adduced to rebut the suggestion that they had a happy marriage.[203] In such cases the evidence poses many of the same risks as SBE introduced in the context of sexual offences.

3.167 In the consultation paper we asked consultees whether the SBE framework should apply in any prosecution whenever evidence that constitutes SBE is sought to be adduced.[204] The majority of consultees supported this,[205] agreeing that it is logical and sensible to extend the SBE framework in this way as the rationales underlying the rape shield legislation apply in non-sexual offences cases.[206] Consultees also suggested that this proposal would lead to greater consistency.[207]

3.168 Some consultees argued that myths and misconceptions are less impactful in non-sexual offences. For example, the Six Circuits[208] stated that, for non-sexual offence cases, "rape myths will have no realistic bearing on a jury's determination." The Criminal Bar Association stated that "whilst such myths and stereotypes may have relevance in connection with other offences (domestic violence for example) their relevance is less apparent." We agree that rape myths and misconceptions may be less impactful when consent is not in issue. However, as indicated by the Criminal Bar Association's comment, there will be cases where rape myths have some relevance to the substantive offence. Further, one of the twin myths is that "promiscuity" itself makes someone less credible. In any case where the witness' credibility is in issue, introducing their SBE could lead jurors to inappropriately question their credibility based on this myth. When and how myths and misconceptions about sexual behaviour and sexual violence may have relevance is difficult to determine based on the offence itself, and will be influenced by the facts of the allegation. That is why we

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203 *R v Garbutt* [2012] EWCA Crim 1167.

204 Consultation Question 26: "Should the framework that restricts sexual behaviour evidence apply whenever sexual behaviour evidence is sought to be admitted, rather than being limited to a particular class of offences?": CP 259, para 4.233.

205 20 out of 27, 6 disagreed, 1 provided a response categorised as "other".

206 Including JURIES; CWJ; the Law Society; the Bar Council; and Professor Findlay Stark.

207 Including Dr Amelia Shooter and the CPS.

208 In a consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

recommend that the framework applies to any case where SBE arises, rather than restricting its application to a list of offences in which it may be more likely to arise.

3.169 Our recommended SBE framework allows judges to consider the risk of myths and misconceptions, but the absence of such a risk does not determine the admissibility of the SBE. The framework also protects the complainant's right to privacy and dignity and this factor may be more relevant in non-sexual offences cases.

3.170 We recognise that the justification for restricting SBE may be stronger, and more likely to arise, in sexual offences. However, the rationales for introducing restrictions and greater scrutiny of SBE apply in all prosecutions where SBE arises. Our recommended framework enables judges to consider the risks in the context of the particular facts when determining admissibility, and ensures that evidence necessary for a fair trial is admitted.

3.171 Finally, we acknowledge that this extension would also have resource implications. In particular, this extension would apply to cases heard in magistrates' courts as well as the Crown Court. While there are circumstances currently where an SBE application under section 41 may be heard in the magistrates' courts, it is rare.[209]

Witnesses and victims of homicide

3.172 As the discussion above demonstrates, witnesses in a variety of cases may face the admission of evidence and questioning relating to their sexual behaviour. By expanding the scope of the SBE framework to non-sexual offences, we are expanding it to include the SBE of all witnesses, not just complainants. This will include witnesses besides the complainant in sexual offences (for example an ex-partner of the defendant called as a witness for the prosecution who is asked about their sexual relationship with the defendant as a motive for lying to the court). The framework should also extend to the SBE of victims of homicide. As described above (at paragraph 3.166) SBE may arise in cases of homicide where the defendant is arguing the so-called "rough sex defence" or in cases where sexual infidelity is relevant to the motive of the defendant. We think there is value in ensuring that the risks and harms of using such evidence are considered by the court before admission, even if the considerations are not the same as with other witnesses. As we described in the consultation paper:

> we have been told that for the victim's loved ones, hearing such evidence causes additional upset. Asides from the impact on the individuals, the risk of prejudice may still be present in all such cases where SBE is used.[210]

3.173 Our recommended framework will provide sufficient discretion for judges to consider relevant factors in such cases.

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209 Under the YJCEA 1999, s 42(3), s 41 applies to "proceedings before a magistrates' court inquiring into an offence as examining justices". Accordingly, magistrates' courts are already able to deal with SBE applications where they retain jurisdiction to hear either-way sexual offences and the defendant elects summary trial.

210 CP 259, para 4.230.

Recommendation 18.

3.174 We recommend that the Government consider whether the framework for admitting sexual behaviour evidence should apply to:

(1) evidence sought to be adduced of the sexual behaviour of any victim of homicide;

(2) evidence sought to be adduced, and questions sought to be asked, of the sexual behaviour of any witness; and

(3) sexual behaviour evidence sought to be adduced in a trial for any criminal offence.

3.175 Although we conclude that the rationale justifying a new SBE regime applies to SBE applications in whatever context they arise (and therefore a greater range of cases and witnesses than section 41 applies to), we do not recommend a right to be heard, supported by ILA and ILR, for all witnesses whose SBE is subject of an application. There are issues that require greater consideration in relation to expanding a right to be heard and ILA/ILR to other witnesses and in non-sexual offences prosecutions than we are able to review in this project. For example, there will be operational difficulties in identifying when SBE will arise in a non-sexual offence case in order to give effect to a right to be heard and ILA/ILR.

Process

3.176 Currently, applications to adduce or ask questions about SBE must be made in writing. The application should include: particulars of the evidence or questions; the issue in the case to which the applicant claims the evidence or questions relates; and the exception to the prohibition under the legislation that the applicant claims applies to the evidence. Applications should be made as soon as reasonably practical after becoming aware of grounds for doing so, and in any event no more than 10 days after disclosure of the material upon which the application is based. Applications are heard in closed court, and the judge gives reasons for their decision in open court, in the absence of the jury.[211]

3.177 We understand that the current procedure for applications works well. We asked consultees whether the current requirements for written applications should

[211] Criminal Procedure Rules ("CrimPR"), r 22.2 to 22.4 and YJCEA 1999, s 43(3).

continue;[212] the majority agreed.[213] The case for reform of the process for applications is not made out. We conclude that the current process and timelines should apply for any application to adduce or ask questions about SBE in all cases where the SBE regime applies.

3.178 We do however recommend that judges should be required to produce written reasons for their decision upon application and that those reasons should address all of the factors they are required to consider under the structured discretion model. We proposed this in the consultation paper as a way of ensuring transparency and consistency, and enhancing scrutiny of these difficult decisions.[214]

3.179 The majority of consultees agreed with the need for written reasons,[215] for the same or similar reasons to those we had provided.[216] For example, nia (a service provider for women and girls who have been victims of sexual violence) noted that it would:

> boost confidence and trust and transparency and build a comparative and consistent framework that will assist efficiency and trust and will focus minds on if and how such evidence is to be used and shared and with what effect.

3.180 Requiring that written reasons must address the recommended factors was also supported.[217] Consultees, including the CPS, stated that this would encourage consistency and ensure decisions reflect the relevant criteria. The Bar Council suggested that such a requirement was not necessary as judges would provide suitable reasons regardless. There was also some concern that such a requirement would lead to "lip service" being paid to factors that are less relevant. We do not think this undermines the value of this requirement; some factors will undoubtedly be less relevant than others in individual cases, but it is important that all are considered in every case. It will still aid transparency, and ensure that due consideration is given to each, if that is articulated in the decision. Now that we have refined the factors that apply under each stage of the test, we conclude that this rationale applies most clearly to the factors under stage 2, not stage 1. The key difference is that the factors under stage 2 should be considered in every case; it is important for their efficacy that judges always turn their minds to those factors. However, under stage 1 the factors may help assess probative value if they are present features of the evidence; it is not

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212 Consultation Question 21, part a: "We provisionally propose, as is currently required, that applications to admit sexual behaviour evidence should be made in writing and that the application should include: detail of the evidence sought to be admitted; the purpose for which its admission is sought; and drafts of any proposed questions". CP 259, para 4.203.

213 28 out of 33, 1 disagreed, 4 gave an answer categorised as "other".

214 Consultation Question 21, part b: "We provisionally propose that the judge should be required to provide written reasons for their decision on an application to admit sexual behaviour evidence". CP 259, para 4.204. Consultation Question 21, part c: "We provisionally propose that the written reasons should address all of the factors judges are required to consider". CP 259, para 4.205.

215 30 out of 35 supported a requirement to provide written reasons, 3 disagreed, 2 gave an answer categorised as "other".

216 Including Men and Boys Coalition; CWJ; Professors Conaghan and Russell; JURIES; Martin Rackstraw; RCEW; CPS; Claire Waxman. We discuss appeal rights for decisions on SBE in Ch 8.

217 23 out of 30 supported a requirement that written reasons address all factors, 2 disagreed, 5 gave an answer categorised as "other".

necessary for their efficacy for the judge to consider every factor regardless of the facts of the case and specifics of the SBE. The reasons should therefore address both stage 1 and stage 2, and the factors under stage 2.

3.181 Although some judges already prepare written reasons, and there is some written preparation involved for oral judgments, we acknowledge that requiring written reasons for all applications will entail additional resources in a trial. Consultees raised concern about the potential for delay and resourcing implications,[218] particularly in an already stretched system.[219] On balance, we agree with the view expressed by Martin Rackstraw: while there are resource implications, there is also benefit to public confidence resulting from the provision of written reasons. We conclude that the benefits ultimately outweigh the resource implications. We do however recognise that this recommendation must be accompanied by suitable resourcing to minimise the impact on the trial itself and the wider criminal justice system.

Recommendation 19.

3.182 We recommend that the judge should be required to provide written reasons for their decision on an application to adduce sexual behaviour evidence, and that their written reasons should address stage 1, stage 2, and all of the factors under stage 2 they are required to consider.

3.183 In Chapter 7 we conclude that complainants should have a right to be heard, supported by independent legal advice and representation, on applications to adduce their SBE in sexual offences prosecutions. As we explained in the consultation paper, complainants are not always told about applications, and if they are it can be at different stages of the process.[220] If complainants have a right to be heard on the application, they will be informed as soon as an application is made. If our recommendations in this regard are not implemented, we think there is benefit to clarifying when complainants have a right to be told.[221]

3.184 We maintain our view that the responsibility for informing complainants of an application to admit their SBE should remain with the prosecution. We conclude that the prosecution should inform the complainant once that application is made, and not wait for the outcome before doing so, unless:

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218 Including the Criminal Bar Association and HM Council of Circuit Judges.

219 Some consultees suggested that transcripts of oral judgments could be a sufficient alternative to written reasons. We do not think this would have the same benefit as written reasons. Transcripts are costly, the requestor may have to pay themselves, and there can be delays in acquiring them. They also rely on technology not available in all courts that will hear SBE applications; for example in magistrates' courts.

220 CP 259, para 4.248. Currently there is only a requirement in the CrimPR to inform the complainant when a successful s 41 application has been made, in order to avoid causing unnecessary distress in relation to an unsuccessful application: CrimPR 22.3.

221 In the consultation paper we concluded that the prosecution should be responsible for telling the complainant about an application and asked whether they should be told (1) when it is made; (2) only when it is decided regardless of outcome; or (3) only when it is successful: Consultation Question 28, para 4.251.

(1) telling the complainant at that stage might interfere with the investigation;

(2) the complainant does not wish to be told then or at all; or

(3) there is a risk of harm to the complainant or another if they are told.[222]

3.185 Complainants' article 8 rights are engaged by applications regarding their SBE, whether they have a right to be heard on the application or not. It is appropriate that they are informed about them at the earliest opportunity unless there is good reason for not doing so. This helps them remain engaged in the process, and supports their agency.[223] In further recognition of this, complainants should be able to tell the prosecution if they do not want to be notified about such an application at any stage. The current law reflects an assumption that they would be caused unnecessary stress if the application is ultimately unsuccessful. We think it is preferable for complainants to decide that for themselves, and let the prosecution know if they do not want to be notified. The other exceptions above serve to protect the trial process in the rare circumstances where informing the complainant would risk the investigation process or cause harm.

3.186 For clarity, the prosecution should also be able to notify the complainant's Independent Sexual Violence Advisor of an SBE application if they have the complainant's consent to do so.

Recommendation 20.

3.187 We recommend that the prosecution should be required to inform the complainant about an application to adduce evidence of or ask questions about their sexual behaviour, once that application is made (and not wait for the outcome of the application) unless:

(1) telling the complainant at that stage would interfere with the investigation;

(2) the complainant does not wish to be told then or at all; or

(3) there is a risk of harm to the complainant or another if they are told.

CONCLUSION

3.188 As we described in detail in the consultation paper and above, there are challenges with all the potential models of restricting SBE we have considered. We reject a complete ban, as that would not be compatible with the defendant's right to a fair trial. Any other model inevitably will require the court to make a determination about the

[222] There are similar exceptions for the requirement to give victim's notice of a request for information relating to them under the Victim and Prisoners Act 2024, s 28 (not yet in force at the time of writing).

[223] The word "agency" is used here, and throughout this report, to refer to the ability or capacity of an individual to act independently or make decisions for themselves. For example, see UK Trauma Council, "Complex trauma: evidence-based principles for reform of children's social care" (2022) p 6. This is not intended to mean a "legal agent", who is someone acting on behalf of a principal.

use of this evidence in individual cases - evidence that can have substantial probative value and, at the same time, pose risks to the trial process and treatment of complainants.

3.189 Further, any model will necessarily permit the use of some SBE and cross-examination of the complainant about their sexual behaviour. The risks associated with SBE do not disappear just because the evidence has been properly admitted. Instead, other measures within the trial process need to operate effectively to minimise any negative outcomes[224] as a result of SBE being admitted; the threshold itself cannot achieve this alone.

3.190 Throughout this report we make recommendations for a range of measures designed to protect complainants from inhumane treatment in the trial process, to mitigate the impact of myths and misconceptions in juror reasoning, and to ensure appropriate adherence to legal thresholds. We explore the overall impact and benefits of our measures as a package in Chapter 14. These recommendations should work in addition to the existing features of criminal courts and sexual offences trials to provide support to our recommended new SBE framework.

3.191 The following features of our recommended SBE framework, and additional measures, should help ensure that the risks associated with SBE are minimised while protecting the defendant's right to a fair trial:

(1) The structured discretion model, unlike the current section 41 model:

(a) has an appropriate level of discretion that is supported by structured guidance to provide clarity in the decision making process;

(b) ensures evidence is admitted when that is necessary for a fair trial, and is excluded where it is not properly relevant, or is excluded when it is not necessary for a fair trial and it disproportionately risks introducing myths or misconceptions or impacts the complainant's dignity or privacy; and

(c) prohibits SBE which is being used for an improper purpose, in particular being used to infer the twin myths.

(2) A clearer, more logical framework for SBE will operate more effectively and consistently. The framework applies to all parties who seek to adduce SBE and in all cases where SBE is sought to be adduced. This should minimise the risk of SBE being adduced without appropriate scrutiny.

(3) The framework is designed so as not to create a disproportionate burden on parties; to ensure that evidence necessary for a fair trial has an easy route to admission. Further, relationship evidence that is used as explanatory background evidence is excluded from the framework which would also proportionately reduce the burden on parties.

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[224] Including, for example, the potential that the jury will use impermissible myth-infected reasoning, that the complainant's privacy will be infringed, that they will be subject to humiliating and intrusive questioning, or that the defence will ask questions beyond what was permitted by the judge.

(4) The process, including the requirement for written reasons, should encourage the making of consistent and transparent decisions, made as early in the trial process as possible.

(5) The framework, and our recommendations that the complainant have a right to be heard supported by independent legal representation for SBE applications, ensures that complainants' rights and their views are an integral part of the judicial decision making process.

(6) Directions, made by the judge to help the jury assess the evidence before them, can help reduce the potential impact of myths when SBE evidence is adduced. We make a number of recommendations about example directions to assist judges in providing clear and consistent directions to help mitigate improper reliance on myths in juror decision making.

(7) The provision of guidance and training for legal practitioners working on sexual offences cases will help to embed the changes, and their purpose.

3.192 Ultimately, we anticipate that our recommendations will contribute to ongoing cultural change, reflecting better understanding of sexual harm, consent, and treatment of complainants within a trial process that ensures the right to a fair trial.

Chapter 4: Previous allegations of sexual offending

INTRODUCTION

4.1 In this chapter we consider evidence that the complainant has made an allegation of sexual offending[1] that is not the subject matter of the trial. While we use the term "previous allegations of sexual offending" for ease, this can also include evidence of an allegation made *after* the allegation that is the subject of the trial. Most often this type of evidence is understood as "false allegation evidence" ("FAE") as it is used to suggest the complainant lied about the previous allegation, in support of the defence case that the complainant is also lying about the allegation on trial, or generally to impugn the complainant's credibility. However, we think it is necessary to consider the full range of evidence of previous allegations of sexual offending. As we explain below at paragraph 4.3, "falsity" is not binary; an allegation may not always be entirely true or entirely false. Further, the falsity of a previous allegation may be in dispute. Finally, evidence of a previous allegation may be adduced even when there is no suggestion it is false.

4.2 In this chapter we will consider how the law can best address the concerns with the use of evidence of previous allegations.[2] We differentiate between evidence of a previous allegation sought to be adduced for its falsity (which we will call FAE),[3] and evidence of a previous allegation where the defence are not suggesting it was false.

FALSE ALLEGATION EVIDENCE

4.3 FAE covers a range of scenarios including allegations that are proven to be false and maliciously made, allegations that the defence say are false but the complainant

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1 For simplicity we will refer to allegations as being of "sexual offending". For clarity, evidence of previous allegations in this chapter refer to any allegation made by the complainant of non-consensual sexual activity whether it would be defined as assault, rape or any other sexual offence. The alleged conduct does not need to amount to an offence in law, nor be reported to any authority for it be considered an allegation for these purposes. In this project we are not considering evidence of previous allegations of non-sexual criminal activity or misconduct, except in as far as they are evidenced in third party records (see Ch 2). As we describe below, evidence of previous allegations of a sexual nature carries specific risks that require separate consideration. For previous allegations of non-sexual misconduct in sexual offences either the bad character regime (where the evidence is adduced as bad character evidence of the complainant or defendant) or the general rules of evidence (where the evidence is not adduced as evidence of bad character) will continue to apply.

2 Our recommendations in this chapter sit alongside others made throughout this report designed to minimise the risk of myths and misconceptions inappropriately influencing the trial process. The framework we describe in this chapter is based on our recommendations in relation to sexual behaviour evidence. Where false allegation evidence arises from content in a personal record, the access to that material will be restricted by our recommendations in Ch 2. In Ch 10 we outline how the use of judicial directions and expert evidence can help ensure juries assess evidence in an appropriate way. Finally, in Ch 11, we explain the most effective use of the judge's trial management powers to ensure evidence and questioning is relevant.

3 Although we will refer to this type of evidence as false allegation evidence, we acknowledge that the falsity may remain in dispute.

maintains are true, and allegations that may not be factually accurate but were not made maliciously or by the complainant misconducting themselves.[4]

4.4 Deliberately lying about a sexual assault is reprehensible conduct. Evidence of such a false allegation can be relevant and important evidence in a sexual offences trial where it may be the defence case that the allegation at issue is also deliberately false.

4.5 However, evidence of false allegations also carries significant risk to the fairness of proceedings. Where it is evidence of reprehensible behaviour, FAE is a form of bad character evidence ("BCE").[5] As we detail in Chapter 6, BCE is restricted in all criminal trials because of its inherent risk of prejudice. The Criminal Justice Act ("CJA") 2003 contains gateways for the admissibility of BCE about both defendants and non-defendants (usually witnesses, including complainants).[6] For non-defendants, the evidence can only be admitted if either: all parties agree to its admission; it is important explanatory evidence; or it has substantial probative value to a matter in issue which is of substantial importance to the case.[7] The statutory framework therefore imposes a higher threshold for admissibility than relevance, unless all parties agree to its admission. Professor John Spencer has summarised the two aims when restricting the use of BCE for non-defendants:

> The first was to protect people's reputations and feelings by preventing their trivial misdeeds being publicly paraded in legal proceedings to which they are barely relevant, and the second was to protect the court from being diverted from examining the central issues by "red herrings".[8]

4.6 These concerns apply directly to FAE. Such evidence can be highly sensitive and reputationally damaging to complainants. Depending on the nature and circumstances of false allegations, they can be "red herrings". There are also other risks more specific to FAE.

4.7 There is a misconception that allegations of sexual offences are commonly fabricated.[9] Juries hearing evidence of a false allegation could impermissibly rely on that misconception rather than give appropriate weight to evidence of that false allegation. For example there is a risk that a juror may reason that the FAE demonstrates that allegations of rape are often false, and therefore that the allegation at trial is also more likely to be false.

4.8 Further, there is a risk that FAE, given its sexual context, may be used to suggest the complainant is "unchaste". As we describe in Chapter 3 there are prevailing myths

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4 For example, allegations made in good faith but proven to be inaccurate such as misidentifying a perpetrator, and knowingly false allegations made without malice such that they do not amount to misconduct (for example, where made as a result of "personality problems" or alcoholism: *Davarifar* [2009] EWCA Crim 2294 at [11]).

5 Criminal Justice Act ("CJA") 2003, ss 98 and 112(1).

6 For defendants, see s 101. For non-defendants, see s 100.

7 CJA 2003, s 100(1).

8 J Spencer, *Evidence of Bad Character* (3rd ed 2016) para [3.46].

9 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259") para 2.6.

(known as the "twin myths") that "unchaste" complainants are more likely to consent to sexual activity, and are less worthy of belief.[10] This is the foundation for restricting evidence of sexual behaviour. The sexual behaviour evidence ("SBE") restrictions are also justified by the risks to the trial process posed by other myths associated with sexual behaviour, described in more detail in Chapter 3. Admitting SBE and questioning complainants about their sexual behaviour also carries a high risk of causing complainants distress and humiliation. These same myths and risks may be engaged with FAE given its inherent sexual context. False allegations in this context are about sexual behaviour; they will involve either a description by the complainant of sexual behaviour (whether describing real events or not), evidence of actual sexual behaviour, or will otherwise be of a sexual nature.

4.9 Finally, it may not be accurate or accepted that an allegation was indeed false, even if that is the basis on which it is sought to be admitted. If it was in fact a true allegation, the evidence may have limited to no probative value and pose a very high risk of causing unjustified distress to the complainant due to the sexual nature of the allegation. If there is disagreement about whether it is false, the trial may be derailed by arguments about an allegation not being tried (sometimes called "satellite litigation"). This makes admissibility decisions even more complex and more challenging, yet important.

PREVIOUS ALLEGATIONS NOT SAID TO BE FALSE

4.10 A previous allegation of sexual offending may be relevant in a trial where the reason for adducing it does not rely on the allegation being false. For example, if the complainant has stated that their knowledge of a particular sexual act derives only from the alleged assault at trial, evidence that they have made a previous allegation involving the same particular sex act with a third party could be relevant evidence. Its relevance does not derive from whether the previous allegation was false or not.

4.11 Such evidence carries some of the same risks as FAE given its sexual nature: the risk of distracting the jury from the issues in the case; of causing unjustified distress to the complainant; and of introducing myths and misconceptions about sexual conduct and sexual violence.

CURRENT LAW AND PRACTICE

False allegations

4.12 As noted above, FAE is currently subject to the BCE restrictions where it amounts to reprehensible conduct.[11] As FAE will most likely involve content of a sexual nature, it can fall within the definition of sexual behaviour and therefore be subject to restrictions under section 41 of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA 1999"), the current framework for restricting SBE.

4.13 Section 41 is unlikely to apply where the evidence is about a complete fabrication of sexual activity (where no sexual activity actually took place as alleged; distinct from an

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10 See Ch 2 and *R v Seaboyer* [1991] 2 SCR 577.

11 Not all allegations, even when proven or accepted to be false, will amount to reprehensible conduct such that it falls within the definition of "bad character" under CJA 2003, s 98: *Davarifar* [2009] EWCA Crim 2294.

allegation that consensual sexual activity that did occur was non-consensual). We explained in the consultation paper:

> the law is clear that questioning about a false allegation of sexual assault may not constitute questioning about sexual behaviour because "sexual behaviour" is defined as "any sexual behaviour or other sexual experience". The Court of Appeal has held that where "cross-examination [of the complainant is] genuinely directed towards establishing that the complainant has made a previous false complaint about a sexual matter" then it will not engage section 41 "if it goes to the lies rather than to the sexual behaviour itself".[12]

4.14 As we then noted, there is some confusion as to when FAE should be subject to the bad character or SBE frameworks. To address this, the defence can obtain a ruling from the court confirming that the SBE framework is not applicable because the questioning is relevant only to the complainant's lies, rather than their sexual behaviour. In these circumstances, the defence need only make a BCE application; otherwise they make an application under both the BCE and SBE provisions.[13] To determine whether the BCE provisions alone should apply, there should be a "proper evidential basis" for asserting that the allegation is false (and therefore that the evidence goes to falsity only and is not about the sexual behaviour of the complainant).[14]

4.15 It is not clear the extent to which section 41 is being applied to FAE in practice. In their guidance, the Crown Prosecution Service ("CPS") recommends that practitioners seek a ruling on whether section 41 applies before questioning on false allegations.[15] There is some academic literature that suggests this is happening in practice. In her report on the operation of section 41, Professor Laura Hoyano notes that "many counsel now follow the prudent practice of making applications under both provisions [ie section 41 and section 100]".[16] However, the two frameworks are different and it is not

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12 CP 259, para 5.182, citing *R v V* [2006] EWCA Crim 1901 at [21], citing *R v RT and MH* [2001] EWCA Crim 1877, [2002] 1 WLR 632 and *Cox* (1987) 83 Crim App R 132. We note here that the Court of Appeal in *R v Hurley* have queried the origin of this distinction stating: "In our judgment there are factual and legal reasons why *Cox* should not be relied on to allow cross-examination under section 41 where it is suggested that a complainant has falsely alleged that he or she did not consent to sexual activity which did in fact take place": *R v Hurley* [2025] EWCA Crim 642 at [80].

13 CP 259, para 4.48, citing Crown Prosecution Service ("CPS"), *Rape and Sexual Offences - Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999* (21 May 2021).

14 *R v RT and MH* [2001] EWCA Crim 1877. See also D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* ("*Blackstone's Criminal Practice*") (2025) F7.31.

15 CPS, *Rape and Sexual Offences - Chapter 11: The Sexual History of Complainants, Section 41 YJCEA 1999* (21 May 2021).

16 L Hoyano, *The operation of YJCEA 1999 section 41 in the courts of E&W: views from the barristers' row* (Criminal Bar Association, 2019) p 71. See also B Brewis and P Dargue, "Sexual Behaviour Evidence in the Court of Appeal (Criminal Division): Presenting the need for reform", p 9 (accepted for publication in (2025) 85, *Journal of Criminal Law*) for a summary of Court of Appeal cases in which it was decided that the trial judge was wrong to have applied section 41 because the evidence should have been considered as bad character evidence.

straightforward to apply both in one application. Further the credibility restriction in section 41 can prevent FAE being admitted if it is applied.[17]

Previous allegations not said to be false

4.16 The admissibility of evidence of previous allegations of sexual offending not said to be false would currently be considered either under the general relevance threshold, or section 41 if the evidence falls within the definition of "sexual behaviour". There is less commentary on how this distinction works in practice.

CONSULTATION

4.17 In the consultation paper we primarily considered FAE. We concluded the lack of clarity on the interaction between the bad character and SBE provisions for FAE does not on its own justify reform:

> Our provisional conclusion is that – whether characterised as intersection, overlap or tension – the possibility that both sections may be engaged is not the source of a risk that rape myths will be brought into play.[18]

4.18 However, we explained that the risks associated with FAE and the connection with SBE required further analysis. We provisionally concluded that the application of the non-defendant bad character regime alone for FAE is unsatisfactory because:

(1) The admissibility restriction applicable to non-defendant BCE under section 100 of the CJA 2003 has "fewer hurdles to admissibility than the SBE framework".[19]

(2) The SBE restrictions were designed to address the concerns regarding sexual behaviour being used to humiliate and distress the complainant and to address its prejudicial impact on juries.[20] These concerns may also arise in relation to evidence of false allegations and therefore it is appropriate that the same admissibility framework is applied.

4.19 Finally, we noted there would be benefit in providing greater consistency and clarity. Current practice appears to require a distinction between false allegations where the allegation fabricates the sexual behaviour, and where the allegation fabricates the lack of consent to sexual activity that did take place.[21] Where the falsity in an allegation lies may not always be clear cut.

4.20 We also explained that we had not heard evidence that FAE is being used to perpetuate these myths (and we did not receive evidence of this during consultation).

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17 Under YJCEA 1999, s 41(4), evidence of sexual behaviour of the complainant cannot be admitted if the purpose, or main purpose, to adduce it would be to "impugn" the complainant's credibility unless it is being admitted under s 41(5) which allows evidence to rebut evidence adduced by the prosecution (the "rebuttal gateway"). See also *R v Hurley* [2025] EWCA Crim 642 at [79]. We discuss this current restriction and make recommendations for a new approach to a credibility restriction in Ch 3.

18 CP 259, para 5.192.

19 CP 259, para 5.194.

20 CP 259, para 5.216.

21 CP 259, para 5.217.

However, we concluded there is nevertheless a potential risk of such evidence prejudicing the jury in the same way as SBE, given the similarity of the content.[22]

4.21 Based on the analysis above, we provisionally proposed that FAE should be governed by the same framework as SBE, which would best address the similar risks.[23]

4.22 Finally, we noted that there are currently no example directions for judges to give juries to provide context and help mitigate against myth-based reasoning when FAE is admitted. We asked whether there should be an example direction for FAE.[24] We consider this question further in Chapter 10 where we make recommendations about a range of example directions, including one that addresses evidence of false allegations.

CONSULTATION RESPONSES AND ANALYSIS

4.23 We received mixed responses to our proposal to consider FAE under the same framework as SBE. Half of those who responded to this question agreed.[25] In support, consultees submitted that such an approach would:

(1) increase the level of scrutiny of FAE;[26]

(2) provide a good balance between restriction and allowing important evidence to be admitted, still allowing the defendant to introduce important, relevant evidence of false allegations;[27]

(3) reflect the overlap with SBE[28] and protect against the inappropriate use of the myths and misconceptions.[29]

4.24 Consultees argued that the threshold for admitting FAE must be high enough to protect against the inherent risks for the trial.[30] For example, the Centre for Women's Justice ("CWJ") stated that there should be "the highest possible threshold for introduction of any evidence of past false allegations" due to "the common

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22 CP 259, para 5.199.

23 Consultation Question 36: "We provisionally propose that where the defendant seeks to adduce evidence that the complainant has made false allegations of sexual assault on previous occasions, the admissibility threshold should be the same as that used for sexual behaviour evidence. Do consultees agree?".

24 Consultation Question 37: "Should the Judicial College consider introducing an example judicial direction for cases where false allegations are introduced that addresses the myth that complainants commonly make false complaints of rape? If so, what should be the content of such a direction?".

25 38 out of 76, 22 disagreed and 16 gave an answer categorised as "other".

26 Juries Understanding Rape Is Essential Standard ("JURIES"); the CPS; HM Crown Prosecution Service Inspectorate ("HMCPSI").

27 Mankind Initiative.

28 Professor Vanessa Munro.

29 Including Behind the Gown; Solace Women's Aid; JURIES; the CPS.

30 Including Claire Waxman, Independent Victims' Commissioner for London; Refuge; Rape Crisis England and Wales ("RCEW"); Centre for Women's Justice ("CWJ"); and the London Metropolitan University Child and Women Abuse Studies Unit.

misconception as to the prevalence [of] victims of sexual offences making false allegations".[31]

4.25 Consultees who disagreed with our proposal argued that:

(1) Evidence of previous false allegations is important, relevant evidence and it should therefore be admissible.[32] Martin Rackstraw, solicitor, commented that "a [demonstrably] false allegation is likely to have such strong probative value that its admission should not be subject to a restrictive framework." Relatedly, some were concerned that the restriction of FAE would impinge on the defendant's right to a fair trial.[33] For example, the Cardiff University Law School Innocence Project claimed, "there are numerous reasons why people make false allegations, and this possibility should be explored, not hindered, to ensure fair trials and safe convictions."

(2) False allegations should not all be treated as SBE.[34] For example, Dr Amelia Shooter stated that evidence of false allegations "is about the morality of the complainant, not the sexual behaviour. These two things are distinct from one another."

(3) The current threshold is sufficiently high.[35] For example, the Criminal Bar Association ("CBA") stated there is already "a high threshold which is usually rigorously scrutinised".

The appropriate framework

4.26 We remain of the view that the crossover between the bad character and SBE provisions does not itself justify reform. Indeed, we have considered the arguments against characterising all FAE as SBE and agree there is a useful distinction. As we acknowledged in the consultation paper, there is reason for caution with applying SBE to all FAE, because of the long-standing and well-understood bad character rationale.[36]

4.27 While much FAE will contain material that should properly be defined as SBE,[37] some evidence and questioning can be distinguished from the sexual content of the allegation. When that is possible it is appropriate for such evidence and questioning solely about the falsity of an allegation to go through the bad character provisions designed for such purposes. We have considered, for example, a string of text messages between a complainant and their friend ("A"). The multiple messages

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31 Although they did not support the framework we provisionally proposed.

32 Including Cardiff University Law School Innocence Project; Martin Rackstraw.

33 Including Cardiff University Law School Innocence Project; FACT.

34 Including Dr Oriola Sallavaci; London Criminal Courts Solicitors' Association; the Bar Council; and a consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

35 Including Martin Rackstraw.

36 CP 259, para 5.218.

37 See Ch 3 and CP 259, paras 4.43-4.45 for further explanation of the breadth of this definition.

contain details of a sexual encounter between the complainant and a third party ("B"); most of the messages include the complainant's description of sexual activity. In one message the complainant writes "after his behaviour last night I am going to tell everyone B raped me". A responds to confirm "he didn't though?" and the complainant writes "no but that's not the point". If the defence wish to adduce the texts as evidence of a false allegation, they could apply under the bad character provisions to admit those three texts which are explicitly about the lie. There is no need to adduce any messages that contain the descriptions of sexual activity; if they wish to do so they should have to apply under the SBE provisions. If, for example, the defence wish to adduce those three texts as BCE but then ask the complainant in cross examination whether there ever had been any sexual activity between them and B, then that would be going further than adducing the evidence of the texts. In those circumstances, the defence would need to apply under the SBE provisions.

4.28 While we asked in the consultation paper about FAE explicitly, based on our analysis we do not think it is helpful to draw a distinction between different types of previous allegation to determine which framework applies. Allegations, whether false or not, will come in many different forms and any aspect of an allegation may be said to be false, or there may be no suggestion it is false. Instead, we think the court ought to consider whether anything in the evidence sought to be adduced, or the questions sought to be asked, of an allegation amounts to "sexual behaviour" under the SBE framework. As described in Chapter 3, the definition of sexual behaviour is broad. It includes behaviour such as online sexual communication, where no physical sexual activity took place. It also includes non-consensual sexual activity. If the evidence of an allegation does fall within the definition of "sexual behaviour", the SBE framework should apply. If not, then either:

(1) The bad character framework will apply where the evidence of an allegation is said to be false, amounting to reprehensible conduct; or

(2) The relevance threshold will apply if the evidence of an allegation is not said to be false, or is not being used as evidence of the complainant's misconduct.

Ensuring the risk of introducing or perpetuating myths and misconceptions is considered

4.29 As we have described throughout this project, myths and misconceptions associated with sexual behaviour are pernicious and can result in juries using impermissible reasoning in their decision making. We think this remains a risk even when there is nothing in the evidence itself, or questions, that falls within the definition of sexual behaviour. Before the jury will always be the fact that the allegation was sexual in nature.

4.30 As explained above, not all evidence relating to previous allegations of sexual violence would be subject to the SBE framework. We remain concerned that outside this framework, there is currently no express provision for consideration of the particular risks associated with the sexual nature of such previous allegations.

4.31 We think there is scope within the bad character framework to improve scrutiny of these risks. Judges considering FAE as bad character evidence should be required to consider the risk of introducing or perpetuating myths and misconceptions, similar to

the requirement to consider the risk of introducing or perpetuating myths and misconceptions in our SBE framework (see Chapter 3 for further detail).

4.32 Both the hearsay provisions, and section 100 of the Criminal Justice Act 2003 already require judges to consider particular factors when assessing the admissibility of evidence.[38] For example, under section 100(3) a judge is directed to consider factors such as the "nature and number of the events" and when they are "alleged to have happened", when assessing whether the BCE has substantial probative value.

4.33 Judges can already consider risks of introducing or relying on myths and misconceptions under the bad character framework. For example, in *Wilson*,[39] the Court of Appeal highlighted the importance of avoiding stereotypical thinking[40] when assessing the probative value of BCE. While it may currently be possible, we think that including explicit reference to the risk of such myths in the legislation would help ensure it is being considered in every appropriate case.

4.34 An addition to section 100 of the CJA 2003 explicitly referring to the risks of introducing or perpetuating myths and misconceptions would ensure an appropriate level of scrutiny of this type of evidence, whether it is being considered under the bad character or SBE framework.

4.35 Such an inclusion should apply to the gateways that require judicial scrutiny of the value of the evidence: sections 100(1)(a) and (b). Evidence admitted through gateway (c) requires both prosecution and defence to agree to its admission. The prosecution has an important protective role and should not agree to the admission of evidence that would benefit from the judicial scrutiny offered by the other two gateways. The CPS could consider providing additional guidance to support prosecutors faced with applications under section 100 for FAE. The Government may also wish to monitor the use of the section 100 gateways to ensure that the "by agreement" gateway is not misused to avoid the explicit consideration of the risk of introducing or perpetuating myths and misconceptions for FAE that would be required under the other two gateways.

4.36 We accept that not all evidence of previous allegations will be subject to either the bad character or the SBE framework. This may arise in rare cases where the evidence of a previous allegation is relevant to a matter in issue, does not fall within the definition of sexual behaviour, and is not being adduced as bad character evidence. Consider, for example, a rape trial where the defence's case is that the allegation is completely fabricated. The defence have evidence that the complainant made a previous allegation of sexual offending: a report to the police of a rape by a third party (X). Days after the report about X, the complainant further reported to the police the rape by the defendant that is the subject matter of the trial. Both reports alleged that the rapes happened on the same day, weeks prior to the reports. The defence wish to adduce the evidence of the report relating to X, to make the point that the complainant did not

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38 For more detail, see Ch 6.

39 [2022] EWCA Crim 1438.

40 In *Wilson*, the judge warned against stereotypical thinking in relation to the way a "real" victim of sexual abuse may behave around their abuser after the alleged sexual assault, for example, by continuing to maintain a form of relationship with them: [2022] EWCA Crim 1438 at [56].

mention the alleged rape by the defendant at that time. The defence are not suggesting the allegation against X is false. They are not seeking to ask any questions about the content of the allegation, only what it did *not* say. While risks will still be present due to the sexual nature of the previous allegation, we do not think it is proportionate to introduce additional legislative scrutiny to address those risks, because unlike evidence subject to the bad character framework, there is no existing statutory admissibility framework to which to add a requirement to consider myths and misconceptions. Instead, the existing protections against the risk of introducing or perpetuating myths and misconceptions in sexual offences trials will operate in such circumstances. Where the evidence of, or questions sought to be asked about, the allegation falls within the definition of "sexual behaviour", the framework for restricting SBE will apply. Judicial directions can also help ensure that the jury consider only the relevant aspects of the previous allegation.[41]

Conclusion

4.37 We conclude that the most appropriate way of addressing previous allegations of sexual offending in sexual offences cases is for any evidence that falls within the definition of sexual behaviour to go through the SBE framework. Any evidence that falls outside that definition and is being adduced as evidence of misconduct should go through the BCE framework. Any evidence that falls outside that definition of sexual behaviour and is not being adduced as evidence of misconduct would be subject to the general relevance threshold for evidence in criminal proceedings. This ensures both the SBE and BCE frameworks can operate as intended to address the particular risks associated with each type of evidence. We have recommended a threshold for SBE that more closely aligns with the bad character provisions than the current section 41. This should ensure that any interaction is clear and more streamlined: both thresholds would require substantial probative value.[42]

4.38 We believe that this approach provides the benefit of our provisional proposal and meets the concerns raised by consultees. Neither the bad character provisions nor the SBE framework that we recommend prohibit the admission of evidence of a previous allegation; where it is necessary for a fair trial it will be admissible under either framework.[43]

4.39 Under our recommendations,[44] evidence of previous allegations that carries the most risks associated with SBE, including the potential infringement of the complainant's privacy rights, will be determined under the SBE framework, with its accompanying

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41 Our recommendations in Ch 2 may also provide a level of scrutiny even when it falls outside the bad character and SBE framework. Where the source of the allegation is a third-party record, the enhanced threshold for access will apply.

42 There are in fact three gateways for admitting BCE for complainants under the CJA 2003, s 100; if the evidence has substantial probative value, if it is important explanatory evidence, or if all parties agree to its admission. However, given the nature of the evidence we anticipate that most FAE will be contested and is most likely to be sought to be admitted under the substantial probative value gateway.

43 As described above at para 4.15, the current SBE framework in the YJCEA 1999, s 41 includes a "credibility restriction" that does operate to exclude evidence admitted for the main purpose of impugning the complainant's credibility. This does limit the extent to which FAE can be admitted under s 41. We recommend a reformed credibility restriction under our structured discretion model (see Ch 3).

44 Chs 3 and 7.

right to be heard and independent legal representation. The complainant's privacy rights are not as strongly engaged when the false allegation does not involve actual sexual behaviour. Therefore, if the application falls to be determined outside the SBE provisions, the complainant will not have a right to be heard.[45]

Recommendation 21.

4.40 We recommend that the admissibility of evidence of, or questioning relating to, an allegation by a complainant of sexual assault not the subject of the trial should be considered:

(1) under the sexual behaviour evidence framework when any aspect of the evidence or questioning falls within the definition of "sexual behaviour" (currently in section 42 of the Youth Justice and Criminal Evidence Act 1999); or

(2) where no part of the evidence or questioning falls within the definition of "sexual behaviour" either:

(a) under the bad character evidence framework (currently in section 100 of the Criminal Justice Act 2003) where the allegation is sought to be adduced as evidence of misconduct; or

(b) absent any question or suggestion that the complainant misconducted themselves in relation to the allegation, under the general relevance threshold.

4.41 We recommend that when considering whether evidence of an allegation sought to be adduced as evidence of misconduct in a sexual offences trial meets the criteria for admission as bad character evidence for a non-defendant under subsections 100(1)(a) or (b) of the Criminal Justice Act 2003, the court must have regard to the risk of the evidence introducing or perpetuating myths and misconceptions in the trial.

Proper evidential basis

4.42 The Court of Appeal has affirmed that a previous allegation will only be considered a "false allegation" where there is a proper evidential basis from which to conclude that the allegation was made, and it was false.[46] The proper evidential basis test means there must be "some material from which it could properly be concluded that the complaint was false". This "proper evidential basis" test is used by the courts to help determine whether evidence of a false allegation should be considered under the bad character framework alone by assessing if there is a sufficient evidential basis on

[45] For further discussion, see Ch 7.

[46] *R v Hilly* [2014] EWCA Crim 1614, [2014] 2 Crim App R 33; *R v Hurley* [2025] EWCA Crim 642.

which to suggest the evidence goes to falsity rather than the sexual behaviour of the complainant.

4.43 A number of stakeholders expressed concern about how the falsity of an allegation is currently assessed or defined.[47] For example, Dr Thomason has argued that the principle outlined by the courts is "vague" and perhaps does not suitably direct the court to the relevant considerations when determining the veracity of a previous complaint.[48] Consultees explained that there may be many reasons why an allegation *appears* to be false, and the full context needs to be considered. For example, the London Metropolitan University Child and Women Abuse Studies Unit stated:

> there is evidence in the case files we have analysed that in order to stop an unwanted investigation, some victim-survivors may say that they made up an allegation and even complete a withdrawal form stating this.

4.44 There is concern that allegations for which there is no proper evidential basis from which to conclude that the allegations are false may still be admitted as FAE. A recent campaign by the CWJ, Rape Crisis England and Wales, Imkaan, Rights of Women, and End Violence Against Women calling for greater scrutiny of the use of previous allegations of sexual violence, has highlighted the problematic use of this type of evidence.[49] They state that:

> In a significant number of cases, judges are allowing the defence to cross-examine the survivor about previous unrelated experiences of sexual violence, in front of the jury, on the basis that these previous disclosures show that she has a propensity to lie about sexual assault, despite there being no basis whatsoever to believe that the previous disclosure might be a false allegation.[50]

That campaign raises a further concern that the practice at trial is informing charging decisions. They submit that cases are not being pursued by the police and CPS when it comes to light that the complainant has made a previous allegation as it would be seen to undermine their credibility.[51]

4.45 In contrast, as noted above at paragraph 4.25(3), the CBA submitted that the bad character threshold is "usually rigorously scrutinised".

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47 Including Solace Women's Aid; HMCPSI; Professor Susan Edwards; Claire Waxman; CWJ; RCEW.

48 M Thomason, "Excluding Sexual Behaviour Evidence: Back to First Principles" [2024] *Criminal Law Review* 692.

49 The campaign led to the issue being raised by Emily Darlington MP and Kirith Entwistle MP in the second reading of the Victims and Courts Bill: *Hansard* (HC) 20 May 2025, vol 767, col 980 and 985.

50 CWJ, End Violence Against Women, Imkaan, RCEW, Rights of Women, *Unfair use of "bad character" evidence against rape victims: How unrelated previous disclosures of rape are used to discredit survivors: Joint Briefing for House of Lords* (May 2025) p 1.

51 CWJ, End Violence Against Women, Imkaan, RCEW, Rights of Women, *Unfair use of "bad character" evidence against rape victims: How unrelated previous disclosures of rape are used to discredit survivors: Joint Briefing for House of Lords* (May 2025) p 3 and case study on p 6.

4.46 Case law demonstrates that the absence of a conviction on its own should not be sufficient to establish falsity.[52] However, the concerns raised during our consultation suggest that this rule is not always adhered to in criminal trials, and that there can be insufficient scrutiny of the basis on which it is being claimed that an allegation is false.

4.47 There are particular concerns with allegations of sexual offences; misconceptions about reporting may lead to incorrect assumptions that an allegation is false when it is not pursued,[53] or even reported. Repeat victimisation of victims of sexual violence demonstrates how important it is that previous allegations and disclosures do not impede justice for the current offence.[54]

4.48 Within admissibility frameworks, it is important to ensure that the standard for considering relevance and falsity is sufficiently robust. We think that our recommendations in this chapter (and those made throughout this report that address the risk of such myths), will help protect against myth-based reasoning impacting how the proper evidential basis from which to conclude that an allegation is false is scrutinised.

4.49 As we conclude above, we do not think it is necessary or beneficial to determine which framework should apply based purely on the falsity of the allegation. Under our recommendations above, the "proper evidential basis" test has less impact: it is not a necessary consideration for determining that the SBE framework does not apply, instead courts should consider whether the evidence or questions contains anything that falls within the definition of "sexual behaviour". This ensures that all evidence of allegations, whether false or not, containing evidence of sexual behaviour is scrutinised under the right framework. As described in Blackstone's Criminal Practice, "it would be professionally improper to put such questions [about FAE] in order to elicit evidence about past sexual behaviour as such under the guise of previous false complaints".[55]

4.50 There remains a need to determine whether evidence of an allegation is evidence of misconduct or not. The party seeking to adduce the evidence should apply under the bad character provisions if they intend to use the evidence to suggest the complainant

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52 *R v Hurley* [2025] EWCA Crim 642; *R v Davarifar* [2009] EWCA Crim 2294, [2011] Criminal Law Review 818 at [10]; *R v D* [2009] EWCA Crim 2137 at [18]; *R v Gorania* [2017] EWCA Crim 1538 at [20]; *R v Citak* [2017] EWCA Crim 1738 at [40], [49]. See *Blackstone's Criminal Practice* (2025), F7.31.

53 There is research that suggests police officers overestimate the number of false allegations of sexual assault. Police are an important gatekeeper in the criminal justice system and their response to reports of sexual assault can determine whether an allegation is pursued as true or false (and in some cases the complainant is then investigated for offences related to making a false allegation). The police response however may be influenced by these myths. See for example, L McMillan, "Police officers' perceptions of false allegations of rape" (2018) 27 *Journal of Gender Studies* 9.

54 Data collected by the Crime Survey of England and Wales found that 49% of victims of sexual assault by rape or penetration since the age of 16 have been a victim more than once: Office for National Statistics, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020*. See for example, M Rogers and others, "'Survive, learn to live with it … or not': A narrative analysis of women's repeat victimization using a lifecourse perspective" (2023) 338, *Social Science & Medicine*, 116338 and CWJ, End Violence Against Women, Imkaan, RCEW, Rights of Women, *Unfair use of "bad character" evidence against rape victims: How unrelated previous disclosures of rape are used to discredit survivors: Joint Briefing for House of Lords* (May 2025) p 1.

55 *R v RT and MH* [2001] EWCA Crim 1877 at [41] and *Blackstone's Criminal Practice* (2025) F7.31.

has lied about another allegation. It would also be professionally improper to adduce evidence of an allegation outside the bad character provisions if the purpose is to suggest that the complainant misconducted themselves by making a false allegation. All parties and the judge have a role in ensuring that the appropriate threshold is used and in challenging evidence and questions that contravene admissibility procedures and rulings. If evidence is adduced without the required scrutiny, judicial directions may be used to mitigate any negative impact on the jury's decision-making process.

4.51 It is inevitably the case that not all true allegations of sexual offending result in convictions. Without a conviction, the defence have some latitude to portray the previous allegation as false, even though it may not be. Given the particular challenges with allegations of sexual violence, we also consider that there is a role for greater scrutiny of falsity in these circumstances. We know there are particular concerns about retracted allegations, or reports to police resulting in no further action, or complainants not supporting a prosecution being used as a basis for falsity. There are many reasons why victims of sexual violence may not report or not support a prosecution; those reasons do not all indicate that the original allegation was false and indeed many are consistent with the original allegation being true.[56] Similarly, given the concerns about sexual offences trials described in detail in this project and in reports including Operation Soteria Bluestone,[57] police deciding to take "no further action", or not to pursue a prosecution, does not in itself mean that the original allegation was false. Nor does an acquittal at trial.

4.52 We think it is appropriate for the approach to admissibility to reflect this when a party wishes to adduce evidence of a previous allegation of sexual offending on the basis that it is, or they intend to suggest it is, false. We recommend the introduction of a statutory prohibition on certain facts amounting to sufficient evidence, by themselves, that an allegation of a sexual assault was false.

4.53 There are already similar approaches in sexual offences trials, although in different contexts. In England and Wales, in *Makanjuola*, the Court of Appeal established principles for applying the discretion to warn a jury about relying on unsupported witness evidence in criminal trials. These principles include clarification that the simple fact that the evidence was given by a complainant of a sexual offence is not alone

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56 See for example, CP 259, para 2.6 where we explained that "there are many reasons why victims do not report or delay reporting, including trauma, feelings of shame, confusion, or fear of the consequences" citing: N Burrowes, *Responding to the challenge of rape myths in court. A guide for prosecutors* (March 2013) p 6; Office for National Statistics, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020* (18 March 2021) p 14: "For those that told someone about the abuse, but did not report it to the police, the most common reasons given were: embarrassment (40%), did not think they could help (38%) and thought it would be humiliating (34%). A quarter of victims also thought the police would not believe them (Appendix Table 16)." J Molina and S Poppleton found that the most important reasons given by victims for not reporting to the police were feeling like they would not be believed, and feeling that there would not be a successful investigation or prosecution for reasons relating to the victim's gender, sexuality or lifestyle. The next most important reason was feelings of shame, embarrassment, or not wanting others to know: Rape Survivors and the Criminal Justice System (Office of the Victims' Commissioner, October 2020) p 11. See also J Lovett and others, (2023) *'Reasons rape investigations are closed by police', Operation Soteria Bluestone Research Briefing 3* which explains the complexities behind police data of closed cases due to lack of victim support.

57 See for example, B Stanko, Independent Report: Operation Soteria Bluestone Year One Report (14 April 2023).

sufficient to give rise to the need for such a warning. The court clarified that an evidential basis was needed for "suggesting that the evidence of the witness may be unreliable" and that "mere suggestion by cross-examining counsel" does not amount to an evidential basis.[58] In Canada, the Criminal Code provides a list of "insufficient grounds" to justify compelled production of personal records of the complainant.[59]

4.54 Based on the existing caselaw, a non-exhaustive list of examples that are not sufficient grounds for asserting falsity should include:

(1) raising and not pursuing a complaint;

(2) decisions not to take further action, not to charge or not to prosecute; and

(3) acquittal.[60]

Recommendation 22.

4.55 We recommend that, on their own, the following should not constitute a "proper evidential basis" that a previous allegation of sexual offending is false:

(1) raising and not pursuing a complaint;

(2) a decision to take no further action, not to charge or not to prosecute; or

(3) acquittal.

58 [1995] 3 All ER 730 at 733.

59 Criminal Code (Canada), s 278.3(4). For further discussion of this provision, see Ch 2 and CP 259, paras 3.229-3.254.

60 *R v Davarifar* [2009] EWCA Crim 2294 at [10], [2011] Criminal Law Review 818; *R v D* [2009] EWCA Crim 2137 at [18]; *R v Gorania* [2017] EWCA Crim 1538 at [20]; *R v Citak* [2017] EWCA Crim 1738 at [40], [49].

Chapter 5: Criminal Injuries Compensation evidence

INTRODUCTION

5.1 Victims of violent crimes are entitled to apply for compensation under the state-funded Criminal Injuries Compensation ("CIC") scheme.[1] The scheme aims to support victims by offering compensation for physical and psychological injuries as acknowledgement of the harm they have suffered. Under the scheme an individual's entitlement to compensation is assessed without any determination of the defendant's guilt. An applicant may be entitled to compensation regardless of whether there are resulting criminal proceedings or a criminal conviction.

5.2 In pre-consultation, we were told that in sexual offences trials the defence may seek to adduce evidence that a complainant has made an application under the CIC scheme, in relation to the offence before the court, or a separate offence. When this evidence is introduced, there is a risk that jurors may be influenced by the misconception that sexual offence allegations are often fabricated, and are often fabricated for financial gain.

5.3 In this chapter we consider the responses to our provisional proposal that Criminal Injuries Compensation evidence ("CICE") and cross-examination on CICE should require leave and be subject to an enhanced relevance admissibility threshold. We present the case for this reform and respond to concerns that there is insufficient evidence regarding the inappropriate use and impact of CICE to justify reform.

5.4 We then explain the scope of the regime and the details of our model for restricting the admissibility of CICE, which is similar to the sexual behaviour evidence ("SBE") regime we recommend in Chapter 3. We set out the threshold for admissibility and relevant guiding factors and explain how the threshold upholds the defendant's right to a fair trial. Finally, we address the procedures for making an application to adduce CICE.

5.5 In this chapter, CICE refers to evidence of a CIC claim made by the complainant in relation to either the offence that is the subject of the prosecution or any other offence. We only consider the application of a higher threshold for CICE where it is introduced in sexual offences prosecutions because there is a greater risk that the jury will be inappropriately influenced by misconceptions about false complaints than in cases involving other offences.

CASE FOR REFORM

Prevalence and impact

5.6 In the consultation paper we provisionally proposed that the use of evidence and questioning about CIC claims should require leave and be subject to an enhanced

[1] Criminal Injuries Compensation Authority, *Criminal injuries compensation: a guide*, (14 June 2024).

relevance threshold, similar to the threshold we proposed for SBE.[2] We cited the following evidence base regarding the use of CICE during sexual offences prosecutions, including data, commentary in literature, and from stakeholders:[3]

(1) Information from the Criminal Injuries Compensation Authority ("CICA") that "the majority of police requests for claims information are made in cases concerning sexual offences".[4]

(2) Comments from stakeholders that CICE is regularly raised as an issue in sexual offence trials,[5] and it is rarely raised in trials of other offences.[6]

(3) Information about sexual offence complainants delaying their CIC claims until the conclusion of criminal proceedings.[7]

5.7 We concluded that the qualitative evidence from the literature and from stakeholders that CICE is used in sexual offence prosecutions, coupled with information received from the CICA that the majority of police requests for information about CIC claims arise in sexual offences cases, are grounds for examining this issue.[8]

5.8 In consultation, a Circuit Judge informed us that they do not think the use of CICE in cross-examination is a widespread occurrence anymore. However, we also received responses from consultees who told us that the use of evidence and questioning regarding CIC claims continues to be an issue.[9] For example, the Crown Prosecution Service ("CPS") advised:

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2 Consultation Question ("CQ") 38: "We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require leave and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence. This would require that evidence and cross-examination about criminal injuries compensation claims would only be admissible if: (1) the evidence has substantial probative value; and (2) its admission would not significantly prejudice the proper administration of justice. Do consultees agree?" Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper 259 ("CP 259"), paras 6.51-6.52.

3 CP 259, paras 6.28-6.29.

4 In the consultation paper we explained that "for the period 1 April 2022 to 15 May 2023, [the CICA] received 392 requests for personal data from the police in England, Wales and Scotland. The CICA was able to identify a relevant application for 243 of those requests and of those, 191 related to claims made for sexual assault". See CP 259, para 6.28.

5 For example, the CPS told us that Rape and Serios Sexual Offences ("RASSO") prosecutors reported that "the defence regularly seek disclosure and use evidence of CIC claims". See also Centre for Women's Justice ("CWJ") written submission, *CICA applications in sexual offences* (September 2022).

6 CP 259, paras 6.3 and 6.28. See G Hanna, "Supporting victims through the trial process" in R Killean et al (eds), *Sexual Violence on Trial* (Northern Ireland) (2021) p 65.

7 CP 259, paras 6.16-6.17. See Office of the Victims' Commissioner ("OVC"), *Compensation without re-traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation* (January 2019).

8 CP 259, para 6.28.

9 Including CWJ; Rape Crisis England and Wales ("RCEW"); JURIES; and Gwent Police (Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually). We note that from the contrasting information we received, it seems there may be some geographic variation in the prevalence of the introduction of CICE in sexual offence trials across England and Wales.

> it is the experience of our prosecutors…that the existence of a criminal injuries compensation claim is frequently the subject of defence disclosure requests and adduced by defence at trial in an attempt to undermine the complainant's credibility...

5.9 Welsh stakeholders also reported that it is common for CIC claims to be raised at trial. One stakeholder added that the use of CICE has led an Independent Sexual Violence Advisor ("ISVA") service in Wales to develop a formal procedure for responding to potential defence requests.[10] Rebecca Camber, Chair of the Crime Reporters Association, told us that in her experience of observing cases, compensation claims have arisen "in almost all recent cases" that she observed. She added that in her view, compensation often arises in cases with significant media attention, such as those involving public figures.

5.10 Based on consultee feedback, alongside the evidence cited in the consultation paper, we are persuaded that CICE continues to be introduced in sexual offence prosecutions.

5.11 We also received varying consultation responses about the perceived impact of CICE on the jury. In considering these responses, we acknowledge the precise impact of CICE on the jury is unknown, given the limitations of evidence relating to rape myth acceptance. In the consultation paper we emphasised the difficulties in obtaining empirical evidence in relation to rape myth acceptance amongst juries.[11] We concluded that no one particular strand of evidence should be used to conclude that juries are impacted by myths and misconceptions in their decision making; however, the balance of the evidence "points to the likelihood that rape myths and misconceptions have some impact on juries".[12] We assess this conclusion again in Chapter 1 of this report and conclude:

> it is prudent for us to continue on the basis that there is a risk that jurors may inadvertently be influenced by myths and misconceptions and reform strategies should try to minimise such risks. Our recommendations for reform should be viewed against this backdrop.

5.12 In relation to the impact of CICE, we have assessed consultees' views on the impact of this evidence with these limitations in mind.

5.13 Five consultees[13] disagreed that this evidence is used in a way that might prejudice the jury. For example, the Criminal Bar Association ("the CBA") wrote, "we do not agree that there is any provable or reliable 'myth or misconception' in this situation".

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10 As part of this procedure, the ISVA service provides a letter to the CPS signed by the ISVA stating that the ISVA initiated the CIC claim, not the complainant. This letter provides context to demonstrate that the complainant was not aware of the CIC scheme prior to making the allegation to police.

11 CP 259, para 2.38.

12 CP 259, para 2.51.

13 The CBA; FACT; Philipp Tanzer; and Tracy Harris, CPS prosecutor; and an anonymous consultee.

The Six Circuits of England and Wales[14] stated "it is unlikely that questions regarding CIC claims will be routinely deployed where there is no relevant basis for the questioning" and "the Trial Judge is likely to intervene in the presence of the jury and undermine any point the advocate was attempting to make if the point has no relevance".

5.14 In the consultation paper we explained that stakeholders were concerned that CICE may be inappropriately used to undermine the credibility of the complainant by suggesting their allegation is false and motivated by financial gain, without further evidence to support this suggestion.[15] This assumption may be grounded in the misconception that people commonly make false sexual offence allegations for financial gain. Jurors may erroneously assume the complainant is lying based on their misconception about the frequency of false complaints and/or assume that a "real" victim would not seek compensation.

5.15 We received responses from nine consultees and feedback from two stakeholders who echoed the concerns that CICE is used in sexual offences prosecutions to suggest that the complainant lacks credibility, and that this is grounded in misconceptions about false allegations.[16] For example, the CPS stated that prosecutors observed CICE being used in cross-examination to suggest that the complainant's allegation is false and motivated by a desire for financial gain by "drawing on the myth that false rape allegations are prevalent". It added that "this practice gives rise to a significant risk that jury decision making is influenced by factors which are not relevant to the issues in the case".

5.16 It is our view that CICE can carry a unique potential prejudice where it is admitted in sexual offences trials and this prejudice may impact the jury's decision making. As with SBE, the particular risk that evidence may prejudice the jury justifies the consideration of a higher admissibility threshold to limit this type of evidence being inappropriately introduced during the trial.

5.17 An additional impact of introducing CICE in sexual offences cases is that it may discourage complainants from promptly claiming compensation to which they may be entitled. We explained in the consultation paper that complainants may fear the evidence will be used at trial.[17] CIC applications must be made within the two years following the alleged crime. Given court delays and backlogs, not all trials begin within two years of the offence. Consultees highlighted that this timeframe places complainants in a difficult position when determining whether and when to apply for compensation if there is a risk it could be used against them during the trial.[18] Accordingly, the impact of the use of CICE in sexual offences trials may be twofold:

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14 This consultation response was submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit ("Six Circuits").

15 CP 259, para 6.3.

16 Including the CPS; Dyfed-Powys Office of the Police and Crime Commissioner ("OPCC"); Dyfed-Powys Police; and Solace Women's Aid.

17 CP 259, paras 6.13-6.17.

18 CWJ; Solace Women's Aid; RCEW; and The Blue Door Support Service CIC.

the potential prejudicial impact on the jury; and the detrimental impact on complainants and their decision to seek timely compensation.

A PRINCIPLED APPROACH TO ADMISSIBILITY

5.18 Having concluded that there is sufficient evidence that CICE may be inappropriately introduced at trial and may wrongly influence jury decision making, we now consider our proposed approach to restricting the use of CICE in sexual offences prosecutions.

5.19 In Chapter 3, we set out the principles underlying our proposed new regime for restricting SBE.[19] It is beneficial to apply the same principled approach to considering the restriction of CICE. This principled approach establishes that for the restriction of CICE to be effective the admissibility framework should:

(1) facilitate a proper interrogation of relevance;

(2) have a threshold for admissibility that is higher than bare relevance;

(3) not amount to a complete ban on all CICE; and

(4) allow evidence necessary for a fair trial to be admitted.

Relevance

5.20 For evidence to be admissible it must be relevant.[20] The assessment of the relevance of CICE should not be influenced by misconceptions about the prevalence of false allegations, or generalisations about why people seek compensation. Instead, the relevance of this type of evidence should be interrogated in the context of the case, including the matters in issue in the trial, the purpose of admitting the evidence, and the other evidence.[21]

5.21 We received differing views on the extent to which CICE may be relevant in sexual offence cases. Some consultees argued that CICE is never relevant and it should therefore be subject to a complete prohibition (we discuss this below at paragraph 5.25 to 5.28).[22] Other consultees and stakeholders emphasised that CICE is very rarely relevant, although they did not suggest a complete prohibition.[23] For example, Dr Matt Thomason suggested a CIC claim will often be irrelevant given that "a genuine victim is just as likely to seek CIC than a false one, in which case it doesn't help resolve any of the issues the jury has to decide".[24] He suggested the problem with this

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19 Ch 3, para 3.14.

20 We describe relevant evidence as evidence which "assists in proving or disproving a fact that is in issue in the trial". CP 259, p xix.

21 See Ch 3, paras 3.16-3.17.

22 Including Refuge; Professor Susan Edwards; and Women Against Rape.

23 The CWJ; RCEW; and Dr Matt Thomason; and two Circuit Judges.

24 The General Council of the Bar of England and Wales ("the Bar Council") also stated that where a CIC claim is raised during a trial and it is consistent with the complainant's evidence, it could be considered "equally indicative of a true complaint as a false one".

evidence may be solved by proper adherence to the relevance standard, rather than the introduction of a higher admissibility threshold.

5.22 Some consultees emphasised that the mere existence of a CIC claim, without further evidence to establish how it assists in proving or disproving a fact in issue, should never be considered relevant.[25]

5.23 In Chapter 3, we explain that relevance is not a sufficiently high threshold to limit the prejudicial risk attached to SBE given the potential it may inappropriately influence juror decision making and cause humiliation and distress to the complainant. We also provided a similar rationale for introducing a higher admissibility threshold for non-defendant bad character evidence in our report on evidence of bad character.[26] In this report we explained that "evidence which distorts the fact-finding process and promotes an inaccurate verdict should be subject to restriction".[27] We stated:

> These distortions arise because there is 'a real danger that evidence from which a character inference can be drawn will be given disproportionate weight …', and, particularly in the case of complainants in sexual cases, the fact-finders will be inclined to make a general moral assessment of the complainant.[28]

5.24 We explain above that CICE may introduce, or be used to perpetuate, misconceptions about false allegations and therefore has the potential to prejudice the jury in their decision making, as well as distract them from the real issues in the case. Additionally, private information contained in CICE may be used to discredit the complainant in cross-examination, potentially causing distress and humiliation. Accordingly, we conclude that a higher threshold for admissibility for CICE is appropriate to reduce the risk that CICE will be used in those ways. Moreover, the threshold still allows for CICE to be admitted in some circumstances. In our view, introducing a higher threshold is a proportionate response to the risk that prejudicial evidence of limited or no relevance is introduced to the jury.

Not a complete prohibition

5.25 In the consultation paper we considered whether a complete prohibition on adducing evidence and questioning about CIC claims is appropriate. We concluded that such an approach "would prevent the defendant from putting material to the complainant which is relevant and is necessary to ensure a fair trial".[29] We identified examples of CICE that are important and relevant.[30] These examples included where a complainant makes a CIC application and there is other evidence that the complainant has lied about the complaint for financial gain. Another example is where the CICE

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25 The CPS; JURIES; CWJ; and Claire Waxman.

26 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

27 Above, para 9.22.

28 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 9.18 citing Australian Law Reform Commission, Interim Report No 26 (vol I) (1985), para 799.

29 CP 259, para 6.38.

30 Above, para 6.39-40.

demonstrates the complainant had told an inconsistency, as seen in the case *North (Mark)*.[31]

5.26 Seven consultees argued that there should be a complete prohibition on the admission of CICE.[32] They emphasised that CICE is highly prejudicial, never relevant, and can have a significant negative impact on complainants. For example, Refuge wrote that evidence and cross-examination about CIC claims should "never be used in a case as their admission could significantly prejudice the proper administration of justice". Refuge contended that the proper administration of justice is prejudiced where CICE is introduced as it leads to complainants delaying their compensation claim and allows for the perpetuation of "harmful myths and stereotypes, including suggesting that an allegation is false and for the purpose of financial gain".

5.27 Other consultees contended that the admission of evidence and questioning regarding CIC claims can be appropriate and necessary.[33] Two consultees provided examples of circumstances in which they thought it would be appropriate for CICE to be admitted.

(1) The Law Society of England and Wales ("Law Society") submitted:

> There are two broad contexts in which evidence concerning a criminal injuries compensation claim can be material. Firstly, where a complainant asserts they are not interested in compensation, or states that they have not made an application, the fact an application has in fact been made would undermine their account. Secondly, where a complainant gives a statement in their compensation claim which is factually inconsistent with their account to the police. In both situations the defence should be entitled [to] raise these inconsistencies.

(2) The Bar Council suggested that CICE "which is inconsistent with the testimony of a witness should continue to be considered within the current rules of disclosure and admissibility".

5.28 We are persuaded that while the circumstances in which CICE will be relevant are likely to be very rare, it is conceivable that the admission of this type of evidence could be necessary for the defendant to have a fair trial. All will depend on the facts of any individual case. Accordingly, we are not persuaded that a complete prohibition on CICE is justified. This conclusion aligns with our conclusions on complete bans for other types of potentially prejudicial evidence, including SBE and personal records.

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31 [2011] EWCA Crim 88. See CP 259, para 6.40.

32 Including Refuge; Professor Susan Edwards; Professor Clare McGlynn; and Women Against Rape.

33 The Law Society; the Bar Council; the Six Circuits; the CBA; Martin Rackstraw, solicitor; Andrew Wilkins, barrister; and Tracy Harris, CPS prosecutor.

Recommendation 23.

5.29 We recommend that there should not be a complete prohibition on the admissibility of evidence that the complainant has made an application for Criminal Injuries Compensation.

Necessary for a fair trial

5.30 It is important that any framework for the admission of evidence does not restrict evidence that is necessary to ensure the defendant's right to a fair trial. As we note above, and in the consultation paper, a complete prohibition "would prevent the defendant from putting material to the complainant which is relevant and is necessary to ensure a fair trial".[34]

5.31 In Chapter 3, we highlight the decision of the House of Lords in *Re A (No 2)*[35] and explain that evidence which is necessary for the defendant to have a fair trial must be admissible.[36] However, not all evidence that is relevant and currently admissible is necessary for the defendant to have a fair trial. Such evidence could be excluded under an enhanced relevance threshold without infringing the defendant's right to a fair trial. On this point, in the consultation paper we cited the following analysis from our report on bad character evidence:

> It follows, from the decision in [*A (No 2)*[37]], that a requirement of enhanced relevance for bad character evidence would risk infringing article 6 only if the required level of relevance were set so high that evidence sufficiently probative to be necessary for a fair trial might nevertheless fail to satisfy it. This result could be avoided by formulating the requirement in such a way that it will inevitably be satisfied whenever the exclusion of the evidence might render the trial unfair.[38]

5.32 Below we will consider how an enhanced relevance threshold can be consistent with this principle by enabling CICE that is prejudicial and reliant on myths or misconceptions to be excluded, while ensuring that CICE which is necessary for a fair trial is admissible.

A NEW ADMISSIBILITY THRESHOLD FOR CICE

5.33 In the consultation paper, we concluded that CICE should be subject to a similar threshold to the one we proposed for SBE. On that basis, we provisionally proposed that CICE and questioning should only be admissible if:

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34 CP 259, para 6.38.

35 [2001] UKHL 25.

36 Ch 3, para 3.31.

37 [2001] UKHL 25; [2001] 3 All ER 1.

38 CP 259, para 4.176 citing Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273 at 9.34.

(1) the evidence has substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

5.34 Also based on our proposals for SBE, we asked consultees which, if any, of the following factors the judge should consider when deciding whether to admit evidence or permit cross-examination:

(1) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

(2) the interests of justice including the defendant's right to a fair trial;

(3) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and

(4) the risk of introducing or perpetuating myths or misconceptions.

General feedback about introducing an enhanced relevance threshold

5.35 We received predominantly positive responses to our proposal to introduce a higher admissibility threshold for CICE.[39] These responses largely focussed on consultees' concerns that CICE evidence is being used to perpetuate myths relating to the prevalence of false allegations. For example, nia wrote:

> The fact that CIC claim information is sought to be disclosed by defences disproportionately in sexual violence cases suggests that this information is loaded with pejorative inferences upon the complainant which feed stereotypes of women as liars, with money as a motivating factor. This information therefore can directly or indirectly feed prejudice and myths and stereotypes.

5.36 However, some consultees suggested there are better approaches to address concerns about the introduction of CICE in sexual offences prosecutions.[40] For example, the CBA and the Bar Council suggested that concerns about the defence's use of CICE can be managed appropriately by the prosecution without the need for an enhanced relevance threshold. For example, where compensation is awarded prior to trial, the prosecution could emphasise that "a complainant's willingness to participate in the trial process thereafter would be a strong indicator of veracity and truthfulness".[41] The CBA also suggested the prosecution improve engagement with complainants by providing them with a "positive and robust" explanation of how CIC claims may be used at trials, including how CICE can be challenged by the prosecution if raised by the defence.

5.37 The Six Circuits also stated that "trial judges often intervene, usually in the presence of the jury, to say that it is the right of every alleged victim of crime to seek

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39 Out of 74 responses: 42 agreed with our provisional proposal, 20 disagreed and 12 were categorised as "other".

40 The CBA; Six Circuits; and Bar Council.

41 The CBA.

compensation for physical or psychological injury directly attributable to that crime". The Bar Council suggested the introduction of CICE can be accompanied by judicial directions "addressing any improper inferences from the making of CICA claims".

5.38 Even in combination, we do not think these approaches on their own will address the potential harm caused by the introduction of CICE. First, the approaches suggested above appear to be directed at responding where relevant CICE is admitted. However, we are concerned that irrelevant CICE may be introduced to suggest the complainant is lying for financial gain, or inferences made to this effect. In the context where irrelevant CICE is being introduced, the suggestions above may be less effective. Second, we note that judicial directions may not always be effective in mitigating the impact of the prejudicial evidence and may be used inconsistently by judges.[42] Once prejudicial evidence has been inappropriately deployed, it may be difficult for directions to prevent the myth from impacting jurors' views. While they have an important role in mitigating the impact of necessary evidence that still carries risks, directions are not a suitable replacement for appropriate scrutiny before admission.

5.39 Judicial scrutiny of the admissibility of CICE prior to trial will help limit the risk that this type of evidence will prejudice sexual offences prosecutions. Furthermore, as explained above at paragraph 5.23 to 5.24, bare relevance is not a suitable threshold for evidence that carries a high risk of prejudice, such as SBE and CICE. An enhanced relevance threshold responds to the need for additional scrutiny to limit the admissibility of particularly prejudicial evidence that may inappropriately influence juror decision making.

5.40 In our view, applying an enhanced relevance threshold to the admissibility of CICE is justified given the risk of prejudice. This approach aligns with our conclusion in relation to SBE.

Feedback relating to the proposed stages

5.41 There were limited responses that engaged with the admissibility threshold we proposed for CICE in the consultation paper. The London Criminal Courts Solicitors Association ("LCCSA") stated it agreed with our proposal generally, however emphasised that the threshold should not be "too high" due to the risk of restricting the defendant's ability to put their case. Meanwhile, Cardiff University Law School Innocence Project rejected the proposal and stated the requirement for the evidence to have substantial probative value in the first limb "denies defendants and juries the ability to demonstrate a holistic view of the case and the complainant's motivations behind making a complaint".

5.42 The Bar Council suggested the second limb of the threshold test is inappropriate and "the court should assess whether the admission of the evidence is in 'the interests of justice', which will focus on trial-specific factors". Two consultees were also concerned with the second limb of the test, arguing the definition of "proper administration of justice" is subjective.[43] One anonymous consultee contended that if it is to be included

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42 CP 259, para 6.46.

43 Philipp Tanzer; and an anonymous consultee.

"then 'the proper administration of justice' must be defined to explicitly mean a fair trial of the defendant".

5.43 These responses align with some of the concerns raised in response to the threshold we proposed for SBE, in particular the overarching concern that relevant evidence may be inappropriately restricted in circumstances where consultees felt it should go before the jury.[44]

5.44 As we acknowledged in the consultation paper, the restriction of CICE "engages the defendant's right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR"). Some consultees were concerned that the restriction of CICE may disproportionately impact the defendant's ability to present their case and, subsequently, on their fair trial rights.[45] For example, in their response, the Six Circuits contended that:

> If the line of questioning is relevant, there is no reason why questions should not be asked about CICA claims without an enhanced relevance admissibility threshold. A defendant has the right to have relevant and admissible points raised upon their behalf without additional hurdles to overcome.

5.45 As we explained in the consultation paper, "where appropriately balanced, restrictions on evidence are not incompatible with the defendant's right to a fair trial".[46] In Chapter 3, we provide a detailed explanation of how the two-stage test is intended to function to ensure that evidence which is necessary for the defendant to have a fair trial will be admissible.[47]

5.46 As we highlight above at paragraph 5.34, one of the guiding principles of our proposal is that it should enable evidence to be admitted if the evidence is necessary for a fair trial. While not all evidence that has substantial probative value will be necessary for a fair trial, all evidence necessary for a fair trial will be admissible because:

(1) this evidence will always have substantial probative value; and

(2) its admission would not significantly prejudice the proper administration of justice.

5.47 The European Court of Human Rights ("ECtHR")" has commented on the balance required in sexual offences cases between the article 6 right of the defendant and the article 8 right of the complainant, stating:

> In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of

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44 Ch 3, para 3.28.

45 The CBA; the Six Circuits; Andrew Wilkins, barrister; Martin Rackstraw, solicitor; Tracey Harris, CPS prosecutor; and an anonymous interest group.

46 CP 259, paras 6.7. For further analysis of ECtHR case law, see Appendix 1.

47 Ch 3, paras 3.34-3.50.

protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.[48]

5.48 In Chapter 3, we explain that the two-stage approach would enable evidence that is necessary for the defendant to have a fair trial to be admitted. It would also enable judges to have the appropriate discretion to supervise the rights of the complainant and the defendant when determining the admissibility of CICE.

5.49 Based on our analysis and the responses we have received from consultees, we conclude the proposed two-stage enhanced relevance test is the most suitable model for restricting CICE. However, the responses from consultees about the specific elements of this threshold indicate there is need for some further refinement of each stage. Our conclusions in relation to suggestions to refine the model are discussed below.

Two-stage structured approach

5.50 As with our recommended SBE model, the proposed test for admissibility for CICE is a two-stage process. This model facilitates careful consideration of the probative value of the evidence and the risk to the proper administration of justice if the evidence were to be admitted. To assist in guiding these stages we have suggested there should be factors provided for consideration at each stage.

5.51 Given the similarities of the proposals relating to CICE and SBE, we have also considered consultees' responses to the SBE threshold, to the extent this feedback relates to the threshold for CICE. Consequently, we have made amendments to provide greater clarity and consistency in the application of the new threshold, taking into account the differences and similarities between SBE and CICE.[49]

Stage 1 – Substantial probative value

5.52 For CICE to be admissible the court must first determine whether the evidence has substantial probative value. If the evidence does not have substantial probative value, it will not be admissible. If the evidence does have substantial probative value, the court will consider whether it meets stage 2 of the test for admissibility.

Substantial

5.53 In Chapter 3, we explain the requirement for "substantial" probative value is a suitably high threshold.[50] We emphasise that it is a standard that is already known and used by practitioners and judges in the context of the bad character provisions. Moreover, it appropriately sets the threshold well above bare relevance to restrict prejudicial evidence that may be grounded in generalisations or misconceptions.

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48 *SN v Sweden* App No 34209/96 at [47]; *Aigner v Austria* App No 28328/03 at [37]. See further Appendix 1 paras 1.24 to 1.32.

49 For example, our recommended SBE framework contains an exclusion for relationship evidence which is not applicable in the CICE context. See paragraphs Ch 3, para 3.131.

50 Ch 3, 3.54-3.55.

5.54 The CBA, which opposed our new CICE model, expressed concern that an enhanced admissibility threshold would inappropriately restrict evidence that it considers should be presented to the jury. It argued:

> We do not accept that such questioning [about CIC claims] would automatically fall into the category of myth/misconception because there can be an evidential basis for questioning a complainant as to whether there is a financial motive for a complaint being made in some cases. Any evidence which may demonstrate a motive to fabricate is a legitimate source for examination and exploration.[51]

5.55 We agree with the CBA that "there can be an evidential basis for questioning a complainant as to whether there is a financial motive for a complaint being made in some cases". However, in our view, some CICE may also evoke prejudicial generalisations about the prevalence of false allegations of sexual offences motivated by financial gain. We suggest that any evidence which "may" demonstrate a motive to fabricate is not an appropriate standard to apply. Instead, to restrict reliance on prejudicial evidence that is of limited probative value, we recommend that the evidence must have substantial probative value. If there is supporting evidence that the complainant had a financial motive to lie about the allegation, evidence that the complainant made a CIC claim may meet this threshold. However, the mere fact that the complainant has made a CIC claim, on its own, would not meet this threshold.

Matter in issue

5.56 In Chapter 3, we clarify that for stage 1 of the SBE threshold, the substantial probative value must relate to "a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole".[52] This language is also used in the non-defendant bad character admissibility provisions to establish the matter to which the probative value must relate.[53] As we explain in Chapter 3, this element has two parts that work to ensure that:

(1) the probative value relates to a matter in issue in the case. This includes evidence of a fact that helps prove the truth or falsity of one of the facts in issue.[54]

(2) the probative value relates to a matter that is of substantial importance to the case as a whole. This explicitly requires the probative value of the evidence to

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51 The Court of Appeal made similar comments in *Sutton v R* [2005] EWCA Crim 190 at [69], where it stated: "It is, of course, a perfectly acceptable tactic on the part of the defence to suggest that a complainant may be motivated by the prospect of compensation and that such motive may make that complainant's evidence unreliable". As we explain in paragraph 5.55, speculative enquiries of this kind would be unlikely to reach the substantial probative value threshold, unless there was additional evidence to support the suggestion that the complainant was motivated to lie for financial gain. Whether the evidence would be admissible would depend on the facts of each individual case.

52 Ch 3, paras 3.56.

53 Criminal Justice Act 2003, s 100(1)(b).

54 Ch 3, para 3.58 citing Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 10.7.

be assessed in the context of facts that are important to the case as a whole, rather than facts of marginal relevance.

5.57 For these reasons, the addition of these clarifying clauses should also apply to assessing the probative value of CICE.

Guiding factors for assessing probative value

5.58 In response to our SBE proposal, some consultees were concerned that "substantial probative value" is an ambiguous term that requires greater clarity.[55] Dr Matt Thomason suggested guiding factors could assist judges in assessing the probative value of the evidence. The use of guiding factors to assess probative value is consistent with the approach in the non-defendant bad character provisions.[56] The Law Commission's Bad Character Report responded to criticism that the concept of "substantial probative value" may be vague or ambiguous. The report concluded that:

> a requirement that all bad character evidence has to be of substantial probative value in order to be admissible can be made more effective in practice by spelling out the factors which a court should take into account when deciding whether evidence meets the raised standard.[57]

5.59 We did not consult on guiding factors for stage 1. However, we agree that appropriate guidance would provide greater clarity and enhance consistency in decision making for the admissibility of CICE. The factors we recommend for stage 1 of the SBE framework[58] and those already contained in the bad character provisions[59] may provide a valuable steer for government when developing the appropriate factors for considering "substantial probative value" under the CICE admissibility framework.

5.60 The factors for assessing the probative value of CICE will need to be different to those considered in relation to SBE, given the different factual contexts in which these types of evidence arise. The factors we recommend for stage 1 of the SBE test were developed based on consultees' responses about the threshold. We have not consulted on these factors in the context of CICE and therefore do not make a specific recommendation.

Stage 2 – Proper administration of justice

5.61 The next stage of the test requires the court to determine whether the admission of the CICE would not significantly prejudice the proper administration of justice. If the evidence would significantly prejudice the proper administration of justice, it must not be admitted, despite it having substantial probative value.

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55 Ch 3, para 3.60-3.61.

56 Criminal Justice Act 2003, s 100(3).

57 Evidence of Bad Character in Criminal Proceedings, Law Commission Report No 273, para 7.16.

58 See factors listed at Ch 3, para 3.62.

59 Criminal Justice Act 2003, s 100(3).

5.62 We clarify in Chapter 3 that the factors we proposed in our consultation paper for structuring the discretion model are most appropriately considerations applied under stage 2 of the test.

5.63 In the consultation paper we asked consultees for their views on the following factors:

(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 that the evidence may invoke or rely on myth or misconceptions.[60]

5.64 There was support for each of these factors, with the most support given to the first two factors.[61] HM Crown Prosecution Service Inspectorate ("HMCPSI") and HM Council of Circuit Judges were supportive of all of the factors, with the latter describing them as "good sense and good law".

5.65 **We recommend that each of the listed factors *must* be considered by the court. We acknowledge that the relevance and weight of each factor will vary depending on the specific circumstances of the case. Further, if a particular factor is not applicable at all, the judge can address this in their reasoning. The list of factors we recommend are mandatory for the judge to consider; however, judges also have the discretion to consider other factors if they are relevant.**

Protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights

5.66 The majority of consultees who responded to this question supported including it in the list of factors for the court to consider when assessing the admissibility of the evidence.[62]

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60 CQ38(2). We asked consultees to indicate "which, if any, of the following factors should the judge consider when deciding whether to admit evidence or permit cross-examination about criminal injuries compensation claims". Consultees could select multiple factors that they considered should be included, or none. CP 258, 6.53.

61 There were 54 consultees who responded to this question. 38 consultees supported including "the protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights"; 40 consultees supported including "the interests of justice including the defendant's right to a fair trial"; 34 consultees supported including "the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions"; 34 consultees supported including "the risk of introducing or perpetuating myths or misconceptions"; and 3 consultees supported not including "any of the above factors".

62 38 consultees supported including "protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights".

5.67 As outlined at paragraph 5.44, complainants have a qualified right to respect for their private life under article 8 of the ECHR.[63] The ECtHR has affirmed that in considering this right in the context of sexual offences prosecutions, states must strike:

> a fair balance between the interests of the defence, in particular the right of the defendant to examine or have examined witnesses pursuant to Article 6(3), and the rights ensured to the victim by Article 8. The manner in which alleged victims of sexual offences are questioned must ensure that a fair balance is achieved between the victim's personal integrity and dignity and the defendant's rights. Even though the defendant must be able to defend themselves by challenging the credibility of the alleged victim and potential contradictions in their testimony, the cross-examination must not be used as a means to intimidate or humiliate the victim.[64]

5.68 The protection afforded to complainants by virtue of the right to respect for private life under article 8 is extensive. The ECtHR's guidance on article 8 explains:

> Private life is a broad concept incapable of exhaustive definition… It covers the physical and psychological integrity of a person and may "embrace multiple aspects of the person's physical and social identity".[65]

5.69 As we explain in Chapter 3, in our recommendation we slightly reword this factor to reflect the protection of complainants' rights under the ECHR. It now reads: "the protection of the complainant's legal rights including their right to respect for their private life and dignity".

5.70 This factor provides an opportunity for the court to consider the potential harm to the complainant's right to respect for their private life, including their dignity, due to the admission of CICE. It is foreseeable that a credibility challenge alleging that a complainant is lying for financial gain, or intimate details made as part of the claim, could impact their dignity.

5.71 We recognise that CICE is not likely to impact the complainant's right to respect for their private life in the same way as SBE.[66] This is because the information in a CIC application relating to the offence at trial is likely to be before the court already. Further, CICE is less likely to contain details that are as intimate as details about the complainant's sexual behaviour. However, the fact that the complainant's privacy is less likely to be impacted by the admission of CICE than by the admission of SBE does not mean that the potential impact is non-existent. We therefore recommend that the judge should consider the potential impact of the admission of the evidence on the complainant's right to respect for their private life when determining the potential prejudice to the proper administration of justice.

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63 See Appendix 1, paras 1.12-1.21

64 *JL v Italy* App No 5671/16 at [128].

65 Council of Europe/European Court of Human Rights, *Guide on Article 8 of the Convention – Right to respect for private and family life* (August 2024), p 26, citing *Denisov v Ukraine* App no 76639/11 at [95]; *S and Marper v the United Kingdom* App Nos 30562/04 and 30566/04 at [66].

66 See CP 259, para 6.41.

The interests of justice including the defendant's right to a fair trial

5.72 There was majority support for including this factor.[67] Several consultees suggested the consideration of the defendant's right to a fair trial should be a paramount consideration.[68] We recognise the importance of this consideration when determining the admissibility of relevant evidence and echo our previous comments in relation to the SBE model, that "it would not be right to suggest that admission necessary for a fair trial can be outweighed by other factors".[69] In fact, as we explain above at paragraphs 5.30 to 5.32, our model is designed to ensure that evidence necessary for a fair trial is admitted. When the CICE is not necessary for a fair trial, the defendant's right to a fair trial should remain an important consideration for the trial judge when assessing the potential for prejudice to the administration of justice.

The benefits of encouraging victims to report and provide evidence for sexual assault prosecutions

5.73 There was majority support for this factor from consultees.[70] However, in response to the SBE proposal, we also received compelling responses that this is too remote a consideration for determining the admissibility of a particular piece of evidence.[71] We are persuaded by this argument and conclude in the SBE chapter that this factor should not be included. In our view, the same rationale, and therefore our conclusion, applies to the CICE threshold.

5.74 Although we do not recommend this as a factor, encouraging victims to report and support prosecutions remains important. We think this will still be facilitated by a clear and appropriate framework for restricting the use of CICE.[72]

The risk of introducing or perpetuating myths or misconceptions in the trial

5.75 There was majority support for including this factor.[73]

5.76 A key justification for introducing a higher admissibility threshold for CICE is to reduce the risk that myths and misconceptions may improperly influence the jury. We suggest that this concern is a relevant factor for the judge to consider when determining whether admitting the evidence could prejudice the proper administration of justice.

5.77 As we explain above at paragraph 5.14, CICE may introduce or perpetuate misconceptions about the prevalence of false allegations. Specifically, jurors may be influenced by the misconception that it is common for people to make false allegations, and that this is often motivated by financial gain. When this myth is at risk

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67 40 consultees, out of 54, supported including "the interests of justice including the defendant's right to a fair trial".

68 Including the Six Circuits; FACT; and Cardiff University Law School Innocence Project.

69 CP 259, para 4.185.

70 34 consultees, out of 54, supported including 'the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions'.

71 Ch 3, paras 3.87-3.88.

72 Ch 3, paras 3.89.

73 34 consultees supported including 'the risk of introducing or perpetuating myths or misconceptions in the trial.

of impacting jurors' decision making, there is also a risk that the proper administration of justice will be prejudiced.

Conclusion

5.78 Based on consultees' responses to both our CIC proposal and the similar SBE proposal, we have refined our provisional proposal to create a fair, clear, and effective framework. We recommend a two-stage test that requires the court to consider whether:

(1) first, the evidence has substantial probative value in relation to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole; and

(2) second, that its admission would not significantly prejudice the proper administration of justice.

5.79 Each stage should be structured by guiding factors to assist parties and the court to determine whether the evidence meets the threshold at each stage.

Recommendation 24.

5.80 We recommend that evidence of a Criminal Injuries Compensation claim should only be admissible if:

(1) the evidence has substantial probative value in relation to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole ("stage 1"); and

(2) its admission would not significantly prejudice the proper administration of justice ("stage 2").

5.81 For stage 1, we recommend that a non-exhaustive list of factors should be developed by government to aid in the assessment of the probative value of the evidence.

5.82 For stage 2, we recommend that the judge should consider the following factors when determining if admission of the Criminal Injuries Compensation evidence would significantly prejudice the proper administration of justice:

(1) protection of the complainant's legal rights, including respect for the complainant's private life and dignity;

(2) the interests of justice, including the defendant's right to a fair trial; and

(3) the risk of introducing or perpetuating myths or misconceptions in the trial.

SCOPE

Extending the regime to any compensation claim

5.83 Consultees suggested that restrictions proposed for CICE should also apply to evidence of compensation relating to the alleged offence sought from means other than the CIC process.[74]

5.84 In the consultation paper, we confined our provisional proposal to CIC claims.[75] This is because stakeholders raised concerns about the use of CICE in sexual offences prosecutions, but we had not heard concerns in respect of other types of compensation claims.

5.85 During consultation, we heard from Rebecca Camber, Chair of the Crime Reporters Association, that she had seen defence barristers ask whether complainants have brought a civil claim for compensation.

5.86 This is not sufficient evidence to recommend extending the regime to other types of compensation claims. We recognise that the rationale we apply to justify restricting evidence of CIC claims could apply to other types of compensation. However, we do not have enough information about the potential impact of a restriction on the admissibility of evidence of other types of compensation claims, nor do we have information suggesting that such evidence is regularly being used in sexual offences trials when compared to other trials. Accordingly, we have limited the scope of our recommendation to introducing a higher admissibility threshold specifically for CICE.

CROSSOVER WITH OTHER EVIDENCE

Bad character

5.87 In response to our proposal to introduce a higher admissibility threshold for CICE, two consultees suggested that there may be overlap between CICE and bad character evidence.[76] We explain the regime governing the admission of evidence of bad character in Chapter 6. CICE could be used as non-defendant bad character evidence, under section 100 of the Criminal Justice Act 2003 ("CJA 2003"). This could arise if the evidence is of a compensation claim made by the complainant regarding a prior criminal complaint that is argued to have been false. In these circumstances, there would need to be a suitable evidential basis to demonstrate the claim was false in order for it to amount to bad character.[77] It is also possible that the defendant bad character provisions will be relevant where the claim relates to a prior allegation of an

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74 Examples may include a compensation order under s 133 of the Sentencing Code or a civil claim.

75 In the consultation paper we advised that we had not received consultee responses or feedback in relation to "other types of compensation claim such as a compensation order under s 133 of the Sentencing Code or a civil claim". CP 259, para 6.1, n 1.

76 Dr Matt Thomason and an Australian legal stakeholder.

77 *R v Hilly* [2014] EWCA Crim 1614, [2014] 2 Crim App R 33. See discussion of the proper evidential basis test in Chapter 4.

offence committed by the defendant. [78] We recognise it would be highly unusual for this evidence to be adduced.

5.88 Although the circumstances in which this crossover is likely to arise will be rare, to the extent that the two frameworks may overlap, the court should apply the CICE threshold if the evidence being adduced is about the CIC claim. If the evidence being adduced relates to the complainant's bad character on the basis that an allegation for which the complainant made a CIC claim was false, then the regime relating to false allegations should apply.[79] This aligns with our conclusions in relation to the interaction between SBE and false allegation evidence.[80]

Sexual behaviour evidence

5.89 CICE may also be considered SBE if the prior claim is about a sexual offence and the defence wish to ask questions specifically about the previous sexual offence allegation and the sexual behaviour relevant to the allegation. It would be rare for the defence to adduce material specifically relating to the sexual behaviour contained in a CIC application, as it would be unusual for this material to be relevant.

5.90 However, if a party does seek to adduce such evidence, the SBE threshold should apply where the questions or evidence are clearly directed at any sexual behaviour of the complainant.

Personal records

5.91 In Chapter 2, we explain that CICE held by third parties, including the CICA, would first need to pass through an enhanced relevance threshold at the access and production stage. Subsequently, use of evidence or lines of questioning based on a CIC claim would be subject to further scrutiny by a judge using the enhanced relevance admissibility threshold we describe above. The CICE threshold would apply regardless of whether the evidence came from third-party material, or from another source such as the defendant's own knowledge or documents in their possession.[81]

PROCEDURE FOR CICE APPLICATIONS

5.92 We have considered the appropriate procedure for SBE applications (see Chapter 3). Based on that analysis, we now briefly set out the procedure we consider most appropriate for applications to adduce evidence of or ask questions about CIC claims. These measures would provide consistency and transparency in respect of applications and judicial decision making.

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78 See CJA 2003, s 101. We note that the bad character evidence provisions would not arise where the CICE relates to the current criminal complaint because of s 98, which excludes "evidence which (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence".

79 See discussion of this regime in Chapter 4.

80 Ch 4, paras 4.37-4.39.

81 Ch 2, para 2.31.

Application process

5.93 We consulted on the process for making an application to adduce SBE.[82] Following responses from consultees we conclude in Chapter 3 that the current approach to making SBE applications should be maintained.

5.94 For SBE applications, section 43 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999 provides that:

> (1) An application for leave shall be heard in private and in the absence of the complainant.
>
> (2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one):
>
> (a) its reasons for giving, or refusing, leave, and
>
> (b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave,
>
> (c) and, if it is a magistrates' court, must cause those matters to be entered in the register of its proceedings.

5.95 Section 43(3) of the YJCEA 1999 enables the Criminal Procedure Rules ("CrimPR") to make provision in relation to SBE applications.

5.96 Currently, the CrimPR require SBE applications to be:

> (1) made in writing; and
>
> (2) include particulars of the evidence or questions; the issue in the case to which the applicant claims the evidence or questions relates; and the exception to the prohibition under the legislation that the applicant claims applies to the evidence.

5.97 The CrimPR also suggest applications should be made as soon as reasonably practical after becoming aware of grounds for doing so, and in any event no more than 10 days after disclosure of the material upon which the application is based.[83]

5.98 We conclude that the current approach should be maintained for SBE on the basis that consultees generally supported this approach and that it appears to function well. It would be sensible to take the same approach for applications to admit CICE. Accordingly, we recommend the procedural aspects of the application for adducing CICE should mirror those currently required for SBE applications under section 43 of the YJCEA 1999 and the CrimPR.

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82 CQ 21(1): We provisionally propose, as is currently required, that applications to admit sexual behaviour evidence should be made in writing and that the application should include: detail of the evidence sought to be admitted; the purpose for which its admission is sought; and drafts of any proposed questions. CP 259, para 4.203.

83 CrimPR, r 22.2-22.4

5.99 An application must be made for any party wishing to adduce evidence or ask questions about a CIC application made by the complainant. It is immaterial whether the evidence is sought to be adduced by the prosecution or defence. This is to ensure that all CICE is subject to judicial scrutiny. This is because, regardless of which party introduces the evidence, CICE carries a risk of prejudicing the jury based on misconceptions about false allegations in sexual offences cases and its admission may impact the complainant's right to respect for their private life. The prosecution is very unlikely to adduce CICE. However, there may be circumstances in which the prosecution intends to introduce CICE because they are pre-empting the defence raising it as an issue. This approach aligns with our recommendation that leave is required when SBE is sought to be adduced, and questions are sought to be asked, by both the defence and prosecution.[84]

Recommendation 25.

5.100 We recommend that a similar procedure to that required under the framework for admitting sexual behaviour evidence should be developed for applications made to adduce Criminal Injuries Compensation evidence.

Recommendation 26.

5.101 We recommend that the admissibility framework for evidence of a Criminal Injuries Compensation claim should apply to evidence sought to be adduced, and questions sought to be asked, by both the defence and prosecution.

Written reasons

5.102 In Chapter 3, we conclude that judges should be required to produce written reasons for their decision on SBE application.[85] This recommendation is underpinned by the need to encourage clarity and transparency about decision making in relation to SBE applications. In coming to this conclusion, we consider concerns presented by consultees that written reasons would create an additional burden on judges and therefore an additional resource demand on the courts. Despite these concerns, we conclude that the potential benefits of providing written reasons outweigh the potential burden on judges in preparing the reasons. We recommend that the judge should be required to provide written reasons for their decision on an SBE application, and that their written reasons should address all of the factors under stage 2 they are required to consider.[86]

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84 Ch 3, para 3.165.

85 We recommend that the judge should be required to provide written reasons for their decision on an application to adduce sexual behaviour evidence, and that their written reasons should address all of the factors under stage 2 they are required to consider. See Ch 3, para 3.181.

86 Ch 3, para 3.182.

5.103 Likewise, we consider requiring written reasons for CICE applications would equally promote transparency and consistency in judicial decision making for these types of applications. This is particularly important with an admissibility model involving significant discretion, such as the one we recommend. Accordingly, we recommend that there should be a requirement for judges to provide written reasons for their decision in relation to a CICE application, and the reasons should address the thresholds at both stage 1 and stage 2, and the factors under stage 2.

Recommendation 27.

5.104 We recommend that the judge should be required to provide written reasons for their decision on an application to adduce evidence of a Criminal Injuries Compensation claim, and that their written reasons should address all the factors under stage 2 they are required to consider.

Directions

5.105 In Chapter 10, we recommend the Judicial College consider developing example directions that should apply where permission is given for CICE to be admitted. This provides a further opportunity to mitigate the risks associated with the introduction of CICE. The content of this recommendation is explained at paragraphs 10.109 to 10.121.

5.106 Judges may also provide corrective directions to the jury where inadmissible evidence is introduced, or prohibited questioning occurs in relation to CICE which has been adduced without leave. This type of direction may include advising the jury to disregard the evidence they have heard. A corrective direction may not always be appropriate or necessary, for example where the court does not wish to draw attention to the inadmissible evidence.

Chapter 6: Character evidence

INTRODUCTION

6.1 Evidence of a person's character may be admissible in a criminal trial. For example, the defence may wish to introduce evidence that the defendant has no previous convictions or cautions so as to suggest that the defendant is more likely to be telling the truth and less likely to have committed the offence. The prosecution may equally wish to introduce evidence that the defendant has previous convictions or has committed other misconduct that has not resulted in a conviction, for example, to suggest the defendant is more likely to have acted in the way alleged or has a propensity to be untruthful. Such evidence can be important for the jury to consider but also risks prejudicing the jury's deliberations.

6.2 Whether character evidence is admissible will depend on the circumstances, including whether it relates to the defendant or the complainant, and whether it is evidence of good or bad character. We will explore how the current law restricts the admissibility of character evidence below.

6.3 The Law Commission previously looked at the issue of bad character evidence in our 2001 report.[1] The recommendations in that report were implemented in the Criminal Justice Act 2003 ("CJA 2003"). In the consultation paper, we did not review all of character evidence again. Rather, we considered specific issues raised by stakeholders that are particularly relevant in the context of sexual offences prosecutions. In this report we address those same issues.

6.4 First, we consider the position where there is evidence that the defendant has previously engaged in misconduct, but this misconduct has not resulted in a conviction. We have concluded that the existing legal framework does allow for the admissibility of evidence of the defendant's bad character not involving a conviction, and further reform is not needed.

6.5 Secondly, we consider the differing positions of the admissibility of evidence of good character for defendants and complainants. While we accept concerns that there is an imbalance in relation to good character evidence, ultimately, we recommend no reform to the existing legal framework for either the defendant or the complainant. Instead, we recommend an explanatory direction should be given to the jury when they have heard evidence of the defendant's character, whether good or bad, but no evidence in relation to the complainant's character.

6.6 As in the consultation paper, [2] our discussion below contemplates only a single defendant and a single complainant in a sexual offences prosecution. We acknowledge that there may be greater complexity where there are multiple defendants or complainants or mixed charges. However, the principles engaged are

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1 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

2 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259"), para 5.6.

the same where there are single or multiple defendants or complainants, or where a sexual offence is prosecuted in isolation or alongside other non-sexual offences, We do not discuss these different scenarios to avoid adding unnecessary complexity or length to the analysis. We consider that our recommendation for an explanatory direction is not unworkable or unfair in such contexts.

DEFENDANT BAD CHARACTER: NON-CONVICTION EVIDENCE

6.7 To support their case, the prosecution may seek to adduce evidence of a defendant's previous misconduct, known as bad character evidence ("BCE"). Such evidence could be relevant either in relation to the defendant's credibility (that the evidence makes it less likely that the defendant's account can be believed) or propensity (that the defendant has a tendency to behave in a way that makes them more likely to have behaved in the way the prosecution alleges amounts to the offence charged). BCE may be evidence of previous convictions as well as evidence of prior misconduct that has not resulted in a conviction. The CJA 2003 defines BCE as evidence of either "misconduct" or a "disposition towards misconduct", other than misconduct to do with the facts of the offence the defendant is currently charged with or the investigation or prosecution of that offence.[3] "Misconduct" is defined as either "the commission of an offence or other reprehensible behaviour".[4]

6.8 Overall, the bad character regime seeks to ensure the admission of relevant evidence without risking unfairness to the defendant.[5] This evidence can be important and appropriate for a jury to consider. However, there are risks that the admission of BCE can have a prejudicial effect and inappropriately influence the jury's reasoning. For example, the jury could consider that a person who has previously committed a crime is more likely to have committed the offence charged, regardless of the type of offence or length of time since, or is more deserving of punishment.[6] Further, this evidence may engage the presumption of innocence in article 6(2) of the European Convention of Human Rights ("ECHR").[7] Therefore, as set out in the CJA 2003, its use is subject to a threshold of admissibility greater than mere relevance.

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3 CJA 2003, s 98.

4 CJA 2003, s 112(1).

5 CP 259, para 5.18, citing *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 5676. In our 2001 report on bad character, we had concluded that the admission of previous convictions as BCE was *per se* compatible with article 6. See Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, paras 3.7-3.8, citing *X v Denmark* Yearbook (1965) vol 8, p 370; *X v Austria* Yearbook (1966) vol 9, p 550; *Unterpertinger v Austria* (1991) 13 EHRR 175 (App No 9120/80), para 20; *Kostovoski v The Netherlands* (1990) 12 EHRR 434 (App No 11454/85), para 18.

6 CP 259, para 5.9, citing P Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (2006) pp 179-180.

7 Article 6(2) provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". The presumption of innocence imposes various procedural requirements intended to guarantee a fair trial, including in relation to the burden of proof, legal presumptions of fact and law, and the privilege against self-incrimination. See *Allen v UK* App No 25424/09 (Grand Chamber decision) at [93]. The presumption of innocence is not absolute and may be restricted within reasonable limits which take into account the importance of what is at stake and the rights of the defence: see *Falk v the Netherlands* App No 66273/01; *Salabiaku v France* App No 10519/83. The presumption of innocence continues to apply following an acquittal or the discontinuation of proceedings: see *Allen v UK* at [94], [103]-[104]. We discuss the impact of non-conviction evidence on article 6(2) from para 6.36 below.

6.9 For evidence which amounts to BCE under section 98 to be admissible, it must fall within one of the seven gateways for admissibility in section 101(1) of the CJA 2003.[8] Even where evidence could be admitted under one of the gateways, the court may still exclude the evidence to avoid the risk of injustice to the defendant and protect the right to a fair trial. Evidence may be excluded under either the specific exclusionary provision in section 101(3) of the CJA 2003 (for evidence admissible under gateway (d) or (g)), or under section 78 of the Police and Criminal Evidence Act 1984 ("PACE") (for all prosecution evidence).[9] The consideration of these safeguards should ensure that the admission of BCE complies with the defendant's right to a fair trial under article 6 of the ECHR.[10] Where BCE is admitted, the judge will direct the jury as to how the evidence is relevant and the purposes for which it can be used.[11]

6.10 Pre-consultation, stakeholders told us that evidence that the defendant has engaged in previous sexual violence, non-sexual violence, or controlling or coercive behaviour is an important consideration in sexual offences prosecutions, which rely heavily on the testimony of the complainant and defendant. However, stakeholders were concerned that where there is no prior conviction for this type of misconduct, the prosecution do not often seek to adduce non-conviction evidence, and that this evidence is not often admitted even when they seek to do so.[12]

6.11 In the consultation paper, we reviewed the regime in the CJA 2003 and provisionally concluded that the law does permit the admission of non-conviction evidence of the defendant's previous misconduct, such as controlling or coercive behaviour, domestic

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8 CJA 2003, s 101(1) sets out seven gateways for admissibility of BCE:

"(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character".

We discuss gateways (c) and (d) in detail below.

9 Under CJA 2003, s 101(3), the court must exclude the evidence if its admission would have "such an adverse effect on the fairness of the proceedings that the court ought not to admit it". Under PACE, s 78, the court "may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". Although s 101(3) states that the court "must" exclude, and s 78 states that the court "may" exclude, the courts have held that there is no difference between the two. See CP 259, paras 5.31-5.33, citing *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049 at [28].

10 CP 259, para 5.33, citing *R v Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472 at [13]-[14]; *R v Weir (Somanathan)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885 at [44]; *R v O'Dowd* [2009] EWCA Crim 905, [2009] 2 Crim App R 16 at [29], [31].

11 CP 259, para 5.19.

12 CP 259, para 5.14.

abuse, violence or sexual misconduct.[13] We considered that such behaviour would undoubtedly meet the threshold for "reprehensible behaviour" to be defined as misconduct for the statutory definition of bad character regime.[14]

6.12 We suggested that non-conviction evidence of this type is most likely to be significant and contentious under gateways (c) and (d). This was because the prosecution can seek to introduce evidence under these gateways without the defendant having triggered or agreed to the introduction of the BCE.[15] For this reason we continue to focus on these gateways in this report.

6.13 Gateway (c) provides that evidence of the defendant's bad character is admissible if it is "important explanatory evidence",[16] defined as evidence without which the jury would find it "impossible or difficult properly to understand" other evidence in the case, or evidence that has substantial value for understanding the case as a whole.[17] We considered it likely that evidence would be admissible under gateway (c):

> where a defendant has previously committed acts of sexual violence, non-sexual violence, or coercion or control: (1) against the complainant; or (2) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.[18]

6.14 This is because such conduct would be important explanatory detail about the circumstances within which the alleged sexual offence occurred, including the nature of the relationship between the defendant and complainant. We suggested that the case for admissibility may be stronger where the previous misconduct was sexual violence committed against the complainant, and strongest if consent was in issue. This is because without this evidence, the jury may have a different understanding of the circumstances of the offence and the complainant's account of their behaviour and the defendant's behaviour.[19]

6.15 We gave the example of the case of *R v C*,[20] where the complainant's stepfather was charged with 18 counts of sexual offences covering a period of over 20 years, since the complainant was aged five. The defendant denied that there had been any sexual activity before the complainant was 16 (in relation to counts 1-9) and provided photographic evidence and messages to suggest that subsequent sexual activity was consensual (in relation to counts 10-18). The Court of Appeal held that once the jury was sure of the defendant's sexual abuse of the complainant when she was a child, then they could take that into account when evaluating the evidence that suggested the complainant consented after she was 16. This evidence would be important

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13 CP 259, para 5.52.

14 CJA 2003, ss 98, 112(1); CP 259, para 5.53.

15 CP 259, para 5.22.

16 CJA 2003, s 101(1)(c).

17 CJA 2003, s 102.

18 CP 259, para 5.56.

19 CP 259, para 5.57.

20 [2012] EWCA Crim 2034, [2013] *Criminal Law Review* 358; Blackstone's Criminal Practice 2025, F13.40.

explanatory evidence; that abuse helped explain the material the defendant relied on to suggest she consented once she had turned 16, casting this evidence "in a very different light".[21] With this explanatory evidence, the jury could then conclude that the abuse had continued, that the complainant had not in fact consented to any of the sexual activity, and the defendant knew her consent was not genuine.[22]

6.16 Gateway (d) provides that evidence of the defendant's bad character is admissible if it is relevant to "an important matter in issue".[23] This includes the defendant's "propensity to commit offences of the kind with which he is charged",[24] and the defendant's propensity to be untruthful.[25] We referred to these as "propensity" and "credibility" respectively.[26] Propensity may be established by a conviction for an offence of the same description or category,[27] but is not limited to evidence of a conviction.[28] However, propensity may not be established with evidence of previous convictions for similar offences if the court is satisfied that it would be unjust to find propensity, because of the length of time since the conviction or for any other reason.[29] Further, evidence must not be admitted under gateway (d) if it would have such an adverse effect on fairness that it ought not be admitted.[30]

6.17 As we explained in the consultation paper, evidence that the defendant had previously committed acts of sexual violence, whether against the complainant or another person, is most likely to be admissible under gateway (d) as demonstrating propensity to commit a sexual offence.[31] However, we considered that evidence that the defendant had committed non-sexual violence or other misconduct is less likely to be admissible under gateway (d), as these would not be offences of the kind with which the defendant is charged.[32]

6.18 We acknowledged that the position for non-conviction evidence is not stated in the case law in these terms, but we considered that non-conviction evidence could be admissible as above.[33] This evidence would remain subject to the requirement that

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21 [2012] EWCA Crim 2034 at [14], [2013] *Criminal Law Review* 358.

22 CP 259, para 5.57.

23 CJA 2003, s 101(1)(d).

24 This limb of the gateway will not apply "where his having such a propensity makes it no more likely that he is guilty of the offence": CJA 2003, s 103(1)(a).

25 CJA 2003, s 103(1).

26 CP 259, para 5.26.

27 Defined pursuant to the Criminal Justice Act 2003 (Categories of Offences) Order 2004.

28 CJA 2003, s 103(2).

29 CJA 2003, s 103(3).

30 CJA 2003, s 101(3).

31 CP 259, para 5.59.

32 CP 259, para 5.60.

33 CP 259, paras 5.61-5.62, citing *R v Balazs* [2014] EWCA Crim 937; *R v Mark Geoffrey P* [2006] EWCA Crim 2517, [2006] 10 WLUK 147.

the prosecution must prove beyond reasonable doubt that the conduct described occurred.[34]

6.19 We provisionally concluded that the legal provisions in section 101 of the CJA 2003 were sufficient to accommodate non-conviction evidence and made a provisional proposal to this effect.[35] We acknowledged potential reasons why applications are not being regularly made to adduce non-conviction evidence of this kind, and asked for views on whether guidance is needed here (see below from paragraph 6.47).

Consultation responses and analysis

6.20 The majority of consultees who responded to our provisional proposal agreed that no amendment to the legal framework is required in order to admit non-conviction BCE.[36] There were two main justifications given by consultees.

6.21 First, consultees told us that that this evidence is in fact currently admitted. For example, the Six Circuits of England and Wales[37] affirmed that judges "readily entertain applications" to admit non-conviction material where appropriate, and that the law "is working in practice". Dr Matt Thomason also commented that his research found that admission of non-conviction evidence is "relatively routine".[38]

6.22 Secondly, consultees agreed that issues with the underuse of non-conviction BCE arise at the investigation and case-building stages of a sexual offences prosecution.[39] For example, HM Crown Prosecution Service Inspectorate ("HMCPSI") said in its

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34 See from para 6.42 below for discussion of the standard of proof for propensity.

35 Consultation question ("CQ") 29: "We provisionally propose that the bad character provisions of the Criminal Justice Act 2003 do not require amendment to accommodate non-conviction evidence of previous sexual violence, non-sexual violence, or controlling or coercive behaviour by the defendant. This is because:

(1) Where a defendant has been charged with rape or a serious sexual offence then non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour may be admissible under gateways (c) and (d) of section 101(1) of the Criminal Justice Act 2003.

(2) Where gateway (c) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour:

(a) against the complainant; or

(b) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.

(3) Where gateway (d) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence against the complainant or against another person.

Do consultees agree?". CP 259, para 5.70.

36 Out of 70 responses, 44 consultees agreed; 19 disagreed; 5 submitted a response categorised as other; 2 submitted a non-substantive response.

37 Consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("the Six Circuits").

38 M Thomason, *A Socio-Legal Study of Non-Defendant Character Evidence in Criminal Trials* Doctoral thesis, University of Nottingham (2020) p 63.

39 Including Rachel Snaith, employee of the Office of the Police and Crime Commissioner ("OPCC") for Northumbria; Dr Matt Thomason; a Circuit Judge; and Rape Crisis England and Wales ("RCEW").

consultation response that, based on its inspections, issues arise "from the police and prosecution not properly using bad character, rather than any issues as to the legislation". In its July 2025 thematic inspection report, HMCPSI suggested that at the pre-charge review stage, "there needs to be better identification and consideration of the potential for a bad character application to strengthen cases". It added:

> We assessed less than two in ten cases as fully meeting the standard for an appropriate application of bad character being considered, and just under half of cases as not meeting the standard. The weaker cases featured prosecutors not identifying how non-conviction bad character could be related to an important matter in issue and in demonstrating a suspect-centric trial strategy.[40]

Professor Vanessa Munro also commented that in relation to this evidence "there is more that could be done to test the boundaries of its admissibility as part of case-building".

6.23 Relatedly, some consultees highlighted the significant resource constraints in the criminal justice system as partly responsible for underuse. Rape Crisis England and Wales ("RCEW") commented that in its view, because bad character applications involve "lengthy procedures and additional required effort", the Crown Prosecution Service ("the CPS") do not pursue these applications "to lighten their own workload".

6.24 Of the consultees that disagreed with our proposal, none disagreed with our conclusion that the current framework allows for the admission of non-conviction BCE. Instead, the consultees who disagreed with the proposal advocated for reform in order to clarify the position or change the thresholds. We consider the reasons given for reform below.

Admission for propensity under gateway (d)

6.25 Ten consultees, predominantly victim support organisations, supported reform in order to make it easier to adduce non-conviction BCE.[41]

6.26 Centre for Women's Justice ("CWJ") disagreed with our position that generally only evidence of sexual violence would be admissible through gateway (d) in the context of a sexual offences prosecution. It argued that in the context of alleged sexual offending against a partner, evidence of previous misconduct against previous or current partners is and should be admissible through gateway (d) to support an argument of propensity. It based this on the case of *R v Balasz*,[42] in which a defendant's previous convictions for assault occasioning actual bodily harm and harassment were admitted through gateway (d) in a rape trial (though in that case they were admitted alongside a previous conviction for rape). CWJ also referred to research linking controlling or

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40 HMCPSI also encouraged the Crown Prosecution Service ("CPS") to re-introduce detailed CPS legal guidance on BCE that had previously been available on the CPS intranet. See HMCPSI, *An inspection of early advice and pre-charge decision making in adult rape cases: A thematic inspection of the quality of the Crown Prosecution Service's early advice and pre-charge decision-making following implementation of the national operating model for prosecuting adult rape cases*, (July 2025) paras 2.32 and 7.27-7.32. On the need for guidance on BCE, see from para 6.47 below.

41 Including RCEW and End Violence Against Women Coalition ("EVAW").

42 [2014] EWCA Crim 937.

coercive behaviour in a relationship to sexual offending.[43] Therefore, CWJ argued that this "more developed understanding of the dynamics of abuse within relationships" should be reflected in the legislation governing BCE.

6.27 To clarify this view of propensity under gateway (d), CWJ proposed amending the Category of Offences Order 2004 to establish a category of "intimate partner violence". Section 103(4)(b) of the CJA 2003 provides that two offences are of the same category as each other, for the purposes of establishing propensity under section 103(2)(b), if they belong to the same category of offences as prescribed by an order made by the Secretary of State. The Order consequently prescribes these categories.[44] The effect of the suggested amendment would be that a conviction for an offence within the "intimate partner violence" category would automatically be capable of supporting an argument of propensity to commit a sexual offence against an intimate partner and would therefore be admissible through gateway (d). We note here that we consulted on the effective use of non-conviction evidence; CWJ's proposal would only have a direct impact where there are previous convictions.

6.28 We acknowledge CWJ's argument that there are circumstances in which non-sexual offending can be admitted for propensity to show sexual offending, and therefore that we may have been too cautious when we provisionally concluded that only sexual offending would likely be admitted for propensity under gateway (d). However, we do not think that reform is needed for a number of reasons.

6.29 First, we do not agree that adding "intimate partner violence" to the Category of Offences Order 2004 would represent a codification of the existing law. While the courts have accepted that in some cases non-sexual misconduct against a partner is capable of establishing a propensity to commit sexual offences against a partner, it would be wrong to infer from this that all offending against an intimate partner demonstrates a propensity to commit sexual offences against a partner. There may be an instance where somebody committed an offence against a partner, for example criminal damage against their property, and has not been convicted of any other offences for fifteen years. They are subsequently accused of rape in a relationship. On CWJ's model, their previous conviction would automatically be capable of demonstrating propensity under section 102(b), without further argument from the prosecution on how this particular conviction demonstrates a propensity to commit this sexual offence.

6.30 There is a particular need for caution with arguments relating to bad character and propensity. As noted at paragraph 6.8 above, this evidence may unfairly prejudice the

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43 C Weiner and T Palmer, "Telling the Wrong Stories: Rough Sex, Coercive Control and the Criminal Law" [2021] *Child and Family Quarterly* 331; C Weiner, *Coercive Control and the Criminal Law* (2022); Katrin Hohl, Abigail-Kate Reid, Sarah Molisso, and Merili Pullerits, Operation Soteria Bluestone Survey Report (September 2023) p 33; CPS, *Legal Guidance on Controlling or Coercive Behaviour Within an Intimate or Family Relationship* (24 April 2023, updated 7 February 2025). Similar comments were made in the consultation responses from RCEW, EVAW and Solace Women's Aid.

44 There are two prescribed categories of offences. First, theft offences including theft, robbery, and burglary amongst others are prescribed in Part 1 of the Criminal Justice Act 2003 (Categories of Offences) Order 2004. Second, sexual offences against a person under the age of 16, including rape, indecent assault and incest, are prescribed under Part 2 of the Order. No further categories have been added since the Order came into force in December 2004.

jury's reasoning. It can be important for the jury to hear this evidence where the previous misconduct is relevant to whether the defendant has a propensity to commit the offence charged. The probative value of this evidence can mean that this evidence is not unfairly prejudicial. However, as we noted in the 2001 report, whether a particular instance of previous similar misconduct demonstrates a propensity to commit the offence charged is context specific.[45] Categorising offences within the Order automatically deems them as relevant to demonstrate propensity without careful consideration on this point. Removing this initial scrutiny increases the risk that irrelevant and unfairly prejudicial evidence may be considered as evidence of propensity, and therefore poses a greater risk to the defendant's right to a fair trial, notwithstanding the possibility of excluding the evidence at a later stage.[46] We regard it as notable that there are only two categories of offences in the Order, and there have been no additions since it was brought into force in December 2004. It is also of note that while sexual offences committed against a person under 16 are currently part of a prescribed category, sexual offences in general are not.

6.31 When adding a category of offences that would automatically demonstrate propensity, we would need to be certain that the conduct triggering propensity in law does in fact generally demonstrate propensity. While we accept that non-sexual misconduct against a partner may sometimes demonstrate propensity, we do not consider that there is a clear enough connection that it should automatically demonstrate propensity, subject to the defence challenging the admission of the evidence on the grounds of fairness.

6.32 Further, in our view, CWJ's proposed amendment would lead to classification issues and confusion in the law. There are many types of offence which are capable of being committed against an intimate partner, or in the context of domestic abuse. The link between these offences is the context in which they were committed, rather than the nature of the offence itself, as for the other categories in the Order. If offences were to be categorised based on the context in which they were committed, it would invite satellite litigation into the specific context of each prior conviction, to establish that the criteria of the statute were met.

6.33 Overall, we consider that amending the Order to include a category of "intimate partner violence" would inappropriately expand the type of previous misconduct that is deemed to demonstrate propensity to commit a sexual offence, thereby risking the admission of irrelevant and prejudicial evidence. We acknowledge that even where propensity has been established under section 103(2), the evidence may not be admitted.[47] However, the presence of exclusionary safeguards does not respond to our underlying position that there should be careful consideration of whether previous

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45 Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273, para 6.56. We rejected automatically introducing the defendant's record of convictions of similar offences at the start of every trial: "It cannot be assumed that previous convictions for similar offences will always have much probative value. According to the psychological research, the extent to which previous offences of a particular kind suggest guilt of a particular offence of the same kind will depend on the individual features of each situation and the character of the person concerned. The criminal record in itself does not reveal enough about the previous misconduct for anyone to know how far, or in what way, each conviction is relevant to the current charge".

46 The judge may find that s 103(2) does not apply under s 103(3) or exclude the evidence under s 101(3).

47 Either by finding that s 103(2) does not apply under s 103(3), or by excluding the evidence under s 101(3).

non-sexual violence demonstrates a propensity to commit a sexual offence in each case, rather than automatically assuming propensity.

General objections to propensity evidence

6.34 Other stakeholders challenged our provisional proposal on the basis that it should be harder, or impossible, for non-conviction evidence to be admissible. This was based on concerns about the use of propensity evidence.[48] Some also supported a return to the pre-CJA 2003 regime, where BCE was primarily only admissible as "similar fact" evidence.[49]

6.35 A general review of the operation of gateway (d) in particular and the bad character regime in general is outside the scope of this project. The consultation paper and questions were aimed at assessing how these provisions work in the context of sexual offences cases and considering specific instances of misconduct. We did not consult on changing the regime for admitting BCE. In any event such a broad-ranging change could not be limited to sexual offences prosecutions. The full range of opinions on this matter was canvassed and considered in the Law Commission Report leading to the enactment of the bad character provisions of the CJA 2003.

The defendant's right to a fair trial

6.36 A clear theme in consultees' responses was the need for particular caution in relation to non-conviction evidence due to the impact on the defendant's right to a fair trial. Definitionally, this is material suggesting misconduct by the defendant but where it has not previously been proven that the misconduct actually occurred or that the defendant was responsible for it. The risk of prejudice to the defendant is consequently very high, while the potential probative value could be limited. Further, non-conviction evidence could impact on the presumption of innocence under article 6(2) where it takes the form of previous misconduct where proceedings were discontinued or resulted in an acquittal.[50]

6.37 Martin Rackstraw argued that:

> The current gateways for non-conviction evidence are too broad and can lead to injustice where i) non-conviction evidence that is old or of limited probative value is admitted or ii) … non-conviction evidence is admitted in circumstances where the defendant challenges the details.

6.38 The use of non-conviction evidence does not result in the jury finding the defendant guilty of an offence in relation to the previous misconduct. Instead, this evidence serves an epistemic function in that it may assist the jury to determine whether the defendant is guilty of the offence charged. [51] In a particular case, it can be legitimate and important for the jury to hear evidence of previous misconduct that resulted in an

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48 Including Cardiff University Law School Innocence Project and an academic.

49 Including Martin Rackstraw, solicitor, and a barrister.

50 See n 7 above on the applicability of article 6(2) and limitations to the presumption of innocence.

51 *R v* Z [2000] 3 WLR 117 at 130 (Lord Hutton); *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 675.

acquittal, as this evidence may have probative value to a matter in issue in the current trial.[52]

6.39 Non-conviction evidence is subject to various safeguards on its admissibility and use. This evidence is subject to judicial scrutiny throughout the determination of its admissibility, which should prevent evidence that is of limited probative value or contested evidence from being admitted inappropriately and ensure compliance with article 6.

6.40 Where the defence contests the details of the non-conviction evidence relied on by the prosecution, there is a greater risk of distracting the jury with satellite litigation. The jury must be persuaded that the BCE is proved to the criminal standard of proof,[53] which may draw their attention away from the central issues within the trial. The courts will therefore exclude evidence giving rise to an undue risk of satellite litigation taking up disproportionate time or distracting from the central issues.[54]

6.41 The judge may also exclude this evidence on the grounds that its admission would have such an adverse effect on the fairness of the trial that it ought to be excluded.[55] Non-conviction evidence may be more likely to have this adverse effect, for instance if it is incomplete due to the lack of previous investigation, or due to the defendant's inability to challenge old evidence due to the passage of time.[56] Further, where the prosecution seek to rely on multiple incidents of misconduct which the defence challenge, "the sheer weight of disputed evidence on other uncharged allegations" may have such an adverse effect on fairness that the judge must exclude it.[57]

6.42 If contested evidence is admitted, the defence may still challenge this evidence before the jury, such as by cross-examining any witnesses or alleging contamination of the evidence. Further, the jury will be directed on the standard of proof required for bad character evidence in line with the approach taken by the Supreme Court in *R v Mitchell (Angeline)*.[58] The Court held that the jury must be sure that the evidence establishes a relevant propensity but need not be sure that each specific incident happened in the way alleged. This was because the jury should not consider the facts of each incident in isolation but should consider the evidence in the round to determine whether they are sure that a relevant propensity has been established. In so doing, the jury is entitled to consider "the improbability of a number of similar alleged incidents alleged against a defendant being false", and that "obvious similarities in various incidents may constitute mutual corroboration of those

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52 See *R v* Z [2000] 3 WLR 117 at 138-139 (Lord Hobhouse); P Roberts, "Acquitted Misconduct Evidence and Double Jeopardy Principles, From *Sambasivam* to *Z*" [2000] *Criminal Law Review* 952.

53 See from para 6.42 below discussing proof of propensity.

54 CP 259, para 5.30. See also *R v Mckenzie* [2008] EWCA Crim 758, [2008] 4 WLUK 316 at [23]-[26] for discussion of the increased risk of satellite litigation for non-conviction evidence.

55 CJA 2003, s 101(3) or PACE, s 78, depending on through which gateway the prosecution have sought to adduce the evidence. See n 9 above discussing the relationship between these provisions.

56 *R v Mckenzie* [2008] EWCA Crim 758, [2008] 4 WLUK 316 at [24].

57 *R v Mitchell* [2016] UKSC 55, [2017] AC 571 at [53] (Lord Kerr of Tonaghmore JSC).

58 [2016] UKSC 55, [2017] AC 571.

incidents".[59] In contrast, where a single incident is relied upon to establish propensity, the jury must be sure that the specific incident occurred.[60]

6.43 Some have criticised the decision in *Mitchell*. For example, while accepting that the Supreme Court's reasoning is logical, Paul McKeown has warned of the risk that "a jury could act on doubtful untrue evidence" and identified a particular risk of evidence affected by contamination.[61] There is a normative argument that even if *Mitchell* has a logical basis, the prejudicial potential of this evidence is so acute that there should be additional safeguards through a higher admissibility threshold.[62]

6.44 To some extent, the result in *Mitchell* appears to be a product of its specific facts. Two of the incidents of previous misconduct had been admitted in agreed facts, with the defendant only challenging the truth of the allegations during her evidence at trial. The admissibility of the evidence on this basis, as opposed to the direction to be given to the jury, does not appear to have been challenged before the trial judge or on appeal. As discussed above, there are several safeguards on which the defence may rely to challenge the admission of this evidence.[63]

6.45 Overall, non-conviction evidence will be subject to judicial scrutiny throughout. The careful operation of safeguards for its admission and use should prevent unfairness. We do not consider that further legislative reform is required.

Conclusion on admissibility

6.46 We conclude that the underlying legal framework does not require amendment to allow non-conviction evidence of this kind to be admitted. Where applications are made, the evidence appears to be admitted where appropriate; where applications are not made, this appears to be a result of broader issues in case-building rather than the substantive law. We do not consider that any legislative reform is necessary.

Guidance on non-conviction bad character evidence

6.47 Although we have concluded that the legal framework for non-conviction BCE does not need reform, that does not mean this area of the law is satisfactory.

6.48 In the consultation paper we explored why applications to admit non-conviction BCE are not frequently made. Reasons suggested by stakeholders included that the available evidence of the conduct lacks detail (due to information not being retained, sought, or shared); and that prosecutors lack clarity in this area.[64]

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59 [2016] UKSC 55, [2017] AC 571 at [43], (Lord Kerr of Tonaghmore JSC).

60 [2016] UKSC 55, [2017] AC 571 at [40]-[43]; *R v Nguyen* [2008] EWCA Crim 585, [2008] 2 Cr App R 9.

61 P McKeown, "Evidence: *R v Mitchell (Angeline)* Supreme Court: Lords Kerr, Clarke, Hughes, Toulson and Hodge: 19 October 2016; [2016] UKSC 55" [2017] *Criminal Law Review* 310, 312-314.

62 *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 711.

63 In relation to the risk of contamination identified by McKeown, the defence may raise this risk for consideration at several stages. This includes when the judge decides on admissibility; when the judge decides whether the case should be brought to an end under section 107 of the CJA 2003; or by cross-examining the witnesses on the possibility of contamination before the jury.

64 CP 259, paras 5.41-5.44.

6.49 We also noted that the Joint Inspection Report recommended collaboration between the police and the CPS, and that the rationale for decisions taken on bad character applications should be recorded.[65] We acknowledged the work of Operation Soteria in this field,[66] and observed that the Joint Inspection Report recommendations combined with Operation Soteria should help to improve record-keeping, searching and prosecutorial case-building in the context of BCE.[67]

6.50 We acknowledged the concerns of stakeholders that there is a need for greater clarity about the admissibility of non-conviction evidence, including when this evidence can be admitted and under which gateway. We asked for consultees' views on whether there is a need for guidance about the law to assist prosecutors and judges here.[68] We suggested that this could be achieved with amendments to existing guidance, such as the Crown Court Compendium.[69]

6.51 The majority of consultees who responded to this question agreed that there should be guidance.[70] Most of these responses dealt with the need for guidance more broadly, including in relation to police practice. The main reasons given by consultees in support for guidance included problems with evidence gathering and case preparation;[71] the inconsistency of the use of this evidence;[72] and the insufficiency of current guidance.[73] Consultees suggested that guidance could be focused on the threshold for admissibility and the operation of the gateways;[74] the interaction with

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65 CP 259, paras 5.46-5.47.

66 Operation Soteria is a joint Police and CPS programme to develop new national operating models for the investigation and prosecution of rape. See B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022). We limit our discussion of policing issues given the work of Operation Soteria in this area: see CP 259, para 5.48.

67 CP 259, para 5.48.

68 CQ 30: "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?". CP 259, paras 5.71-5.72.

69 CP 259, para 5.69.

70 Out of 67 responses, 48 consultees agreed; 7 disagreed; 9 submitted a response categorised as other; 3 submitted non-substantive responses.

71 Including RCEW and Juries Understanding Rape Is Essential Standard ("JURIES"). RCEW also proposed a requirement for the prosecution to consider BCE, and to record the rationale of any decision not to make a bad character application, in order to improve transparency and clarity in decision-making. Recommendations from the Joint Inspection Report in 2022 should respond to this concern. See CP 259, paras 5.47-5.48, citing Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape Phase 2: Post-charge* (HMICFRS and HMCPSI, February 2022) pp 37-38 and Recommendation 8.

72 London Criminal Courts Solicitors' Association ("LCCSA"); Rachel Snaith; and South Wales OPCC. Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually.

73 Professor Susan Edwards and an anonymous consultee.

74 Including CWJ and RCEW.

"satellite litigation";[75] the principle that this evidence cannot be used to "bolster a weak case";[76] and the defendant's overarching right to a fair trial.[77]

6.52 We received very few views that guidance is required for judges in particular. Two legal practitioners suggested that guidance for judges could ensure consistency and appropriate dealing with applications. In contrast, HM Council of Circuit Judges indicated that sufficient guidance for judges was provided by Court of Appeal decisions and training from the Judicial College.

6.53 We conclude that a recommendation on guidance for prosecutors and judges is not necessary. The Crown Court Compendium already discusses non-conviction BCE and the directions which should be given to the jury where this evidence is admitted.[78]

6.54 The bulk of consultees' responses were directed at police and prosecutorial practice. In relation to prosecutors, the CPS expressed concern about "the limited use of non-conviction bad character evidence in sexual offences cases". The CPS is "in the process of drafting supplementary guidance for prosecutors which focuses on the opportunities that exist to utilise this evidence".[79] As we noted in the consultation paper, the ongoing work of Operation Soteria has aimed to transform the investigation and prosecution of rape cases. This work should assist police and prosecutors in improving record-keeping, searching and retrieving material which could be used as non-conviction evidence, as well as prosecutorial case-building in the context of BCE.

GOOD CHARACTER EVIDENCE

6.55 The defence and prosecution may wish to adduce good character evidence ("GCE") at trial. Such evidence may be relevant to a person's credibility or propensity (or both).[80] Different legal principles apply to the admission of GCE for the defendant than to other participants in a trial. The defendant is entitled to adduce evidence of their good character, which may be taken into account by the jury when considering the defendant's credibility and/or propensity to act in the manner alleged.[81] Whether the defendant is entitled to receive a good character direction from the judge, and the content of that direction, will depend on whether the defendant is of "absolute" good character or has been deemed to be of "effective" good character.[82] In contrast, GCE is rarely admissible for prosecution witnesses to bolster credibility.

6.56 There are good reasons for the difference in admissibility of GCE for defendants and other witnesses. Professor Paul Roberts has argued that criminal justice and the law

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75 HMCPSI. See para 6.40 above for discussion of satellite litigation.

76 CWJ.

77 Including LCCSA and Cardiff University Law School Innocence Project.

78 See for example, Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (April 2025 Update) ("Crown Court Compendium") 12-16, Example 2.

79 The CPS, consultation response.

80 CP 259, para 5.77. See para 6.7 above for explanation of the meaning of credibility and propensity.

81 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [4]-[5].

82 See CP 259, para 5.88, summarising the law on good character directions as set out in *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367.

of criminal evidence is governed by a "principled asymmetry" that protects the innocent from wrongful conviction.[83] The defendant is the one on trial, with their liberty at stake, and the prosecution bears the burden of proving its case.[84]

6.57 However, some stakeholders told us that the "imbalance" between the positions of the defendant and complainant was unfair and needed reform. These stakeholders were concerned that in sexual offences trials, there is often little evidence beyond the testimony of the complainant and the defendant. The jury's assessment of the credibility of the complainant and defendant is of great importance. Where GCE is called on behalf of the defendant but not for the complainant, there is a risk that the jury may speculate about this, to the complainant's detriment.[85]

6.58 In the consultation paper, we were guided by an understanding of "principled asymmetry" that meant not every imbalance in the admissibility of evidence relating to the defendant compared to evidence relating to the complainant is needed to protect the innocent from wrongful conviction, but reforming an inappropriate imbalance does not require equivalent admissibility of GCE.[86] While stakeholders generally recognised that there is a difference in the admissibility of GCE for complainants and defendants, there was no agreed or dominant view about whether and if so how this difference should be rectified.[87]

6.59 Having explored the options for reform suggested by stakeholders in pre-consultation, we provisionally concluded against reform to the admissibility of GCE for either defendants or complainants. Rather, any unjust imbalance could be rectified by a direction given to the jury about the lack of evidence of the complainant's good character.[88]

6.60 In this section, we consider consultation responses on the admissibility of GCE for defendants and complainants and do not recommend reform. We consider the need for an explanatory direction where the jury has heard evidence of the defendant's character, good or bad, but no evidence of the complainant's character later in this chapter.

Defendant good character evidence

6.61 The defendant is entitled to introduce evidence of their good character. This evidence may include a statement that the defendant has no previous convictions or cautions. The defence may also call witnesses to give evidence of the defendant's positive good character. This evidence may be used to support their credibility or lack of propensity (or both).[89] Where GCE is admitted, the judge may then direct the jury in relation to its

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83 CP 259, para 5.73, citing P Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review* 393; *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 21.

84 CP 259, paras 5.11, 5.73 and 5.145.

85 CP 259, paras 5.105-5.106 and 5.152-5.153.

86 CP 259, para 5.106.

87 CP 259, para 5.123.

88 CP 259, paras 5.146-5.158.

89 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367. See para 6.7 above for explanation of the meaning of credibility and propensity.

use. The example direction states that "just because D is of previous good character does not mean that D could not have committed the offence(s) with which D is charged".[90]

6.62 In *R v Hunter*, the Court of Appeal considered the admissibility of GCE for defendants and when the judge should give a good character direction.[91] While the Court acknowledged concerns over the relevance of GCE, it did not restrict the admissibility of this evidence.[92] The Court focused instead on the nature and extent of good character directions. The Court considered that the use of good character directions had been "extended too far", with some defendants receiving good character directions when they should not have done.[93] The Court therefore identified five categories of cases in which good character may be relevant, and whether the judge would be required or have discretion to give a good character direction.[94]

6.63 We had heard two main arguments for reform of the admissibility of GCE. First, stakeholders suggested preventing the use of GCE for all witnesses, including defendants, as GCE was suggested to have limited evidential value in the context of sexual offences.[95] Second, some stakeholders had raised concerns with the use of GCE for defendants specifically. For example, End Violence Against Women Coalition ("EVAW") and the Rape Crisis ISVA Reference Panel had told us that defendant GCE was often used to reinforce societal myths about rape, such as that a rape conviction would be the worst thing that could happen to a young man.[96]

6.64 We provisionally concluded that there should be no reform to the admissibility of GCE for the defendant or corresponding good character directions. Removing GCE for defendants would make England and Wales an outlier compared to comparator jurisdictions, suggesting a stronger case for reform would be needed than we had heard pre-consultation.[97] We considered that GCE may be relevant, and the defendant might rightly want to introduce it to counter the prosecution's case.[98] We also considered that preventing the defendant from adducing GCE or receiving a good character direction could conceivably infringe their right to a fair trial.[99] Therefore, we provisionally proposed that there should be no change to the admissibility of GCE for defendants and the associated directions.[100]

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90 Crown Court Compendium, 11-6, Example 2.

91 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367.

92 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [67].

93 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [70]-[72].

94 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [77]-[88].

95 CP 259, para 5.107.

96 CP 259, para 5.115.

97 CP 259, para 5.143.

98 CP 259, para 5.148.

99 CP 259, para 5.149.

100 CQ 31: "We provisionally propose that the defendant's right to introduce good character evidence and the associated law relating to directions should be retained. Do consultees agree?". CP 259, para 5.150.

Consultation responses and analysis

6.65 The majority of consultees who responded to this proposal agreed that there should not be reform of the current law on defendant GCE and directions.[101] Consultees argued that defendant GCE can be relevant and important for the defence case.[102] For example, the Six Circuits emphasised that it is "very difficult for a defendant to defend themselves when all they can do is simply deny an offence occurred". It gave an example that GCE may be needed to refute the prosecution's case:

> If a person is said to have controlled, coerced and sexually abused a long-term partner, it must surely be right that a previous long-term partner is permitted to say that type of behaviour was no part of their relationship.

6.66 Consultees commented that GCE is currently used appropriately,[103] and that restricting GCE further may impact on the defendant's right to a fair trial.[104]

6.67 The two main objections to retaining GCE for defendants without reform echoed those considered in the consultation paper. First, consultees argued that GCE is irrelevant, either in sexual offences prosecutions,[105] or criminal trials generally,[106] and so should be abolished. Second, consultees warned that the use of GCE for defendants may perpetuate myths and misconceptions about sexual offences.[107] For example, RCEW commented that typical examples of GCE for defendants, such as the defendant is "a pillar of the community" or "family man", imply that the defendant "would be incapable of sexual offending".

6.68 Given these concerns, some stakeholders argued in favour of a more restrictive approach to defendant GCE.[108] For example, Northumbria Centre for Evidence and Criminal Justice suggested that the admissibility of evidence of the defendant's good character could be restricted through an "enhanced relevance threshold".

Conclusion

6.69 We have concluded that there should be no reform to the regime governing admission of evidence of the defendant's good character. We did not consult on any models of restriction, and consultees did not provide convincing justifications for reform.

6.70 We consider that the defendant should generally remain able to adduce evidence of their good character. While we acknowledge views about the general relevance of

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101 Out of 26 responses, 17 consultees agreed; 3 disagreed; 5 submitted a response categorised as other; 1 submitted a non-substantive response.

102 The CPS; the Six Circuits; Cardiff University Law School Innocence Project; and Martin Rackstraw.

103 HM Council of Circuit Judges and the Six Circuits.

104 The Six Circuits; see also the consultation response from Northumbria Centre for Evidence and Criminal Justice Studies (categorised as other).

105 RCEW and EVAW.

106 Dr Matt Thomason.

107 RCEW; nia (a service provider for women and girls who have been victims of sexual violence); and Northumbria Centre for Evidence and Criminal Justice Studies.

108 Northumbria Centre for Evidence and Criminal Justice Studies (consultation response) and two academics.

GCE, defendant GCE has been recently considered and settled by the Court of Appeal in *Hunter*. Further, while juries are meant to assess the credibility of prosecution witnesses free from "oath-helping" evidence,[109] there are good reasons why the same is not true for defendants. Alongside the argument of "principled asymmetry", GCE may also be used to counter the misconception that a defendant must have done something wrong to be appearing in court.[110] Abolition or restriction of GCE for defendants would be a significant change with wide-reaching implications beyond sexual offences proceedings; reform in this context based on the irrelevance of GCE would necessarily cast doubt on the strengths of these arguments for retaining GCE for other offences. In the absence of evidence showing substantial issues with the use of this evidence, we do not consider that there is a need for further reform.

6.71 We also consider that the defendant should remain able to adduce evidence of their good character in sexual offences prosecutions. In *R v Mader*, the court acknowledged that in the context of character evidence, sexual offences cases are a special category of cases.[111] However, we are not convinced that there is sufficient evidence of the problems that defendant GCE poses in sexual offences cases to justify exceptional reform for this category of cases. We acknowledge that there are risks that GCE may be misused to support rape myths and misconceptions. We do not consider that this justifies removing the defendant's right to introduce this evidence when there are other safeguards against reliance on myths and misconceptions. Elsewhere in this report,[112] we make recommendations on training for counsel and guidance for judges to reduce reliance on myths and misconceptions. Where GCE invokes myths, the prosecution may challenge its admission, cross-examine the witness or seek edits to its content where it is in the form of a written statement.

6.72 Given the limited strength of the arguments in support of restriction, and the risk to the defendant if this evidence is not admissible, we conclude that there should not be reform of the admissibility of GCE for defendants.

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109 See para 6.74 below.

110 As raised by a barrister at a consultation event. GCE has been described as an important safeguard for a fair trial, acting as a counterweight to the defendant's "serious credibility problem" caused by the jury's tendency to assume the defendant is of bad character where they do not hear GCE. See R Glover, "The good character 'backstop': directions, defeasibility and frameworks of fairness" (2020) 40 *Legal Studies* 675, 676 and 691-692, citing M Redmayne, *Character in the Criminal Trial* (2015); S Lloyd-Bostock, "The effects on juries on hearing about the defendant's previous criminal record: a simulation study" [2000] *Criminal Law Review* 734. For recognition that in a sexual offences prosecution, GCE may work to dispel certain myths in respect of the defendant while also perpetuating rape myths, see E Dowds, "Challenging the role of good character evidence in rape trials: Monsters, myths and mitigation" (2025) *International Journal of Evidence and Proof* (online).

111 *R v Mader* [2018] EWCA Crim 2454, [2018] 10 WLUK 734 at [32].

112 See Ch 11.

Recommendation 28.

6.73 We recommend that there should be no reform to the admissibility of good character evidence for defendants in sexual offences prosecutions.

Complainant good character evidence

6.74 Generally, the prosecution is prohibited from adducing GCE in relation to a prosecution witness solely to bolster their credibility. The use of GCE in this way is considered "oath-helping", whereas the jury should decide for themselves if the witness is telling the truth without evidence unrelated to the facts of the case supporting this.[113]

6.75 However, exceptions have developed: GCE in relation to a complainant in a sexual offences prosecution may be admissible if it goes to a matter in issue. In *Funderburk*,[114] the Court of Appeal referred to a passage from *Cross on Evidence*. This passage explained that exceptions may be made in sexual offences cases as the evidence is effectively limited to the testimony of the defendant and complainant and depends "on the balance of credibility between them". As a result, the difference between evidence that goes to credibility and evidence that goes to an issue can be reduced "to vanishing point".

6.76 This passage was also cited by the Court of Appeal in *R v Tobin*.[115] The issue was whether the complainant had initiated sexual conduct while the defendant drove her and a friend home. The Court dismissed the defendant's appeal and agreed that the prosecution was entitled to adduce GCE in relation to the complainant given the circumstances of the case. The Court reiterated that GCE is not admissible merely to bolster the complainant's credibility or to suggest the complainant is not the type of person who would behave in the manner alleged by the defendant. However, GCE may be admissible if it is relevant to a matter in issue, even if it also bolsters credibility.[116]

6.77 In *Mader*,[117] the Court of Appeal suggested that the principles of non-defendant GCE were "well established". The Court noted that while GCE is generally not admissible for prosecution witnesses, "the issue of consent in a trial involving sexual conduct is an issue to which evidence of character or disposition may be relevant".[118]

6.78 In the consultation paper, we considered arguments for and against expanding the admissibility of GCE for complainants. Some stakeholders had suggested to us that

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113 CP 259, para 5.90, citing P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) 19.105.

114 (1990) Crim App R 466, [1990] 1 WLR 587.

115 [2003] EWCA Crim 190, [2003] *Criminal Law Review* 408.

116 *R v Tobin* [2003] EWCA Crim 190 at [22]-[23], [2003] *Criminal Law Review* 408.

117 [2018] EWCA Crim 2454.

118 *R v Mader* [2018] EWCA Crim 2454 at [32].

there should be greater admissibility of complainant GCE, such as to counter attacks on the complainant's character by the defence.[119] Stakeholders also suggested the use of a direction that the complainant has no prior convictions.[120]

6.79 We had also heard arguments from stakeholders against increasing the use of complainant GCE. Their concerns were that this evidence could pose a risk to the defendant's right to a fair trial,[121] lead to greater intrusion into the complainant's life and privacy,[122] and disadvantage minoritised and vulnerable complainants who may be less likely to be able to adduce GCE.[123] We were also told that greater use of complainant GCE could increase the likelihood of the defence seeking to adduce complainant BCE in rebuttal, which could risk traumatisation of the complainant and disproportionately affect minoritised complainants, who are more likely to have convictions.[124]

6.80 We also considered technical concerns with the interaction between sexual behaviour evidence ("SBE") and character evidence where complainant GCE is admissible:[125]

> For those minded to redress the imbalance between the defendant and complainant as regards character, *Funderburk* and *Tobin* may on their face be appealing because they enable a complainant's good character to be raised. However, there are reasons for caution. First, the cases open the door to the admission of SBE even though under section 41 of the YJCEA such evidence is not admissible if it goes solely or mainly to credit. There is a difference here in that section 41(4) concerns evidence that impugns credibility rather than bolsters it, but it is nonetheless a regressive step if evidence of sexual behaviour (or the lack thereof) is to be admissible on the grounds it helps a jury assess credibility. Secondly, if evidence that someone is nice, respectful and well-behaved goes to the question of consent in the *Tobin* circumstances – that is, it goes not merely to credibility but to an issue – then the same rationale suggests that evidence that a complainant is "badly-behaved" could also be said to go to the question of consent. It suggests that where a young complainant has, for example, a long social services record of running away and being seen with older men then that could be used as evidence to attack credibility and to suggest she is more likely to have consented to sexual activity. Such an argument deploys rape myths and is neither legitimate nor logical: previous sexual experience is not probative of consent on this occasion, with this person.

6.81 We concluded that while *Mader* is a valuable narrow window for the admission of complainant GCE, it should not be expanded further. Expansion would conflict with the concerns in *Hunter* that character evidence may lengthen trials and draw juries

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119 CP 259, paras 5.111-5.112.

120 CP 259, para 5.114.

121 CP 259, para 5.110.

122 CP 259, para 5.116.

123 CP 259, para 5.119.

124 CP 259, para 5.119. Minoritised complainants are more likely to have convictions due to complex factors including over-policing. See R Thiara and S Roy, *Reclaiming Voice: Minoritised Women and Sexual Violence: Key Findings* (March 2020) p 6.

125 CP 259, para 5.97 (references omitted).

away from the key issues. As defendant GCE is already complex and nuanced, expanding complainant GCE would add to the existing risk of distracting the jury.[126] We also emphasised the potential for intrusive questioning and the risk that vulnerable complainants would be further disadvantaged.[127] Therefore, we provisionally proposed that there should be no expansion of the admissibility of GCE of complainants beyond the principles set out in *Mader*.[128] We considered that if there were to be any expansion beyond *Mader*, this expansion should be limited given concerns over the use of GCE for complainants and the risk to the defendant's right to a fair trial.[129] Therefore, in the alternative, we provisionally proposed several preconditions and factors for consideration in relation to admitting a complainant's GCE.[130]

Consultation responses and analysis

6.82 Over three-quarters of consultees who responded to our provisional proposal agreed that there should be no expansion of the admissibility of GCE for complainants.[131] This included consultees who disagreed that there is any unjustified imbalance in the positions of the defendant and complainant. Some consultees did consider there to be an imbalance but did not favour expanding the admissibility of complainant GCE as a response.

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126 CP 259, para 5.156. At para 5.157, we acknowledged that this risk could be reduced through the form of complainant GCE, such as written character references or in agreed facts.

127 CP 259, para 5.156.

128 CQ 33: "We provisionally propose there should be no substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in *R v Mader*. Do consultees agree?". CP 259, para 5.158.

129 CP 259, para 5.161.

130 CQ 35: "We provisionally propose that if there is to be a substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in *R v Mader*, such expansion should be limited to:

(1) Where the complainant has no previous convictions or has no previous convictions relevant to credibility or propensity, then that may be admitted into evidence.

(2) Other good character evidence may be admissible where the trial judge is of the view it is appropriate.

(3) A determination regarding admissibility should take into account of the following:

(a) the relevance of the evidence;

(b) risks to the complainant's well-being;

(c) the risk of unfairness to the defendant if such good character evidence is admitted;

(d) the risk of a disproportionate advantage to the defendant if such good character evidence is not admitted; and

(e) whether bad character evidence may be introduced to counter the good character evidence.

(4) The complainant should have a right to be heard before any evidence of their good character is admitted.

(5) Where any evidence of the complainant's good character is admitted then it should be accompanied by a jury direction that explains its relevance.

Do consultees agree?". CP 259, para 5.165.

131 Out of 26 responses to CQ 33, 21 consultees agreed; 3 disagreed; 1 submitted a response categorised as other; 1 submitted a non-substantive response.

6.83 There were several reasons given by consultees for not expanding the admissibility of GCE for complainants. First, consultees argued that expanding complainant GCE would lead to a focus on irrelevant material and intrude into the complainant's life.[132] For example, the London Criminal Courts Solicitors' Association ("LCCSA") commented that the defence may seek "to request and receive a wide range of non-conviction bad character evidence" in relation to the complainant to undermine their account, with "intrusive and potentially traumatic ramifications". Two consultees also commented that an increased focus on the character of the complainant could risk elongating trials and distract the jury.[133]

6.84 Secondly, consultees echoed our concern that expanding complainant GCE would disadvantage vulnerable and minoritised complainants.[134] For example, RCEW suggested that this evidence risks perpetuating myths and stereotypes about rape, resulting in a "hierarchy of victimhood" that will "inevitably affect vulnerable and marginalised populations the most".

6.85 Thirdly, two consultees agreed with our concern in the consultation paper that broader admissibility of complainant GCE could perpetuate myths and misconceptions in relation to consent, by allowing previous sexual behaviour to bolster credibility or be used as evidence of lack of consent.[135]

6.86 Fourthly, two consultees emphasised that there is a principled difference in the positions of the defendant and the complainant, meaning that the imbalance in the admissibility of GCE is justified.[136] Further, consultees warned that the admission of GCE for complainants could risk the defendant's right to a fair trial.[137] For example, Professor Roberts told us that this evidence could invite a "a comparative credibility" approach, where the jury considers whether they believe the complainant or defendant more, "which threatens to erode the presumption of innocence".

6.87 Finally, the General Council of the Bar of England and Wales ("the Bar Council") suggested that any expansion of GCE for complainants could not be limited to sexual offences prosecutions, as "the credibility of complainants can be potentially relevant in respect of almost every imaginable criminal offence". While we acknowledge that assessment of credibility is potentially relevant for all complainant witnesses, the Court of Appeal in *Mader* identified sexual offences prosecutions as a particular category where non-defendant GCE may be relevant, given the overlap between evidence going to issues in the case and evidence going to credibility. We also acknowledge that the exceptional nature of sexual offences prosecutions does not in itself justify expanding beyond the principles in *Mader*.

6.88 Few consultees gave reasons in favour of expanding the admissibility of GCE for complainants. The main reason given by consultees was that greater admissibility is

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132 RCEW; LCCSA; CWJ; and the CBA.

133 The Law Society of England and Wales ("Law Society") and the Six Circuits.

134 RCEW; CWJ; and the Six Circuits.

135 LCCSA and CWJ.

136 LCCSA and Martin Rackstraw.

137 The Six Circuits; Professor Paul Roberts; and LCCSA.

needed to "address the risk of unfairness to the complainant".[138] For example, the CPS told us in its consultation response that as most contested sexual offences cases "feature limited corroborative evidence", it is "inevitable that a jury will focus very strongly upon the credibility of the evidence provided by the complainant and defendant when determining their verdict". Where the only evidence of good character that the jury hears relates to the defendant, the defendant may therefore have "a very substantial advantage at trial". The CPS argued that an expansion of the admissibility of GCE for complainants in line with our provisionally proposed limits and factors[139] would "ensure that the jury are furnished with key information in relation to the credibility assessment in relevant cases while safeguarding the defendant's right to a fair trial".[140]

Conclusion

6.89 We conclude that there should not be further expansion of the admissibility of GCE for complainants beyond the principles set out in *Mader*. We accept that character evidence for complainants in sexual offences prosecutions may be of greater probative value than it is for other offences. This is because frequently there is limited evidence beyond the testimony of the defendant and the complainant, and evidence that relates to the complainant's credibility may also relate to issues in the case. Consequently, there is comparatively greater scrutiny of the complainant's character, and a potentially unfair imbalance in the positions of the complainant and the defendant. It is for these reasons that we consider that the limited admissibility of GCE for complainants under the principles set out in *Mader* is valuable and should be retained.

6.90 However, we do not consider that admission of non-defendant GCE beyond these principles is justified. We are concerned that greater use of GCE could risk unfairness to the defendant, by diluting the good character direction to which they are entitled and inviting the jury to focus on the respective characters of the defendant and complainant rather than the issues. Further, we do not consider that a greater use of GCE would be beneficial for complainants. An expansion in the use of GCE would require greater examination of the complainant's life and past, from both the prosecution and the defence seeking to identify non-conviction BCE.[141] An increased use of GCE could also disadvantage vulnerable and minoritised complainants and perpetuate myths about credibility. Further, the use of this evidence could undermine the purpose of the SBE regime by legitimising the myth that previous (lack of) sexual behaviour is relevant to credibility and consent.

6.91 Although there is an imbalance in the position of the defendant and the complainant in relation to admitting evidence of their character, greater admissibility of GCE for complainants is not an appropriate response to this imbalance. Therefore, we

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138 The CPS (quoted); JURIES; Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences; and an anonymous organisation.

139 See CQ 35 at n 130 above.

140 The CPS, consultation response.

141 One concern that Operation Soteria seeks to address is that police and prosecutors already focus too much on the complainant's character and credibility in sexual offences cases, rather than the defendant's behaviour. See B Stanko, *Operation Soteria Bluestone Year 1 Report 2021-2022* (December 2022).

recommend that there should not be an expansion of the admissibility of GCE for the complainant.

6.92 Below, we make a recommendation for a direction to be given to the jury when they have not heard evidence of the complainant's character that should discourage the jury from inappropriately scrutinising the complainant's character.[142] This should address the problematic impact of this imbalance, without risking unfairness to the defendant or resulting in greater intrusion into the life of the complainant beyond that which already occurs in many sexual offences cases.

6.93 Given our conclusions above, we do not make alternative recommendations on limiting any expansion of complainant GCE beyond the principles in *Mader*. While consultees generally agreed with the limitations we proposed in the alternative,[143] overall consultation responses agreed with our view that there should be no such expansion. Consequently, we reiterate our conclusion that any expansion beyond *Mader* would be undesirable.

Recommendation 29.

6.94 We recommend that there should be no reform to expand the admissibility of good character evidence for complainants in sexual offences prosecutions beyond the principles set out in *R v Mader*.

DIRECTIONS RELATING TO THE COMPLAINANT'S CHARACTER

6.95 Where the jury has heard evidence of the defendant's good character, the judge may direct the jury in relation to the use of this evidence. As noted above, the Court of Appeal in *R v Hunter* reviewed and set out the law on directions. A 'full' good character direction will direct the jury on the relevance of the evidence to both the credibility and propensity of the defendant – these are referred to as the credibility and propensity limbs of the direction. A defendant will only receive the credibility limb of the direction if they have made pre-trial statements or given evidence at trial, but may receive the propensity limb without making pre-trial statements or giving evidence.[144] A 'modified' good character direction may address either or both limbs but is modified to reflect other evidence that does not suggest good character so that the jury is not misled.[145] Whether a defendant is entitled to receive a good character direction, and the content of that direction, will depend on the character evidence that has been admitted for the defendant and within which category in *Hunter* their character falls.[146]

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142 See from para 6.97 below.

143 Out of 24 responses to CQ 35, 12 consultees agreed; 8 disagreed; 3 submitted a response categorised as other; 1 submitted a non-substantive response.

144 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [68].

145 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [80].

146 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 at [77]-[88].

6.96 In this section we first discuss the need for a direction where the jury has heard evidence of the defendant's character but not the complainant's, and then address the position where the jury has heard GCE in relation to the complainant.

Where the jury has not heard evidence of the complainant's character

6.97 As discussed above, in sexual offences prosecutions there is comparatively greater scrutiny of the characters of the defendant and the complainant than in other trials, given that their testimony frequently forms the primary evidence in the case. Where the jury has not heard evidence of the complainant's character, and has heard evidence of the defendant's character, there is a risk that they will speculate as to whether the complainant is of good or bad character.

6.98 In the consultation paper, we referred to a passage in *R v Green* which asserts that unless a jury has heard that a prosecution witness is not of good character, they will assume that there is nothing to speak against their credibility.[147] However, we also referred to concerns from stakeholders that cast "considerable doubt" on this proposition. Stakeholders argued that jurors who have heard no evidence of the complainant's good character could just as easily assume that the complainant was of bad character, particularly if they have heard evidence of the defendant's good character and the defendant has received a good character direction.[148] We therefore considered that this assumption in *Green* was "questionable".[149]

6.99 We concluded that where the jury has heard no evidence of the complainant's good character, and the complainant has no prior convictions, the complainant's lack of entitlement to a good character direction is a "significant gap" in the law.[150] We considered that a direction would be the most appropriate way for this imbalance to be remedied. It is possible to give a direction on the complainant's good character where this is relevant to a matter in issue without risking the defendant's right to a fair trial, as indicated by the Court of Appeal in *Mader* and *Tobin*.[151] However, we considered it would not be appropriate to give a good character direction as ordinarily understood, as this may "water down" the defendant's good character direction,[152] thereby risking the defendant's right to a fair trial, and require further investigation into the complainant's history to enable GCE to be adduced.[153]

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147 CP 259, para 5.105, citing *R v Green* [2017] EWCA Crim 1774, [2018] 4 WLR 39.

148 CP 259, para 5.105.

149 CP 259, para 5.153.

150 CP 259, para 5.152.

151 CP 259, para 5.152.

152 See *R v Green* [2017] EWCA Crim 1774, [2018] 4 WLR 39 at [20]-[26] (McCombe LJ). The trial judge had directed the jury that the complainant was also of good character, and that there was a "level playing field" between the complainant and the defendant in relation to character. The Court of Appeal held that a defendant good character direction operates as a protection for the defendant when the jury is considering whether the Crown has proved guilt. Giving a similar good character direction for the complainant would be "to 'water down' a protection that our procedure affords to an accused person of good character, and to reduce, to that limited extent, the burden of proof on the Crown".

153 CP 259, para 5.153.

6.100 Instead, we provisionally proposed that there should be a direction given to the jury, explaining that GCE is not usually called for prosecution witnesses, and directing the jury not to draw any inference adverse to the complainant.[154] This direction would act as a counterweight to the common attacks on a complainant's character in sexual offences prosecutions, and prevent the jury from speculating as to the complainant's character.[155] We considered that this direction should ordinarily be given when the complainant has no prior convictions, but that it should be for the trial judge to decide whether fairness dictates that a direction is appropriate, to ensure that the jury is not misled about the complainant's character.[156]

Consultation responses and analysis

6.101 We received mixed responses on our provisional proposal.[157] Just under half of consultees who responded agreed with the provisional proposal. These consultees argued that the direction would ensure the jury does not speculate on the complainant's character,[158] and would improve fairness between the defendant and the complainant.[159] A quarter of consultees disagreed with the proposal, challenging both the need for a direction as well as its content,[160] and warning of potential unfairness to the defendant as a result.[161] We consider the main issues raised by consultees in greater detail below.

The need for an explanatory direction in sexual offences prosecutions

6.102 We received mixed responses from consultees on whether there is a need for an explanatory direction on the lack of character evidence admitted in relation to complainants in sexual offences prosecutions.

6.103 First, reflecting the discussion in the consultation paper, consultees differed on whether there is a risk that the jury will speculate on the complainant's character. Some consultees argued that our proposed direction would prevent speculation. For example, LCCSA thought that it was "quite possible" that having heard GCE for the defendant, jurors "will draw incorrect and prejudicial assumptions about the absence of similar evidence called on the complainant's behalf". HMCPSI also commented that a direction would ensure that "the jury do not read into the lack of evidence on this point" to the "detriment of the complainant or the defendant".

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154 CQ 32: "We provisionally propose that, if the jury has heard no evidence about the complainant's good character and the complainant has no prior convictions then, if the trial judge decides that fairness demands it, there should be a jury direction that explains why the jury has heard no evidence of the complainant's good character and that no inference adverse to the complainant should be drawn from its absence. Do consultees agree?". CP 259, para 5.154.

155 CP 259, para 5.152.

156 CP 259, para 5.153.

157 Out of 72 responses, 34 consultees agreed; 18 disagreed; 18 submitted a response categorised as other; 2 submitted a non-substantive response.

158 The Law Society; HMCPSI; LCCSA; and Solace Women's Aid.

159 Women Against Rape and an anonymous consultee.

160 Including Professor Paul Roberts and Martin Rackstraw.

161 Including the CBA; the Six Circuits; and Martin Rackstraw.

6.104 Others disputed that juries do speculate as to the complainant's character, therefore opposing the need for a direction.[162] Two judges told us that they had not seen a jury raise issues about the complainant's character. In contrast, some consultees told us that some juries do speculate about the complainant's character, basing this on instances where juries had asked for information about the complainant's character.[163] For example, the CPS commented that "juries can be confused by the lack of information they receive about the complainant's character". It stated that it was "aware of specific instances where juries, having received information about the defendant's good character, have asked the judge to provide information about the complainant's character".

6.105 Secondly, some consultees disagreed with the underlying premise of our proposals in this chapter that there is an imbalance between the defendant and complainant that requires reform. These consultees emphasised the different position of the defendant and the complainant.[164] For example, the Criminal Bar Association ("CBA") commented that "the complainant is not on trial and faces no penalty" should the defendant be acquitted, unlike the defendant who faces the prospect of conviction. Consultees also raised concerns with exceptionalism, arguing that a direction only for sexual offences prosecutions could not be justified given it would inappropriately distinguish these cases from other offences.[165]

6.106 We remain of the view that there is an imbalance in the admissibility of character evidence of defendants and complainants in sexual offences prosecutions. While we acknowledge concerns about exceptionalism, there is already greater scrutiny of the complainant's credibility and character in sexual offences prosecutions. As we discuss above, sexual offences prosecutions have unique evidentiary features, given the frequent lack of direct supporting evidence beyond that of the defendant and complainant. The testimony of the complainant and the defendant, and the jury's assessment of their credibility, is of comparatively greater importance compared to other offences. There is a greater risk of juries relying on extra-legal reasoning, including myths and misconceptions, when assessing this evidence and reaching a verdict.[166] Recommendations for reform of character evidence would respond to the exceptionality already present in the investigation, prosecution and trial process for sexual offences.

6.107 We concluded above that the risk of unfairness to the complainant arising from this imbalance does not justify an expansion in the admissibility of GCE for complainants. However, given feedback from consultees including the CPS, we consider that there is sufficient risk of jury speculation as a result of this imbalance to justify an explanatory direction. Such a direction does not seek to put the complainant in the same position as the defendant, or advantage them compared to witnesses in other prosecutions,

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162 Including Martin Rackstraw and the Bar Council.

163 The CPS and JURIES.

164 Including HM Council of Circuit Judges; the CBA; Dr Oriola Sallavaci; and Cardiff University Law School Innocence Project.

165 HM Council of Circuit Judges; the CBA; and the Six Circuits.

166 See Ch 1, paras 1.5 and 1.63-1.64, and 6.57 and 6.89 above.

but responds to the heightened risk of speculation arising due to the nature of the evidence given in sexual offences prosecutions.

6.108 We accept that whether a jury does speculate on the complainant's character will vary from jury to jury, depending on the evidence in the case and the other directions that they had been given. However, we consider that there is a risk of speculation. This speculation could be to the complainant's detriment (that they are of bad character, unlike the defendant who is of good character). Speculation could also be to the defendant's detriment: where the prosecution has adduced BCE in relation to the defendant, the jury could equally speculate that the complainant is of good character otherwise BCE would have been admitted for them. Regardless of whether jury speculation benefits the prosecution case or the defence case, such speculation is inappropriate and should form no part of the jury's decision-making. An appropriately worded direction would ensure fairness to both the complainant and defendant and ensure the jury does not engage in improper reasoning based on irrelevant or incorrect information. We consider what form such a direction would need to take below.

The content of an explanatory direction

6.109 Consultees also raised concerns about the content of our proposed direction. First, consultees suggested that the direction as proposed would fail to prevent juries from speculating about the complainant's character or would in fact increase speculation.[167] For example, Martin Rackstraw commented that "a direction along these lines might simply confuse jurors by drawing attention to an issue that may not have occurred to them without meaningfully guiding them as to how to address the issue". Similarly, while Northumbria Centre for Evidence and Criminal Justice Studies agreed with giving an explanatory direction, it warned that our proposed direction "would be insufficient" because it lacks "crucial context ie that this is because such evidence is prohibited, not that it does not exist".

6.110 Secondly, some consultees suggested that the proposed directions could result in unfairness to the defendant, either by undermining their evidence or bolstering the complainant's evidence and therefore risking the defendant's right to a fair trial.[168] For example, Martin Rackstraw commented that our proposed direction could "work unfairly against a defendant" by "diluting the effect of any good character [evidence] given in their favour" and/or by "adding undue weight to any bad [character] evidence called by the prosecution against them". Professor Roberts also commented that any reference to the complainant's good character would "implicitly invite the jury to pit one good character against another", which then is "liable to invite a comparative credibility 'who do we believe more?' approach which threatens to erode the presumption of innocence".

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[167] Including Martin Rackstraw; the Six Circuits; and Dr Amelia Shooter. Two judges also suggested that the direction could increase speculation.

[168] Including Martin Rackstraw; the CBA; the Six Circuits; and Professor Paul Roberts.

6.111 Consultees also provided suggestions for alternative directions which they considered would be clearer and merely explanatory.[169] In particular, Professor Roberts suggested that a better direction would explain why the jury has heard no evidence of the complainant's character, such as "the accused is the one on trial… you haven't heard anything about whether the complainant has a criminal record or not because it's simply irrelevant to your assessment of the prosecution's case".

6.112 We acknowledge consultees' concerns that our proposed direction may be confusing to juries and therefore may not prevent speculation as intended. By referring to the "good character" of the complainant, the direction could act as a "shadow character direction" that could be understood by the jury as a good character direction.[170] This would invite the jury to weigh up two good characters and decide who they believe more (a "comparative credibility" approach which ignores the burden and standard of proof). Further, telling the jury not to draw adverse inferences from the lack of GCE leaves open the possibility of the jury drawing inferences that the complainant is in fact of good character. This would not prevent speculation and risks the jury considering irrelevant information to the defendant's disadvantage.

6.113 Instead, we think the direction should explain to the jury why they have not heard any evidence of the complainant's character. This could include an explanation that they have not heard evidence of the complainant's character because the defendant is the one on trial, not the complainant. The jury should then be told not to speculate about the complainant's character, as it is not a matter that they should be considering when making their decision. As this direction would be purely explanatory, it should not operate as a shadow good character direction and therefore should not risk unfairness to the defendant.[171]

To be given when the jury has heard evidence of the defendant's character

6.114 We received some feedback on whether the direction should be given in all cases, or only where the jury has heard some evidence relating to the defendant's character. Rape Crisis argued that the direction should only be given if the jury has heard GCE in relation to the defendant, as otherwise the direction could wrongly draw the jury's attention to the character of the complainant when they would not have considered it otherwise.

6.115 In the consultation paper, our focus was on preventing the jury from speculating that the complainant is of bad character when they have only heard evidence of good character in relation to the defendant. It is for this reason that we suggested the direction should refer to the lack of "good character" evidence for the complainant.

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169 Including LCCSA; Professor Paul Roberts; and Northumbria Centre for Evidence and Criminal Justice Studies.

170 As described by a barrister.

171 This direction would be in line with the approach suggested by Roberts and Zuckerman to prevent juries from speculating that the defendant is of bad character. Roberts and Zuckerman argued that "juries and magistrates should be encouraged not to speculate in the absence of information. This is best achieved, not by denigrating fact-finders' cognitive abilities, humanity, or commitment to justice, but by helping them to understand the principled basis on which bad character evidence is excluded from criminal trials (when it is) in accordance with the presumption of innocence". *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) pp 677-678.

However, as we note above, the risk of speculation also arises in the opposite scenario: the jury may speculate that the complainant is of good character if they have only heard evidence of bad character in relation to the defendant. Where the jury has heard no evidence of the complainant's character, good or bad, they should not be considering the complainant's character. Therefore, we now conclude that the direction should be given whenever the jury has heard evidence of the defendant's character, whether this is BCE or GCE. Where the jury has not heard evidence of the defendant's character, there should be no direction given, as the jury is unlikely to be considering the issue of character.[172]

To be given regardless of the complainant's character

6.116 In the consultation paper, we provisionally proposed that the direction should only be given if the complainant has no convictions.

6.117 Some consultees suggested that the direction could not be given unless there had been a full examination of the complainant's character to determine whether the complainant was in fact of good character. The CBA commented that "any reference to the complainant's good character could only be made if there had been a full and forensic examination of the complainant's past conduct". A barrister told us that as our proposed direction would operate as a shadow good character direction, where a complainant had non-conviction BCE, this would mislead the jury and disadvantage the defendant.

6.118 In contrast, other consultees thought that our proposed criteria were too limited. LCCSA argued that an explanatory direction could be given even if the complainant had previous convictions which had not been admitted into evidence, as these "are irrelevant to the jury's decision-making" and therefore speculation "is just as inappropriate".

6.119 The risk of misleading the jury arises where the direction operates as a shadow good character direction. If the direction implies to the jury that the complainant is of good character, the jury would be misled where the complainant had in fact committed previous misconduct (whether admitted into evidence or not). A shadow good character direction is inappropriate not least because it misleads the jury where the complainant is not in fact of good character. As discussed above, it invites the jury to consider irrelevant material and risks unfairness to the defendant. We rejected the use of a shadow good character direction above.

6.120 A reformulated direction that directs the jury not to speculate about the complainant's character is appropriate regardless of the complainant's character. We accept

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[172] Roberts and Zuckerman have noted the risk that jurors may speculate that the defendant is of bad character where they have not heard evidence of their good character. This could be where a juror has previously sat on a trial where a good character direction was given, or where co-defendants receive a good character direction, but other defendants do not. They also refer to mock juror research conducted for the Law Commission's previous work on bad character, where two-thirds of mock jurors who were given no information about the defendant's criminal record speculated that the defendant had previous convictions. See *Roberts & Zuckerman's Criminal Evidence* (3rd ed 2022) p 677; S Lloyd-Bostock, "The Effects of Hearing About the Defendant's Previous Criminal Record" [2000] *Criminal Law Review* 734, 753. This risk of the jury speculating that the defendant is of bad character could be increased where reference is made to the complainant's character, even with a purely explanatory direction.

LCCSA's argument that where no BCE has been admitted, the jury should not speculate about the complainant's character. Therefore, the direction should be given in all cases where the jury have heard no evidence in relation to the complainant's character. As a purely explanatory direction, it would not risk giving the jury a misleading picture of the complainant. Therefore, it would not require scrutiny of the complainant's history and should not trigger defence applications to examine the complainant's character. The reformulated direction will also work better where there are multiple complainants, some of whom may have previous convictions or other non-conviction BCE that has not been admitted into evidence,[173] by avoiding any invidious distinctions between complainants.

Conclusion

6.121 We conclude that there should be an explanatory direction where the jury has heard evidence of the defendant's character (whether good or bad) but has heard no evidence in relation to the complainant's character. This direction should explain to the jury why they have not heard evidence of the complainant's character and instruct them not to speculate. An explanatory direction would respond to the imbalance between the defendant and complainant in relation to character evidence in sexual offences trials and mitigate the risk of the jury speculating on the complainant's character.

Recommendation 30.

6.122 We recommend that the Judicial College should consider whether the Crown Court Compendium should include an example direction to be given in a sexual offences prosecution where the jury has heard evidence about the defendant's character, but has heard no evidence of the complainant's character. The direction should explain why the jury has heard no evidence of the complainant's character (because the defendant is the one on trial and not the complainant) and instruct the jury not to speculate.

Where the jury has heard evidence of the complainant's good character

6.123 Even with the existing restrictions, there are circumstances in which GCE in relation to a complainant may be admitted.[174] In those circumstances, we would expect that the judge would direct the jury on using this evidence. However, there is no guidance on giving such a direction, in case law or in the Crown Court Compendium. The only example direction about good character of prosecution witnesses covers instances where a defendant who asserts that they acted in self-defence alleges that the complainant of the offence used violence first.[175] It does not cover the situation in *Tobin* and recognised in *Mader* where evidence of a complainant's good character is heard. In the consultation paper, we asked whether there should be guidance for

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173 As raised by the Six Circuits.

174 See from para 6.74 above.

175 Crown Court Compendium, 11-9, Example 9.

judges on directing the jury where, exceptionally, evidence of the complainant's good character has been admitted.[176]

6.124 Of the consultees who responded to this question, the majority agreed that there should be guidance about directions where the jury has heard evidence of the complainant's good character.[177] Some consultees focused specifically on the need for a direction to be given once GCE has been admitted, rather than the need for guidance.[178] This included consultees who re-emphasised their opposition to the admission of GCE, but accepted that a direction should be given if it were admitted.[179]

6.125 Three consultees disagreed with the need for guidance, including LCCSA and CWJ. Both suggested that as complainant GCE will only be admitted in narrow circumstances, guidance and/or directions on its use are unnecessary.

6.126 We conclude that an example direction in the Crown Court Compendium would be useful. This would ensure that in the limited instances where complainant GCE is admitted, judges will know how to direct the jury to ensure they deal with the evidence appropriately. Therefore, we recommend that the Judicial College should consider whether the Crown Court Compendium should be amended to include an example direction to be given where complainant GCE has been admitted.

Recommendation 31.

6.127 We recommend that the Judicial College should consider whether the Crown Court Compendium should include an example direction to be given where evidence of the complainant's good character has been admitted in a sexual offences prosecution.

176 CQ 34: "Where the jury has heard evidence of the complainant's good character should there be guidance about directions? What should be the content of any guidance?". CP 259, paras 5.159-5.160.

177 Out of 21 responses, 12 consultees agreed; 3 disagreed; 5 submitted a response categorised as other; 1 submitted a non-substantive response.

178 The Law Society; the CPS; and the CBA.

179 Including responses categorised as other from the Bar Council; Martin Rackstraw; nia; and Dr Matt Thomason.

Chapter 7: Independent legal advice and representation for complainants

INTRODUCTION

7.1 As we explore throughout this report, complainants in sexual offences prosecutions face unique challenges. In Chapter 2, we conclude that there ought to be a bespoke regime governing access to and compelled production of personal records held by third parties. In Chapter 3, we conclude that there should be a new threshold for the admissibility of sexual behaviour evidence ("SBE"). Part of the rationale for these recommendations is that applications of this kind directly engage complainants' right to respect for their private life under article 8 of the European Convention on Human Rights ("ECHR"). In this chapter, we consider whether complainants in sexual offences prosecutions should be afforded independent legal advice, assistance and representation to provide greater support and scrutiny in respect of decisions which engage their rights.

7.2 In this chapter, we begin by setting out the case for introducing a right to be heard for complainants in respect of applications relating to personal records and SBE, supported by access to independent legal advice ("ILA") and independent legal representation ("ILR"). ILA is provided by a qualified legal adviser. A legal adviser can provide advice on a range of topics, and by a range of means (including face to face advice, advice phone lines, or websites). Legal advice could cover the provision of information with respect to legal procedure; any relevant legal tests; the complainant's rights throughout the criminal justice process; how evidence may be used once admitted; and the grounds of challenge to an application. Legal advisers could engage with case materials, the police, prosecution and defence where permitted. This is what we refer to as "legal assistance".[1] Legal assistance would also include providing responses to queries or requests and making written or oral requests on the complainant's behalf. ILR involves a legally qualified person acting on behalf of an individual, taking instructions, providing advice, and making representations to the court on their behalf.

7.3 When we refer to "legal advisers" we are referring those who are providing independent legal advice and assistance. Similarly, when we refer to "legal representatives" we are referring to those who are providing legal representation. We recognise that, in practice, someone who has provided legal advice to the complainant may be the same person who provides legal representation to the complainant. For example, a solicitor with higher rights of audience[2] would be able to provide both ILA and ILR for a complainant in a sexual offence case.[3] We refer to the roles separately

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1 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper 259 ("CP 259") para 8.6.

2 Solicitors Regulation Authority, *SRA Authorisation of Individuals Regulations* (April 2025) Regulation 9.10.

3 In some cases, applications for production of personal records might be determined in a magistrates' court. A solicitor with rights of audience in the magistrates' court would be able to provide ILR to a complainant in relation to that application.

throughout in order to clearly delineate the scopes of the roles and associated responsibilities.

7.4 Secondly, we consider the various ways which, in practice, ILA can be provided to complainants, including legal information leaflets, online and telephone advice, and in-person advice and assistance.

7.5 Thirdly, we make recommendations that define the scope of ILR, including limitations on the role of an independent legal representative during the trial process, to ensure the provision of ILR is proportionate to its aim.

7.6 Fourthly, we make recommendations to give practical effect to the rights recommended, including: access to documents related to the case; engagement with the police, prosecution and defence; and who should be able to provide ILA and ILR. We also recommend that ILA and ILR should only be provided by qualified legal professionals.

7.7 Finally, we consider the benefits of providing ILA for other aspects of the trial process.

THE JUSTIFICATION FOR ILA, ILR AND A RIGHT TO BE HEARD

7.8 In England and Wales, the criminal justice process is adversarial, meaning there are only two parties to proceedings: the prosecutor and the defendant.[4] The prosecution represent the interests of the state and the general public. The prosecution present their case to be tested and decided upon by the jury. The defendant, if they wish to present their own case, may do so but is not obliged to call any evidence. The defence may simply challenge the prosecution case. The interests of the complainant are only one aspect of the wider public interest; prosecutors must also ensure that the defendant receives a fair trial and that they maintain public confidence in the criminal justice system.[5] Complainants are not parties in the criminal process. As the prosecution must take account of the wider public interest, there may be times where the interests of the complainant and the prosecution differ. For example, the prosecution may adduce SBE – such as evidence of pregnancy from the alleged rape – due to it having substantial probative value to a fact in issue (penetration of the complainant by the defendant).[6] The complainant may wish this information to remain private, and therefore may object to its admission.

7.9 In sexual offences cases there is often a particular focus on the credibility of the complainant. Sensitive personal information (often either third party materials such as medical or school records, or evidence of their sexual behaviour) may be used to discredit them. The use of this type of evidence engages their right to respect for their private life under article 8 of the ECHR.[7]

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4 In some cases there will be more than two parties to proceedings if there are multiple defendants.

5 Crown Prosecution Service ("CPS"), *Code for Crown Prosecutors* (October 2018) para 2.1-2.8.

6 CP 259, para 4.235.

7 *Mockutė v Lithuania* App No 66490/09; *Avilkina v Russia* App No 1585/09; *JL v Italy* App No 5671/16. See also Appendix 1, paras 1.78-1.99.

7.10 In the consultation paper we argued that changes to the usual trial process are needed to ensure those privacy rights are adequately protected. Indeed, states have a positive obligation to ensure that individuals' article 8 rights are effectively protected.[8] Therefore, we provisionally proposed that complainants should be given a right to be heard on applications relating to their personal records and SBE.[9]

7.11 We described the practical benefits of the introduction of a right to be heard with ILA and ILR. For example, during the investigation, ILA would help ensure that there is robust consent to access personal records. A right to be heard on applications relating to evidence where privacy rights were most strongly engaged (personal records and SBE), supported by ILR, is appropriate to vindicate those rights in the course of a trial. It would enable the complainant's right to privacy to be advocated for "independent from other concerns such as the public interest".[10] Cumulatively, these proposals would ensure an appropriate level of scrutiny of difficult and sensitive areas of evidence by allowing complainants to "challenge inappropriate applications or use of their personal information".[11] Further, we argued that for complainants interacting with the criminal justice system, it would "significantly improve their experience or mitigate some of the more harmful aspects".[12] This would reduce the prospect of traumatisation by the trial process, improve the quality of complainants' evidence, and improve confidence and engagement in the criminal justice system.

7.12 We clarified that a right to be heard would not amount to full party status, meaning that complainants would not be entitled to make submissions to the court on any applications other than those relating to their SBE or personal records. Complainants would also not be entitled to call or cross-examine witnesses. Full party status would be costly, introduce the most delay, and have the biggest impact on the binary adversarial model throughout the trial process.[13] We noted equivalence with other contexts where third parties have a right to be heard, such as in confiscation proceedings, applications on reporting restrictions, or witness summons regarding the production of confidential information.[14]

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8 *Kroon v The Netherlands* App No 18535/91 at [31]; *Lozovyye v. Russia* App No 4587/09 at [36]. See further discussion of this obligation from Appendix 1, para 1.15.

9 Consultation Question ("CQ") 65: "We provisionally propose that complainants should have a right to be heard in respect of applications relating to the admission of their personal records or sexual behaviour evidence. Do consultees agree?" CP 259, para 8.137.

CQ 66: "We provisionally propose that complainants in sexual offences cases should have access to independent legal advice, assistance, and representation in respect of applications relating to personal records or sexual behaviour evidence. Do consultees agree?" CP 259, para 8.157.

In CQ 66, we asked consultees, if they did not agree that complainant should have access to independent legal advice, assistance, and representation, whether complainants should have access to independent legal advice only; independent legal advice and assistance only; independent legal representation only; or none of these. CP 259, para 8.158.

10 CP 259, para 8.27(2).

11 Above, para 8.27.

12 Above, para 8.52.

13 Above, para 8.122.

14 Proceeds of Crime Act 2002, s 10A(2); Criminal Procedure Rules ("CrimPR") 2020 r 6.2, r 17.5. Though not in a criminal context and therefore not directly analogous, it is also notable that third parties who are directly

Consultation responses and analysis

Increased scrutiny, improved confidence, and greater agency

7.13 Consultees[15] agreed that complainants' privacy rights provide justification for a right to be heard in respect of applications relating to their personal records or sexual behaviour.[16] Where such rights are engaged, it is important for the complainant to have a voice in those applications. For example, the Law Society wrote that it agreed because complainants' rights are "directly affected by the decision taken".

7.14 Consultees who disagreed with introducing a complainant right to be heard and ILR argued that the prosecution already provides an appropriate mechanism for scrutiny of sensitive applications.[17] However consultees who supported the proposal agreed that prosecutors are not always best placed to advance the complainant's privacy rights, noting this may be in conflict with the prosecution's duty to act in the public interest. Where the interests of the prosecution and the complainant diverge, a right to be heard and access to ILR is necessary to ensure that the complainant's rights are properly advanced in the application process.[18] If a complainant has access to ILR, they can advance their position in the most effective way to the benefit of the trial process. We therefore maintain our view that it is necessary and proportionate for complainants to have a right to be heard and access to ILR.

7.15 Consultees also suggested that complainant engagement and confidence in the criminal justice system would be improved if they had a right to be heard. This is because it would provide them with "greater autonomy"[19] and would reduce "feelings of isolation and alienation".[20] Conversely, two consultees argued that a complainant right to be heard (paired with ILR) would negatively impact confidence as complainants would become distressed if an application, made on their behalf, failed.[21] HM Council of Circuit Judges argued that:

> Quite aside from the additional emotional burden consequent on the associated sense of responsibility, to encourage the perception that [the case is the complainant against the defendant] would lead to a complainant assuming an entitlement to have a say, perhaps even a decisive say, in both strategic and tactical decisions. Moreover, tensions may well develop between a complainant and the prosecution, rooted in an unrealistic expectation on the part of the former. Creating

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affected by a claim for judicial review can obtain "interested party" status (Civil Procedure Rules, Rule 54.1(2)(f)) and may be allowed to participate in the judicial review (Civil Procedure Rules, Rule 19.4).

15 Including the Law Society of England and Wales ("Law Society"); Dr Susan Leahy; and Eamon Keane.

16 A majority of consultees were in favour of introducing a right to be heard for complainants in sexual offences cases (54 out of 78). There was also majority support amongst consultees for complainants in sexual offences cases having access to ILA and ILR (61 out of 88).

17 Including Martin Rackstraw and the Criminal Bar Association ("CBA").

18 Including Rape Crisis England and Wales ("RCEW"); the Centre for Women's Justice ("CWJ"); London Criminal Courts Solicitors' Association ("LCCSA"); and End Violence Against Women Coalition ("EVAW").

19 Dr Georgina Clifford, a clinical psychologist.

20 Dr Susan Leahy.

21 The CBA and HM Council of Circuit Judges.

> unrealistic expectations in a complainant in such cases is irreparably destructive, and should not be risked for gain that is in reality cosmetic.

7.16 The complainant's legal adviser would be responsible for managing the expectations of their client. This extends to both managing expectations about the likelihood of success of an application, as well as explaining the status and extent of the complainant's role in the proceedings, and how that is separate from the prosecution. This was supported by Eamon Keane, a Scottish academic and solicitor,[22] who stated that in his experience "concerns in respect of procedure, law and related matters can be readily assuaged in terms of an initial conversation with a client". Managing complainants' expectations should help them to prepare emotionally for the case. We agree with consultees that a right to be heard, paired with ILR, would in fact empower complainants, and provide them with agency.[23] The benefit of this is not just cosmetic: self-agency is a critical part of recovery from trauma.[24] Complainants are more likely to be confident in the criminal justice system when they have a greater understanding of their rights and know that those rights are being advocated for.

7.17 Even in matters where there is no formal application to the court (and therefore parties are not advancing their arguments to a judge) there is benefit in providing ILA to complainants. Consultees agreed that legal advice and assistance would help improve the protection of complainants' privacy rights with respect to requests to access personal records held by third parties. Complainants are able to consent to such requests for the police to access the material (as opposed to permission being required from the court). Victim Support argued that "complainants would undoubtably benefit from advice and assistance in this area" to ensure that requests for access to personal records are proportionate. Several consultees also indicated that ILA would improve complainants' understanding of their rights with respect to access to their personal records.[25] Nia (a service provider for women and girls who have been victims of sexual violence) argued that "complainants may come under overt or indirect pressure to consent to disclosure whereas an advocate or [adviser] may be able to identify and challenge such pressure". Professor Susan Edwards wrote:

> Complainants need to give full and free consent to personal records. They need to understand the potential benefit and the disadvantages and the implications. Only an independent suitably qualified adviser can assist with this.

7.18 It is important that complainants receive independent legal advice about the impact of their decision whether to consent to their personal records being accessed. Consent to access should be informed. We recommend in Chapter 2 that judicial scrutiny

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22 Eamon Keane is also the Co-Director of the Emma Ritch Law Clinic, which provides legal representation to complainers in sexual offences cases in Scotland. See University of Glasgow, *Emma Ritch Law Clinic*.

23 The word "agency" is used here, and throughout this chapter, to refer to the ability or capacity of an individual to act independently or make decisions for themselves. For example, see UK Trauma Council, *Complex trauma: evidence-based principles for the reform of children's social care* (March 2022) p 6.This is not intended to mean a "legal agent", who is someone acting on behalf of a principal.

24 UK Trauma Council, *Complex trauma: evidence-based principles for the reform of children's social care* (March 2022); S Hobfoll, "Five Essential Elements of Immediate and Mid–Term Mass Trauma Intervention: Empirical Evidence" (2007) 70 *Psychiatry* 283.

25 Including Victim Support; Dyfed-Powys Office of the Police and Crime Commissioner; and Professor Susan Edwards.

should not be required where consent is the basis for accessing personal records held by third parties either pre- or post-charge. Therefore, ensuring that the complainant can give informed consent to access will act as an important safeguard of their privacy. ILA is the most effective way of ensuring that consent is informed.

7.19 Overall, we remain of the view that there is a strong principled justification for introducing a right to be heard, supported by ILR and ILA. We now turn to some of the criticisms related to the impact of these measures on the fairness of the trial process.

Fair trial concerns

7.20 In the consultation paper, we concluded that changes to the typical trial model "do not automatically interfere with the defendant's right to a fair trial". We explained that several other Council of Europe member states provide ILR for complainants in sexual offences cases and that this has been found to be compliant with article 6 which guarantees the defendant's right to a fair trial. Further, we outlined the ECHR case law holding that defendants' right to a fair trial does not prevent states from implementing measures to protect the article 8 rights of complainants.[26]

7.21 Several consultees raised concerns about the impact on defendants' fair trial rights in response to our provisional proposals for a right to be heard and the provision of ILA and ILR. The three main issues raised were: the dilution of the binary adversarial model; the risk of witness coaching;[27] and how the operation of legal professional privilege ("LPP") would impact the disclosure of potentially exculpatory material.

Binary adversarial model

7.22 Various consultees[28] and a Circuit Judge argued that a complainant right to be heard would interfere with the binary adversarial model. They told us that it is a basic principle of the adversarial criminal justice system that the complainant is a witness and not a party to the case. One consultee argued that providing ILA or ILR to complainants would create an imbalance against the defendant, effectively forcing them to face "two teams of lawyers instead of only one".[29]

7.23 In our view, the scope of the right to be heard and the model of ILR that we recommend would have only a limited, and justified, impact on the binary model. The right to be heard would be limited to applications relating to the complainant's personal records and SBE. Since complainants' article 8 rights are directly engaged by these applications, we think that this departure from the binary adversarial model is justified. Further, as outlined below, the complainant's legal representative would have no role at trial in the presence of the jury: the scope of their role would be limited to making representations when applications on SBE or personal records are decided.[30] The complainant's representative would not be responsible for monitoring compliance

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26 CP 259, paras 8.76-8.87.

27 We respond to the concerns about witness coaching below from para 7.91 when discussing whether the ILA should have access to all documents necessary to provide full and frank legal advice.

28 Including HM Council of Circuit Judges and Cardiff University Law School Innocence Project.

29 Cardiff University Law School Innocence Project.

30 The only exception to this would be where the complainant exercises an appeal right. For more detail on this, see Ch 8.

with the order permitting use of evidence and questioning about SBE, meaning that a defendant would not be faced with two prosecutors.

Legal professional privilege

7.24 We received feedback from consultees and stakeholders about how LPP would operate in respect of communications between a complainant and their legal adviser or representative. We were asked whether they would be required to disclose privileged materials that would be capable of undermining the case against the defendant. As an example, at one consultation event, a legal practitioner explained that a complainant may tell their adviser that an allegation is false, or may discuss having made a previous false allegation, but that this would not be disclosable to the defence due to LPP. The Six Circuits of England and Wales[31] also suggested that a complainant "may say something in their discussions with the [adviser] or [representative] that potentially is undermining for the defence case and ought to be disclosed". It suggested that "LPP should not attach to such material".

7.25 Consultees suggested that guidance and clarity on the scope of the ILA and ILR roles could assist. The Law Society stated that there should be "guidance on how the role ought to be carried out, with particular reference to ethical constraints". In particular, it suggested that such guidance could clarify what legal professionals should do "where a complainant makes a retraction of their complaint". The Criminal Bar Association ("CBA") suggested that a code of conduct should be created with "the same duties, responsibilities and limits as are placed on prosecution counsel". It argued that advisers and representatives should be requested to keep "notes of any meetings or conversations with complainants" and that "it may be necessary in certain circumstances for these to be disclosed". In contrast, the Centre for Women's Justice ("CWJ") did not believe that additional guidance would be required on LPP, because "lawyers in England and Wales are already regulated by Codes of Conduct which make these concepts very clear".[32]

7.26 It is possible that the complainant may make a retraction, admission of fabrication or misattribution, or a statement unambiguously at odds with the allegation, to their legal adviser. Such statements would be plainly exculpatory and could indicate that the current allegation is false. We do not think that these sorts of statements would be common: the existing evidence base shows it is not common for allegations of sexual offending to be false, and that a generalised suspicion of rape complainants is unjustified.[33] We raised this issue with legal professionals who provide legal advice to

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31 Consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

32 We asked consultees whether there should be guidance for the ILA and ILR roles, and what the definition of the roles ought to be (CP 259, paras 8.173-8.174). The feedback that we received was limited. We therefore do not make any recommendations on the definition of the ILA and ILR roles, or the contents of any further guidance. The principles that we set out in this chapter may help to inform future guidance that the relevant professional bodies may choose to draft for those acting as legal advisers and representatives for complainants in sexual offences cases.

33 L Kelly, J Lovett and L Regan, A gap or a chasm? Attrition in reported rape cases (Home Office Research Study 293, 2005) p 50; P Rumney, "False allegations of rape" (2006) 65 *Cambridge Law Journal* 128; P

complainants in other jurisdictions. Robyn Gilbert (Senior Solicitor at the Sexual Assault Communications Privilege Service ("SACPS") Legal Aid New South Wales ("NSW"))[34] told us that in NSW there are no special rules about client legal privilege that apply to a complainant receiving legal advice. They also told us that they have never encountered exculpatory material when providing advice to a complainant. We also received feedback from a lawyer at the Rebâtir service in the Canadian province of Québec, who indicated to us that the legal consultations that they provide to complainants "respect professional secrecy".[35]

7.27 Other kinds of communications between the complainant and their legal adviser or representative that could be favourable to the defence include those which reveal a further line of enquiry, that could be used in rebuttal, or which demonstrate a minor inconsistency that is not directly at odds with the allegation. These types of communications are not exculpatory but are potentially favourable to the defence. They may be more common than the plainly exculpatory statements described above: for example, we know that inconsistencies in accounts can happen whether a person is telling the truth or not, particularly if they have experienced a traumatic event.[36] This full range of kinds of communications must be accounted for when considering how the law ought to approach these issues.

Analysis

7.28 In our view, communications between a complainant and their legal adviser or representative should continue to be subject to LPP. The common law has established that an individual should be able to consult their legal representative in confidence, as otherwise they may be dissuaded from fully confiding in them. The importance of this confidence is such that LPP has been described as a "fundamental condition on which the administration of justice as a whole rests".[37] Given the nature of the alleged offence, discussions between complainants and their advisers may contain particularly sensitive personal information. For example, the complainant may discuss their mental health or concerns for their safety when receiving advice about measures to assist with giving evidence. Complainants may be concerned that, without LPP, those communications could be used against them in court, so may be discouraged from fully confiding in their adviser, or from seeking legal advice at all. Without LPP, the quality of advice and representation provided would be diminished, thereby interfering with the effective administration of justice. Therefore, complainants in sexual offences cases should be entitled to receive legal advice with the same expectation of confidence as anyone else who receives legal advice. This is the basis on which they presently receive legal advice.

Rumney and K McCartan, "Purported false allegations of rape, child abuse and non-sexual violence: nature, characteristics and implications" (2017) 81 *Journal of Criminal Law* 497.

34 The SACPS is a legal service in NSW that provides legal advice and representation in respect of disclosure of sensitive counselling communications in court.

35 Rebâtir are a service in Québec that provides legal consultations about the legal process to complainants in domestic and sexual violence cases.

36 See Judicial College, The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up (April 2025 Update) 20-7 Example 4: inconsistent accounts.

37 *R v Derby Magistrates' Court, Ex parte B* [1995] 3 WLR 681 [1996] AC 487, 507.

7.29 In our view, complainants receiving confidential independent legal advice would not amount to interference with the defendant's right to a fair trial. Whilst recognising the importance of disclosure to the right to a fair trial, the entitlement to disclosure of relevant evidence is not itself an absolute right.[38] In some cases it will be necessary to withhold certain evidence from the defence "to preserve the fundamental rights of another individual or to safeguard an important public interest".[39] Where restrictions on disclosure have caused difficulties for the defence, measures can be taken by the court to counterbalance this.[40] We think that there are several safeguards which will ensure that the defendant receives a fair trial.

7.30 The first of these is the iniquity exception.[41] This is an exception to LPP which prevents privilege from attaching to communications which are "criminal in themselves or intended to further any criminal purpose".[42] The principle also extends to communications for the purpose of "fraud, or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice".[43] Protecting such communications would be "injurious to the interests of justice and to those of the administration of justice", which would conflict with the underlying rationale of LPP.[44] The iniquity exception is narrow and its purpose is to ensure that the lawyer-client relationship is not used to further iniquity.[45] We acknowledge that this limits the extent to which the iniquity exception can be used to disclose materials to the defence which are necessary for a fair trial.

7.31 In our view, the iniquity exception will be applicable in cases where the iniquitous purpose for making the communication is very clear: for example, where the complainant admits to their adviser that they have fabricated the allegation.[46] In such a circumstance, if the purpose of receiving ILA or ILR is to prevent the disclosure and admission of evidence that would reveal the allegation was false, this could amount to an iniquitous purpose. It would be contrary to public policy and the interests of justice for the law to protect such communications.[47] Further, it likely falls outside of the ordinary course of engagement for the ILA or ILR, in so far as the advice sought would

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38 *Rowe and Davis v UK* App No 28901/95 (Grand chamber decision) at [61].

39 Above at [61].

40 *Doorson v The Netherlands* App No 20524/92 at [72]; *SN v Sweden* App No 34209/96 at [47]. See also para Appendix 1, para 1.23.

41 The iniquity exception is sometimes also referred to as the "crime-fraud" exception.

42 *R v Cox and Railton* (1884) 14 QBD 153, 167-168.

43 *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) at [68].

44 *R v Cox and Railton* (1884) 14 QBD 153, 167-168.

45 In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) at [93], the court stated that "in cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question".

46 Other types of communications, such as those described at para 7.27, would not necessarily be sufficient to demonstrate an iniquitous purpose, but may still be favourable to the defence case.

47 Such offences might include perverting the course of justice (*R v Grimes* [1968] 3 All ER 179) or wasting police time (Criminal Law Act 1967, s 5(2)).

be for the furtherance of an offence against the administration of justice.[48] Therefore, the iniquity exception may be useful in some limited circumstances where there is an evident iniquitous motive behind seeking legal advice.

7.32 A second safeguard is provided through the professional obligations of the ILA and ILR.[49] Solicitors and barristers are under similar professional obligations not to mislead the court and, if their client persists in instructing them to mislead the court, to withdraw from advising or representing that client.[50] Even though the ILA or ILR could not give reasons for their withdrawal, this ought to trigger the prosecution to direct the police to make enquiries including with the complainant and review the case, including whether it continues to meet the threshold for prosecution. Any information discovered through these enquiries which would assist the defence case or undermine the case for the prosecution would be disclosable to the defence. We acknowledge that the complainant would not necessarily reveal what was said between themselves and their adviser or representative that led to the withdrawal, however these enquiries by the prosecution would act as one of a range of safeguards designed to maintain the fairness of proceedings. In addition to prosecutorial inquiries, in these circumstances the defence may also be entitled to request privilege to be waived with respect to the adviser's or representative's notes about the complainant's account of the allegation. If a witness does not voluntarily waive privilege, Rook and Ward have suggested that the defence advocate will be "confined to asking the witness to waive privilege and commenting upon any refusal in his final speech".[51]

7.33 Additionally, in some cases the defence could make an abuse of process application. An abuse of process is defined as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding".[52] The court has the discretion to stay criminal proceedings where to try those proceedings would amount to an abuse of process because: it would be "impossible (usually by reason of delay) to give the [defendant] a fair trial";[53] or because it "offends the court's sense of justice and propriety to be asked to try the [defendant] in the circumstances of a particular case".[54] Rook and Ward have

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48 Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs* (November 2019) para 1.4; Bar Standards Board, BSB Handbook, (December 2020), Part 2, Code of Conduct, rC6.1.

49 As we discuss below from para 7.78, we recommend that those providing ILA and ILR be legally qualified, so they would necessarily be subject to these professional obligations.

50 Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs* (November 2019) para 1.4; Bar Standards Board, BSB Handbook, (May 2024), Part 2, Code of Conduct, gC10-gC11.

51 P Rook and R Ward, Rook and Ward on Sexual Offences: Law and Practice (6th ed 2021) ("Rook and Ward"), para 18.33.

52 *Hui Chi-Ming Appellant v The Queen Respondent* [1991] 3 WLR 495, [1992] 1 AC 34, 57.

53 *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42, 74. This has included where there has been: significant delay by the prosecution in bringing the proceedings which resulted in the loss of material evidence and prejudice to the defence (*Ali v CPS* [2007] EWCA Crim 691); loss or destruction of crucial evidence by the prosecution caused by bad faith or other serious default (*R v Feltham Magistrates' Court, Ex parte DPP* [2001] EWHC 130 (Admin)); and a fundamental breach of the duty of disclosure by the prosecution leading to prejudice to the defendant (*R v Birmingham and others* [1992] Crim LR 117).

54 *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42, 74. This has included: a breach of a promise by the prosecuting authority where the defendant has acted to their detriment in relying on the promise (*R v Croydon Justices, ex p Dean* [1993] QB 769); an unlawful act by the prosecution which cannot

suggested that the defence could mount an abuse of process argument in "certain extreme cases" such as "where the case against a defendant rests wholly on the evidence of the witness who has refused to waive privilege".[55]

7.34 Finally, the wider adversarial trial process will additionally safeguard fair trial rights. There may be other evidence available which is capable of advancing the defendant's case without having to interfere with LPP. For example, if inconsistencies in the complainant's account are apparent in their communications with their legal adviser, those same inconsistencies may be found in other evidence in the case, or may arise during cross-examination.[56]

7.35 We acknowledge that despite these safeguards, some material that could be helpful to the defence case may be covered by LPP and therefore would not be disclosable to the defence. However, as we have already set out above, we believe that further exceptions to LPP for complainants in sexual offences cases would undermine the value of ILA and ILR. The courts have determined that LPP is absolute once it has been established. The interest in privilege does not have to be weighed against other public interests, including the defendant's right to a fair trial.[57] In *R v Derby Magistrates' Court*, Lord Lloyd of Berwick recognised that "there may be cases where the principle will work hardship on a third party seeking to assert his innocence".[58] However, he accepted that the "overall interests of the administration of justice" justified the strict approach.[59] We acknowledge that this judgment has been criticised as having the potential to interfere with defendants' fair trial rights.[60] The thrust of this criticism reflects the concern of some consultees that a defendant could be deprived of exculpatory material, resulting in a miscarriage of justice. However, these criticisms are of the wider LPP regime as it currently exists, and are not specific to sexual

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be cured by the powers to exclude illegally obtained evidence (*R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1993] 3 WLR 90); and prosecutions following the imposition of cautions where the defendant is given an assurance at the time of the caution that they will not be prosecuted (*Jones v Whalley* [2006] UKHL 41). If seeking to stay proceedings due to an abuse of process that offends the court's sense of justice and propriety, the court must consider "whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system" (*R v Latif* [1996] 1 WLR 104, 112).

55 Rook and Ward, para 18.33.

56 The Court of Appeal Criminal Division has previously denied appeals against convictions where one of the grounds of appeal was that the assertion of privilege prevented the defendant from having a fair trial, on the basis that this did not prevent the defendant from advancing their case through other evidence: *R v Okedare* [2014] EWCA Crim 228; *R v Maya Devani* [2007] EWCA Crim 1926.

57 *R v Derby Magistrates' Court, Ex parte B* [1995] 3 WLR 681 [1996] AC 487, 507-509.

58 Above, 509-510.

59 Above, 509-510.

60 See *Carter v Northmore Hale Daly and Leake* (1995) 183 CLR 121, 129 ALR 593, 617. Toohey J stated: "While legal professional privilege is well established as the product of a balancing exercise between competing public interests, it may seem somewhat paradoxical that 'the perfect administration of justice' should accord priority to confidentiality of disclosures over the interests of a fair trial …". See also, Rook and Ward, para 18.34; M Bowes, "The supremacy of legal professional privilege: the Derby Magistrates case" (1996) 4 *Archbold News* 7; C Passmore, *Privilege* (4th ed 2020) para 1-365.

offences cases.[61] Therefore, we do not think that taking an exceptional approach in sexual offences cases is justified.

7.36 Overall, we conclude that the complainant should be entitled to the same right to LPP as anyone who receives legal advice. Without this, the quality of advice and representation would be severely diminished. We do not think that restricting the access of the defence to these communications necessarily interferes with the fairness of proceedings: there may be other evidence available to ensure that the defendant can advance their case. The iniquity exception could also be utilised where the ILA or ILR was being used to further an iniquitous objective. In the exceptional cases where the operation of LPP undermines the fairness of proceedings, it would be open to the defence to challenge the prosecution as an abuse of process.

Resourcing and delay

7.37 In the consultation paper, we addressed concerns about cost and delay of even a limited right to be heard supported by ILR and ILA. We noted, for example, that it will take time for the complainant to seek legal advice before responding to requests from police to consent to access to personal records.[62] Further, once a relevant application is made, it will take time to identify and instruct a lawyer and for the lawyer to obtain and review the relevant material, take instructions on it, and prepare for the hearing. There will also be an additional layer of complexity added to the listing of hearings, as there will be more people to accommodate. However, we also noted that efficiencies may be created elsewhere.[63] There was some support for this amongst consultees, who cited the Sexual Violence Complainants' Advocate ("SVCA") Evaluation Report.[64] The Report found that ILA led to efficiencies at the investigation stage by preventing excessive requests for access to third party material ("TPM").[65] However, other consultees queried the extent to which such efficiencies would offset resources incurred.[66]

7.38 Consultees and stakeholders who disagreed with introducing ILA and ILR were concerned about the delays to trials and the associated costs. Among those, the CBA

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61 We note that in other common law jurisdictions a different approach to that in *Derby* has been taken with respect to LPP, and exceptions have been created to allow for disclosure of privileged materials where necessary for the defendant to receive a fair trial. In New Zealand, s 67(2) of the Evidence Act 2006 allows a judge to disallow a claim of privilege where "evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence". The Supreme Court of Canada has held that solicitor-client privilege is not absolute and determined that an "innocence at stake" test can be applied to determine whether the invasion of privilege is necessary. This test will be applied in two stages. Firstly, the defendant seeking production of a privileged communication must provide "some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to guilt". Secondly, the judge must "examine the solicitor-client file to determine whether, in fact, there is a communication that is likely to raise a reasonable doubt as to the guilt of the accused". See *J.C. v Her Majesty the Queen and David Elliott McClure and The Advocates' Society and the Criminal Lawyers' Association (Ontario)* [2001] 1 SCR 445 at [50].

62 CP 259, para 8.55.

63 Above, para 8.56.

64 O Smith and E Daly, Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme (December 2020) ("SVCA Evaluation Report") p 68.

65 Above, p 62.

66 Including Dr Matt Thomason.

highlighted the need to account for the availability of the complainant's representative. It said this would be particularly acute if the relevant application was made after the trial had started. At a consultation event, a criminal barrister suggested to us that in such cases the trial might have to be suspended until the ILR has been engaged and had the opportunity to make representations.

7.39 There are undoubtably also resourcing concerns. The CBA argued that sourcing solicitors and barristers to provide ILA and ILR would be problematic, as there is "already a gross shortage of lawyers, both solicitors and counsel, undertaking RASSO work".[67] The General Council of the Bar of England and Wales ("the Bar Council") made similar comments, arguing that on "an almost weekly basis cases are being adjourned… for want of a barrister to prosecute". Although it was supportive of the proposal, the Law Society emphasised the importance of proper funding for an ILA and ILR scheme. It suggested that the qualified legal representative ("QLR") scheme in the family courts has been "so poorly funded that there are not enough practitioners signing up" and "judges are having to adjourn cases while a QLR [is] sourced".[68]

Analysis

7.40 We acknowledge the resourcing and funding challenges currently faced by the criminal justice system, and we address these in more detail in Chapter 14.[69] Although we are not suggesting that the efficiencies created by ILA and ILR (in terms of time and resources) will completely outweigh the costs, these efficiencies are not negligible. As identified by the SVCA Evaluation Report, ILA can create efficiencies at the investigation stage by preventing excessive requests for TPM.[70] For example, where the investigating officers requested the consent of the complainant to access all their personal records, an SVCA was able to directly challenge this by explaining why certain records would not be relevant to the case. Officers were then able to refine their request. The result of this was that there were less materials for the police to review. Without the SVCA, the complainant may have consented to the broader request for access to their personal records.

7.41 Further, ILA and ILR would reduce the traumatisation of complainants by the criminal justice process. Trauma can have significant costs to wider society, beyond the harm caused to the individual.[71] Reduced traumatisation would lessen the costs created by complainants accessing counselling or other therapeutic healthcare post-trial, and the costs associated with taking time off work due to mental ill-health. The SVCA Evaluation Report suggested that the costs of an ILA or ILR scheme, which it estimated to be £3.9 million annually, could be "offset by savings on health and

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67 As explained in the glossary, "RASSO" is an acronym for "rape and serious sexual offences".

68 A QLR is a lawyer appointed to represent someone in the family courts who is restricted from cross-examining someone against whom they have committed, or have been accused of committing, a specified offence: Matrimonial and Family Proceedings Act 1984, s 31W(6); Courts Act 2003, s 85K(6).

69 Due to these challenges, an independent review of the criminal courts has been commissioned by the government. The Rt Hon Sir Brian Leveson, *Independent Review of the Criminal Courts: Part 1* (July 2025).

70 SVCA Evaluation Report (2020) p 62.

71 In the consultation paper, we outlined the current cost to society for crimes of sexual violence. In 2015/16, for both rape and other sexual offences, the total cost to the public was £12.2bn: CP 259, para 12.13-12.20, citing M Heeks et al, Home Office, *The economic and social costs of crime Second edition, Research Report 99* (July 2018) Table 2, p 17.

employment spending". It also noted that an estimated cost of £9.8 billion is "caused by the emotional consequences of both the crimes and inadequate responses to those crimes". [72] More detail on the costs and benefits of this proposal will be provided in the impact assessment for this report.

7.42 Our view remains that it is necessary for ILA and ILR to be publicly funded to ensure that the benefits are available in all sexual offences cases and to all complainants.[73] Ultimately, in our view, the cost of introducing ILA and ILR is justified by the positive impact that it will have on complainants' experiences of the criminal justice process. As highlighted above, these benefits include increased scrutiny of sensitive applications, increased complainant confidence, agency and engagement in the criminal justice process, and reduced traumatisation.

The right to be heard and our recommendations on personal records

7.43 In Chapter 2 we make recommendations regarding access, disclosure and admissibility of complainants' personal records held by third parties. In light of the feedback that we received, we recommend that a bespoke regime should focus on access and compelled production, rather than disclosure and admissibility. The primary reason for this is that the evidence base suggests that the disproportionate requests which interfere with the complainant's privacy rights arise at the point of access. We therefore conclude that targeting resources (including judicial scrutiny) at the point of access is most justified and would maximise the impact of those resources. We also conclude that requests for access and production of personal records should be subject to an enhanced relevance threshold. This threshold requires first that the evidence is likely to be relevant to an issue at trial or to the competence of a witness to testify, and secondly that access or production is necessary in the interests of justice. We outline detailed factors guiding decision making in respect of the second limb, including the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates.

7.44 The effect of these recommendations is that a right to be heard for complainants regarding disclosure of their personal records would be redundant and a right to be heard for complainants with respect to the admissibility of their personal records is not justified. For disclosure to the defence, the prosecution will use the current framework, considering whether the material "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".[74] No application will be heard before a judge, and therefore there will be no application for the complainant to challenge.[75] For admissibility, whilst there

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72 SVCA Evaluation Report (2020) p 8.

73 CP 259, para 8.155.

74 Criminal Procedure and Investigations Act 1996 ("CPIA"), s 7A(2)(a).

75 Unless the prosecution makes an application to withhold disclosure on the basis of public interest immunity ("PII") or the defence seek disclosure of material they have reasonable cause to believe is required to have been disclosed but has not been (CPIA, s 8). In Ch 2, we state that the PII framework can, and should continue to, provide a mechanism in certain cases for safeguarding complainants' personal records and to allow for judicial scrutiny of the disclosure of these records to the defence. Complainants have a right to be heard and to be represented in such applications, see CP 259, para 3.35 and CPIA, s 16. At para 7.42, we comment that it is necessary for ILA and ILR to be publicly funded to ensure that the benefits are available in all sexual offences cases and to all complainants. When considering public funding arrangements for ILA

would be judicial scrutiny (applying the bare relevance threshold), providing a right to be heard is still not justified. The disclosure and admissibility thresholds do not engage complainants' privacy rights in the same way as our recommended threshold for access and compelled production. Further, for disclosure and admissibility, the prosecution or the judge ought to be capable of ensuring adherence to the relevant thresholds, and the complainant's representative would not provide significant additional scrutiny. The most appropriate and effective stage for challenge by the complainant is access and compelled production.

Conclusion

7.45 There was strong support from consultees for introducing a right to be heard on applications to admit SBE and for applications for compelled production of complainants' personal records. We also received strong backing for the introduction of ILA and ILR to support that right. Our recommended model of ILA and ILR will provide the necessary protection for complainants' privacy rights, reduce traumatisation during the trial process, and would create efficiencies elsewhere. Further, the limited model of ILA and ILR we recommend would not interfere with defendants' right to a fair trial. Several safeguards would ensure that defendants would receive a fair trial should complainants assert privilege over particular communications.[76] As outlined above, complainants' right to be heard would be limited to particular applications that engage their right to privacy, and complainants' representatives would have no role at trial in the presence of the jury.[77]

Recommendation 32.

7.46 We recommend that complainants in sexual offences cases should have a right to be heard in respect of applications:

(1) for pre- and post-charge compelled production of their personal records; and

(2) to adduce evidence of their sexual behaviour.

7.47 We recommend that complainants in sexual offences cases should have access to independent legal advice, assistance and representation in respect of requests and applications relating to their personal records and sexual behaviour evidence.

MODELS OF ILA

7.48 We have outlined above the benefits of providing ILA to complainants. We now turn to consider the various ways in which, in practice, legal advice and information can be provided to complainants. The means of providing legal information and advice

and ILR, the Government may wish to consider arrangements regarding complainants who wish to be represented at PII applications.

76 See paras 7.28-7.36 above.

77 See para 7.23 above.

impacts how informed the complainant is about their legal rights, how tailored the advice is, and what resources are required.

7.49 In the consultation paper, we considered that ILA provision could include online and telephone advice, and in-person advice and assistance. Legal information could be provided to complainants through legal information leaflets. We drew on the experience of other jurisdictions. For example, in Ireland, leaflets give legal information on specific issues, such as personal records.[78] While cost-effective and easily accessible, the information provided on leaflets alone would have to be generalised and could not be tailored to a complainant's individual circumstances, nor necessarily provide answers to all their questions. In some Canadian provinces, ILA is provided for free by telephone. This information and advice can be tailored to the complainant's needs and is more cost-effective than in-person advice. However, remote advice and assistance may not always be sufficient, particularly if the adviser needs to review documents with their client.[79] In Ontario, public funding for legal advice for complainants is capped at four hours, which may not be sufficient to address complainants' concerns.[80] Dr Susan Leahy has argued that the lack of funding available for ILA and ILR is a "serious shortcoming" of this regime.[81]

7.50 We concluded that in order for ILA provision to be both helpful and cost-effective, a range of different sources of legal information, advice, and assistance would be required. This would include legal information leaflets with generalised information about the complainant's rights and the legal process; online or telephone advice for urgent enquiries that can be dealt with remotely; and in-person advice and assistance when engagement with the police or access to physical documents would be necessary.[82]

Consultation responses

7.51 A majority of consultees agreed with our proposal that complainants should have access to legal information leaflets, online and telephone advice and in-person advice and assistance.[83] Consultees recognised that providing a mix of all of these sources of legal information, advice, and assistance would best for the individual complainant. It was also suggested that complainants' needs may vary at different stages of the

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78 Office of the Director of Public Prosecutions, Ireland, "Releasing my counselling records" (February 2019).

79 CP 259, paras 8.111-8.112.

80 Ontario Ministry of the Attorney General, "Independent legal advice for survivors of sexual assault" (September 2022).

81 S Leahy, "The Defendant's Right or a Bridge too Far? Regulating Defence Access to Complainants' Counselling Records in Trials for Sexual Offences – Part 2" (2012) 22(2) *Irish Criminal Law Journal* 34, 39-40.

82 In CQ 68: "We provisionally propose that independent legal advice and assistance should include, where appropriate, legal information leaflets, online and telephone advice, and in-person advice and assistance. Do consultees agree?" CP 259, para 8.160.

83 Of those who responded to CQ 68, 24 consultees selected "yes", 2 consultees selected "no", and 8 consultees selected "other".

process, so a range of models of information, advice, and assistance would be most appropriate.[84]

7.52 Three consultees supported the use of information leaflets, but were concerned about the potential for overreliance on them.[85] They argued that complainants would require personalised legal advice and assistance to resolve issues that are specific to their case. Further, two consultees argued that information leaflets would not be accessible to some complainants.[86] For example, some complainants do not have English as their first language or may have learning difficulties.

Analysis

7.53 We remain of the view that complainants should have access to legal information leaflets, online and telephone advice, and in-person advice and assistance. This would ensure that the needs of the individual complainant can be met. Complainants should be able to choose which means of information, advice, or assistance they wish to access, taking into account their own accessibility requirements and other needs.

7.54 If complainants were only provided information leaflets, this would be insufficient as the information provided would not be specific to the complainant's case, so may not address all their concerns. Additionally, as noted by consultees, there are clear accessibility concerns associated with only having written forms of information and advice available. Despite this, it would still be helpful for complainants to have access to information leaflets when they initially report a sexual offence. The leaflets could provide complainants with a basic understanding of their rights and would be able to direct them to find legal advice and assistance if necessary. The leaflets could be provided in a range of languages or formats, including an Easy Read version.[87]

7.55 Tailored advice and assistance is also necessary. This could be provided by telephone, online, or in-person. Online and telephone advice can be cost-effective. Further, online and telephone information and advice may be more accessible than in-person advice for people who cannot travel. There are, however, concerns about accessibility with respect to online advice. In her recent report, Dr Natalie Byrom referred to research which found that vulnerable clients can be excluded from accessing legal services because of "lack of access to mobile phone data and low levels of digital capability".[88] In-person advice or assistance may be needed where complainant has a particular communication difficulty. Further, in some cases the adviser may need to access material that is not available digitally. This would require in-person assistance. This should be reflected in the model of ILA, which we think could be achieved through the range of provision we recommend.

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84 Including the Law Society and Dr Susan Leahy.

85 Including the CWJ and the Pan-London Rape Crisis Centres Experts by Experience Panel.

86 The CWJ and The Pan-London Rape Crisis Centres Experts by Experience Panel.

87 Easy Read texts use simple language in an accessible format, often with pictures. They are often used with people with learning disabilities.

88 Dr Natalie Byrom, *Where has my justice gone? Current issues in access to justice in England and Wales* (Nuffield Foundation, 22 April 2024) p 18.

Recommendation 33.

7.56 We recommend that independent legal advice and assistance should include, where appropriate, legal information leaflets, online and telephone advice and assistance, and in-person advice and assistance.

THE SCOPE OF THE ILR ROLE

ILR for an application made pre-trial and at trial

7.57 Having concluded that it is necessary for complainants to have a right to be heard supported by ILR when applications relating to their personal records and SBE are heard in court, we now look at how best to give effect to the ILR in practice. In the consultation paper, we considered three main models of ILR: representation that is limited to decisions made at pre-trial hearings; representation for applications whenever they arise including during the trial; and full party status for complainants.

7.58 We rejected a full party status model on the basis that it would be the costliest, cause the most delay, and have the biggest adverse impact on the binary adversarial model. It is not necessary for the complainant to be a full party to vindicate their privacy rights. There is a clear need for representation at pre-trial hearings as this is where the majority of applications regarding personal records and SBE are heard.[89] Applications relating to SBE and personal records are relatively narrow in scope and would not require the length of preparation needed for a whole trial.[90]

7.59 In relation to representation at trial, we noted that applications may arise during trial for a range of valid reasons, for example, if the need to apply to admit SBE only arose because of the evidence given at trial.[91] We suggested it would be inconsistent to deny representation because of the timing of the application. Therefore, we provisionally proposed that ILR for complainants in sexual offences prosecutions should include representation in court when applications for admission of such evidence are determined.[92]

Consultation responses

7.60 The majority of consultees agreed that ILR should include representation for applications made both pre-trial and during the trial in the absence of the jury.[93] Consultees agreed that, given the sensitivity of applications relating to SBE and

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89 CP 259, paras 8.122-8.127.

90 Above, para 8.142.

91 Above, para 8.120.

92 In CQ 67: "We provisionally propose that independent legal representation for complainants in sexual offences prosecutions should include representation at court when applications for admission of such evidence are determined, whether that is pre-trial or during the trial in the absence of the jury. Do consultees agree?" CP 259, para 8.159.

93 Of those who responded to CQ 67, 54 consultees selected "yes", 16 consultees selected "no", and 11 consultees selected "other".

personal records, the legal representative should be permitted to respond to applications whenever these decisions are taken. Three consultees agreed that the right to ILR whenever personal records or SBE applications are determined would ensure that those applications are afforded appropriate scrutiny.[94] One of these, the Law Society, caveated that "as a matter of effective case management, those issues should be addressed pre-trial unless there is a compelling reason why the matter could not be adjudicated upon before the start of the trial".

7.61 Four consultees and a stakeholder who disagreed with the provisional proposal argued that there would be additional associated delays and costs.[95] The CBA disputed our claim that preparation for SBE and personal records applications would not require the same length of time required to prepare for a full trial.[96] It stated that "in order to appreciate the relevance of any material, all material relating to the allegation must be considered", which would take more time than we suggested.

7.62 Two consultees raised concerns about creating a perception of unfairness to the defendant.[97] For example, the Six Circuits wrote that representation at court when SBE and personal records applications are determined would "appear unfair and weighted against the defence (along with the prosecutor present) and is unnecessary". It added that it would "have the appearance of undermining the role of the judge/showing a lack of confidence in the judicial system".

Analysis

7.63 We remain of the view that ILR for complainants should include representation at court in the absence of the jury when applications for admission of SBE and personal records are made. The complainant's article 8 rights are engaged whenever SBE or personal records applications are made, whether that is pre-trial or during the trial. Therefore, it is appropriate that their ILR should be able to make representations whenever those applications are made. To limit ILR to pre-trial hearings would create unjustified gaps in protection.

7.64 While there will be additional resources required when the complainant has a right to be heard with ILR, as indicated above at paragraphs 7.8 to 7.12, this is justified. As most applications relating to evidence should be made before the trial, the risk of increasing delays should be minimal. If both the defence and prosecution were to engage promptly with the complainant's representative, and the prosecution were to provide the complainant's adviser or representative with the necessary material in a timely fashion, (explored further below) delays could be further mitigated. As we explained above at paragraph 7.59 it is inevitable that some applications to admit SBE will arise during the trial. If this were to happen, the application could not be heard until the complainant's representative could attend or one could be secured. However, in our view, the resultant delay is justified as it will ensure an appropriate degree of scrutiny of these applications which engage the complainant's article 8 rights.

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94 Including: Gwent Office of the Police and Crime Commissioner; The Law Society; and Dr Susan Leahy.

95 Including the CBA; Six Circuits; and Dr Oriola Sallavaci.

96 See para 7.58.

97 Six Circuits and Dr Oriola Sallavaci.

7.65 Further to our discussion above at paragraph 7.23, we recommend a model of ILR that will result in only a limited change to the binary adversarial model, and which is intended to diminish the risk of defendants, jurors and the public perceiving unfairness towards the defendant. Our provisional proposal was that representations made at trial would be made in the absence of the jury because all applications during the trial are made in the absence of the jury. Evidentiary determinations, including details about the submissions made by parties to an application, are not (and should not be) put before the jury. Further, the complainant's representative would not be seen by members of the public even when representations were made during the trial, as such hearings are conducted in private.[98] Further, the defendant's legal representative could explain the role of the complainant's representative to the defendant. This would include explaining that the complainant's representative can only make representations in respect of certain applications relating to the complainant's SBE and personal records, that they cannot cross-examine the defendant or any other witness, and that the defendant is not facing two prosecutors. This ought to prevent perceptions of unfairness.

Conclusion

7.66 A majority of consultees agreed that ILR should include representation at court when applications for the admission of SBE and personal records are determined, whether that is pre-trial or during the trial (which will naturally occur in the absence of the jury). Without an entitlement to make representations at court when relevant applications are made, the benefits of ILR would be significantly limited.

Recommendation 34.

7.67 We recommend that independent legal representation for complainants should include representation at court when applications for the admission of their sexual behaviour evidence and compelled production of their personal records are determined, whether that is pre-trial or during the trial in the absence of the jury.

Attendance of the ILR during the trial

7.68 In the consultation paper, we asked what the role of the complainant's representative post-application should be. We considered whether they should have an active role in monitoring compliance with orders permitting the relevant evidence to be admitted and if so, whether that role should be for the duration of the trial or during the complainant's evidence only.

7.69 If the complainant's representative were present for the duration of the complainant's evidence and cross-examination they could "provide extra scrutiny to ensure the questioning is within agreed parameters".[99] However, as we highlighted in the consultation paper, there are numerous arguments against the continued presence of the ILR throughout the trial, primarily that it should be the role of the prosecutor and

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98 Youth Justice and Criminal Evidence Act 1999, s 43. See also Ch 13.

99 CP 259, para 8.163.

judge to ensure that cross-examination is kept within the decided parameters.[100] We also considered that the complainant's representative being an active presence during the trial "would be, or at least appear to be, a move away from the binary adversarial model" which could have an impact on the defendant's right to a fair trial. It could also confuse the jury, who may "equate the role of the complainant with that of the prosecution".[101] Further it could add costs and create delays to the trial process by accommodating an extra advocate's availability.

7.70 We suggested that some of these concerns could be alleviated by "the presence of a complainant's representative post-application being at the discretion of the trial judge". This is because the judge could determine "based on the applications and their decision on admissibility, whether it is appropriate for the representative to attend". A judge would also be able to explain the role of the representative to the jury and ensure that the representative acts within their remit, which would prevent interference with the defendant's right to a fair trial.[102] Since these issues were finely balanced, in Consultation Question 71 we did not reach a provisional conclusion, and instead invited views on what the role of the ILR should be at trial.[103]

Consultation responses

7.71 We received mixed responses on what the role of the ILR should be after the application has been determined.

7.72 Some consultees felt that the presence of the complainant's representative for the duration of the trial would be beneficial. Juries Understanding Rape is Essential Standard argued that it is "impossible to say with certainty when issues justifying their intervention would arise". Claire Waxman, Independent Victims' Commissioner for London, contended that representation during cross-examination would "ensure that correct procedures are followed".

7.73 However, consultees also raised concerns about the ILR being present at the trial. Some argued that this would create confusion amongst the jury which might impact on their deliberations.[104] For example, the LCCSA suggested that it might be difficult for the ILR to "maintain the necessary level of objectivity in front of a jury". Two consultees suggested that the presence of the ILR at trial, in front of the jury, might negatively impact the jury's perception of the complainant.[105] The Law Society argued that the jury "might think the complainant has something to hide". Eamon Keane

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100 Above, para 8.163.

101 Above, para 8.163.

102 Above, para 8.164.

103 In CQ 71: "We invite consultees' views on whether the independent legal representative for the complainant should be permitted to: attend the trial and, not in the presence of the jury, make representations to the judge in respect of compliance with the order permitting the relevant evidence to be admitted; attend and make representations only while the complainant is giving evidence relating to their personal records or sexual behaviour, including during cross-examination, whether at trial (including in the presence of the jury) or during a pre-trial hearing at which their evidence is recorded; or make representations to the court during the whole trial in the presence of the jury". CP 259, para 8.165.

104 Including the LCCSA; Six Circuits; and Dr Susan Leahy.

105 The Law Society and Eamon Keane.

suggested that the jury might "speculate in some way that the presence of their lawyer is somehow attributable to a risk that they themselves may impugn themselves through dishonesty".

7.74 Two consultees highlighted that the continued presence of the representative for the duration of the trial would have significant resourcing implications.[106] They noted that trials can last for several weeks, and that the presence of the ILR for this time would incur disproportionate cost.

7.75 Additionally, consultees argued against the ILR having a role at trial.[107] They suggested that the prosecution and the judge are capable of monitoring lines of questioning and intervening where that questioning goes beyond what was agreed.

Analysis

7.76 It is the duty of the court to further the overriding objective[108] by actively managing the case, which includes monitoring compliance with directions.[109] Once decisions have been taken on the disclosure and admissibility of the evidence, the prosecution and defence are obliged to respect those decisions, and it is the role of the trial judge to ensure compliance with these rulings. It is therefore difficult to justify adding an additional representative to the proceedings for any part of the trial. Doing so would disproportionately interfere with the binary adversarial model. Further, it would require disproportionate costs and resources. We therefore do not think that it is necessary to provide for ILR post-application. The only role for the ILR during trial should be to make representations when an application relating to the complainant's personal records or SBE is made, which would naturally take place in the absence of the jury.

Recommendation 35.

7.77 We recommend that the complainant's independent legal representative should have no role at the trial in the presence of the jury.

GIVING EFFECT TO THE ROLES

ILA and ILR provided by qualified legal professionals

7.78 To ensure the provision of ILA and ILR has the intended effect, we concluded in the consultation paper that it should be provided by qualified legal professionals. While there are already non-legally qualified professionals (predominantly Independent

106 RCEW and the CWJ.

107 Including Eamon Keane; Six Circuits; and the Bar Council.

108 The overriding objective of the CrimPR is that cases be dealt with justly which, amongst other things, includes "dealing with the case efficiently and expeditiously" (CrimPR 2020 rr 1.1(1) and 1.1(2)(f)).

109 CrimPR 2020 r 3.2(2)(d).

Sexual Violence Advisers ("ISVA"))[110] who provide legal information to complainants, the role of legal adviser requires different expertise. We referred to the SVCA pilot scheme, which noted that it would be "inappropriate for ISVAs to take on the role of providing legal advice" and preferred lawyers with specific expertise in this area. Further, only legally qualified professionals with rights of audience can make representations to the court on behalf of someone else. Additionally, if ILA were provided by qualified lawyers, then LPP would apply to their communications with the complainant. This would allow for a "frank exchange of confidential information and advice". However, we acknowledged that there are issues with "resourcing criminal legally aided work" and that "funding any additional service would be seen to further strain those resources".[111] We provisionally proposed that ILA and ILR should only be provided by qualified legal professionals.[112]

Consultation responses

7.79 A majority of consultees agreed that ILA and ILR should only be provided by qualified legal professionals.[113] Two main reasons were given by consultees in support. First, only those who are legally qualified would have the necessary skills and expertise to advise and represent complainants.[114] Secondly, those who are legally qualified are required to adhere to the rules of professional conduct and ethics, in particular the rules against witness coaching.[115] Therefore, requiring ILA and ILR to be provided by those who are legally qualified would maintain the integrity of the trial process.

7.80 Several consultees argued that, in addition to being legally qualified, those providing ILA and ILR should have to meet other training, experience or accreditation requirements. For example, the CBA argued that ILA and ILR should be provided by those who have "completed the relevant RASSO training and RASSO courses and who would fit the criteria of grades 3 and 4 for CPS RASSO panel advocates".[116] Other consultees suggested that those providing ILA and ILR to complainants in sexual offences cases should be required to demonstrate previous experience or specialisation.[117] Dr Leahy referred to the O'Malley Review in Ireland, which found that lawyers acting for complainants tended to lack experience compared to prosecution and defence representatives. She stated that this was often due to "issues of availability as these lawyers are often appointed at relatively short

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110 As noted in the glossary, an Independent Sexual Violence Adviser ("ISVA") is someone who provides emotional support and guidance for anyone who has experienced sexual violence at any point in their lives. They also provide information and support through the criminal justice process.

111 CP 259, paras 8.166-8.170.

112 In CQ 72: "We provisionally propose that independent legal advice and independent legal representation for complainants in sexual offences cases should only be provided by qualified legal professionals. Do consultees agree?" CP 259, para 8.171.

113 Of those who responded to CQ 72, 26 consultees selected "yes", 1 consultee selected "no", and 5 consultees selected "other".

114 Including the CPS and the CWJ.

115 The Law Society and nia.

116 CPS, *Advocate Panels: 2020 Panel – General Crime and the Rape and Serious Sexual Offences List (RASSO List)* (August 2024).

117 Including the Six Circuits and Dr Susan Leahy.

notice".[118] She also suggested that it may be necessary to have a panel of approved ILA and ILR providers. Finally, the Law Society suggested that there should be some kind of accreditation scheme for those seeking to advise and represent complainants.

7.81 However, as we explain in Chapter 1, there are concerns that currently there are insufficient legal professionals able to provide support to complainants. One consultee who agreed that the ILA and ILR should be legally qualified (nia) wrote that there is a "paucity of affordable legal advice especially with expertise on issues of violence against women". However, it objected to the lack of available legal professionals being used as a reason not to introduce publicly funded ILA.

Analysis

7.82 Consultees provided substantial support for requiring that ILA and ILR is provided by those who are legally qualified. We remain of the view that this is important to ensure that ILA and ILR provides the intended benefits. We considered whether there should be any further training, experience, or accreditation requirements for those undertaking this kind of work. Further training could improve the quality of ILA and ILR provided to complainants. For example, the SVCA Evaluation Report suggested that those performing this role should be "trauma-informed and trained by specialist support services".[119] However, we appreciate that imposing further requirements on those seeking to undertake ILA or ILR may deter them from doing so.

7.83 In our view, the desirability of any further process of accreditation is a matter for government and the relevant professional bodies, such as the Bar Standards Board and the Solicitors Regulation Authority, to decide upon. However, we do think that practitioners who are providing ILA and ILR for complainants in sexual offences cases should, at a minimum, be required to undergo training on myths and misconceptions. This is consistent with our recommendation in Chapter 11, that such training should be mandatory for practitioners undertaking work in sexual offences cases. Such training would also enable the adviser or representative to better scrutinise SBE or personal records applications, where myths and misconceptions may form the basis of the application. We also consider the role of trauma-informed practice training in the context of the introduction of specialist courts in Chapter 12.

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118 S Leahy, *The Realities of Irish Rape Trials: Perspectives from Practice* (Dublin Rape Crisis Centre, 2021) p 24.

119 SVCA Evaluation Report (2020) p 46.

Recommendation 36.

7.84 We recommend that independent legal advice and independent legal representation for complainants should only be provided by qualified legal professionals.

7.85 We recommend that those providing independent legal representation for complainants in sexual offences cases should, at a minimum, be required to undertake the same mandatory training on myths and misconceptions that is required of prosecution and defence practitioners in sexual offences cases.

Access to documents

7.86 In the consultation paper, we concluded that where a party has a right to be heard, their legal representative should be provided with the material and information necessary to enable them to exercise that right effectively. This information should be proportionate to the issues to be determined by the application. We explained that the existing rules and guidance that are used to prevent witness coaching will apply to the complainant's adviser and representative to ensure that the complainant's evidence is not contaminated.[120] Therefore, we provisionally proposed that legal advisers and representatives should be permitted to access documents relating to personal records and SBE which are necessary for them to be able to advise, assist and represent complainants.[121]

Consultation responses and analysis

7.87 The majority of consultees agreed with our provisional proposal for legal advisers to have access to the documents necessary for them to provide full and frank advice, assistance and representation for complainants.[122] Consultees agreed that access to documents is necessary in order for the legal advice and representation to be effective.[123] For example, Dr Leahy argued that without these documents, the ILA and ILR would be acting "without a full picture of the case, which would obviously limit their ability to effectively represent a complainant's interests". Further, Eamon Keane stated that, in his experience of advising complainants in Scotland, obtaining trial documents is "essential to the efficacy of the right to ILR/ILA proposed".

7.88 The Bar Council disagreed with the introduction of ILA and ILR, however, it recognised that if introduced, "the legal representatives should have access to all relevant documents to assist in the provision of advice as per the usual codes of conduct". It noted that there would be difficulty in prescribing "the correct bounds of the documents required" and that it would be necessary for a judge to make that

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120 CP 259, para 8.136.

121 In CQ 69: "We provisionally propose that legal advisers and representatives should be permitted to access documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence. Do consultees agree?" CP 259, para 8.161.

122 Of those who responded to CQ 69, 22 consultees selected "yes", 4 consultees selected "no", and 5 consultees selected "other".

123 Including the Law Society; Eamon Keane; and Dr Susan Leahy.

decision. Both the CBA and a legal practitioner at a consultation event indicated that the resolution of disputes over disclosure of materials may require additional hearings, which would create delay. In Scotland, section 64(2)(b) of the Victims, Witnesses, and Justice Reform (Scotland) Bill outlines a process for seeking the court's permission to disclose relevant documents to the ILR. In his consultation response, Eamon Keane described this clause as "cumbersome" since, in his view, the court is likely to accede to the request in most instances.

7.89 Some consultees suggested that there would need to be oversight of the materials that are disclosed to the ILA or ILR. For example, both the Six Circuits and the LCCSA suggested that a record should be kept of what is disclosed to the complainant's adviser and representative. We agree this would be helpful. The prosecution is already required to keep a record of conversations that they have with complainants or witnesses in a case. This record must be passed to the disclosure officer and "any material arising out of the contact that assists or undermines must be disclosed to the defence".[124] The prosecution is also required to keep a record of any materials disclosed to the defence.[125] It would similarly be helpful for prosecutors to keep a record of materials that they disclose to the ILA or ILR.

7.90 To provide advice or representation about challenging an SBE or personal records application, it will be necessary for the legal adviser or representative to understand the relevance of that evidence to the case. Examples of documents that would be needed in most cases would be the defence statement (in so far as it relates to the SBE application) and the applications. Exactly which documents will be necessary will vary depending on the facts of the case. In our view, the prosecution is best placed to decide which documents are necessary in the context of any given case. The legal adviser or representative could liaise with the prosecutor where they feel that greater access is required. If there were a dispute, which we think would be rare, it could be resolved through an application to the court.

Witness coaching

7.91 Consultees including the CBA, Cardiff University Law School Innocence Project and Dr Amelia Shooter raised concerns about the risk of witness coaching associated with the ILA having access to case materials. The CBA wrote that the complainant should be protected from the "risk of adapting, even sub-consciously, their evidence to meet other material". Dr Shooter agreed that the ILA and ILR should be able to access necessary documents but that there should be guidance given on "the restrictions of advice, particularly designed to minimise the risk of witness coaching". The CWJ stated that it does not believe that there is reason for concern regarding ILA having access to documents relevant to personal records or SBE applications. It noted that lawyers advising complainants are "required to adhere strictly to their professional duty to not coach any client". Further, it stated that:

> In certain cases, a lawyer will be able to provide the victim with much better advice if they are able to understand the full picture of the evidence in the case, even if (as they will be aware) they cannot share all material with their client.

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124 CPS, *Disclosure Manual: Chapter 20 - Victim Communication and Liaison* (October 2021).

125 CPS, *Disclosure Manual: Chapter 29 – Large Scale Case Administration* (October 2021).

7.92 When engaging with the complainant, the legal adviser or representative would have to adhere to the rules against witness coaching. The CPS Guidance for Speaking to Witnesses at Court clearly outlines the common law rules on witness coaching and how the prosecution ought to ensure that they adhere to them. The ILA and ILR would be able to discuss "the general nature of the defence where it is known" without engaging "in a discussion of the factual basis of it". They should not "provide the detail of, discuss or speculate upon the specific questions a witness is likely to face or discuss with them how to answer the questions".[126]

7.93 Since the adviser or representative would be legally qualified, they will be capable of exercising professional judgement when discussing the case with complainants. The SVCA Evaluation Report noted that in family proceedings representatives of child clients use "professional judgement to avoid sharing details of sensitive and potentially distressing evidence … Representation therefore does not have to equate [to] a full briefing of the client".[127] To comply with the Solicitors Regulation Authority Code of Conduct, solicitors are usually required to "make the client aware of all information material to the matter of which [they] have knowledge". An exception to this is where a client "gives informed consent, given or evidenced in writing, to the information not being disclosed to them".[128] To prevent witness coaching and contamination of the complainant's evidence, whilst also complying with the Code, the legal adviser or representative could obtain consent from the complainant to refrain from sharing certain materials with them. We have heard from Robyn Gilbert (Senior Solicitor at the SACP Service, Legal Aid NSW), that one of the terms of their retainer with the complainant states that they are not able to pass on all information about the case that they receive. A similar approach could be taken in England and Wales: consent to refrain from sharing certain material could be obtained, and confirmed in the terms of the retainer.

7.94 The legal adviser or representative would be bound by their professional obligations to the court. They would be aware that breach of these obligations would result in disciplinary proceedings and sanctions from their regulator. Further, coaching would be contrary to the complainant's interests because it may jeopardise the prosecution. Collectively, this will ensure that the ILA and ILR exercise caution when advising the complainant.

Conclusion

7.95 In conclusion, the complainant's independent legal adviser and representative should be permitted to access documents necessary to provide full and frank legal advice, assistance and representation relating to applications about their personal records and sexual behaviour. These documents should be provided to the complainant's adviser or representative by the prosecution, and a record should be kept of disclosures that are made. In the exceptional case where there is a dispute over disclosure between the prosecution and the ILA or ILR, this ought to be resolved

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126 CPS, *Speaking to Witnesses at Court Legal Guidance* (March 2018), para 3.4(3)(d)(i).

127 O Smith and E Daly, *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme* (December 2020) p 31.

128 The Solicitors Regulation Authority, SRA Code of Conduct for Solicitors, RELs and RFLs (November 2019) ("SRA Code of Conduct") para 6.4.

through application to the court. To further reduce the risk of witness coaching, the ILA and ILR ought to seek consent from the complainant not to share certain material with them, and this should be included in their initial retainer.

Recommendation 37.

7.96 We recommend that independent legal advisers and representatives should be permitted to access documents necessary to provide full and frank legal advice, assistance and representation relating to applications about complainants' personal records and sexual behaviour.

Engagement with the police, prosecution and defence

7.97 While complainants can privately instruct solicitors to provide them with legal advice, currently there is no formal entitlement to do so. One of the limits to the current position is that the adviser does not have standing to engage directly with police, prosecution, and the defence to access documents.[129] If communication with others involved in the process is restricted, then this may impact the ability of the ILA to give meaningful tailored advice to the complainant. Engagement with the police will also be necessary at the investigation stage to challenge excessive requests for personal records. Further, the adviser can engage with the police and prosecution to find out whether questions about SBE will be asked at an Achieving Best Evidence ("ABE") interview, and what might subsequently be allowed to be asked at trial on the basis of the ABE interview. This will allow them to give more meaningful advice to the complainant about whether evidence of their sexual behaviour can be used at trial. Consequently, we provisionally proposed that legal advisers and representatives should be permitted to engage directly with the police, prosecution and defence counsel[130] where necessary to obtain trial documents.[131]

Consultation responses

7.98 Consultees recognised that a formal right to engage with the police, prosecution and defence would add value to the ILA and ILR roles. For example, The Law Society wrote that "effective representation requires the ability to discuss matters with others involved in the case, and without this they would not be able to properly advise". Further, it stated that "being able to engage directly with police, prosecution, and

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129 CP 259, para 8.107.

130 We also recognise that there will be times when it may be desirable for legal advisers to engage with the court. For example, speaking with the court about the availability of measures to assist with giving evidence (currently called "special measures") would enable the adviser to advise the complainant in greater detail about the options available to them. In our view, engagement with the court is a natural extension of the right to be heard.

131 In CQ 70: "We provisionally propose that legal advisers and representatives should be permitted to engage directly with police, prosecutors and defence counsel where necessary. This is in order to obtain trial documents necessary to provide full and frank advice, assistance, and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence. Do consultees agree?" CP 259, para 8.162.

defence solicitors and counsel may lead to certain matters being negotiated or agreed, which will be advantageous for all involved in the process".

7.99 The Bar Council however suggested that engagement should "only take place with the litigators for each party – so representatives for the complainant to defence solicitors and the CPS, not directly with the police or defence counsel". Otherwise, it suggested that there would be "too much room for confusion, inappropriate release of material or indeed breach of the conduct rules imposed on advocates conducting litigation".

7.100 The CBA questioned how the relationship between the ILA and ILR and other parties would be managed. For example, it asked if there would be professional sanctions imposed if any of the parties do not engage with them.

Analysis

7.101 The SVCA Evaluation Report found that lack of direct communication between the SVCAs and the CPS was a challenge. Police forces felt that they were often acting as messengers between the SVCAs and the CPS, which added to their workload. It recommended that there should be a clear policy on communication between the SVCAs and prosecutors if the scheme were expanded.[132] In our proposed model, the prosecution would be primarily responsible for providing the ILA and ILR with the documents necessary to provide advice, assistance and representation. To this end, it ought to be made clear that the ILA and ILR are permitted to engage with the prosecution for the purpose of obtaining materials necessary to provide full and frank legal advice, assistance and representation to the complainant.

7.102 We think it is important that the complainant's legal adviser or representative can also engage directly with the police. The SVCA Evaluation Report found that one of the "main benefits" of the SVCA role was the "potential to challenge police and hold them accountable for ensuring best practice".[133] For example, in some cases the SVCAs were able to work with officers to ensure that consent for access to TPM was obtained properly where inappropriate consent forms had been used.[134] In other cases, the SVCAs were able to liaise with police to ensure that an intermediary was arranged who had expertise in the complainant's mental health condition.[135] Evidently, much of the value of the ILA role comes from their ability to engage directly with the police.

7.103 Although engagement between the ILR and prosecution and defence counsel is unlikely to be as frequent, we still see value in allowing such engagement. Ahead of an application on SBE or personal records being made, the complainant's representative might want to speak to the defence and/or prosecution counsel in order to identify issues where there is agreement, and where there is still dispute. Engagement like this is routine between the defence and prosecution, and we see no

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132 SVCA Evaluation Report (2020) p 45-46.

133 Above, p 47.

134 Above, p 54.

135 Above, p 55. For further discussion about the extension of ILA to advice on measures to assist with giving evidence see Ch 9.

reason why such engagement should not also be possible for a complainant's representative where the complainant has a right to be heard.

7.104 Engagement with the ILR can be ensured through existing obligations in the Criminal Procedure Rules ("CrimPR"). Parties to a case are under a duty to actively assist the court in furthering the overriding objective.[136] Where there is an independent legal adviser or representative, productive engagement by the parties will be in the interests of justice. Where there are issues with engagement, there are existing mechanisms available to the court to encourage engagement between parties. For example, engagement with the complainant's representative can be encouraged through active case management by the court.[137]

Recommendation 38.

7.105 We recommend that complainants' independent legal advisers and representatives should be permitted to engage directly with the police, prosecution and defence where necessary to provide full and frank legal advice, assistance and representation to the complainant.

ILA AND ILR ON OTHER ISSUES

7.106 In the consultation paper we proposed a limited role for ILA and ILR, made available only for the matters at trial that most engage the complainant's right to privacy and their involvement in the trial as a witness. During consultation we received suggestions of other matters for which ILA and ILR should be made available, including:

(1) making a criminal injuries compensation ("CIC") claim;

(2) applications to admit evidence of CIC claims;

(3) the victims' right to review ("VRR") scheme;

(4) complaints about the police and CPS;

(5) failure to gather defendant bad character evidence;

(6) victim personal statements ("VPS");

(7) applications to admit complainants' bad character evidence; and

(8) all matters and areas of concern relating to a complainant's engagement in the criminal justice process.

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136 CrimPR 2020, r 3.3. See para 7.76.

137 CrimPR 2020, r 3.5.

7.107 The overarching goal of introducing ILA and ILR for personal records and SBE applications is to ensure that complainants' privacy rights are adequately protected. Several of the matters listed above do not have the same risk of engaging complainants' privacy rights as do personal records and SBE applications, therefore there is less justification for providing ILA or ILR in respect of those issues. For example, whether to make a CIC claim or a complaint about the police does not always engage the complainant's privacy right. Comparatively, an application to admit evidence of a CIC claim would be likely to contain personal information, such as information about the complainant's mental health. There is therefore a stronger argument for extending provision of ILA and ILR to those issues which are more likely to engage the complainant's privacy right. We consider these further below.

7.108 A further consideration is the impact on the binary adversarial trial model if the complainant had a right to be represented for additional applications and stages of the trial process. As explained above, departure from the binary adversarial trial model is justified because these are areas where the complainant's article 8 rights are most directly engaged, and is proportionate because the departure is narrow in scope.

ILA and ILR for applications to admit evidence of CIC claims

7.109 In Chapter 5, we explain that evidence of CIC claims has the potential to be uniquely prejudicial in sexual offences cases. There is a risk that evidence of CIC claims may trigger the myth that people commonly make false allegations of sexual offending for financial gain. We suggested that the prejudicial potential of CIC claim evidence is similar to that of SBE.

7.110 In the consultation paper, we stated that material and information held by the Criminal Injuries Compensation Authority ("CICA") is a third-party record, meaning that requests to access this information will be considered under the personal records regime.[138] Therefore, the effect of our recommendations is that the complainant will have ILA and a right to be heard and ILR for requests for access or compelled production of CIC evidence where it is held by a third party such as the CICA. These records will contain personal information about the complainant, such as details about their mental and physical health, which engages their article 8 rights. Further, as we outline in Chapter 5, CIC evidence could be within the defendant's knowledge or possession without having come from the CICA via the personal records regime. Our recommended enhanced relevance threshold for admitting CIC evidence will apply whatever its source, whether derived from third-party material or otherwise.

7.111 The risks associated with CIC evidence are present regardless of its source. However, in our view, this is not sufficient to justify expanding the complainant's right to be heard regarding the admissibility of CIC evidence. Interference with the binary adversarial trial model is proportionate where that interference is necessary to safeguard the complainant's article 8 rights. Extending the right to be heard to applications to admit evidence of CIC claims would not significantly improve this protection given the overlap with the personal records regime.

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138 CP 259, para 6.9.

7.112 We therefore conclude that the complainant's right to be heard supported by ILR should not be extended to applications to admit evidence of CIC claims.

ILA and ILR on complainant bad character evidence

7.113 Professor John Jackson suggested that "if [a right to be heard] were implemented, it would seem logical that it should extend to applications relating to the admission of complainants' bad character evidence (as provided for in the new Victims, Witnesses and Justice Reform (Scotland) Bill 2023)".

7.114 The Victims, Witnesses and Justice Reform (Scotland) Bill (as introduced) creates a right for complainers in Scotland to have access to independent legal representation in relation to applications made to admit evidence of the complainer's bad character and sexual behaviour in sexual offences cases. In Scotland, admissibility of these kinds of evidence is dealt with jointly in statute.[139]

7.115 As we outline in Chapter 4 we do not recommend that evidence of the complainant's bad character (primarily evidence of previous false allegations of sexual offending) should have to meet the same threshold as evidence of the complainant's sexual behaviour. Evidence of the complainant's bad character can have a similarly prejudicial effect as SBE. However, the underlying justification for introducing a right to be heard supported by ILR is to protect the privacy rights of complainants in sexual offences cases. In our view, these privacy rights are engaged by SBE, but not by evidence of previous false allegations or other misconduct that falls outside the SBE framework. Use of evidence of the complainant's sexual behaviour is a direct intrusion into an intimate part of the complainant's personal life. Comparatively, evidence of a false allegation that is limited to the fact that the complainant has misconducted themselves and does not include any evidence of their sexual behaviour, does not engage their privacy rights in the same way. We therefore conclude that the complainant's right to be heard supported by ILR should not extend to applications to admit evidence of the complainant's bad character.

Providing advice

7.116 The provision of ILA to support individualised assessment and informed decision making on measures to assist complainants to give evidence[140] demonstrates the benefit of ILA even where the main concern is not the vindication of privacy rights. We can see that similar arguments can be made for analogous issues that may arise during the criminal justice process such as a VRR application, support when the police fail to explore routes of investigation, or providing a VPS. One consultee explained that it might be difficult for an adviser or representative to have to decline to give advice on such topics when they are already engaged with a complainant on a matter for which there is express provision for ILA or ILR.[141] However, these matters fall outside of our terms of reference, meaning that we have not consulted on whether ILA should also be available in respect of these legal issues.

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139 Criminal Procedure (Scotland) Act 1995, ss 274-275.

140 See Ch 9.

141 The CWJ.

7.117 Government have announced the introduction of an "independent legal advocate" scheme to support adult rape complainants. This will include the provision of legal advice about reviewing CPS decisions, making an application for compensation, requests for medical data or mobile phone access, and general rights and entitlements.[142] As such, several of the additional areas put to us by consultees are already being considered by government.

Conclusion

7.118 We have recommended that ILA and ILR should be provided for complainants in relation to applications about their personal records or sexual behaviour in order to vindicate their right to privacy. We have also recommended that ILA (but not ILR) should be available with respect to special measures. Whilst we acknowledge the arguments for an adviser to provide advice on related issues, such as those suggested by consultees, our recommendations are limited in order to ensure that ILA and ILR is proportionate. Government has introduced measures for an ILA scheme that would provide advice to complainants on a greater range of issues.

CONCLUSION

7.119 We have concluded that complainants should have a right to be heard, supported by ILR and ILA, for applications relating to their personal records and SBE, and ILA in relation to measures to assist with giving evidence. This will improve the protection of complainants' privacy rights; reduce traumatisation in the trial process; create efficiencies by reducing disproportionate requests for TPM; and improve public confidence in the criminal justice system. Such a model would not interfere with defendants' fair trial rights. It is in the interests of justice that such sensitive, difficult admissibility decisions are fully scrutinised.

7.120 We have considered the scope of independent legal advice that should be provided to complainants in sexual offences cases. We have concluded that this should include a range of forms of advice, including legal information leaflets, online and telephone advice, and in-person advice and assistance.

7.121 We have considered the scope of the independent legal representation that should be provided to complainants in sexual offences cases. We have concluded that ILR should only include representation at court when applications for admission of SBE or access to personal records are determined, whether that is pre-trial or during the trial in the absence of the jury. We do not recommend that the ILR should have any role at trial other than making representations on the complainant's behalf in respect of these applications. To best ensure that the benefits of ILA and ILR are realised, we have concluded that:

(1) legal advisers and representatives should be permitted to engage directly with police, prosecutors and defence counsel where necessary;

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142 Ministry of Justice, *Extra support for women through the criminal justice system announced* (24 September 2024).

(2) legal advisers and representatives should be permitted to access documents necessary to provide full and frank advice, assistance and representation relating to personal records and SBE; and

(3) ILA and ILR should only be provided by qualified legal professionals.

Chapter 8: Right of appeal

INTRODUCTION

8.1 In sexual offences cases the use of complainants' personal records and sexual behaviour evidence ("SBE") carries a risk of introducing myths and misconceptions that can inappropriately impact jury decision making. Questions of access, disclosure and admissibility will also engage several rights, including the complainant's right to a private life and the defendant's right to a fair trial protected by the European Convention on Human Rights ("ECHR"). To better reflect the risks, and ensure appropriate consideration of these rights, we recommend a bespoke regime regulating access to complainants' personal records, and a new threshold for the admissibility of SBE (for further detail see Chapters 2 and 3).

8.2 In Chapter 7 we recommend that complainants should have a right to be heard in respect of applications for the compelled production of their personal records and the admissibility of their SBE. We also recommend that complainants should have access to independent legal advice, assistance and representation in respect of those applications. Part of the rationale for these recommendations is to ensure that the complainant's position on these challenging applications that engage their privacy rights is adequately advanced to the court.

8.3 Given the sensitivity of these matters, and the importance of the decisions, we have also considered whether there should be any right of appeal against rulings on such applications. A right of appeal would provide a layer of oversight of judicial rulings because if leave to appeal were granted then rulings would be reviewed independently by a panel of three judges in the Court of Appeal. This would encourage "better-reasoned decisions" at first instance because of the knowledge that these rulings could be subject to further review.[1]

8.4 In the consultation paper we explored different models of an appeal right, for complainants and for all parties, concerning SBE and personal records applications. We considered models that would enable the relevant party to appeal the admissibility decision before the conclusion of the trial. As the decisions relate to evidence that would be adduced at trial, it is necessary that any challenge to that decision can be resolved before the trial proceeds any further. If an appeal is successful, the outcome (either by admitting evidence previously denied, or not admitting evidence previously permitted) will prevent harm from the original decision before it is realised. While there is some scope for defendants to challenge admissibility decisions post-conviction, this is limited, and the defendant will have already been convicted. There is currently no right of appeal allowing complainants to challenge a decision on an application concerning evidence of their sexual behaviour or personal records. Without any right of appeal, the right to a private life that they may have asserted in opposition to the application is engaged the moment the evidence is admitted.

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[1] Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper 259 ("CP 259"), para 11.46.

8.5 We provisionally concluded that there would be benefits to the individuals in the case, and to the trial process, from an appeal right on decisions relating to the admissibility of SBE and personal records. However, we also described the very real challenges such rights would present, including the prospect of delay to the trial. As we explore in Chapter 14, delay has harmful consequences for all parties and is contrary to the interests of justice.[2] We considered different models of limited rights of appeal that sought to balance the benefits with the risks.

8.6 In this chapter we first consider whether the complainant should have a right to appeal a ruling relating to evidence of their personal records or sexual behaviour limited to rulings made at a preparatory hearing. We conclude that complainants should be able to appeal a ruling on the admissibility of their SBE, but not their personal records, made at a preparatory hearing. This right of appeal would be equivalent to the limited right of appeal that a defendant has against evidential rulings made at a preparatory hearing, except limited to evidential rulings regarding SBE. We also recommend that a complainant who has a right to be heard on a public interest immunity application relating to the disclosure of their personal records should have the same right to appeal a decision as is afforded to the prosecution and defendant, where that decision is made at a preparatory hearing. We also conclude that complainants should have access to independent legal advice and representation where they have a right to appeal a judicial ruling.

8.7 Next, we examine whether better use could be made of preparatory hearings to determine the admissibility of SBE and personal records. Currently, preparatory hearings are not often used for the purpose of determining the admissibility of SBE or personal records. If preparatory hearings were used more often for this purpose then there would be a greater number of potentially appealable applications. While preparatory hearings have a useful role in the trial process, we conclude that their increased use is not the appropriate vehicle for giving complainants a further right of appeal. However, if the court orders a preparatory hearing and determines an SBE application at that hearing, then the complainant should have the same right to appeal a ruling on that application as the prosecution and defence.

8.8 We also consider whether an appeal right should extend beyond preparatory hearings to decisions made at other pre-trial hearings or at trial, for the complainant alone, or for all parties to the relevant application. We conclude that greater evaluation is required of the impact of such a right of appeal on the wider system of criminal appeals. We are considering this in our ongoing project on criminal appeals.[3]

CURRENT LAW

8.9 Currently, there are limited rights of appeal for parties to challenge rulings made during a criminal case before the verdict is given. The prosecution or the defendant (as the two parties in the case) may appeal to the Court of Appeal Criminal Division

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2 In extreme cases delay could also amount to interference with the defendant's ECHR article 6 right to receive a fair hearing "within a reasonable time". The European Court of Human Rights ("ECtHR") have previously found a period of seven years and 10 months between arrest and acquittal to have failed to satisfy the reasonable time requirement: *Rutkowski v Poland* (2018) 66 EHRR 15.

3 Criminal Appeals (2025) Law Commission Consultation Paper No 268 ("CP 268") ch 12.

("CACD") against a ruling made at a preparatory hearing, with the leave of the judge or the CACD.[4] Preparatory hearings can only be ordered by judges in cases of serious fraud, or in cases of sufficient complexity, seriousness, or likely length *and* where holding the hearing would accrue "substantial benefits".[5] At a preparatory hearing, the judge can make rulings about the admissibility of evidence, any other question of law relating to the case, and any question as to the severance or joinder of charges.[6] Preparatory hearings, and any appeals arising from them, must conclude before the trial can continue.[7]

8.10 Other than a judicial ruling made at a preparatory hearing, the prosecution may appeal a judicial ruling under section 58 of the Criminal Justice Act ("CJA") 2003, except for a ruling that the jury be discharged. The prosecution can appeal any ruling made "in relation to a trial on indictment" at any point pre-trial and after the trial has begun before the judge starts their summing up.[8] However, a section 58 appeal can only be made if the prosecution enter an "acquittal agreement", whereby they agree that the defendant is to be acquitted if leave to appeal is not obtained or the appeal is abandoned.[9]

8.11 In a limited set of circumstances, third parties (any individual besides the prosecution and defence) might have the right to appeal a decision where they have an interest in it, or are affected by the ruling.[10] For example, a legal representative of a party to proceedings may appeal a wasted costs order made against them.[11] There are some narrower circumstances where a third party can appeal a ruling before the trial has concluded. Any person "aggrieved" by an order that restricts publication of a trial

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4 Criminal Procedure and Investigations Act ("CPIA") 1996, s 35(1); Criminal Justice Act ("CJA") 1987, s 9(11).

5 CPIA 1996, s 29(1).

6 Above, s 31(3).

7 Above, s 35(2). As discussed further below (para 8.55) if a judge orders a preparatory hearing, the trial shall start with that hearing (CJA 1987, s 8; CPIA 1996, s 30).

8 CJA 2003, s 58(13).

9 Above, ss 58(8)-(9). Section 62 of the CJA 2003 would also introduce a power for the prosecution to appeal against evidentiary rulings (rulings as to the admissibility of prosecution evidence which would include rulings relating to SBE and personal records) but without the need for an acquittal agreement. This provision has not yet come into force and requires an order of the Secretary of State to do so (CJA 2003, s 336(3)). The Law Commission have recently provisionally proposed that this section should not be brought into effect and should instead be repealed (CP 268, para 12.92).

10 In addition to those listed below, other examples of third party rights of appeal in criminal cases are: a right of appeal by way of case stated against a decision by a magistrates' court that applies to "any person … aggrieved by the conviction, order or determination or other proceeding" (Magistrates' Court Act 1980, s 111); in confiscation proceedings where there has been a determination of the defendant's interest in a property, a third party claiming an interest may appeal a determination refusing them the opportunity to make representations (Proceeds of Crime Act 2002, s 31); a parent or guardian may appeal a parenting order made against them upon conviction of a child aged under 18 (Sentencing Code, s 366(9)). See CP 259, paras 11.19-11.22.

11 Prosecution of Offenders Act 1985, s 19A.

report, or an order that restricts public access to a trial on indictment in the Crown Court, or proceedings related to that trial, can seek leave to appeal that order.[12]

8.12 After the verdict is given, any person convicted of an offence tried on indictment has a right of appeal against conviction or sentence if leave is granted by the CACD, or (less commonly) where the trial judge grants a certificate that the case is fit for appeal within 28 days of the conviction.[13] The CACD must "allow an appeal against conviction if they think that the conviction is unsafe" and quash the conviction.[14] Therefore, the defendant can challenge a ruling to admit or exclude evidence but would have to demonstrate that the ruling rendered the conviction unsafe. This could include rulings made about SBE or personal records.

THE CASE FOR REFORM

8.13 Applications relating to SBE and personal records are complex and carry a risk of introducing myths and misconceptions into the trial process. Further, these applications directly engage the complainant's right to privacy under article 8 of the ECHR.

8.14 Under article 13 of the ECHR, those whose rights have been violated have a right to an effective remedy before a national authority, without having to apply directly to the European Court of Human Rights ("ECtHR"). The rationale underlying article 13 is that unless individuals have an appropriate domestic remedy, the effective functioning of the ECHR and the protections which it affords are undermined.[15] The ECtHR has found that article 13 will be violated where there is no effective remedy for a violation of article 8.[16] Currently, complainants have no route of challenge for a decision of a domestic court that potentially breaches their rights under the ECHR: their only option to vindicate their rights is to apply to the ECtHR.[17]

8.15 The prosecution may choose not to appeal a ruling on these types of evidence, even when that ruling engages the complainant's privacy rights. As we outline in Chapter 7, the prosecution has an overriding duty to act in the public interest, and the

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12 CJA 1988, s 159. This right of appeal is particularly relevant, as it is an example of a third party right of appeal to vindicate a right which is engaged by the original decision, namely the right to freedom of expression protected by article 10 of the ECHR.

13 Criminal Appeal Act 1968, s 1.

14 Above, s 2.

15 See *Kudla v Poland* App No 30210/96 at [152], where the Grand Chamber explained that article 13 gives "direct expression to the States' obligation to protect human rights first and foremost within their own legal system" and therefore "establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights".

16 See *Panteleyenko v Ukraine* App No 11901/02, where a right of appeal in respect of the disclosure of confidential psychiatric information at a public hearing was found to be an ineffective remedy as it had resulted in neither the discontinuance of the disclosure of the private information, nor compensation for the unlawful interference with the applicant's private life. More broadly, see European Court of Human Rights, *Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy* (28 February 2025) p 48/88.

17 Article 13 of the European Convention on Human Rights is not incorporated into domestic law by the Human Rights Act 1998. See the Human Rights Act 1998, sch 1.

complainant's privacy is only one aspect of this.[18] A right for complainants to appeal rulings on SBE and personal records, independent of the prosecution, could help to ensure that the complainant's privacy is given appropriate consideration, and to provide the complainant with an effective remedy for decisions which violate their right to privacy.

8.16 A right of appeal against such decisions could ensure better-reasoned decisions at first instance. This is because the knowledge that these rulings are appealable might lead to greater consideration of their reasoning. If the complainant has a right of appeal, thorough consideration of the submissions of the complainant's representative will be encouraged. Further, it would allow a body of case law to develop, which would promote greater consistency of first-instance decisions.

8.17 The primary concern with extending rights of appeal against judicial rulings is the delay that would be caused whilst the outcome of an appeal is pending.[19] For example, in the consultation paper we noted that stakeholders observed that the time required to obtain trial transcripts and list appeals causes delays impacting on the CACD.[20] Any delay caused by further appeal rights would exacerbate existing delays within the criminal justice system.[21] The extent of delay would vary depending on the model of appeal right, including who can apply for leave to appeal, at what point in the trial this right arises, and the threshold for granting leave to appeal.

8.18 We now turn to examine consultees' responses on different models of rights of appeal for complainants in sexual offences cases.

COMPLAINANTS' APPEALS OF RULINGS MADE AT PREPARATORY HEARINGS

8.19 As outlined above, there is a right, though limited, for the prosecution and defendant to appeal decisions made at preparatory hearings. In the consultation paper we explained that in the rare cases where a decision on admissibility of personal records or SBE is made at a preparatory hearing, the prosecution and defendant can appeal that decision before the trial concludes. Currently complainants have no such right of appeal. As we have recommended that complainants should have a right to be heard on those applications, without further reform they would be the only party to the application that does not have an appeal right. In the consultation paper we considered whether there is justification for extending to complainants the same appeal right available to prosecutors and defendants on such applications. Just as a right to be heard at first instance would ensure greater scrutiny and better-informed decision-making on these issues, so too would a right of appeal for complainants. Since there is potential for a lack of alignment between the interests of the prosecution

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18 In para 7.8-7.12 we explain that in sexual offences cases there is often a particular focus on the credibility of the complainant, and that sensitive personal information is often used to discredit them. The use of this information engages the complainant's privacy right, which justifies a right to be heard at first instance, as well as a right of appeal against rulings relating to evidence of sensitive personal information.

19 We address other concerns below at para 8.56.

20 CP 259, para 11.49.

21 See Chapter 1.

and the complainant, our view was that the prosecution's right of appeal insufficiently vindicates the complainant's rights.[22]

8.20 We provisionally proposed that complainants in sexual offences cases who have a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant, where that ruling is made at a preparatory hearing.[23] We noted that this would be a very limited right of appeal as it is currently "very rare that applications relating to SBE and personal records will be determined at a preparatory hearing".[24]

Consultation responses

8.21 The majority of consultees supported our provisional proposal for providing a complainant with the right to appeal judicial rulings made at preparatory hearings on the admissibility of their SBE and personal records.

8.22 Consultees agreed with our rationale.[25] For example, the London Criminal Courts Solicitors' Association ("LCCSA") wrote:

> it would be contrary to due process – and illogical – to afford complainants the right to engage in the legal process with the granting of a right to be heard without simultaneously granting a right to appeal.

8.23 The LCCSA also agreed that a right of appeal would further protect complainants' article 8 rights and would encourage wider engagement in the criminal justice system.

8.24 One victim support organisation submitted that a right of appeal for complainants was needed as their interests are separate from those of the prosecution.[26]

8.25 Consultees noted the disadvantages of extending an appeal right only to decisions made at preparatory hearings. The Crown Prosecution Service ("CPS") suggested that limiting the right of appeal to preparatory hearings "would undermine the overall value of the appeal right to complainants" though acknowledged that this would mitigate the risk of delay. The General Council of the Bar of England and Wales ("the Bar Council") wrote that applications to admit evidence relating to personal records or sexual behaviour are "never currently determined at preparatory hearings". Instead, it explained that they are dealt with at further case management hearings. Dr Matt Thomason commented that if complainants' appeal rights were limited to decisions

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22 CP 259, para 8.2.

23 Consultation Question ("CQ") 104: "We provisionally propose that complainants who have a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant. This will only occur where the decision is made at a "preparatory hearing" (a hearing that can be ordered by a judge pursuant to section 29 of the Criminal Procedure and Investigations Act 1996). Do consultees agree?" CP 259, para 11.89.

24 CP 259, para 11.78; *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10, at [21].

25 Of those who responded to CQ 104, 40 consultees selected "yes", 16 consultees selected "no", and 14 consultees selected "other".

26 Solace Women's Aid.

made at preparatory hearings, then "tactically, the defence would be best advised to delay applications until this right to appeal no longer applied".

8.26 Both HM Council of Circuit Judges and an individual Circuit Judge argued that the prosecution is capable of protecting the interests of the complainant, and that the proper solution is to ensure that the legislation is applied properly in the first instance by providing further training to judges.

8.27 Several consultees objected to the proposal on the grounds that a right of appeal for complainants from preparatory hearings would result in delay and costs.[27] For example, the Criminal Bar Association ("CBA") argued that complainants would "naturally seek to appeal any ruling that was adverse to them", resulting in "relatively frequent" appeals and causing delay.[28] HM Council of Circuit Judges commented that "such rights [of appeal] would be likely to be exercised despite advice to the contrary".

Analysis

8.28 We think it is justified and proportionate to provide a complainant who has a right to be heard on an application to admit evidence of their sexual behaviour a right to appeal such a decision when it is taken at a preparatory hearing. The complainant's privacy rights are directly engaged by an application to admit evidence of their sexual behaviour. As we outline in Chapter 7, the interests of the prosecution and the complainant do not necessarily align. The prosecution is obliged to act in the wider public interest, and the complainant's right to privacy is only one aspect of this. We have already concluded that to ensure their privacy rights can be better vindicated in the trial process, the complainant should have a right to be heard on applications to admit evidence of their sexual behaviour. The same rationale justifies a right of appeal for complainants.

8.29 At first instance, the involvement of the complainant, through their legal representative, will also provide and facilitate additional scrutiny of applications that are sensitive, difficult, and important to the trial as a whole. An appeal right would amplify this benefit and could result in better-reasoned first-instance decision making.[29] Well-reasoned, scrutinised decision making for SBE admissibility applications will help to ensure greater public confidence in the criminal justice system. Further judicial training would be valuable, but we do not consider that it is a suitable alternative to a right of appeal for complainants, from preparatory hearings or otherwise. Judges already receive training and, if our recommendations are implemented, would also be trained on our reformed SBE framework. In our view, an appeal right would provide the complainant with the ability to vindicate their rights that are by definition compromised when an order to admit SBE is made.

8.30 We note that a similar appeal right is currently being considered in Scotland. A right of appeal for complainers is included in the Victims, Witnesses, and Justice Reform

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27 Including the Criminal Bar Association ("CBA"); Six Circuits; and the Bar Council.

28 Two consultees who selected "other" made similar submissions. HM Council of Circuit Judges, who provided a response categorised as "other", similarly suggested that "such rights would be likely to be exercised despite advice to the contrary". Dr Georgina Clifford (a clinical psychologist) suggested that complainants might choose to appeal admissibility decisions out of fear or anxiety.

29 See para 7.11.

(Scotland) Bill.[30] This right of appeal is equivalent to the existing right for a party to appeal against a decision taken at a first diet[31] or a preliminary hearing, which requires the leave of the court of first instance.[32]

8.31 Limiting complainants' appeal rights to decisions on the admissibility of SBE made at preparatory hearings not only ensures a level of parity with defendants' rights regarding such applications, but also would have a more limited impact on delay and resources. It is a proportionate way of providing the benefit of extended appeal rights, while minimising the significant impact that appeals before the conclusion of the trial can have for all involved. The appeal right would be extended only to decisions on the admissibility of SBE. Preparatory hearings conclude before the jury is sworn in, therefore the right to appeal could not arise during trial, which would avoid adjournment of the trial and resultant delays. This also means that the complainant can appeal decisions that impact their privacy right before that right is engaged by the admission of the evidence at trial.

8.32 Within the process, there are mechanisms that will protect against the risk raised by consultees that complainants may seek to appeal every judicial ruling on the admissibility of SBE that is unfavourable to them. Complainants will have access to an independent legal adviser who could explain the likelihood of the appeal succeeding, and the consequences of delaying proceedings. Further, leave of the trial judge or the CACD is required before a ruling made at a preparatory hearing can be appealed, which could help ensure that unmeritorious appeals do not take up court time.[33]

8.33 We acknowledge that limiting the complainant's right of appeal to preparatory hearings could create an incentive for the defence to make these applications at a later stage, thereby undermining the value of that right. However, we note that to do so would be a risky litigation strategy, insofar as it would also deprive the defendant of an appeal right other than a later challenge to the safety of their conviction(s).

8.34 We acknowledge that extending the complainant's appeal right only to decisions taken at preparatory hearings is a significantly limited extension. As consultees indicated, preparatory hearings are rarely used in sexual offences cases or for the purpose of determining SBE applications. Admissibility decisions are more commonly made at other pre-trial hearings and at trial. Even for applications that are determined at preparatory hearings, there may be limited scope for an appeal to be successful. As we explained in the consultation paper, case law suggests that an appeal from a preparatory hearing is only considered justified where the point of law is "discrete, novel, certain to arise… [involves] no factual dispute" and is needed to avoid the risk of error resulting in a retrial.[34] We acknowledge that it is unlikely that fact-sensitive rulings such as on the admissibility of SBE would be so suitable. However, even

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30 Victims, Witnesses, and Justice Reform (Scotland) Bill, s 64(5).

31 In solemn cases heard in the Sheriff Court, a "first diet" will be held. Here, the court will call on the defendant to plead and (assuming the defendant pleads not guilty) other preliminary matters relating to the trial are resolved: Criminal Procedure (Scotland) Act 1995, s 71.

32 Criminal Procedure (Scotland) Act 1995, s 74(2A)(b).

33 CPIA 1996, s 35(1); CJA 1987, s 9(11).

34 *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10 at [21].

though the possibility is remote, there is some scope for appeals on decisions of admissibility of SBE arising from preparatory hearings.

8.35 We take the view that where the complainant, defendant and prosecution all have a right to be heard on SBE applications, it would be unjust if the complainant is the only one who cannot appeal at this stage. The submissions of the complainant's legal representative may not have the same force as those of the defence and prosecution without the prospect of an appeal against the subsequent decision. This would be a particularly acute disadvantage in such applications as that representative is the best protection of the complainant's right to privacy. In Chapter 7, we recommend that the complainant should have a right to be heard in respect of applications to admit evidence of their sexual behaviour. Since the prosecution and defence could seek leave to appeal a ruling on the admissibility of SBE made at a preparatory hearing, the complainant should have an equivalent right of appeal.

8.36 However, we do not think that the scrutiny of personal records admissibility applications would be improved if the complainant were to have a right of appeal from such decisions taken at a preparatory hearing. In Chapter 7, we recommend that the complainant should have a right to be heard in respect of applications for compelled production of their personal records, but not their disclosure[35] or admissibility. Our rationale is that the thresholds for disclosure and admissibility do not engage the complainant's privacy rights in the same way as the threshold for production, so a right to be heard would not meaningfully improve the scrutiny of these applications. Since the complainant does not have a right to be heard on disclosure and admissibility in respect of a first-instance ruling, they cannot have a right to appeal that ruling. Although we recommend that the complainant should have a right to be heard with respect to both pre- and post-charge applications for compelled production of their personal records, we do not take the view that there should be a corresponding right of appeal from a preparatory hearing. First, in Chapter 2 we recommend that third-party material can be accessed with the consent of the complainant and/or record holder without judicial scrutiny. Therefore, some determinations will be made without an appealable first-instance judicial ruling. Secondly, a significant proportion of requests for the complainant's personal records are made pre-charge. In these cases, a right of appeal from a preparatory hearing would be redundant because a preparatory hearing cannot occur pre-charge. Finally, a ruling on an application for compelled production would not ordinarily fall within the scope of the rulings made at a preparatory hearing: rulings at a preparatory hearing are on a "question on law relating to the case" rather than solely about the merits of the application.[36] Overall, we take the view that a right of appeal against rulings on compelled production of complainants' personal records – equivalent to that which the prosecution and defence have from a ruling made at a preparatory hearing – would have very limited value.

8.37 Currently, complainants have a right to be heard if the prosecution make an application to withhold their personal records from disclosure to the defence on the

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35 With the exception of the existing right to be heard in respect of public interest immunity applications, see CPIA, s 16.

36 CPIA 1995, s 31(3)(b).

basis of public interest immunity ("PII").[37] While it is uncommon for decisions on disclosure to be taken at a preparatory hearing, this might happen where the ruling is on a question of law and would render the ruling appealable.[38] Therefore, so that they are not the only party to the application without a right of appeal, the complainant should have a right of appeal from rulings on PII applications taken at a preparatory hearing, equivalent to that which the defence and prosecution currently have.

Recommendation 39.

8.38 We recommend that a complainant who has a right to be heard on an application concerning the admissibility of evidence of their sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant, where that decision is made at a preparatory hearing.

8.39 We recommend that a complainant who has a right to be heard on a public interest immunity application relating to the disclosure of their personal records should have the same right to appeal a decision as is afforded to the prosecution and defendant, where that decision is made at a preparatory hearing.

ACCESS TO INDEPENDENT LEGAL ADVICE AND REPRESENTATION FOR APPEALS

8.40 We recommend that complainants should have an appeal right based on their right to be heard at first instance. That right to be heard at first instance is supported by a right to independent legal advice ("ILA") and independent legal representation ("ILR") as detailed in Chapter 7. A right to be heard at first instance would not be meaningful without ILA and ILR. Similarly, complainants ought to have access to ILA and ILR in connection with their right of appeal in order to give effect to that right.

8.41 We explored this in the consultation paper[39] and provisionally proposed that complainants should have access to ILA and ILR when they have a right to appeal a judicial ruling on SBE or personal records.[40]

Consultation responses and analysis

8.42 A majority of consultees agreed that if complainants have the right to appeal a judicial ruling, then they ought to have access to ILA and ILR in respect of that right.[41]

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

38 *R v H* [2007] UKHL 7, [2007] 2 AC 270.

39 CP 259, para 11.77.

40 CQ 106: "We provisionally propose that complainants should have access to independent legal advice and representation when they have a right to appeal a judicial ruling relating to evidence of their sexual behaviour or personal records. Do consultees agree?" CP 259, para 11.91.

41 Of those who responded to CQ 106, 13 consultees selected "yes", 3 consultees selected "no", and 8 consultees selected "other".

8.43 The CWJ wrote that a right of appeal without ILA and ILR would be "of very limited usefulness" because "if appeals can only be brought on a point of law, experienced lawyers are required, and all the other parties will be represented at an appeal". Adding to our discussion on the benefit of the extra scrutiny provided by appeal rights, the CWJ wrote:

> Appeals are an important opportunity to clarify the law and create caselaw, so it is important that the appeal court is assisted by the victim being represented, rather than having to grapple with an unrepresented individual.

8.44 Although it disagreed with complainants being afforded rights of appeal, the Bar Council submitted that it would be "unthinkable that complainants would ever be expected to exercise such appeal rights as litigants in person". It suggested that doing so would "add to the trauma and stress of participating in the judicial system".

8.45 We conclude that complainants who have a right to appeal a decision on the admissibility of SBE should have access to ILA and ILR in relation to that right. It would be inconsistent for complainants to be entitled to ILA and ILR in respect of SBE applications at first instance but not in relation to an appeal. Appeals brought on a point of law require someone with legal expertise and qualification to advise and represent the complainant. Without access to ILR, a complainant would be forced to act as a litigant in person, or else forgo an appeal entirely. We agree with the Bar Council that this would be unnecessarily distressing for the complainant and could be traumatising. Without expert legal advice and representation, the benefits of extending an appeal right, including greater scrutiny of the decision making and improved argumentation, would be significantly limited. ILA and ILR are also an important measure for ensuring that complainants make better informed decisions about whether to bring an appeal which will likely delay the trial process. This will be beneficial both to the complainant and the efficient administration of justice.

Recommendation 40.

8.46 We recommend that a complainant should have access to independent legal advice and representation when they have a right to appeal a judicial ruling relating to evidence of their sexual behaviour.

FURTHER EXTENSION OF APPEAL RIGHTS FOR COMPLAINANTS

8.47 As highlighted above, preparatory hearings are infrequently used for determining the admissibility of SBE in sexual offences cases. Additionally, an appeal from such a ruling even when made at a preparatory hearing would only be justified if the point is "discrete, novel, certain to arise… [involves] no factual dispute" and needs to be determined to avoid the risk of error resulting in a retrial.[42] As described above, extending the complainant's right to appeal only to decisions made at preparatory

[42] *R v I(C)* [2009] EWCA Crim 1793, [2010] 1 Cr App R 10, at [21].

hearings is a very limited route for complainants to challenge breaches of their privacy rights.

8.48 Given the benefits of providing the complainant with an appeal right, we have considered whether there should be a wider expansion of appeal rights from decisions on SBE and personal records for complainants. In the consultation paper we set out two ways this could be achieved.

Greater use of preparatory hearings

8.49 Greater use could be made of preparatory hearings to determine applications regarding the admissibility of evidence of the complainant's sexual behaviour. This would mean that parties to those applications would have greater opportunity to appeal before a ruling takes effect in the trial. However, as we noted in the consultation paper, a potential disadvantage of greater use of preparatory hearings would be a proliferation of appeals.[43] Defendants might use their right to appeal to "further the complainant's distress, or to increase the chance that the complainant 'gives up' on supporting the proceedings".[44] However, we acknowledged that there are already adverse consequences, including costs rulings, for a defendant who brings a frivolous appeal. In the consultation paper we invited consultees' views on whether better use could be made of preparatory hearings to determine the admissibility of SBE and personal records.[45]

Consultation responses

8.50 A majority of consultees thought that better use could be made of preparatory hearings.[46] However, we received limited evidence on the benefits of doing so beyond the general benefits of extended appeal rights.

8.51 Consultees commented on whether the criteria for holding a preparatory hearing would need to be expanded to include such applications.[47] As explained above at paragraph 8.9, currently preparatory hearings can only be ordered in cases of sufficient complexity, seriousness, or likely length, and where holding the hearing would accrue "substantial benefits".[48] The Law Society of England and Wales ("Law Society") suggested that:

> some rape cases may fall within the legal scope of preparatory hearings due to their 'complexity', but more are likely to because of their 'seriousness'. However, [as] the consultation paper notes at paragraph 11.7, the legislation states that such hearings can be ordered only if 'substantial benefits' are likely to accrue.

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43 CP 259, para 11.81.

44 Above, para 11.82.

45 CQ 105(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?" CP 259, para 11.90(1).

46 Of those who responded to CQ 105(1), 29 consultees selected "yes", 9 consultees selected "no", and 13 consultees selected "other".

47 The Law Society and Six Circuits.

48 CPIA 1996, s 29(1).

8.52 The Six Circuits of England and Wales ("Six Circuits")[49] thought that preparatory hearings could not be used in the vast majority of cases. It stated that "it is unlikely that the vast majority of sex offence trials would trigger [section] 35 of the Criminal Procedure and Investigation Act ("CPIA") 1996, as the vast majority of RASSO would not qualify for such a hearing". Instead, it, along with the Bar Council, noted that it is much more likely that decisions on admissibility of evidence are determined at other parts of the trial process including ground rules hearings,[50] section 28 hearings,[51] and further case management hearings.[52] The Bar Council also highlighted that preparatory hearings are not only used for decisions on admissibility. It warned against extending their use for one purpose, without preparing for the consequences for their other uses:

> It would also seem that many aspects of the preparatory hearings scheme would have to be revised as a result, and so in effect the proposal must actually be to create a new category of 'preparatory hearing' which does not have the same features as existing preparatory hearings and is designed to deal with different issues in different cases. If this proposal is adopted, the hearing should therefore be termed, and dealt with, as a different type of hearing [for example] 'pre-trial sexual evidence hearing'.

8.53 Consultees identified several issues with using preparatory hearings more frequently to determine the admissibility of SBE. One of these was resourcing and delay. For example, HM Council of Circuit Judges stated that while increased use of preparatory hearings "may be the most appropriate method of dealing with such case management issues", this would require "extensive additional work from the legal profession and the judiciary" and that these are "resources which are currently stretched". The Six Circuits stated it would be difficult to secure adequate judicial time. The CPS commented that lack of resources would present an obstacle to preparatory hearings being used in the way suggested. Two consultees who supported better use of preparatory hearings argued that it would reduce the risk of delay to the trial.[53] For example, the LCCSA submitted that preparatory hearings help to avoid disruption to trials because they set the "legal landscape in advance of the trial". It also argued that if preparatory hearings were used more frequently "it would be rare for such rulings to be made at trial and therefore fewer appeals [would arise] at this stage of the proceedings".

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49 Consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit which was produced collaboratively by taking account of the views of individual barristers from each circuit.

50 A ground rules hearing ("GRH") is a pre-trial hearing. At a GRH, the court can give directions for the appropriate treatment and questioning of a witness, including directions about the manner of the questioning, its length, and questions which may not be asked. GRHs can also be used direct that someone may accompany a witness while they give evidence (Criminal Procedure Rules, rr 3.8(9), 3.8(6)).

51 Youth Justice and Criminal Evidence Act 1999, s 28. This is a hearing where pre-recorded cross-examination and re-examination of a witness is conducted and recorded for subsequent use at trial.

52 Criminal Practice Directions 5.2.9. Further Case Management Hearings are used for the trial judge to give directions which are necessary for an effective trial, to "set the ground rules for the conduct of the questioning" of a witness or defendant, and "to further the overriding objective".

53 LCCSA and Rachel Snaith, employee of Northumbria Office of the Police and Crime Commissioner.

8.54 Consultees also stated that expanding the use of preparatory hearings to determine the admissibility of SBE or personal records may interfere with the defendant's right to a fair trial. Dr Thomason agreed that better use could be made of preparatory hearings. However, he suggested that the defence could not be forced to make applications pre-trial without interfering with the defendant's right to a fair trial under article 6 of the ECHR. In Chapter 11 we note that a requirement for the defence to provide a list of questions for cross-examination of the complainant in advance of the trial would not interfere with the fairness of proceedings in certain circumstances, such as where necessary for the effective participation of the complainant.[54] Similarly, we do not think that holding a preparatory hearing where applications on the admissibility of SBE would be decided necessarily creates a sufficient degree of forensic disadvantage to interfere with the fairness of the trial.

8.55 The Bar Council highlighted that a preparatory hearing is deemed to be the start of the trial.[55] This means that the custody time limits for a defendant who is remanded will stop running at the start of the preparatory hearing.[56] Therefore, it argued that increasing the use of preparatory hearings would "[remove] the imperative on the court system to have the substantive trial of a defendant who is remanded in custody [begin] within the statutory time limit". Increased use of preparatory hearings could potentially deprive the defendant of the safeguards to their ECHR rights intended to be afforded by custody time limits.[57]

Analysis

8.56 Overall, the evidence we received during consultation does not support making greater use of preparatory hearings to determine the admissibility of SBE in sexual offences cases as an appropriate method of extending complainants' appeal rights. The various limitations of preparatory hearings suggest that without significant reform to their purpose and function, they would not be a suitable vehicle for hearing applications on admissibility of evidence in most sexual offences prosecutions. We also note the implications for the protection afforded to defendants by custody time limits. Creating an inroad into this safeguard is not justified solely in order to expand complainants' appeal rights. While there are notable benefits to ensuring that admissibility applications are determined before the jury are sworn in, there are other, less constrained, pre-trial hearings that are currently used for this purpose. Therefore, these benefits do not justify the extended use of preparatory hearings.

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54 See para 11.44.

55 CJA 1987, s 8; CPIA 1996, s 30.

56 A custody time limit is the maximum period for which a defendant can be held in custody in relation to an offence while awaiting the preliminary stage of proceedings to begin. These are a safeguard for defendants which prevents them from being held in custody for an excessive period of time ahead of the trial. For prosecutions being heard before the Crown Court, the maximum period of custody is 112 days (The Prosecution of Offences (Custody Time Limits) Regulations 1987 SI 1987 No 299, reg 5(3)).

57 *Kanaris v Governor of Pentonville Prison* [2003] UKHL 2, [2003] 1 WLR 443 at [16]-[17]. See also the ECHR, article 5(3), which provides that "everyone arrested or detained ... shall be entitled to trial within a reasonable time or to release pending the trial".

Complainants' rights of appeal not limited to preparatory hearings

8.57 In the consultation paper, we sought views on whether complainants should have a right of appeal against decisions on SBE and personal records that is not limited to those made at preparatory hearings. We noted that there are "many reasons why admissibility decisions are made at trial instead of before the trial begins", so limiting the appeal by the timing of the application could arguably create "arbitrary distinctions".[58] However, the concerns about delay from granting an appeal right would be more pronounced if not limited to a certain type of hearing. Such an approach could include a right of appeal even when the application is made mid-trial, creating a risk that the trial must be adjourned until the appeal is determined. In a previous project, we noted that such delays to the trial could "seriously compromise the interests of justice".[59] For example, there is a risk of prejudice from the delay because jurors may forget the evidence they have heard, or they may learn of information about the case outside of the trial process whilst waiting for the proceedings to resume. Alternatively, the jury might be discharged when leave to appeal an admissibility ruling has been granted. Restarting the trial with a new jury will result in longer delays, causing distress to the complainant and the defendant, increasing the risk that witnesses' recollections may fade and increasing the time spent by the defendant in custody or subject to bail conditions.

8.58 To mitigate this, we suggested in the consultation paper that a suitably high threshold for permission to appeal could be set to take account of the risk to the interests of justice from delay.[60] We asked an open question as to whether the complainant should have a further right of appeal against decisions about the admissibility of evidence relating to their personal records or sexual behaviour that is not limited to decisions made at preparatory hearings.[61]

Consultation responses

8.59 A majority of consultees supported the idea that complainants should have a further right of appeal against decisions regarding the admissibility of evidence relating to their personal records or sexual behaviour.[62] Those in support of extending the right of appeal beyond decisions taken at preparatory hearings agreed it would be arbitrary to

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58 CP 259, para 11.87.

59 The High Court's Jurisdiction in Relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184, para 5.18.

60 CP 259, para 11.87.

61 CQ 105(2): "Should the complainant have any further right of appeal against decisions regarding the admissibility of evidence relating to their personal records or sexual behaviour that is not limited to decisions made at preparatory hearings? If so, should that right of appeal be: (a) Limited to decisions that are made before the trial commences; or (b) Not limited so that the right includes a right to appeal a judicial ruling on admissibility made during the trial?" CP 259, para 11.90(2).

62 Of those who responded to CQ 105(2), 30 consultees selected "yes", 14 consultees selected "no", and 7 consultees selected "other". Of these: 12 consultees indicated that the right of appeal should be limited to decisions that are made before the trial commences; 8 consultees indicated that the right of appeal should not be limited so that the right includes a right to appeal a judicial ruling on admissibility made during the trial.

limit the complainant's right of appeal to preparatory hearings.[63] Although it opposed the introduction of a right of appeal, the Bar Council wrote that if a right of appeal for complainants was introduced:

> it would seem inconsistent to have a right of appeal against pre-trial decisions, and not against in-trial decisions, particularly where the applications to admit the evidence may, for good reasons, only arise during trial.

8.60 However, consultees who were opposed to extending a right of appeal for complainants beyond decisions taken at preparatory hearings argued that it would add additional cost and delay to proceedings.[64] A legal practitioner stakeholder, who was in favour of complainants having an appeal right from decisions taken at preparatory hearings, was against extending this beyond preparatory hearings. They suggested that at a certain point in the trial process "the guillotine comes down and we can't do anything more" because at later stages of the trial process "other interests are more germane".

8.61 Below, we consider whether there should be a right for all parties to an application to admit evidence relating to either the complainant's personal records or sexual behaviour to appeal the decision (a "general right of appeal"). The responses that we received about a general right of appeal overlap with those outlined immediately above about a further right of appeal for complainants, as does the rationale in our analysis. As such, we have provided our views on both these models of appeal right below from paragraph 8.67.

EXTENDING THE GENERAL RIGHT OF APPEAL TO APPLICATIONS CONCERNING COMPLAINANTS' SBE AND PERSONAL RECORDS

8.62 In the consultation paper, we asked for views on whether there should 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. Although the defendant has a right of appeal against conviction (as outlined above at paragraph 8.10), they have no right to appeal an evidential ruling unless it is made at a preparatory hearing. The prosecution can appeal such a ruling before the conclusion of the trial if they provide an acquittal agreement.[65] A general right of appeal would give parties the opportunity to challenge admissibility rulings on potentially important evidence, which would provide greater scrutiny of such rulings.

8.63 However, we also explained that a general right of appeal could lead to delays which, as explained above at paragraph 8.57, would compromise the interests of justice. In the consultation paper, we suggested that this risk could be mitigated by ensuring that as far as possible, admissibility appeals are dealt with before the trial commences. Recognising that some applications to admit evidence can only arise closer to or

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63 Including Dr Matt Thomason; the Bar Council; and Juries Understanding Rape is Essential Standard ("JURIES").

64 Including: Cardiff University Law School Innocence Project; HM Council of Circuit Judges; and Lyall Thompson (barrister). Similar concerns were raised by stakeholders at consultation events, including two legal practitioners and a member of the judiciary.

65 CJA 2003, ss 58(8)-(9).

during the trial, we suggested that delay could be mitigated by using an expedited appeal process. We also highlighted that such appeals would be narrow in scope and, accordingly, any appeal hearing should be short. Nonetheless, we recognised that, even if mitigating measures were introduced, delays could still arise, particularly if there were a significant increase in the number of appeals against decisions on the admissibility of SBE and personal records. We asked an open question about whether there should 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.[66]

Consultation responses

8.64 We received mixed views in response to this question.[67] Consultees who supported a general right of appeal against decisions on SBE and personal records argued that it is justified because of the sensitive nature of the issues.[68] Relatedly, one consultee in support of a general right of appeal suggested that it would improve confidence in the criminal justice system.[69]

8.65 The CWJ submitted that a right of appeal will improve the quality of decisions by police, parties and trial judges as appeals will generate case law clarifying this area of law. It also argued that having a right of appeal would give the complainant and their representative "far greater impact in relation to any submissions they make as a judge will be aware that if their arguments are disregarded this could lead to an appealable error of law". Similarly, the LCCSA agreed that greater scrutiny of judicial decisions in this area is required, but was uncertain that there is sufficient evidence that a general right of appeal is the correct way of achieving this. It was also unsure how the appeal right would operate in practice.

8.66 Consultees who opposed a general right of appeal did so on the grounds that it would result in delays. HM Council of Circuit Judges argued that if there was an appeal at a late stage of proceedings, the trial date may have to be abandoned. It also argued that a general right of appeal "may, and probably would, result in unnecessary appellate rulings/considerations". Rachel Snaith (Office of the Police and Crime Commissioner for Northumbria) wrote that there would need to be additional capacity for appeals if such a right were to be introduced. The CPS, who neither endorsed nor opposed a general right of appeal, commented that a general right of appeal could increase confidence in judicial decision making in this area, though flagged that there would be concerns surrounding resourcing. The CBA argued that the current rights of appeal strike an appropriate balance between fairness and avoiding delay.

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66 CQ 103: "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?" CP 259, para 11.68.

67 Of those who responded to CQ 103, 35 consultees selected "yes", 19 consultees selected "no", and 17 consultees selected "other".

68 JURIES; Dyfed-Powys Office of the Police and Crime Commissioner; and Dyfed-Powys Police.

69 JURIES.

Analysis

8.67 In our view, the complainant's right of appeal against decisions relating to the admissibility of evidence of their sexual behaviour or personal records should not be extended to rulings at other pre-trial hearings or at trial. We also take the view that a general right of appeal against the admissibility of evidence of the complainant's sexual behaviour or personal records should not currently be introduced. In this section, we start by outlining our rationale for rejecting a further right of appeal for complainants, before turning to our reasoning for rejecting a general right of appeal. Having set out our views, we then explore our other recommendations that will help to improve the scrutiny of these sensitive applications. Finally, we outline the steps which we consider to be necessary before a further right of appeal against rulings on the admissibility of SBE and personal records can be introduced.

8.68 The purpose of a right of appeal for the complainant against SBE and personal records applications would be to protect the complainant's rights and improve the scrutiny of those applications. Extending the complainant's appeal rights to other points in the trial where admissibility decisions are taken, besides preparatory hearings, could also help to achieve this goal. Complainants' privacy rights are engaged by applications to admit evidence of their sexual behaviour or personal records, regardless of when that application is made. A further right of appeal for complainants could therefore be justified in principle. Further, it is necessary that the complainant's right of appeal enables the determination of the appeal before the conclusion of the trial. Since the complainant's privacy rights are engaged at the point that the evidence is adduced, the resolution of an appeal after the evidence has been admitted would be meaningless.

8.69 However, implementing such an appeal right would risk significant delays to the trial process. As described above, delays can harm the ability of witnesses to recall information about the event, and can have a disproportionate impact on a defendant, particularly if they are in custody. If a jury has already been sworn in, then there is a risk that the trial will be prejudiced by delay: jurors might forget the evidence that they have already heard and there is an increased risk that they may access outside information whilst waiting for the trial to restart. Delay to trials would also place additional pressure on already stretched Crown Court and CACD resources, with subsequent impacts on the progression of the instant case, and other cases.[70]

8.70 There may be a practical balance that can be struck between a right of appeal which provides for adequate vindication of the complainant's privacy right, whilst also mitigating delay. However, given that the rationale for extending the appeal right is tied to the application itself, it is difficult to see how to strike that balance.

8.71 We have arrived at a similar view with regards to a general right of appeal from SBE and personal records applications. A general right of appeal would mean that any party to the original application (usually the defence, prosecution and complainant) could appeal the decision. Such an appeal right could also have a positive impact on the scrutiny of applications to admit potentially important pieces of evidence. The benefits of scrutiny are not limited to the complainant's position on an application. The outcomes of such decisions can have a significant impact on the way the trial

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[70] CP 259, paras 11.60-11.61.

proceeds and they can limit the way a defence and the prosecution run their respective cases. However, the concerns about delay detailed above would also apply to a general right of appeal. In fact, the risk of delay is greater as more parties have the opportunity to seek leave to appeal. This could mean an even greater number of appeals, with the associated impact on the resourcing of the CACD and the progression of cases in the Crown Court.

8.72 Further, there are different considerations justifying a general right of appeal that would extend to the defence and prosecution as well as the complainant. Whereas the justification for a right of appeal for complainants against these rulings is that they directly engage the complainant's article 8 right to privacy, the same is not true of the defence and prosecution. The complainant has no other recourse to challenge an infringement of this right other than the ECtHR. The defence and prosecution do have other routes of challenge, although they are limited, as described above in paragraphs 8.10 and 8.12.

8.73 Throughout this report we have made several recommendations for reform in relation to first-instance decision making which would improve scrutiny without the same substantial risk of delay to proceedings as an appeal right. These recommendations include:

(1) a clear, high threshold for admissibility of SBE with a requirement to provide written reasons for the ruling.

(2) a bespoke statutory framework for requests for access and production, a requirement that such requests meet an enhanced relevance threshold, with judicial scrutiny reserved for compelled production pre- or post-charge, a right for complainants to receive independent legal advice and assistance in respect of applications related to their sexual behaviour or personal records; and

(3) a right for complainants to be heard on applications related to their sexual behaviour or personal records, supported by independent legal representation.

8.74 The Law Commission is also currently conducting a review of the law governing appeals in criminal cases. In that project, we are considering whether a third party should have the right to appeal decisions or rulings made during a trial where, unless they were to appeal straight away, they would have no other adequate remedy in domestic law in respect of the decision or ruling. This would include decisions or rulings which affect the liberty of the third party, or which the third party seeks to challenge as being in contravention of the ECHR.[71] That review will provide additional scrutiny of the issues considered in this chapter that apply to all prosecutions. The appeals project will consider the impact of further appeal rights on delay, ways of processing appeals more efficiently, and how to ensure fairness to all parties. That review is better placed to consider all of the issues by taking a holistic view of the impact on the entirety of the appeals system, and not just in sexual offences cases.

8.75 In this chapter we have recommended that complainants who have a right to be heard on applications concerning the admissibility of evidence of their sexual behaviour

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71 CP 268, CQ 72, para 12.120.

should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant, where that decision is made at a preparatory hearing. We have also recommended that any right of appeal available to complainants should be accompanied by access to ILA and ILR. The Law Commission's criminal appeals project will provide further recommendations for expanding this right.

Chapter 9: Measures to assist with giving evidence

INTRODUCTION

9.1 The Youth Justice and Criminal Evidence Act 1999 ("YJCEA 1999") provides for special measures to assist eligible witnesses to give their best evidence. Statutory special measures include a witness giving evidence in court from behind a screen, or remotely through a live video link ("live link"). The regime was introduced following recommendations in the Home Office review of the treatment of vulnerable or intimidated witnesses in the criminal justice system, *Speaking up for Justice*.[1] The introduction of the regime had several aims. First, to improve the quality of the witness' evidence to enable them to give their best evidence. Secondly, to ensure that the witness is treated humanely while giving evidence. Finally, to thereby encourage witnesses to report, attend court and give evidence in prosecutions.[2]

9.2 Currently, complainants in sexual offences cases are automatically eligible to apply for special measures under section 17(4) of the YJCEA 1999. This section characterises them as witnesses who are in fear or distress about testifying, frequently referred to as "intimidated" witnesses. Complainants may also satisfy the relevant criteria in section 16(2) to be eligible as "vulnerable" witnesses.[3] Although complainants are automatically eligible for these measures, upon application by the prosecution, the judge must be satisfied that the measures (or any combination of measures) would be likely to improve the quality of the evidence given by the complainant.[4]

9.3 In the consultation paper, we examined the existing provisions for special measures for complainants in the YJCEA 1999. We provisionally proposed that complainants should be automatically entitled to standard measures when they give evidence based on their status as complainants in sexual offences cases, without having to apply and provide evidence that the measure would enhance the quality of their evidence. We also asked for consultees' views on whether there should be specific measures for defendants in sexual offences prosecutions beyond those currently available for all vulnerable defendants.

9.4 In this chapter, we make several recommendations for reform of eligibility for, and provision of, special measures. We recommend that complainants should be entitled

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1 Home Office, *Speaking Up for Justice, Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998).

2 Above, p 2; Criminal Procedure Rules ("CrimPR") r 3.8(3).

3 The terms "vulnerable" and "intimidated" are found in the statutory heading for Chapter I of the YJCEA 1999, the chapter which governs special measures. Complainants in sexual offences cases may be eligible for special measures under section 16 if the court considers that the quality of their evidence is likely to be diminished due to the fact that they suffer from a mental disorder within the meaning of the Mental Health Act 1983; or they have a significant impairment of intelligent or social functioning; or they have a physical disability or disorder.

4 YJCEA 1999, s 19(2).

to the use of "standard measures" to assist with giving evidence,[5] which we define as: screens; live link; pre-recorded evidence; exclusion of the public,[6] subject to a reformed exemption; removal of wigs and gowns; presence of a supporter; and separate and accessible entrances and waiting rooms where available. We recommend that complainants should be entitled to independent legal advice on measures to assist with giving evidence. We also recommend that there should be measures to facilitate complainants' engagement with the trial process once they have given their evidence. Our entitlement model better reflects the underlying rationales of best evidence and humane treatment, while ensuring that defendants can participate effectively and receive a fair trial. These recommendations should give complainants greater agency[7] and autonomy over how they give evidence and promote consistency and certainty over the use and effect of measures, while reflecting an individualised approach to measures to assist with giving evidence.

9.5 Another aim of our recommendations is to simplify and clarify the legal framework underpinning how witnesses give evidence in sexual offences cases. In line with this, the terminology used to describe these measures should be clear and understandable by all participants in the trial process. Therefore, we recommend that the term "special measures" should be replaced with the more neutral and descriptive term "measures to assist with giving evidence".

9.6 Finally, we recommend that the Government should consider further review of the measures available to all defendants when they give evidence at trial.

MEASURES TO ASSIST WITH GIVING EVIDENCE

9.7 The term "special measures" is used in the YJCEA 1999 to refer to measures used by some witnesses when giving evidence.[8] However, there are concerns with this terminology. Stakeholders had told us that the term "special measures" had negative connotations, given that it is used to describe failing organisations in the healthcare and education settings.[9] We also heard that using the term "special measures" may give the perception that complainants receive favourable treatment in the trial process.[10] Therefore, we provisionally proposed that in sexual offence cases, the term "special measures" should be replaced with the term "measures to assist with giving evidence".[11]

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5 We use the term "standard measures" to refer to measures to assist with giving evidence that the complainant would be entitled to receive. See from para 9.64 below. We use the term "additional measures" to refer to measures to which the complainant would not be entitled and would need to satisfy the court that these measures would improve the quality of their evidence. See from para 9.167 below.

6 YJCEA 1999, s 25 refers to this measure as "evidence given in private".

7 See Ch 7, n 23, on the use of the term "agency" in this context.

8 See for example YJCEA 1999, s 19 referring to a "special measures direction".

9 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259"), para 7.24.

10 Above, para 7.24.

11 Consultation question ("CQ") 40: "We provisionally propose that in sexual offences prosecutions, the term 'measures to assist with giving evidence' should be used instead of 'special measures'. Do consultees agree?". CP 259, para 7.25.

9.8 The majority of consultees who responded to this question agreed with replacing the term "special measures".[12] Consultees generally agreed that the current terminology has negative connotations for complainants,[13] and that our proposed terminology was more neutral, clearer, and more accurate about why measures are used.[14] Other consultees disagreed that the term "special measures" has negative connotations, or argued that replacing the terminology would have no practical benefit.[15]

9.9 We conclude that the term "special measures" should be replaced with the term "measures to assist with giving evidence".[16] Those who disputed that the current term has negative connotations focused on how legal professionals understand the term, rather than the perspective of complainants and witnesses. The negative connotations of the terminology can impact how complainants choose to give evidence. Research shows that "some witnesses have declined special measures for fear that they would appear less competent or credible in front of the jury".[17] This more neutral term should mitigate against negative connotations of using such measures, and therefore better reflects one of the aims of the regime, which is to encourage witnesses to give their best evidence.[18]

9.10 Further, we recommend that the Government should consider whether the term "measures to assist with giving evidence" should be used in all cases where such measures are available. As the term "special measures" is primarily used within the YJCEA 1999, it would not be burdensome to replace it for all cases. Using the same term in all cases would ensure even greater consistency and clarity. Sexual offences are often charged alongside other offences, meaning that there would be different terminology used to describe measures in the same trial.[19] Replacing this term generally may prevent the use of "special measures" as a shorthand where charges relate both to sexual offences and non-sexual offences.

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12 Out of 33 responses, 25 consultees agreed; 6 disagreed; 2 submitted a response categorised as other.

13 Including Rape Crisis England and Wales ("RCEW"); Victim Support; and HM Crown Prosecution Service Inspectorate ("HMCPSI").

14 Including HM Council of Circuit Judges; the Crown Prosecution Service ("the CPS"); and the Law Society of England and Wales ("Law Society").

15 Including the Six Circuits of England and Wales ("the Six Circuits"); the Feminism, Law and Gender ("FLAG) research cluster at the Open University Law School ("the FLAG research cluster"); and the General Council of the Bar of England and Wales ("the Bar Council").

16 Although the statutory term used to implement this recommendation may differ from this exact phrase.

17 Dr Natalie Kyneswood. At present, there is a mixed evidence base on the impact of measures to assist with giving evidence on jurors' perceptions of the witness. See paras 9.77-9.78 and 9.214 below.

18 We use this term for the remainder of this chapter, including where referring to measures that are currently referred to as "special measures".

19 Dr Samantha Fairclough, consultation response.

Recommendation 41.

9.11 We recommend that in sexual offences cases, the term "measures to assist with giving evidence" should be used instead of "special measures".

9.12 We recommend that the Government should consider whether the term "measures to assist with giving evidence" should be used in all cases.

ENTITLEMENT TO STANDARD MEASURES

9.13 In this section we set out our recommendations for a model of entitlement to measures to assist with giving evidence for complainants in sexual offences cases. Our recommendations would mean that that complainants become entitled to use these measures when they give evidence at trial, without needing to demonstrate (as they are currently required to do) that this would improve the quality of their evidence. The provision of these measures under our recommendations would be subject to the availability of the measure requested and the defence's ability to effectively test the evidence.

9.14 The default position would continue to be that witnesses give evidence physically present in court without the use of measures. However, where complainants wish to use measures to assist with giving evidence, our recommended entitlement model should ensure that the process is simpler and clearer.

Entitlement

9.15 In the consultation paper, we concluded that the current approach of automatic eligibility, based on complainants being categorised as intimidated witnesses in "fear or distress", was unsatisfactory. We had heard from stakeholders that the labels of "intimidated" or "vulnerable" may not accurately describe complainants of sexual offences. We also heard that some complainants will not request measures for fear of being perceived as "vulnerable", and that these connotations undermine the approach taken by those working to support survivors of sexual violence.[20]

9.16 Most applications for measures to assist with giving evidence are either unopposed or are successful when opposed.[21] However, the application must still demonstrate how the measures requested would improve the quality of the complainant's evidence, requiring explanation from the complainant. We considered that this requirement can be intrusive, unnecessary, and burdensome.[22] We also noted concerns from stakeholders that the current regime does not sufficiently allow consideration of the complainant's views, which may undermine their sense of control or lead to them disengaging from the process.[23]

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20 CP 259, para 7.35.

21 Above, para 7.60.

22 Above, paras 7.52, 7.60-7.61.

23 Above, para 7.43.

9.17 We provisionally concluded that an automatic entitlement to certain measures would be less burdensome for complainants, in that they would not need to provide reasons to justify why the measure would improve the quality of their evidence.[24] It would provide greater consistency over whether measures would be granted, reassuring complainants and improving confidence in the system.[25] We also concluded that an automatic entitlement would be more likely to ensure that complainants are treated humanely, as it would give effect to the specific needs and wishes of complainants, and limit disproportionate stress and trauma from uncertainty over whether measures will be provided.[26]

9.18 As measures are generally granted with little opposition, moving to an automatic entitlement would give effect to current practice.[27] Where there are inconsistencies in the granting of measures, automatic entitlement could ensure more consistent use.[28] There would also be resource benefits from streamlining the application process.[29]

9.19 Therefore, we provisionally proposed that complainants in sexual offences cases should be automatically entitled to the use of standard measures to assist with giving evidence, with the ability to apply to the court for additional measures,[30] rather than being automatically eligible to apply for measures on the basis of being categorised as intimidated or vulnerable witnesses.[31]

Categorisation

9.20 The majority of consultees who responded to our proposals agreed with this approach. Nearly three-quarters of consultees agreed that complainants in sexual offences cases should not be categorised as vulnerable or intimidated witnesses.[32] Consultees agreed that these labels do not accurately describe complainants,[33] have negative connotations,[34] and may cause confusion where complainants do not present as intimidated or vulnerable in the traditional sense.[35] A Circuit Judge

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24 CP 259, para 7.61.

25 Above, para 7.62.

26 Above, para 7.65.

27 Above, para 7.61.

28 Above, para 7.52.

29 Above, para 7.61.

30 CQ 42: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to standard measures to assist them giving evidence, with the ability to apply to the court for additional measures. Do consultees agree?". CP 259, para 7.74.

31 CQ 41: "We provisionally propose that complainants in sexual offences prosecutions should not be included in the categories of 'vulnerable' or 'intimidated' witnesses under sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999. Instead they should be automatically entitled to measures to assist them giving evidence solely on the basis that they are complainants in sexual offence prosecutions". CP 259, para 7.40.

32 Out of 29 responses, 21 consultees agreed; 5 disagreed; 3 submitted a response categorised as other.

33 Including the CPS; HMCPSI; and Victim Support.

34 HMCPSI.

35 Dr Natalie Kyneswood.

emphasised that many complainants "are only vulnerable because of the circumstance of being a complainant in a sex case".

9.21 The Six Circuits of England and Wales[36] argued that the YJCEA 1999 does not categorise complainants of sexual offences as "vulnerable" or "intimidated" as those terms are only used in the heading of Chapter I, the Chapter which governs special measures. It suggested that eligibility based on complainants of sexual offences being in "fear or distress about testifying"[37] was "accurate and unobjectionable". We disagree. While this terminology may be accurate for some, there can be a range of reasons why complainants wish to use measures to assist with giving evidence. It is not always appropriate to describe them as being in "fear or distress" about giving evidence. As noted by HM Crown Prosecution Service Inspectorate ("HMCPSI") in its consultation responses, this terminology makes assumptions about complainants which it has found "can be retraumatising", since it does not treat complainants as individuals or reflect their individual needs. An Independent Sexual Violence Adviser ("ISVA") told us that many complainants may wish to use a screen to prevent the defendant from seeing their changed appearance,[38] but this does not mean they are "intimidated" or in "fear" of giving evidence. Alternatively, some complainants may wish to pre-record their evidence so that they do not have to wait until the trial date and do not have to delay seeking therapy until after they have given evidence at trial.[39]

9.22 We consider that a complainant in a sexual offences case should be entitled to measures based on the nature of the offence. This should be a separate category, rather than a sub-category of "intimidated" witnesses. This would best reflect the nature of the vulnerability to which standard measures to assist with giving evidence seek to respond. We use the term "vulnerability" here in the broader sense of requiring adaptation of the trial process to enable individuals to participate effectively,[40] as opposed to its specific meaning for witnesses eligible for special measures under section 16 of the YJCEA 1999.[41] Many complainants in sexual offences cases have a level of vulnerability due to the nature of the offence. This offence-based vulnerability is separate from, and exists regardless of, the presence or absence of any individual

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36 Consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("the Six Circuits").

37 YJCEA 1999, s 17(4).

38 See from para 9.102 below on whether the effect of a screen should be to prevent the defendant from seeing the complainant.

39 Complainants may delay seeking therapy before they give evidence due to concerns that the content of their therapy notes may be accessed, disclosed to the defence, and used against them in cross-examination. See CP 259, paras 3.60, 3.67 and 7.116.

40 See Criminal Practice Directions 2023 (as amended in 2024) ("CrimPD") 6.1.3.

41 The term "vulnerability" is widely used across the criminal justice system but can have different meanings depending on the context in which it is used. In the consultation paper, we generally used the term vulnerable to mean witnesses who are eligible for special measures under section 16 of the YJCEA 1999, while acknowledging wider discussions of the meaning of the term. See CP 259, para 7.11, n 18. We acknowledge that there is broader academic and critical debate over the utility of this term in the criminal justice system. See for example, British Society of Criminology Vulnerability Research Network | University of South Wales. See n 3 above for the definition of vulnerable and intimidated witnesses in the YJCEA 1999.

vulnerabilities arising from their personal characteristics or response to the prospect of giving evidence.

Automatic entitlement

9.23 Nearly three-quarters of consultees who responded to our provisional proposal agreed with an automatic entitlement model, while less than a quarter disagreed.[42] Consultees who objected to any entitlement stated that the current test should remain, with some asserting that the current test of improving the quality of evidence is the only justification for providing measures.[43]

9.24 However, ensuring best evidence is only one rationale behind the introduction of measures to assist with giving evidence in the YJCEA 1999. Other rationales include encouraging witnesses to report and give evidence, and treating them humanely when they do so. Humane treatment requires that witnesses are not subject to disproportionate stress, traumatisation or poor treatment while giving evidence and participating in the criminal justice system.[44] Giving evidence in a sexual offences prosecution engages the complainant's rights under article 8[45] of the European Convention on Human Rights ("ECHR").[46] The right to respect for private life under article 8 protects the physical and psychological integrity of a person.[47] In addition to the negative obligation not to interfere with an individual's article 8 rights, the state has a positive obligation to protect individuals from violence by third parties. This positive obligation extends to ensuring an adequate legal framework to protect individuals against sexual violence,[48] and protecting witnesses and victims in the course of investigation and prosecution of criminal offences.[49]

9.25 The European Court of Human Rights ("ECtHR") has recognised that the context of sexual offences prosecutions may mean that complainants have a greater need for support than other witnesses.[50] The ECtHR has repeatedly emphasised that states must adopt measures to protect victims, including from the risk of secondary

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42 Out of 86 responses, 64 consultees agreed; 14 disagreed; 8 submitted a response categorised as other.

43 Including the Six Circuits and Cardiff University Law School Innocence Project.

44 CP 259, para 7.21.

45 Article 8 provides for the right to respect for a person's private and family life, their home and their correspondence. It is a qualified right. An interference may be justified where in pursuit of a legitimate aim and necessary in a democratic society: see article 8(2). Under the Human Rights Act 1998, ss 2 and 3, the court is required to interpret legislation compatibly with Convention rights and must take into account the jurisprudence of the European Court of Human Rights ("ECtHR").

46 The ECtHR has also accepted that the state has positive obligations under article 3 (freedom of torture and inhuman or degrading treatment), alongside article 8, to protect the rights of victims in criminal proceedings and prevent secondary victimisation. See *X v Greece* App No 38588/21 and *Daugaard Sorensen v Denmark* App No 25650/22 at [64].

47 Appendix 1, para 1.13.

48 *Y v Slovenia* App No 41107/10. The state also has a positive obligation under article 3: *MC v Bulgaria* App No 39272/98.

49 Appendix 1, para 1.13, citing *Romanov v Russia* App No 41461/02 at [97].

50 Above, para 1.21, citing *Y v Slovenia* App No 41107/10 at [103].

victimisation.[51] The ECtHR has also considered the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence, noting that this Convention requires:[52]

> Contracting Parties to take the necessary legislative and other measures to protect the rights and interests of victims. Such measures involve, *inter alia*, protection from intimidation and repeat victimisation, enabling victims to be heard and to have their views, needs and concerns presented and duly considered, and enabling them, if permitted by applicable domestic law, to testify in the absence of the alleged perpetrator.

9.26 The nature of giving evidence in a sexual offences prosecution means that the potential for traumatisation and distress cannot be removed entirely. However, witnesses should not suffer disproportionate distress or trauma as a result of giving evidence. Therefore, in order to discharge the positive obligations under article 8, complainants must be supported to give their best evidence and protected from inhumane treatment when doing so. It follows that the quality of the complainant's evidence alone should not be the only basis for the provision of measures.

9.27 There are several reasons why an entitlement to standard measures is preferable, rather than complainants needing to satisfy the court that the requested measures will improve the quality of their evidence.

9.28 First, an entitlement model is more consistent with these broader rationales of humane treatment and witness engagement, as well as article 8, compared to the current model. An entitlement model recognises explicitly that complainants have a right to be protected and treated humanely when giving evidence, even where it can be shown that the use of these measures is not necessary to improve the quality of their evidence.

9.29 Secondly, an entitlement model recognises that the complainant is the best judge of what will help them to give their best evidence and ensure they are treated humanely when giving evidence. It gives complainants greater autonomy and control over how they give evidence, which serves to ensure humane treatment. This greater agency over how complainants participate in the trial is an important part of ensuring procedural justice.

9.30 Consultees who agreed with our proposal echoed these points, arguing that an entitlement model centres the complainant's needs and wishes and provides certainty over whether they may be permitted to use measures, thereby empowering complainants in their choice to give evidence.[53] For example, Northumbria Centre for Evidence and Criminal Justice Studies commented that automatic entitlement to measures would be "a welcome change, as it treats the interests and wishes of complainants as important in themselves, rather than treating the witness as a means

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51 Appendix 1, para 1.21, citing *Y v Slovenia* App No 41107/10 at [104]; *JL v Italy* App No 5671/16 at [141]; *A and B v Croatia* App No 7144/15 at [121].

52 *Y v Slovenia* App No 41107/10 at [104].

53 Including Dr Samantha Fairclough; Dr Natalie Kyneswood; and End Violence Against Women Coalition ("EVAW").

to an end". Consultees also noted that greater certainty over measures to assist with giving evidence should increase complainants' confidence in and engagement with the criminal justice system,[54] which is itself an objective of the regime for measures to assist with giving evidence.

9.31 Thirdly, an entitlement model will facilitate humane treatment by limiting disproportionate stress caused to complainants by the current model. In the consultation paper, we considered that the requirement to demonstrate impact on the quality of evidence, and therefore the requirement for the complainant to provide evidence of this, was unnecessary and burdensome,[55] particularly given that most requests for measures are granted.[56]

9.32 The Six Circuits disagreed that the current application process requires "evidence" from the complainant in the sense of testimony or a witness statement. Consequently, it disagreed that the application process is burdensome. We are not persuaded by this argument. The current application form for measures requires collection of information from the complainant to justify the request and demonstrate that the measures sought will improve the quality of their evidence. This includes the witness' views on whether measures would be likely to improve the quality of their evidence, and views on the specific measures requested.[57] Even if this is not in the form of a witness statement or oral evidence, it still requires information from the complainant that may be burdensome for them to provide.

9.33 Further, there are additional burdens that arise from the current legal test beyond the need to provide information. Complainants lack certainty over whether they will be able to access various measures. Consultees commented on how this current system may traumatise complainants. For example, Solace Women's Aid noted the "pronounced impact" on complainants where requests for special measures are denied. We were told of the distress caused by waiting for a judicial decision on measures, with the mother of a victim-survivor telling us of the "stress" and "terror" felt by her daughter about the prospect of giving evidence without a screen.

9.34 Until the measures are granted, there is an element of doubt as to whether the complainant will be granted these. This doubt – even if objectively it is unlikely to come to pass – can hardly help a complainant who must wait until the application is granted to be sure. An entitlement to standard measures would give greater clarity to complainants on which measures they may receive. By removing the wait for a judicial decision, and thereby reducing the stress that may come from this, the model will also facilitate humane treatment.

9.35 Fourthly, an entitlement model better reflects the nature of the vulnerability of complainants to which measures to assist with giving evidence can respond. As noted above at paragraph 9.22, many complainants are vulnerable due to their status as a complainant in a sexual offences case. The provision of measures to respond to this

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[54] Including RCEW; Professor Vanessa Munro; and Rachel Snaith, employee of the Office of the Police and Crime Commissioner ("OPCC") for Northumbria.

[55] CP 259, paras 7.52 and 7.60-7.61.

[56] Above, para 7.60.

[57] See here for the MG2 form, and here for the special measures application form, for example, section C1.

offence-based vulnerability should not therefore depend on the individual complainant demonstrating how the measure would improve the quality of their evidence.

9.36 Fifthly, an entitlement model should ensure consistent practice. Consultees agreed that automatic entitlement reflects the current practice that most applications for special measures are generally granted. For example, the Law Society of England and Wales ("Law Society") commented that the proposal "would reflect the current practice" that "special measures are applied by virtue of the case being a sexual offence prosecution". Therefore, an entitlement model would not result in a significant change in the number of measures provided but will streamline and clarify the process with consequent resource benefits.

9.37 Evidence from consultees suggests there can be inconsistencies in whether certain standard measures are granted.[58] In particular, consultees suggested that applications for pre-recorded cross-examination under section 28 of the YJCEA 1999 are denied inconsistently, unlike the frequent granting of applications for screens or live links.[59] Stakeholders also told us that there are inconsistencies in whether a combination of measures will be granted (such as screens in combination with live links).[60] An entitlement model should reduce these inconsistencies.

9.38 Finally, consultees warned that an entitlement model must not result in a move away from individualised assessments or lead to measures being imposed on complainants. We agree. We consider that an entitlement model, in combination with our recommendation for independent legal advice on measures to assist with giving evidence,[61] will better facilitate an individualised approach. The independent legal adviser will be able to advise the complainant to ensure they can make an informed choice, and to engage with and challenge the police and prosecution where there has not been sufficient assessment of the complainant's vulnerabilities and needs.

Limitations to the complainant's entitlement

9.39 While a model of entitlement would provide more certainty, consistency, and better ensure humane treatment and best evidence, there may be circumstances in which it is not possible to provide complainants with the measures they seek. We outline two key limitations below: the availability of the measure requested, and the defence's ability to effectively test the evidence. These circumstances should form two limbs of a proviso that will allow the judge to modify or deny the complainant's request where the measure cannot be provided.

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58 Including RCEW; Dr Natalie Kyneswood; Rachel Snaith; and EVAW.

59 For example, Rachel Snaith commented that while such applications are generally granted in one court in Northumbria, in another these applications are frequently rejected unless a further reason or evidence is provided from the complainant. There are also concerns that s 28 applications in sexual offences prosecutions are denied due to concerns over resourcing and delays. Dr Natalie Kyneswood explained that s 28 applications may be denied due to the level of resources or where it would not "materially advance" the date of cross-examination, despite pre-recorded evidence offering many benefits to complainants beyond capturing their evidence early.

60 RCEW, consultation response.

61 See from para 9.175 below.

Availability of measures

9.40 The complainant's access to a measure may be limited by the availability of the measure in the court in which they give their evidence. For example, if the listed court building does not have separate accessible entrances or multiple waiting rooms,[62] that may not be available to a complainant as a standard measure. Courts should be able to use this limb of the proviso to consider alternatives; it may be that the full measure cannot be provided but suitable alternative arrangements can be made. For example, while a court may not have dedicated separate entrances and waiting rooms, court staff may be able to use other rooms and manage arrival timings to give the same effect. Alternatively, if the position of the monitors in the courtroom would allow the defendant to see a complainant who is giving evidence via live link, screens could be used to prevent this.[63] Where the measure is not available and there are no reasonable alternatives, the court may use this limb of the proviso to deny the complainant's request. The complainant may then request the use of other measures that are available within that court. We expect that courts will have sufficient measures available to ensure complainants have some choice, even if not all courts will be able to facilitate every standard measure.

The defence's ability to effectively test the evidence

9.41 Under the current regime, when determining whether any measure would be likely to improve the quality of the witness' evidence, the judge must consider whether the measure "might tend to inhibit such evidence being effectively tested by a party to the proceedings".[64] In the consultation paper, we noted that this proviso operates to protect the defendant's right to a fair trial. We concluded this is an "important overall safeguard" that should be retained.[65]

9.42 We also described some rare examples where the effect of a measure may prevent a defendant with particular needs from participating effectively in the trial. To illustrate, we gave an example of a defendant with a severe cognitive impairment that prevents them from understanding speech without seeing the speaker, or a defendant who is deaf and uses lip reading rather than sign language, who may need to see the complainant give evidence in order to participate fully. We concluded that in such examples, even if a measure would otherwise prevent the defendant from seeing the complainant, provision must be made to allow the defendant to see the complainant in a way that enables them to understand the evidence and give instructions to their representatives.[66]

9.43 Some of the consultees who opposed a model of entitlement emphasised the importance of the defendant's right to a fair trial.[67] Others commented specifically on

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62 See para 9.163 below for discussion of consultation responses that explained that some court buildings do not have separate and accessible entrances and waiting rooms.

63 See from para 9.102 below on the effect of a live link on whether the defendant can see the complainant.

64 YJCEA 1999, s 19(3)(b).

65 CP 259, para 7.66.

66 Above, para 7.156.

67 Cardiff University Law School Innocence Project; Dr Oriola Sallavaci; Kate Goold, solicitor; and an anonymous consultee.

the current proviso, agreeing that there should be an exception to entitlement where the measure would inhibit the effective testing of evidence.[68] In relation to the examples in the consultation paper, stakeholders emphasised that there should be a process to ensure that measures are not undermined unless it is absolutely necessary for the defendant to participate effectively.[69]

9.44 We maintain our view that there should be an exception to the provision of measures where the measure in question would prevent the defence from effectively testing the evidence against them. As a public authority under the Human Rights Act 1998,[70] the court is required to act compatibly with the defendant's right to a fair trial under article 6, irrespective of any statutory safeguard. However, an explicit proviso within the statutory scheme offers greater clarity over how the defence may challenge the use of a measure and in what circumstances the judge may decline to provide a measure.

9.45 This proviso would be an amended form of the proviso in section 19(3) of the YJCEA 1999, as the judge will not consider generally the impact on the quality of the evidence as the test for granting measures.[71] Rather, the complainant would be entitled to receive the measure(s) requested, unless this measure would prevent the defence from effectively testing the complainant's evidence.

9.46 The right to test the evidence against them forms part of the defendant's rights under article 6.[72] The provision of measures to assist with giving evidence is generally compatible with the defendant's right to a fair trial. The courts in England and Wales have concluded that the overall regime in the YJCEA 1999, including specific special measures and related procedure, complies with the defendant's right to a fair trial.[73] States may provide measures to assist with giving evidence to discharge their positive obligations under article 8 to support complainants in sexual offences cases to give their best evidence and protect them from suffering traumatisation and secondary victimisation in doing so. The ECtHR has interpreted the safeguards within article 6 to reflect the article 8 rights of victims and witnesses; in appropriate cases, the principles of a fair trial may require the interests of the defence to be balanced against those of witnesses or victims called upon to testify.[74] In relation to sexual offences prosecutions, the ECtHR has held that measures may be taken to protect the complainant and their right to respect for their private life, provided that these

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68 HM Council of Circuit Judges; the Bar Council; and the Law Society.

69 Including Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences.

70 Human Rights Act 1998, s 6(3)(a).

71 As noted by Dr Natalie Kyneswood.

72 Article 6 provides for the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6(3) refers to the minimum rights of those charged with a criminal offence, including: the right to a public hearing; the right to equality of arms; the right to be informed promptly of the nature and cause of the accusation; the right to have adequate time and facilities for the preparation of the defence; the right to defend oneself in person or through legal assistance; the right to examine or have examined witnesses; and the right to an interpreter. See Appendix 1, paras 1.8-1.11 on the ECtHR's general approach to article 6.

73 *Camberwell Green Youth Court, ex parte D* [2005] UKHL 4, [2005] 1 WLR 393; *R v Richards (Randall)* (1999) 163 JP 246 (clearing the public gallery during the complainant's evidence under YJCEA 1999, s 25).

74 Appendix 1, paras 1.22-1.27; *Doorson v The Netherlands* App No 2052/92 at [70].

measures can be "reconciled with an adequate and effective exercise of the rights of the defence" to challenge the evidence against them.[75]

9.47 Therefore, the provision of measures alone does not prevent the defence from testing the evidence. However, there may be exceptional cases where due to the particular circumstances of the individuals involved, the requested measure would prevent the defence from testing the evidence. These unique needs must be over and above any general issues of engagement for defendants. Above, we refer to the example of a defendant who needs to lip read. If the complainant requested a screen, which would prevent the defendant from seeing them, the effect of this measure would be that the defendant cannot receive and understand the complainant's evidence and therefore cannot give instructions. In such cases, the defence could not effectively test the evidence due to the measure sought.

9.48 When considering whether to exercise the proviso, the judge should also consider the impact of the measure on the trial as a whole,[76] given that the complainant's evidence is only one (albeit significant) part of a trial, as well as any other measures to assist with giving evidence or aids available to support the defendant's participation.[77] In some of the cases where the proviso is engaged, the judge may seek to modify the effect of the measure to ensure the defence can effectively test the evidence, rather than denying the measure entirely. In the example above, a defendant who lip reads must be permitted to see the complainant despite their request for a screen. Depending on the resources available to the court, this could be done through a one-way screen,[78] or relaying a video feed of the complainant behind the screen to the defendant; or, if no modifications are possible, by declining the complainant's request for a screen and providing an alternative measure.

9.49 Overall, this proviso will operate to preserve the judge's limited discretion to deny the complainant's requested measures in rare and exceptional cases to ensure the defence can effectively test the evidence. At present, most applications for measures are unopposed by the defence. Even when opposed, most applications are granted. Therefore, we expect that there would be very few cases where a complainant's requested measure is denied on the basis of this proviso. The limited scope of this proviso would therefore operate to protect the defendant's right to a fair trial under

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75 Appendix 1, para 1.26, citing *SN v Sweden* App No 34209/96 at [47]; *Aigner v Austria* App No 28328/03 at [37]. For discussion of ECtHR case law on specific measures to assist with giving evidence, including exclusion of the public, evidence over video-link, pre-recorded evidence and two-way mirrors, see Appendix 1, paras 1.53-1.77.

76 This reflects the general approach of the ECtHR to evaluate the fairness of the proceedings as a whole, even where particular rights within article 6 may not have been complied with. See Appendix 1, paras 1.9-1.11.

77 For example, while the use of court dress may help some vulnerable defendants to recognise who the legal actors are and follow proceedings, removal of wigs and gowns (if requested) would only occur during the complainant's evidence. The defendant would have seen the judge and legal counsel before, will likely have seen the complainant before, and will have defence counsel available throughout the complainant's cross-examination to explain matters to them. Therefore, removal of wigs and gowns during the complainant's evidence in these circumstances may be unlikely to prevent the defence from effectively testing the evidence.

78 Where the screen would prevent the complainant from seeing the defendant, but the defendant would be able to see the complainant through the screen.

article 6, while reflecting the principles behind an entitlement model: that complainants are able to give their best evidence and be treated humanely while doing so, with greater clarity, certainty and autonomy over how they give evidence.

9.50 Finally, we heard concerns that the use of measures to assist with giving evidence risks the jury perceiving the defendant negatively, potentially infringing their right to a fair trial.[79] We do not consider that the general risk of the jury perceiving the defendant negatively when measures to assist with giving evidence are used means that the defendant cannot receive a fair trial. The risk, if it is a risk, is inherent to any use of measures to assist with giving evidence, including under the current regime in the YJCEA 1999. The general use of measures to assist with giving evidence has been held compatible with article 6 by both the ECtHR and domestic courts.[80] When these measures are adopted, the jury are always directed that they should not read anything into the use of such measures, and certainly not hold anything against the defendant as a result.[81] This direction should be tailored to the specific measures used and the factual circumstances of each case.

Conclusion

9.51 We have concluded that the complainant's entitlement to receive measures must also be subject to the defence's ability to effectively test the evidence and the court's ability to provide the measures sought. Therefore, a complainant's entitlement to use standard measures would not be an unqualified entitlement.

9.52 We accept that our provisionally proposed terminology of "automatic entitlement" may not accurately describe this model. HM Council of Circuit Judges warned that if complainants do not have an "absolute and unqualified right (and so expectation)", calling this right an automatic entitlement "would unfairly raise expectations". We agree that the label of "automatic" entitlement suggests that measures will be provided for all requests and does not represent the reality that there will be circumstances in which a measure cannot be provided.

9.53 We therefore consider the term "entitlement" alone a more accurate label for our recommended model. The complainant is entitled to use these measures to assist with giving evidence, without needing to demonstrate that the measures will improve the quality of their evidence. At their request, the measures will be provided unless the court cannot practically facilitate the use of a particular measure, or the judge modifies or denies the measure on the grounds that the defence cannot effectively test the evidence.

9.54 Currently, section 19(2) of the YJCEA 1999 provides for witnesses to use measures in combination. Our entitlement model would retain the ability to combine measures, so that complainants in sexual offences prosecutions would be entitled to combine compatible measures to assist with giving evidence. This would include but would not

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79 Cardiff University Law School Innocence Project; the London Criminal Courts Solicitors' Association ("LCCSA"); Kate Goold; and a Circuit Judge.

80 See para 9.46 above.

81 See YJCEA 1999, s 32; Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) 3-30 Special Measures paras 10-11.

be limited to the combination of screens and live links to prevent the defendant from seeing the complainant, as discussed below from paragraph 9.102.

9.55 In the consultation paper, we asked for consultees' views on the need for any procedural changes to measures to assist with giving evidence, through our provisional proposal that the current time limits for applications were suitable.[82] Consultees' responses indicated that no change to the current time limits is required.[83] The Criminal Procedure Rule Committee is well placed to consider any procedural changes that are required to accommodate an entitlement model.

Recommendation 42.

9.56 We recommend that complainants in sexual offences cases should be entitled to the use of standard measures when they give their evidence.

9.57 We recommend that the provision of standard measures should be subject to the availability of the measure in that court and the defence's ability to effectively test the evidence.

Definition of the complainant's evidence

9.58 There are four main stages of a complainant's evidence: their evidence in chief, cross-examination, any re-examination, and, if applicable, their victim personal statement ("VPS"). The VPS is a form of evidence given by or on behalf of the complainant after a guilty verdict or plea. It often includes evidence of the harm and impact suffered as a result of the offence.[84] The judge will consider this evidence when determining the appropriate sentence.[85]

9.59 Currently, measures are usually only made available for evidence given pre-verdict. In the consultation paper we asked whether measures should also be available for complainants giving their VPS.[86] Consultees agreed that the VPS is a form of evidence for which measures should be available,[87] and that its content engages the complainant's right to privacy and may cause distress when read out.[88]

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82 CQ 43: "We provisionally propose that time limits for special measures applications should not be changed or removed. Do consultees agree?". CP 259, para 7.83.

83 Out of 24 responses, 15 consultees agreed; 5 disagreed; 4 submitted a response categorised as other.

84 CrimPD 9.5.3.

85 CrimPD 9.5.1; CrimPD VII Sentencing F.3.

86 CQ 55: "We invite consultees' views on whether, for sexual offences prosecutions, there should be a power to direct the exclusion of the public [subject to current exemptions] … when the victim personal statement is read". CP 259, para 7.190. CQ 61: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the use of live link or screens to facilitate their attendance at the verdict and sentencing hearing. Do consultees agree?". CP 259, para 7.247.

87 The Six Circuits.

88 HM Council of Circuit Judges and the CPS.

9.60 The considerations, and benefits, of measures to assist with giving evidence apply at all these stages. Provision of measures can help ensure humane treatment, and support complainants to give their best evidence, whether during the trial or when they read their VPS at the sentencing hearing. We therefore conclude that complainants should be entitled to the use of standard measures at all stages when they give evidence, whether this is by pre-recording their evidence in advance of trial or giving evidence contemporaneously during the trial or at the sentencing hearing.

9.61 At each stage of giving evidence, the complainant should be able to use whatever standard measure, or combination of measures, they require. Their choice should not have to depend on what measures, if any, were used for other stages. Complainants' needs may change throughout the trial process, depending on the type of evidence they are giving. As Dr Samantha Fairclough noted in her consultation response, following their first experience of giving evidence "the complainant may not feel able to go into court a second time". Alternatively, after the verdict they may prefer to give evidence in court, despite having pre-recorded their earlier evidence. Allowing complainants to determine which measures they require at each stage of giving evidence reflects our underlying aim of giving complainants autonomy, control and certainty over how they give evidence.

9.62 Once the complainant has given their evidence, measures to assist with giving evidence will no longer apply.[89] Where a complainant attends the remainder of the trial to watch the playback of their pre-recorded evidence, or to hear their VPS read out on their behalf, they will instead be entitled to measures to facilitate their engagement with the trial process (see from paragraph 9.196 below).

Recommendation 43.

9.63 For the purposes of measures to assist with giving evidence, we recommend that the evidence of a complainant should include their evidence in chief, cross-examination, re-examination and their reading of their victim personal statement.

STANDARD MEASURES TO ASSIST WITH GIVING EVIDENCE

9.64 We have described the model we think best achieves the aims of providing complainants in sexual offences cases with measures to assist with giving evidence. As indicated above, for the purposes of clarity and consistency we recommend that this regime should apply to a set of standard measures. Such an approach would provide the benefits of the entitlement model to those measures that are most commonly used, and most appropriate to make available to all complainants of sexual offences. This follows the approach in the regime established by the YJCEA 1999. In this section we consider the range of measures currently available, recommending that they be considered the "standard measures" to which the entitlement applies. Following this, we consider other non-standard measures, namely the use of

[89] The only measure that will continue to apply where the complainant's pre-recorded evidence is played back at trial, or the VPS is read out in their behalf, is exclusion of the public (subject to a reformed exemption). See from para 9.119 below.

intermediaries, that may be available to vulnerable complainants upon application under section 16 of the YJCEA 1999. Alongside this framework, the court retains its inherent jurisdiction to make adjustments to the trial process which can include directing the provision of measures not specified in legislation.

Screens

9.65 The YJCEA 1999 provides for the use of a screen or other arrangement to prevent the complainant from seeing the defendant when they give evidence.[90] The YJCEA 1999 states that the complainant must see and be seen by the judge, jury, legal representatives and any interpreter or other person appointed to assist the complainant.[91] Depending on the courtroom layout and the screen's position, in practice counsel may not always be able to see the complainant at all times. Screens are frequently used by complainants in sexual offences prosecutions.[92]

9.66 In the consultation paper, we provisionally proposed that screens should be a standard measure attracting automatic entitlement.[93] The majority (over three-quarters) of consultees agreed with this proposal.[94] Consultees agreed that an entitlement would reflect the current practice that screens are frequently granted,[95] while also preventing inconsistencies.[96] Consultees also affirmed that screens may improve complainants' experience of testifying or assist them to give more impactful evidence in person.[97]

9.67 Most consultees who disagreed did not object to the use of screens in particular, but repeated general objections to an automatic entitlement model. Above, we respond to those general objections and conclude that an entitlement model is justified and appropriate. Other consultees commented on the effect of a screen in preventing the defendant from seeing the complainant. We discuss this effect below from paragraph 9.102 Overall, we are satisfied that screens should be a standard measure to which the complainant is entitled when giving evidence.

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90 YJCEA 1999, s23(1).

91 Above, s23(2). The section does not specify whether the defendant must be allowed or prevented from seeing the complainant. We make recommendations on whether the effect of a screen should be to prevent the defendant from seeing the complainant from para 9.102 below.

92 S Fairclough, *Special Measures Literature Review*, (Victims Commissioner, July 2020) p 19, citing R Majeed-Ariss, et al, "'Could do better': Report on the use of special measures in sexual offences cases" [2019] *Criminology and Criminal Justice* 4.

93 CQ 45: "We provisionally propose that a complainant in a sexual offences prosecution should be automatically entitled to the use of a screen so that they cannot see the defendant while they give evidence in court. Do consultees agree?". CP 259, para 7.106.

94 Out of 86 responses, 72 consultees agreed; 5 disagreed; 4 submitted a response categorised as other.

95 Including Dr Samantha Fairclough; Dr Natalie Kyneswood; and the Bar Council.

96 Consultees noted that there can be inconsistencies in the provision and effect of screens. For example, RCEW commented that there are inconsistencies in whether a screen prevents the defendant from seeing the complainant. We make recommendations on whether the effect of a screen should be to prevent the defendant from seeing a complainant below.

97 Including Dr Samantha Fairclough and Victim Support.

Live link

9.68 The YJCEA 1999 provides for the complainant to give evidence remotely through a live link, rather than in person within the courtroom.[98] In the consultation paper, we explained that applications for live links are commonly granted and rarely opposed.[99] We provisionally proposed that live links should be a standard measure attracting automatic entitlement.[100] The majority (over three-quarters) of consultees agreed.[101] Consultees agreed that an entitlement would reflect current practice.[102] Others commented that live links can improve the quality of complainants' evidence and experience, as the distance can reduce traumatisation.[103] Most consultees who disagreed repeated general objections to automatic entitlement, rather than to live links being a standard measure.

9.69 Some consultees did raise concerns over the quality of video evidence. This included concerns over the technical quality of the video,[104] as well as suggestions that there is a reduced impact for the jury of evidence given over video compared to evidence given live in person.[105] We do not think that these concerns mean that live links should not be a standard measure to which complainants are entitled. While complainants should be informed of any potential impact of video evidence, the choice whether to use a live link should be for the complainant.[106] Therefore, we recommend that live links should be a standard measure to which a complainant in a sexual offences prosecution is entitled.

Pre-recorded evidence

9.70 Currently, complainants in sexual offences cases may have their evidence in chief taken by the police through a video-recorded Achieving Best Evidence interview ("ABE interview") at the investigation stage. There is a presumption that this interview will be admitted at trial as their evidence in chief if requested by the prosecution, subject to the interests of justice.[107] Once the ABE interview has been admitted as the complainant's evidence in chief, the prosecution may apply for cross-examination and re-examination to be pre-recorded under section 28 of the YJCEA 1999. Pre-recording of cross-examination takes place at a separate hearing in advance of the trial in the absence of the jury. The complainant will usually give evidence over a live link from

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98 YJCEA 1999, s 24.

99 CP 259, para 7.107.

100 CQ 46: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use a live link to join the trial proceedings and give evidence. Do consultees agree?". CP 259, para 7.109.

101 Out of 86 responses, 71 consultees agreed; 10 disagreed; 5 submitted a response categorised as other.

102 The Bar Council and Martin Rackstraw, solicitor.

103 Including RCEW and Victim Support.

104 Including Chief Constable Sarah Crew; the Criminal Bar Association ("the CBA"); and a victim-survivor who had used a live link to give evidence.

105 Including Dr Samantha Fairclough and a Recorder.

106 The provision of independent legal advice on measures to assist with giving evidence as well as training for judges and legal practitioners on the evidence base of the impact of measures may also mitigate this concern. We make recommendations on these points at paras 9.188 and 9.215-9.216 below.

107 YJCEA 1999, s 22A.

the witness suite, with the judge, legal representatives and defendant in the courtroom.[108] The ability to pre-record evidence means that the complainant's evidence can be completed before the trial.[109]

9.71 Applications for the use of the video-recorded ABE interview as the complainant's evidence in chief are frequently granted and are rarely opposed by the defence.[110] Pre-recorded cross-examination under section 28 has been available for adult complainants in sexual offences prosecutions at all Crown Courts from September 2022.[111] However, there is evidence that the use of pre-recorded cross-examination is not consistent. There are inconsistencies in whether applications under section 28 are granted,[112] with judges rarely giving reasons for their decisions.[113] In comparison to applications for other measures, judges appeared to require additional evidence to support the complainant's need for pre-recorded cross-examination before granting the application.[114]

9.72 There are several benefits of pre-recorded evidence for complainants. As we explained in the consultation paper, cross-examination may take place sooner, with less waiting time at court and with more focused and shorter questioning.[115] This can mean complainants feel able to access therapy sooner.[116] Some may feel a sense of closure prior to the trial itself, although others may continue to feel distressed or anxious until the trial concludes.[117] The experience of cross-examination and quality of evidence may be improved through physical separation from the defendant and the courtroom. It can reduce stress, assist with better recall and more timely evidence

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108 CrimPD 6.3.37-6.3.38.

109 The prosecution or defence may wish to conduct further re-examination or cross-examination of the complainant after the s 28 hearing and recording has concluded. The YJCEA 1999, s 28(5)-(6) provides that further examination is possible only if the court makes a further special measures direction for another s 28 recording. The judge must be satisfied that further cross-examination is sought as a result of the requesting party having become aware since the original recording of a matter which they could not with reasonable diligence have ascertained before, or that for any other reason a further direction is in the interests of justice.

110 CP 259, para 7.132.

111 Above, para 7.114.

112 See submissions to the Justice Committee by Darlington and Durham Rape and Sexual Abuse Counselling Centre, Erim Mushtaq, and the National Police Chiefs' Council (all December 2023).

113 Submission to the Justice Committee by Erim Mushtaq (December 2023).

114 See submissions to the Justice Committee by Darlington and Durham Rape and Sexual Abuse Counselling Centre (December 2023) and Dr Natalie Kyneswood (December 2023).

115 J Baverstock, *Process evaluation of pre-recorded cross-examination pilot (section 28)* (Ministry of Justice, 2016).

116 Dame Vera Baird KC and D Ward et al, *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses* (Ministry of Justice and Ipsos UK, April 2023).

117 Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape – Phase two: Post-charge* (25 February 2022) p 70.

hearings.[118] Further, complainants may not need to give evidence again in a retrial as the recording can be used again.[119]

9.73 However, the use and availability of pre-recorded evidence for adult complainants has been criticised. Stakeholders have suggested that pre-recording evidence which requires an additional hearing may have significant negative impacts on resources and listing of cases, raising issues with timely disclosure and frontloading trial preparation. Some have suggested that the defence's ability to cross-examine the complainant may be diminished, either because issues may only arise during the process of trial after the complainant's main evidence has been taken, or because of the different nature and quality of the playback of recorded evidence. In addition, some legal practitioners have suggested that pre-recorded evidence has a distancing effect on juries, meaning that there is a diminished impact of the complainant's evidence compared to the greater impact of evidence given contemporaneously.[120]

9.74 In the consultation paper, we provisionally concluded that complainants should be entitled to pre-record all their evidence, having considered the benefits and risks of doing so.[121] We also concluded that it was not appropriate to limit the availability of pre-recording cross-examination only to those who had a pre-recorded ABE interview that was admissible as their evidence in chief, as is currently the case. There are many reasons why an ABE interview might not be conducted, or why it might not be admissible. For example, the police may have overlooked the need for an ABE interview where the complainant's vulnerabilities had not yet been identified.[122] These reasons do not justify a restriction on the ability to pre-record cross examination. Therefore, we provisionally proposed that where the complainant does not have an admissible ABE interview, they should be entitled to pre-record their evidence in chief, cross-examination and re-examination.[123]

Consultation responses and analysis

9.75 Over two-thirds of consultees who responded to our provisional proposal on automatic entitlement to pre-recorded evidence agreed.[124] Consultees affirmed the benefits of pre-recorded cross-examination for complainants. For example, Rape Crisis England and Wales ("RCEW") commented that pre-recording evidence at an earlier stage allows some complainants to begin recovery and therapy earlier. Others commented that pre-recording all evidence together could improve both the quality of the evidence

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118 J Baverstock, *Process evaluation of pre-recorded cross-examination pilot (section 28)* (Ministry of Justice, 2016).

119 CP 259, paras 7.115-7.116 and 7.120.

120 Above, paras 7.115, 7.117, 7.119-7.120 and 7.124.

121 CQ 47: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to pre-record their evidence. Do consultees agree?". CP 259, para 7.134.

122 CP 259, para 7.135, citing L Hoyano and J Riley, "Making Section 28 More Flexible and Effective" (1 June 2021) *Counsel*.

123 CQ 48: "We provisionally propose that, for complainants in sexual offences prosecutions, evidence in chief, cross-examination and re-examination should all be able to be pre-recorded before trial and should not depend on there being an admissible Achieving Best Evidence (known as "ABE") interview. Do consultees agree?". CP 259, para 7.140.

124 Out of 87 responses, 63 consultees agreed; 16 disagreed; 8 submitted a response categorised as other.

and the complainant's experience,[125] and reduce the risk of traumatisation by allowing complainants to give evidence away from court.[126] Several consultees also argued that an entitlement would reduce inconsistencies in whether section 28 applications are granted.[127]

9.76 Consultees who disagreed with automatic entitlement to pre-recorded evidence raised three main objections. First, some argued that an entitlement should not be granted given the burden on resources of the additional hearing it requires. For example, Dr Fairclough argued that the increased "backlog and thus delays in getting cases to court" suggest that pre-recorded evidence is not a justifiable measure for most complainants in sexual offences prosecutions who are not "vulnerable witnesses who would otherwise not be able to recall the detail of the offence once time had passed". We disagree that pre-recorded cross-examination should be limited only to certain complainants in sexual offences prosecutions. The benefits of pre-recorded evidence are not limited to capturing evidence before the witness' memory deteriorates and are not dependent on complainants otherwise satisfying the criteria for vulnerable witnesses.[128]

9.77 Secondly, stakeholders warned that pre-recorded evidence has a diminished impact on the jury compared to live evidence.[129] Research from Professor Cheryl Thomas in 2024 found lower conviction rates in cases where pre-recorded cross-examination had been used.[130] Professor Thomas argued that "such a strong and consistent correlation" indicates that pre-recorded evidence impacts jury decision-making. However, that research does not conclude whether this correlation was caused by an intrinsic difference in how juries experience pre-recorded evidence or whether other factors may be responsible.[131] Professor Thomas suggested, based on these findings, that our proposal of automatic entitlement to pre-recorded evidence would result in a

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125 Dr Matt Thomason.

126 Professors Joanne Conaghan and Yvette Russell.

127 Including RCEW; EVAW; and Dr Natalie Kyneswood.

128 See also written correspondence to the Justice Committee by Professor Katrin Hohl OBE (June 2025). Professor Hohl emphasised that such operational problems are not inherent to offering pre-recorded cross-examination to RASSO complainants, "but manifestations of pre-existing system problems of an under-funded, outdated and overwhelmed criminal justice system" (p 3).

129 Including legal practitioners; Circuit Judges; and a Recorder.

130 See submission to the Justice Committee (January 2024). Professor Thomas analysed a dataset of all charges against all defendants in all cases in all Crown Court Centres from June 2016 to June 2023. She found that jury conviction rates for every single offence are lower when s 28 evidence is used than when it is not used. Although juries convict more often than acquit where s 28 is used (61%), the conviction rate was almost ten percentage points lower compared to when s 28 is not used (70%). For rape charges, the conviction rate was 20% lower when s 28 is used compared to when it is not used.

131 Professor Thomas noted that the overwhelming majority of cases in the study were sexual offences cases, where nearly all complainants give evidence in chief through a pre-recorded video interview. She suggested this may mean lower conviction rates where s 28 pre-corded cross-examination is used are due to the "combined effect" of all the complainant's evidence being recorded. Professor Thomas suggested the other factors that could contribute to this combined effect include: no comparability between the main prosecution witness and other witnesses including the defendant; the timing of the main prosecution witness evidence at the beginning of the trial; the witness' evidence is structured differently when pre-recorded, leading to the disjointed nature of evidence in chief and cross-examination; recorded evidence is often poor quality, particularly when played back; or s 28 cases may be used for cases that are inherently weaker.

reduction in conviction rates.[132] Professor Thomas' analysis of the dataset and conclusions have been questioned.[133] Some have noted that further exploration of other possible factors affecting conviction rates should be researched before reaching such a conclusion.[134]

9.78 Other research has not found that section 28 results in lower conviction rates. The Ministry of Justice published an impact evaluation of section 28 in March 2025, analysing the effect of pre-recorded cross-examination on conviction rates, trial ineffectiveness and time to cross-examination.[135] In relation to conviction rates, it found that section 28 "does not appear to have an effect on a jury's decision to acquit, or convict, in a case, when controlling for court, case mix and trends over time".[136] For all cases sampled overall,[137] the unmodified conviction rates for section 28 cases were slightly lower than non-section 28 cases; though the unmodified conviction rate for all sexual offences cases were slightly higher than non-section 28 cases. However, once it had controlled for "the impact of the conviction rate over time, court-level impacts, and changes in the rate and type of sexual offences cases", it found that "there was no evidence that [section] 28 has an impact on conviction rates".[138]

9.79 Our project and recommendations do not have the objective of increasing conviction rates.[139] Equally, the likelihood of ensuring a conviction is not the sole concern behind

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132 Professor Thomas suggested that conviction rates for sexual offences would be likely to fall by approximately 10 percentage points (as this is the differential between any section 28 and non-section 28 conviction rate) and by approximately 20 percentage points for rape offences. This assumes that all complainants in sexual offences prosecutions will choose to pre-record all their evidence, rather than choosing other measures to assist with giving evidence to which they are also entitled.

133 See submissions to the Justice Committee by Dr Kelly Johnson et al (April 2024) and Dr Natalie Kyneswood (March 2024), criticising the reliability and presentation of the data included in Professor Thomas's submission. See also written correspondence to the Justice Committee by Professor Katrin Hohl OBE (June 2025).

134 See submissions to the Justice Committee by Dr Kelly Johnson et al (April 2024), Dr Natalie Kyneswood (March 2024) and Rape Crisis (May 2024).

135 O Seaton, A Christmas and K Jones, *Impact Evaluation of Pre-recorded Cross Examination for Vulnerable & Intimidated Witnesses* (Ministry of Justice Analytical Series, 2025). To assess the impact of pre-recorded cross-examination on conviction rates, the Ministry of Justice evaluation examined whether the use of s 28 changes the likelihood that a defendant will be found guilty in a trial by jury, sampling all cases received into Crown Courts between 1 January 2019 and 8 September 2022 that were tried by a jury and received a disposal, with some limited exclusions. It defined a case as one involving a conviction where at least one offence tried resulted in a guilty verdict by a jury. See pp 12-13.

136 Above, p 2.

137 The conviction rate final sample for all cases was 70,908 cases (of an initial sample of 449,390). The final sample for s 28 cases was 2,169 cases (of an initial sample of 4,241). See above, pp 17-18.

138 Above, pp 27-28. For all cases, the unmodified conviction rate was 63.9% for s 28 cases, and 64.7% for non-s 28 cases. For all sexual offences, the unmodified conviction rate was 64.0% for s 28 cases, and 60.4% for non-s 28 cases. Modified conviction rates were assessed by controlling for the impact of the conviction rate over time, court-level impacts and changes in the rate and type of sexual offences cases: pp 15-16. The effect size of the s 28 rate was estimated at 0.006 for all cases, and 0.005 for sexual offences cases only, alongside a confidence interval that contained zero. Therefore, the effect rate of s 28 could not be distinguished from zero: pp 55-58.

139 See CP 259, para 1.2. See also paras 3.47-3.52, discussing how we considered trial outcome data as part of a mosaic of evidence from different types of research, rather than reaching conclusions on one limited strand of the evidence base.

the use of measures when a complainant gives evidence. The principles of best evidence and humane treatment are important regardless of the verdict.[140] Complainants should be informed of this research, and its limitations, as well as any other relevant research on impact by their independent legal adviser.[141] This will ensure they can make an informed decision whether to pre-record their evidence. These concerns should not prevent complainants from accessing pre-recorded evidence where they determine this measure would be most suitable for them.

9.80 Thirdly, some consultees emphasised that the use of pre-recorded evidence should not be available as a matter of entitlement where this would impact the defendant's right to a fair trial. For example, the Six Circuits also suggested that significant delays to trial following a section 28 hearing mean that the defendant is disadvantaged compared to the complainant due to the deterioration of their memory. It argued that the complainant should not therefore be given an entitlement, and judicial discretion should be required to safeguard fairness.

9.81 As with other standard measures, the provision of pre-recorded evidence would be subject to the defence's ability to effectively test the evidence. We do not consider that the delay following a section 28 hearing would in general terms be sufficient to render the trial unfair,[142] as is the case now with cases using section 28 hearings. Significant delay is required for a trial to be considered unfair as an abuse of process,[143] for example where the delay has caused such forensic disadvantage to the defence that they are unable properly to advance their case due to evidence no longer being available or deteriorating.[144] Delays due to listing section 28 hearings and subsequent trials should not lead to such outcomes.

9.82 Further, once a complainant has pre-recorded their evidence, the judge may make a direction for further cross-examination and re-examination. The judge must be

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140 See the submission to the Justice Committee by Rape Crisis England and Wales (May 2024), emphasising that s 28 allows some complainants to give evidence when they otherwise would not and therefore its importance for procedural justice. See also written correspondence to the Justice Committee from Professor Katrin Hohl OBE (June 2025), in which she identified the limitations of the evaluations by Professor Thomas and the Ministry of Justice. Professor Hohl argued that s 28 should be evaluated primarily against whether it enables access to justice and improves complainants' ability to give their best evidence. She noted the importance of procedural fairness and emphasised that the availability of s 28 is essential to ensure procedural fairness for adult RASSO complainants.

141 See para 9.188 for our recommendation that complainants in sexual offences cases should be entitled to independent legal advice on their choice of measures to assist with giving evidence.

142 Article 6(1) includes the right to a hearing within a "reasonable time". The ECtHR will assess the reasonableness of the length of the proceedings in light of the circumstances of the case. Factors for consideration include the complexity of the case, the applicant's conduct, and the conduct of the relevant administrative and judicial authorities. For discussion of the ECtHR's application of these principles and examples of whether "reasonable time" was exceeded, see, among many, *Boddaert v Belgium* App No 12919/87; and *König v Germany* App No 6232/73.

143 A stay for abuse of process on the grounds of delay will only be granted in exceptional circumstances, where a fair trial is no longer possible owing to the prejudice to the defendant as a result of delay where this prejudice cannot be addressed in the normal trial process through the admission of evidence and the use of directions. See *Attorney General's Reference (No 1 of 1990)* [1992] QB 630; *R v F* [2011] EWCA Crim 1844, [2012] QB 703.

144 See Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) 10-4 Delay paras 1-6.

satisfied that the prosecution or defence have become aware of a matter which they could not with reasonable diligence have ascertained before the original recording, or where it is in the interests of justice to give the direction.[145] These provisions are sufficient to enable further examination of the complainant when necessary, even where pre-recorded evidence has been used.

Conclusion on entitlement

9.83 We have concluded that complainants in sexual offences cases should be entitled to pre-record their evidence. There are many benefits to pre-recorded evidence that ensure complainants support prosecutions, give their best evidence, and experience humane treatment. Such an entitlement would reduce inconsistencies in whether section 28 applications are granted. As with other standard measures, this entitlement is subject to a proviso that the defence can effectively test the evidence. While we do not consider that pre-recorded evidence generally prevents the defence from effectively testing the evidence, in exceptional cases this proviso will enable the judge to modify or deny the use of pre-recorded evidence if necessary.[146]

9.84 While we acknowledge concerns with resourcing and delays, we think it is still appropriate for the complainant to be entitled to pre-record their evidence. Complainants can consider potential delays, the possibility of technological issues, and evidence of the impact of pre-recorded evidence on the jury when deciding whether to request pre-recorded evidence. Given the benefits of pre-recorded evidence for the complainant and the trial process, it is important that the system supports the provision of the measure effectively. Ideally, technology should not hinder effective recording or playback, and the trial should not be delayed as a result of a complainant choosing this measure given the impact this has on all parties. We acknowledge that this is, however, the reality in many courts currently, which will take substantial resources and time to correct.[147]

ABE interviews

9.85 We provisionally proposed removing the requirement for an admissible ABE interview before pre-recorded cross-examination can be conducted. Nearly two-thirds of consultees who responded to this question agreed with the proposal.[148] Some noted that the current requirement for an admissible ABE interview prevents complainants who would particularly benefit from pre-recorded evidence from using this measure. Dr Olivia Smith explained that complainants with "complex needs" are less likely to have ABE interviews conducted, as difficulties in scheduling intermediaries may mean the police will take a written statement instead.

9.86 There were few objections expressed to removing the requirement of an admissible ABE interview. Dr Fairclough argued that pre-recording evidence in chief should be permitted where there is no admissible ABE interview, but warned against re-

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145 YJCEA 1999, ss 28(5)-(6).

146 See from para 9.41 above; Appendix 1, paras 1.67-1.75.

147 Consultees suggested ways to improve the procedure to alleviate resource burdens. For example, the CBA suggested that there should be dedicated court days for Ground Rules Hearings and s 28 hearings, with additional remuneration for counsel, to reduce delays in listings.

148 Out of 32 responses, 20 consultees agreed; 4 disagreed; 7 submitted a response categorised as other.

recording evidence in chief where there is an admissible ABE interview, given that this would require the complainant to give multiple accounts which may increase inconsistencies.

9.87 Consultees also raised issues with ABE interviews more generally. They argued that ABE interviews are inappropriate as evidence in chief, given they have a dual investigative and evidential purpose, and require significant editing in order to be used as evidence. For example, the Six Circuits criticised the structure and content of ABE interviews, commenting that many involved both "forensically [and] legally inappropriate questioning".[149] There are also concerns that the recordings of ABE interviews are of poor quality, resulting in technical issues when they are played back at court.[150]

9.88 Some consultees provided suggestions for reform of ABE interviews. This included the use of specialist examiners[151] to conduct ABE interviews instead of police officers.[152] For example, the Bar Council suggested "a trial of specialist examiners (ideally counsel/higher court rights advocates) in respect of ABEs". Other consultees disagreed with the use of specialist examiners.[153] For example, the Criminal Bar Association ("the CBA") suggested that police officers could be replaced with counsel instead.

9.89 The current requirement does not reflect the various reasons why an ABE interview may not be admissible. Further, this requirement discriminates against complainants who have greater needs and therefore prevents those who may benefit most from pre-recorded evidence from accessing this measure. We conclude that where complainants do not have an admissible ABE interview, they should be permitted to pre-record their evidence in chief. The evidence in chief should be conducted by the prosecution. Where the complainant chooses to pre-record their evidence in chief, this should not require them also to pre-record their cross-examination. Therefore, this evidence in chief need not take place at a section 28 hearing alongside cross-examination by the defence.

9.90 We acknowledge that there are significant concerns with ABE interviews, however we do not consider that a complainant who has an admissible ABE interview should be entitled to re-record their evidence in chief. While there may be issues with the appropriateness and quality of ABE interviews, identifying when an otherwise admissible ABE is so inadequate as to justify re-recording evidence in chief would be difficult. Requiring the complainant to re-record their evidence in chief may risk traumatisation, generate inconsistency between the accounts, and undermine the benefits of ABE interviews in capturing evidence at the earliest stage. Therefore,

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149 See also evidence submitted to the Justice Committee by Matthew Roberts (December 2023) and the JiCSAV project research team (January 2024).

150 The Six Circuits, consultation response; several stakeholders at consultation events.

151 See from Ch 12, para 12.90 below for explanation of specialist examiners.

152 The Bar Council; Martin Rackstraw; and Dr Olivia Smith.

153 The Six Circuits and the CBA.

where there is an admissible ABE interview, we consider that this should be used as the complainant's evidence in chief.

9.91 The evidence we have considered above suggests a clear need for further research on whether and, if so, how ABE interviews can be improved. The concerns raised by consultees are not limited to the use of ABE interviews in sexual offences prosecutions, and therefore would benefit from more holistic consideration. We recommend that the Government should consider reviewing whether ABE interviews should continue to be used as evidence in chief, or whether reform to the use of ABE interviews is necessary.

Recommendation 44.

9.92 We recommend that the entitlement of a complainant in a sexual offences case to pre-record their evidence should not be dependent upon there being an admissible video-recorded Achieving Best Evidence ("ABE") interview. Where there is no admissible ABE interview, evidence in chief should be able to be pre-recorded at a separate hearing conducted by the prosecution.

9.93 We recommend that the Government should consider further review of whether ABE interviews should continue to be used as evidence in chief in criminal prosecutions, or should be reformed for this purpose.

Editing recorded evidence

9.94 One of the benefits of pre-recorded evidence identified above is that in the event of a retrial, the complainant should not need to give evidence again as the pre-recorded evidence can be played back.[154] However, there may be instances where the pre-recorded evidence requires editing for it to be suitable to use at trial, or at a re-trial, including a re-trial for only some of the original charges on the indictment.

9.95 There are no specific provisions on the editing of pre-recorded evidence within the YJCEA 1999. Section 27 provides that the judge may direct for part of the video-recorded ABE interview not to be admitted as evidence in chief where the court is satisfied that in the interests of justice that part should not be admitted.[155] In contrast, section 28 contains no reference to admitting only part of the recorded cross-examination. The Criminal Practice Directions ("CrimPD") provides that "without exception, editing of the ABE interview/examination-in-chief or recorded cross-examination is prohibited without an order of the court".[156]

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154 We were told by a barrister that evidence given live could be recorded at trial for use in a subsequent re-trial to prevent vulnerable witnesses from having to give evidence again. Whether live evidence should be recorded at trial is not an issue limited to sexual offences prosecutions. There have also been suggestions that recording live evidence could assist judges when hearing appeals: see Criminal Appeals (2025) Law Commission Consultation Paper 268, para 15.249.

155 YJCEA 1999, s 27(2).

156 CrimPD 6.3.41.

9.96 As of 2024, the Criminal Procedure Rules ("CrimPR") also refer to the possibility of editing a section 28 recording, by requiring the court to set a timetable providing for "the date by which any editing of the recording must be completed".[157] The Criminal Procedure Rule Committee intended this amendment to reflect that it "may be necessary with the court's permission to edit the recording to be used as evidence". The previous lack of reference to the ability to edit pre-recorded cross-examination had "sometimes led to uncertainty about the court's powers".[158]

9.97 We understand that in practice, editing of pre-recorded cross-examination may be done by agreement between the parties, with a mention hearing with the judge taking place only where edits are disputed. Edits are requested through a court editing form approved by the judge.[159] However, concerns have been raised about the ability to effectively edit recordings in the circumstances of a re-trial.[160]

9.98 We consider that the CrimPD provides a clear legal basis that both pre-recorded evidence in chief and pre-recorded cross-examination may be edited where approved by the court. However, the discrepancy in wording between the different sections of the YJCEA 1999, as well as the CrimPD and the CrimPR, may cause confusion and uncertainty over the ability to edit pre-recorded cross-examination. We think it would be helpful and sensible to have all the powers governing the use and editing of pre-recorded evidence consolidated within the same statutory source.

Recommendation 45.

9.99 We recommend that the current provisions governing the ability to edit the recordings of a witness' evidence in chief, cross-examination and re-examination should be consolidated within the statute that governs the power to order pre-recorded evidence.

Youth courts

9.100 The Bar Council suggested that the use of pre-recorded evidence should be extended to the youth courts. A pilot of pre-recorded cross-examination began in Leeds youth court in 2022, though there has been no wider roll-out. We think that the same benefits of pre-recorded evidence may apply here. A youth court judge also told us that section 28 does not present similar listing difficulties for the youth court compared to the Crown Court, given the shorter length of youth court trials. However, the scope of our project means that we have not considered the specific context of the youth courts. Therefore, we recommend that the Government consider whether pre-

157 CrimPR r 18.8(2).

158 See the explanation of the amendments to the Criminal Procedure Rules in April 2024.

159 HM Courts & Tribunals Service, *Pre-Recorded Evidence (PRE): view recorded evidence before trial* (6 September 2024, updated 16 June 2025).

160 See oral evidence given by John Riley to the Justice Committee (23 June 2023); and evidence submitted to the Justice Committee by COEUS (March 2024).

recorded evidence should be extended to all sexual offences prosecutions in the youth courts.

Recommendation 46.

9.101 We recommend that the Government should consider whether the use of pre-recorded evidence should be extended to sexual offences prosecutions in youth courts.

Whether the defendant can see the complainant

9.102 One of the aims of our recommendations in this chapter is to simplify and clarify the regime governing measures to assist with giving evidence. Currently, there is uncertainty about whether the defendant can be prevented from seeing the complainant where screens, live link, or pre-recorded evidence is used. The statutory aim of a screen is to prevent the complainant from seeing the defendant;[161] however, in practice, most screens also prevent the defendant from seeing the complainant.[162] The YJCEA 1999 does not require the defendant to be able to see the witness where a screen is used.[163]

9.103 Where the complainant gives evidence over live link, the defendant can generally see the complainant on a screen in the courtroom.[164] However, the YJCEA 1999 does not include the defendant as a specified person who must be able to see the witness where a live link is used.[165]

9.104 Where the complainant pre-records their evidence in chief through an ABE interview, the defendant will see this recording alongside their legal representatives when it is disclosed to the defence. Under the Criminal Procedure and Investigations Act 1996, the prosecution are obliged to serve the complainant's ABE interview and any transcript on the defendant's legal representatives. The legal representatives will show this evidence to the defendant to receive instructions, prepare their case and represent them at trial.[166] The police are not permitted to edit the ABE interview to prevent the complainant being seen in the recording, such as through pixelating their image, before it is sent to the defence. Any proposed edits must be discussed between the prosecution and the defence, which requires the defence and defendant to have sight of the unedited video.[167]

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161 YJCEA 1999, s 23(1).

162 CP 259, para 7.142.

163 YJCEA 1999, s 23(2). The witness must be able to see, and be seen by, the judge, jury, legal representatives and any interpreter or other person appointed to assist the witness.

164 CP 259, para 7.142.

165 YJCEA 1999, ss 23(2) and 24(8).

166 CP 295, para 7.143.

167 Above, para 7.144.

9.105 Cross-examination and re-examination are pre-recorded at a section 28 hearing. At those hearings, the complainant gives their evidence over live link with the defendant, legal representatives and the judge remaining in the courtroom where they can observe the evidence as it is given. There is inconsistency in the provisions governing section 28 hearings on whether the defendant *must* be allowed to see the complainant while they are pre-recording their cross-examination and re-examination. The YJCEA 1999 requires the defendant to be "able to see and hear any such examination and to communicate with any legal representative acting for him".[168] However, the CrimPD suggest that the defendant may be prevented from seeing the complainant at the section 28 hearing if a screen has been directed.[169] The relevant direction states that the defendant must be able to communicate with their representative and "should be able to *hear the witness* via the live link and *see the proceedings*".[170] In consultation, judges told us that they have directed screens to be used at section 28 hearings to prevent the defendant from seeing the complainant.

9.106 Generally, where a live link is used or pre-recorded evidence is played back at court, the defendant will be able to see the complainant on a monitor screen. However, in some cases the defendant may be prevented from seeing the complainant by 'screening the screen' on which the complainant appears.[171] How the defendant is prevented from seeing the complainant will depend on the layout and capabilities of each courtroom. CPS guidance suggests screens could be placed around the witness box, or around the dock.[172] There is therefore a level of inconsistency and lack of clarity on the effect of these measures. In the consultation paper, we sought views on whether the defendant should be able to see the complainant when certain measures are used.[173]

9.107 We consider that where possible there should be a consistent approach. This means that whenever a particular measure is used, the practical effect is the same in all cases where it is used and can be understood in advance. There is value in clarifying the effects of standard measures so that these are known ahead of the complainant's decision whether and if so how to give evidence. This should provide greater clarity and certainty in advance for both complainants and defendants to enable effective

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168 YJCEA 1999, s 28(2(b).

169 CrimPD 6.3.38.

170 Above (emphasis added).

171 CP 259, para 7.145, n 232.

172 Above, para 7.146, citing CPS, *Special Measures Legal Guidance* (22 July 2021).

173 CQ 49: "When a direction is made for the use of a measure to assist the complainant in a sexual offences prosecution to give evidence, should the defendant be able to see the complainant when: (1) the complainant gives evidence behind a screen; (2) the complainant gives evidence using a live link; (3) the complainant is pre-recording their evidence; (4) the complainant's pre-recorded evidence is disclosed to the defence; and (5) the complainant's pre-recorded evidence is played in court". CP 259, para 7.157. CQ 50: "We provisionally propose that, where a defendant has a vulnerability or impairment that requires them to watch someone speaking in order to understand what they are saying, provision should be made to allow them to see the complainant while they give evidence. This should be allowed even if the complainant has chosen to use a measure to assist them give evidence that would otherwise prevent the defendant from seeing them. Do consultees agree?". CP 259, para 7.158.

preparation. With the assistance of their independent legal adviser,[174] complainants can then make an informed choice over how to give their best evidence, considering all benefits and features of each standard measure.

9.108 Absent the use of any measures, the defendant is entitled to and will see the entirety of the evidence against them. However, article 6 does not require the defendant always to be able to see the complainant to receive a fair trial.[175] Article 6(3)(d) sets out the defendant's right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Observing the behaviour and assessing the credibility of a witness is an important element of this right to confront witnesses.[176] The defendant may, when some measures are used, be prevented from seeing the complainant's evidence in its entirety. However, measures that limit the defendant's ability to observe the complainant are not as such incompatible with the right to a fair trial, provided there is adequate opportunity for the defendant to challenge the evidence and question witnesses.[177] The ECtHR has endorsed the use of measures that avoid a direct confrontation between the defendant and complainant where necessary to ensure states comply with the positive obligation to protect the complainant's privacy rights.[178]

9.109 There are good reasons why a complainant may not want the defendant to see them, and consultees expressed support for measures that prevent this.[179] Complainants may have changed their appearance and not want the defendant to see their new appearance, for example. Knowing that the defendant can see them give evidence may prevent complainants from supporting prosecutions or giving evidence at all. Where they do give evidence, this knowledge may prevent complainants from giving their best evidence. They may experience disproportionate stress and risk traumatisation that may prevent humane treatment. The fear of being seen may also undermine the use of other measures to assist with giving evidence. For example, the Bar Council stated that though live links are intended to support complainants by allowing them to give evidence away from the courtroom, knowing the defendant can see them may undermine the reassurance given by the measure. Consultees

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174 See from para 9.175 below for our recommendation that complainants in sexual offences cases should be entitled to receive independent legal advice on measures to assist with giving evidence.

175 See Appendix 1, from paras 1.62-1.77. For instances where preventing the defendant from seeing a witness at all resulted in an unfair trial, see *R v Davis* [2008] UKHL 36 and *R v Pope* [2010] EWCA Crim 2113.

176 Appendix 1, para 1.65, citing I Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] *Criminal Law Review* 255; M Daniele, "Testimony Through a Live Link in the Perspective of the Right to Confront Witnesses" [2014] *Criminal Law Review* 189; *Bocos-Cuesta v The Netherlands* App No 54789/00 at [71]; *Graviano v Italy* App No 10075/02 at [38] (in French).

177 Appendix 1, paras 1.62-1.66.

178 CP 259, para 2.66.

179 Including consultees from law enforcement (Chief Constable Sarah Crew), the judiciary (HM Council of Circuit Judges), legal practitioners (the CPS, the Bar Council and the Law Society) and victim support organisations (RCEW, Victim Support and Centre for Women's Justice ("CWJ")).

suggested that it is common for complainants not to want the defendant to see them and that they are surprised to learn that a chosen measure permits it.[180]

9.110 There are also good reasons why the defendant may want to see the complainant. Where the defendant can see as well as hear the complainant, they are able to see the evidence in its entirety. Particularly where the complainant is known to the defendant, by seeing the complainant give evidence the defendant could recognise gestures or body language that would otherwise go unnoticed by legal representatives. For example, the LCCSA commented that a complainant's demeanour could be "crucial" evidence in some cases, but that the defence advocate "may not know this without the defendant being able to see the complainant do it and give instructions". Seeing the complainant therefore can assist the defendant to give instructions and receive informed representation.

9.111 The justifications for preventing the defendant from seeing the complainant are strongest while the complainant is giving their evidence, either at trial (when they may use live link or a screen) or pre-recording in advance of trial. While the complainant is giving their evidence, there is a direct "confrontation" between the complainant and the defendant. The context in which the complainant is actually giving their evidence will most likely have the greatest impact on the quality of that evidence and the complainant's experience.

9.112 We consider that the defendant has adequate opportunity to challenge the complainant's evidence, even where they are prevented from seeing the complainant when they give their evidence behind a screen, over live link or while pre-recording. The defendant will be able to hear the evidence at all times. Their legal representative will at all times be able to see and hear the complainant's evidence, who can challenge the evidence on the defendant's behalf. Therefore, we have concluded that while the complainant is giving their evidence behind a screen, using a live link, or is pre-recording their evidence, the effect of these measures should be that the defendant cannot see the complainant.

9.113 If the complainant pre-records their evidence, after the evidence session the recording will be disclosed to the defence and played back at court. We consider that, as at present, the defendant should continue to be able to see the complainant in the recording when viewing the recorded evidence in these contexts. The complainant's evidence is captured at the recording stage. The defendant will then watch the evidence either in the presence of their legal representatives once disclosed, or in the courtroom when it is played back. We acknowledge that knowing that the defendant will see them when their pre-recorded evidence is played back may still affect complainants. However, there is less direct "confrontation" between the complainant and the defendant in these circumstances, compared to when the defendant sees the complainant at the time that the complainant is giving their evidence. There should be a lesser impact on the quality of the complainant's evidence and a reduced risk of inhumane treatment. Further, allowing the defendant to see the playback of pre-recorded evidence in advance of cross-examination can assist the defence to challenge the complainant's evidence, such as where the defendant may pick up on

[180] Including RCEW; Victim Support; Claire Waxman, Independent Victims' Commissioner for London; and the CPS.

elements of the evidence that defence counsel would not (as described at paragraph 1.110 above). Therefore, we have concluded that the defendant should be permitted to see the complainant in the recording when pre-recorded evidence is disclosed to the defence and played back at trial.

9.114 The proviso described from paragraph 9.41 above is another safeguard to guarantee that the defence can effectively test the evidence, as required for a fair trial. In exceptional cases where the particular circumstances of the defendant mean it is necessary for them to see the complainant in order for the defence to effectively test this evidence, the judge will be able to modify the effect of the requested measure so that the defendant may see the complainant. We gave examples of such circumstances at paragraph 9.42 above.

9.115 Preventing the defendant from seeing the complainant can be done in various ways depending on the layout of the courtroom. Some consultees were concerned that the defendant themself may be screened off to prevent them from seeing the complainant, albeit without suggesting that this occurs frequently. In our view, that is undesirable. Screening the defendant would prevent them from seeing their legal representatives and the judge during the complainant's evidence, which may diminish their ability to participate effectively and result in the defendant having less engagement with their own trial compared to those in the public gallery. Further, this may impact the jury's perception of the defendant negatively if they infer that the complainant's need for the measure relates to the defendant's prior actions. Therefore, in giving effect to these standard measures, courts should avoid screening the defendant, even if this means that the complainant must be screened so that the public cannot see them.

9.116 Some consultees raised more general concerns that there may be particular risks to a complainant's safety that require the defendant to be prevented from seeing them at all stages of the trial process. For example, Chief Constable Sarah Crew commented that particularly for cases of stranger rape, allowing the defendant to see the complainant creates "further risk". There are existing steps that the police and prosecution may take to protect a witness where their identification could place them at risk of harm. For example, the prosecution may seek to apply for a witness anonymity order, which can require measures such as using a pseudonym, screening the witness from the defendant and public, or modulating the witness' voice.[181] Our recommendations above would not prevent these witness anonymity measures from being used where necessary and in combination with measures to assist with giving evidence. Further, the court would retain powers under the inherent jurisdiction to prevent the defendant from seeing the complainant when pre-recorded evidence is disclosed or played back, if necessary to protect the safety of the complainant.

[181] Coroners and Justice Act, s 86; see CPS, "Witness protection and anonymity" (12 March 2025).

Recommendation 47.

9.117 We recommend that where the complainant:

(1) gives evidence using a screen;

(2) gives evidence using a live link; or

(3) is pre-recording their evidence;

the effect of these measures should be that the defendant cannot see the complainant while they are giving their evidence.

9.118 We recommend that when the recording of the complainant's pre-recorded evidence is disclosed to the defence or played back at court, the defendant should be permitted to see the complainant in the recording when watching the recorded evidence.

Exclusion of the public

9.119 Currently, eligible witnesses can apply to give their evidence in private, by having the public excluded from the courtroom. Exclusion of the public is a statutory measure to assist with giving evidence for intimidated witnesses, including complainants of sexual offences, under section 25 of the YJCEA 1999.[182] A direction does not automatically exclude all members of the public. Rather, the judge has discretion over the persons to be specified within the exclusion direction.[183] The exclusion could therefore apply to all of the public, or to some of the public, and may or may not apply to members of the press. The direction cannot exclude the defendant, legal representatives acting in the proceedings, or any interpreter or other person appointed to assist the complainant who can all remain in the courtroom.[184] If the judge directs the exclusion of members of the press, at least one named representative of the press must be permitted to remain.[185]

9.120 Alongside this statutory measure for intimidated witnesses, the judge retains the power under the inherent jurisdiction to clear the court when any witness gives evidence. The judge may require evidence to be given in private if otherwise it "would frustrate or render impracticable the administration of justice". Sometimes called "clearing the court", it must be no more than "the court reasonably believes it to be necessary in order to serve the ends of justice".[186] Excluding the public and press where it is in the interests of justice to do so has been held compatible with the right to

182 YJCEA 1999, s 25(4).

183 Above, s 25(1).

184 Above, s 25(2).

185 Above, s 25(3).

186 *Attorney-General v Leveller Magazine Ltd and others* [1979] AC 440, 450 (Lord Diplock).

a fair and public trial under article 6.[187] In this section, we recommend that complainants in sexual offences prosecutions should be entitled to exclusion of the public during their evidence. We recommend that this should be subject to a reformed exemption to allow the following categories of individuals to remain in the court: individuals directly involved in proceedings,[188] including legal professionals, the defendant, as well as any interpreters for the defendant or complainant or an ISVA for the complainant; bona fide representatives of the press; a supporter for the complainant; academic researchers conducting research that has been approved by a university research ethics committee; and any other person whom the judge permits, on application.

Entitlement

9.121 In the consultation paper, we referred to evidence that exclusion of the public is a rarely used measure.[189] Stakeholders had suggested to us that this may be due to concerns about open justice, lack of awareness of the measure, a lack of applications from the prosecution, and concerns about jurors' perceptions of the defendant where exclusion of the public is directed.[190]

9.122 There have been efforts to increase the use of this measure to support witnesses. The CPS legal guidance on measures to assist with giving evidence no longer describes exclusion of the public as being only for "highly sensitive issues and in very exceptional cases".[191] Instead, the CPS has encouraged prosecutors to highlight this measure to complainants of sexual offences prosecutions.[192] The Joint Inspection described the underuse of exclusion of the public as a "missed opportunity" for victims,[193] while the Office of the Victims' Commissioner's ("OVC") review recommended that the Ministry of Justice should engage with the judiciary to promote the use of this measure for vulnerable and intimidated witnesses.[194]

9.123 We also noted that across the UK and Ireland, England and Wales is the only jurisdiction that routinely requires complainants to give evidence in public.[195] In Scotland, the court may exclude the public during the evidence of a complainant in a sexual offences prosecution, subject to an exemption for members or officers of the court, parties and their representatives, bona fide members of the press, and such

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187 CP 259, para 7.168, citing *R v Richards (Randall)* (1999) 163 JP 246, [1999] Crim LR 764-765; Appendix 1, paras 1.53-1.59.

188 Defined from para 9.140 below.

189 CP 259, para 7.171.

190 Above, para 7.171, n 261.

191 CPS, *Special Measures Legal Guidance* (22 July 2021, updated 29 August 2023 and 29 October 2024).

192 CPS, *Could clearing the public gallery help the victim to give their best evidence at court?* (1 December 2021).

193 CP 259, para 7.171, citing Criminal Justice Joint Inspection, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape – Phase two: Post-charge* (25 February 2022) p 66.

194 Above, para 7.171, citing Office of the Victims' Commissioner ("OVC"), *Next steps for special measures* (May 2021) Recommendation 14.

195 Above, para 7.174.

others as the court may authorise to be present.[196] In serious sexual offences trials, such applications are "invariably successfully made".[197] In Ireland and Northern Ireland, the entire trial of serious sexual offences must be held in private.[198]

9.124 Exclusion of the public may have significant benefits for complainants given the highly sensitive and private nature of their evidence and risk of traumatisation from the process. We noted that this measure may encourage complainants to report offences and give evidence physically in court, protect their privacy rights and prevent breaches of their lifetime anonymity under section 1 of the Sexual Offences (Amendment) Act 1992.[199] We argued that an entitlement would reduce inconsistencies and increase complainants' certainty and confidence in the criminal justice system.[200] We acknowledged the importance of open justice and public knowledge of criminal trials, noting that there is an exemption to allow at least one member of the press to attend even where the public is excluded, to help promote transparency.[201]

9.125 We provisionally proposed that complainants in sexual offences prosecutions should be automatically entitled to exclusion of the public when they give their evidence. The complainant would be entitled to an exclusion direction, though the judge would retain discretion over to whom the direction applied. We proposed that the current exemption for the defendant, legal representatives, at least one named representative of the press, and any interpreter for the complainant should be retained.[202]

9.126 The majority of consultees agreed with our provisional proposal.[203] Consultees agreed that entitlement to exclusion of the public would improve complainants' access to this measure.[204] For example, the CPS commented that its advocates had experienced "some inconsistency with regards to [its] application" and that automatic entitlement would respond to this. Consultees further argued that exclusion would reduce complainants' distress while giving evidence and the risk of traumatisation, leading to

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196 Criminal Procedure (Scotland) Act 1995, s 271HB.

197 Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (May 2019) para 3.41.

198 CP 259, para 7.175, citing Criminal Law (Rape) Act 1981, s 6; Criminal Justice (Victims of Crime) Act 2017, s 20; Children Act 2001, s 257; Criminal Law (Sexual Offences) Act 2017, s 29; Justice (Sexual Offences and Trafficking) Act (Northern Ireland) 2022.

199 Above, para 7.171.

200 Above, paras 7.176-7.177.

201 Above, para 7.172; Appendix 1, para 1.53, citing *Riepan v Austria* App No 35115/97 at [27].

202 CQ 53: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the exclusion of the public from observing the trial while they are giving evidence, whether in court or by live link, or while their pre-recorded evidence is played. As is currently the case under section 25 of the Youth Justice and Criminal Evidence Act, exclusion of the public would not apply to: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, all of whom would still be permitted to attend. Do consultees agree?". CP 259, paras 7.186.

203 Out of 92 responses, 55 consultees agreed; 30 disagreed; 7 submitted a response categorised as other.

204 Including HMCPSI; the CPS; and RCEW.

improvement in the quality of the evidence given by complainants.[205] Others suggested that greater use of this measure would increase complainants' confidence and willingness to participate in the criminal justice system.[206]

9.127 Other consultees focused on the complainant's rights to privacy and anonymity. In particular, consultees noted the increased risk for certain complainants in sexual offences prosecutions from giving evidence in public. For example, Muslim Women's Network UK emphasised that women from racialised minority communities "face additional barriers such as shame and perceived dishonour from families and communities", and that giving evidence in public may result in "further psychological trauma, heightened risk of honour-based abuse and ostracization".

9.128 Exclusion of the public may help complainants to give their best evidence, ensure they are treated humanely, and protect their privacy rights under article 8 of the ECHR. As discussed at paragraph 1.24 above, the court has positive obligations to prevent the complainant from suffering unnecessary distress and trauma when giving evidence, including preventing secondary victimisation.[207] The ECtHR has held that exclusion of the public may be justified to protect the privacy rights of complainants and defendants.[208]

9.129 The presence of the wider public may prevent the complainant from giving their best evidence and may result in disproportionate distress or traumatisation. The evidence given by complainants in sexual offences prosecutions is of an exceptionally private nature. While the public should be able to hear the content of the complainant's evidence when disseminated by media reporting,[209] there is a far greater impact on the complainant's ability to give their best evidence and their experience of doing so when the public are present during the evidence itself.

Open justice and article 10

9.130 Consultees who agreed with entitlement to exclusion of the public also noted the importance of open justice and the need for an exemption for the press to uphold this. For example, RCEW noted that the current press exemption to exclusion is "justified and appropriate", and that an entitlement for complainants should not interfere with the rights of the press to report.

9.131 Consultees who disagreed generally focused on issues of open justice, as well as the media's and the public's rights under article 10 of the ECHR. Consultees argued that it should be for the judge to determine whether the needs of a particular complainant

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205 Including consultees from law enforcement (Chief Constable Sarah Crew), legal practitioners (the CPS, HMCPSI) and victim support organisations (CWJ, EVAW, Victim Support).

206 Including the CPS and CWJ.

207 Appendix 1, para 1.21.

208 Appendix 1, paras 1.53-1.59.

209 This reporting would not identify the complainant due to their statutory right to anonymity under the Sexual Offences (Amendment) Act 1992, s 1.

justify the interference with open justice, rather than an entitlement for all complainants in sexual offences prosecutions to use this measure.[210]

9.132 We acknowledge that exclusion of the public could interfere with open justice and article 10 rights. Article 10 provides for the right to freedom of expression, including the freedom to receive and impart information and ideas. It is a qualified right; any interference may be justified where in pursuit of a legitimate aim, including protection of the rights of others, and necessary in a democratic society.[211] As noted at paragraph 9.128 above, exclusion of the public may be necessary and justified to protect the article 8 rights of the complainant.

9.133 Open justice is a fundamental principle of criminal trials, including where measures have been taken to provide a degree of privacy for parties or witnesses.[212] Given the potential for biased and poorly conducted cross-examination in sexual offences prosecutions, the scrutiny of open justice is important to discourage mistreatment of complainants by advocates and ensure proceedings are conducted fairly by judges.[213]

9.134 Restrictions on open justice may be justified where necessary and proportionate.[214] In legislating for the current discretionary model, Parliament concluded that where this would improve the quality of the evidence of the complainant, exclusion of the public with the exception of at least one named representative of the press was a justified interference.[215] This exclusion is limited only to the complainant's evidence, further ensuring proportionality.

9.135 There are practical limitations to the ability to observe trials. Consequently, the media play an important role in open justice by acting as the "eyes and ears" of the public.[216] We recommend a reformed exemption to a direction to exclude the public, explained further below, to allow all bona fide representatives of the press to remain. The presence of multiple representatives better serves open justice, as the accuracy of each reporter's notes can be cross-tested, and each will bring different perspectives to their reporting.

9.136 With a suitable exemption, exclusion of the public is a justifiable interference given the exceptionally private nature of the complainant's evidence, the need for complainants to give their best evidence and to be treated humanely when doing so.

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210 Including HM Council of Circuit Judges; the Law Society; LCCSA; the Six Circuits; the CBA; the Bar Council; the Crime Reporters' Association ("CRA"); and the Media Lawyers Association ("MLA").

211 Article 10(2). Other legitimate aims include: national security, territorial integrity or public safety; the prevention of disorder or crime; the protection of health or morals; the protection of the reputation of others; preventing the disclosure of information received in confidence; or maintaining the authority and impartiality of the judiciary.

212 See *Tickle v The BBC* [2025] EWCA Civ 42 at [45]-[46], rejecting suggestions that the family courts operate in "shielded justice" rather than "open justice".

213 As recognised by consultees including RCEW; EVAW; and Guardian News and Media.

214 *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861.

215 *Hansard* (HL), 23 March 1999, vol 598, col 1187.

216 *Re British Broadcasting Corporation* [2018] EWCA Crim 1241, [2018] 1 WLR 6023 at [30]; *Re S* [2005] 1 AC 593 at [18].

9.137 Therefore, we recommend that exclusion of the public during their evidence should be a standard measure to which complainants should be entitled.[217] This measure should apply to all of the complainant's evidence, as defined at paragraph 9.63 above, and where their pre-recorded evidence is played back at trial or their VPS is read out. It would operate as currently: the judge has discretion over to whom the direction to exclude should apply. The direction would not apply automatically to all members of the public who do not fall within the exemption. The discretion to tailor the direction allows for the judge to consider the balance of rights under articles 6, 8 and 10, and ensure any interference with these rights is necessary and proportionate. When a direction would exclude all members of the public, the reformed exemption below permits important categories of people to remain.

Reformed exemption

9.138 In the consultation paper we acknowledged that we had not heard evidence on how the exemption for at least one named representative of the press works in practice and requested evidence from consultees on this.[218] We also asked for views on whether any other individual or group should be exempted from a direction to exclude the public.[219]

9.139 We have concluded that there should be a reformed exemption for the following categories of individuals: persons directly involved in proceedings;[220] bona fide representatives of the press; academic researchers conducting research that has been approved by a university research ethics committee; and a supporter for the complainant. Further, we have concluded that the judge should retain discretion to permit any individual to remain on application where a direction to exclude is made, considering the interests of justice as well as the impact on the quality of the complainant's evidence, humane treatment, the complainant's rights to privacy and the complainant's wishes.

Persons directly involved in proceedings

9.140 The YJCEA 1999 currently exempts from a direction to exclude the defendant, legal representatives acting in the proceedings, or any interpreter or other person appointed to assist the complainant.[221] Not all individuals who are directly involved in proceedings are exempted: the defendant may also be assisted by an interpreter. All legal professionals and interpreters are directly involved in the case and are necessary for the complainant's evidence to be given. We recommend that there should continue to be an exemption for persons directly involved in the proceedings, including but not limited to those listed in the YJCEA 1999. The exemption should also include any interpreter or other person appointed to assist the defendant. Below, we recommend that complainants should be entitled to the presence of a supporter such

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217 See from para 9.165 below.

218 CP 259, para 7.182.

219 CQ 54: "If the public are excluded from observing the trial while a complainant in a sexual offences prosecution is giving evidence, whether in court or by live link, or while their pre-recorded evidence is played, should there be an exemption to allow the attendance of any other individual or group, in addition to those listed in the Consultation Question above?" CP 259, para 7.187.

220 Defined from para 9.140 below.

221 YJCEA 1999, s 25(2).

as an ISVA as a distinct standard measure for giving evidence. Where the complainant requests this measure in combination with exclusion of the public, their supporter or ISVA should be considered a person appointed to assist the complainant, and therefore exempt as a person directly involved in the proceedings. For clarity, the complainant should also be permitted to remain in court when the public is excluded while their pre-recorded evidence is being played.

Bona fide representatives of the press

9.141 Media consultees criticised the current exemption for at least one named representative of the press to remain where an exclusion order applies to the press. Consultees raised both practical and principled criticisms. Practical criticisms included the lack of a clear mechanism for the press to select one named representative; a single representative could not distribute copy to all media organisations in a timely manner given each organisation has different deadlines for reporting; and a single representative could not check their reporting for errors with other representatives. Consultees suggested this would increase the likelihood of errors that would be replicated in all publications that relied on the original report, resulting in risk of legal liability. Further, consultees stated that where media organisations report based on the copy from one named representative, reporting may be unbalanced and that the plurality of perspectives currently found in media reporting would be diminished. For example, the British Broadcasting Corporation ("BBC") emphasised that different media reports focus on different aspects of a trial, allowing the public to obtain "a holistic understanding" of the criminal justice system, with this "diversity in reporting and sources of information" needed for the media "to collectively discharge the watchdog function" for open justice.

9.142 Media reporting is an important safeguard for open justice. The way that the press report and distribute information has changed significantly since the YJCEA 1999 was introduced. The evidence we sought clearly demonstrates that the current exemption is now not workable. Therefore, we recommend that there should be an exemption for all bona fide representatives of news gathering or reporting organisations to remain.[222]

9.143 Such an exemption applies to directions to exclude the public under this measure for giving evidence; our recommendations do not seek to limit the judge's powers to control their courtroom or their inherent jurisdiction. In particular cases, the judge may use their inherent jurisdiction to direct for members of the press to attend proceedings remotely, such as where there are too many representatives to accommodate within the physical courtroom; or to exclude members of the press where this is necessary and proportionate in the interests of justice.

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222 This exemption mirrors those found in the youth courts and in Scotland, Northern Ireland and Ireland. See, for example, Children and Young Persons Act 1922, s 37(1) ("bona fide representatives of a newspaper or news agency"); Criminal Procedure (Scotland) Act 1995, s 271HB(3)(c) ("bona fide representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings); Criminal Evidence (Northern Ireland) Order 1999, s 27A(2)(e) ("bona fide representatives of news gathering or reporting organisations"); Criminal Law (Sexual Offences) Act 2017 (Ireland), s 19(1) ("bona fide representatives of the press").

Academic researchers

9.144 Some consultees suggested there should be an exemption for academic researchers given the public interest in research which helps to ensure accountability and public knowledge of proceedings. For example, Dr Natalie Kyneswood commented that trial observation formed a central part of her research on section 28, and the reforms in the YJCEA 1999 were themselves preceded by observation studies.

9.145 We agree that there is value in ensuring academic research involving court observation studies can continue even where the judge has directed for the public not to be present during the complainant's evidence.[223] As with media reporting, such research contributes to public knowledge and understanding of the criminal justice system in practice and informs public debate and law reform. To be proportionate and manageable, the exemption should apply to academic researchers who are conducting research that has been approved by a university research ethics committee. This form of ethical approval should ensure sufficient scrutiny that the research will contribute to public knowledge and understanding of sexual offences prosecutions and therefore be in the public interest.

A supporter for the complainant

9.146 We consider that there should be an exemption to allow a supporter for the complainant to remain in a suitable place in court, where requested by the complainant. Complainants may wish the general public to be excluded, but for a friend or family member to remain for support while they give evidence.[224] Notwithstanding this exemption, the judge retains powers under the inherent jurisdiction to control their courtroom. These inherent powers may be used to respond where an individual supporter of the complainant is disruptive to proceedings.

Discretion to allow individuals to remain on application

9.147 Finally, we recommend that the judge should retain a residual discretion to allow for individuals to be exempted from an exclusion direction where the judge is satisfied that it is in the interests of justice for them to remain. There may be factual circumstances in some cases that mean there are good reasons for an individual to remain despite falling outside of the exempted categories. For example, the defendant may wish for a supporter to remain during the complainant's evidence, such as where they have a particular vulnerability or need for support. While rare, given the purpose of this measure and the exemptions already provided, we think it is important to allow for that possibility. Individuals should be permitted to apply to the judge to remain where an exclusion direction has been made. To determine whether it is in the interests of justice for the individual to remain, the judge should consider their reasons alongside the impact on the quality of the complainant's evidence, the need for the

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223 Without an exemption, researchers would be reliant on the judge's discretion to allow them to remain. See J Jackson, J Doak, C Saunders, D Wright, D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (2024) pp 30-31, noting difficulties with conducting trial observation research in Scotland, Norther Ireland and Ireland where the public had been excluded.

224 This supporter may be in addition to an ISVA or any other supporter appointed to assist the complainant with giving evidence as a distinct measure, who would fall within the first category of the exemption. See para 9.140 above.

complainant to be treated humanely, the complainant's privacy rights and the complainant's wishes.

Recommendation 48.

9.148 We recommend that where the public are excluded during the evidence of a complainant in a sexual offences prosecution, there should be an exemption to allow the following categories of individuals to attend:

(1) persons directly involved in proceedings;

(2) bona fide representatives of news gathering or reporting organisations;

(3) academic researchers conducting research that has been approved by a university research ethics committee; and

(4) a supporter for the complainant, where requested by the complainant.

9.149 We recommend that, on application from an individual, the judge should retain discretion to allow that individual to attend where it is in the interests of justice for them to do so, considering the impact on the quality of the complainant's evidence, the need for humane treatment of the complainant, the complainant's privacy rights and the wishes of the complainant.

Removal of wigs and gowns

9.150 The removal of wigs and gowns by legal representatives and the judge while the complainant gives evidence is a statutory measure available within the YJCEA 1999.[225] Removing wigs and gowns is intended to create a less formal and traditional court setting, making it less intimidating.[226] While there is broader debate about the use and role of court dress,[227] we had not heard good reasons why this measure should be treated differently to other standard measures in the context of sexual offences prosecutions.[228] Therefore, we provisionally proposed that removal of wigs and gowns should remain a standard measure to which a complainant in a sexual offences prosecution would be entitled when giving evidence.[229]

9.151 Nearly three-quarters of consultees who responded agreed with this provisional proposal.[230] Consultees agreed that the removal of wigs and gowns can be a beneficial measure for complainants of sexual offences. For example, Victim Support

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225 YJCEA 1999, s 26.

226 CP 259, para 7.193.

227 Above, para 7.195.

228 Above, para 7.197.

229 CQ 56: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to have wigs and gowns removed while they are giving evidence. Do consultees agree?". CP 259, para 7.198.

230 Out of 83 responses, 60 consultees agreed; 13 disagreed; 10 submitted a response categorised as other.

told us that a witness in a sexual offences case had felt that wigs and gowns added to the "frightening" and "daunting" experience of giving evidence.

9.152 Some consultees disagreed, suggesting that the measure should be available only for complainants with specific vulnerabilities, such as child complainants or complainants with disabilities,[231] or that the use of this measure is infantilising or patronising.[232]

9.153 As noted above, this measure is already available for intimidated witnesses. Consultees did not provide reasons why complainants in sexual offences prosecutions should not have access to this measure. Our model of entitlement would not require the removal of wigs and gowns. Rather, complainants who consider that they would benefit from this measure could request it; those who would find it infantilising would not. Therefore, we recommend that complainants in sexual offences prosecutions should have an entitlement to the removal of wigs and gowns when they give their evidence.

Presence of a supporter

9.154 When a complainant gives evidence by live link, the court may allow a supporter to accompany them under section 24 of the YJCEA 1999. This supporter may be a professional such as an ISVA,[233] but the provision is not limited to professional supporters.[234] The presence of a supporter may provide emotional support to complainants, enabling them to give their best evidence.[235] There is no statutory provision for the presence of a supporter when the complainant gives evidence by other means, although the court may use its inherent powers to permit a supporter to be present. The CrimPR require the court to take "every reasonable step" to facilitate the attendance of witnesses, including allowing a companion such as an ISVA to accompany the complainant while they give their evidence.[236]

9.155 In the consultation paper, we noted inconsistency in both legislation and practice.[237] Judges also told us that some judges may decline to permit ISVAs to attend due to lack of clarity over their role.[238] Creating an entitlement to the presence of a supporter

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231 The Bar Council and Dr Matt Thomason, consultation responses.

232 Dr Matt Thomason, consultation response.

233 An ISVA provides independent support to those who have experienced sexual violence at any point in their lives. Where a complainant gives evidence in a sexual offence prosecution, an ISVA may accompany and sit beside them during their evidence. We focus only on this aspect of an ISVA's role in this chapter. However, an ISVA's role is not limited to their presence during the complainant's evidence. They may also support those who have not reported an offence to the police, provide information and support throughout the criminal justice process, and provide advocacy to relevant professionals where appropriate. For more information on an ISVA's role, see Ministry of Justice, *Independent Sexual Violence Adviser Statutory Guidance* (May 2025).

234 YJCEA 1999, s 24(1A) permits the direction to provide for a "specified person" to accompany a witness giving evidence by live link.

235 CP 259, para 7.199, n 303, citing the 2015 Criminal Practice Directions (CrimPD V Evidence 18B.1 and 5).

236 CrimPR r 3.8(3) and 3.8(7)-(8). Where the companion is an ISVA, the CrimPR states that as a general rule they must be allowed to sit next to or near the witness. For any other companion, the court may allow or require them to sit with the witness.

237 CP 259, para 7.200.

238 Above, para 7.204.

would promote consistency and give complainants greater certainty and confidence in their choice of this measure.[239] Therefore, we provisionally proposed that complainants in sexual offences prosecutions should be automatically entitled to the attendance of a supporter when they give their evidence, including but not limited to the presence of an ISVA.[240]

9.156 The majority of consultees agreed with these provisional proposals.[241] Consultees agreed that the presence of a supporter may reduce the distress felt by complainants, ensuring they give their best evidence.[242] Consultees also agreed that entitlement would reduce inconsistencies in whether supporters are permitted to remain and ensure that the presence of a supporter is recognised as a right.[243]

9.157 Some consultees suggested that the presence of a supporter should be limited only to professional supporters such as ISVAs. For example, some consultees suggested that family members would not be appropriate due to their emotional involvement.[244] Other consultees warned that no supporter including an ISVA should be permitted to influence the evidence given by the complainant, and therefore that judicial discretion would be needed to determine whether a supporter should be permitted.[245]

9.158 We have concluded that the presence of a supporter should not be limited to professional supporters or only permitted by judicial discretion. The concerns raised relate to the risk of a supporter inappropriately influencing the complainant's evidence. In relation to ISVAs, this is a professional role with defined expectations.[246] In its consultation response, Victim Support confirmed that ISVAs "establish clear boundaries within their role as supporter to ensure they know limited details about the case" and therefore prevent any conflict of interest in the trial process. It is reasonable to expect that an ISVA will conduct themselves according to their professional obligations and will not seek to influence the complainant's evidence.

9.159 The current rules do not limit who can act as a supporter. We have not seen evidence that non-professional supporters frequently and improperly influence the content of the complainant's evidence, or that they are more likely to do so than professional supporters such that a prohibition would be appropriate. Further, while the complainant may be entitled to the presence of a supporter, the provision of this

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239 CP 259, para 7.206.

240 CQ 57: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled the presence of a supporter when they are giving or recording their evidence at court or remotely. Do consultees agree?". CP 259, para 7.208. CQ 58: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of an Independent Sexual Violence Adviser as a supporter when they are giving or recording their evidence at court or remotely. Do consultees agree?". CP 259, para 7.212.

241 Out of 87 responses to CQ 57, 67 consultees agreed; 14 disagreed; 6 submitted a response categorised as other. Out of 86 responses to CQ 58, 68 consultees agreed; 13 disagreed; 4 submitted a response categorised as other.

242 Including HMCPSI; Victim Support; and Dr Samantha Fairclough.

243 Including the CPS and HMCPSI.

244 The FLAG research cluster and Tricia O'Sullivan, solicitor.

245 Including the CBA and Dr Oriola Sallavaci.

246 See Ministry of Justice, *Independent Sexual Violence Adviser Statutory Guidance* (May 2025).

measure will be subject to the proviso that the defence must be able to effectively test the evidence, and the court's inherent jurisdiction to control the court. For example, where there are concerns that a supporter may inappropriately influence the complainant's evidence, the judge may intervene during the evidence where necessary or exercise their inherent jurisdiction to remove the supporter. Therefore, we recommend that complainants in sexual offences prosecutions should be entitled to the presence of a supporter when they give their evidence, including but not limited to an ISVA.

Separate and accessible entrances and waiting rooms

9.160 Currently, using a separate entrance and waiting room is not an available special measure. Although the Victims' Code suggests that complainants will not have to see the defendant when they arrive at court, there can be considerable variation in practice as to whether complainants may use separate entrances or waiting rooms.[247]

9.161 In the consultation paper, we noted that the benefits of separate entrances and waiting rooms include reducing traumatisation associated with giving evidence, and encouraging complainants to give evidence in person by reducing fears they will have to see the defendant, particularly in combination with screens.[248] We acknowledged the resource implications of this measure, concluding that this may serve as a short term barrier to implementation in some courts.[249] We provisionally proposed that complainants in sexual offences prosecutions should be automatically entitled to the use of separate and accessible entrances and waiting rooms when they give evidence.[250]

9.162 Over three-quarters of consultees agreed.[251] For example, the JiCSAV - Justice in Covid-19 for Sexual Abuse and Violence research group commented that for the complainants it had interviewed, where they saw the defendant "entering the building or in the waiting room, it completely undermined any special measures that they had in place to give their evidence".

9.163 The main concern raised by consultees related to the resourcing implications of this measure. For example, the Six Circuits disagreed with an entitlement given that there are insufficient resources, and "to enact an automatic entitlement to a measure which cannot be uniformly applied would be incoherent and futile". Other consultees who agreed with entitlement submitted that additional resources would be required. The Law Society suggested that consequently an entitlement "may result in the improvement of court infrastructure and basic maintenance generally".

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247 Ministry of Justice, *Statutory Guidance, Code of Practice for Victims of Crime in England and Wales (Victims' Code)* (21 April 2021) pp 40-41.

248 CP 259, paras 7.214-7.215.

249 Above, paras 7.215-7.216.

250 CQ 59: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use an accessible entrance and waiting room that is separate from members of the public and the defendant. Do consultees agree?". CP 259, para 7.217.

251 Out of 86 responses, 73 consultees agreed; 6 disagreed; 7 submitted a response categorised as other.

9.164 Introducing an entitlement to separate and accessible entrances and waiting rooms for complainants is not only beneficial in itself, but also serves to ensure that any other measures requested are not undermined. Formalising this measure would reduce inconsistencies as to whether it is offered to complainants when available. We recognise its resource implications, but think it is important that, where possible, this measure is made available for complainants who request it. Where a separate and accessible entrance or waiting room is not available, the availability of measures limb of the proviso discussed above will allow judges to consider alternative ways of achieving the same impact, or to decline to order the measure if it cannot be provided.

Conclusion on standard measures

Recommendation 49.

9.165 We recommend that complainants in sexual offences cases should be entitled to the following standard measures when they give their evidence:

(1) screens;

(2) live link;

(3) pre-recorded evidence;

(4) exclusion of the public during their evidence, with the exception of:

(a) persons directly involved in proceedings;

(b) bona fide representatives of news gathering or reporting organisations;

(c) academic researchers conducting research that has been approved by a university research ethics committee;

(d) a supporter for the complainant, where requested by the complainant; and

(e) on application from an individual, the judge should retain discretion to allow that individual to attend where it is in the interests of justice for them to do so, considering the impact on the quality of the complainant's evidence, the need for humane treatment of the complainant, the complainant's privacy rights and the wishes of the complainant;

(5) removal of wigs and gowns;

(6) presence of a supporter, including but not limited to an Independent Sexual Violence Adviser; and

(7) separate and accessible entrances and waiting rooms.

9.166 We recommend that the provision of standard measures should be subject to the availability of the measure in that court and the defence's ability to effectively test the evidence.

ADDITIONAL MEASURES

9.167 Our recommended model of entitlement applies to the standard measures to assist with giving evidence, discussed above. These standard measures will be available as a matter of entitlement for all complainants, regardless of any personal vulnerabilities. However, some complainants may have vulnerabilities that necessitate support beyond these standard measures. A statutory scheme of entitlement to standard

measurers would not displace the court's ability to order further measures for vulnerable witnesses under the inherent jurisdiction or other statutory provisions.

Intermediaries

9.168 The court may direct the use of an intermediary for a complainant who satisfies the criteria for vulnerable witnesses in section 16 of the YJCEA 1999.[252] An intermediary assesses the witness' communication needs and ensures that questions are appropriately asked, though they cannot give the evidence for a witness.[253]

9.169 In the consultation paper, we recognised the importance and benefits of intermediaries for complainants with additional communication needs. However, we noted that there is a lack of empirical evidence about the completeness, accuracy and coherence of evidence facilitated by intermediaries.[254] We also noted concerns that intermediaries are underused due to the lack of, or late, identification of communication needs, and that courts do not always direct the attendance of an intermediary where the witness gives evidence at trial.[255] We invited consultees' views on how the current legislation and practice of the use of intermediaries is working in respect of eligible complainants in sexual offences cases, and whether this process could be improved. We also asked for views on how best to account for the impact of trauma when assessing the need for an intermediary. [256]

9.170 Consultees did not raise any specific concerns relating to the legal test for eligibility for an intermediary. Rather, their main concerns focused on resourcing, funding, and police practice. For example, Chief Constable Sarah Crew commented that intermediaries are underused due to officers' failures to understand their role and purpose, but that this is "a police issue rather than legislative". We do not consider that reform to the current legislation and procedure on intermediaries is necessary for the purposes of this project.

9.171 Some consultees suggested there may be a role for intermediaries to assist where complainants have communication difficulties which are the product of trauma. The CPS referred to a pilot scheme in London by the Havens specialist centres,[257] where psychologists examine victims of sexual assault and document in a Summary of Psychological Findings report any psychological impact from the sexual assault. The report is then used to determine whether a complainant requires additional support due to psychological injury, which could include an intermediary. The CPS suggested

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252 YJCEA 1999, ss 16 and 18(1)(a).

253 Above, s 29(2); *Rook and Ward on Sexual Offences: Law and Practice* (6th ed 2021) 27.142.

254 CP 259, para 7.231.

255 Above, para 7.232.

256 CQ 60: "We invite consultees' views on how the current legislation and practice of the use of intermediaries is working in respect of complainants in sexual offences cases with disabilities and disorders. We invite consultees' views on how the current process might be improved. For complainants in sexual offences prosecutions who have experienced trauma, we invite consultees' views on whether, and if so, how the impact of that trauma could best be reflected in the assessment and use of intermediaries". CP 259, paras 7.239-7.241.

257 See The Havens.

this process could be adopted to identify "the need for additional support for traumatised complainants" at an early stage.

9.172 Further research into how intermediaries can best be used to support complainants in sexual offences cases with trauma could help to improve the usefulness of intermediaries in this context. This could build on the pilot scheme by the Havens centres.

Recommendation 50.

9.173 We recommend that the Government should consider whether reform is needed to the use of intermediaries where complainants in sexual offences cases have communication difficulties as a result of trauma.

Further measures

9.174 In the consultation paper, we asked whether there should be further measures provided for in statute. The main suggestion from consultees was court witness familiarisation visits. The Victims' Code currently refers to the right to a familiarisation visit ahead of giving evidence, and consultees confirmed that these visits are frequently offered.[258] Given this current practice, we do not see the need for court witness familiarisation visits to be formalised further in statute. In general, the court's inherent jurisdiction is sufficient to respond where an individual complainant's needs require further measures for support.

INDEPENDENT LEGAL ADVICE ON MEASURES TO ASSIST WITH GIVING EVIDENCE

9.175 In Chapter 7 we recommend that complainants should have access to independent legal advice, assistance and representation in respect of requests and applications relating to their personal records and sexual behaviour evidence. We now consider whether independent legal advice ("ILA") should be available for complainants in relation to measures to assist with giving evidence.

9.176 In the consultation paper, we emphasised that for the entitlement model to work, complainants need to be provided with access to sufficient information about measures to assist with giving evidence, including to which measures they are entitled, the practical effect and impact of each measure, and how to apply. This will ensure that complainants can make an informed choice about which measure (or combination of measures) best suits their needs, thereby ensuring consideration of complainants' individual needs. We suggested that an independent legal adviser would be able to provide the complainant with information about how the measures would work in practice because they would be familiar with courtrooms and trial processes. The adviser could explain any potential limitations of the options, including the current evidence base of the impact of recorded evidence on jurors, and respond to concerns that the complainant may have. A further positive effect of the

[258] The Six Circuits and Dr Samantha Fairclough. See also research from Victim Support in which court witness familiarisation visits were offered in 83% of cases analysed: Victim Support, *Suffering for justice: Sexual violence victim-survivors' experiences of going to court and cross-examination* (October 2024).

complainant making an informed decision is that it would enable them to give their best evidence.[259] We commented that the legal adviser can also take a role in liaising with parties to ensure measures are implemented effectively.

9.177 In addition to this, we noted that ILA on measures to assist with giving evidence would ensure early identification of the complainant's choice of measures. This would mean that complainants would feel reassured from an early stage of proceedings that they will have access to the necessary measures. This could help ensure they continue to engage with the proceedings and support the prosecution. We also highlighted that some measures are only available before the trial, such as pre-recorded evidence. ILA on measures to assist with giving evidence would give the opportunity for complainants to understand these measures well in advance of the trial. Therefore, the court could be notified of a complainant's choice with enough time to put measures in place, which would prevent delay to the start of trials. We also stated that whilst police may be able to advise the complainant about the process of recording an ABE interview, the police's needs in respect of gathering the complainant's evidence may "impact the independence and scope of the advice they are able to give".[260] As such, we provisionally proposed that complainants in sexual offences cases should have access to ILA and assistance in relation to their right to measures to assist them in giving evidence.[261]

9.178 We are aware of other methods of providing information to complainants on measures to assist with giving evidence. Recently, Dr Kyneswood published a video which aims to provide complainants with more information about how they can give their evidence.[262] A leaflet has also been designed to accompany that video.[263] In our view, interventions such as these will be useful for providing information to complainants about the range of measures available to them. However, the provision of legal information alone would not ensure individualised assessment of complainants' needs in the same way that legal advice would.

Consultation responses and analysis

9.179 A majority of consultees agreed that ILA should be available to complainants for advice and assistance in relation to measures to assist with giving evidence.[264] Consultees submitted that complainants are not currently given sufficient advice on measures to assist with giving evidence, and several consultees agreed that ILA would improve complainants' understanding of the measures to which they are

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259 CP 259, paras 8.176-8.177.

260 Above, para 8.177.

261 In CQ 74: "We provisionally propose that complainants in sexual offences cases should have access to independent legal advice and assistance in relation to their right to measures to assist them give evidence (currently called "special measures"). Do consultees agree?". CP 259, para 8.181.

262 Centre for Socio-Legal Studies, *Which special measure? A Guide for adults giving evidence in cases of rape and sexual assault* (7 November 2024).

263 In its consultation response, the CBA suggested that an information leaflet may be a suitable alternative to ILA on special measures.

264 Out of 78 responses to CQ 74, 55 consultees agreed; 13 disagreed; 10 submitted a response categorised as other.

entitled.[265] For example, Centre for Women's Justice ("CWJ") told us that it regularly receives requests for advice about measures. It told us about a complainant with autism who had been "refused an intermediary by the police, who [claimed] there [was] no indication an intermediary assessment is needed". It also referred to a complainant with learning disabilities who was told by the police that a case should not be taken forward, because it would be "too traumatic for them to give evidence, without discussion of what special measures might be available". Finally, CWJ referred to the "CPS refusing to make applications for early video-recorded cross-examination" of complainants.

9.180 Relatedly, Dr Fairclough highlighted the importance of having "an independent person" to discuss options "in a balanced way, without trying to sway them to give evidence in a particular way for tactical or other reasons". Research published by Victim Support Scotland found that some complainants "felt persuaded to choose specific special measures by criminal justice practitioners". The same research found that prosecutors preferred evidence to be given in-court due to a perception that giving evidence remotely is less effective.[266]

9.181 Research conducted by Dr Kyneswood found that barristers do not always recognise sexual offences complainants as vulnerable and failed to consider "the circumstances of the case and the individual on a case-by-case basis". This research also indicated that complainants were frequently referred to by barristers as "robust" and therefore not in need of measures to assist with giving evidence.[267] It suggests that there is a greater need for individualised assessment of complainants' needs, and that the prosecution are not currently doing so sufficiently.

9.182 In contrast, consultees who disagreed that ILA should be available for this purpose argued that there are already a range of suitable sources for information about the availability of measures to assist with giving evidence.[268] South Wales Police[269] suggested that "the commencement of Operation Soteria and the enhanced relationships between police, prosecution and ISVAs" means that ILA on measures to assist with giving evidence is unnecessary. Similarly, the Six Circuits stated that the police and CPS "can and should explain this properly to the complainant". It also argued that ISVAs already provide this kind of information. The Bar Council argued that ILA on this matter is unnecessary because this kind of advice is commonly given "by witness care service staff, who are not legal professionals". The CBA suggested that if there are concerns that "the police might wish a complainant to give their evidence in a certain way" this could be resolved through other means. Instead, it

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265 Including the Law Society; Dr Susan Leahy; and the Pan-London Rape Crisis Centres Experts by Experience Panel.

266 A Moroz and T Dinisman, *Suffering for justice: sexual violence victim-survivors' experiences of going to court and cross-examination* (Victim Support, October 2024) p 28.

267 N Kyneswood, *The Application of Section 28 and Related Measures in Sex Offence Cases: Is Pre-recorded Cross-examination Achieving Best Evidence for Intimidated Complainants?* Doctoral thesis, University of Warwick (2022).

268 Including South Wales Police; Six Circuits; and the Bar Council.

269 Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually.

suggested that "better training for the police and ISVAs, coupled with a more detailed MG2 statement when applying for special measures will allow a complainant's voice to be heard".[270]

9.183 In our view, there are several benefits to complainants receiving ILA on this matter. Firstly, we agree with Dr Fairclough that it is desirable that complainants receive advice from someone who is independent of the police and prosecution. The examples provided by CWJ further illustrate the importance of independent advice on measures to assist with giving evidence.

9.184 Secondly, we think that a legal adviser can help to ensure that the complainant's wishes are communicated and given effect to. Pre-charge, the adviser could liaise with the police if, for example, the complainant wished to provide a written statement rather than an ABE interview, or if they require an intermediary for their ABE interview. Post-charge, the adviser could liaise with the police Witness Care Unit, the CPS, and the court regarding the complainant's choice of measures to assist them in giving evidence during the trial.

9.185 Thirdly, a legal adviser will be better placed than a non-legal adviser to answer specific questions that the complainant may have about the use of measures. For example, the adviser could explain to the complainant the current evidence base of the impact of recorded evidence on the jury and conviction rates, or in which circumstances the defendant will be permitted to see the complainant. The adviser would also be able to manage the complainant's expectations about receiving measures to assist with giving evidence, caveating that their entitlement to various measures would be subject to availability and the defence's ability to effectively test the evidence. Since issues like this are case specific, generalised sources such as leaflets or information videos would not, by themselves, be sufficient.

9.186 Finally, conversations between the complainant and legal adviser would be subject to legal professional privilege. This means that the complainant could openly discuss their concerns about giving evidence without fear that this could be disclosed to the defence.

9.187 Consultees against ILA on measures to assist with giving evidence also stated that there would be additional cost implications. In our view, this cost is justified because it is the best way of informing complainants about the measures available to assist them with giving evidence and ensuring that these measures are implemented. The cost is also proportionate. It could be incorporated into the Government's announced ILA scheme, which would not create a significant additional resource burden.[271] It may also create efficiencies: greater individualised assessment of the complainant's needs

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[270] An MG2 form is a form that is completed by the police Witness Care Unit to advise the CPS on the need for measures for a witness who may be called to give evidence in a case. See Home Office, *Manual of Guidance and MG Forms* (1 June 2020) p 9.

[271] Ministry of Justice and Lord Timpson OBE, "Extra support for women through the criminal justice system announced" (24 September 2024).

will help to prevent traumatisation and stress from the trial process, thereby reducing the cost required from public health services to respond to this harm.[272]

Recommendation 51.

9.188 We recommend that complainants in sexual offences cases should have access to independent legal advice in relation to their entitlement to measures to assist with giving evidence.

WIDER APPLICATION

9.189 Our terms of reference limit our recommendations to prosecutions of sexual offences.[273] We recognise that our recommendations for entitlement to measures to assist with giving evidence for complainants in such prosecutions could result in additional complexity, particularly when sexual offences are charged alongside other offences. There is already a distinction between those intimidated witnesses who are automatically eligible for measures to assist with giving evidence,[274] and those witnesses who must demonstrate that they meet the eligibility criteria as either vulnerable or intimated witnesses.[275] An entitlement only for complainants in sexual offences cases would add another distinction.

9.190 Claire Waxman, Independent Victims' Commissioner for London warned that automatic entitlement for complainants in sexual offences cases could also lead to "confusion with statutory partners and support agencies", who may then tell other complainants who are only automatically *eligible* for measures "that they do not have the rights to special measures".[276]

9.191 Currently, complainants in prosecutions of both sexual offences and other offences are automatically eligible to use measures to assist with giving evidence when they give evidence in relation to both types of offences.[277] This provision should remain such that where sexual offences are charged alongside other offences, complainants would be entitled to use standard measures while giving evidence in relation to all offences.

9.192 At paragraphs 9.20-9.38 above, we explain our view that complainants of sexual offences cases should be removed from the categories of "vulnerable" or "intimidated" witnesses in favour of an entitlement based on the nature of the offence. We think that the same principles apply to complainants of other offences also currently within the definition of "intimidated" under section 17(4) of the YJCEA 1999. Complainants of

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272 See Ch 7 above.

273 See Ch 1, para 1.21 above.

274 YJCEA 1999, s 17(4).

275 Above, ss 16-17.

276 Complainants of domestic abuse and modern slavery offences are automatically eligible under YJCEA 1999, s 17(4A).

277 YJCEA 1999, s 17(4).

domestic abuse and modern slavery offences could similarly be considered vulnerable due to the nature of the offence of which they are a complainant.[278] An entitlement to standard measures based on the offence is more consistent with the nature of this vulnerability, rather than aligning these complainants with witnesses who are eligible for measures based on their personal circumstances or their response to the prospect of giving evidence.

9.193 However, our review has not included the trial process for prosecutions of domestic abuse or modern slavery. While some of these offences may be analogous to sexual offences, they cover a variety of factual circumstances that can differ from sexual offences in important ways. Further review may assist with determining to what extent the same rationale applies. We therefore recommend that the Government should consider whether complainants in prosecutions for these offences should be entitled to standard measures to assist with giving evidence.

Recommendation 52.

9.194 We recommend that where sexual offences are charged alongside other offences, complainants of the sexual offences in those prosecutions should be entitled to use standard measures to assist with giving evidence throughout the trial.

9.195 We recommend that the Government should consider whether complainants of other offences, including an offence under sections 1 or 2 of the Modern Slavery Act 2015, or an offence where it is alleged that the behaviour of the accused amounted to domestic abuse within the meaning of section 1 of the Domestic Abuse Act 2021, should be entitled to standard measures to assist with giving evidence.

MEASURES TO FACILITATE COMPLAINANTS' ENGAGEMENT WITH THE TRIAL PROCESS

9.196 Once the complainant has given their evidence, like all witnesses, they are entitled to attend court during the trial including when their pre-recorded evidence is played.[279] There is nothing in law prohibiting their attendance even if they used measures to give evidence. However, we heard concerns that complainants have been discouraged from attending court after giving evidence, either by prosecutors, or due to a lack of support and measures available.[280]

9.197 Currently, complainants in sexual offences prosecutions may be permitted to attend court remotely through a live link following their evidence.[281] The Victims' Code also suggests that the complainant should be able to use a separate entrance when they

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278 See para 9.22 above for discussion of the meaning of the term "vulnerable" here.

279 As raised by Dr Samantha Fairclough's consultation response to CQ 61.

280 CP 259, para 7.423.

281 Other than as a special measure in the YJCEA 1999, s 24, the court may direct for witnesses to participate remotely in proceedings under the Criminal Justice Act 2003, ss 51 and 56. See also CPS, "Witnesses" (15 July 2024).

arrive at court to avoid seeing the defendant. However, there is no statutory entitlement to the use of measures to facilitate attendance.

9.198 In the consultation paper, we provisionally proposed that complainants in sexual offences prosecutions should be automatically entitled to the use of screens or live link to facilitate their attendance at the verdict and sentencing hearing.[282] We also asked for consultees' views on whether there should be further powers to exclude the public during the trial outside of the complainant's evidence, and at the verdict and sentencing hearing.[283]

9.199 Nearly all consultees who responded agreed with the provision of measures to facilitate complainants' engagement with the trial process.[284] Consultees agreed that measures to facilitate engagement with the trial process are necessary to encourage complainants to attend the remainder of the trial and ensure humane treatment.[285] Those who disagreed either raised general objections to automatic entitlement,[286] or distinguished between screens and live links.[287]

9.200 There are benefits to formalising the support available to complainants after they give evidence. A formalised scheme of entitlement will promote complainants' ability to attend the remainder of the trial. Providing measures to facilitate engagement with the trial process should also support complainants' continued engagement with the criminal justice system and ensure they are treated humanely throughout.

9.201 The provision of measures to facilitate engagement with the trial process should be distinct from, and not depend on, the provision of measures to assist with giving evidence. There are different considerations once the complainant is no longer giving evidence. Some measures are appropriate for giving evidence but not for observing the trial; see the discussion on screens below at paragraph 9.204. Further, as noted by Dr Fairclough in her consultation response, complainants may have different needs for support following (and in some cases due to) their experience giving evidence.

9.202 The use of live links and separate and accessible entrances and waiting rooms can help complainants to engage with the remainder of the trial and to ensure they are treated humanely when they do so. They create only minimal interference with the way the trial runs.

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282 CQ 61: "We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the use of live link or screens to facilitate their attendance at the verdict and sentencing hearing. Do consultees agree?". CP 259, para 7.247.

283 CQ 55: "We invite consultees' views on whether, for sexual offences prosecutions, there should be a power to direct the exclusion of the public [subject to current exemptions] … from observing the following: the whole trial; the verdict and sentencing hearing; when the victim personal statement is read". CP 259, para 7.190.

284 Out of 33 responses to CQ 61, 30 consultees agreed; 2 disagreed; 1 submitted a response categorised as other.

285 Including the CPS; RCEW; Claire Waxman; Dr Samantha Fairclough; and Dr Natalie Kyneswood.

286 Andrew Wilkins, barrister, and an anonymous consultee.

287 HM Council of Circuit Judges and the CBA.

9.203 We conclude that complainants in sexual offences prosecutions should be entitled to the following measures to facilitate their engagement with the trial process: the use of a live link where the complainant wishes to attend remotely, and separate and accessible entrances where the complainant attends court in person. As with measures to assist with giving evidence, we recommend that the provision of the measure should be subject to its availability in that court.[288]

Screens

9.204 The CBA and HM Council of Circuit Judges suggested that screens should not be offered as a measure unless the complainant is giving evidence due to the logistical difficulties of screening the complainant. We agree that the use of a screen is difficult to implement where the complainant attends in the public gallery as opposed to giving evidence in the witness box.[289] In particular, we are concerned that this could result in screening the defendant rather than the complainant or public gallery, which we warn against above at paragraph 9.115. Therefore, we do not think that screens should be available as a measure to facilitate complainants' engagement with the trial process to which complainants are entitled.

Exclusion of the public

9.205 Some consultees suggested that exclusion of the public should be a measure available beyond the complainant's evidence, such as for the whole trial or the verdict and sentencing hearing. This measure could facilitate the complainant's attendance at trial after they give evidence. However, the benefits of this measure are not limited to facilitating engagement with the trial process. Exclusion of the public may also protect the complainant's rights to privacy and anonymity regardless of whether the complainant attends.[290] Consultees that disagreed with exclusion of the public emphasised the importance of open justice and the importance of public understanding of criminal trials.

9.206 We acknowledge concerns from consultees relating to the complainant's privacy and anonymity. We also acknowledge that exclusion of the public could encourage some complainants to attend the trial and result in better treatment when they do so. However, we do not consider these to be sufficient justifications for exclusion of the public for the purpose of facilitating the complainant's attendance, given the significant intrusion this would represent into the important principle of open justice. When the complainant is not giving evidence, there is much less impact from the public's

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288 We cannot conceive of a scenario where a measure to facilitate the complainant's engagement with the trial process would result in the defendant being unable to receive a fair trial, given that the complainant is merely an observer and is no longer giving evidence. If such an exceptional circumstance arose, the judge would have the power under the inherent jurisdiction to modify or deny the requested measure to protect the defendant's right to a fair trial.

289 Where the complainant gives their VPS at the sentencing hearing, they will be entitled to use a screen or any other standard measures. See from para 9.58 above.

290 Some jurisdictions, including Northern Ireland, Ireland and Canada, hold the entire trial of serious sexual offences in private to avoid undermining the complainant's right to anonymity. See CP 259, paras 7.174 and 7.188.

presence on the quality of their evidence or humane treatment. Further, the complainant's right to privacy is most engaged when they give their evidence.[291]

9.207 There may be specific circumstances where there are good reasons to exclude the public at points during the remainder of the trial, aside from facilitating the complainant's attendance. For example, Claire Waxman suggested that exclusion of the public would be desirable where video evidence of the assault is played to reduce traumatisation of the complainant and the public. However, the judge has powers under the inherent jurisdiction which are sufficient to respond to such scenarios: they could screen the monitor screen from the public gallery, or exclude the public where necessary.

Recommendation 53.

9.208 We recommend that complainants in sexual offences prosecutions should be entitled to the following measures to facilitate their attendance at the trial, verdict and sentencing hearing when not giving evidence:

(1) live link; and

(2) separate and accessible entrances and waiting rooms.

9.209 We recommend that the provision of measures to facilitate the complainant's attendance should be subject to the availability of the measure in that court.

TRAINING ON IMPACT OF MEASURES

9.210 In the consultation paper, we explained that some legal practitioners suggested that giving evidence over live link or by recorded evidence may diminish the impact of the evidence for the jury.[292] Stakeholders were concerned that practitioners may influence whether complainants are offered or request certain measures.[293] We acknowledged it would be concerning if legal professionals were influencing complainants' choices of measures based on incomplete evidence regarding their impact.[294] Therefore, we provisionally proposed that judges and legal professionals should receive training on the impact of measures to assist with giving evidence on juries.[295]

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291 The complainant's evidence includes their VPS, as discussed from para 9.58 above.

292 CP 259, para 7.283.

293 OVC, *Next steps for special measures* (May 2021) p 35.

294 CP 259, paras 7.285 and 7.123.

295 CQ 64: "We provisionally propose that the Judicial College consider providing training to the judiciary on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court. Do consultees agree? We provisionally propose that legal professionals receive training on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court. Do consultees agree?". CP 259, paras 7.287-7.288.

9.211 Nearly three-quarters of consultees agreed training would be beneficial.[296] Many noted, however, that there is insufficient research on the impact of measures to assist with giving evidence to determine the content of the training. Some consultees disputed the relevance of such training. For example, the Bar Council and the Six Circuits both argued that the impact of measures to assist with giving evidence on juries is irrelevant for judges, as impact does not form part of the decision to grant measures.

9.212 We consider that there should be training on the evidence base of the impact of measures to assist with giving evidence for both judges and legal professionals. We recognise that under a model of entitlement, the impact of the measure to assist with giving evidence does not form part of the decision whether to direct the provision of standard measures. However, it is still beneficial for all legal professionals involved in applications for measures to have accurate and up to date information. For example, defence practitioners may wish to rely on any evidence of impact if challenging the provision of certain measures. Further, the prosecution may wish to consider this evidence when responding to defence challenges to standard measures, or when applying for further measures.

9.213 To ensure complainants receive accurate information about the current evidence of impact on juries to make an informed decision on whether to use measures to assist with giving evidence, their independent legal adviser should also have such training. Given that the judge will decide on any objection to the complainant's request for measures to assist with giving evidence, it is important that they receive equivalent training as those making or opposing the applications. Further, the judge must direct the jury to avoid any impact of the use of measures on the jury's assessment of the evidence, meaning they will need to understand the current evidence of what this impact may be.

9.214 At present, the evidence base on the impact of measures to assist with giving evidence is mixed and includes a range of different research. The available research includes both peer reviewed and non-peer reviewed research, and research conducted with mock jurors and real jurors, as well as comparative research. Further research on the impact on juries of measures to assist with giving evidence is ongoing.[297] As the evidence base develops, training for judges and legal practitioners should be updated to reflect these further developments.

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296 Out of 29 responses, 21 consultees agreed; 4 disagreed; 4 submitted a response categorised as other.

297 See evidence submitted to the Justice Committee by Professor Cheryl Thomas (January 2024), in which Professor Thomas stated that in 2024 the UCL Jury Project would conduct research "with real juries at courts in England and Wales", involving a "controlled testing" of the possible factors identified as contributing to lower jury conviction rates "to determine whether they are associated with differences in juror perceptions of evidence and jury verdicts when s 28 evidence is used in trials". This research has not yet been published.

Recommendation 54.

9.215 We recommend that the Judicial College should consider providing training to the judiciary on the evidence base of the impact on juries of measures to assist with giving evidence.

9.216 We recommend that legal professionals should receive training on the evidence base of the impact on juries of measures to assist with giving evidence.

CONCLUSION ON MEASURES FOR COMPLAINANTS

9.217 We have recommended a simplified approach to measures to assist with giving evidence for complainants in sexual offences cases. All such complainants should be entitled to receive standard measures of their choosing, subject to the court's ability to provide the measure and the defence's ability to effectively test the evidence. We have also made recommendations to clarify the effect of standard measures. Where complainants have additional vulnerabilities that require support beyond these measures, additional measures such as intermediaries should be available. This simplified regime should increase certainty and clarity for all parties and promote individualised assessment of complainants' need for support. The standard measures available to complainants should ensure they can give their best evidence and be treated humanely while safeguarding open justice and the defendant's right to a fair trial.

9.218 To operate effectively, the statutory regime will need to be supported in various ways. This includes the court's inherent jurisdiction to provide adjustments, as well as the provision of ILA for complainants on measures to assist with giving evidence. We make recommendations above on the need for training of judges and legal practitioners on the evidence base of the impact of measures on juries. Further research on the impact of measures on juries will inform the content of this training, as well as assisting complainants to make informed choices to use measures to assist with giving evidence.

MEASURES FOR DEFENDANTS WHO GIVE EVIDENCE

9.219 There is no similar statutory scheme for vulnerable defendants who wish to use measures to assist with giving evidence. While there are measures that may be made available for defendants classified as vulnerable, the eligibility criteria and available measures are spread over various sources.

9.220 The court may order the use of a live link for defendants under section 51 of the Criminal Justice Act 2003. The court must be satisfied that it is in "the interests of justice" for the defendant to participate through a live link,[298] and that all parties to the proceedings have been permitted to make representations.[299]

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298 CJA 2003, s 51(4)(a).

299 Above, s 51(4)(b).

9.221 The YJCEA 1999 contained provisions for the court to direct the examination of eligible defendants through an intermediary where necessary for a fair trial. These were never brought into force and are now limited to service courts.[300] However, under its inherent jurisdiction the court can direct the use of an intermediary where the defendant gives evidence.[301] The CrimPR state that the court "must" exercise these inherent powers to appoint an intermediary where certain eligibility criteria are met, and an intermediary is necessary to facilitate the defendant's effective participation.[302]

9.222 The court may also direct further measures be provided under its inherent jurisdiction. The CrimPD include a list of non-statutory measures for vulnerable defendants, including removal of wigs and gowns, attendance of a supporter and restricting members of the public in the courtroom, amongst others.[303]

9.223 In the consultation paper, we acknowledged the discrepancies in the measures available to defendants and complainants in sexual offences prosecutions, but noted that there are justifications for these discrepancies, including the unique vulnerabilities experienced by complainants of sexual offences when giving evidence.[304] We asked for consultees' views on whether there should be specific, or different, provisions for measures to assist defendants in sexual offences prosecutions to give evidence, beyond those currently available for all vulnerable defendants.[305]

9.224 Most consultees who responded to this question did not consider there to be a need for further measures specific to this group of defendants,[306] although several consultees were in favour of better provision of measures for defendants in all prosecutions. Consultees argued that reform is needed to the provision of measures for vulnerable defendants, including formalising these measures in statute and increasing the range of measures available.[307] For example, HM Council of Circuit Judges commented that it was "illogical" that vulnerable defendants do not have a statutory entitlement to intermediaries as complainants do. The Six Circuits suggested that vulnerable defendants should be eligible for a greater range of measures,

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300 YJCEA 1999, s 33BA; Police, Crime, Sentencing and Courts Act 2022, Sch 20, para 6(2) limited the provisions within Chapter IA of the YJCEA 1999 to service courts.

301 The judge may exercise their inherent powers to appoint an intermediary only during the defendant's evidence, rather than the whole trial. See for example *R v Rashid* [2017] EWCA Crim 2, [2017] 1 WLR 2449. For an example of the value of intermediaries for vulnerable defendants in sexual offences cases, see *R v Beards* [2016] EW Misc B14 (CC) (23 May 2016).

302 CrimPR r 18.23. For a child defendant (under 18), their ability to participate must be likely diminished by their age. For an adult defendant, their ability to participate must be likely diminished by either a mental disorder, a significant impairment of intelligence or social functioning, or a physical disability or disorder.

303 CrimPD 6.4.2.

304 CP 259, paras 7.276-7.277.

305 CQ 63: "We invite consultees' views on whether there should be specific, or different, provisions for measures to assist defendants in sexual offences prosecutions to give evidence, beyond those currently available for all vulnerable defendants". CP 259, para 7.279.

306 Out of 66 responses, 18 consultees agreed with measures for defendants in sexual offences proceedings specifically; 38 did not support measures for defendants in sexual offences proceedings specifically; 6 gave an answer categorised as other; 4 submitted non-substantive answers.

307 Including HM Council of Circuit Judges; the CBA; the Six Circuits; Dr Samantha Fairclough; and Dr Matt Thomason.

including screening from the public gallery, giving evidence in private, the presence of a supporter, and removal of wigs and gowns. Other consultees suggested that there is a need for additional support for all defendants to ensure they give their best evidence and can participate effectively.[308]

9.225 We have concluded that there is insufficient evidence to support specific or different provisions for measures for defendants in sexual offences prosecutions. Reform would create a hierarchy in the support available to defendants based on the nature of the offence that is not justified by the need.

9.226 There are broader considerations in relation to measures to assist with giving evidence for defendants, not limited to the context of sexual offences, that in our view justify further review. Defendants have a different status and role in the trial process compared to complainants or other witnesses. The specific measures and support that are necessary to ensure best evidence, effective participation and humane treatment may therefore differ from those available for witnesses. These considerations arise regardless of the offence of which the defendant is accused. The limitations of our terms of reference have prevented us from considering this broader context, with any limited reform risking unintended consequences for defendants of other offences.

9.227 Instead, the concerns raised by consultees would be better considered in a broader review that considers the availability of measures for all defendants. Such a review would allow for the aims of encouraging best evidence, effective participation, and humane treatment to be considered in light of the differentiated status and role of the defendant compared to other witnesses in the trial process.

Recommendation 55.

9.228 We recommend that the Government should consider the need for a further review of measures to assist with giving evidence for defendants. This should include a review of the measures available to support vulnerable defendants in criminal prosecutions.

[308] Including Dr Samantha Fairclough and Dr Oriola Sallavaci.

Chapter 10: Juries

INTRODUCTION

10.1 In Chapter 1 we describe the prevalence of myths and misconceptions about sexual offending and their potential effect on jurors in sexual offences prosecutions. The extent to which myths and misconceptions influence juror deliberations is disputed. However, when taken as a whole, the evidence base suggests that rape myths and misconceptions do have some impact. This chapter considers how best to convey information to jurors about rape myths to ensure that they are able to consider impartially the evidence before them.

10.2 The primary way that jurors are provided with information about myths and misconceptions is through judicial directions.[1] The Crown Court Compendium contains example directions to assist judges in constructing directions which alert the jury to guard against reliance on myths.[2] In this chapter, we recommend that judges should retain discretion in relation to the timing and the content of the directions they give, ensuring that judges have sufficient flexibility to take a tailored approach in each case. We also consider how to ensure that such directions are given consistently. We recommend that the Judicial College should consider providing guidance to judges that directions on myths and misconceptions should be given where there is a risk of the jury relying on myths and misconceptions unless, in the circumstances of the case, no reasonable jury would consider the evidence, question, or statement to be material.

10.3 Secondly, we recommend that the Judicial College consider amending existing example directions on rape myths and adding new ones, so that judges are provided with up-to-date information when directing jurors.

10.4 Thirdly, we outline our recommendations for alternative ways of providing information about myths and misconceptions to jurors. We recommend that, where it is necessary, expert evidence of general behavioural responses to sexual violence should be admissible to address myths and misconceptions in sexual offences trials. We make no recommendations with respect to juror information notices, juror education videos, and online interactive tools because there is insufficient evidence to support the efficacy of these educational methods.

10.5 Finally, we recommend that further research should be commissioned that engages real jurors. There should be a statutory exception for researchers and juror participants in such research from the existing offence which prohibits disclosing

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1 We discuss directions to the jury on myths and misconceptions elsewhere in this report. In Chapter 11 we suggest that in some circumstances it may be appropriate for a direction on myths and misconceptions to be given to the jury after the judge has directed the jury to disregard lines of questioning or evidence that is irrelevant due to reliance on myths or misconceptions.

2 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (April 2025 Update) ("Crown Court Compendium") 20-1.

information about juror deliberations in order to allow for the content of real jurors' deliberations to be researched.[3]

GIVING DIRECTIONS ON MYTHS AND MISCONCEPTIONS

Discretionary content for myths and misconceptions directions

10.6 There is some concern that the content of directions given about myths and misconceptions does not provide the jury with all the information needed for them to identify and avoid reliance on myth inflected reasoning. Dr Olivia Smith and Dr Tina Skinner's 2017 trial observation study found that "judges did not give the full directions listed, but rather summarised their essence and ignored the concrete examples provided".[4] In the consultation paper, we referred to several judges who told us that there is inconsistency in the content of directions. A Recorder told us that judicial discretion over the content of directions can mean that judges cut them down too much.[5] Practitioner Hanna Llewellyn-Waters told us that there is a perception by some judges that certain concepts are understood by jurors when, in actuality, jurors would still benefit from having them more fully explained.[6]

10.7 To solve the issue of inconsistency in the content of directions, we considered whether the content should be mandatory, discretionary or subject to a presumption. We ultimately discounted mandatory or presumptive content, on the basis that requiring particular content could encroach on the independence of the judiciary and prevent the judge from being able to tailor the direction to the case.[7] Consequently we provisionally proposed that the content of a direction on myths and misconceptions should be left entirely to the judge's discretion.[8]

Consultation responses and analysis

10.8 A majority of consultees agreed that the content of directions on myths and misconceptions should be discretionary.[9]

10.9 Some consultees were in favour of some degree of mandatory content for myths directions.[10] For example, Professors Julia Quilter and Luke McNamara suggested that some statutory form of words would ensure substantive consistency, though recognised that directions would still need to be tailored to the case. We agree that it

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3 Juries Act 1974, s 20D.

4 O Smith and T Skinner "How rape myths are used and challenged in rape and sexual assault trials" (2017) 26 *Social and Legal Studies* 441, 462 note 9.

5 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper 259 ("CP 259"), para 10.34.

6 CP 259, para 10.34.

7 Above, para 10.74.

8 Consultation Question ("CQ") 88: "We provisionally propose that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion. Do consultees agree?" CP 259, para 10.75.

9 Of those who responded to Consultation Question 88, 12 consultees selected "yes", 4 consultees selected "no", and 7 consultees selected "other".

10 Including Professors Julia Quilter and Luke McNamara; JURIES; and Professor Susan Edwards.

is important that jurors are consistently provided with the necessary level of detail in directions. This will help them to reach a verdict based only on the evidence in the case, without reliance on myths and misconceptions. However, we do not consider that mandatory content is the best way to achieve this, and it is important that judges retain discretion over the content of directions so that they can tailor those directions to each case. In our view, the recommendations that we have made for consideration of amendments to existing example directions and new example directions ought to help ensure greater consistency in the content of directions.

10.10 Consultees tended to agree that when directions are tailored to the case then they are more meaningful and effective. For example, referring to their research with mock jurors, Dr Dominic Willmott and Dr Lara Hudspith stated that directions are effective in reducing rape myth bias among jurors when the directions are directly related to the specific facts of the case. In addition, the Law Society of England and Wales ("Law Society") told us that previous experience with "more rigid specimen directions", such as those from the Judicial Studies Board, had led to issues such as "appeals based on minor deviations from prescribed words".[11] We recognise the risk of appeals might inappropriately disincentivise judges from tailoring directions to the case.

10.11 Therefore, we conclude that the content of a direction on myths and misconceptions should remain entirely at the judge's discretion, and that there should be no mandatory or presumptive wording.

Recommendation 56.

10.12 We recommend that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion.

Ensuring that directions are given when appropriate

10.13 There is some concern that directions on myths and misconceptions are not being given consistently, where appropriate, in sexual offences cases. In response to the Crown Prosecution Service ("CPS") RASSO advocates survey,[12] three advocates raised significant concerns about the inconsistent use of directions. One advocate stated that directions are being used inconsistently because "some judges are happy to give them others not so".[13] We received similar feedback from several Circuit Judges, a Recorder, and former Victims' Commissioner Dame Vera Baird KC (Hon).[14]

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11 The Judicial Studies Board was replaced by the Judicial College on 1 April 2011. The Judicial Studies Board produced the Crown Court Bench Book, which was a predecessor to the Crown Court Compendium. According to Dingemans LJ (formerly Vice President of the King's Bench Division) the specimen directions found in the Crown Court Bench Book, resulted in judges reading them off "without making attempts to tailor the directions to the particular case being tried". Later versions of the Bench Book attempted to resolve this problem and were ultimately replaced by the current example directions. See Crown Court Compendium, 22-1.

12 As outlined in the glossary, the acronym "RASSO" stands for Rape and Serious Sexual Offences.

13 CPS, RASSO Advocacy Survey (2022).

14 CP 259, para 10.34.

Further, Smith and Skinner's trial observation study found that myths directions were only given in 10 out of the 18 sexual offences trials observed.[15]

10.14 We asked for views on whether there should be a rebuttable presumption that a direction on myths or misconceptions will be given in sexual offences cases.[16] We suggested that this approach could help to alleviate the concern that directions are not given when they should be because judges would be required to justify not giving a direction in a particular case.

10.15 One objection to this approach was that it would unduly constrain the trial judge, who is best placed to make decisions about whether directions are needed. Presumptive directions could also be seen as a restriction of judicial discretion and an intrusion into judicial independence.[17] However, we highlighted that other common law jurisdictions have mandatory or presumptive directions for certain myths in limited circumstances, which are not seen as unduly constraining.[18] Furthermore, this measure would not prescribe the content or timing of a direction, meaning the judge would retain discretion to tailor the direction as needed.[19]

Presumptive directions

Consultation responses

10.16 A majority of consultees who responded to Consultation Question 84 believed that there should be a rebuttable presumption.[20] Several consultees agreed that a presumption would improve consistency in respect of the decision to give a direction on myths and misconceptions to juries.[21] Further, the CPS, Juries Understanding Rape is Essential Standard ("JURIES") and Women Against Rape all indicated that they were aware of inconsistency with regards to when directions are given. For example, the CPS wrote:

> Feedback from our advocates is that there is some inconsistency with regards to when directions are and are not given by the judge at trial such that on occasions juries are denied important assistance with challenging myths and misconceptions that have arisen during the course of the trial.

10.17 We note that in *Lake* there was a successful appeal against conviction where one of the grounds of appeal was that the jury were not given a direction about the

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15 O Smith and T Skinner "How rape myths are used and challenged in rape and sexual assault trials" (2017) 26 *Social and Legal Studies* 441, 453.

16 CQ 84: "Should there be a rebuttable presumption that a direction on myths or misconceptions will be given?" CP 259, para 10.69.

17 CP 259, para 10.65.

18 For example, in Scotland (Criminal Procedure (Scotland) Act 1995, ss 288DA and 288DB), in New Zealand (Evidence Act 2006 (NZ), s 126A) and Victoria (Jury Directions Act 2015 (Vic), part 5).

19 CP 259, para 10.66.

20 Of those who responded to CQ 84, 45 consultees selected "yes", 16 consultees selected "no", and 13 consultees selected "other".

21 Including the CPS; the Centre for Women's Justice ("CWJ"); and Dyfed-Powys Office of the Police and Crime Commissioner.

complainant displaying emotion or distress when giving evidence or at the time of complaint to the police.[22]

10.18 However, we were also told by consultees and stakeholders that directions on myths and misconceptions are given consistently.[23] A Recorder wrote that in their experience, "judicial directions on rape myths are invariably given in RASSO cases" and that "since those directions came in, I have not done a single case where the rape myths judicial direction was not given". A Circuit Judge told us that they did not see an issue with creating a presumption that a direction should be given because directions are routinely given in most cases.

10.19 Several consultees opposed this proposal because they thought a myths direction may not be necessary in every case, so it should be left to the judge to exercise their discretion. The Six Circuits of England and Wales ("Six Circuits")[24] provided examples, such as where the defence is mistaken identity or that a defendant had a reasonable belief in consent. In contrast, two consultees favoured mandatory directions in certain circumstances.[25] Professors Quilter and McNamara referred to section 52 of the Jury Directions Act 2015 (Vic), which requires a direction on delay to be given if one of the triggering conditions is met.

Analysis

10.20 We acknowledge that there are mixed views on the consistency with which myths directions are being given. However, viewing the available evidence as a whole, we conclude that judicial directions could be given more consistently than they are presently. Although we were told during consultation by Circuit Judges and a Recorder that directions are given consistently, we were also told during our pre-consultation engagement by several Circuit Judges and a Recorder that there is inconsistency. Additionally, as outlined above, it is the experience of several prosecutors that directions are not given consistently, and this is supported by the findings of an academic study. Even if some individual judges consistently use directions, further guidance that is reflective of best practice is justified to ensure greater consistency in all sexual offences prosecutions.

10.21 As outlined at paragraphs 10.6 to 10.12 above, the content of a direction ought to be left entirely to the discretion of the trial judge. In the consultation paper, we asserted that making a direction mandatory in certain circumstances would not "prescribe the content or timing of a direction, and therefore the judge would retain significant discretion to tailor the direction as appropriate". [26]

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22 *R v Lake* [2023] EWCA Crim 710.

23 Including a Circuit Judge; HM Council of Circuit Judges; and a Recorder.

24 Consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit.

25 Professors Julia Quilter and Luke McNamara and nia (a service provider for women and girls who have been victims of sexual violence).

26 CP 259, para 10.66.

10.22 In other jurisdictions that require directions to be given in certain circumstances, this requirement is in statute. However, that requirement being in statute means that the content of that direction is also prescribed by statute. For example, in Scotland, judges are required to give a direction on delay when evidence is given, a question is asked, or a statement is made that draws attention to the fact that the complainant delayed in reporting the offence or telling anyone about the offence.[27] In giving that direction, the judge is required to advise the jury that:

(1) there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things; and

(2) this does not, therefore, necessarily indicate that an allegation is false.[28]

10.23 Similarly, in Victoria, the trial judge must give a direction on absence of physical injury, violence or a threat when they consider that "there are good reasons" to give that direction.[29] The content of this direction is defined as a direction informing the jury that experience shows that:

(1) there are many different circumstances in which people do and do not consent to a sexual act; and

(2) people who do not consent to a sexual act may not be

(a) physically injured or subjected to violence; or

(b) threatened with physical injury or violence.[30]

10.24 In England and Wales, example directions are provided in the Crown Court Compendium. One of the benefits of the Compendium is that it is kept under review and is regularly updated to bring it in line with recent developments.[31] It is much more easily amended than statute, meaning that example directions can be regularly updated to reflect current research. Furthermore, its non-statutory status allows the Judicial College to include more nuance in directions than would be possible in legislation.

10.25 Whilst we recognise that legislating for directions works in several other jurisdictions, we are concerned that to do so in England and Wales would cause a loss of the flexibility which the Compendium allows. The content of directions could become frozen in statute, and could only be amended by further primary legislation. In addition, we do not think it is workable to introduce a statutory requirement that a direction ought to be given, with the parameters of that direction sitting separately in the Compendium.

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27 Criminal Procedure (Scotland) Act 1995, ss 288DA(1).

28 Above, ss 288DA(2)

29 Jury Directions Act 2015 (Vic) s 47C.

30 Above, s 47D.

31 Crown Court Compendium, p ix.

10.26 In view of this, we do not think that there should be a statutory requirement to give directions in certain circumstances. However, we agree with the sentiment indicated by consultees: that there is a need for measures that will ensure directions are given consistently when helpful for the jury. In our view, it would be beneficial for the Crown Court Compendium to provide further guidance on giving directions about myths and misconceptions. We do not consider it would be accurate or appropriate for this to be referred to as a "rebuttable presumption". Given that the Compendium only provides guidance to judges, using the term "rebuttable presumption" may wrongly give the impression there is a legal duty or may misrepresent the legal status of the Compendium. In our view, it would be preferable for the Judicial College to consider providing further guidance to judges on when directions should be given. Below, we examine responses we received about the circumstances in which myths directions should and should not be given.

Circumstances where a direction should be given

10.27 Based on the approaches in other jurisdictions,[32] in the consultation paper we suggested that the rebuttable presumption could be engaged where evidence or questions raise a myth or misconception, or an application is made by the parties (the prosecution or defence) for such a direction.[33]

Consultation responses and analysis

10.28 Consultees were generally in favour of some of the circumstances that we outlined in the consultation paper. Two consultees indicated support for a presumption arising in all the circumstances that we raised in the consultation paper.[34]

10.29 Several consultees suggested that the presumption should apply where a myth is (or will be) raised in the complainant's evidence or based on questions asked (or that will be asked) of the witness.[35] We note that these are similar to the circumstances in which a direction will be given in several other jurisdictions, including Scotland and New Zealand.[36] Further guidance that suitable directions ought to be given when myths are engaged by evidence or questions asked would ensure that directions would be given consistently both pre-emptively and reactively. We also note that in Scotland, another circumstance where a direction will be given is when a statement is made that draws attention to a myth or misconception.[37] If counsel were to say something in their closing speech that would draw the attention of the jury to a myth or misconception, then a direction ought to be given in relation to that myth or misconception.

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32 Such as in Scotland or New South Wales. See CP 259, paras 10.39 to 10.42.

33 CQ 84: "If so, what should be the triggering conditions for a presumption in favour of a direction? For example, these could be that evidence is or will be led, questions are or will be asked, or an application by the parties." CP 259, para 10.70.

34 JURIES and the CPS.

35 Including HM Council of Circuit Judges; the Law Society; and the Six Circuits.

36 Criminal Procedure (Scotland) Act 1995, ss 288DA(1), 288DB(1) and 288DB(4); Evidence Act 2006 (NZ), s 127.

37 Above, ss 288DA(1)(b).

10.30 Four consultees were in favour of a presumption that a direction should be given where an application is made by the parties.[38] One of these, the Law Society wrote:

> It is good practice to share a draft of the final summing up with counsel. This is a good opportunity for the advocates to check that any myths or misconceptions that might have been triggered by the evidence (or by questions) are addressed properly.

10.31 We agree that where an application by the parties in the case alerts the court to myths being engaged by evidence, questions or statements, judges ought to give a direction unless (as discussed below) no reasonable jury would consider the evidence, question or statement to be material to the question of whether the alleged offence is proved.

10.32 The Criminal Bar Association ("CBA") wrote that the judge, being privy to case documents and applications, "ought to be able to identify … any stereotype or myth which might apply" and that "that identification would be the trigger". We note that in Victoria, in addition to "evidence in the trial" triggering a mandatory direction on delay, the direction "may" also be given "on the trial judge's own motion".[39] The CBA also suggested that "other directions may be required once the evidence is heard". As the individual ultimately responsible for the management of the trial, the judge should be able to give a direction where they identify a need for one. We take the view that where the judge identifies the need for a direction they ordinarily ought to give one.

Circumstances where a direction should not be given

10.33 Next, we consider the circumstances where a direction on myths or misconceptions should not be given. In the consultation paper we referred to the Scottish test for rebutting the presumption that directions on myths and misconceptions will be given, which is that the judge considers that no reasonable jury would consider the evidence, question or statement to be material to the question of whether the alleged offence is proved.[40]

Consultation responses and analysis

10.34 Although they provided limited reasoning, a majority of consultees agreed that the test for rebutting the presumption should be "where no reasonable jury would consider the evidence, question, or statement to be material", as it is in Scotland.[41] For example, HM Council of Circuit Judges wrote that "this would be an appropriate test".

10.35 Andrew Wilkins (a barrister) provided the only negative response. He disagreed with the test because "it should depend on the circumstances of the case". In our view, the Scottish test does take into account the circumstances of the case; it requires the

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38 Cardiff University Law School Innocence Project; Professor Dr Julia Quilter and Professor Dr Luke McNamara; and the Law Society.

39 Jury Directions Act 2015 (Vic), s 52(2A).

40 Criminal Procedure (Scotland) Act 1995, ss 288DA(3), 288DB(3) and 288DB(6).

41 Of those who responded to CQ 85, 13 consultees selected "yes", 2 consultees selected "no", and 8 consultees selected "other".

judge to evaluate how the evidence, question or statement will be considered by the jury.

10.36 The CBA suggested an alternative way of phrasing the test to rebut the presumption: "if there is a rebuttable presumption, then the test should be that the trial judge does not consider that the evidence, question or statement is material". In other words, the CBA would prefer to remove the element of the test we proposed which requires the judge to consider the views of a reasonable jury. In our view, the requirement for the judge to consider the impact that the evidence, question, or statement would have on the jury is important. The reason a direction is given is to respond to false assumptions that the jury may hold which may be engaged by aspects of the case. Therefore, it is right that in deciding not to give a direction the judge should have to consider the impact of that evidence, question or statement on the jury.

10.37 The Scottish threshold clearly outlines the circumstances in which a direction on myths and misconceptions should not be given. It requires the judge to consider how the jury might interpret the evidence within the wider circumstances of the case. This is important to ensure that judges are not required to give directions where those directions would not be helpful to the jury. The Explanatory Notes to the Scottish legislation suggest that the test will be met in respect of the direction on delay where the offence was committed against someone who was "a baby or very young child at the time the offence was alleged to have been committed".[42] No reasonable jury would consider that a very young child, who would not possess a developed understanding of the appropriateness of the relevant behaviour, is less credible because they did not report the alleged offence sooner. Similarly, in respect of the direction about lack of physical resistance, a direction would not need to be given where the complainant was asleep or unconscious at the time of the alleged offence.[43] In situations like these, there ought to be an exception to the general rule that a direction on myths and misconceptions should be given. Overall, our view is that, although a direction on myths and misconceptions should ordinarily be given where useful in the circumstances of the case, a direction should not be required in the circumstances outlined by the Scottish test: where "in the circumstances of the case, no reasonable jury would consider the evidence question, or statement to be material".

10.38 The CBA queried whether a judge would be required to give a written ruling if a direction was not given. Generally, we think that oral decisions would be given as a matter of course, since judges will invariably check the phrasing of directions with counsel before summing up. Oral reasoning will also naturally follow from parties applying for a direction to be given. Some judges may think it appropriate to give written rulings, and they ought to be able to do so. However, requiring written rulings would not bring significant additional benefits justifying the additional workload this would entail. We therefore do not think that written rulings should be required when judges do not give a direction on myths and misconceptions.

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42 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Explanatory Notes, s 6, para 38.

43 Above, s 6, para 43.

Myths directions that ought to be given more consistently

10.39 In the consultation paper, we asked consultees to tell us which directions on myths or misconceptions should attract a rebuttable presumption.[44] We highlighted the directions on delay in reporting, absence of resistance, and inconsistency as three examples of myths directions that are subject to a presumption or mandatory requirement in other jurisdictions.

Consultation responses and analysis

10.40 Nine consultees supported presumptive directions about delay, inconsistency, and absence of resistance.[45] Some consultees resisted presumptive directions for some of these misconceptions.

10.41 Cardiff University Law School Innocence Project disagreed, arguing that "none of these examples would be fairly considered myths or misconceptions in some circumstances". It suggested that classifying absence of resistance as a myth would be "unfair" because "there are circumstances where that is relied upon by the defence to be evidence consistent with reasonable belief in consent". It made similar comments about inconsistency in a complainant's account arguing that is often the only "avenue of exploration for a defendant to mount a defence". We do not agree. Judges already give directions on inconsistency and absence of resistance. Further, example directions are drafted to be balanced so their content is imparted to the jury in a way that is fair, referring to both the defendant's and the complainant's accounts. Finally, judges have discretion to tailor the content of the directions to the case, which is a further mechanism for ensuring fairness. We therefore disagree that it would be unfair if judges were provided with guidance that they should ordinarily give these directions unless no reasonable jury would consider the evidence, question, or statement to be material.

10.42 Consultees also told us that there should be presumptive directions in respect of other myths and misconceptions, including:

(1) myths about male complainants' sexuality;[46]

(2) the myth that there is a typical rape victim or perpetrator;[47]

(3) misconceptions about ongoing relationships and subsequent consensual sex;[48] and

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44 CQ 86: "In relation to which myths or misconceptions should there be such a rebuttable presumption? Some examples from other jurisdictions are: (1) delay; (2) absence of resistance; and (3) inconsistency." CP 259, para 10.72.

45 Including the CBA; the Law Society; and the London Criminal Courts Solicitors' Association ("LCCSA").

46 Men and Boys Coalition. For further discussion of example directions for male complainants, see para 10.93 below.

47 The CBA.

48 Dr Olivia Smith wrote that "juries are ill-equipped to deal with this type of evidence and would benefit from balanced guidance". For further discussion of this topic, see para 10.130 below.

(4) the challenges of grooming or coercive relationships.[49]

10.43 Additionally, four consultees suggested that if a rebuttable presumption was introduced, then it should apply for all example myths directions in the Crown Court Compendium.[50] The CPS argued that applying the presumption to all myths would alleviate concerns about signalling that some myths and misconceptions are more significant than others.

10.44 If a myth or misconception is engaged in the circumstances that we have outlined, then there is a risk that this will impact on jury deliberations, so there will be a need for a direction to the jury about that misconception. This is true of all misconceptions that are identified in the Crown Court Compendium. Distinguishing between different myths directions would create a perception that certain myths are of greater significance or more in need of remedying than others. In our view, to ensure that directions are given more consistently when necessary to assist the jury, it would be beneficial for further guidance to apply to any direction on myths or misconceptions in the Crown Court Compendium.

Recommendation 57.

10.45 We recommend that the Judicial College consider including guidance in the Crown Court Compendium that directions on myths and misconceptions should be given when:

(1) evidence is or will be led relating to the myth or misconception;

(2) questions are or will be asked relating to the myth or misconception;

(3) a statement is made that relates to a myth or misconception;

(4) an application is made for a direction by the parties; or

(5) the judge considers that a direction may be needed

unless, in the circumstances of the case, no reasonable jury would consider the evidence, question, or statement to be material.

Further training on split directions

10.46 We now turn to whether judges should receive further training in respect of when to give directions. Currently, judges are permitted to give directions at any time that will assist jurors with their evaluation of the evidence (referred to as "split directions"). This could mean giving directions at the outset of the case, immediately before the complainant gives evidence, elsewhere throughout the case, or at the end of the case when summing up. Judges can also give a "split summing up", which means giving

[49] Above.

[50] HM Council of Circuit Judges; CPS; JURIES; nia.

their legal directions before the prosecution and defence closing speeches and their summary of the evidence afterwards.[51]

10.47 In the consultation paper, we noted that there is a variety of evidence of the benefits of split directions. Split directions can be more memorable to the jury than leaving directions to summing up, where directions will be given alongside a lengthy summary of the evidence and relevant law. Split directions may be useful for addressing jurors' misconceptions about the evidence before they have had an opportunity to form an opinion about the complainant's credibility.[52]

10.48 We referred to stakeholders who had told us that the use of split directions is "inconsistent" and that there is "a lack of training on this approach". We suggested that greater consistency could be achieved through providing further training to the judiciary on split directions and summing up. We provisionally proposed that the Judicial College should consider training on split directions and split summing up for directions on myths and misconceptions.[53]

Consultation responses and analysis

10.49 A majority of consultees agreed that the Judicial College should consider training about the use and benefits of split directions and split summing up for myths directions.[54]

10.50 Consultees provided mixed views on whether split directions and split summing up are currently being used consistently; some said they were, and some said they were not. A Circuit Judge told us that they are aware that approaches to using split directions vary between judges, who each have preferred approaches. We were also assured that there is already training on split directions and split summing up.[55] A Circuit Judge told us that the existing training is comprehensive and makes clear that split summing up is usually preferable.

10.51 In our view, given it is already offered, further training is unlikely to improve consistency. Additionally, there is already guidance to judges in the Compendium that the use of split summing up for myths directions can be useful to "deter advocates

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51 Closing speeches are given after the jury have heard all the evidence; they provide an opportunity for the prosecution and defence to comment on the evidence and the strengths in their case. After closing speeches, the trial judge gives a "summing up", which is a reminder to the jury of the prosecution and defence cases and also includes directions to the jury on relevant matters, such as directions on myths and misconceptions.

52 F Leverick, "What do we know about rape myths and juror decision making?" (2020) 24 *International Journal of Evidence and Proof* 255, 273, citing J Chalmers and F Leverick, *Methods of Conveying Information to Jurors: An Evidence Review* (2018) pp 27-31. See also J Horan and J Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: Failures and Lessons Learned" (2020) 43(2) *University of New South Wales Law Journal* 707.

53 CQ 95: "We provisionally propose that the Judicial College consider training about the use and benefits of split directions and split summing up for myths directions. Do consultees agree?" CP 259, para 10.99.

54 Of those who responded to CQ 95, 16 consultees selected "yes", 4 consultees selected "no", and 3 consultees selected "other".

55 A Circuit Judge; HM Council of Circuit Judges; and the CBA. Both HM Council of Circuit Judges and the CBA stated that they would be open to the idea of additional training, though noted the resource implications.

from making 'bad' points" in their closing speeches.[56] In light of the above, we conclude that further training on the use of split directions or split summing up is unnecessary.

10.52 Professors Julia and McNamara suggested that because of the evidence in support of the efficacy of split directions, mandatory split directions would be preferable. They referred to the approach taken in Victoria as an example.[57] We reject this for two reasons. First, because consultees underlined the need for judicial discretion over the timing of directions.[58] Secondly, because we think it is an inroad too far into the independence of the judiciary.

EXAMPLE DIRECTIONS

10.53 In the consultation paper, we stated that stakeholders had raised concerns that the existing example directions do not accurately reflect the available empirical evidence. We referred to Professor Anne Cossins, who has criticised the absence of a direction about freezing as a frequent response to sexual offending.[59] Professor Cossins has also criticised the example direction on delay for not "adequately summarising the state of the research on the topic". In her view, the direction should reflect the fact that "the majority of complainants of sexual assault delay their complaint" and "there is no evidence to prove a relationship between delay and fabrication".[60] We also referred to a CPS survey, which found that 74% of respondents stated that example directions should be expanded to cover additional complexities that arise in sexual offences cases.[61]

10.54 We noted that there may be difficulty in amending existing example directions to reflect the current psychological and neurological literature on the topic. The judge may inadvertently give – or may be perceived as giving – expert evidence, which is not permitted. Additionally, there is a risk that this would cause example directions to be unbalanced, or that they could prejudge issues such as the complainant's credibility, which are for the jury to determine.[62]

10.55 We asked for views on whether the Judicial College should consider amending several existing example directions on myths and misconceptions, including: freezing

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56 Crown Court Compendium, 20-5, para 17.

57 The Jury Directions Act (Vic) 2015 outlines the requirements for a judge directing a jury about a complainant who has not reported a sexual offence immediately (s 52). If, before any evidence is adduced in trial, the judge considers that there is "likely to be evidence in the trial that suggests that the complainant delayed in making a complaint" then they must provide the relevant direction to the jury (s 52(1)). If, at any other time in the trial, the judge considers that there is evidence which suggests that the complainant delayed in making a complaint, then the trial judge must direct the jury "as soon as is practicable" (s 52(2)). The judge also retains discretion to repeat a direction "at any time in the trial" (s 52(3)).

58 HM Council of Circuit Judges stated that "how and when such directions should be given should always remain a matter for the trial judge".

59 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 331.

60 CP 259, para 10.81, citing A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 487.

61 CP 259, para 10.77, citing CPS, RASSO Advocacy Survey (2022).

62 CP 259, para 10.82.

and delay;[63] the prevalence of acquaintance rape as opposed to stranger rape; and distress shown by the complainant when giving evidence.[64] We also asked for views on whether the Judicial College should consider amending any other example directions.[65]

Amendments to the example directions on myths and misconceptions

Amending the example direction about physical resistance

10.56 The first example direction which we considered for amendment was the example direction about the myth that rape will always be physically or verbally resisted. The relevant example direction contains the following explanation of why an individual may not resist non-consensual sexual activity:

> Experience has shown that people can respond to unwanted sexual activity … in different ways. Some may protest and physically resist throughout the event. But others may be unable to protest or physically resist. This may be out of fear or because they are not a very forceful person.[66]

10.57 There is also a separate more general example direction about "avoiding assumptions about rape and other sexual offences". This example direction includes commentary about how people may react to rape:

> We also know that there is no typical response to rape. People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation.[67]

Consultation responses and analysis

10.58 Consultees suggested a range of ways of amending the existing example direction on physical resistance. A Circuit Judge stated that in their experience there are difficulties with a jury understanding why a complainant would freeze, so updating the direction to provide further explanation would be a good idea.

10.59 Consultees also told us how the direction could be improved. Two consultees argued that the example direction should make reference to the fight, flight, freeze, flop and befriend survival responses.[68] A Circuit Judge also suggested that the example

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63 CQ 89: "Should the Judicial College consider amending the Crown Court Compendium example directions on delay and freezing better to reflect the empirical evidence about complainants' responses?" CP 259, para 10.84.

64 CQ 93: "We invite consultees' views on the effectiveness of the example directions on: (1) the prevalence of acquaintance rape as opposed to stranger rape; and (2) distress shown by the complainant when giving evidence?" CP 259, para 10.95.

65 CQ 90 we asked: "Are there any example directions other than those on delay and freezing which do not reflect the empirical evidence, and therefore the Judicial College should consider amending?" CP 259, para 10.85.

66 Crown Court Compendium, 20-10, Example 12.

67 Above, 20-06, Example 1.

68 Solace Women's Aid and an anonymous health professional. The "flop" trauma response is similar to the "freeze" response as the individual will become immobile, however, rather than tensing up, the body becomes floppy. "Befriending" refers to taking steps to placate or appease someone who poses a threat.

directions could be improved by making reference to the different trauma reactions that are based on reliable empirical evidence. The Centre for Women's Justice ("CWJ") argued that the existing phrasing of "frozen with fear" implies "some higher state of terror" which overlooks instinctive reactions and may not accurately reflect current understanding of the range of common responses.[69]

10.60 In our view, the Judicial College should consider amending the existing example direction on lack of resistance to provide more detail about the variety of different ways that someone might respond to non-consensual sexual activity, and why they might do so. Consultees have rightly highlighted that although the current example direction states that there are "different ways" that people may respond to unwanted sexual activity, it does not provide further detail, other than to suggest a binary; that they may "protest and physically resist", or they may not. This does not accurately depict the range of common responses to sexual offending.[70] Additionally, the example direction provides insufficient explanation as to why people might not physically resist. The direction states that people may not resist unwanted sexual activity "out of fear or because they are not a very forceful person" but omits that lack of resistance is a common neurological reaction to a traumatic event, such as rape.[71] In our view, for a judicial direction effectively to challenge myths about physical resistance, it is necessary that this additional detail is consistently provided to jurors.

10.61 Consultees also suggested that in the example direction about avoiding assumptions, the phrase "there is no typical response to rape" should be expanded. The CPS and JURIES suggested it does not provide insight into what the range of responses are and should give reasons why a complainant may remain silent or offer no resistance. Similarly, the Six Circuits described the phrasing as "too bland an observation to be of much use to jurors" and "specific reference to the common response of victims to freeze would be an improvement".[72]

10.62 We agree that directing the jury that there is "no typical response to rape" is by itself insufficient, as it does not provide insight into the kinds of responses that are common, such as freezing or flopping. However, the example direction about avoiding assumptions is intended to be a more generalised direction. This can be supplemented with the direction about physical resistance, meaning that jurors would still receive the necessary information about freezing, flopping and other responses to rape. If this information is provided in a revised example direction covering freezing,

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Rape Crisis England and Wales, *The 5 Fs: fight, flight, freeze, flop and friend*. See also E Dhawan and P Haggard, "Neuroscience evidence counters a rape myth" (2023) 7 *Nature Human Behaviour* 835, 837 and S Taylor, "Biobehavioural responses to stress in females: tend-and-befriend, no fight-or-flight" (2000) 107(3) *Psychological Review* 411.

69 Crown Court Compendium 20-10, Example 12: "W accepts that they did not put up a struggle against D, and it is agreed that W did not suffer any injury. The defence say this is because W fully consented to what took place. But W told you that when D started to undo D's trousers and then undid W's jeans, they were so frightened that they could not move. W described being 'frozen with fear'".

70 S Taylor, "Biobehavioural responses to stress in females: tend-and-befriend, no fight-or-flight" (2000) 107(3) *Psychological Review* 411.

71 E Dhawan and P Haggard, "Neuroscience evidence counters a rape myth" (2023) 7 *Nature Human Behaviour* 835.

72 This response was categorised as "other".

then it is not necessary also to include it in the example direction about avoiding assumptions.

Amending the example direction on background of domestic abuse

10.63 Consultees suggested consideration of the example direction on sexual offending in the context of domestic abuse which reflects other counterintuitive responses to sexual offending. The current example direction is:

> It is the experience of the courts that people who are in an abusive relationship may struggle to extricate themselves from it for a whole range of reasons including fear, lack of resources, family responsibilities, cultural or societal concerns and/or their own conflicting emotions towards their abuser. Further, their capacity to react to events may be compromised or blunted by their lived experience. Where the abuse is not physical but psychological, emotional and/or financial, those subject to it may not even recognise themselves as victims of abuse, particularly where the behaviours develop over time. Whether that is relevant here will depend upon your assessment of the evidence that you have heard.[73]

Consultation responses and analysis

10.64 Consultees told us that the behaviour of a victim of sexual offending within the context of an abusive relationship can be distinctively counterintuitive, and that the Compendium should be updated to reflect this. Two consultees suggested that there should be an example direction explaining that a common response to sexual offending in the context of an abusive relationship is to appease the rapist. For example, the CPS suggested that a victim of sexual violence in the context of an abusive relationship might take steps such as:

> prioritising placating their abuser rather than challenging or resisting his or her abusive behaviour or taking steps to protect their abuser from potential legal repercussions on account of how those repercussions may negatively impact the complainant and/or the wider family.

10.65 Similarly, Tricia O'Sullivan (a solicitor and former CPS prosecutor) wrote that a victim "may accept the attacker's apology and, even where no guilt is expressed, reassure their attacker of their lack of wrongdoing and act independently to cover up the offence". She also stated that "victims often blame themselves for the attack and ruminate over what they could have done to prevent it from happening".[74]

10.66 The existing example direction on abusive relationships refers to the complainant having difficulty extricating themselves from the relationship with the defendant. However, it does not refer to the tendency of those who have been subject to coercive control to develop protective strategies to minimise the extent of the abuse in order to protect themselves, such as taking steps to placate an abuser.[75] This may result in

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73 Crown Court Compendium 20-11, Example 15.

74 South Wales Office of the Police and Crime Commissioner similarly referred to the tendency of victims of domestic abuse to use self-blaming language.

75 Defences for victims of domestic abuse who kill their abusers (2024) Law Commission Background Paper, p 11, citing S Hamby, *Battered Women's Protective Strategies* (2009).

counterintuitive patterns of behaviour, an explanation of which might assist the jury. We therefore recommend that the Judicial College should consider amending the existing example direction on a background of domestic abuse accordingly.

Amending the example direction on delay

10.67 We also asked consultees about amending the example direction used when the complainant has delayed in reporting a rape, which responds to the myth that rape will always be reported promptly. The example direction on delay directs juries that just because "a complaint is made late does not make the allegation untrue" and that "a complaint is not necessarily true just because it was made immediately". The example direction contains the following explanation for why a complainant might delay reporting a rape:

> Different people react to situations in different ways. Some people may tell someone about it straight away. But others may not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people. It is your job to consider whether or not any of those things affected [the complainant's] decision not to complain at that time and whether or not that impacts upon [the complainant's] reliability as a witness.[76]

Consultation responses and analysis

10.68 Consultees suggested various ways that the existing example direction on delay could be improved. JURIES wrote that the typicality of delay in reporting "should be clearly highlighted within the direction with a view to improving its effectiveness". The CPS wrote that "academic research has revealed that delay is a typical feature of sexual assault and rape and this could be more clearly highlighted within the direction to jurors".

10.69 Two consultees disagreed with amending the example direction on delay due to general concerns about fairness to the defendant and the need for balance in directions.[77]

10.70 In our view, the direction on delay would not be improved by referring to the typicality of delay. We recognise that it is common that rape is not immediately reported to the police, and most rapes are never reported at all.[78] Nonetheless, we do not think that it helps the jury to be told that delay is a typical response to sexual offending. There is a risk that this would create an expectation of how a victim of rape ought to behave, and that complainants' accounts would have to replicate this to be believed. Alternatively, referring to delay as "typical" might inadvertently have the effect of bolstering the credibility of a complainant who delayed in reporting. The point that needs to be conveyed to jurors is that the timing of a complaint does not in itself have a bearing on the veracity of the allegation. In our view, the current example direction on delay does this.

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76 Crown Court Compendium, 20-6, Example 2.

77 Lyall Thompson (a barrister) and Cardiff University Law School Innocence Project.

78 ONS, *Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020* (18 March 2021) p 14.

Amending the example direction on the prevalence of stranger and acquaintance rape

10.71 The current example direction on the prevalence of stranger and acquaintance rape is in the first example direction 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.[79]

Consultation responses and analysis

10.72 We received two suggestions from consultees: first, that the existing example direction should make reference to statistics on the prevalence of acquaintance rape compared to stranger rape; and secondly, that it should be amended in line with the direction approved in *Andreous.*[80]

10.73 Consultees who were in favour of including statistics on the prevalence of stranger and acquaintance rape observed that research shows that there is a misconception amongst the public that rape is most commonly perpetrated by a stranger. The CBA wrote that Professor Cheryl Thomas' research[81] into myths and stereotypes "demonstrated that jurors can believe that rape is something that tends to occur amongst strangers". Accordingly, it stated that "judicial direction should be strengthened to take account of this misconception". In addition, JURIES commented that "the direction covering the prevalence of acquaintance rape could be improved by including reference to relevant research studies" and by citing statistical evidence.

10.74 In our view, an example direction which referred to the statistical reality (that the majority of rapes are committed by people known to the victim rather than strangers) would be problematic. It would put the judge in the position of giving expert evidence. Further, it might inadvertently suggest to jurors that it is more likely that a particular allegation is true because the defendant is known to the complainant. Therefore, we do not suggest that the Judicial College consider amending the example direction on the prevalence of stranger and acquaintance rape to refer to the relative prevalence of stranger and acquaintance rape.

10.75 The Six Circuits supported "a direction in line with that given in *Andreous*".[82] The direction endorsed by the Court of Appeal Criminal Division ("CACD") is that there is "no fixed type of those who have these offences committed against them or commit them" and that "they come from every possible culture, age, class, profession".[83] In the consultation paper we noted Dr Ellen Daly's view that such a direction may be

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79 Crown Court Compendium, 20-5, Example 1.

80 [2014] EWCA Crim 2886, [2014] 11 WLUK 279. We outline the scope of an *Andreous* direction below at para 10.75.

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

82 [2014] EWCA Crim 2886, [2014] 11 WLUK 279.

83 *R v Andreous* [2014] EWCA Crim 2886, [2014] 11 WLUK 279 at [21]-[23].

"necessary to address problematic cultural narratives that assume sexual violence is considered permissible in some minoritized communities".[84]

10.76 We agree that it may be helpful to integrate an *Andreous* direction into a direction about avoiding assumptions about there being a "typical rapist or typical person that is raped". We agree with Dr Daly that this could be used to respond to problematic cultural narratives. It may also enhance the existing example direction by providing greater clarity about the kinds of assumptions that jurors ought to avoid, for example, that an individual could not be a rapist if they hold a respectable job. We note that there may be concern that in a case where good character evidence has been admitted or where a good character direction has been given, an *Andreous* direction may dilute that evidence or direction. However, as the court in *Andreous* stated, giving such a direction does not undermine a good character direction. The direction is consistent with the existing approach in this area: that juries should be directed to avoid judgements based on stereotypes and misconceptions. The jury will still be required to bear in mind the defendant's good character, but in so doing should avoid making judgements based on prejudicial preconceptions.[85] We therefore recommend that the Judicial College consider amending the existing example direction that there is no "typical rapist or typical person that is raped" in line with the direction approved in *Andreous.*

Amending the example direction on distress

10.77 The current example direction relating to distress, or lack thereof, when giving evidence states that:

> You should not assume that the way [the complainant] gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape/sexual assault in a variety of ways. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. The presence or absence of emotion or distress when giving evidence is not a good indication of whether the person is telling the truth or not.[86]

Consultation responses and analysis

10.78 Consultees were broadly supportive of maintaining the existing example direction on distress, and indicated that the existing direction is sufficient.[87] The Law Society stated that "the example direction … on distress (or lack of) shown by the complainant when giving evidence, seem[s] to cover the key points". It stated that "it should be borne in mind that a judge should, in any event, tailor [a direction] to the particular case". The CBA wrote that Professor Cheryl Thomas' research into myths and misconceptions "demonstrated that jurors may expect distress from complainants". However, it stated that "the direction given for distress is much more detailed and does not require adjustment".

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84 CP 259, paras 10.35-10.36, citing E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 155.

85 *R v Andreous* [2014] EWCA Crim 2886, [2014] 11 WLUK 279 at [23].

86 Crown Court Compendium, 20-8, Example 6.

87 Including HM Council of Circuit Judges; the Law Society; and the CBA.

10.79 We received some consultation responses about ways that the example direction on distress could be modified to make it more useful for a jury. Chief Constable Sarah Crew (National Police Chief's Council Lead for Adult Sexual Offences) wrote that "it is important that supressed emotion in a witness isn't then used to undermine the credibility of a witness". Due to this, she argued that "it would be useful to have [a] direction around the different ways trauma manifests and is dealt with by a complainant to address misconceptions and assumptions around how a person 'should' respond". The existing example direction already does address suppressed emotion of a witness when giving evidence, and it is not clear what could usefully be added.

10.80 Martin Rackstraw (a solicitor) wrote that if there are directions about distress shown by a complainant, then consideration ought to be given to extending these to a defendant. In our view, a trial judge could tailor the existing example direction to the defendant if they think that such a direction is necessary, but a separate example direction is not required.

Amending the example direction on the use of measures to assist with giving evidence

10.81 In Chapter 3 of the Compendium there are example directions for use when a witness gives evidence with measures to assist with giving evidence.[88] The example directions provide guidance to judges to direct juries that they should treat all evidence in the same way, regardless of how it is given and that this is no reflection on the witness or defendant.[89] These example directions are not specific to sexual offences prosecutions and are to be used whenever a witness uses measures to assist with giving evidence in proceedings.

Consultation responses and analysis

10.82 Consultees suggested that there should be an additional example direction to warn against making assumptions about a complainant who elects to watch the rest of the trial after giving evidence behind a screen, remotely, or pre-recording their evidence. Claire Waxman (Independent Victims' Commissioner for London) wrote that complainants "are often dissuaded from attending the remainder of a trial or sentencing" because there is "a perception that they may look 'vindictive' to the jury, particularly if they have used special measures". She suggested that "it may be worthwhile considering a judicial direction on this point, so the jury is clear that the judge supports a [complainant] attending the remainder of the trial". At a consultation event an Independent Sexual Violence Adviser ("ISVA") told us that the judge should direct the jury that a complainant watching the trial after having given evidence behind a screen is not a reflection on their credibility.

10.83 In July 2024, the CPS published guidance aiming to challenge the misconception that complainants should avoid watching the rest of the trial because "their presence could jeopardise the prosecution".[90] It noted that the principle of open justice means that

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88 In Ch 9 we recommend that "special measures" should be renamed "measures to assist with giving evidence".

89 Crown Court Compendium, 3-31, Example 2.

90 CPS, *Crown Prosecution Service guidance aims to end misconception victims shouldn't sit in public gallery after giving evidence* (16 July 2024).

complainants should be entitled to do this. This change in guidance will likely result in witnesses (including complainants) who have used measures to assist with giving evidence attending the remainder of the trial more often, meaning that there may be greater need for a direction on this issue.[91]

10.84 It is possible that jurors may misconstrue the complainant's presence at trial after they have utilised measures to assist with giving evidence. For example, jurors may conclude that the complainant chose to use such measures because they were fearful of giving evidence, and conclude that their later presence is contradictory. In fact, given the acutely sensitive and private nature of their evidence, it is understandable that a complainant may have concerns about giving evidence that do not arise when watching the remainder of the trial. Without steps being taken to rectify this misconception, complainants may be disincentivised or discouraged from attending the remainder of the trial. We conclude that the Judicial College should consider amending the existing directions that are given when a witness uses special measures to address this misconception.

Recommendation 58.

10.85 We recommend that the Judicial College consider whether the example direction on "avoiding assumptions about rape and other sexual offences" should be amended along the lines of the direction that was approved in *Andreous.*

10.86 We recommend that the Judicial College consider whether the example direction on "fear, although no use or threat of force, physical struggle and/or injury" should be amended to refer to the range of common responses to sexual offending, including freeze, befriend, flight, fight, and flop.

10.87 We recommend that the Judicial College consider whether the example direction on "background of domestic abuse" should be amended to refer to the common response of a victim of domestic abuse taking steps to placate and/or appease an abuser.

10.88 We recommend that the Judicial College consider whether the existing example directions about giving evidence using special measures should be amended to explain that the jury should draw no inference from a complainant's decision to watch the rest of the trial when they have used special measures to give evidence.

Additional example directions on myths and misconceptions

10.89 Having examined amendments to example directions, we now consider whether there are any areas where additional example directions would be useful.

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91 In Ch 9 we recommend that complainants in sexual offences prosecutions should have a presumed entitlement to certain measures to assist with giving evidence to facilitate their attendance at the trial, verdict and sentencing hearing when not giving evidence. If implemented, this could also lead to increased attendance by complainants at trial after they have given their evidence.

10.90 In the consultation paper, we referred to Professor Phil Rumney, who told us that the example directions do not sufficiently respond to misconceptions about male complainants. He highlighted the direction addressing myths about clothing as an example: while the existing example direction refers to myths about clothing being provocative, research indicates that the misconception about male complainants is that their clothing would have been a physical barrier to the offence. This meant that "claims to having been raped without incurring injury" were less credible.[92] Further, we highlighted research indicating a misconception that "a closeted gay man, for example, would make a false allegation of rape out of shame or fear of reprisal for consensual sexual activity with another man".[93] Consequently, we provisionally proposed that the Judicial College should consider whether additional example directions are needed to address the particular myths and misconceptions relating to male complainants.[94]

10.91 Additionally, we highlighted pre-consultation feedback that there ought to be an example direction dealing with misconceptions about the complainant's vulnerabilities such as autism and mental health difficulties. We noted that these may affect the complainant's risk perception or presentation whilst giving evidence, so a direction could address this. We asked whether the Judicial College should consider an example direction to address myths and misconceptions about complainants with a mental health condition or learning disability.[95]

10.92 Finally, we also asked whether there are any other myths or misconceptions that are not currently addressed by example directions and should be.[96]

Additional example directions for male complainants

10.93 A majority of consultees who responded to Consultation Question 91 agreed that the Judicial College should consider additional example directions to reflect better the myths and misconceptions which affect male complainants of sexual offences.[97]

10.94 Two consultees suggested that there is a myth that men who consent to homosexual sex will subsequently report it as rape. Dr Siobhan Weare and Dr Willmott referred to their research findings that 25% of respondents to an online survey agreed with the statement "many men claim rape if they have consented to homosexual relations but have changed their minds afterward". Similarly, the CPS wrote that additional

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92 P Rumney and N Hanley, "The Mythology of Male Rape: Social Attitudes and Law Enforcement" in C McGlynn and V Munro (eds), *Rethinking Rape Law International and Comparative Perspectives* (2010), p 304.

93 CP 259, para 10.88.

94 CQ 91: "We provisionally propose that the Judicial College should consider whether additional example directions are needed in order to address the particular myths and misconceptions relating to male complainants. Do consultees agree?" CP 259, para 10.93.

95 CQ 92: "Should the Judicial College consider an additional example direction to address the presentation and particular myths and misconceptions relating to complainants with a mental health condition or learning disability?" CP 259, para 10.94.

96 CQ 94: "Are there any other groups of complainants or myths and misconceptions which are not currently addressed by example directions and should be?" CP 259, para 10.96.

97 Of those who responded to CQ 91, 19 consultees selected "yes", 3 consultees selected "no", and 0 consultees selected "other".

directions would address "the misconception that a closeted gay man makes false allegations out of shame or fear of reprisals for consensual activity with another male". Recently, mock juror research into jury decision making in male rape trials has been conducted by Dr Weare, Dr Willmott and Maddy Millar. The preliminary findings of this research indicate that although rape myths were not widely endorsed in the abstract by the mock jurors, one of the male rape myths that jurors overall appeared least certain about was the myth that "men claim rape if they have consented to homosexual relations but later changed their mind".[98]

10.95 Irrespective of the complainant's sexual orientation, there is a risk in a case with a male complainant that jurors may be less likely to believe that a rape occurred based on the homophobic assumption that homosexual sexual activity is shameful, and therefore that the complainant is more likely to lie about having consented. Where it has been suggested that the complainant fabricated the complaint due to shame or fear of reprisal for what the defence claims to be a consensual sexual encounter, the judge could remind the jury to avoid assumptions such as this, and to consider all of the evidence in the case. Based on the evidence cited above, we recommend consideration of an example direction about the misconception that a male complainant will make a false allegation about sexual offending due to shame or fear of reprisal in connection with homosexual sexual activity.

10.96 The CPS suggested that additional directions would be helpful due to "gaps in relation to clothing as a physical barrier". Contrastingly, the Six Circuits thought that the myths to which we referred in the consultation paper "would seem to potentially apply equally to female complainants". We agree that the misconception about clothing acting as a physical barrier could apply to both male and female complainants, depending on the clothing that they are wearing.

10.97 In our view, the myth about clothing as a physical barrier is already sufficiently addressed by the example direction about lack of physical resistance (see above). Indeed, Professor Phillip Rumney and Dr Natalia Hanley's research confirmed this link. They noted that some participants in their study considered that the complainant's clothing created a physical barrier "which made claims to having been raped without incurring injury less credible".[99] The underlying rationale for this myth is that the clothing did not act as a physical barrier because the complainant did not offer resistance or was cooperative. We note that this is already reflected in the existing example direction about lack of physical resistance.[100] Further, at paragraphs 10.58 to 10.60 we recommend ways to strengthen this example direction, which ought to enhance its impact in relation to the myth about clothing as a physical barrier.

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98 S Weare, D Willmott and M Millar, "Trial by Gender: Jury Decision Making in Male Rape Trials" (Unpublished, 2025).

99 P Rumney and N Hanley, "The Mythology of Male Rape: Social Attitudes and Law Enforcement" in C McGlynn and V Munro (eds), *Rethinking Rape Law International and Comparative Perspectives* (2010), p 304.

100 Crown Court Compendium, 20-10, Example 12: "W accepts that they did not put up a struggle against D, and it is agreed that W did not suffer any injury. The defence say this is because W fully consented to what took place. But W told you that when D started to undo D's trousers and then undid W's jeans, they were so frightened that they could not move. W described being 'frozen with fear'".

Additional example directions on mental health and learning disabilities

10.98 A majority of consultees who responded to Consultation Question 92 agreed that the Judicial College should consider an additional example direction to address the presentation of, and particular myths and misconceptions relating to, complainants with a mental health condition or learning disability.[101] Three consultees who agreed that a direction should be given stated that it would help to improve jurors' understanding of mental health conditions and learning disabilities.[102] Four consultees suggested that, in addition to directions on complainants with mental health and learning disabilities, the Judicial College should consider adding additional directions on complainants who are neurodiverse.[103] The CWJ specifically suggested that there should be an example direction for complainants who are autistic or have ADHD. In Chapter 2, we also describe consultees' views that lines of questioning regarding these topics may be used to invoke myths or inappropriately suggest lack of credibility.

10.99 We acknowledge the potential benefits of an example direction for complainants with mental health conditions, learning disabilities, and who are neurodiverse, as outlined by consultees above. However, consultees commented that it may be difficult to draft an example direction broadly enough to be generally applicable, yet with sufficient detail to be useful to judges. HM Council of Circuit Judges suggested that any example direction "would have to be so generally drafted that it would fail to serve its purpose … if the direction were not very broadly drawn, it would risk excluding some presentations or myths and misconceptions". It stressed that it is important that "any direction should be tailored to the particular individual". Further, Martin Rackstraw, who agreed that there should be an example direction on this topic, stated that the judge's tailoring of such a direction should be informed by medical evidence:

> any such direction would need to be very carefully tailored to the facts, and supported by medical evidence, and so any standard direction would [need] to provide for considerable modification on a case by case basis.

10.100 Even though it could be difficult to create an example direction about misconceptions relating to those with mental health conditions, learning disabilities, and who are neurodiverse, we conclude it is worthwhile. Drafting an example direction may be difficult because these conditions are complex, present in a variety of different ways, and can present simultaneously. However, an example direction, even if broadly drafted, could prompt and guide the judge in formulating directions on these matters. We note that a Circuit Judge told us that a standard direction on this topic would make giving these directions easier. This direction would be adapted to the evidence in the case, including any medical or other expert evidence regarding the complainant.[104]

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101 Of those who responded to CQ 92, 21 consultees selected "yes", 2 consultees selected "no", and 3 consultees selected "other".

102 Including JURIES; nia; Victim Support.

103 Including the CWJ; the Pan-London Rape Crisis Centres Experts by Experience Panel; and Dr Olivia Smith.

104 Expert evidence of a witness's mental health condition may be admissible "as a background against which the jury may judge the consistency and veracity" of their account and to "explain the witness's presentation when giving evidence: *R v Zubair Anwar* [2012] EWCA Crim 1478; *R v Mulindawa* [2017] EWCA Crim 416. One consultee – the CPS – wrote that it preferred the use of expert evidence on this particular issue rather than a judicial direction. However, the Six Circuits expressed a preference for the opposite, highlighting

We therefore take the view that the Judicial College should consider an example direction about complainants with mental health conditions, learning disabilities, or who are neurodiverse.

10.101 The Six Circuits suggested that "any such new direction should also apply to all witnesses in a trial" by which it meant "other crown witnesses, a defendant, and/or defence witnesses". In the consultation paper, we noted that a judge told us that there is a high proportion of defendants with serious mental disabilities or impairments.[105] Research shows that individuals with learning disabilities are overrepresented in the prison population.[106] Defendants often will not have "a single or clearly delineated form of intellectual or psychological difficulty" and mental health conditions or learning disabilities may co-exist.[107] There is a risk that juries might hold stereotypical views about a defendant with a mental health condition, or learning disability or who is neurodiverse. For example, jurors might correlate mental health conditions with violent behaviour, and therefore assume that a defendant with a mental health condition is more likely to have committed a violent offence than if they did not have a mental health condition.[108] Similar to how a lack of understanding about a complainant's mental health condition, learning disability, or neurodiversity has the potential to impact on the jury's perception of their credibility, there is also a risk for a defendant or other witness who gives evidence. It would therefore be appropriate for this example direction to be drafted so that it can be tailored to defendants and other witnesses who are neurodiverse, or who have a mental health condition or learning disability.

Additional example directions on false allegation evidence ("FAE")

10.102 In the consultation paper, we explained that evidence of a previous false allegation made by the complainant relating to a sexual offence[109] may perpetuate the myth that false allegations of sexual offences are common. This myth may subsequently influence the jury's assessment of the evidence.[110] In Chapter 6, we recommend amendments to the bad character provisions in section 100 of the Criminal Justice Act 2003 to enable judges and the parties to consider this risk when deciding an application to admit evidence of previous false allegations. In the consultation paper we asked consultees whether, where FAE is admitted, the Judicial College should consider introducing an example direction relating to false allegations.[111]

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resourcing concerns associated with expert evidence. See further discussion of the use of expert evidence below from para 10.134.

105 CP 259, para 7.262.

106 S Fairclough, "Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality" [2018] *Criminal Law Review* 4, 5-6.

107 J Jacobson and J Talbot, *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Prison Reform Trust, 2009) p 7.

108 J Jackson et al, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (February 2024) p 107.

109 For the purpose of this report, we refer to this as "false allegation evidence".

110 CP 259, para 5.199.

111 CQ 37: "Should the Judicial College consider introducing an example judicial direction for cases where false allegations are introduced that addresses the myth that complainants commonly make false complaints of rape. If so, what should be the content of such a direction?" CP 259, paras 5.222-5.223.

10.103 The majority of the consultees who responded to this question were supportive of introducing an example direction.[112] Consultees emphasised the risks associated with the myth that allegations are commonly false.[113] For example, the CPS wrote:

> it is the experience of prosecutors at our consultation workshop that misleading narratives around the definition and prevalence of false allegations are occasionally deployed by the defence in court because they are considered likely to resonate with members of a jury which can serve to undermine the fairness of jury decision-making.

10.104 Consultees who opposed an example direction raised three main concerns. First, that false allegations cannot be appropriately measured and therefore they should not be described as uncommon in a direction.[114] Second, that juries do not commonly believe the myth that complainants generally make false accusations.[115] Finally, that a direction about the prevalence of false allegations could undermine the defence case.[116]

10.105 In Chapter 4, we highlight that there remains a risk that juries may be influenced by the myth that false allegations are common when considering FAE. We also explained in the consultation paper that while the precise number of false allegations is not known, when compared with genuine allegations they are not "common".[117]

10.106 However, we agree with the concerns that a direction instructing the jury that false allegations are not common may prejudice the defence case.[118] A direction regarding the rarity of false allegations could inappropriately suggest to the jury that the complainant's allegation is not likely to be false. However, an appropriate example direction relating to false allegations could be developed to respond to the risks with such evidence, highlighted above.

10.107 Consultees suggested that directing the jury about the misconception that false allegations are common, may lead juries to conclude that evidence of a false allegation necessarily means the present allegation is false.[119] In our view, an example direction would be a valuable way of responding to this issue. It would allow jurors to evaluate fairly and give appropriate weight to the contrasting defence and prosecution evidence about the prior false allegation. Professor Vanessa Munro

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112 Out of 23 responses: 13 were positive, 9 were negative and 1 was categorised as "other".

113 Including Rape Crisis England and Wales; Dr Amelia Shooter; CPS; and Feminism Law and Gender research cluster at the Open University Law School.

114 Dr Matt Thomason; Andrew Wilkins (a barrister); and the Cardiff University Law School Innocence Project.

115 The CBA citing C Thomas' research on rape myth acceptance amongst jurors. See, C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987.

116 Dr Matt Thomason; LCCSA; Six Circuits; and Martin Rackstraw (a solicitor).

117 See CP 259, para 2.6, n 35 citing L Kelly, J Lovett and L Regan, A gap or a chasm? Attrition in reported rape cases (Home Office Research Study 293, 2005) p 50; P Rumney, "False allegations of rape" (2006) 65 *Cambridge Law Journal* 128 and P Rumney and K McCartan, "Purported false allegations of rape, child abuse and non-sexual violence: nature, characteristics and implications" (2017) 81 *Journal of Criminal Law* 497.

118 The Six Circuits; LCCSA; Andrew Wilkins; Martin Rackstraw; and Dr Matt Thomason.

119 The Law Society; the CPS; and Professor Vanessa Munro.

suggested the direction could explain that the fact that "a prior 'false' allegation may have been made does not *in itself* establish the veracity of the current complaint". Similarly, the CPS suggested the direction could:

> warn the jury against assuming that a complainant's evidence cannot be relied upon due to the fact of the previous false allegation and that the weight attached to the false allegation is ultimately a matter for them.

10.108 Although FAE may affect the jury's assessment of the complainant's credibility, it should be considered in the context of the evidence presented to them by the prosecution and the defence. Clearly the defendant will wish to use such evidence to challenge the complainant's credibility. Accordingly, we emphasise that an example direction in relation to FAE would need to be drafted in such a way that ensures it does not inappropriately undermine the defendant's case. Given that FAE is a form of bad character evidence,[120] this direction could also be supplemented by existing content in the example direction for non-defendant bad character evidence. This example direction includes: "the jury should be directed that it is for them to decide the extent to which, if any, the evidence of bad character of the non-defendant assists them in resolving the potential issue(s)".[121]

Additional directions on Criminal Injuries Compensation evidence ("CICE")

10.109 In Chapter 5, we recommend that evidence relating to a criminal injuries compensation claim made by the complainant should be subject to an enhanced relevance threshold. We make this recommendation because this type of evidence risks evoking the myth that allegations of sexual offences are commonly false, and that people commonly make false allegations for financial gain. This myth may then inappropriately influence juror decision making.

10.110 Our recommended threshold should limit this risk. However, as explained in the consultation paper, an accompanying direction could further assist the jury.[122] An example direction might be useful when CICE has been introduced with leave of the court, or when inadmissible CICE is introduced. In the consultation paper we asked consultees whether the Judicial College should consider directions to the jury to respond to these scenarios.[123]

10.111 The majority of consultees who responded to this question supported the development of an example direction relating to CICE for the reasons we set out.[124] For example, the CPS stated:

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120 Criminal Justice Act 2008, s 98; CP 259, para 5.169.

121 Crown Court Compendium, 12-27.

122 CP 295, para 6.50.

123 CQ 39: "We provisionally propose that the Judicial College consider whether judicial directions should be used: (1) where permission is given to adduce evidence and cross-examine regarding a criminal injuries compensation claim; or (2) to address the risk of jurors relying on misconceptions if inadmissible evidence of a criminal injuries compensation claim is introduced or prohibited cross-examination on such a claim occurs." CP 259, para 6.53.

124 Out of 25 responses: 18 were positive, 3 were negative and 4 was categorised as "other".

a direction would be helpful in mitigating the risk that jurors rely on misconceptions in circumstances where inadmissible evidence is introduced or prohibited cross-examination on a claim takes place and so [we] support this proposal.

10.112 Consultees provided three key concerns in opposition to an example direction.

(1) These directions should not be prescriptive as judges should give directions at their discretion on an individual basis.[125]

(2) Evidence of the complainant's CIC claim is not highly prejudicial and therefore a direction is not required.[126]

(3) Any reference to myths or misconceptions "is likely to have [the] effect of diluting the defence case unnecessarily".[127]

10.113 In response to (1), we emphasise that we do not recommend mandatory directions, nor do we recommend that their content is mandatory. In relation to (2), we conclude in Chapter 5 that CICE can lead to inappropriate generalisations about the credibility of the complainant on the basis that they sought financial compensation. As regards (3), we disagree that such a direction may lead to unfairness by diluting the defence case. If the CICE has been introduced with leave of the court, the direction can be crafted in a balanced way to clarify the circumstances in which CIC claims are made to provide context to jurors' assessment of the evidence.

10.114 Accordingly, we remain of the view that where CICE is introduced during a sexual offences trial, the jury would benefit from clarification regarding this evidence to mitigate the potential unfounded assumptions about the CIC scheme, the complainant's motives and the prevalence of false complaints. Tailoring of the example direction by the judge in the individual circumstances of each case will further ensure fairness.

10.115 In terms of content for the direction, nia (a service provider for women and girls who have been victims of sexual violence) suggested that it should include:

(1) "the extent to which such claims are brought in other cases";

(2) "the implications of delays and backlogs in the justice system that impact on time limits for bringing such claims";

(3) "the need for financial support to recover and rebuild one's life";

(4) "the sex discrimination inherent in incomes for females"; and

(5) "CIC claims are normal and built into international and national human rights obligations on the state and not opportunistic or moneygrubbing behaviour as is often portrayed to detriment of complainant".

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125 Martin Rackstraw, Six Circuits of England and Wales and an anonymous consultee.

126 The CBA.

127 Martin Rackstraw.

10.116 The CWJ stated that CICE directions should:

> remind the jury that applications for criminal injury compensation are routine in all forms of inter-personal violence and sexual offending, and that victims are entitled to be compensated by a government scheme set up for this purpose, to reflect the hardship they have suffered.

10.117 Dr Matt Thomason suggested that the direction should be limited to explaining only "some of the simple facts about how CIC works".

10.118 We suggest that the example direction should avoid referring to the complainant as a "victim of crime" or any specific details or statistics about the justice system, prevalence of CIC claims, or the myths about the financial motives underlying sexual offence complaints. This is to ensure the direction is suitably balanced, does not inappropriately bolster the complainant's credibility, and does not include unnecessary complex detail.

10.119 We consider the following content may be appropriate to include in an example direction relating to CIC evidence:

(1) An explanation of the purpose of the CIC scheme and how it functions. This could include:

(a) The CIC scheme is a government scheme established for people injured as a result of an offence.

(b) CIC may be awarded regardless of whether criminal proceedings take place and regardless of whether there is a conviction.

(c) The CIC Authority assesses whether the offence occurred for the purpose of awarding compensation and not to establish the guilt of the defendant.

(2) An explanation of how the CICE may be used and any limitations on its use. Where this information has been introduced impermissibly, this may include an explanation that in the absence of evidence that the complainant fabricated the allegation for financial gain, the fact the complainant made a CIC claim should not on its own affect the complainant's credibility. This degree of detail may not be appropriate where there is other evidence to support the claim that the complainant made the allegation for financial gain, such as in a case where the complainant has made comments indicating they were financially motivated to make an untrue allegation.

10.120 In our view, this content strikes an effective balance between clarifying the relevant context for the jury, without "diluting" the defence case.

10.121 Finally, in circumstances where CICE has been introduced without permission of the court, the judge may also direct the jury to disregard the evidence they have heard.[128]

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[128] See Ch 11, paras 11.119-11.124.

Additional example direction on sexual behaviour evidence

10.122 When sexual behaviour evidence ("SBE") is admitted, judges can already consider giving a direction. In Chapter 3 we make recommendations for a new framework for the admissibility of SBE, which provides significant protection against the risk that highly prejudicial SBE will be admitted or inappropriately relied upon. In addition to this framework, a direction may be valuable where SBE is admitted with or without the court's permission, to counter the risk that the SBE presented to the jury will inappropriately influence their decision making.[129]

10.123 In our view, and as we explained in the consultation paper, a direction may be useful when SBE is admitted to explain to the jury for what purpose the evidence may (and may not) be used. This should safeguard the trial process from jurors' misunderstanding this evidence or evaluating it based on misconceptions. Further, an example direction could be useful when SBE is admitted and gives rise to a prejudice not foreseen at the time of application. This may be triggered by the complainant's answers to certain permitted lines of questioning.

10.124 Given the variability of the content and context of SBE, we noted that "judges are best placed to determine whether a direction is needed and if so, whether it should be given when the evidence is adduced or in summing up, and what it should contain".[130] An example direction could assist with this task. It would also encourage greater consistency regarding the giving of such directions and in relation to their content.

Additional example direction on promiscuity

10.125 A number of consultation responses highlighted the gap in the existing example directions for addressing myths or misconceptions triggered by evidence or lines of questioning that suggest that a complainant is sexually promiscuous.[131] The effect of these misconceptions could be that the jury perceive the complainant as less credible or find it less believable that they did not consent to sexual activity with the defendant. Consultees suggested three contexts in which a direction to the jury about this myth may be appropriate.

10.126 The first was in relation to homosexual male complainants. The CBA told us that there is a myth that "homosexual men are more promiscuous which might need to be the subject of appropriately tailored directions". We note that the CPS guidance to prosecutors on tackling myths and misconceptions suggests that prosecutors should seek to challenge homophobic assumptions about the promiscuity and sexual preferences of homosexual men.[132]

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129 CP 259, para 4.192.

130 Above, para 4.192.

131 See the discussion in the consultation paper about the "twin myths": CP 259, para 4.25. See also para 2.23, citing *R v Seaboyer* [1991] 2 SCR 577 at 604, by McLachlin J.

132 CPS, *Legal Guidance, Rape and Sexual Offences*, Chapter 4, Tackling Rape Myths and Stereotypes, Annex A (21 May 2021).

10.127 Secondly, consultees thought that there should be an example direction for complainants who are sex workers or who have engaged in sex work in the past.[133] The CPS suggested a direction explaining that "prostitutes can be victims of rape". This is because "the law on consent applies regardless of the situation" and that "on account of their vulnerability prostitutes may be targeted by perpetrators". In addition, Chief Constable Sarah Crew noted that "society is inherently derogatory towards sex workers and a direction on the complainant's lifestyle might be beneficial".

10.128 Thirdly, consultees proposed an example direction about the misconception that consent can be inferred by meeting through a dating application or sharing sexualised messages or images online.[134] A public survey conducted by the CPS and Equally Ours found that just over half of respondents (54%) agreed that if a person says online that they want to meet up and have sex, that does not mean that they have to have sex when they meet. Just over a quarter (26%) chose midpoints[135] and 14% agreed that "if a person says online that they want to meet up and have sex, that means they have consented to having sex when they meet".[136] The research also noted that similar misconceptions arise regarding gay complainants, citing a CPS stakeholder who stated that complainants who have used apps like Grindr[137] are seen as "being basically up for anything and therefore not having the right to say no anymore".[138]

10.129 The myths that we have outlined above bear close resemblance to the "twin myths". As we outlined in Chapter 3, the "twin myths" are that a complainant who is sexually active is more likely to consent to sex and is less worthy of belief. These are assumptions which create a risk of prejudice to the complainant, and therefore ought to be challenged when engaged by a feature of the case. Whilst these myths might be introduced through SBE (and as such there may be overlap with a direction on SBE) they may also be introduced by other evidence. Consequently, we think it is appropriate for the Judicial College to consider a generalised example direction to juries about the danger of making assumptions that certain groups of complainants are more likely to have consented or are less worthy of belief because of the perception that they are sexually promiscuous. We recognise that a generalised direction might lack nuance about the contexts we describe above. As such, we suggest that a broader direction on avoiding assumptions based on the perceived promiscuity of a complainant should have further text specific to the scenarios we

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133 Including the CPS; the CBA; and End Violence Against Women Coalition (EVAW).

134 Including the CPS; the CBA; and JURIES.

135 Participants in the research were asked to indicate, on a scale from 1 to 10 (where 1 was close to the participants' view, and 10 was furthest from their view) how close a statement was to their view. Those who "chose midpoints" include those who selected 4, 5, or 6 on that scale. CPS and Equally Ours, *Research into the understanding of Rape and Serious Sexual Offences (RASSO) and consent – Stage 1: Rape and serious sexual offences: public understanding and attitudes* (January 2024), pp 15, 145.

136 CPS and Equally Ours, *Research into the understanding of Rape and Serious Sexual Offences (RASSO) and consent – Stage 1: Rape and serious sexual offences: public understanding and attitudes* (January 2024) p 83.

137 Grindr is a social networking application designed for gay, bisexual, transgender and queer people.

138 CPS and Equally Ours, *Research into the understanding of Rape and Serious Sexual Offences (RASSO) and consent – Stage 1: Rape and serious sexual offences: public understanding and attitudes* (January 2024) p 42.

highlight above.[139] On a case by case basis, the trial judge would be able to determine whether it would be appropriate to give this additional detail, or whether the general direction about making assumptions about particular groups of complainants would suffice.

Additional example direction on ongoing contact between the complainant and defendant

10.130 We were also told by both consultees and stakeholders that there should be an example direction about the myth that a victim of sexual offending would cut contact with a rapist.[140] The CPS indicated that there is not an example direction to explain to the jury that "the complainant may continue to contact the suspect after the incident for a number of reasons including fear, joint children, or confusion". At a consultation event, a senior barrister told us that juries do not understand that people make poor choices because of trauma and that directions are necessary to explain why they might continue to contact or remain in a relationship with the defendant.

10.131 Research conducted by CPS and Equally Ours, found that the complainant being in contact with the defendant after an allegation of rape was seen to undermine the complainant's credibility. Just over half (53%) of respondents thought that if the complainant and defendant "remained in contact then it might still have been rape". 12% thought that if the complainant and defendant "remained in contact then it probably wasn't rape" and 27% "chose midpoints" between those options.[141]

10.132 Overall, we conclude that, given there is a misconception that a victim of sexual offending would avoid contact with the person who raped them, a judicial direction on this topic would be useful. We note that there is currently an example direction on "background of domestic abuse", which refers to there being various reasons that someone might struggle to remove themselves from an abusive relationship.[142] However, there are a variety of reasons why someone might find it difficult to extricate themselves from a relationship besides ongoing abuse. The person who raped them may be a co-worker, family member, or part of a close circle of friends. Therefore, a separate example direction is justified.

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139 This could be similar to example direction 6 in the Crown Court Compendium, which contains example directions for two different scenarios related to displays of emotion by a complainant.

140 Including a senior barrister; a Circuit Judge; and the CBA.

141 CPS and Equally Ours, *Research into the understanding of Rape and Serious Sexual Offences (RASSO) and consent – Stage 1: Rape and serious sexual offences: public understanding and attitudes* (January 2024) p 61.

142 See our recommendations for amending this example direction above at paras 10.63-10.66.

Recommendation 59.

10.133 We recommend that the Judicial College consider whether to add example directions on the following topics to the Crown Court Compendium:

(1) An example direction to respond to the myth that a male complainant will make false allegations about sexual offending due to shame or fear of reprisal in connection with consensual homosexual sexual activity.

(2) An example direction on misconceptions about complainants and defendants who have a mental health condition, have a learning disability, or are neurodiverse.

(3) An example direction about false allegation evidence to respond to misconceptions about the prevalence of false allegations.

(4) An example direction that provides clarification about Criminal Injuries Compensation evidence and the Criminal Injuries Compensation scheme.

(5) An example direction about sexual behaviour evidence.

(6) An example direction responding to the misconception that certain groups of people are more sexually promiscuous and therefore less worthy of belief and/or more likely to have consented, including:

(a) homosexual men;

(b) sex workers and escorts;

(c) complainants who met a defendant through a dating application or who have shared sexualised messages or images of themselves online.

(7) An example direction about the misconception that a victim of sexual offending would not continue to be in contact with the person who raped them.

EXPERT EVIDENCE

Current law

10.134 Currently, expert opinion evidence is admissible in criminal proceedings if:

(1) it is relevant to a matter in issue in the proceedings;[143]

[143] *R v Brecani* [2021] EWCA Crim 731.

(2) it is needed to provide the court with information likely to be outside the court's knowledge and experience;[144]

(3) the witness is competent to give that opinion;[145] and

(4) the scientific basis on which it is advanced is sufficiently reliable for it to be put before the jury.[146]

10.135 Expert evidence may be admissible for the purpose of explaining the impact of a sexual offence on a particular complainant. This may be admitted in limited circumstances as background against which the jury may judge the consistency and veracity of the complainant's account,[147] as evidence of the complainant's psychological injury,[148] or as evidence to explain the witness's presentation when giving evidence where the witness has a mental disorder.[149] As we explained in the consultation paper, no stakeholders suggested to us that there should be an expanded use of particularised expert evidence. Our view was, and remains, that where expert evidence particular to the complainant is needed, the prosecution could make use of the existing categories that are outlined above.[150] We consider below the admissibility of a separate category of evidence, namely generalised expert evidence about behavioural responses to sexual violence.

Expert evidence of general behavioural responses

10.136 In *R v ER*,[151] expert evidence regarding general behavioural responses to rape and sexual assault was held to be inadmissible on the basis that it was unnecessary. Hughes LJ (as he then was) accepted that the jury may need guidance on how to approach the evidence regarding the specific kind of familial abuse experienced by the complainant but confirmed that the appropriate remedy would be judicial directions rather than expert evidence.[152] Several reasons were given for this:

(1) such patterns of behaviour are commonly understood;

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144 Above. See also *R v Turner* [1975] QB 834, at 841D-841E by Lawton LJ: "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. … The fact that an expert has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of jurors themselves; but there is a danger that they may think it does".

145 *R v Brecani* [2021] EWCA Crim 731.

146 *R v Garmson* [2009] EWCA Crim 2698 at [111].

147 *R v Zubair Anwar* [2012] EWCA Crim 1478. In this case, the Court of Appeal Criminal Division ("CACD") accepted that expert evidence (the reports of two clinical psychiatrists) about the complainant's alleged post-traumatic stress disorder could be used to provide a background against which the jury could determine whether the complainant's behaviour (retracting the allegations to a police officer) was consistent with that diagnosis.

148 *R v Eden* [2011] EWCA Crim 1690.

149 *R v Mulindawa* [2017] EWCA Crim 416.

150 CP 259, para 10.118.

151 [2010] EWCA Crim 2522.

152 CP 259, para 10.112.

(2) expert assistance risks special status or weight being given by the jury;

(3) a judge is well placed to help jurors in a neutral way, balancing arguments on both sides in a way that an expert may not be in a position to do;

(4) it may add to the length of the trial if defendants also subsequently lead expert evidence in rebuttal.

10.137 In light of this, Hughes LJ concluded:

> All that, we are satisfied, is reason enough to say that expert evidence of this kind is simply unnecessary. It should not be employed unless there is something very unusual which really does mean that the evidence is directed to something which is quite outside both the experience of the jury and the ability of the judge to explain common understanding and common patterns of behaviour.[153]

The case for reform

10.138 The decision in *R v ER* takes a highly restrictive approach to the circumstances in which expert evidence of general behavioural responses to sexual offending will meet the necessity criterion for admissibility (see paragraph 10.134(2) above). If the purpose of expert evidence is "to furnish the court with … information which is likely to be outside the experience and knowledge of a judge or jury",[154] then expert evidence about general behavioural responses to sexual offending could be justified on the basis that counterintuitive responses to sexual offending are not generally well understood by members of the public, including jurors. In certain complex cases, there is a risk that without a more detailed understanding of responses to sexual offending, jurors may rely on pre-existing misconceptions about how a victim of sexual offending ought to behave.[155] Professor Louise Ellison has explained:

> The purpose of general expert testimony is limited to alerting jurors to certain phenomena of which they may not otherwise be aware. 'Its aim is to be "myth-dispelling"—educative, directed toward enhancing the understanding of the tribunal of fact and toward removing from the evaluative process a source of error.' In sexual assault trials, general expert testimony simply serves to inform jurors, who may have no experience of victimisation, about the normal and varied reactions of victims.[156]

10.139 Similarly, in the leading practitioner text, Rook and Ward recognised the potential of such expert evidence for addressing counterintuitive behaviour.

> There is clear potential for evidence of these psychological effects [of rape and sexual assault] to be adduced in evidence by the prosecution in order to explain

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153 *R v ER* [2010] EWCA Crim 2522 at [21].

154 *R v Turner* [1975] QB 834, 841.

155 In the consultation paper we outlined the evidence base which suggests that myths and misconceptions can impact on jurors' evaluation of the evidence and the complainant's credibility (CP 259, ch 2). We provide updated evidence in support of this claim in Chapter 1.

156 L Ellison, "Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases" (2005) 9(4) *International Journal of Evidence and Proof* 239, citing I Freckelton, "Counterintuitive Evidence" (1997) 4 *Journal of Law and Medicine* 303.

victim behaviour, for example late reporting or uncharacteristic conduct, in order to counter "rape myths"—i.e. to negate any assumptions that may be held by jurors that the victims of serious sexual assaults will behave in a certain way, which the jurors may bring to bear in assessing the truth of the complainant's evidence.[157]

10.140 In a 2004 report for the CPS, Michelle Dempsey argued that, in the context of domestic violence cases:

> In the absence of expert testimony, the insidious power of myth threatens to limit or destroy the jury's ability to engage in clear-headed, rational analysis of the facts before them. By negating the power of myth, expert testimony clears the way for fact-finders to deliberate regarding the actual facts of the case and the logical conclusions that flow from such facts, rather than focusing upon the falsehoods created when the evidence is viewed through the distorting lens of myth.[158]

10.141 The Angiolini Review concluded that the way that the human brain responds to trauma "is not something about which jurors could readily 'form their own conclusions' as demonstrated by the prevalence of societal myths".[159] The New Zealand Law Commission has described the purpose of such evidence as "to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance".[160]

10.142 It appears to be generally accepted, including by the court in *R v ER*,[161] that it will sometimes be necessary to provide assistance to jurors when they are confronted with what appear to be counterintuitive behavioural responses. The point of contention then becomes whether expert evidence of general behavioural responses is necessary to achieve this given that this assistance could instead be provided through judicial directions.

Necessity

10.143 In the consultation paper, we referred to stakeholder feedback that expert evidence would be able to provide "a fuller explanation of behaviour than is possible within a judicial direction". A member of the judiciary told us that while judicial directions would work well in more "standard" cases, expert evidence could be useful in more exceptional circumstances.[162] An organisation working with complainants thought that

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157 P Rook and R Ward, *Rook and Ward on Sexual Offences* (6th ed 2021) ("*Rook and Ward*") 24.29.

158 MM Dempsey, The Use of Expert Witness Testimony in the Prosecution of Domestic Violence (Crown Prosecution Service: London, 2004) p 11. Available here.

159 Angiolini Review (2015) para 706.

160 New Zealand Law Commission, *Evidence Code and Commentary* (1999, Report 55, Volume 2) para C111. The CACD has similarly observed in respect of judicial directions on myths and misconceptions that "the effect of each direction may be to bolster the evidence of a victim; but it only bolsters their evidence to the extent necessary to prevent unfairness to the victim caused by the stereotypical thinking against which it warns". (*R v Bhatt* [2022] EWCA Crim 926, [2022] 7 WLUK 44 at [73]).

161 *R v ER* [2010] EWCA Crim 2522 at [13]: "It is, we think, true that it may well be that not all jurors will have experience of this kind of family abuse, neither themselves nor in others near them, and that they do need some assistance and warning when confronted with the kind of issue that the passage of time posed in this case".

162 CP 259, para 10.158.

expert evidence could be useful to explain "cultural differences which might impact when a complainant reported or to whom they disclosed an offence".[163] A police officer suggested that expert evidence may be useful in "certain exceptional cases", such as in cases of "prolonged intra-familial abuse".[164]

10.144 We received responses from consultees that were further illustrative of this issue. JURIES wrote that expert evidence may be helpful for cases of "significant evidential complexities" such that a "brief explanation offered by judicial directions" would not be sufficient. It argued that expert evidence would allow juries better to engage in issues such as why one might freeze. South Wales Office of the Police and Crime Commissioner[165] stated that expert evidence would be "helpful to aid the understanding of the jury where a judicial direction is not sufficient". It added that "expert evidence would provide greater clarity than a judicial direction could, particularly for behavioural responses that are hard to understand". Behind the Gown[166] wrote that "judicial directions do not necessarily cater to behavioural responses underpinned by scientific research", suggesting that "evidence on the 'fawn / freeze' response, or the impact of trauma on memory, might be more appropriately explained by an expert".

10.145 Conversely, three consultees suggested that expert evidence may not be necessary to provide the jury with information about general behavioural responses to sexual offending, since this can be communicated to the jury through judicial directions. For example, the CBA wrote that "experts are not required to deal with myths and misconceptions" because judges can give directions. It argued that:

> Expertise might be required in cases where a complainant has suffered PTSD or suffers from any significant mental health disorder outwith the experience of jurors, but expert opinion is already admissible on such specific issues in appropriate cases.

10.146 Similarly, the Law Society wrote that "there seems to be little evidence to support the proposition that evidence from an expert would be any more effective [than] judicial direction". In the consultation paper, we acknowledged that there is "limited" research exploring the effectiveness of expert evidence to address myths and misconceptions,

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163 Above, para 10.158.

164 Above, para 10.130.

165 Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually.

166 An organisation founded in 2017 to "combat sexual harassment and abuse of power at the Bar".

but that there were some "promising indications".[167] We also acknowledged that the effectiveness of judicial directions is disputed.[168]

10.147 The necessity of expert evidence about general behavioural responses to sexual offending where there is a suitable judicial direction has been addressed in other jurisdictions. In New Zealand, expert opinion is admissible if it is likely to be of "substantial help" to understand other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.[169] In *DH v R*, the Supreme Court of New Zealand noted that not all topics covered by the expert's evidence in that case would be amenable to a jury direction. For example, it suggested that the issue of delay in reporting is "less controversial than some other areas, such as retractions or normalisation".[170] It stated that it would not be appropriate to be "prescriptive about how erroneous beliefs or assumptions are best to be countered in criminal trials" but acknowledged that jury directions could be suitable alternatives to expert evidence in some cases.[171]

> Jury directions of the type used in England and Wales on topics where there is a general acceptance of the topic are a worthwhile alternative to expert evidence. If all the areas that would otherwise be covered by expert evidence are amenable to jury direction, this would obviate the need for the evidence and it would no longer be substantially helpful. If not, the jury directions could reduce the scope of the evidence to topics not covered in the directions.[172]

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167 CP 259, paras 10.147-10.154; N Ryan and N Westera, "The effect of expert witness testimony and complainant cognitive statements on mock jurors' perceptions of rape trial testimony" (2018) 25 *Psychiatry, Psychology and Law* 693, although there is also some research suggesting that the usefulness of expert evidence may be more limited: J Horan and J Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: Failures and Lessons Learned" (2020) 43 *University of New South Wales Law Journal* 707.

168 CP 259, para 10.50-10.63; Sir John Gillen, Report into the law and procedures in serious sexual offences in Northern Ireland, (May 2019) ("Gillen Review") paras 6.38-6.39; A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) pp 590-591, citing J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*. Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse (2016); D Simon, "More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms" (2012) 75 *Law and Contemporary Problems 167*; L Trimboli, "Juror understanding of judicial instructions in criminal trials" (2008) 119 *Crime and Justice Bulletin* 1; J Temkin, ""And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13 *New Criminal Law Review* 710, 721.

169 Evidence Act 2006 (NZ), s 25(1).

170 *DH v R* [2015] NZSC 35, at [107]. The evidence given about "normalisation" was to explain to the jury that sometimes people who sexually abuse children "normalise" the abuse so that the victim "comes to regard sexual activity as a normal and everyday activity". This provided the jury with a potential explanation as to why a victim of child sexual abuse may not realise that what is occurring is wrong and therefore may delay in reporting or may even be seen to be affectionate to the perpetrator.

171 Above, at [110]. However, the court also noted that: "a cautious approach needs to be taken to the ambit of expert evidence given at trials of this kind to ensure that such evidence is confined to what would be substantially helpful, there is focus on live issues and that the evidence is not unduly lengthy or repetitive and is expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial". We deal with these issues in more detail below.

172 Above, at [111].

10.148 The Supreme Court of Canada in *R v DD* held that expert evidence would not be necessary if "jury instruction [would] achieve the same purpose as the expert evidence".[173] In that case, a direction by a judge that delay in disclosure was not a proper basis for an adverse inference against the credibility of the complainant was sufficient, so expert evidence about delay was not necessary. However, in subsequent cases, the courts in Canada have permitted expert evidence about responses related to, but more complex than, mere delay in reporting. For example, in *R v Meyn*, the trial judge held that expert evidence was necessary because "the sheer number of alleged assaults rendered this case unusual". An appeal against conviction on the basis that (amongst other issues) the judge erred in admitting this expert evidence was rejected by the Court of Appeal for British Columbia, where Chief Justice Finch stated:

> I am satisfied that the expert evidence met the requirement of necessity for the reasons given by the trial judge. The protracted nature of the sexual assaults alleged by the complainant in this case is an unusual feature. The expert evidence was necessary to ensure the jury did not draw misinformed common sense inferences from the dynamics of the relationship between the appellant and the complainant, and the behaviour of the complainant.[174]

10.149 We acknowledge that judicial directions can perform a similar function to expert evidence insofar as they provide the jury with information to reduce the influence of myths and misconceptions on deliberations. However, the cases outlined above illustrate that there may be instances where complainants' responses are particularly complex and difficult to understand, or the context within which the offending happened is so unusual, that the jury require more detailed information to be able to properly assess the evidence. For example, in a case of intrafamilial abuse, an explanation of the impact of strategies used to normalise the abuse could require a greater level of detail that may not be appropriate for a judge to provide in directions. Similarly, if the sexual offending happened in the context of human trafficking or modern slavery, counterintuitive behaviours (such as delay in reporting) that would ordinarily be adequately dealt with through standard judicial directions may instead be better conveyed by context-specific expert evidence.[175]

10.150 There is a risk that in such cases, judges would be unable to provide sufficiently detailed directions without offending the common law principle that judicial notice can be taken only of facts of "particular notoriety or common knowledge".[176] Judicial directions which go beyond that which is common knowledge could put the judge in the position of giving expert evidence themselves. Judges do not give evidence, and such an approach plainly is not permitted.

10.151 Without expert evidence in these more complex cases there would be no mechanism for addressing the risk of juries relying on myths and misconceptions in their

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173 *R v DD* [2000] 2 SCR 275, at [30].

174 *R v Meyn* [2003] BCCA 401, at [55].

175 See J Murphy, "Combating the "myth of physical restraint" in human trafficking and modern slavery trials heard in the Crown Court" (2022) 26(1) *International Journal of Evidence and Proof* 3.

176 Crown Court Compendium, 20-1 at [4], citing *Miller* [2010] EWCA Crim 1578. See also *R v D* [2008] EWCA Crim 2557 at [11], per Latham LJ: "But any comment must be uncontroversial. It is no part of the judge's task to put before the jury [the expert's] learning without her having been called as a witness".

deliberations. We take the view that expert evidence of general behavioural responses may be necessary in those cases and therefore, if the other criteria for admissibility of expert evidence are met, such evidence ought to be admissible.

10.152 Having now addressed the issue of the necessity of expert evidence of general behavioural responses to sexual offending, we turn to consider the practical objections raised in *R v ER* and by consultees.

Concerns about expert evidence on general behavioural responses

10.153 In the consultation paper, we also noted several concerns regarding the admissibility of expert evidence of general behavioural responses to sexual offending. Some stakeholders were concerned that expert evidence would have undue prominence, meaning that jurors would "defer to the expert evidence, rather than making their own assessment".[177] However, we suggested that expert evidence may be necessary as judicial directions may not by themselves be sufficiently prominent to address myths and misconceptions effectively. We explained that expert evidence may be more memorable, which would create a greater chance of dispelling misconceptions held by the jury.

10.154 Another concern about introducing expert evidence is that it could lead to a "battle of the experts", whereby two competing experts (one prosecution and one defence) might distract the jury from the issues in the trial. This could also have the effect of introducing doubt into the mind of the jury which may not otherwise have been present. However, we cited judges who told us that, given the consensus of expert opinion in this area, the concern about experts giving competing views was misplaced. We also noted that it may be possible for the prosecution and defence to reach an agreement, and the resulting expert evidence could be read to the jury.[178]

10.155 We also heard from stakeholders that expert evidence could create "a new conceptual model of how a victim should behave in response to sexual violence" to which a complainant would have to conform to be believed.[179] However, we responded that the aim of such expert evidence would not be "to specify a reaction, but to dispel the idea of expecting one particular reaction".[180]

10.156 Some stakeholders argued that the use of expert evidence would risk poorly qualified experts being called to give evidence. However, we responded that the Criminal Procedure Rules ("CrimPR")[181] and Criminal Practice Directions ("CrimPD")[182] contain extensive requirements regarding the reliability of expert evidence before it can be admitted. This allows the court to maintain control over the quality of expert evidence.

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177 CP 259, para 10.159(1).

178 Above, para 10.159(2).

179 Above, para 10.159(3).

180 Above, para 10.159(3).

181 Criminal Procedure Rules ("CrimPR") 2020 rr 19.1-19.2.

182 Criminal Practice Directions ("CrimPD") 2023 (as amended 2024) 7.1.2-7.1.6. These rules were introduced in response to Law Commission recommendations. See CrimPD 2015 19A.4 and Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325, para 9.11.

Alternatively, we argued that a "code of practice" or a panel of suitable experts could be created.[183]

10.157 Some stakeholders told us that there is a risk that expert evidence could bolster the credibility of the complainant, meaning that there may be implications for the fairness of the trial. We suggested that the risk of expert evidence being "oath helping"[184] would be reduced if the expert evidence were generalised, as the evidence would not be tailored to the complainant or their responses. We also stated that the purpose of the evidence would not be to bolster the complainant's credibility, but rather to address a misconception in the circumstances of a case by providing additional information to the jury. This information may be outside their knowledge and experience, and providing it would enable the jury to make an assessment of the complainant's credibility according to the facts of the case rather than any preconceived misconceptions. We also highlighted that the defence could challenge admissibility, cross-examine, or could call their own expert.

Consultation responses and analysis

10.158 Consultees raised similar concerns to those that we outlined in the consultation paper.

Fair trial concerns

10.159 Some consultees suggested that introducing expert evidence of general behavioural responses to sexual offending could risk bolstering the credibility of the complainant and interfering with the role of the jury.

10.160 Kate Goold (a solicitor) argued that "there is a strong risk that this would undermine the fairness of proceedings". She wrote that expert evidence on these matters would have the impact "of giving any inconsistencies or irregularities in the complainant's evidence a 'special' status if explained away through an expert". Similarly, Martin Rackstraw wrote that "there would be a danger that such evidence would be unfair to the defence [because] it could give the appearance of reinforcing a complainant's credibility". The Law Society suggested that there would be "cross-examination on possible exceptions to the norm" which "could lead to the expert being asked – directly or indirectly – to express a view on the behaviour of the particular complainant". It noted that this could risk usurping the role of the jury.

10.161 We maintain our view, as outlined in the consultation paper, that expert evidence of general behavioural responses to sexual offending would not bolster credibility. The expert evidence would be generalised, meaning that the expert would not be permitted to comment on the credibility of the complainant and could not discuss exceptions to behavioural norms because there is no normal response to sexual offending. When giving evidence, the expert would outline a range of responses to sexual offending and provide more detail about the neurological or psychological

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183 CP 259, para 10.159(4), citing The Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (September 2021), Recommendation 80.

184 "Oath helping" refers to the prohibited practice of improperly bolstering a witness's credibility. Lord Taylor of Gosforth CJ summarised the rule against oath helping in *R v Robinson* [1994] 3 All ER 346, 352: "[T]he Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard the witness as reliable".

understanding of those responses. As the Law Society pointed out, the defence are entitled to cross-examine the expert. However, such questioning would also have to be about general responses, rather than about the complainant's response directly. During both examination and cross-examination, the trial judge would be responsible for monitoring and intervening in lines of questioning which would invite the expert to comment on the complainant's credibility. Therefore, judicial oversight can help to ensure the overall fairness of proceedings within the circumstances of each particular case.[185]

Battle of the experts

10.162 Consultees, including some who were in favour of introducing expert evidence, were nonetheless concerned about a "battle of the experts". Some consultees pointed to the prospect of delays and additional costs if the defence called competing expert evidence in rebuttal.[186] Other consultees suggested that competing experts would have a negative impact on the educational value for the jury.[187] For example, Dr Rebecca Helm suggested that this would lead to the information being discounted by some jurors.

10.163 We take the view that in practice there are ways to mitigate these concerns. As we noted in the consultation paper, since there is consensus amongst experts about the range of responses to sexual offending, the prospect of competing experts is reduced. Due to this consensus a Circuit Judge suggested that this evidence could be admitted through agreed facts[188] or as a joint report.[189] Stakeholders told us that other jurisdictions take a similar approach. For example, we heard from Scottish academics and practitioners that when used, expert evidence tends to be given as joint evidence rather than as separate experts instructed by the prosecution and defence. Further, we heard from an academic in New Zealand that expert evidence is increasingly admitted under the statutory provisions allowing admission by agreement.[190]

10.164 The Six Circuits stated that because the expert could be cross examined and the defence could introduce their own expert evidence then, for tactical reasons, prosecutors may decline to use expert evidence, relying instead on judicial directions which cannot be challenged. We acknowledge that in some cases the prosecution may prefer directions to the use of expert evidence. However, the prosecution may also choose to adduce expert evidence in cases of particular complexity in order to fill gaps in juror knowledge and understanding not covered by judicial directions.

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185 This is consistent with the European Court of Human Rights' general approach to assessing the fairness of a trial, by evaluating the overall fairness of proceedings rather than isolated considerations such as the admissibility of particular evidence. See *Khan v UK* App No 35394/97 at [34]; *Allan v UK* App No 48539/99 at [42]. See further Appendix 1, para 1.10.

186 Geraldine Hanna, Commissioner Designate for Victims of Crime in Northern Ireland and nia.

187 Including Dr Rebecca Helm; the CBA; and the CWJ.

188 Criminal Justice Act 1967, s 9.

189 Above, s 10.

190 Evidence Act (NZ) 2006, s 9.

The risk of creating a new framework for how victims ought to behave

10.165 Three consultees told us that introducing expert evidence of general behavioural responses to sexual offending may create a new framework of typical behaviour to which complainants must conform in order to be believed.[191] HM Council of Circuit Judges suggested that the use of expert evidence about general behavioural responses to sexual offending would shift the focus of the trial to whether the complainant's behaviour was within the range of general responses. It also noted that the expert evidence could contradict the "no typical response" direction which is given to juries in most sexual offences trials (see paragraph 10.57 above).

10.166 In our view, the purpose of expert evidence of general behavioural responses to sexual offending is to dispel the expectation of a particular response or pattern of behaviour from a complainant, rather than specifying how a victim ought to react. It would be for the expert to explain that they are giving a non-exhaustive account of the range of responses to sexual offending. The judge could also explain this to the jury in their summing up, alongside their direction that there is no typical response to sexual offending. Therefore, we do not share the view that expert evidence of general behavioural responses to sexual offending would create a new norm for complainants' behaviour in sexual offences cases.

Quality of experts

10.167 Four consultees indicated that if expert evidence of general behavioural responses to sexual offending was introduced, it would be important to ensure that the quality of experts is regulated so that the evidence is not misleading, incorrect, or reinforcing of myths and misconceptions.[192] Two consultees[193] referred to the use of parental alienation evidence in family courts as a reason to be sceptical about experts of questionable qualification being allowed to give evidence.[194]

10.168 In March 2011 the Law Commission published its report on expert evidence in criminal proceedings. The project was prompted by public concern over the use of expert evidence in criminal trials following high profile miscarriages of justice, such as those involving Sally Clark and Angela Cannings.[195] The report noted that there was no clear legal test to safeguard the reliability of expert evidence, and made recommendations for a reliability test, which would include:

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191 An individual Circuit Judge; the Law Society; and HM Council of Circuit Judges.

192 Including EVAW; Professor Susan Edwards; and Northumbria Centre for Evidence and Criminal Justice Studies.

193 EVAW and Refuge.

194 Expert evidence of parental alienation has previously been used in the family courts to support the claim that the reason why a child does not want contact with one parent is because the child has been turned against that parent by the other parent. The use of this evidence in the family courts has now been heavily restricted, and "parental alienation" is no longer regarded by the family courts as a syndrome that can be diagnosed by an expert: *Re C* [2023] EWHC 345 (Fam).

195 In both these cases expert evidence was given by Professor Sir Roy Meadow about sudden unexplained death in infancy. For discussion of these cases see Criminal Appeals (2025) Law Commission Consultation Paper No 268, paras 3.54 to 3.63.

(1) A statutory provision providing that expert opinion evidence would only be admissible if it were "sufficiently reliable" to be admitted.[196]

(2) A statutory provision providing that expert opinion evidence would be sufficiently reliable to be admitted if the opinion is soundly based, and the strength of the opinion is warranted having regard to the grounds on which it is based.[197]

(3) A statutory provision setting out a list of high-level examples of reasons why an expert's opinion evidence would not be sufficiently reliable to be admitted.[198]

(4) A list of factors that the trial judge would have to consider when determining whether an expert's opinion evidence is sufficiently reliable to be admitted.[199]

10.169 The Government did not implement the recommendations for a statutory test for the reliability of expert evidence, citing concerns about "the cost of fully implementing the Law Commission's recommendations".[200] However, the CrimPD were amended to include a list of factors that the court may take into account in determining the reliability of expert opinion, which are based on the Law Commission's recommendations. These factors include, among others: the extent and quality of the data on which the expert evidence is based; if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise.[201] Also based on the Law Commission's recommendations, the CrimPD now list factors that the court may take into account when identifying potential flaws in expert opinion which detract from its reliability. These factors include, but are not limited to: being based on a hypothesis which has not been subjected to sufficient scrutiny; being based on an unjustifiable assumption; being based on flawed data.[202]

10.170 The CrimPR also contain extensive requirements in respect of the reliability of expert evidence before it can be admitted, which provides a basis for the court to exercise control over the use of experts. The expert's report must, amongst other things: give details of the expert's qualifications, relevant experience and accreditation; give details of any literature or other information on which the expert has relied in making the report; make clear which of the facts stated in the report are within the expert's own knowledge; and where there is a range of opinion on the matters dealt with in the

196 Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325, para 9.11(1).

197 Above, para 9.11(2).

198 Above, para 9.11(3).

199 Above, para 9.12.

200 Ministry of Justice, "The Government's response to the Law Commission report: "Expert Evidence in criminal proceedings in England and Wales" (Law Com No 325)" (21 November 2013) p 5.

201 CrimPD 2023 (as amended 2024) 7.1.2.

202 Above, 7.1.3.

report, summarise the range of opinion, and give reasons for the expert's own opinion.[203]

10.171 The risk that evidence of insufficient quality is adduced at trial is associated with all types of expert evidence and is not necessarily greater for expert evidence of general behavioural responses to sexual offending. The law and procedural rules designed to ensure the reliability of expert evidence are beyond the scope of this project, which is confined to the trial process for sexual offending. In our view, the existing rules regulating the quality and competence expert evidence and the rules governing the reliability of such evidence ought to ensure that expert evidence of general behavioural responses to sexual offending is reliable. However, if the Government take the view that existing processes are not sufficient, consideration could be given to introducing other measures to exercise quality control over expert evidence of general behavioural responses to sexual offending.[204] In the consultation paper for this project, we noted that the New Zealand Law Commission recommended a code of conduct for expert witnesses in both criminal and civil cases.[205] We also highlighted that the Victorian Law Reform Commission recommended the creation of a panel of experts for sexual offences cases. In order to maintain experts of a high calibre, it also recommended that the panel ought to be subject to an approval and periodic review process.[206] More recently, the Australian Law Reform Commission recommended "the establishment of an appropriately funded governing body of expert witnesses in sexual violence matters".[207]

Resourcing and delay

10.172 We heard from various consultees and stakeholders that making expert evidence of general behavioural responses to sexual offending admissible would create additional resourcing needs and cause delays to the trial process.[208] A Circuit Judge told us that there are already limited numbers of people with sufficient expertise to provide this kind of evidence, noting that it takes six to twelve weeks to produce psychiatric reports for defendants, and that such experts "charge thousands". The Law Society also noted that increased use of expert evidence would risk lengthening trials. Two consultees questioned whether there would be legal aid funding for defendants to instruct an expert.[209] HM Council of Circuit Judges wrote:

> There is also a very real risk that defendants on legal aid would not be able to obtain an expert's report as many experts will not provide a report at legal aid rates. This would lead to appeals to the Legal Aid Agency that would cause delays and, if

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203 CrimPR 2020 r 19.4.

204 Consultees did not comment on these measures.

205 NZLC, *Second Review of the Evidence Act 2006* (February 2019) para 11.4.

206 VLRC, *Improving the Response of the Justice System to Sexual Offences* (September 2021), Recommendation 80.

207 ALRC, *Justice Responses to Sexual Offending* (February 2025) Recommendation 24.

208 Including an individual Circuit Judge; HM Council of Circuit Judges; and the Law Society.

209 A Recorder and HM Council of Circuit Judges.

unsuccessful, to an inequality of arms that could form the basis for an application to stay the indictment.

10.173 In contrast, we were told by academics and legal practitioners from jurisdictions where expert evidence is permitted that it is used conservatively. We think this is likely to be replicated in this jurisdiction because the defence and prosecution may agree expert evidence. Further, Six Circuits suggested that for tactical reasons prosecutors may decline to use expert evidence, relying instead on judicial directions which cannot be challenged in cross-examination. This reduces the potential for delay, as time will not be required to cross-examine two competing experts. Finally, our recommendation for expert evidence limits the admissibility of expert evidence of this kind to complex cases. This means that expert evidence would not be used in all (or indeed, most) sexual offences cases.

Recommendation 60.

10.174 We recommend that expert evidence of general behavioural responses to sexual violence should be admissible to address myths and misconceptions in particularly complex sexual offences trials where it is necessary because:

(1) the evidence is directed to something that is outside the knowledge and experience of the jury; and

(2) other forms of juror education, including by means of judicial directions, would not provide sufficient help to the jury.

OTHER JUROR EDUCATION METHODS

10.175 Next, we consider alternative methods of juror education that could be used to provide jurors with information about myths and misconceptions. Currently, jurors are given information at the start of the trial through an information notice titled "Your Legal Responsibilities as Juror", which outlines the rules and legal obligations by which all jurors must abide.[210] This information is also available in video form online and can be viewed by jurors at any time. In the consultation paper, we acknowledged the potential for wider public education campaigns to educate jurors, though clarified that these are outside of our terms of reference.[211]

[210] For example, the notice explains that jurors are explicitly prohibited from making their own inquiries about anything related to the case.

[211] Six consultees suggested to us that there should be wider public education campaigns, particularly in schools, directed at addressing myths and misconceptions. This included Professor Vannessa Munro; the CBA; the CPS; and a Circuit Judge.

10.176 We consulted on three different kinds of juror education methods to address myths and misconceptions: written information notices;[212] juror education videos;[213] and online interactive tools.[214] Given that the evidence base for the effectiveness of each of these education tools is still developing, we sought views on their suitability for addressing myths and misconceptions in sexual offences trials. We also asked whether there are any other methods for addressing myths and misconceptions amongst jurors that we should consider,[215] and whether any particular juror education methods should be prioritised for introduction.[216]

Consultation responses and analysis

10.177 A number of themes emerged from consultees' responses to each of the three juror education methods. One was that they would be too generalised to have any meaningful educational impact.[217] For example, HM Council of Circuit Judges wrote:

> A video could not cover everything unless it was so generalised as to be of little use or so comprehensive that it would be too long and contain a lot of material that would not be relevant to the case being tried.

10.178 Another theme was that each of the three methods would risk jurors giving undue prominence to their content in their deliberations.[218] Additionally, consultees differed on the timing of these educational interventions. For example, some consultees suggested that education should be offered to jurors prior to their attendance at court,[219] whereas others suggested that they should be viewed at court either pre-trial or upon retirement.[220]

10.179 Several consultees told us that there is a lack of empirical evidence to demonstrate the effectiveness of each of the three juror education methods.[221] For example, Dr Hudspith wrote that:

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212 CQ 97: "We invite consultees' views on the use of written juror information notices to address myths and misconceptions amongst jurors." CP 259, para 10.189.

213 CQ 98: "We invite consultees' views on the use of education videos to address myths and misconceptions amongst jurors." CP 259, para 10.190.

214 CQ 99: "We invite consultees' views on the use of online interactive tools to address myths and misconceptions amongst jurors." CP 259, para 10.191.

215 CQ 100: "Are there any other methods for addressing myths and misconceptions amongst jurors that we should consider?" CP 259, para 10.192.

216 CQ 102: "Which of the following methods should be prioritised for introduction and which is likely to be the most effective combination to address myths and misconceptions, alongside judicial directions? (1) expert evidence of general behavioural responses to sexual violence; (2) a written information notice; (3) an education video; or (4) an online interactive tool." CP 259, para 10.209.

217 Including Six Circuits; HM Council of Circuit Judges; and the Law Society.

218 Including Andrew Wilkins; Martin Rackstraw; and Kate Goold.

219 Including Six Circuits and Dyfed-Powys Office for the Police and Crime Commissioner and Dyfed-Powys Police.

220 Including Chief Constable Sarah Crew and West Mercia Police.

221 Including HM Council of Circuit Judges; Dr Lara Hudspith and Dr Dominic Willmott; and EVAW.

There has been very little research regarding the impact of each of the methods outlined above. Indeed, most of the research into rape myth interventions has not been conducted with (mock) jurors, rather the interventions have been implemented in alternative settings such as universities with student samples.

10.180 We did not receive any further empirical research from consultees into the effectiveness of juror education videos, written information notices, or online interactive tools, although we note that Professor Cheryl Thomas is currently conducting research into different methods of directing jurors about myths and misconceptions, including the use of juror information videos.

10.181 Further empirical research into the effectiveness of these juror education methods, and their potential implications for the wider trial process is needed. At present, we cannot recommend that any of these methods should be introduced.

REAL JUROR RESEARCH

10.182 In the consultation paper, we noted that research into the impact that myths and misconceptions may have on jurors' deliberations has generally been conducted using mock juries. In England and Wales, only a limited number of researchers have received permission to undertake research with real jurors,[222] but that permission did not extend to observing deliberations or seeking or obtaining information about how deliberations are made. Such research is currently restricted under section 20D(1) of the Juries Act 1974, which makes it an offence for a person intentionally:

(a) to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or

(b) to solicit or obtain such information.

10.183 The effect of section 20D is that researchers cannot observe juror deliberations, or ask jurors about their deliberations. Further, jurors cannot disclose any information about their deliberations to a researcher. There are exceptions to this offence where information is disclosed for the purpose of enabling the jury to arrive at their verdict[223] or for the purposes of disclosing, investigating, or prosecuting juror misconduct.[224] However, there is no exception for conducting research with juries. Consequently, research involving direct observation of jurors' deliberations (for example, by being present in the deliberation room, observing deliberations remotely in real time through a video feed, or recording deliberations for subsequent review), as well as post-

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222 M Zander and P Henderson, *The Crown Court Study* (Royal Commission Research Study No 19) (1993); C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] Criminal Law Review 987.

223 Juries Act 1974, ss 20E(1)-(2)(a), (4), 20G.

224 Juries Act 1974, ss 20E(2)(b)-(3), 20F, 20G. Although we did not consult on the issue, we have also heard that the offence in section 20D can prohibit jurors from discussing their deliberations in therapy. We note that in Canada there is an exception to the offence of disclosing information about jury proceedings which allows jurors to disclose information about deliberations for the purpose of receiving medical or psychiatric treatment, therapy or counselling from a medical professional after the completion of the trial (Criminal Code (Canada), s 649(2)(c)).

deliberation research involving interviews or surveys about jurors' deliberations, is prohibited.

10.184 There are thus significant limits to the extent that research with real jurors can advance our understanding of deliberations. The result is a substantial gap in knowledge in this area, which is significant because measures that seek to assist juries and mitigate the risk that irrelevant factors will be taken into account in deliberations should be evidence based. Whilst mock jury studies are useful, research with real jurors is also necessary to advance our understanding of how jurors deliberate.

10.185 We asked consultees whether there should be further commissioning of research with real jurors and what criteria should govern access to such research. We also asked whether there should be a statutory exemption for researchers and juror participants to the offence in section 20D of the Juries Act 1974.[225]

Consultation responses and analysis

Further commissioning of research with real jurors

10.186 A majority of consultees agreed that there should be further commissioning of, or permission for, research that engages real jurors.[226]

10.187 Several consultees suggested that there would be significant benefit to further real juror research. One reason given was that it would fill gaps in the existing evidence base that currently exist due to the limitations of mock juror research.[227] The Law Society agreed that mock jury research can be "useful and valid (so long as the participants reflect those eligible for jury service)" but stated that "research into the 'real thing' is self-evidently better". In contrast, the General Council of the Bar of England and Wales disagreed with commissioning or giving permission for further research with real juries, doubting the potential benefit of such research.

10.188 Three consultees noted that further real juror research would be particularly beneficial for sexual offences cases due to there being significant debate about whether, and to what extent, jurors rely on myths and misconceptions.[228] However three consultees also acknowledged that further research with real jurors would be beneficial beyond sexual offences cases, as it would improve understanding of how juries operate.[229] For example, nia identified that research with real jurors would provide insight into "how decisions are reached, the power dynamics at play, what

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225 CQ 101: "Should there be further commissioning of, or permission for, research that engages real jurors? If so, what criteria should govern access and what conditions should be placed on research? Should researchers and juror participants be given a statutory exemption from section 20D of the Juries Act 1974 that makes it an offence intentionally to "disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or to solicit or obtain such information?" CP 259, paras 14.146-14.147.

226 Of those who responded to CQ 101a, 21 consultees selected "yes", 4 consultees selected "no", and 4 consultees selected "other".

227 Including Dr Matt Thomason; Dr Siobhan Weare and Dr Dominic Willmott; and the Law Society.

228 Including Dr Charlotte Herriott; the CPS; and JURIES.

229 Including Dr Charlotte Herriott; Cardiff University Law School Innocence Project; and nia.

information is retained, what information is acted on, what information is forgotten or discarded and ignored and why". With this said, consultees who were in favour of additional real juror research also acknowledged that there are limitations to such a methodology.[230] Dr Helm suggested that "we can't execute controlled designs in real jury cases and therefore cannot draw robust causal conclusions". This suggests that even if further research with real juries is conducted, there will still be a need for other complementary work, such as mock juror research.[231]

10.189 In addition to noting the benefits of further research with real jurors, consultees also commented that there should be greater access to real juries for researchers from a range of different disciplines. For example, Dr Weare and Dr Willmott stated that research "should be undertaken from a range of disciplines and institutions to maximise its validity and usefulness", emphasising that cross-disciplinary work would "capitalise on the varied and complementary knowledge, methodologies, and analytical capabilities that socio-legal, psychological, criminological, and criminal justice scholars offer". Similarly, Dr Smith stated that it would be "important that this is genuinely open to all researchers". In her Kalisher Lecture on 19 March 2024, the Lady Chief Justice similarly extoled the value of a wider range of researchers and research methodologies being employed to empirically examine the criminal justice system.

> If, however, we are to ensure that we nurture our justice systems, and particularly the jewel that is our criminal justice system, we need to go much further. We need more studies. More testing. More scrutiny. We need different approaches. More methodologies. More research and a wider range of researchers testing and challenging our systems. This will, of course, depend on the availability of access to more and better data, and access for researchers to that data. The strength exemplified by the Milgram example is that it rests on multiple researchers working in the same field. That is something we must foster. We cannot rest on the approach that opens up our system to scrutiny by a limited number of researchers. We need a plurality. It is my view that we have much to learn from such scrutiny, not least where juries are concerned.[232]

10.190 We conclude that further commissioning of, and permission for, research with real jurors would help fill gaps in our understanding of how juries function, and how greater assistance could be provided to them. We also agree that the scientific rigour of such research would be improved by access being granted to a wide range of researchers.

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230 Dr Rebecca Helm and Durham Police and Crime Commissioners' Office

231 See also Y Tinsley, C Baylis and W Young, "'I think she's learnt her lesson': Juror use of cultural misconceptions in sexual violence trials" (2021) 52 *Victoria University of Wellington Law Review* 464, 479: "Even if jurors reported that a specific line of misconception-based thinking was crucial, we usually cannot know what would have happened had that reasoning not been employed. That is partly because the collective decision-making process may over-ride or neutralise flaws in individual juror decision-making, and there may have been a collective view that there was reasonable doubt anyway. Combining mock and real juror research findings could help with this difficulty, as mock juror or experimental studies can control for variables in ways that research with real jurors cannot".

232 Courts and Tribunals Judiciary, *Lady Chief Justice: Kalisher lecture 2024* (March 2024).

Statutory exemption for researchers and juror participants

10.191 A majority of consultees who responded to Consultation Question 101 agreed that researchers and juror participants should be given a statutory exemption from section 20D of the Juries Act 1974 so that researchers can observe juror deliberations or ask jurors about their deliberations.[233] Several consultees indicated that an exemption would be necessary for any further research with real jurors to be meaningful.[234] For example, the CPS wrote that "in order to conduct the type of comprehensive research that will improve understanding of jury decision making in sexual offence cases this change is required". Dr Thomason stated that an exemption is "an absolute necessity" for any research "of real value". He argued that "one can only infer so much from generic questionnaire responses" and that research requires "interviews and observations/recordings of deliberations (possibly in combination with observations of the trials in question for triangulation)". Dr Helm identified the substance of deliberations and "what, in their opinion, underlay the verdict" as "the most helpful information that real jurors can provide". She argued that an exemption "is important in ensuring the reliability and utility of research with jurors". We received similar feedback from an academic, who has previously conducted studies with real jurors in New Zealand. They stated that research into jury deliberations can provide insight into how the dynamics of a group work; what individual jurors think; what can go wrong; and how they respond to what is said by judges and counsel. They also suggested that in discussing jurors' deliberations with them, things can come out inadvertently (such as evidence of unconscious bias or reliance on rape myths) that would not necessarily come out when asking questions in the abstract.

10.192 Some consultees argued that research into juror deliberations could lead to public confidence in jury deliberations being undermined. The Six Circuits warned that this research "could be misused to cherry-pick examples of infelicitously phrased justifications by people not used to drafting reasons and not able to justify their reactions by the specifics of the case under discussion". Further, it raised concerns of wider impact from real jury research that it:

> could undermine faith in the jury system quite wrongly leading to incursions on the right to trial by jury – perhaps initially for this type of offence, and thereafter for others as it suits political ends.

10.193 We take the view that research with juries would improve, rather than undermine, faith in the jury system. We acknowledge that research of this kind might reveal shortcomings in juries' deliberations. However, the value of further research of this kind is that it would provide insight into how to improve the assistance that we provide to juries so that they can function better. For example, if research into jury deliberations shows that juries misunderstand or misapply a direction, this could inform improvements to the direction. In our view, this would improve confidence in juries, rather than undermine it.

10.194 Consultees also commented on the extent of access that researchers should have to jury deliberations. Chief Constable Sarah Crew suggested that jury deliberations could

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233 Of those who responded to CQ 101, 11 consultees selected "yes", 3 consultees selected "no", and 4 consultees selected "other".

234 Including the CPS; Dr Matt Thomason; and Professor Vanessa Munro.

be accessed by recording jurors or by "carrying out a debrief". However, consultees and stakeholders raised concerns about this possibility, noting the importance of the confidentiality of juror deliberations.[235] At a consultation event, Professor Cheryl Thomas raised concerns about the effect recording jury deliberations would have on the outcome of cases, explaining that when she had interviewed juries post-verdict, the universal view amongst jurors was that this would have affected their deliberations. The Six Circuits warned that permitting real jury research would be an "overturning of principles that have underpinned the principles of confidentiality as to deliberations in the jury room". As such, it suggested that research with real jurors should be limited to a post-trial interview, and that such research should be optional for jurors. Similarly, the CBA wrote that "deliberations in the jury room are and must remain sacrosanct" and that "jurors would not feel comfortable knowing that their discussion could be considered".

10.195 We note that the principle of confidentiality of juror deliberations is not absolute: as outlined above, there are already several exceptions to the offence under section 20D. However, we also acknowledge that further interference with confidentiality could mean that jurors feel restricted from openly discussing their views during deliberation. In our view, if an exception to section 20D were to be created for researchers and juror participants, the research methodology and conditions imposed on the research could address these concerns. For example, as was suggested by several consultees, the body responsible for granting permission for such research could require the anonymisation of participants as a standard condition on research with juries.[236] Dr Helm commented that in addition to not identifying participants, it is important that particular proceedings are not identified. We note that an academic who has conducted research with real jurors in New Zealand told us that their research design and ethical permissions required vigilance regarding identification of proceedings. Their research protocol required that where sufficient de-identification was not possible, cases would be excluded from published results. De-identification of proceedings and anonymisation of participants in the trial is a condition that could be imposed by the ethics committee approving the research and by the body responsible for giving permission for research with jurors.

10.196 Some consultees also commented that if researchers were permitted to observe juror deliberations, there could be an increased risk of appeals. Martin Rackstraw stated that he does not agree with observing juror deliberations as it could "lead to any convicted defendant arguing on appeal that their trial was conducted in an unprecedented manner, and the jury subjected to constraints as a result of the research". He further suggested that there is a "risk of proliferation of appeals if research is carried out, particularly if it is carried [out] on a wide enough scale for meaningful conclusions to be drawn". The CBA also stated that:

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[235] We have recently engaged with the rationale for jury secrecy in the context of appeals based on juror deliberations in the consultation paper for our project on criminal appeals. Criminal Appeals (2025) Law Commission Consultation Paper No 268, paras 8.215-8.218.

> Should discussions take place between any outside person and a juror which might impinge on the fairness of the trial process or provide grounds for an appeal it would be contrary to the rules of justice for such information to be hidden.

10.197 These are valid concerns; research with real jurors has the potential to lead to additional appeals. A researcher may uncover juror misconduct that could provide grounds for an appeal against a conviction. However, if misconduct is revealed which could provide grounds for an appeal, it is right that a defendant should be able to raise an appeal. Such information would not be "hidden" as there is an exception to the section 20D offence which exists for the purposes of disclosing juror conduct which may "provide grounds for an appeal against conviction or sentence".[237]

10.198 We also acknowledge that the degree of risk of disruption to the jury varies depending on the methodology of research conducted. Less intrusive forms of juror research, such as that conducted post-verdict, do not run the risk of impacting juror deliberations. There is a greater risk of disrupting the jury with research that involves direct observation of jury deliberations, where the jury have been made aware that research is being conducted before their deliberations. We think that this concern can be addressed through a rigorous approval process for this research, rather than via statutory prohibition. The approval process would necessarily require consideration of the impact of the proposed research on the fairness of proceedings. As such, more intrusive research (such as directly observing juror deliberations) could be restricted by the approvals process without being set out in statute. This is the approach taken in New Zealand, where an exception to the offence of disclosing jury deliberations is made for information that

> is sought or disclosed during or after the trial with the permission of the presiding Judge or the relevant head of bench, including for the purpose of conducting research about juries or jury service … .[238]

In New Zealand, the Judicial Research Committee is responsible for considering requests made for judicial participation in research. It notes that "a particularly cautious approach" will be taken in respect of jury research, given the implications for the confidentiality of jury deliberations.[239]

10.199 In England and Wales, there is guidance for making requests for judicial participation in research concerning the judicial process or other aspects of court procedure. Approval of requests is decided by the relevant Head of Division and the Senior

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237 Juries Act 1974, s 20F(1). The researchers would be able to disclose such misconduct to a number of people listed in s 20F(2), including a member of a police force; a judge of the Court of Appeal; the registrar of criminal appeals; a judge of the court where the relevant proceedings took place; or a member of staff of that court who would reasonably be expected to disclose the information only to one of the persons previously mentioned. In the consultation paper for our criminal appeals project, we have provisionally proposed that the Criminal Cases Review Commission should be added to the list of persons in section 20F(2): Criminal Appeals (2025) Law Commission Consultation Paper No 268, para 8.256.

238 Contempt of Court Act (NZ) 2019, ss 14(1), 15(1)(d). We note that this section was based on a recommendation by the New Zealand Law Commission ("NZLC"), who justified it on the basis that "genuine research is important to assist society in understanding juries and to improve the administration of justice" (NZLC, *Reforming the law of contempt of court: a modern statute* (May 2017) para 4.83).

239 Courts of New Zealand, *Research guidelines* (October 2016).

Presiding Judge or the Senior President of Tribunals, as appropriate.[240] We note that an application for research with a judicial office holder requires the applicant to set out how ethical considerations have been addressed and if they have received ethical approval for the research. We take the view that a similar process to this ought to be required to obtain approval for research involving real jurors.

10.200 Whilst acknowledging the need for a thorough approval process, we conclude there should be an exemption to the existing offence under section 20D of the Juries Act 1974. In our view, this would allow for valuable research that would fill existing gaps in knowledge about how jurors deliberate and how best to assist them in their task. A requirement to apply for permission to conduct the research will ensure that considerations such as the scope of access (including the difficulties which may arise from researchers accessing deliberations) and steps to ensure juror anonymity will be given sufficient scrutiny. Criteria and conditions for conducting research with real jurors should be imposed on a case-by-case basis depending on the nature of the research and therefore should not be specified as part of the statutory exemption.

Recommendation 61.

10.201 We recommend that there should be further commissioning, and permission for, research that engages real jurors.

10.202 We recommend that there should be a further exception to section 20D of the Juries Act 1974 for those conducting research with real jurors and for juror participants in such research.

[240] Courts and Tribunals Judiciary, *Judicial participation in research projects* (October 2020).

Chapter 11: Conduct of sexual offences cases

INTRODUCTION

11.1 An advocate's role in a criminal trial involves presenting their case to the jury. This includes adducing evidence, questioning witnesses and giving opening and closing speeches. In sexual offences prosecutions, the way an advocate performs this role has a significant bearing on the complainant's experience and the risk that myths or misconceptions will be introduced to the jury. Responding to this risk can be a challenge, particularly in the context of a criminal justice system that is under significant strain, resulting in substantial time constraints for advocates when preparing for trial, and challenges for the courts in managing case backlogs.[1]

11.2 In this chapter we first outline the issues we aim to address: namely that myths and misconceptions continue to be introduced in sexual offences prosecutions through advocates' conduct in the trial, and that this may prejudice the jury's decision-making. We highlight our conclusion from Chapter 1 about the strength of the evidence base in relation to the introduction of myths and misconceptions. We conclude that there is a risk that myths and misconceptions continue to be deployed during trials and this risk justifies appropriate reform.

11.3 We then consider how adherence to the relevance threshold interacts with reliance on myths and misconceptions when judges and parties consider lines of questioning. We conclude that the relevance threshold is generally the most appropriate threshold for determining acceptable lines of questioning, unless an alternative admissibility threshold applies. We also examine whether it is appropriate to require prior approval of all lines of questioning, enabling judges to assess their relevance prior to trial. We conclude that this is not a proportionate measure.

11.4 Subsequently, we describe the roles of the defence and prosecution in minimising the risk that myths and misconceptions will be introduced during sexual offences cases. Our first recommendation is that mandatory training on myths and misconceptions should be introduced for barristers and solicitors who act in sexual offences trials. This foundational recommendation aims to enhance the competence of legal professionals working on sexual offences cases. In this section we explain how this recommendation could be achieved most efficiently and economically.

11.5 We also consider whether the Bar Standards Board ("BSB") should explicitly include professional misconduct consequences in its Code of Conduct (the "BSB Code") for barristers who deliberately rely on myths and misconceptions. We conclude that this could assist to reduce egregious cases of reliance on myths and misconceptions through deterrence. We explore this option specifically for intentional conduct, noting that inadvertent reliance on myths and misconceptions should not amount to professional misconduct. We conclude that the BSB should consider whether to amend the BSB Code to state explicitly that deliberate reliance on myths and

[1] See Office of Victims' Commissioner ("OVC"), *Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system* (March 2025).

misconceptions could result in professional misconduct consequences and that the deployment of generalisations based on myths and misconceptions is prohibited.

11.6 Finally, we present the existing ways in which judges may effectively use their case management powers to regulate the trial and respond to the introduction of myths or misconceptions. To improve and clarify the use of these powers in sexual offences cases, we recommend the Judicial College consider new guidance for judges.[2] Such guidance would assist judges to identify myths and misconceptions and respond when they are adduced at trial.

11.7 Regulating advocates' conduct in sexual offences prosecutions necessitates a multifaceted approach to respond to the introduction of myths and misconceptions. Consequently, our recommendations in this chapter encompass a combination of measures that work together to minimise the influence of myths and misconceptions on sexual offences prosecutions.

RELIANCE ON MYTHS AND MISCONCEPTIONS

11.8 The way an advocate conducts their case may allow myths or misconceptions to be introduced to the trial. Myths or misconceptions may be relied upon, either inadvertently or deliberately, through lines of questioning.[3] When applied correctly, the relevance threshold should ensure that lines of questioning are excluded if they rely solely on myths or misconceptions. Advocates' opening and closing speeches are also potential routes for the introduction of myths or misconceptions or generalisations about complainants and the nature of sexual offences.

11.9 Some advocates can, and do, demonstrate significant knowledge of and sensitivity to the complex issues that arise in sexual offences prosecutions, including the risk of inappropriately influencing the jury and the potential vulnerabilities of complainants. The Criminal Bar Association ("CBA") told us that in its experience:

> advocates who undertake and conduct RASSO work, on both sides, are overwhelmingly experienced professionals dedicated to the fair treatment of all involved in the process, be they complainants, witnesses or defendants.

11.10 Nonetheless, the feedback from consultees and stakeholders we have received and the literature we have analysed indicates that myths and misconceptions continue to impact sexual offences prosecutions.[4] In the consultation paper we concluded that the literature, including trial observation studies, indicates that myths continue to be relied on.[5] However, we also acknowledged that there are some limitations to trial observation studies, given they are often limited in number, and observers may not be

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2 The Lord or Lady Chief Justice is responsible for arrangements for training the courts' judiciary in England and Wales under the Constitutional Reform Act 2005. The Judicial College operationalises this responsibility. See Courts and Tribunals, *Judicial College.*

3 We explained in the consultation paper that "a 'line of questioning' refers to a plan to question a complainant on a particular topic, or to cause the complainant to give particular evidence, rather than referring to the wording of specific questions". Evidence in Sexual Offences Prosecutions (2023), Law Commission Consultation Paper No 259 ("CP 259"), para 9.27.

4 CP 259, paras 9.29-9.57.

5 Above, paras 9.30-9.59.

privy to the entire proceedings, such as pre-trial applications.[6] In Chapter 1 of this report, we review the recently published evidence and conclude that despite the ongoing lack of consensus, there remains a risk that jurors may inadvertently be influenced by myths.[7]

11.11 During our consultation we received additional anecdotal evidence from consultees about reliance on myths and misconceptions. For example, some legal practitioners suggested that deliberate, inappropriate conduct from advocates is rare, and it is unusual for advocates to stray deliberately into reliance on myths and misconceptions.[8] For example, Martin Rackstraw, solicitor, advised:

> in my experience, there is no significant problem of defence advocates not adhering to relevant matters in cross-examination and in the rare cases where questioning strays outside relevant issues, judges are capable of intervening.

11.12 Other consultees expressed concerns that inappropriate reliance on myths and misconceptions continues to arise in sexual offences prosecutions.[9] For example, JusticeIsNow stated that Independent Sexual Violence Advisers ("ISVAs") from "across the country" have reported to them that rape myths "are used still, to great extent". An anonymous organisation that works with women who have experienced sexual violence stated "routinely, rape myths are used to undermine and discredit victim-survivors and excuse the behaviour of perpetrators".

11.13 We have considered these responses, alongside the evidence discussed in the consultation paper.[10] Based on the totality of the evidence, we remain convinced that "myths and misconceptions do feature in sexual offences cases, though their prevalence is unclear".[11] In light of this conclusion, in this chapter we consider whether there are opportunities for reform that respond to the risk that myths and misconceptions will be introduced during the trial.

11.14 The measures we recommend below are targeted at addressing the concerns that myths and misconceptions continue to be introduced and perpetuated through lines of questioning and speeches. In making these recommendations we also recognise the complexity that can arise in distinguishing reliance on myths and misconceptions from legitimate lines of questioning or arguments. Accordingly, we take a comprehensive approach in this chapter, suggesting various measures that collectively aim to reduce the impact of myths and misconceptions on the trial.

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6 CP 259, para 9.34.

7 See Ch 1, paras 1.11-1.14.

8 The CBA; Martin Rackstraw; and the Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

9 Including the CPS; Refuge; JusticeIsNow; Dr Charlotte Herriott; Dr Siobhan Weare and Dr Dominic Willmott.

10 CP 269, paras 9.29-9.59.

11 Above, para 9.57.

THE RELEVANCE THRESHOLD FOR LINES OF QUESTIONING

11.15 Advocates can only adduce relevant evidence and can only question witnesses on relevant topics.[12] Evidence will be relevant if it "assists in proving or disproving a fact that is in issue in the trial".[13] Material which relies solely on a myth or misconception cannot be admissible as evidence as it does not assist in proving or disproving a fact in issue. That is because such "evidence" is grounded in a false belief, rather than facts or other evidence from which the jury could reasonably draw a conclusion about the truth or falsity of a disputed fact.

11.16 It can be difficult to identify questioning or arguments that rely on myths or misconceptions, which creates inherent challenges in responding to reliance on myths or misconceptions during trial.[14] While questions grounded in myths and misconceptions are generally not relevant and should not be allowed, there may be cases where there is an evidential basis for introducing questioning that would, on its face, appear to introduce myths or misconceptions.[15] The following example demonstrates the challenge with identifying lines of questioning which may be relevant and permissible in some circumstances, but might otherwise invoke myths and misconceptions.

Example 1

The complainant alleged she was raped by her partner and did not report any physical injuries arising from the alleged rape. She did not claim that the rape included a violent assault that would result in obvious physical injury. In this case the lack of physical injuries would be irrelevant to the issue of whether the sexual activity was consensual. It is a myth that "real" sexual assaults always cause physical injury. To suggest that the evidence of a lack of physical injury would make the claim that the complainant consented more likely, would be relying on a myth to claim the evidence is relevant. In these circumstances, a line of questioning about the lack of injuries sustained would be impermissible if it were being adduced to perpetuate this myth. However, evidence in relation to the lack of injury may be adduced appropriately to affirm the nature of the complainant's allegation, so long as it is not accompanied by a suggestion that the lack of injury is relevant to consent. For example, defence counsel may ask the complainant to confirm that they do not allege any physical injury resulting from the alleged rape.

In an alternative scenario, if the complainant alleged that she had suffered from a physical injury following the alleged rape, a lack of injury recorded in the medical examination following the alleged rape might be a relevant line of questioning as it would demonstrate an inconsistency in the complainant's allegation. In these circumstances, this line of questioning would be relevant where the complainant's credibility was in issue.

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12 See CP 259, 9.27.

13 CP 259, p xix.

14 See discussion about "distinguishing myths" at CP 259, paras 9.60-9.70.

15 See examples at CP 259, paras 9.67-9.68.

11.17 Individual biases may impact the consideration of whether certain evidence is relevant.[16] In the consultation paper we cited Dr Ellen Daly, who conducted trial observations of sexual offences trials, and found that "myths and misconceptions were rarely explicit but were instead bound up with the overall trial narrative and reproduced broader cultural narratives around gender and social class".[17] We highlighted Dr Daly's suggestion that:

> barristers who draw on rape myths to bolster their cases should be required to justify why and how their argument is relevant. This could help to ensure fairness for victim-survivors and the upholding of public interests whilst still protecting the defendant's right to a fair trial.

11.18 In light of the concerns that myths and misconceptions continue to be relied upon in sexual offences prosecutions, we considered the application of the relevance threshold for lines of questioning and ways to improve adherence to the relevance threshold.[18]

Maintaining the relevance threshold

11.19 We provisionally proposed that the test for determining acceptable lines of questioning on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour evidence ("SBE") or criminal injuries compensation evidence ("CICE").[19]

11.20 The majority of consultees who responded to this provisional proposal supported our conclusion.[20] Consultees emphasised that the relevance threshold allows for flexibility in decision making so that judges can treat evidence on a case-by-case basis and appropriately address any complexity.[21] For example the London Criminal Courts Solicitors Association ("LCCSA") affirmed "that judicial discretion remains the most flexible and appropriate approach" when determining lines of questioning.

11.21 Consultees also emphasised the need to distinguish between reliance on myths and misconceptions and legitimate lines of questioning based on evidence which could otherwise evoke myths and misconceptions.[22] For example, the Bar Council stated

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16 We specifically highlighted this risk in the consultation paper in relation to discretionary thresholds for admissibility at CP 259, para 4.155, citing *R v Seaboyer* [1991] 2 SCR 577 at [228].

17 CP 259 para 9.48 citing E Daly, *Rape, Gender and Class Intersections in Courtroom Narratives* (2022) p 147.

18 Consultation Question ("CQ") 76 at CP 259, para 9.76; CQ 77 at CP 259, para 9.77; and CQ 78 CP 259, para 9.101.

19 CQ 76: "We provisionally propose that, in sexual offences prosecutions, the test for determining acceptable lines of questioning of a witness on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour or claims for criminal injuries compensation". CP 259, para 9.78.

20 Out of 73 responses, 39 consultees agreed; 17 disagreed; 17 submitted a response categorised as other.

21 Juries Understanding Rape is Essential Standard ("JURIES"); LCCSA; the CBA; and the Crown Prosecution Service (the "CPS").

22 The General Council of the Bar of England and Wales ("the Bar Council"); the CBA; and an anonymous stakeholder.

that "the consultation paper properly notes the distinction between reliance on generalisations and focusing on issues that matter to the particular case".

11.22 Several consultees told us they are concerned by their perception of an ongoing lack of adherence to the relevance threshold in sexual offences prosecutions.[23] This concern was clearly articulated by Professors Joanne Conaghan and Yvette Russell, who argued:

> While we agree that relevance should filter out improper lines of questioning in the trial, the current application of the relevance threshold is founded on representations and interpretations of behaviour which are both gendered (ie are applied differentially to male and female behaviour) and generalised (ie draw upon general assumptions about behaviour which may or may not be empirically sound). Because rape and serious sexual offence trials as a whole are infused with myths and stereotypes which together constitute the cultural scaffolding of rape culture, relevance as currently operationalised, cannot necessarily be relied upon to filter these out.

11.23 We recognise that myths and misconceptions may impact advocates' and judges' perceptions of relevance in sexual offences prosecutions. However, in the consultation paper we provided the following reasons why introducing a higher admissibility threshold for lines of questioning is not the best way to address this issue. First, restrictions on certain lines of questioning requires a clearly defined category of questioning that may evoke myths or misconceptions, such as SBE or CICE. Without a clear category or clear justification, it would not be proportionate to risk restricting the defendant from putting their case.[24] We were not persuaded that there are any additional specific categories of prejudicial evidence that should attract a higher threshold. Second, advocates and judges should already be giving careful consideration to the relevance of lines of questioning. Lines of questioning which are not relevant should already be restricted.[25] If the relevance threshold is not being applied effectively to lines of questioning in sexual offences cases, this may be an issue with the adherence to the threshold, rather than the threshold itself. Finally, there are alternative means of encouraging adherence to the relevance threshold that may be preferable to changing the threshold. For example, at paragraphs 11.129 to 11.155 below we discuss the provision of guidance to judges in relation to distinguishing relevant lines of questioning from questioning that relies on myths and misconceptions.

11.24 These issues, along with the responses we received from consultees in relation to maintaining the relevance threshold for lines of questioning, are explored in greater detail below.

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23 Including Refuge; nia; Professors Julia Quilter and Luke McNamara; Women Against Rape; Dr Natalie Kyneswood; and Professors Joanne Conaghan and Yvette Russell.

24 CP 259, para 9.77.

25 CP 259, para 9.78.

What categories of questioning should attract a higher threshold

11.25 As we explain above, and in the consultation paper, inappropriate reliance on myths or misconceptions can be exceptionally difficult to identify and to distinguish from legitimate lines of questioning.[26] In contrast, topics such as SBE and CICE can more clearly be distinguished from the broader category of lines of questioning that rely on myths and misconceptions. In the consultation paper we noted that, in comparison to SBE and CICE, broader categories of evidence that may relate to myths and misconceptions have "less prejudicial potential, are more nebulous, may be more relevant on the facts of a case, and are not necessarily easily identified".[27]

11.26 In their responses, some consultees emphasised the importance of safeguarding the defendant's right to a fair trial when considering a higher admissibility threshold for an ambiguously defined category of questioning.[28] For example, Martin Rackstraw agreed with our proposal, stating, "further restriction [on lines of questioning] risks prejudicing the fundamental right of a defendant to a fair trial".

11.27 Dr Matt Thomason commented that limitations on the admissibility of evidence should have a "robust justification". He emphasised:

> Individual rules of admissibility by themselves may not obviously infringe the defendant's right to an accurate verdict and a fair trial (and, more pointedly, the defendant's right not to be wrongfully convicted), but the more barriers which are erected the greater the likelihood that the combination of rules will do so.

11.28 Applying an enhanced relevance threshold to some types of evidence does not inherently pose a risk to the defendant's right to a fair trial.[29] However, in our view, it is not proportionate to introduce an enhanced relevance threshold without clearly identifying the prejudicial lines of questioning that should be subject to the greater restriction.[30]

Identifying specific evidence and lines of questioning

11.29 In the consultation paper we asked consultees to identify types of potentially highly prejudicial material or factual scenarios that should be subject to a higher admissibility threshold.[31] We received a limited number of responses to this question.

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26 See CP 259, paras 9.64-9.70.

27 CP 259, para 9.76.

28 Including Martin Rackstraw; Richard English; and Philipp Tanzer.

29 In Appendix 1 we explain that "the case law of the ECtHR has clarified that what constitutes a 'fair' trial cannot be determined in the abstract but depends on the circumstances of each particular case. In assessing whether a trial has been fair, the general approach has been to evaluate the fairness of the proceedings as a whole, rather than focussing on isolated considerations". Appendix 1, para 1.9 citing *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [250]; *O'Halloran and Francis v UK* App Nos 15809/02 and 25624/02 (Grand Chamber decision) at [53].

30 CP 259, para 9.76.

31 CQ 76: "We invite consultees' views on whether there are any types of potentially highly prejudicial material or factual scenarios beyond sexual behaviour and claims for criminal injuries compensation where evidence and cross-examination should be subject to an enhanced admissibility threshold rather than the relevance threshold?" CP 259, para 9.79.

11.30 Four consultees suggested that evidence regarding the complainant's physical and/or mental health should be subject to greater restrictions.[32] This suggestion was made on the basis that generalisations about a complainant's physical and/or mental health may be used inappropriately to undermine their credibility. Given the intersection between evidence of a complainant's health and their personal records, we address this issue as part of our discussion of personal records in Chapter 2 of this report.[33]

11.31 Consultees provided other responses to this question, including the following suggestions.

(1) The complainant's relevant religious or moral beliefs[34] – we are not aware of evidence that demonstrates these factors are being relied upon in sexual offences prosecutions inappropriately to influence juror decision-making. Accordingly, the case for introducing a higher threshold is not made out.

(2) Accusing the complainant of having a motive to lie for attention or revenge[35] – if there is an evidential basis for claiming the complainant has a particular motive for lying, it is likely to be relevant and should not attract a higher admissibility threshold. Generally, this type of evidence should be considered with careful attention to the relevance threshold to ensure it is based on the facts of the case and the evidence presented and is not grounded in generalisations about myths or misconceptions.

(3) Evidence of the complainant's previous offending or substance abuse[36] – in Chapter 6, we explain that bad character evidence ("BCE") is restricted in all criminal trials because of its inherent risk of prejudice. Where the evidence of the complainant's prior offending or substance abuse meets the definition of misconduct[37] it will be covered by the non-defendant bad character provisions in section 100 of the Criminal Justice Act 2003 ("CJA 2003").[38] This would include evidence of a complainant's previous criminal offending and could include their drug use.[39]

11.32 Given our analysis of these topics, we do not think it is appropriate for any of these categories of evidence to attract a higher admissibility threshold.

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32 Dr Olivia Smith; CWJ; Rape Crisis England and Wales ("RCEW"); and the Pan-London Rape Crisis Centres Experts by Experience Panel.

33 Ch 2, paras 2.193-2.195.

34 Durham Police and Crime Commissioner's Office.

35 Pan-London Rape Crisis Centres Experts by Experience Panel.

36 RCEW.

37 Evidence of bad character is either "evidence of … misconduct" or "evidence of … a disposition towards misconduct". CJA 2003, s 98. Under s 112(1) of the CJA 2003, "[m]isconduct" is defined as "the commission of an offence or other reprehensible behaviour".

38 CP 259, para 5.173.

39 CP 259, para 4.53, citing Rook and Ward, *Rook and Ward on Sexual Offences* (6th Ed. 2021) para 20.20.

Conclusion

11.33 In our view, there are no specific prejudicial categories of evidence which should attract a higher threshold (other than SBE, CICE and BCE). Accordingly, we conclude that the relevance threshold should remain when assessing all other lines of questioning.

11.34 Encouraging stringent adherence to the existing relevance threshold may be a more appropriate way of responding to concerns about the functioning of the relevance threshold. In their response, Professors Conaghan and Russell called for "opportunities to scrutinise and call to account the use of unfounded assumptions and inferences about how men and women behave in the context of sexual encounters". Later in this chapter we explore case management tools, which can be deployed to control questioning and encourage proper adherence to the relevance threshold through interrogation of the relevance of evidence and questions.

Recommendation 62.

11.35 We recommend that the test for determining acceptable lines of questioning of a witness on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour, claims for criminal injuries compensation and bad character.

Prior approval of lines of questioning

11.36 One option for scrutinising adherence to the relevance threshold that we discussed in the consultation paper is to require judicial approval of lines of questioning prior to trial.[40] This approach is already taken for determining permissible questioning for vulnerable and young witnesses in order to respond to communication difficulties and assist those witnesses to give their best evidence.[41] There are also circumstances where specific lines of questioning will be subject to restriction following scrutiny prior to trial. For example, there may be limits placed on lines of questions about SBE.[42] In the consultation paper we stated that Ground Rules Hearings ("GRHs")[43] could be used in advance of sexual offences trials, during which lines of questioning could be canvassed and attention turned to the question of their relevance".[44]

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40 CQ 78: "We invite consultees' views on how the situation can be improved so that the requirement for lines of questioning to be relevant is considered and adhered to in each case. Some possibilities include… (2) a requirement that lines of questioning are discussed and approved by a judge at a hearing in advance". CP 259, para 9.101.

41 See *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579.

42 See Chapter 3.

43 A GRH is a pre-trial hearing. At a GRH, the court can give directions for the appropriate treatment and questioning of a witness, including directions about the manner of the questioning, its length, and questions which may not be asked. Criminal Procedure Rules, r 3.8(9).

44 CP 259, para 9.96.

11.37 The consultees who expressed support for the introduction of prior approval for lines of questioning in sexual offences trials[45] emphasised that prior approval could:

(1) help focus the advocate's attention on whether myths or misconceptions might arise during their questioning;[46]

(2) reduce the risk that irrelevant questions will be raised before the jury and impact their decision-making;[47] and/or

(3) reduce the distress caused to the complainant as a consequence of being asked irrelevant questions that rely on myths and misconceptions.[48]

11.38 However, in the consultation paper we acknowledged the following concerns with this approach:

(1) it may be an onerous and time-consuming approach, resulting in elongated trials;[49]

(2) it may not achieve the intended benefit of improving adherence to the relevance threshold, given that it still relies on judicial discretion to determine relevance, which may also be influenced by existing biases or assumptions amongst judges;[50] and

(3) extending the requirement to obtain advance approval of questions beyond vulnerable witnesses or specific prejudicial topics (such as SBE) may not be considered justifiable or proportionate given that the requirement for prior approval may limit the defence's ability to cross-examine the complainant.[51]

11.39 Consultees, including several legal practitioners and practitioner bodies, rejected the suggestion to introduce mandatory prior approval of lines of questioning. These consultees echoed the concerns we had foreshadowed in the consultation paper.[52]

11.40 Two consultees were also concerned that prior approval of lines of questioning may impact the defence's ability to put their case.[53] For example, Martin Rackstraw commented:

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45 Including Durham Police and Crime Commissioner's Office; Professors Julia Quilter and Laurence McNamara; Professor Susan Edwards; Behind the Gown; and RCEW.

46 Including Rachel Snaith, employee of Northumbria Office of the Police and Crime Commissioner; and RCEW.

47 Including the CPS; and JURIES.

48 Solace Women's Aid.

49 CP 259, para 9.97.

50 CP 259, para 9.98.

51 CP 259, para 9.97.

52 Martin Rackstraw; Law Society, LCCSA; the Six Circuits; the Bar Council; Dr Matt Thomason; and Centre for Women's Justice ("CWJ").

53 Dr Matt Thomason; and Martin Rackstraw.

> Requiring judicial approval of all lines of questioning in advance might undermine the legitimate aim of the defence to challenge and undermine the Prosecution case through forensic cross-examination. That is, requiring the defence to disclose their lines of questioning prior to trial could lead to a forensic disadvantage for the defence, because it would reveal to the prosecution what questions the defence is likely to ask during the trial.

11.41 Three consultees argued that while mandatory prior approval is beneficial where there is a vulnerable or young witness, it is not proportionate to extend the requirement to assess lines of questioning in all sexual offences cases.[54] For example, Dr Matt Thomason emphasised that for prior approval for children and vulnerable witnesses, "the pre-approvals are geared towards comprehension, not content".

11.42 Consultees suggested that mandatory pre-trial approval is not needed as lines of questioning can already be discussed prior to trial, without the need for mandatory pre-trial approval. They argued that the existing approach allows for flexibility to respond to the needs of each individual case.[55] Consultees were also concerned that requiring prior approval may lead to unacceptable delay and costs to the criminal justice system.[56] For example, the CWJ stated it did not support this approach because of:

> The existing lack of capacity in the criminal justice system as a whole, and among defence advocates in particular, as well as the fact that almost inevitably additional lines of questioning might arise shortly before the trial, rendering the process less useful.

11.43 Finally, one academic stakeholder suggested that it is possible that considering broad lines of questioning prior to trial may only restrict the "low-hanging fruit". This reference to "low-hanging fruit" emphasises the concern that a mandatory approach will have limited practical value given the difficulties in identifying when a line of questioning is reliant on a myth or misconception.

11.44 In *Dinc*, the Court of Appeal Criminal Division ("CACD") held that judicial control of cross-examination and requiring a list of questions in advance of trial for vulnerable witnesses "is not inherently unfair and in fact, may ensure that cross-examination is more focused and effective".[57] The overarching objective cited in the Criminal Practice Directions ("CrimPD") relating to the treatment of vulnerable witnesses is "to encourage and facilitate the attendance of witnesses"[58] including enabling witnesses to give their best evidence. This includes ensuring the witness can comprehend and respond to questioning.[59] It also includes preventing questions from being asked and considering the treatment of the witness, including the potential for questioning to

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54 Dr Matt Thomason; LCCSA, and the Law Society.

55 The Law Society; LCCSA; the Six Circuits; the Bar Council; and the CBA.

56 The CWJ; and HM Council of Circuit Judges.

57 CP 259, para 13.22, citing *R v Dinc* [2017] EWCA Crim 1206, [2018] Crim LR 263.

58 Criminal Practice Direction 2023 ("CrimPD") (as amended 2024) 6.1.1.

59 CrimPD 2023 (as amended 2024) 6.1.8.

cause them distress.[60] However, as we acknowledge above, this approach is currently only required in limited circumstances where there is a vulnerable witness.

11.45 On balance, we are persuaded by the concerns raised by consultees in relation to requiring prior approval of lines of questioning in all sexual offences cases. We recognise the circumstances in which prior approval is currently mandatory are primarily justified on the basis that it is needed to assist the witness to give their evidence (for example for vulnerable witnesses), or the questioning relates to a specific and prejudicial category of evidence (for example, questioning relating to SBE). These justifications for requiring prior approval of questioning do not apply clearly to assessing the relevance of all lines of questioning in all sexual offences cases. This suggests that a blanket requirement for prior approval of lines of questioning in all sexual offence cases may not be justifiable or proportionate, and that such decisions should instead be approached flexibly.

11.46 Additionally, we are persuaded that there is a risk that mandatory prior approval of lines of questioning may only limit questions which exclusively rely on myths or misconceptions (that is, the "low-hanging fruit"). If mandatory prior approval of lines of questioning offers limited value by only restricting evidence that would likely be restricted by the courts regardless, the potential financial and time burden on the courts is not justified.

11.47 Early identification of issues and restricting irrelevant lines of questioning is still of vital importance. However, we agree with consultees that a more flexible approach to examining lines of questioning, rather than a mandatory approach, is preferable. This aligns with the views of the Bar Council, which advised:

> If there is a concern at the Bar that a particular line of questioning may cross a line, then it would be helpful (both to the questioner and the witness) for it to be canvassed in advance with the trial judge. However, it may be that counsel can be trusted to examine appropriately, with the practical sanction for crossing a line being interruption from their opponent / the judge and a direction to the jury that a particular line of questioning was inappropriate. A light touch rather than a fixed rule may be most appropriate.

11.48 We acknowledge the concerns expressed by some consultees that some advocates may not examine the relevance of their lines of questioning robustly, resulting in irrelevant lines of questioning. While these observations indicate that judicial oversight is always required, we are persuaded that, when used effectively, existing approaches to case management are sufficient. Judges may already interrogate lines of questioning flexibly and intervene during trial where required. We consider the instigation of early discussion of potential issues and lines of questioning by judges prior to trial to be a flexible approach that can be applied appropriately at the court's discretion. This is discussed further below at paragraphs 11.113 to 11.118.

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[60] CrimPD 2023 (as amended 2024) 6.1.8; The Advocate's Gateway *Toolkit 1: Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court* (2024).

Admissibility of personal records and lines of questioning

11.49 In her response to the consultation questions relating to personal records, Dr Kyneswood suggested that there should be judicial oversight of lines of questioning which are based on third party records, or where those records are re-produced in agreed facts. Further, she suggested that "questioning on directly relevant counselling records could be written out prior to cross-examination to ensure that questioning is precise and unlikely to reveal other sensitive or personal information and appropriate".[61]

11.50 We are not convinced that this is necessary or justified, particularly in light of our other recommendations. First, as we explain in Chapter 2, the information contained in personal records may have greater probative value and less prejudicial potential than other more inherently problematic categories of material. Prior judicial approval of lines of questioning based on third party material ("TPM") would be inappropriate and too onerous. Secondly, where there has been a judicial determination regarding a request for production, this ruling will provide guidance to parties regarding their decision making and their conduct of later stages of the case (and will develop a body of good practice for other cases). Thirdly, where evidence which meets the access and production threshold is also SBE, BCE or CICE, it will be further scrutinised by the judge for admissibility using an enhanced relevance threshold and where applicable, will require prior approval of lines of questioning.

THE ROLE OF THE PARTIES

The prosecution

11.51 In sexual offences cases the prosecution plays a critical role in combating the introduction and perpetuation of myths and misconceptions. They must vigilantly identify and respond to myths and misconceptions, both within their own arguments, and when myths or misconceptions are introduced by defence advocates. This responsibility is part of the prosecution's broader duty to "ensure that the law is properly applied, that relevant evidence is put before the court and that obligations of disclosure are complied with".[62]

11.52 In line with this responsibility, the role of the prosecution is reinforced by established legal guidelines. An example is the Crown Prosecution Service ("CPS") guidance on responding to myths and misconceptions in court, which includes guidance on identifying and countering rape myths.[63] The Prosecutors' Pledge also affirms that prosecutors must protect victims from irrelevant or unwarranted attacks on their character and "may seek the court's intervention where cross-examination is considered to be inappropriate or oppressive".[64]

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61 Response to CQs 5 and 12.

62 CPS, *The Code for Crown Prosecutors* (October 2018), para 2.5.

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

64 CPS, *Victims and Witnesses: CPS Public Policy Statement on the Delivery of Services to Victims - The Prosecutors' Pledge*, (23 January 2018).

11.53 However, as we acknowledged in the consultation paper, there may be a reluctance among some prosecutors to intervene during cross-examination, particularly when they fear it might affect the jury's perceptions and/or jeopardise the trial.[65] In the consultation paper we canvassed the literature that examines myths and misconceptions and suggests there may be "missed opportunities"[66] by prosecutors in responding to these myths. For example, trial observations conducted by Professor Jennifer Temkin and others reported examples where the prosecution appeared to fail in challenging misconceptions during sexual offences prosecutions.[67]

11.54 A 2023 report on improving CPS responses to rape complaints and complainants also considered the role of prosecutors at various stages of sexual offences cases.[68] This research included analysis of the ways in which myths and misconceptions may arise, including through pre-trial CPS decision-making, the development and articulation of trial strategy, and their engagement with barristers. The authors suggested that increased courtroom attendance by CPS solicitors could help to improve the skills and knowledge of CPS solicitors, including their understanding of "approaches to disavowing jurors of potential myths and stereotypes".[69]

11.55 Advocates appearing for the prosecution must take a balanced approach when responding to the introduction of myths during trial and should exercise their discretion on the appropriateness of interventions on a case-by-case basis. Equally, they must remain mindful of responding to myths and misconceptions, including by:

(1) having awareness of when the jury is likely to be influenced by myths and misconceptions;

(2) inviting the court's intervention when inappropriate lines of questioning are pursued; and

(3) assisting the court when it is determining proper directions. This may include inviting the court to make particular directions to the jury when the circumstances require it.

11.56 Our intention in highlighting this information is to emphasise the significant role that the prosecution have in robustly protecting the trial process from reliance on myths and misconceptions, impermissible reasoning, and deliberately humiliating treatment of the complainant. The prosecution should respond to the introduction of myths or misconceptions to ensure that the trial process is fair, that only relevant evidence is

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65 CP 259, paras 8.35-8.36.

66 CP 259, para 9.38, citing J Temkin, J Gray and J Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 *Feminist Criminology* 205. See also, O Smith and T Skinner, "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441.

67 J Temkin, J Gray and J Barrett, "Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study" (2018) 13 *Feminist Criminology* 205, 212.

68 A King, V Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants,* (December 2023).

69 A King, V Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants,* (December 2023), p 121.

adduced, and that complainants are treated humanely and encouraged to give their best evidence.

The defence

11.57 In criminal cases, defence advocates test the prosecution's case and make arguments on behalf of the defendant. This includes conducting cross-examination of prosecution witnesses and making closing speeches. A defence advocate will represent their client's interests at the trial, including ensuring the defendant receives a fair trial. In sexual offences prosecutions the defence advocate's role also requires careful navigation of the sensitive and complex issues that can arise in such cases.

11.58 All barristers[70] must "observe their duty to the court in the administration of justice".[71] This primary duty under the BSB Code includes the obligation not to mislead the court, for example, by knowingly presenting false representations or submissions, or asking misleading questions.[72] Barristers must also not abuse their role by making statements or ask questions merely to insult, humiliate or annoy a witness or any other person.[73] A barrister's duty to act in the best interests of their client is always subject to their duty to the court.[74] This means that a barrister's dedicated advocacy on behalf of a client must be balanced by their paramount professional duty to the court.

11.59 These obligations should be well-known and carefully adhered to by all barristers. This is important in all trials, including sexual offences prosecutions in which a barrister's approach to cross-examination or presenting their case may risk introducing myths and misconceptions to the jury. We discuss the ramifications of deliberate breaches of the duties under the BSB Code below at paragraphs 11.81 to 11.87.

MANDATORY TRAINING

11.60 Training for legal practitioners[75] on myths and misconceptions can improve awareness of how they can influence sexual offences cases and highlight the responsibility practitioners have to minimise their impact. Providing this training to all legal practitioners in sexual offences cases would equip practitioners with the necessary tools to perform their duties effectively. Mandatory training would increase the number of legal practitioners with the requisite knowledge of the specific risks that myths and misconceptions pose.

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70 In this chapter we use the term "barristers" when referring to legal practitioners who are subject to the obligations under the BSB Code of Conduct. Otherwise, we use "advocates" to refer to barristers and solicitor advocates who appear as litigators at trial. See, Bar Standards Board, *BSB Handbook*, (December 2020), Part 1, Introduction, I6.

71 Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct, C1.

72 Above, Part 2, Code of Conduct rC3 and rC6.

73 Above, Part 2, Code of Conduct rC7.

74 Above, Part 2, Code of Conduct rC3 and rC4.

75 The term "legal practitioners" in this section is used to refer to both solicitors and barristers.

11.61 In the consultation paper we acknowledged that many advocates who appear in sexual offences trials will already have had training on myths and misconceptions.[76] For advocates who prosecute, the selection process for the CPS Rape and Serious Sexual Offences ("RASSO") Advocate Panel requires advocates to demonstrate competencies and knowledge of rape myths and stereotypes.[77] CPS solicitor training also includes a session on "dispelling myths and stereotypes".[78]

11.62 Defence practitioners are not required to undergo training on myths and misconceptions prior to undertaking sexual offences cases. Some barristers will have received relevant training on myths and misconceptions if they are a CPS RASSO Advocate. However, there is no formal requirement for defence solicitors who work on sexual offences cases to undertake training on myths and misconceptions.

11.63 To address the training discrepancy amongst practitioners, a requirement to obtain training could specifically target those practitioners who work on sexual offences cases[79] and have not already received training on myths and misconceptions. Accordingly, practitioners who can demonstrate that they have previously undertaken equivalent training in the relevant competencies would not need to obtain further training.

11.64 Mandatory training could focus on educating legal practitioners to identify myths and misconceptions and recognise their own role in reducing the impact of these myths on trials. The training should align with the broader goal of ensuring that legal practitioners possess the necessary competencies to work on sexual offences cases, including the ability to identify myths and misconceptions.

Consultation responses

11.65 We received significant support[80] from consultees in relation to introducing mandatory training on myths and misconceptions for legal practitioners who work on sexual offences cases.[81] This included support from members of the judiciary[82] and legal professionals.[83]

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76 CP 259, para 9.8.

77 CP 259, para 9.8 citing CPS, *Selection Criteria: The Rape and Serious Sexual Offences List* ('the RASSO List') (June 2021).

78 The authors of the CPS Responses to Rape Report comment on some of the limitations of this training and concluded "more robust and ambitious induction training should be considered, along with a clear regime of continuing professional development and refresher training for all colleagues, sitting alongside internal mentoring and quality review processes". A King, V Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants*, (December 2023), p 115.

79 In Ch 1, para 1.26 we explain what we mean when we refer to "sexual offences" in this report.

80 Out of 102 responses, 81 consultees agreed; 13 disagreed; 9 submitted a response categorised as "other".

81 CQ 75: "Should it be mandatory for practitioners to undergo training on myths and misconceptions in order to work on sexual offences cases". CP 259, para 9.26.

82 Including three Circuit Judges and HM Council of Circuit Judges.

83 Including the CPS; the LCCSA; and Behind the Gown.

11.66 Consultees who responded positively to this suggestion emphasised the following benefits of introducing mandatory training on myths and misconceptions:

(1) Training can be used to challenge pre-existing myths and misconceptions and reduce any gaps in the knowledge or understanding of legal professionals about myths and misconceptions.[84] For example, the CPS commented that training can be valuable "in improving knowledge and changing the culture".

(2) Training would encourage consistency by ensuring both practitioners acting for the prosecution and practitioners acting for the defence in sexual offences cases receive mandatory training.[85] For example, the LCCSA stated "it is difficult to justify such training being voluntary for defence practitioners, but mandatory for Judges and prosecutors".

11.67 These reasons align with the justifications we presented in the consultation paper and support our conclusion that it would be beneficial to introduce mandatory training for all legal professionals working on sexual offences cases.

11.68 Three consultees[86] and one legal stakeholder suggested that mandatory training is unnecessary because legal practitioners are already able to obtain training on myths and misconceptions. For example, a response submitted on behalf of the Six Circuits contended that the continuing professional development ("CPD") obligations already provide an opportunity for advocates to obtain training relevant to their practice. Additionally, it said that "defence advocates are already required to satisfy the Court, using the GRH form, of their suitability to act and cross-examine in trials involving vulnerable witnesses". Meanwhile, the CBA highlighted that there is already the opportunity to attend Circuit-wide specialist training and many advocates both prosecute and defend and therefore already receive specialist training.

11.69 These arguments do not address the existing gap between practitioners who receive training and those who do not. While some training relevant to sexual offences cases may already exist for practitioners, it is not clear whether the focus of this training is directed at identifying myths and misconceptions and their impact during trials. We also did not receive evidence about this type of training being offered to defence solicitors. We contend it would be valuable for this type of training to be a requirement to ensure barristers and solicitors are competent to act in sexual offences cases. As noted above, those practitioners who already have the training would not be required to undertake further training.

11.70 Consultees expressed concern that the definition of myths and misconceptions is not sufficiently clear, or they disputed our description of myths and misconceptions in the consultation paper.[87] In this chapter and in Chapter 1, we explain the basis for our conclusion that myths and misconceptions continue to be introduced in sexual offences cases, posing a risk of prejudicially impacting the jury's decision making.

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84 Including Victim Support; Dr Siobhan Weare and Dr Dominic Willmott; and the CPS.

85 Including Dr Natalie Kyneswood; Behind the Gown; and LCCSA.

86 The CBA; the Bar Council and Six Circuits.

87 Including the Bar Council and FACT.

11.71 We conclude that all legal practitioners should obtain training on myths and misconceptions prior to working on sexual offences cases. This training would promote a greater awareness amongst practitioners of the impact of myths and misconceptions in sexual offences cases. Training could also explore the role practitioners can play in reducing reliance on myths and misconceptions and responding if they do arise during trial. An increased awareness of these considerations could enhance the conduct of legal practitioners during sexual offences cases.

11.72 Finally, some consultees suggested that training should be expanded to apply to other court staff[88] and emphasised that there should be additional training on trauma in sexual offences cases.[89] We consider other training for persons involved in sexual offences cases in Chapter 12, where we recommend the introduction of specialist sexual offences courts, which includes a recommendation that specialist training be provided to all staff on the complexities of sexual offences and the impact of trauma on complainants.

Operationalising mandatory training

11.73 The model for implementing mandatory training is an important aspect of this recommendation given concerns that training may place an unreasonable time and financial burden on practitioners.[90] These concerns, which we foreshadowed in the consultation paper,[91] were reiterated by consultees and legal stakeholders. The Six Circuits, the LCCSA and Dr Matt Thomason suggested that this financial burden might deter advocates from working on sexual offences cases, which would strain the criminal justice system.

11.74 We have carefully considered how mandatory training could be implemented in a way that limits the burden on practitioners. We have concluded that the most proportionate and effective way to operationalise mandatory training would be to require barristers and solicitors to affirm that they have the relevant knowledge and training on myths and misconceptions in order to prove their competence to undertake work in sexual offences cases.

11.75 This is analogous to the requirement for advocates working with vulnerable witnesses to undertake training.[92] Advocates who work with children or vulnerable witness are required to obtain training in order to affirm they are competent to act in these cases.[93] The court has described a failure to obtain this competency as a "serious dereliction of duty to the court, quite apart from a breach of professional duty".[94] Therefore,

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88 Including EVAW; Simon Foster (West Midlands Police and Crime Commissioner); and Sarah Bowditch.

89 Including Refuge; RCEW; Dr Kyneswood.

90 Including the Law Society; the Six Circuits; LCCSA; and Kate Goold.

91 CP 259, paras 9.19-9.22.

92 See The Inns of Court College of Advocacy, *Advocacy for Vulnerable People and Children (Crime)*.

93 CP 259, para 9.11.

94 *R v Rashid (Yahya)* [2017] EWCA Crim 2, [2017] 1 WLR 2449 (Lord Thomas CJ at [81]). In *Grant-Murray; Henry; Hewitt; Hewitt* [2017] EWCA Crim 1228, Lord Thomas CJ at [226] added: "It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training".

although the Advocacy and the Vulnerable training is not explicitly mandatory, it effectively creates a requirement for advocates to be properly trained before engaging with vulnerable witnesses.[95]

11.76 The enhanced training and information on advocacy and vulnerable witnesses provided to advocates has been commended as a "catalyst for change".[96] A recent study on cross-examination in criminal trials reported that responses from barristers included comments that the toolkits in the Advocate's Gateway are "particularly important in England and Wales, Scotland and Northern Ireland in raising awareness of the changes needed".[97] These toolkits were developed to assist advocates to meet their competency requirement in relation to cross-examination of vulnerable witnesses. During our consultation we also received positive feedback from legal stakeholders about the toolkits and training for advocates working with vulnerable witnesses.

11.77 We believe this approach strikes the most appropriate balance, requiring practitioners to ensure they meet the relevant competency with minimal administrative burdens. This is distinct from making the training a requirement for maintaining a practising certificate (such as the CPD obligations), although some practitioners may use this training to support the completion of their competency requirements.[98] We conclude that using these obligations is not suitable because:

(1) it could be onerous for individual practitioners and firms to ensure the CPD requirement is met and would be onerous for the regulating bodies; and

(2) such a requirement would not be consistent with the existing CPD obligations, which are inherently broad in nature given they are intended to apply to all barristers and solicitors, not only those who work on sexual offences cases.

11.78 The court currently assists in enforcing the competency requirement for advocates working with vulnerable or child witnesses by making enquiries with advocates to ensure they are competent.[99] A similar approach could be taken for mandatory training on myths and misconceptions. One way of checking that the training competency has been met could be to require practitioners in sexual offences cases to declare that they have received training on myths and misconceptions. This process could be facilitated through an amendment to the Plea and Trial Preparation Hearing ("PTPH") form, enabling both barristers and solicitors to affirm that they meet this requirement prior to trial.[100]

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95 Another similar example is the requirement for barristers to declare to the BSB that they meet the Youth Proceedings Competence if they intend to undertake work in the youth court. Bar Standards Board, *BSB Handbook*, (December 2020), Part 3: Scope of Practice, Authorisation and Licensing Rules, rS59.6.

96 J Jackson, et al, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (2024) p 112.

97 Above, p 112.

98 See Solicitors Regulation Authority, *Reflecting and identifying your competence requirements*; Bar Standards Board, *Continuing Professional Development*.

99 CP 259, para 9.11.

100 A legal stakeholder suggested we consider whether all duty solicitors including those representing suspects at the police station should be required to undergo the mandatory training on myths and misconceptions

11.79 We recognise there are likely to be some financial and time costs associated with attending training in order for a practitioner to ensure they meet this competency. However, this burden does not substantially outweigh the value of ensuring all practitioners acting in sexual offences cases have received training on the risks of myths and misconceptions. Additionally, as we highlighted above, many practitioners will already have obtained training on myths and misconceptions, and consequently the number of practitioners who will be impacted by the burden of mandatory training will be limited.

Recommendation 63.

11.80 We recommend that legal practitioners should be required to undertake training on myths and misconceptions in order to work on sexual offences cases.

PROFESSIONAL MISCONDUCT CONSEQUENCES

11.81 The deliberate use of myths and misconceptions by barristers in sexual offences prosecutions may increase the risk that the jury will be influenced by myths in their decision making, and may cause significant distress to complainants.[101] This type of conduct is antithetical to barristers' obligation to act in the interests of justice.[102] In the consultation paper, we suggested this type of conduct could be reduced by strengthening disincentives against deliberately introducing or perpetuating myths and misconceptions. We considered whether this could be achieved by clarifying the professional misconduct consequences that barristers may face as a result of deliberate reliance on myths or misconceptions.[103]

11.82 The BSB Handbook is a central part of the regulatory framework governing barristers.[104] It includes the BSB Code which contains the Core Duties that barristers must adhere to and Rules, which supplement the Core Duties by providing more specific, enforceable requirements. The Rules are designed to support and operationalise the Core Duties; the BSB also publishes guidance to help interpret the Core Duties and Rules, offering examples and context.[105]

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given they may be required to act in sexual offences cases. As we explain in this chapter, we think this requirement should apply to any solicitor who is acting in a sexual offence case, for either the defence or prosecution. It would be the responsibility of individual practitioners to ensure they have received the relevant training prior to undertaking to act in a sexual offence case.

101 This section addresses professional misconduct consequences for barristers only. The conduct of barristers has the most significant potential to influence the introduction or reliance on myths and misconceptions during trials. We recognise the conduct of solicitors, including solicitors appearing as advocates, may also contribute to the reliance on myths and misconceptions at trial. Solicitors are regulated by the Solicitors Regulation Authority. See comments at CP 259, paras 9.129-9.131

102 Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct, CD1.

103 CP 259, para 9.129.

104 Bar Standards Board, *BSB Handbook*, (December 2020), Part 1, Introduction.

105 Bar Standards Board, *Code Guidance*.

11.83 As discussed at paragraph 11.58, under the BSB Code barristers have a paramount duty to the court in the administration of justice; this includes the obligation not to mislead the court and to act with integrity and honesty.[106] The BSB has the power to investigate alleged breaches of the BSB Code and impose sanctions on barristers when breaches are found.[107] In the consultation paper we explained that a barrister who deliberately relies on myths and misconceptions may be in breach of the existing professional obligations to the court under the BSB Code.[108]

11.84 A representative at the BSB advised us prior to consultation that if a barrister disregards a clear direction from a judge, it could constitute a breach of their Core Duties under the BSB Code.[109] For example, a judge may direct a barrister not to pursue an irrelevant line of questioning that relies on myths and misconceptions. If a barrister deliberately ignores this direction and continues with the same line of questioning, they may be in breach of their professional duties. The BSB suggested to us that clarity in the BSB Code in relation to reliance on myths and misconceptions "would make it easier for the BSB to decide on breaches in specific factual circumstances".[110] In a subsequent discussion with representatives from the BSB, we were told that explicit clarification about the deployment of myths and misconceptions in sexual offences cases could also be achieved through guidance, rather than an amendment to the BSB Code. They suggested that generally the Core Duties and Rules in the BSB Code are principle-based statements of a barrister's obligations, while explanation of how particular conduct might breach those obligations in particular circumstances can be explained through guidance.

11.85 In the consultation paper, we asked consultees whether the BSB should consider amending the BSB Code to clarify the existing rules governing consequences for barristers who breach their professional obligations. Specifically, we asked whether:

(1) the BSB should consider making explicit reference in the BSB Code to the potential for professional misconduct consequences to arise from reliance on myths and misconceptions in sexual offences cases;[111] and

(2) the BSB should consider explicitly stating in the BSB Code that generalisations relying on myths and misconceptions about sexual offences in barristers' speeches are prohibited as they constitute a breach of the duty not to mislead the court. These generalisations include:

(a) suggesting that complainants as a class are unreliable witnesses;

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106 Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct, CD1, CD3 and rC6.

107 Above, Part 5, Enforcement Regulations.

108 Above, Part 2, Code of Conduct, CD1, CD3 and rC6.

109 We were advised this could involve breaches of the following duties: Core Duty 1 – You must observe your duty to the court in the administration of justice; Core Duty 3 – You must act with honesty, and with integrity (integrity only); and/or Core Duty 5 – You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession. Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct.

110 CP 259, para 9.134.

111 CQ 81, CP 259, para 9.145.

(b) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

(c) suggesting that delayed reporting, in itself, makes complainants less credible.[112]

11.86 The first amendment would specify that there is a risk that any deliberate reliance on myths or misconceptions could amount to a breach of professional obligations under the BSB Code. Meanwhile, the second amendment would clarify that certain generalisations are prohibited as they amount to a breach of an existing duty not to mislead the court. The second amendment is confined to barristers' speeches given the relevance threshold should already restrict the use of generalisations introduced through lines of questioning, alongside the effective use of case management powers.[113] Despite the focus of this amendment on speeches, we emphasise that generalisations which rely on myths should also not be deployed by barristers at any stage of the trial.

11.87 In considering potential professional misconduct consequences, we recognise there is existing pressure on barristers undertaking sexual offences cases and this pressure, along with the complexity of sexual offences cases, may lead barristers to rely inadvertently on myths or misconceptions.[114] In the consultation paper we acknowledged that "there is a risk that the threat of disciplinary sanction may cause fewer advocates to accept instructions to act in sexual offences cases".[115] The consideration or professional misconduct consequences in this section is targeted towards *deliberate* reliance on myths and misconceptions in sexual offences cases.

Consultation responses

11.88 Consultees' responses to the two proposed amendments were overlapping and so we address them collectively.

11.89 The majority of consultees supported the suggested amendments.[116] The main themes from the supportive responses included the following:

(1) Four consultees echoed our suggestion that clarifying professional misconduct consequences will disincentivise the misconduct.[117] The CWJ, for example, thought that "potential misconduct implications may be effective in encouraging defence advocates to change the way they practice".

(2) Three consultees emphasised the value of providing greater clarity and transparency by identifying the conduct which may amount to a breach of the

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112 CQ 82, CP 259 para 9.150.

113 CP 259, para 9.149.

114 This is also noted at CP 259, para 9.129

115 CP 259, para 9.142.

116 For CQ81: Out of 29 responses, 18 consultees agreed; 8 disagreed and 3 were responses categorised as "other". For CQ82: Out of 27 responses, 15 consultees agreed; 11 disagreed and 1 were responses categorised as "other".

117 CWJ; Tricia O'Sullivan; JURIES; and nia.

BSB Code.[118] On this point, the CPS suggested that while it can already be argued that "rape myth deployment in the court room infringes existing codes of conduct", it would be beneficial for the BSB to remove any doubt "about the scope of their codes by making an explicit reference to the potential for disciplinary proceedings if the practice is pursued".

(3) Two consultees suggested that there is a public benefit to clarifying the professional obligations of barristers.[119] The CPS stated that "prohibiting generalisations within the Code of Conduct would carry a strong signalling function that they have no place in sexual offences trials". nia (a service provider for women and girls who have been victims of sexual violence) also stated that this approach will encourage accountability and improve public confidence.

Prevalence

11.90 In response to these questions, three consultees emphasised that, in their experience, barristers rarely or never deliberately rely on myths or misconceptions or make generalisations in the way we suggested in the consultation paper.[120]

11.91 In our view, it is possible that deliberate reliance on myths and misconceptions occurs occasionally. We do however acknowledge that it is not possible to know how often this occurs. Our consideration of these amendments, however, was not based on the prevalence of the conduct. As we explain above at paragraph 11.84 the conduct targeted by the suggested amendments may already amount to professional misconduct. We suggest this could be clarified through amending the BSB Code to state directly that this conduct may amount to professional misconduct and ensure this is clearly communicated to barristers and the public.

Impact on number of barristers

11.92 Some consultees who opposed the suggestion to amend the BSB Code expressed significant concern that the changes could cause barristers to be less willing to accept cases involving sexual offences due to the threat of professional misconduct consequences. Four consultees emphasised there is already significant pressure on barristers working in the criminal justice system, and the threat of professional misconduct consequences could lead to a further decline in the number of barristers willing to undertake sexual offences cases.[121] This was echoed by a Circuit Judge who stated that they do not think barristers are acting deliberately and advised:

> I do not think [professional misconduct consequences] would help at all, as the problem is [that] it isn't deliberate… You would just have more and more people refusing to do these cases.

11.93 We explained in our consultation paper how the pressures of a trial can occasionally cause barristers to ask questions or pursue arguments that unintentionally introduce

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118 The CPS; JURIS; and nia.

119 The CPS; and nia.

120 Martin Rackstraw; the Six Circuits; and the CBA.

121 The Six Circuits; Martin Rackstraw; LCCSA; and the CBA.

myths or misconceptions to the jury.[122] The suggested amendments are not intended to apply to barristers who inadvertently act in this way. We agree that an approach that captures inadvertent conduct would risk alienating barristers who may be fearful that accidental conduct could lead to a breach of their professional duties, which could deter them from undertaking sexual offences cases altogether.

11.94 However, there should be a clear obligation on barristers not to rely intentionally on myths or misconceptions in sexual offences prosecutions. The amendments suggested are directed towards *deliberate* reliance on myths or misconceptions.[123] Barristers will not face professional misconduct consequences for inadvertently introducing myths or misconceptions during questioning or speeches.

11.95 As we have highlighted, this type of deliberate conduct may already lead to professional misconduct consequences under the existing BSB Code. Accordingly, the objective of the amendments is to clarify the potential consequences of a breach of a barrister's current professional duties. This may also facilitate appropriate responses by the BSB.

Risk of limiting the defendant's ability to present their case

11.96 Some consultees were concerned the amendments to the BSB Code could lead barristers to avoid certain arguments that may be perceived to relate to myths or misconceptions but are also important for their case or reflect their client's instructions.[124] For example, Dr Matt Thomason suggested that barristers should not be "prevented from running defences which themselves appear to rely on myths/misconceptions".

11.97 We highlight that a barrister's duty to act in the best interests of their client[125] is always subject to their overriding duty to the court and their obligations to act with honesty, and with integrity and to maintain their independence.[126] We recognise that there may be circumstances where a client's instructions appear to promote an argument which relies on a myth or misconception, but there is an evidential basis for the argument, and it is therefore not reliant on a myth or misconception.[127] A barrister's decision to pursue that argument during questioning or opening/closing speeches would not be a breach of the barrister's professional duties. If a barrister pursues an argument or question in line with their client's instructions that is purely a generalisation or reliant on a myth, they may be at risk of professional misconduct consequences for misleading the court.

11.98 If the amendments are made, it will be the responsibility of the BSB to exercise its investigative functions and consider potential breaches of the BSB Code based on the facts before it. It would need to distinguish when barristers are deliberately relying on

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122 CP 259, para 9.129.

123 CP 259, para 9.129.

124 The CBA; Matt Thomason; and Cardiff University Law School Innocence Project.

125 Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct, CD2.

126 Bar Standards Board, *BSB Handbook*, (December 2020), Part 2, Code of Conduct, CD1, CD3, CD4, and RC16.

127 See discussion of distinguishing myths and misconceptions at CP 259, paras 9.67-9.70.

myths or misconceptions to the extent that such reliance amounts to a breach of their professional obligations. The boundaries of a barrister's professional obligations in these circumstances could be made clear through the amendments to the BSB Code, and/or relevant BSB guidance to assist barristers in interpreting their obligations.

Importance of clarity and guidance for the profession

11.99 Some consultees were also concerned that the term "reliance on myths and misconceptions" may be ambiguous or unclear.[128] Without a clear definition it could be difficult for any professional misconduct consequences to be enforced and for barristers to be confident they are not breaching their professional obligations when acting in sexual offences cases.

11.100 In our view, this concern can be alleviated by providing clear guidance for practitioners. The amendments to the BSB Code should be communicated clearly and transparently so that barristers are aware of their obligations and what behaviour may constitute a breach. There are examples where the BSB has issued guidance to assist barristers to comply with their obligations under the BSB Handbook.[129] This includes providing resources for barristers practising in youth proceedings to assist these barristers to meet their professional competencies.[130]

11.101 Similarly, the BSB could provide guidance in addition to, or instead of, amendments to the BSB Code, to specify what type of conduct may constitute deliberate reliance on myths or misconceptions for the purpose of a breach of the Code. The BSB can assess whether guidance alone is the most appropriate means of clarifying potential misconduct consequences and determining the content and detail of such guidance.

Example generalisations

11.102 In the consultation paper we suggested the following examples could form part of the amendments to the BSB Code, clarifying that the deliberate deployment of generalisations is prohibited where they are used to mislead the court:

(1) suggesting that complainants as a class are unreliable witnesses ("example 1");

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses ("example 2"); or

(3) suggesting that delayed reporting, in itself, makes complainants less credible ("example 3").

11.103 We argued that these are examples of generalisations that could be deployed to impermissibly mislead the jury and should therefore be expressly prohibited.[131] The prohibition is intended to respond to cases of deliberate and clearly discernible generalisations that rely on myths or misconceptions. The first example is a

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128 The Law Society; Andrew Wilkins; and the Bar Council.

129 Bar Standards Board, *Code Guidance*.

130 Bar Standards Board, *Resources for barristers practising in youth proceedings*.

131 CP 259, para 9.146.

generalisation that has been expressly prohibited in other jurisdictions[132] and restricted in England and Wales.[133] The second example is related to the first, however it suggests that a complainant's evidence may require greater scrutiny than other witnesses because they are the complainant in a sexual offences case. The final example is influenced by the misconception that complainants in sexual offences cases who delay in making a complaint lack credibility. In the consultation paper we highlighted literature and stakeholders' feedback, suggesting that this generalisation is relied on in sexual offences prosecutions.[134] We noted that in Victoria, judges are expressly restricted from suggesting to the jury that "complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants".[135]

11.104 Some consultees raised concerns with these examples.[136] Consultees stated that in their experience, barristers do not regularly make the generalisation in example 1.[137] Consultees also contended that example 2 is problematic because a complainant's evidence will occasionally require greater scrutiny than other witnesses, depending on the facts of the case.[138] Some consultees suggested that example 3 is not suitable because there may be circumstances in which it is appropriate for the defence to rely on delay as being relevant to credibility, and there are already adequate example directions addressing delay.[139] In light of this, there is a concern that expressly including a regulatory prohibition for a nuanced topic like delay may be inappropriate given the challenges in assessing the fine distinction between permissible questioning about a complainant who delayed in reporting a complaint and impermissible arguments about the credibility of complainants *generally* who delay in reporting.

11.105 We are persuaded that it is not necessary to include examples of generalisations in our recommendation to the BSB. We recognise the concerns that the examples may be interpreted as lacking the necessary nuance to describe impermissible generalisations and may be perceived as not reflecting behaviour that should amount to professional misconduct.

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132 For example, in Victoria, New South Wales, and Queensland there are restrictions on suggesting that complainants as a class are unreliable witnesses. See, CP 259, paras 9.117-9.122.

133 In England and Wales, the previous common law requirement to caution juries about convicting based on the uncorroborated evidence of a complainant was abolished by statute in 1994. However, the CACD in *Makanjuola* [1995] 1 WLR 1348 clarified that judges may still warn juries about the potential unreliability of the complainant's evidence if there is an evidential basis on which to question the complainant's credibility. CP 259, para 9.123.

134 CP 259, para 9.31; A Williams, *Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials*, University of the West of England PhD thesis (2020); J Quilter, L McNamara and M Porter, "The most persistent rape myth? A qualitative study of 'delay' in complaint in Victorian rape trials" (2023) 35 *Current Issues in Criminal Justice* 4.

135 Jury Directions Act 2015 (Vic), s 51.

136 Including Dr Matt Thomason; Bar Council; and Martin Rackstraw.

137 Martin Rackstraw; Richard English; Cardiff University Law School Innocence Project; the Bar Council; and West Mercia Police.

138 Martin Rackstraw; the Bar Council; the CBA; and Dr Matt Thomason.

139 Martin Rackstraw; the Bar Council; the CBA; and Dr Matt Thomason.

11.106 Guidance as to which generalisations may amount to a breach and how to identify a generalisation based on a myth is most appropriately developed by the BSB, if it decides to implement the recommendation. As we emphasise above at paragraphs 11.98 to 11.101, it is important that amendments to the BSB Code be accompanied by clear guidance to provide confidence and clarity for barristers in relation to their professional obligations.

Conclusion

11.107 We conclude that the BSB should consider amending the BSB Code and/or developing guidance to clarify that:

(1) barristers who deliberately rely on myths and misconceptions may be in breach of their professional obligations; and

(2) barristers are prohibited from using generalisations that perpetuate myths in their speeches as this conduct breaches the barrister's duty not to mislead the court.

11.108 In our view these amendments would clarify the existing professional obligations under the BSB Code and disincentivise barristers who deliberately engage in this conduct. The amendments should inform both barristers and the public that deliberate reliance on myths or misconceptions is unacceptable conduct that has tangible consequences.

11.109 These amendments are not intended to capture inadvertent reliance on myths or misconceptions in the course of pursuing proper arguments or lines of questioning. Such conduct should be dealt with via other case management tools, such as judicial intervention or directions, as appropriate. These tools are discussed below.

Recommendation 64.

11.110 We recommend that the Bar Standards Board should consider amending its Code of Conduct and/or introducing guidance to:

(1) make explicit reference to the potential for professional misconduct consequences to arise from reliance on myths or misconceptions in sexual offences cases; and

(2) state explicitly that generalisations relying on myths or misconceptions about sexual offences in barristers' speeches are prohibited as they constitute a breach of the duty not to mislead the court.

THE ROLE OF THE COURT

11.111 The overriding objective of the criminal courts is to deal with cases "justly".[140] In order to give effect to this objective, judges have a proactive duty of case management to

[140] Criminal Procedure Rules 2020 ("CrimPR"), r 1.1.

manage proceedings in the interests of justice, ensuring that the case is conducted fairly and in accordance with the law.[141] Judges should use their case management powers to ensure that the trial remains focused on the relevant facts of the case and to prevent the introduction of irrelevant evidence and questioning, including the introduction of myths and misconceptions in sexual offences prosecutions. A discretionary approach to case management enables the judge to determine the most appropriate intervention where parties have introduced myths or misconceptions or are at risk of doing so.

11.112 The Lady Chief Justice, through the Judicial College, is responsible for judicial training. In the consultation paper we highlighted the developments in training for judges who preside over sexual offences cases. We reiterate our comment in relation to the improvement in training for judges here:

> There have been very substantial moves within the judiciary to ensure that sexual offences cases are managed well by judges who have an understanding of the nature and effects of sexual assault and sexual harm. The Crown Court Compendium provides guidance and example directions that are designed to address myths and misconceptions. There is extensive judicial training. This includes requiring judges to complete specialist training if they are to preside over serious sexual offences cases; they cannot hear such cases unless they are "ticketed" to do so.[142]

Case management approaches to regulate reliance on myths and misconceptions

11.113 Below we explain the main approaches that can be used at the judge's discretion in sexual offences cases to combat myths and misconceptions. We have highlighted these examples as they demonstrate the existing ways in which judges can manage trials both proactively and responsively. While we do not make any specific recommendations in relation to these existing approaches, they inform the guidance which we recommend the Judicial College consider at paragraph 11.172.

Early identification of issues

11.114 Under the Criminal Procedure Rules 2020 ("CrimPR") the court has a duty to ensure "early identification of the real issues".[143] Judges can and should seek to discuss potential issues arising from intended lines of questioning prior to the trial. The judge may wish to identify what topics are likely to be contentious prior to trial. In sexual offences cases this can provide an opportunity to scrutinise whether arguments or lines of questioning are likely to rely solely on myths and misconceptions. Conducting this inquiry prior to trial may avoid unnecessary delays or complications during the trial itself. Discussion of issues and topics to be covered in cross examination will mean that the judge can provide guidance as to their relevance.

11.115 The Six Circuits told us that if a topic or line of questioning that may rely on myths and misconceptions is likely to be raised during trial, "a judge would be entitled to require the advocate to explain its relevance to the issues for the jury to determine".

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141 CrimPR, r 3.2.

142 CP 259, para 1.70.

143 CrimPR r 3.2.

Then, if the advocate has indicated a topic will not be raised during the trial, but they subsequently pursue the topic, "a judge could and should raise the issue immediately and, without a satisfactory reason being given as to why matters have changed, prohibit further questioning on the topic".

11.116 The Crown Court Compendium also highlights the benefit of early identification of issues for the purpose of considering directions and outlining the legal framework for any topic which will be central to the trial.[144]

11.117 One Circuit Judge told us:

> Early identification is helpful, it focuses the mind on directions and speeches, but it is unlikely to end up in rejecting lines of questioning... It is a good idea to ask people to think about it before cross-examination, maybe to identify in the defence case statement anything they would rely on which might trigger a myth, so that counsel has to think about it and the judge can start to think about directions.

11.118 In response to our question about adherence to the relevance threshold,[145] consultees emphasised the value in the early identification of potential lines of questioning.[146] This early identification can be used by judges to assess whether an intended line of questioning is relevant (and therefore admissible), and to assist the judge to determine what directions may be appropriate and to prepare those directions with the assistance of the parties.

11.119 Although we do not recommend mandatory prior approval of lines of questioning, we acknowledge that where it is appropriate or possible, the early discussion of lines of questioning prior to trial is a valuable approach that may flexibly be used by the trial judge. In Chapter 13 we also recommend that there should be a presumption in favour of holding a GRH in every sexual offences case where the complainant is expected to give evidence. This recommendation, amongst other benefits, aims to encourage parties to engage with issues earlier in proceedings.

Directions

11.120 In the consultation paper we explained that directions to the jury are important in mitigating the impact of myths and misconceptions on juror decision-making.[147] Directions may be given in respect of certain myths to counter the risk of jurors relying on misconceptions about evidence or arguments presented during trial. Directions can also have an important regulatory function by deterring advocates from introducing myths in the first place. This is because advocates will be aware that a direction may be used if evidence that relies on myths is adduced to correct any assumptions about that evidence, thereby reducing the impact of the myth relied upon. The LCCSA commented that directions may encourage advocates to "become more cautious

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144 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (April 2025 Update) ("Crown Court Compendium"), 3-6.

145 CQ 78. CP 259, para 9.101.

146 The CPS; JURIES; Rachel Snaith, employee of Northumbria Office of the Police and Crime Commissioner; and Solace Women's Aid.

147 CP 259, paras 10.13-10.16.

about straying into the territory of myths and misconceptions, given the obvious disadvantage of judicial correction of their approach before the jury".

11.121 As we explore in Chapter 11, the Crown Court Compendium already provides example directions that address some of the potential myths and misconceptions that can arise in sexual offences prosecutions.[148] In that chapter, we recommend that the Judicial College consider several additional example directions that could assist judges in formulating appropriate directions in sexual offences prosecutions.

11.122 Additionally, while we do not recommend mandatory split directions or split summing up in Chapter 11, we consider these to be an effective means of enhancing the way directions are communicated to the jury.[149] The Compendium highlights the deterrent effect this may have on advocates who may otherwise seek to introduce arguments or ask questions that rely on myths or misconceptions.[150]

11.123 There is also value in providing written directions to the jury, which is now well recognised as a means of enhancing communication with the jury.[151] Written directions also provide an opportunity for judges to invite advocates to assist in their drafting, which can encourage greater transparency, clarity and precision.[152]

11.124 In the consultation paper, we asked whether the Judicial College should consider recommending that a direction should be given where a line of questioning is deemed irrelevant because it relies on myths.[153] An overwhelming majority of consultees who responded supported the suggestion that the Judicial College consider a direction of this kind.[154]

11.125 If a party has asked an irrelevant question that draws upon a myth, a direction could be used in order to counter the impact of the irrelevant evidence or questioning. Given that questioning or evidence which relies on a myth is inadmissible, it is likely that the judge would advise the jury to disregard the questioning or evidence. Where appropriate, this direction could be accompanied by one of the example directions that target particular myths. We discuss the use of directions to respond to reliance on myths and misconceptions, including new example directions for specific myths in Chapter 10.

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148 *The Crown Court Compendium,* Ch 20.

149 Split directions enable the judge to give directions at any time to assist jurors with their evaluation of the evidence, meaning directions can be given at the outset of the case, immediately before the complainant gives evidence, elsewhere throughout the case, or at the end of the case when summing up.

150 *The Crown Court Compendium,* para 20-5.

151 *The Crown Court Compendium*, ii citing; *Atta-Dankwa* [2018] EWCA Crim 320 and *N* [2019] EWCA Crim 2280.

152 *N* [2019] EWCA Crim 2280 at [18].

153 CQ 78(c): "We invite consultees' views on how the situation can be improved so that the requirement for lines of questioning to be relevant is considered and adhered to in each case. Some possibilities include: … (c) that the Judicial College consider whether a direction should be given where a line of questioning is deemed irrelevant because it relies on myths". CP 259, para 9.101.

154 Out of 12 responses: 11 were positive, 0 were negative and 1 was categorised as "other".

Judicial intervention

11.126 Under the CrimPR, judges have discretion to manage proceedings, including controlling the questioning of witnesses. This is part of their broader role in managing cases to maintain fairness and efficiency, which includes "monitoring the progress of the case and compliance with directions"[155] and "ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way".[156] In *R v Lubemba*, the CACD emphasised that the judge "is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate".[157]

11.127 Lord Justice Auld considered developments in judicial intervention during cross-examination in his 2001 report on the Criminal Courts in England and Wales. He observed that judges and magistrates are more vigilant in using their power to prevent unnecessary or repetitive evidence. He also highlighted that judicial intervention can be a challenging exercise as "often the decision when to intervene is a difficult one, and it is not aided by the developing tension between [the right to a fair trial protected by] Article 6 [of the European Convention on Human Rights], in its focus on due process, and the safety of the conviction".[158]

11.128 Intervention requires a considered approach that accounts for the role of the judge within the adversarial model to ensure the court's independence and neutrality are maintained. Excessive interventions could result in perceptions of judicial bias amongst jurors and potentially lead to an appeal.[159] Additionally, in some circumstances, intervention may reinforce the problematic or irrelevant question or argument, by emphasising it in front of the jury.[160]

11.129 However, navigating these concerns should not inhibit judges from responding where witnesses are being asked irrelevant, inappropriate or harassing questions. A recent study on cross examination in criminal trials commented positively on the increase in judicial intervention in cross examination, particularly in relation to questioning of vulnerable witnesses:[161]

> The willingness of judges either before or at trial to become involved in policing questions, often with the assistance of intermediaries, was considered to be a crucial catalyst [for changing cross-examination of vulnerable witnesses]. There was

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155 CrimPR, r 3.2(2)(d).

156 CrimPR, r 3.2(2)(E).

157 *R v Lubemba* [2014] EWCA Crim 2064 at [51].

158 Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (September 2001), ch.11 para 34.

159 See *R v Sieudath* [2024] EWCA Crim 489 at [33]-[38].

160 For example, interrupting an advocate to address an impermissible question or an irrelevant argument can unintentionally draw attention to that issue. This can distract the jury from the evidence and relevant issues they should be considering and may give the argument or question undue prominence.

161 Participants in the study consisted of "60 interviewees across six court centres, 21 with judges, 24 with advocates and 15 with intermediaries". The court centres were located in England and Wales, Scotland, Northern Ireland and the Republic of Ireland. J Jackson, et al, *Mapping the Changing Face of Cross-Examination in Criminal Trials*, (2024), p 33.

a consensus that judges had descended into the arena in this respect much more than they used to.[162]

GUIDANCE FOR JUDGES

11.130 In this section, we recommend that the Judicial College consider developing guidance for judges to assist with some of the challenges in responding when myths and misconceptions are introduced in sexual offences prosecutions. Such guidance could be valuable for judges, as well as parties, as a tool to help identify myths and misconceptions and clarify the range of appropriate responses available to the court.

11.131 Guidance for judges can promote consistency, fairness, and transparency within sexual offences prosecutions. When judges are equipped with specific guidance on identifying and responding to myths and misconceptions, they are better positioned to manage the risks and potential impact on the trial. Guidance may also promote efficiency, supporting judges to make decisions more quickly and confidently. Legal practitioners would also benefit from guidance as it could provide greater insight into the considerations that contribute to judicial responses to the introduction of myths and misconceptions. Guidance could also support the integrity of the legal system given clear explanation of how judges respond to myths and misconceptions could contribute to the public's trust in the court's fairness.

Implementation of guidance

11.132 The Judicial College's 2021-2025 Strategy outlines that the College's "overriding objective is to provide training, resources and publications of the highest standard, thereby strengthening the judiciary's capacity to discharge their functions effectively".[163]

11.133 The Judicial College is responsible for publishing the Crown Court Compendium. Part 1 of the Compendium plays a vitally important role in guiding judges specifically in relation to jury directions and jury management. We make a series of recommendations in 8 for the Judicial College to consider, including the introduction of further example directions within the Compendium.

11.134 The guidance we recommend in this section would be separate to the role of the Compendium, as it would be directed specifically to sexual offences trials and would cover issues beyond jury directions and jury management. The New South Wales ("NSW") Sexual Assault Trials Handbook is an example of a resource provided to judges that assists in their management of sexual offences cases through the provision of additional resources.[164] The NSW Judicial Commission developed the Handbook "to provide a practical and academic reference point for judicial officers dealing with sexual offence proceedings".[165] The Handbook is expressly designed to

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162 J Jackson, et al, *Mapping the Changing Face of Cross-Examination in Criminal Trials*, (2024), p 112.

163 Judicial College, *Judicial College Strategy 2021-2025* (2021) p 5.

164 The New South Wales Judicial Commission, *Sexual Assault Trials Handbook.* (December 2024).

165 Above.

be used along with the NSW Criminal Trial Courts Bench Book (which is similar to the Compendium).[166]

Content of guidance

11.135 In the consultation paper, we sought consultees' views on whether guidance would be useful in relation to the following topics:

(1) identifying when lines of questioning may be irrelevant because they rely on myths and misconceptions (CQ78);

(2) ways to respond to generalisations which rely on myths or misconceptions where they are raised in advocates' speeches (CQ79);

(3) warning barristers about the potential for professional misconduct consequences to follow from their reliance on myths and misconceptions in the conduct of a sexual offences case (CQ80); and

(4) warning barristers about the possibility of a wasted costs order where reliance on myths and misconceptions in their conduct of a sexual offences case has caused costs to be wasted (CQ83).

Identifying irrelevant lines of questioning

11.136 As part of our consideration of measures that would assist to improve adherence to the relevance threshold and reduce reliance on myths and misconceptions, we asked consultees for their views on a range of measures to ensure the relevance threshold is adhered to.[167] This question included the following suggested factors to guide the court when assessing relevance of lines of questioning that may rely on myths or misconceptions:[168]

(1) whether the line of questioning constitutes or relies upon a generalisation, unsupported by evidence;

(2) whether the line of questioning will be used to invoke an impermissible stereotype;

(3) whether the line of questioning is based upon a factual conclusion deriving from the evidence in the case; and

(4) whether the potential prejudicial effect of the line of questioning outweighs its potential probative value.

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166 Above.

167 CQ 78: "We invite consultees' views on how the situation can be improved so that the requirement for lines of questioning to be relevant is considered and adhered to in each case. Some possibilities include: (1) codification of the relevance threshold…" CP 259, para 9.101.

168 In the CP we (perhaps unhelpfully) used the word "codification", however our intention was to propose a list of factors that could be used to assist in determining whether a line of questioning relies on a myth or misconception, and is therefore irrelevant and inadmissible. Accordingly, the following analysis relates specifically to the development of non-legislative guidance on the definition of relevance in the context of identifying where evidence may rely on a myth or misconception.

11.137 We suggested these factors could be beneficial "by giving greater prominence to these issues and focusing the minds of advocates and the court", and "could also result in a more consistent application of the threshold".[169]

11.138 A majority of consultees who responded to this question supported our proposed guiding factors relating to the relevance threshold.[170] Consultees emphasised the value of focusing the attention of parties and judges towards factors that may be useful in assessing whether questioning relies on myths and misconceptions.[171] For example, the CPS stated that these factors are "likely to assist in concentrating the minds of practitioners around the importance of questioning and remarks meeting the relevance threshold".

11.139 Conversely, some consultees contended that clarification is not needed because a flexible approach to assessing the relevance of lines of questioning is preferable.[172]

11.140 Others reflected on the challenge of balancing pertinent guidance with ensuring sufficiently flexibility.[173] For example, HM Council of Circuit Judges stated that "the problem with codification is capturing all, or even the majority, of factual scenarios without the codification itself being so general as to be of little use".

11.141 We remain of the view that there is value in providing guidance that can be used by both judges and legal professionals to identify reliance on myths or misconceptions. Some consultees agreed with our commentary in the consultation paper that distinguishing the reliance on myths and misconceptions from permissible lines of questioning is a complex task.[174] In this context, non-legislative guidance may be a helpful tool in approaching this task and enable greater consistency in the approach taken by judges and practitioners. This guidance would not be able to address all potential considerations required to determine the relevance of evidence or questioning, however highlighting particularly pertinent considerations will assist judges and parties in scrutinising whether lines of questioning may risk invoking myths and misconceptions.

11.142 We also received responses on the individual factors for consideration, referenced above at paragraph 1.135. Dr Thomason argued that it is not suitable to include: "whether the potential prejudicial effect of the line of questioning outweighs its potential probative value". He suggested that "weighing probative value and prejudicial effect is a separate exercise to determining whether something is relevant". We agree with this assessment and therefore do not recommend that this factor form part of the guidance.[175]

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169 CP 259, para 9.81.

170 Out of 12 responses, 7 consultees agreed and 5 disagreed.

171 JURIES; and CPS.

172 The Law Society; the LCCSA; HM Council of Circuit Judges; and the Six Circuits.

173 Including HM Council of Circuit Judges and nia.

174 Including the CBA; and the Bar Council.

175 Dr Thomason provided additional criticisms of the other three factors we suggested in the consultation paper. His critiques were premised on the understanding that we suggested in the consultation paper that

11.143 The list of factors is not an exhaustive list of the pertinent considerations for determining relevance, nor will each factor be applicable to every case. However, the list may be a useful aid when assessing the relevance of evidence that may be influenced by myths or misconceptions. For example, questioning which is not based on conclusions that are derived from the evidence in the case is less likely to be relevant given it is less likely to assist in proving or disproving a fact in issue. However, we acknowledge there may circumstances in which it is appropriate to introduce a line of questioning for the purpose of eliciting new evidence that is relevant to a fact in issue.

11.144 Consequently, we suggest the Judicial College consider including the following factors for the guidance to be provided to judges in relation to assessing whether a line of questioning is relevant or is reliant on myths or misconceptions:

(1) whether the line of questioning constitutes or relies upon a generalisation, unsupported by evidence;

(2) whether the line of questioning will be used to invoke an impermissible stereotype; and

(3) whether the line of questioning is based upon a factual conclusion deriving from the evidence in the case.

Responding to generalisations in speeches

11.145 Advocates' opening or closing speeches may also be avenues for introducing or perpetuating myths or misconceptions, in particular by drawing on prohibited generalisations. Guidance on how judges should respond to generalisations could remind both judges and advocates that generalisations in relation to myths or misconceptions encourage a form of prohibited reasoning and should trigger a proportionate response from judges when they arise.[176]

11.146 We asked consultees whether the Judicial College should consider providing guidance to judges on how best to respond to generalisations which rely solely on myths or misconceptions where they are raised in advocates' speeches.[177]

11.147 The generalisations we suggested should be included as examples are:

(1) suggesting that complainants as a class are unreliable witnesses;

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

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these factors should form the basis of a new statutory definition of relevance. As explained at para 11.135, footnote 167, above, our CQ failed to make our intentions clear in this regard.

176 CP 259, para 9.126.

177 CQ 79: "Should the Judicial College consider providing guidance to judges on how best to respond to generalisations which rely on myths or misconceptions where they are raised in counsels' speeches? These generalisations include: (a) suggesting that complainants as a class are unreliable witnesses; (b) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or (c) suggesting that delayed reporting, in itself, makes complainants less credible?" CP 259, para 9.127.

(3) suggesting that delayed reporting, in itself, makes complainants less credible.

11.148 The majority of consultees responded positively to the suggestion that the Judicial College consider providing guidance on responding to generalisations in speeches.[178] Some emphasised the value of such guidance as a tool to explain the appropriate judicial intervention when generalisations are relied upon.[179] The Muslim Women's Network UK supported this guidance because it "will provide the judiciary with a more consistent and unified response" and could limit tactics employed by advocates in their speeches to gain "an unfair advantage". nia commented that guidance will assist judges to be more "confident and proactive" in responding to advocates' conduct.

11.149 The most prominent negative response to this suggestion was that developing guidance of this kind is not necessary because judges already have the tools and training to determine when generalisations are being used and respond appropriately.[180] The Bar Council and Six Circuits both suggested that the Compendium already provides guidance to judges and example directions to apply in response to myths or misconceptions being introduced in this way.

11.150 As we suggested above at paragraph 11.133, this guidance could be developed in addition to the existing content in the Compendium. The content of the guidance could help identify particularly problematic generalisations within the context of sexual offences cases. This could include an explanation of the varied responses that a judge may have in responding to generalisations (which may not solely comprise directions).

11.151 We conclude that guidance on responding to generalisations could be a useful tool for both judges and advocates. We suggest the Judicial College should consider developing appropriate guidance given they are best placed to consider whether the current tools and training are sufficient and to develop the appropriate content.

Example generalisations

11.152 In the consultation paper, we suggested three generalisations should be included as examples of the types of generalisations that rely on myths or misconceptions. These are the same example generalisations we originally suggested should be included in the amendments to the BSB Code. These are:

(1) suggesting that complainants as a class are unreliable witnesses ("example 1");

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses ("example 2"); or

(3) suggesting that delayed reporting, in itself, makes complainants less credible ("example 3").[181]

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[178] Out of 29 responses, 17 consultees agreed; 5 disagreed; 7 submitted a response categorised as other.

[179] Including CWJ; nia; and LCCSA.

[180] The Six Circuits; the Bar Council; and the CBA.

[181] Above at para 11.105, we decided to remove this list of example generalisations from our recommendation to the BSB. The reasons for doing so were specific to our recommendation to the BSB to consider amending

11.153 The first two examples address generalisations that draw upon the misconception that the complainant requires greater scrutiny than any other witness simply *because* they are the complainant in a sexual offences case. The impermissible reasoning involves a generalisation about complainants *as a class*. The first two examples are grouped together in our recommendation below for greater clarity.

11.154 The third example relates to making a generalisation in relation to the credibility of complainants who delay in making a complaint. We recognised in the consultation paper that introducing evidence of delay may be relevant when there is an evidential basis for its relationship to the complainant's credibility.[182] In these circumstances the relevance of the evidence of delay is not reliant on a generalisation and may therefore be permissible. The impermissible generalisation is the suggestion that the complainant's delay in reporting alone demonstrates a lack of credibility.

11.155 We note that three consultees suggested the list of examples should include other types of generalisations.[183] Dr Olivia Smith specifically suggested that guidance on generalisations relating to "mental ill-health" would be particularly helpful. Dr Smith gave the example of a generalisation that a complainant is less credible simply because they have been diagnosed with depression.

11.156 We do not have sufficient evidence to make a recommendation about explicitly including further examples in our list of generalisations. However, the examples provided are not intended to capture all circumstances which should trigger judicial intervention. The Judicial College may wish to consider clarifying the types of generalisations that it considers are most pertinent and explain how they should be appropriately dealt with by the trial judge.

Warning about professional misconduct consequences

11.157 At paragraph 11.107 we recommend that the BSB consider amending the BSB Code to clarify the potential professional misconduct consequences for barristers who deliberately rely on myths or misconceptions in sexual offences prosecutions.[184] As we explain above at paragraph 11.84, the deliberate reliance on myths and misconceptions and deployment of impermissible generalisations may already amount to breaches of the BSB Code. In the consultation paper we also explored whether the risk of professional misconduct consequences could also be communicated to barristers through judicial warnings and whether the Judicial College should consider developing guidance on such warnings.[185]

11.158 The majority of consultees who responded to this consultation question supported the suggestion that the Judicial College consider developing judicial guidance on warnings about professional misconduct consequences for reliance on myths and

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the BSB Code. The same reasons do not apply in relation to our consideration of potential guidance for judges about generalisations that rely on myths and misconceptions.

182 CP 259, para 9.67.

183 Dr Amelia Shooter; nia; and the CPS.

184 CP 259, para 9.129-9.143.

185 CQ 80: "Should the Judicial College consider providing guidance to judges on warning advocates about the potential for professional misconduct consequences to follow from their reliance on myths and misconceptions in the conduct of a sexual offences case?" CP 259, para 9.144.

misconceptions.[186] Consultees expressed broad support for encouraging mechanisms that help to hold advocates accountable for breaches of their professional obligations.[187]

11.159 However, some consultees who did not support the proposal queried whether judicial warnings about reliance on myths or misconceptions are appropriate. First, consultees argued that warnings are not necessary because barristers are already guided by their obligations under the BSB Code and judges are already aware of their case management responsibilities.[188] Secondly, two consultees suggested that it is not appropriate for judges to provide warnings of this kind as it goes beyond their judicial responsibilities.[189] Andrew Wilkins contended it should not be the role of a judge to provide such warnings given "this should be the role of the professional bodies rather than judges". Meanwhile the LCCSA commented:

> encouraging Judges to stray into the question of advocates' professional misconduct, rather than relying on their existing powers to ensure the fairness of trials, would seem a confusing way of addressing the issue.

11.160 Thirdly, some consultees argued that warnings may restrict the defence's arguments, impacting the ability of the barrister to represent their client.[190] For example, the CBA argued that "any warning by a Judge as to misconduct may deter Counsel from pursuing a legitimate line of questioning, which in turn may risk unfairness".

11.161 We acknowledge the circumstances in which it would be appropriate for a judge to provide a warning relating to potential professional misconduct consequences would be very rare. We are persuaded that it is not necessary for the Judicial College to develop guidance for judges in relation to warnings for professional misconduct consequences where a barrister relies on myths and misconceptions. Judges can already use their discretion to provide warnings to advocates where they are acting inappropriately by relying on myths and misconceptions, including if they are acting in a way that risks breaching their professional duties. Judges also already have the power to intervene where barristers seek to introduce irrelevant and prejudicial evidence or arguments.

11.162 Judicial intervention can be determined by individual judges at their discretion, depending on the conduct of the barrister before them and the facts of the case. Independently, it is the BSB's role to identify when a barrister has breached their professional obligations and to enforce those obligations. We recognise that judicial guidance which appears to encourage warnings about professional misconduct

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186 Out of 27 responses, 15 consultees agreed; 8 disagreed; 4 submitted a response categorised as other.

187 Including Dr Amelia Shooter; CWJ; and nia.

188 Martin Rackstraw; the Bar Council; the CBA; and an anonymous consultee.

189 Andrew Wilkins; and the LCCSA.

190 The CBA; the Bar Council; Dr Matt Thomason; and the Six Circuits.

consequences to be given by judges during trial may not align with the role of the judge in managing the trial.

11.163 Given these concerns, we do not recommend that the Judicial College consider developing guidance about potential professional misconduct consequences to follow from a reliance on myths and misconceptions in the conduct of a sexual offences case.

Warning about wasted costs

11.164 Wasted costs orders can be awarded against a party or legal representative where their actions or conduct have incurred costs. This applies to acts or omissions which are improper, unreasonable, or negligent.[191] These orders are typically sought in an application by a party who incurred the cost, however, they may be made on the court's own initiative in exceptional circumstances.[192] In the consultation paper, we cited case law which establishes that instances of serious professional misconduct may amount to an improper and negligent act for the purpose of awarding wasted costs.[193] However, wasted costs orders are unlikely to be made where myths and misconceptions have been relied upon, unless the jury has been discharged, given the need to establish that a loss has been incurred.[194]

11.165 Wasted costs orders are considered to be a severe response to misconduct and accordingly we emphasised in the consultation paper that there "must be a clear and particular ground for imposing one".[195] The objective of wasted costs orders is to compensate the party who incurred the cost, as opposed to punishing the party or representative for their conduct.

11.166 In the consultation paper we concluded that while it is unlikely that the threshold for imposing wasted costs would be met by a reliance on myths or misconceptions, it is possible that such an order could be made.[196] We asked consultees whether the Judicial College should consider providing guidance to judges on warning barristers about the possibility of a wasted costs order where reliance on myths or misconceptions may cause costs to be wasted.[197]

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191 See *Re a Barrister (Wasted Costs Order) (No.1 of 1991)* 1993] QB 293, [1992] 3 WLR 662 in which the court recommended a three-stage test or approach to assessing wasted costs orders:

(i) Has there been an improper, unreasonable or negligent act or omission?

(ii) As a result have any costs been incurred by a party?

(iii) If the answers to (i) and (ii) are 'Yes,' should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?

192 CrimPR, r45.9(3).

193 CP 259, para 9.152, citing *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 WLR 462.

194 See discussion at CP 259, para 9.158; and *Re a Barrister (Wasted Costs Order) (No.1 of 1991)* 1993] QB 293, [1992] 3 WLR 662.

195 CP 259, para 9.157, citing Practice Direction (Costs in Criminal Proceedings) 2015, 4.2.5.

196 *Re a Barrister (Wasted Costs Order) (No.1 of 1991)* [1993] QB 293, [1992] 3 WLR 662.

197 CP 259, para 9.161.

11.167 A majority of consultees agreed that there should be a warning in relation to wasted costs.[198] Consultees who responded positively suggested there is value in transparency and disincentivising barristers from relying on myths or misconceptions.[199] The CWJ stated:

> while we recognise that this will be unlikely to occur in practice solely on the basis of an advocate's reliance on rape myths… we consider that potential personal ramifications of ignoring this principle may be effective in encouraging defence advocates to change the way they practice.

11.168 Consultees who opposed such guidance were concerned that a warning on wasted costs would inappropriately restrict barristers' ability to argue the case.[200] For example, the Cardiff University Law School Innocence Project argued that:

> advocates should not be put in a position where they are deterred from mounting a reasonable defence taking into account all the circumstances of the case, their client's instructions, and the Codes of Conduct.

11.169 Consultees also rejected the need for guidance on wasted costs on the basis that such guidance is unnecessary.[201] For example, the CBA asserted that "there is already plain guidance on the issue of wasted costs and with that the inevitable referral to the BSB". It further highlighted that "where counsel has behaved improperly in speeches, the Court of Appeal have made it plain that the solution is judicial direction to the jury, not to discharge them". Both the Six Circuits and the Law Society emphasised the threshold for a wasted costs order is unlikely to be met by reliance on myths or misconceptions and therefore guidance is unlikely to be valuable.

11.170 We are persuaded that it would be extraordinarily rare for the criteria required to issue a wasted costs order to be met by deliberate reliance on myths or misconceptions by a barrister, particularly given the limited likelihood that reliance on myths and misconceptions would lead the judge to discharge the jury. Accordingly, we agree that the value of guidance on wasted costs in this context would be extremely limited, to the point it may be non-existent. As the Law Society argued, in these circumstances it would not be a good use of resources to develop guidance on this issue. Accordingly, we do not recommend that the Judicial College provide guidance on warning barristers that their reliance on myths or misconceptions may cause costs to be wasted.

Conclusion

11.171 We conclude the Judicial College should consider providing guidance on the following topics to assist judges in identifying myths and misconceptions and responding appropriately if they are introduced during sexual offences prosecutions:

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198 Out of 25 responses, 13 consultees agreed; 12 disagreed; 0 submitted a response categorised as "other".

199 JURIES; the CPS; nia; and CWJ.

200 Dr Matt Thomason; the Bar Council; The Cardiff University Law School Innocence Project; and Richard English.

201 LCCSA; HM Council of Circuit Court Judges; and the CBA.

(1) factors to assist in identifying myths and misconceptions; and

(2) judicial responses to generalisations that rely on myths and misconceptions.

11.172 We do not recommend the Judicial College consider including warnings in relation potential professional misconduct consequences or potential wasted costs for reliance on myths or misconceptions in judicial guidance.

Recommendation 65.

11.173 We recommend that the Judicial College should consider developing guidance on the following topics:

(1) identifying when lines of questioning may be irrelevant because they rely on myths or misconceptions, including consideration of the following factors:

(a) whether the line of questioning constitutes or relies upon a generalisation, unsupported by evidence;

(b) whether the line of questioning will be used to invoke an impermissible stereotype; and

(c) whether the line of questioning is based upon a factual conclusion derived from the evidence in the case.

(2) how best to respond to generalisations which rely on myths or misconceptions where they are raised in advocates' speeches. These generalisations include:

(a) suggesting that complainants as a class are unreliable witnesses or that their evidence requires greater scrutiny than evidence given by other witnesses; or

(b) suggesting that delayed reporting, in itself, makes complainants less credible.

Chapter 12: Specialist courts and more radical reform

INTRODUCTION

12.1 In previous chapters, we have recommended changes which will improve the current system within its existing parameters. We acknowledge, however, that this project is set against the background of a series of reviews and recommendations that have sought to improve the trial process for sexual offences.[1] Some commentators express concerns that meaningful progress may be difficult to achieve without substantial reform.[2] As such, we consider it important to give serious consideration to proposals for reform that may be viewed as more radical.

12.2 In this chapter, we consider five broad proposals which would significantly alter the criminal trial process for sexual offences[3] in England and Wales:

(1) the creation of specialist sexual offences courts;

(2) the use of specialist examiners to take evidence from complainants;

(3) the use of rape myth acceptance scales to screen and / or train jurors;

(4) a requirement for reasoned verdicts in jury trials; and

(5) the removal of juries in sexual offences cases.

12.3 We do so in light of the recommendations we have made in previous chapters, the views expressed by consultees, and the ongoing research and debate that has shaped the long history of sexual offences reform.[4]

12.4 We ultimately conclude in favour of the introduction of specialist courts for sexual offences, and make recommendations about the model that would most effectively realise the benefits of doing so. We make no recommendation in relation to requiring reasoned verdicts. We recommend against the use of juror screening, and we do not recommend the introduction of specialist examiners. We recommend the retention of juries in sexual offences cases.

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1 For further detail, see Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259") Appendix 1 and Ch 13.

2 See CP 259, paras 1.91-1.92.

3 In this report, we use the word "sexual offences" to mean all of the offences encompassed by the term "rape and serious sexual offences". Unless specified, we do not consider or make recommendations regarding non-sexual offences or less serious sexual offences. See Ch 1, para 1.26.

4 For a summary of the issues, research and key debates, see Ch 1 of this report and CP 259, Chs 1 and 2.

SPECIALIST SEXUAL OFFENCES COURTS

12.5 There is already a level of specialisation in sexual offences cases. Judges who hear sexual offences trials must be appropriately qualified to do so, with required specialist training.[5] The Crown Prosecution Service ("CPS") operates a Rape and Serious Sexual Offences ("RASSO") panel, a list of appropriately qualified prosecutors who can be instructed in such cases.[6] No similar panel exists for defence advocates, but they are expected to be appropriately qualified before they can accept instructions in a case.[7] Specialist guidelines, directions and evidential rules apply in such cases.[8]

12.6 Despite these incremental changes, it is clear that concerns still exist about the criminal justice system's handling of sexual offences. These include inconsistent availability of measures to assist with giving evidence[9] and application of evidential principles, courtrooms that are unsuited to the particular requirements of sexual offences cases, and the need for a wider "cultural change" in the investigation and trial process.[10]

12.7 In the consultation paper, we referred to the comments of the New Zealand Law Commission ("NZLC") that a specialist court could better recognise the particular "complexities and sensitivities" of sexual offences cases.[11] We set out the following potential elements of a specialist court.[12]

(1) A dedicated court building, or designated rooms within an existing court, set aside and adapted to accommodate sexual offences trials.

(2) Ensuring appropriate physical and technological capabilities to meet the needs of these cases. These would include equipment to allow for the effective use of measures to assist with giving evidence, and separate entrances to the court.

(3) Participants refining and accumulating expertise in such cases.

(4) Training of all personnel in taking a trauma-informed approach and recognising myths and misconceptions.

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5 Judicial College, *Judicial College Prospectus 2023-2024* p 4.

6 Crown Prosecution Service ("CPS"), "Advocate Panels: 2020 Panel - General Crime and the Rape and Serious Sexual Offences List (RASSO List)" (updated August 2024).

7 See for example Bar Standards Board, "BSB Handbook" Version 4.8, (2024), CD7, rc21.8 and gc39. We make recommendations in relation to mandatory training on myths and misconceptions for legal practitioners in Ch 11.

8 For example, the restrictions on the use of sexual history evidence, currently governed by s 41 of the Youth Justice and Criminal Evidence Act 1999.

9 In Ch 9 we recommend that "special measures" should be renamed "measures to assist with giving evidence".

10 See for example, A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 436.

11 New Zealand Law Commission, "The Justice Response to Victims of Sexual Violence", Report 136 (December 2015) para 5.4, and CP 259, para 13.118.

12 CP 259, para 13.156.

Overview of the current position

12.8 Specialised courts already exist in England and Wales, in the form of youth courts, specialist domestic violence courts ("SDVCs") and court centres with particular areas of expertise.

12.9 The evidence of the effectiveness of SDVCs is mixed.[13] One study found that SDVCs enhanced the effectiveness of court and support services, improved advocacy, improved information sharing, and increased victim participation and satisfaction.[14] A later review in 2022 had more mixed findings. The positives included the "clear priority" given to victim welfare, frequent access to measures to assist with giving evidence such as screens and live links, and efficiencies of court procedures and case management.[15] However, the report also found inadequate court facilities, poor information sharing and insufficient specialist training.[16] The 2022 review concluded that the components required to deliver SDVCs were inadequate, highlighting the impact of funding cuts and the need for additional support and training for personnel and improved court facilities, among other factors.[17]

12.10 Southwark Crown Court is an example of a court with a particular specialist practice area. While it hears all types of criminal cases, Southwark is designated as "the specialist trial centre for heavy fraud and long and complex cases in England and Wales".[18] Southwark Crown Court has published a practice note on judicial case management of heavy fraud and other complex cases; although it does not create "a local practice", practitioners at Southwark are expected to be familiar with its contents. The note includes early allocation of a trial judge where possible, clear identification of relevant procedural rules, and greater use of electronic presentation of evidence.[19] Southwark is described as continuing to contribute to "the development of best practices in heavy fraud and long and complex trial work".[20] The construction of a further court centre in the City of London specialising in cybercrime, fraud, and

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13 CP 259, paras 13.121-13.125.

14 D Cook, M Burton, A Robinson, and C Vallely, *Evaluation of Specialist Domestic Violence Courts/Fast Track Systems London* (2004).

15 C Hannon, *Specialist Domestic Violence Courts (SDVC) – How Special Were They in 2020?* (2022) pp 44-45.

16 C Hannon, *Specialist Domestic Violence Courts (SDVC) – How Special Were They in 2020?* (2022).

17 Above, p 46.

18 Courts and Tribunals Judiciary, "Celebrating 40 years of Southwark Crown Court" (2023). Between April 2020 and June 2021, courts across England and Wales heard a total of 3,569 cases where the primary offence was a fraud charge; 110 of these were heard at Southwark Crown Court and its associated Nightingale court. See M Stewart, "Local court initiatives making a difference to our recovery", *Inside HMTCS* (2021).

19 HHJ Baumgartner, "Southwark Practice Note No.1/2024 Judicial Control And Management Of Heavy Fraud And Other Complex Criminal Cases" (2024). See also A Penhale, "Lessons from the frontline: Back of the courtroom queue" (2024), p 8.

20 Courts and Tribunals Judiciary, "Celebrating 40 years of Southwark Crown Court" (2023).

economic crime was announced in 2018.[21] Construction is expected to complete in September 2026, with an estimated operational readiness date of March 2027.[22]

Comparative jurisdictions

12.11 Other jurisdictions have introduced or sought to introduce specialist sexual offences courts ("SSOCs").[23]

12.12 New Zealand established a pilot scheme of sexual violence courts in 2016. The scheme included guidelines for best practice, designated judges with specialist training, greater front-loaded case management, dedicated case managers, earlier allocation of cases and trial scheduling, more frequent use of measures to assist with giving evidence, tighter cross-examination constraints, separate court entrances, and opportunities for complainants to meet the judge and counsel.[24] A 2019 evaluation found improved timelines and working practices, which had reduced the risk of "secondary victimisation".[25] In her subsequent research, Professor Elisabeth McDonald described the pilot as operating "more as a separate list court" and observed that "the impact of cross-examination was (understandably) largely unchanged".[26] When compared with non-pilot cases, however, she found positive differences in how complainants were treated in court, with greater attention paid to their emotional state.[27]

12.13 In South Africa, specialised sexual violence courts were first established in 1993. Their use declined due to concerns that because they were better resourced, they infringed the constitutional right to equal protection of the law. They were reintroduced in 2013 after research concluded that their "victim-centred" approach reduced "secondary victimisation", improved the "skills of court personnel", reduced delays and increased efficiency.[28] As of 2018, the majority of these courts were hybrid, hearing a mixture of cases in existing court buildings, but prioritising sexual offences.[29]

12.14 In consultation, Juries Understanding Rape is Essential Standard ("JURIES") noted the favourable outcomes of the specialist sexual violence courts in South Africa. It added that they were found to "increase conviction rates, reduce delay and improve victim satisfaction levels". We do not consider increasing conviction rates to be an

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21 Ministry of Justice and HMCTS, "World-class fraud and cybercrime court approved for London's Fleetbank House site" (July 2018).

22 Civil Court Users Association, "Update on the new City of London Courthouse" (20 February 2025).

23 For further detail, see CP 259, paras 13.139-13.155.

24 The Rt Hon Lady Dorrian, *Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (Scottish Courts and Tribunals Service, March 2021) ("Dorrian review") paras 3.16-3.18.

25 Gravitas report for the Ministry of Justice (New Zealand), "Evaluation of the Sexual Violence Court Pilot" (June 2019) pp 2-4.

26 E McDonald, *In the Absence of a Jury* (2022) p 4.

27 E McDonald, *Rape Myths as Barriers to Fair Trial Processes* (2020) pp 59 and 75.

28 South African Department of Justice and Constitutional Development Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, "Report on the Re-Establishment of Sexual Offences Courts" (August 2013) p 12.

29 Rape Crisis Cape Town Trust, "Part 4: The Future of Sexual Offences Courts in South Africa" (2018).

appropriate metric for measuring the success of a given reform, nor is it the aim of this review. It is encouraging, however, that there were notable benefits for waiting times and participants' experiences.

12.15 In Scotland, the Dorrian Review recommended the creation of a national specialist Sexual Offences court.[30] That proposal was subsequently included in the Victims, Witnesses, and Justice Reform Bill (Scotland), and has remained in the Bill as it progresses to Stage 3.[31] In response to the Bill, Dr Marsha Scott of Scottish Women's Aid noted that the specialist domestic abuse courts piloted in Glasgow had delivered "some excellent outcomes", including reduced witness attrition, speedy trials, better evidence, and reduced trauma. She observed that some of the arguments which had been made against the specialist domestic abuse courts in Glasgow, based on the notion that "the status quo is safer", were similar to those now being deployed against the proposed Sexual Offences Court.[32]

The introduction of specialist sexual offences courts

12.16 In the consultation paper, we highlighted some of the potential advantages of a specialist court. Firstly, SSOCs would improve the physical and technological capacity to facilitate the use of measures to assist with giving evidence. Second, they could incorporate training in trauma-informed practice to improve complainants' experiences and reduce the risk of traumatisation. Third, they could facilitate improved inter-agency communication, support and information sharing, reflecting specialisation found elsewhere amongst investigators and prosecutors. Fourth, SSOCs have the potential to reduce delays and address backlogs, subject to resourcing and capacity. Finally, SSOCs would develop practitioner expertise in combating myths and misconceptions, to maximise best evidence.[33]

12.17 We also referred to some of the key arguments against SSOCs. Given the current state of the criminal justice system, the resource implications for training and infrastructure need careful consideration. Prioritisation of one offence type entails de-prioritisation of others. Depending on location, there is a risk that inequality in access to services could be heightened. Opponents raise the risk of "case-hardening" among judges, referring to desensitisation, indifference or cynicism due to repeated exposure to sexual offences cases. There are further concerns that repeated exposure may lead to traumatisation of practitioners and judges. There are also concerns about actual or perceived loss of impartiality, and the risk that defendants will believe they will not receive a fair trial in such courts.[34]

12.18 In Consultation Question 112, we invited consultees' views on whether SSOCs should be introduced to deal with the delays and the content of sexual offences prosecutions.

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30 The Dorrian Review, Recommendation 2, p 11.

31 Victims, Witnesses, and Justice Reform (Scotland) Bill, Part 5. At the time of writing, the Bill has passed Stage 2 (which deals with proposed amendments) and has progressed to Stage 3 (final amendments and debate, and a vote on whether to pass the Bill).

32 Scottish Parliament (Criminal Justice Committee), Official Report of Wednesday 17 January 2024 p 48.

33 See CP 259, para 13.156.

34 CP 259, para 13.158.

12.19 In this section, we consider the arguments for and against the introduction of SSOCs in general. There are several proposed models of SSOCs, ranging from entirely separate facilities to specialist courtrooms within existing courts. Some objections to greater specialisation will be relevant to a particular feature, rather than to all possible models of specialist court. We deal with this in further detail from paragraph 12.64 below.

12.20 For clarity, we set out here our overall conclusion, which we go on to explain below. While we reject the introduction of an entirely separate court, we do recommend the establishment of SSOCs in existing court buildings, combined with specialist listing protocols. We consider that this option best addresses concerns about reduced accessibility and perceived bias. Further, it is a pragmatic position which responds to resourcing difficulties within the criminal justice system and could be implemented effectively within a reasonable timescale.[35]

12.21 Our recommendations on SSOCs should not be viewed as an alternative to the recommendations made in earlier chapters of this report. Rather, the model of specialisation proposed in this chapter forms a package which aims to operationalise those recommendations in a holistic, consistent and principled way.

Consultation responses and analysis

12.22 Consultees expressed strong support for the introduction of SSOCs.[36] However, some of those who supported the introduction of SSOCs indicated qualified agreement, expressing concerns that a specialist court would need to be properly resourced to avoid creating further delays or impacting on other cases within the criminal justice system.[37]

Improving participant experiences

12.23 Proponents of SSOCs argued that greater specialisation will improve complainants' experiences, encourage reporting and reduce attrition rates.[38] As Claire Waxman, Independent Victims' Commissioner for London, put it, SSOCs would aim to "improve the treatment of victim-survivors, taking reasonable steps towards the goal of providing 'procedural' justice regardless of trial outcome". In this light, we note Professor McDonald's research into the use of specialist sexual violence courts in New Zealand, which found positive differences in how complainants were treated in

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35 We discuss these resourcing difficulties in Ch 14 and at para 12.28 below.

36 Of the 80 substantive responses to this question, 49 consultees supported the introduction of a specialist court. Sixteen consultees opposed it, whilst 15 consultees gave answers categorised as "other".

37 Such as Rape Crisis England and Wales ("RCEW"); Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences; Dyfed-Powys Office of the Police and Crime Commissioner; and Dyfed-Powys Police. Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually.

38 Nine consultees expressed this view, including Claire Waxman, Independent Victims' Commissioner for London; Professor Vanessa Munro; Geraldine Hanna, Commissioner Designate for Victims of Crime in Northern Ireland; West Mercia Police; JURIES; and Chief Constable Sarah Crew.

the courtroom.[39] One consultee suggested that SSOCs have the potential to reduce trauma for all participants, not just complainants.[40]

12.24 Particular features of SSOCs that would achieve this include training of all personnel, including court staff and security guards; provision of infrastructure such as separate entrances and waiting areas and suitable courtroom layouts; and appropriate technology to accommodate measures to assist with giving evidence.

12.25 One of the issues identified in the consultation paper was inconsistency of access to measures to assist with giving evidence and other accommodations designed to reassure complainants and achieve best evidence. Based on her research, Dr Natalie Kyneswood suggested that:

> Specialist sexual offences courts may be better equipped to present live link and pre-recorded evidence. For example, individual tablets or portable screens for each participant would enable the complainant to follow the trial in the presence of a supporter, for example, away from the courtroom. Individual screens or tablets and headphones for jurors may also help them follow live-link and pre-recorded evidence more closely and enable the court to control what evidence the defendant and the public sees.

12.26 This is not a universal view. Some consultees considered that SSOCs would not be effective or necessary in improving participants' experiences, or thought the objective should be to improve the experiences of all complainants regardless of offence type. The Bar Council saw the value of trained court staff and "expert at court support" for complainants, but believed that this "could just as easily be introduced without designating specialist courts, by increasing the resource available at each existing court centre". Exceptionality is a theme that appears throughout this report; we consider it in the context of SSOCs from paragraph 12.53 below.

12.27 We acknowledge further concerns that SSOCs might concentrate resources in certain locations, reducing accessibility for witnesses and defendants.[41] Participants' experiences are unlikely to be improved in practice if they are denied access to these courts, or required to travel excessive distances to reach them. We consider that concerns about accessibility can be addressed by the particular model of specialisation that is adopted. In our view, this is an argument in favour of specialisation within existing courts, rather than an entirely separate specialist court.

Resourcing, delays and impact on the wider criminal justice system

12.28 Increased expertise, greater efficiency and improved training impact on all areas of the trial process, from participants' experiences to courtroom efficiency. In this section, we consider two broad themes – delay and resourcing (by which we mean access to specialist training, suitable equipment and appropriate facilities). Whilst we consider that SSOCs have the potential to improve both areas, the criticisms that they attract in

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39 E McDonald, *Rape Myths as Barriers to Fair Trial Processes* (2020) p 59 and p 75.

40 Men and Boys Coalition.

41 Raised by the Bar Council; the CPS; and HM Council of Circuit Judges.

respect of delay and resourcing are similar, particularly in relation to funding. We therefore consider those criticisms together in this section.

12.29 Ten consultees referred to the benefits of well-trained specialist practitioners, judges and court staff; these benefits, however, were generally coupled with the need for proper funding.[42] Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences, summed up these concerns in cautioning that there might be particular challenges in "enrolling / training / retaining specialists that could create capability / capacity issues in an already stretched system".

12.30 It has been suggested that SSOCs have the potential to alleviate delays in sexual offences cases. In consultation, we were referred to benefits of the specialist court in New Zealand in this context, where it has improved court practices, particularly the timeliness of case progression.[43]

12.31 A properly resourced specialist court may make significant in-roads into the existing backlog of RASSO cases. Nevertheless, we are alive to concerns that SSOCs may increase delays in those or other cases. There are particular concerns that, unless there is increased court capacity to hear RASSO cases, delay will be inevitable. The Bar Council explained that:

> if the volume of specialist cases represented 25% of court sitting days, but fewer than 25% of courtrooms were designated for such cases, that would actually increase rather than decrease the wait for trial in such cases.

12.32 Some consultees suggested that diverting resources to a specialist court would be to the detriment of complainants of other offences. The Feminism Law and Gender ("FLAG") research cluster at the Open University Law School argued that delays "are a serious issue throughout the criminal justice system", which needs to be addressed systematically. HM Council of Circuit Judges raised concerns about delays arising in other cases:

> There appears to be a real risk of certain cases being prioritised in which case the end result with current resources will be further extended delays for other trials …
>
> The reason for the delays before trial is simple – there are insufficient resources to bring all Crown Court cases to trial in good time.

12.33 Likewise, the Bar Council described the value of SSOCs as "questionable", noting that "reorganisation of the court estate holds only superficial appeal while the overall capacity and condition of the estate remains as limited as it is at present".

12.34 These are valid concerns, raised by stakeholders who are fully aware of the serious resourcing challenges faced by the criminal justice system. We acknowledge, at the risk of understating the position, that there are widespread concerns about the current

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[42] Such as RCEW; Refuge; Gwent Office of the Police and Crime Commissioner; Dyfed-Powys Office of the Police and Crime Commissioner; Dyfed-Powys Police; and Chief Constable Sarah Crew.

[43] End Violence Against Women and Girls Coalition UK ("EVAW") and Refuge expressly referred to this in their responses. For further consideration of the New Zealand model, see para 12.12 above, and the Dorrian Review (2021) paras 3.16-3.22.

capacity of the criminal justice system. In that light, some consultees strongly questioned the merits of funding a specialist court when many of the features of a specialist court already exist in some form. They argue that many of the potential benefits of a specialist court would stem from simply providing funding more generally.

12.35 We note that some of these consultees accepted that, where properly resourced, a specialist court may be a valid proposition. For example, the Bar Council stated:

> On the other hand, if the proposal is to create additional new specialist court centres on each circuit, which would relieve the burden on the existing estate by increasing overall capacity, staffed with specially trained staff, that could potentially make a difference both to the backlog and the experience of participants in the criminal justice system (provided that reasonable access to local courts remained …)

12.36 While it is clear that resourcing will be a significant consideration when it comes to implementation, we consider that a properly-resourced specialist sexual offences court will alleviate rather than exacerbate concerns about delay. To an extent, these concerns can be addressed by choosing the right model of specialist court, and the considerations we outline at paragraph 12.87 below. We also note the views of Professor Joanne Conaghan and Professor Yvette Russell that, as delays are problematic in all cases, "the case for specialist courts is best made on the basis of [sexual offence cases'] nature and complexity". We agree with this analysis. Alleviating delay is only one of a number of rationales for introducing a specialist court. This sits alongside other, more persuasive arguments relating to the exceptional features and requirements of RASSO cases.

12.37 We consider that the use of SSOCs may also carry indirect benefits for other cases heard in the same court centre. A practitioner and judicial consultee told us that a specialist RASSO court within each Crown Court centre could alleviate delays:

> Firstly, this would mean that the courtrooms in those centres are not clogged up with cases which say they will be trials but won't be (it is well known that RASSO cases rarely result in Guilty pleas). That will mean that cases will get meaningful listings. Secondly, as the Court is focussing only on RASSO cases, everything is geared towards the unique challenges that RASSO cases provide. Thirdly, those centres should receive an extra injection of funding firstly to deal with the backlog but secondly to expedite RASSO cases. Fourthly, specialised centres could take RASSO cases from other Court centres if they had capacity.

12.38 SSOCs have the potential to benefit other cases by creating greater efficiency in the long term. A specialist court which adopts a prioritised listing strategy may result in fewer ineffective hearings, in turn creating efficiencies more broadly. While putting expertise in silos is a valid concern, we address how this can be mitigated in our consideration of the particular model to be adopted from paragraph 12.64 below.

12.39 Any impact assessment of SSOCs should also include the potential for wider societal benefits. By way of example, improved procedural justice may reduce costs associated with the physical and emotional harm arising from sexual violence; these include costs to health and victims' services, and costs of lost productivity due to

absence from work.[44] From 2015 to 2016, for example, the estimated physical and emotional cost incurred per rape was £24,390; for other sexual offences, it was £3,700.[45] Loss of productive hours due to time taken off work was estimated at 137.7 hours per rape, while lost output due to reduced productivity on returning to work was estimated at 184 hours; for other sexual offences, this amounted to 13.8 hours and 47 hours respectively.[46]

Fair trial rights

12.40 Consultees expressed mixed views on the impact of SSOCs on case outcomes and fair trial rights.

12.41 Three consultees believed specialist judges, practitioners and personnel would minimise the influence of myths and misconceptions and lead to greater consistency.[47]

12.42 Three consultees were concerned that a specialist court may inappropriately increase conviction rates and impact on fair trial rights.[48] Cardiff University Law School Innocence Project saw the specialist court as part of a general trend of reforms which it perceived as reducing the defendant's ability to advance their case fully. We do not agree with this argument. We anticipate that greater specialist expertise, streamlined procedures and improved listing practices will in fact improve the experience of all participants; it is difficult to conceptualise a way in which these might negatively impact upon fair trial rights.

12.43 In relation to fair trial rights, Facing Allegations in Contexts of Trust ("FACT") indicated that any specialist court arrangements should be of equivalent benefit to the defendant. We agree that it is desirable that defendants also see benefits arising from these changes. However, it is inevitable that defendants' experiences of the trial process in a specialist court will not be identical to complainants' experiences. We do not consider that measures which are not of equivalent benefit for defendants would amount to a violation of defendants' fair trial rights. The right to a fair trial does not demand formal equality; defendants have a distinct role in the trial process and are subject to different procedures. As discussed in Chapter 9, for example, defendants are subject to a different framework for special measures than other witnesses. There are good reasons not to demand formal equality between all parties and participants in a criminal trial. The presumption of innocence, for instance, leads to a burden and standard of proof which favours the defendant. We consider this "principled asymmetry" further in Chapter 1.[49]

12.44 While we consider that there will be benefits to all participants arising from these improvements, we do not agree that these benefits would or must be universal, nor do

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44 See CP 259, paras 12.13-12.19.

45 M Heeks, S Reed, M Tafsiri and S Prince, "The economic and social costs of crime: Second edition" (2018) p 37.

46 Above, pp 39 and 41.

47 West Mercia Police; Chief Constable Sarah Crew; and Muslim Women's Network UK.

48 Philipp Tanzer; FACT; and Cardiff University Law School Innocence Project.

49 See also CP 259, paras 5.73 and 5.145.

we think this poses a risk to defendants' fair trial rights in principle. We discuss the specific risks of partiality, stigmatisation and case-hardening and how these might be mitigated in the following section.

Impartiality, stigmatisation and case-hardening

12.45 In the consultation paper, we acknowledged concerns that SSOCs may lack impartiality or be perceived as lacking impartiality. These concerns were reflected by a small number of consultees.[50] Some considered that there would be a risk to actual impartiality, suggesting that judges may become jaded, or that juries conscious of sitting in a specialist court may approach their task differently.[51] This risk was also acknowledged by those who supported the use of SSOCs; Chief Constable Sarah Crew, for example, viewed the risk that participants may lose impartiality as a "significant factor to consider". Others felt that the greater risk was that participants would *perceive* unfairness and partiality.

12.46 One anonymous consultee referred to "singling out sexual offences as somehow outside the general criminal justice system; adding to the stigma". Another was concerned that the public may assume that a defendant tried in a specialist court is guilty by virtue of the fact that "they put him in the special sex court".

12.47 We consider that these concerns can be addressed by choosing the right model of specialist court. Specialist courtrooms within existing court centres, for example, would reduce visible differences, and may alleviate fears that jurors would approach their task differently. Jurors need not necessarily be aware that the case is listed in a specialist court. Further, or in the alternative, judges could explain to the jury that they should not read anything into the hearing of the case in a specialist court; a similar direction is already given when special measures are used.[52] This would reduce the risk that the jury perceive the defendant or approach their deliberations differently. Defendants' legal representatives could advise their clients on the nature of the specialist court, reducing the risk of the defendant feeling stigmatised.

12.48 With regards to case-hardening, we consider that preventative strategies could be adopted, such as training judges and rotating court staff and judges so they continue to work on a range of cases. Specialisation within an existing court would also provide greater opportunity for rotating staff and sharing knowledge, to avoid case-hardening, and to prevent putting expertise in silos.

12.49 Regardless of the model, any perceived loss of impartiality would need to be kept under review via evaluation of case outcomes and participants' experiences.[53]

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50 Six consultees expressly referred to this issue.

51 Martin Rackstraw, solicitor.

52 Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (April 2025 Update) ("Crown Court Compendium") ch 3-6, paras 10-11.

53 See, for example, evaluations of comparable specialist courts carried out in other jurisdictions: S Allison and T Boyer, "Evaluation of the [New Zealand] Sexual Offences Court Pilot" (2019); B Kruger and M Reyneke, "Sexual Offences Courts in South Africa: Quo vadis?" (2008) 33(2) *Journal for Juridical Science* 32, 38-42.

Vicarious trauma

12.50 By its nature, a specialist sexual offences court would routinely deal with distressing evidence. In this section we consider the impact of such evidence on all participants, including the risk of vicarious trauma.

12.51 Hearing only sexual offences cases would place a significant emotional burden on the judiciary. One judicial consultee questioned what support would be available for professionals "permanently exposed" to sexual offences cases.

12.52 As we considered with regards to case-hardening and impartiality above, these significant concerns could be alleviated by choosing the right model of specialist court. This could include case rotation and the provision of specialist training and support. In this regard, consultees suggested adopting practices from other sectors, such as debriefs, clinical support and counselling, and placing time limits on such work.

Exceptionality

12.53 In Chapter 1, we considered the justifications for creating separate frameworks, laws and procedures for sexual offences cases, which we refer to as exceptionality. The issue of exceptionality surfaces in several of the arguments considered above, particularly in relation to resourcing. It was also raised in its own right by several consultees. One anonymous consultee thought that other offences could also benefit from a specialist court, noting that other offences such as murder can be similarly distressing and involve intimate or graphic details. The Bar Council argued that:

> Categorising priority of victims is a hopeless task; the effect of delay on a victim of serious violence cannot be said to be any less damaging than that on a victim of a sexual offence.

12.54 This does not accord with the evidence of specialist support services and victim advocacy groups such as Victim Support and Rape Crisis England and Wales ("RCEW"). We acknowledge that delay in the administration of justice can have a serious impact on victims of all kinds of crimes. Sexual offences complainants, however, face what Baroness Helen Newlove, the Victims' Commissioner for England and Wales, has described as a "unique set of challenges" and are "unique in facing the worst of these crushing delays".[54] One material difference lies in the impact of proceedings on victims' access to support such as therapy. The CPS guidance on pre-trial therapy highlights exposure to sexual violence as carrying a particular risk of leading to significant psychological and emotional difficulties.[55] Despite this, "many survivors decide not to seek counselling or therapy until after a decision has been reached in their case"[56] for fear that their medical records may be obtained and used in court – indeed, some are advised not to do so.[57] Where support is sought, there is

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54 Baroness Helen Newlove, "Rape survivors are paying too high a price for justice" (11 December 2024).

55 The CPS, "Legal Guidance; Pre-Trial Therapy" (26 May 2022).

56 RCEW, "Keep Counselling Confidential". See also A Moroz and T Dinisman, "Suffering for Justice" (2024) p 11.

57 S Murray, S Welland and M Storry, "Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system" (March 2025), pp 8 and 42-43.

evidence that some mental health treatments are limited in scope or not available at all ahead of trial.[58]

12.55 HM Council of Circuit Judges thought a specialist sexual offences court would raise questions about other offences attracting specialism, such as complex fraud. We note that specialist trial centres already exist across the civil and criminal justice system. We consider an example of this in respect of complex trial work and heavy fraud cases at paragraph 12.10 above.

12.56 We have considered the exceptionality argument elsewhere in this report.[59] We reiterate that exceptionality in sexual offences cases is not in principle incompatible with either article 6 of the European Convention on Human Rights ("ECHR"),[60] or our own procedural traditions. Due to the lack of direct supporting evidence, sexual offences cases routinely involve significant and disproportionate focus on the complainant's credibility and greater risks of intrusion into the complainant's privacy rights and of traumatisation. As a result, it is already accepted that there should be exceptionality for sexual offences via restrictions on sexual behaviour evidence, anonymity, automatic eligibility for special measures, judicial directions and specialisation of judges.[61] These existing rules and our recommendations do not undermine the trial or the burden and standard of proof in sexual offences cases. Rather, they respond to the exceptionality already present in the investigation, prosecution and trial process.

12.57 We do not consider that exceptionality is a sufficient reason to reject the introduction of SSOCs. Some of these concerns may be alleviated by the features of the particular model of specialism introduced. We note, for example, that our recommended model would involve specialist training and rotation of judges and court staff within existing court centres, leading to long-term benefits for other cases.

Sufficiency of existing measures

12.58 Another thread that runs through several of the objections set out above is the suggestion that SSOCs are not necessary, because other measures are or could be made available. Several consultees told us that a specialist court is unnecessary because courts usually accommodate requests for special measures, and judges and practitioners already have specialist training for these cases.

12.59 Similar arguments were made in the context of the Victims, Witnesses and Justice Reform (Scotland) Bill, which will introduce a specialist sexual offences court.[62] In relation to that proposal, Lady Dorrian told the Criminal Justice Committee that

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58 Above, pp 43 and 48. See also CP 259, paras 3.123-3.128.

59 See, for example, Chs 1 and 2.

60 See *SN v Sweden* App No 34209/96 (2004) 39 EHRR 12, para 47. We consider the position of the European Court of Human Rights ("ECtHR") in greater detail in Appendix 1.

61 For further discussion of this in the context of the development of the law of England and Wales, see CP 259, paras 1.45-1.66.

62 Victims, Witnesses, and Justice Reform (Scotland) Bill, Part 5.

> … if we do not seize the opportunity to create the culture change from the ground up … there is every risk that, in 40 years, my successor and your successors will be in this room having the same conversation.[63]

12.60 One of the concerns highlighted with the current state of affairs is the issue of inconsistency of approach and uncertainty – examples include differing access to special measures across court centres and cases[64] and inconsistent use of judicial directions.[65] A particular benefit of SSOCs would be to address those inconsistencies holistically, by creating a national operating model.

12.61 We acknowledge the need for a pragmatic approach and effective use of existing resources. However, we consider that there are benefits to SSOCs beyond those which can be accomplished within the current framework; these include ensuring consistency of approach, introducing widespread cultural change, and ensuring that reforms are operationalised in a principled rather than piecemeal manner. A model of specialisation within the existing court structure, alongside the other reforms proposed in this report, is best placed realise these benefits.

Conclusion

12.62 We received strong quantitative support for introduction of SSOCs. While there are persuasive arguments from both sides of the debate, we consider that the arguments in favour of SSOCs are of greater weight overall. These include improving participant experiences, greater training and specialisation in trauma-informed practice, effective listing and resolution of cases, and reducing delays. Concerns about resourcing from those with substantial experience of the justice system require careful consideration. However, we consider that these can be addressed by choosing the right model of SSOC. We therefore recommend, in principle, the introduction of SSOCs.

12.63 In the following sections, we consider the optimal features of SSOCs, and the key principles for any implementation of this recommendation.

Features of specialist courts

12.64 In Consultation Question 113, we invited views on the necessary features of an SSOC, including specialist listing, specialisation within existing courts, or entirely separate courts.

Consultation and analysis

12.65 As we suggested above, many of the arguments against SSOCs can be addressed by choosing the right model of SSOC. We highlight the need to ensure accessibility, avoid siloing of expertise and create a pragmatic and resource-efficient model. We

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63 Scottish Parliament (Criminal Justice Committee), *Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report* (2024) para 12.

64 For example, a 2009 review of the experience of rape victims reported that officers experienced difficulty reassuring complainants that they would be able to access special measures due to the current inconsistent application of measures. See S Payne MBE, *Rape: The Victim Experience Review* (November 2009) Home Office.

65 See for example the comments of Rape Crisis England and Wales in CP 259, para 6.46. See also remarks on inconsistencies on the presence of ISVAs or other supporters during the complainant's evidence at CP 259, para 7.200. We discuss these in further detail in Ch 10.

consider this best achieved by specialisation within existing courts, with prioritised listing, better facilities for measures to assist with giving evidence and specialist training. Consultees took a similar view, with the most significant qualitative and quantitative support expressed for a combination of specialisation within existing structures and specialist listing.

Separate specialist courts

12.66 Entirely separate SSOCs would represent the greatest change to the status quo, comprising bespoke court buildings with appropriate infrastructure and unique protocols and practices such as mandatory pre-trial case conferences, default measures to assist with giving evidence, specialist support and trained personnel.

12.67 Consultees who supported this option took the view that a trauma-informed approach would only be possible by completely remodelling courts. RCEW argued that:

> If the aim of specialist courts is to create a trauma-informed environment that focuses on survivors' needs and provides the necessary technology and infrastructural design, this would only be achieved by redesigning courts entirely. For this to be deliverable, the government need to ensure sufficient investment, planning and a firm focus on the right issues.

12.68 There was significant opposition to this model. Judicial and practitioner consultees were concerned that a separate court might reduce accessibility for all participants, including complainants, witnesses and defendants. This argument was considered in the context of the Dorrian Review, which proposed the creation of a national Sexual Offences court, including "routine pre-recording of the evidence of complainers".[66] The Review considered that reduced accessibility would not be a bar to the proposals, because evidence would be given via pre-recording in the majority of cases, so the complainer would not have to attend the trial.

12.69 In our view, pre-recorded evidence does not resolve the core of the accessibility argument. Not all complainants will want to pre-record their evidence; in any event, entitlements to pre-recorded evidence are not available to defendants and some other witnesses. A separate court could result in defendants, witnesses and some complainants having difficulty accessing courts. We consider this to be a significant disadvantage of a separate SSOC model.

12.70 A further disadvantage concerns perceived bias and stigmatisation. As set out above, six consultees who rejected SSOCs noted the risk that SSOCs may lack impartiality or be perceived as doing so. There is a risk that judges may become case-hardened, or that jurors may approach their task differently in the knowledge that they are in an SSOC. Defendants may consider themselves stigmatised by having their case heard in such courts. In this vein, Tricia O'Sullivan, a solicitor and former Senior Crown Prosecutor, suggested a further avenue of stigmatisation – that complainants would not wish to attend a separate court for fear of "being identified as a rape victim".

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66 Dorrian Review (2021), Recommendation 2 and para xi.

12.71 We note, too, the arguments concerning siloing of expertise and channelling resources away from other cases and court centres. We consider that these concerns are best addressed through an alternative specialist court model.

Specialist listing

12.72 In some senses, specialist listing is already in operation. The Criminal Bar Association ("CBA") told us that specialist listing already exists, due to the necessity of finding a specialist judge to hear the case. We note that in March 2024, the then Senior Presiding Judge (Lord Justice Edis) announced prioritisation of the 181 rape cases which had been awaiting trial for over two years, pledging to list them for trial before the end of July 2024 "wherever possible".[67]

12.73 There was limited support for the use of specialist listing alone. While the Law Society of England and Wales ("Law Society") thought that "specialist listing ought to suffice", it added that this should sit alongside "greater expertise on the part of judges and advocates".

12.74 Professor Yvette Tinsley drew comparisons with the New Zealand model, which she considered to be a specialist list court which aims to have lawyers and judges be more aware of the types of issues which arise in sexual offences cases. She also noted that in Victoria, Australia there is now a legislative time-frame for hearing these cases. Professor Elisabeth McDonald, too, told us that much of the success of New Zealand's pilot resulted from the fast-tracking of cases.

12.75 Specialist listing was not without its detractors. The Bar Council remarked on possible alternative models. It said that:

> an alternative way of incentivising timely listing would be to create a CTL [custody time limit] equivalent protocol whereby serious sexual offences are required to be listed for trial within a certain time period. However, the sanction for breach of such a time limit would be difficult to identify, and in any event such a protocol would do nothing to help the overall backlog, and would result in other bail cases falling back in the queue.

12.76 One judge told us that specialist listing would impact on the flexibility of the courts to hear other cases. Another added that in their court, they already prioritise sexual offences cases. However, they explained that there are complex factors to weigh up – for example, defendants in custody must also take priority, particularly if they are vulnerable. Any cases with vulnerable or child witnesses must also be prioritised.

12.77 We note that listing is an independent judicial function, and highlight that any measures taken in this area would require consultation with and the support of the judiciary.

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67 Rt. Hon. Lord Justice Edis, "Message to Presiding Judges, Resident Judges, Crown Court Judges, Heads of Crime and members of the Criminal Bar and their clerks" (20 March 2024). See also New Law Journal, "Judiciary to prioritise clearing backlog of rape cases" (6 March 2024).

Specialisation within existing courts

12.78 This option involves the use of the existing court estate to sit specialist court rooms within court centres. This would include features such as trained personnel, appropriate technology to access measures to assist with giving evidence, and specialist support services for participants.

12.79 Five consultees thought that specialisation in existing courts should be the main focus of reform. JURIES, for example, told us that specialisation within existing structures would be an acceptable compromise, given the challenges of resourcing a separate court. It suggested such a court should include:

> entrances, waiting areas and rooms for giving remote evidence providing greater support and privacy for victims and their families. Victim support services should be on site. All staff working in the court including judges should receive enhanced levels of training around the complexities of sexual offences including the impact of trauma.

12.80 One consultee, Chief Constable Sarah Crew, stated that specialisation within existing courts or entirely separate courts would be preferable to specialist listing alone. However, she was not convinced that the current court estate could accommodate the required facilities, such as separate entrances and waiting areas. We consider these issues in Chapter 9, where we discuss the availability of alternative measures and the need for courts to be adaptable.

12.81 The CBA argued that a specialist court "would lead to avoidable delay", and gave the example of a sexual offences trial not being permitted to proceed using an available courtroom merely because it was not earmarked as a "specialist court". We acknowledge this concern; this could be addressed through, for example, the use of a Practice Direction or a protocol permitting cases to proceed in a non-specialist court where it is in the interests of justice to do so.

A combined approach

12.82 Specialist listing and specialism within existing court structures are not mutually exclusive. Consultees expressed the highest support for a combination of specialist listing and specialisation within existing courts.[68] Consultees considered that this was the most realistic and cost-effective approach, whilst still assisting in developing facilities and procedures that respond to the particular challenges faced in sexual offences prosecutions. The London Criminal Courts Solicitors' Association ("LCCSA"), for example, rejected an entirely separate court because "it would not be cost effective" and because "it could exacerbate the issue of courts already not always being particularly local to defendants, witnesses and complainants". Instead, it thought the focus should be on "making the current system more efficient" via "specialist lawyers, judges, staff" and "a specialist list and specialist courts within the current system".

12.83 Two stakeholders thought that ideally, completely separate specialised buildings should hear sexual offences cases. However, given the nature of the court estate and

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[68] Eight consultees expressly supported this approach.

concerns about resourcing and delay, they accepted that it may be more pragmatic for a specialist court to use existing courtrooms and buildings.

12.84 Four consultees agreed with the use of all three options,[69] which tended to reflect a desire for specialism in any form possible. The CPS, for example, told us that it would support "consideration of any option that introduced more tailored treatment of these cases and the victims involved".

Conclusions

12.85 Overall, we conclude that a combination of specialisation within existing court structures and specialist listing would best achieve the benefits of specialism, and address more of the objections considered above.

12.86 We therefore recommend the introduction of SSOCs within the existing court estate, combined with specialist listing protocols. This option best addresses concerns about reduced accessibility and perceived bias, whilst upholding the aims of improving participants' experiences and achieving best evidence. We consider this a pragmatic position which responds to resourcing difficulties within the criminal justice system and could be implemented effectively in a reasonable timescale.

Additional operational considerations

12.87 It is clear that resourcing is of fundamental importance when it comes to the implementation of SSOCs. Above, we have considered evidence from a range of stakeholders about the need for proper investment and the impact of under-resourcing. We consider that the 2022 review of SDVCs set out at paragraph 12.9 above further indicates the need for a genuine commitment to funding and resourcing specialist courts.[70] Here we provide a non-exhaustive set of considerations to which the Government should have regard when operationalising SSOCs. [71]

(1) Proper funding and expansion of existing court capacity. This is essential to the effective delivery of SSOCs.

(2) Consideration of specialist listing encompassing the requirement for RASSO cases to be listed before a specialist judge, in a particular court, and the expediting of hearing dates because of the particular needs of the complainant, defendant, and witnesses. When designing a prioritised listing model, the judiciary could consider:

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69 Centre for Women's Justice ("CWJ"); CPS; Durham Police and Crime Commissioner's Office; and nia.

70 C Hannon, *Specialist Domestic Violence Courts (SDVC) – How Special Were They in 2020?* (2022). The review identified that the components required to deliver an SDVC were inadequate; it did not suggest that the principle of a specialist court itself was flawed.

71 In June 2022, the Ministry of Justice announced a pilot scheme of "enhanced specialist sexual violence support" at three courts; see CP 259, para 7.282, and Ministry of Justice, "New pilots to boost support for rape victims in court" (16 June 2022). The scheme includes specialist training for court staff, police and prosecutors, and improved technology in courtrooms; any evaluation of the pilot may therefore be of assistance when operationalising SSOCs. At the time of writing, the results of this pilot scheme have not yet been published.

(a) introducing a prohibition on listing RASSO trials as "floaters",[72] so they are only listed for a fixed date; and

(b) a requirement for seven days' notice and provision of written reasons to the complainant in the case of trial adjournment.

(3) Consideration of a protocol allowing RASSO cases to be heard in non-SSOCs where it is in the interests of justice to do so, such as where no SSOC is available within a reasonable timeframe.

(4) Specialist training for all court staff on the complexities of sexual offences cases and the impact of trauma.

(5) Sufficient technology to accommodate measures to assist with giving evidence. This should include consideration of courtroom adaptations, including appropriate courtroom layout and separate waiting areas and entrances.

(6) Ongoing rotation of court staff and judges, and sharing of knowledge.

(7) Support systems to manage the risk of vicarious trauma for court staff and judges, such as debriefs, counselling support, and limiting length of exposure to sensitive cases.

(8) Mechanisms for generating and supporting judicial engagement, with follow-up research and evaluation of efficacy.

Recommendation 66.

12.88 We recommend the introduction of a specialist sexual offences court within the existing court structure.

12.89 We recommend the adoption of a model of specialisation within the existing court estate, combined with specialist listing practices. This should include features such as trained personnel, appropriate technology to access measures to assist with giving evidence, and specialist support for participants.

SPECIALIST EXAMINERS

12.90 In the traditional adversarial trial model, witnesses usually give evidence in two stages. The first is "evidence in chief", where the witness is asked open questions by the party who called them as a witness so that the court can hear their account. As we explain in Chapter 9, complainants in sexual offences cases may have pre-recorded their account in an Achieving Best Evidence ("ABE") interview, which can be played in court as their evidence in chief. If they give their evidence in chief at the time of the trial, they will be asked questions by prosecution counsel. The second stage is "cross-examination", in which the other party or parties can ask the witness questions in

[72] A "floater" is a trial which is not listed in a specific courtroom or before a specific judge within a court centre, but which can be heard in any available court in the same court centre within a set period of time.

order to test the credibility and reliability of their evidence, undermine the case of the opposing parties, and put forward their own case.[73] A complainant in a sexual offences case would generally be cross-examined by the defendant's advocate. Unlike evidence in chief, questions may be closed and leading, suggesting or prompting the desired answers.

12.91 Cross-examination is seen by many as necessary in order to "fairly and effectively test the evidence".[74] At its worst, however, it has been described as "legitimated bullying"[75] and "a process of manipulating the witness through suggestive questioning, avoiding unfavourable disclosures, and obtaining jury sympathy".[76]

12.92 A growing body of evidence suggests that the traditional adversarial model of cross-examination fails to achieve best evidence in cases with vulnerable witnesses.[77] In Chapter 9, we considered the broad use of the term "vulnerable" in the criminal justice system, and how it can be applied to sexual offences complainants by virtue of being a complainant in that category of case. While many of the issues identified with cross-examination apply to wider categories of vulnerable witnesses,[78] we focus here on the commentary that suggests that it is ill-suited for testing the evidence of sexual offences complainants. Critics contend that adversarial cross-examination does not take account of research about the nature of human memory, or the impact of trauma on recollection.[79] It has also been suggested that the more combative traditional approach may carry particular risks of traumatisation for sexual offences complainants.[80]

12.93 In this section, we consider proposals to use specialist examiners to question complainants in sexual offences trials, rather than counsel for the prosecution and defence.

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73 Cross-examination may then be followed by re-examination by the first party, which is subject to the same rules as evidence in chief and should be confined to matters raised in cross-examination.

74 The Inns of Court College of Advocacy, "Raising the Bar" (2011) pp 9-10.

75 T Henning, "Control of cross-examination - A snowflake's chance in hell?" (2006) 30 *Criminal Law Journal* 133.

76 C Eastwood and W Patton, "The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System" (2002) pp 4-5, citing E Henderson, "Persuading and controlling: The theory of cross-examination in relation to children" (2002) in H Westcott, G Davies and R Bull, *Children's testimony: A handbook of psychological research and forensic practice* pp 279-294.

77 For example, J Jackson, J Doak, C Saunders, D Wright, and D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (2024) p 20; and V 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) p 208.

78 Such as young people or those with cognitive impairments.

79 See eg R Helm, "Constructing truth in the jury box in serious sexual offence cases" [2023] *Criminal Law Review* 399, 400; K Hohl and M Conway, "Memory As Evidence: How Normal Features of Victim Memory Lead to The Attrition of Rape Complaints" (2017) 17 *Criminology and Criminal Justice* 248, 255-256.

80 J Chalmers, E Keane, F Leverick and V Munro, "Putting victims and witnesses at the heart of the justice system? The Victims, Witnesses and Justice Reform (Scotland) Bill" [2023] *Criminal Law Review* 709, 715 and A Williams, "Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials" (2020) pp 89 and 100.

Overview of the current position

12.94 There are various adaptions available for giving evidence for vulnerable and intimidated witnesses, including modifications to advocacy and the use of intermediaries to facilitate participation. In modern practice, advocates are expected to adapt their advocacy style for young or vulnerable witnesses.[81] Depending on the needs of the particular witness, the judge may control the questions asked in cross-examination, and can require a list of questions in advance. These questions can be discussed between the parties at a pre-trial hearing known as a ground rules hearing ("GRH"), and adapted to comply with guidance on questioning vulnerable witnesses.[82] The courts are alive to the potential prejudice to the defendant if they are "wrongly prevented from pursuing a legitimate line of questioning".[83] However, case law has concluded that restriction and modification of questioning for vulnerable witnesses "is not inherently unfair and in fact, may ensure that cross-examination is more focussed and effective".[84] We consider the existing measures to assist with giving evidence available to sexual offences complainants in Chapter 9.

12.95 In the consultation paper, we considered the use of intermediaries as a possible comparator to specialist examiners. The original vision for the intermediary role was a third party interposed between the child witness and the advocate, "through whom questions would be relayed".[85] The Youth Justice and Criminal Evidence Act ("YJCEA") 1999 gave effect to this to some extent. Section 29 of the YJCEA allows questions to be asked through an intermediary, who can explain the questions to the witness, and communicate and explain their answers back to the person asking the questions. In practice, intermediaries usually take a more advisory role, suggesting how questions should generally be asked by the advocate, and only intervening if there is a risk of miscommunication.[86]

12.96 Drawing on comparable schemes in other jurisdictions,[87] the model we discussed would extend these principles by placing some or all of the questioning of a witness in the hands of a third party trained in adducing best evidence from vulnerable witnesses. Specialist examiners would assess the communication needs of a witness, and, unlike intermediaries, advise on the content of questions as well as their form. They could then conduct the questioning, with input from the parties. In the consultation paper, we identified several possible models; these include the use of court-appointed lawyers with specialist training or communications experts, either of

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81 See Criminal Practice Direction 3E.4; *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579.

82 See, for example, Inns of Court College of Advocacy, "The 20 Principles of Questioning: A Guide to the Cross-Examination of Vulnerable People and Children" (2022).

83 *R v Dinc* [2017] EWCA Crim 1206, [2018] Crim LR 263.

84 Above.

85 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 352, citing Home Office, *Report of the Advisory Group on Video Evidence* (1989).

86 P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 354.

87 For more detail on these jurisdictions, see CP 259, paras 13.57 to 13.79.

whom could cross-examine and / or take evidence in chief in pre-recorded interviews.[88]

12.97 We identified several general benefits of using specialist examiners.[89] Using specialist examiners focuses on taking a trauma-informed approach and may reduce the risk of traumatisation for complainants. In light of research on the impact of trauma on memory, it may improve complainants' ability to communicate, and be more effective at producing accurate information and best evidence.[90] The use of specialist examiners would place less reliance on judges monitoring cross-examination, ensuring questioning is appropriate from the outset.[91]

12.98 We also noted a number of disadvantages, including the limited evidence base to support their introduction.[92] Aside from the dispute as to the extent of the problems with the current model,[93] there is an absence of evidence about potential impact.[94] There are concerns about the cost and availability of specialist examiners, along with the cost of the associated GRHs. Some express dissatisfaction with the role of intermediaries, who can be perceived as unwelcome additional third parties, affecting the adversarial model of justice.[95] Others consider that the use of specialist examiners risks removing the onus on judges and parties to educate themselves. Some fear that specialist examiners would lack legal training and would not probe the complainant's account sufficiently, or would be perceived as not doing so. Some argue that their presence could create a negative perception of the defence in the eyes of the jury.

12.99 We acknowledged that the arguments in favour of specialist examiners are most persuasive in relation to child witnesses or those with particular communication needs. We commented that a trauma-informed approach might be incorporated in other ways, such as enhanced measures to assist with giving evidence, SSOCs, and greater use of GRHs and agreed questions. Further, we stated that the concerns about adversarialism and traumatisation may be overstated in practice, noting that there are limitations to the trial observation studies on this topic.[96]

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88 In Consultation Question 110, we asked for views on whether a specialist examiner role should be undertaken by communication experts or lawyers. While this question received limited responses, there was a clear preference amongst consultees that if a scheme were to be introduced, it should use legal professionals in the specialist examiner role.

89 CP 259, paras 13.81 and 13.82.

90 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assau*lt (2020) chs 8-12.

91 Above, pp 428 and 430.

92 CP 259, para 13.83.

93 See CP 259, ch 9.

94 There is an absence of evidence concerning intermediaries, the nearest comparator. See P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence" (2017) 21 *International Journal of Evidence and Proof* 351, 364.

95 See, for example, South Australian Law Reform Institute, 'Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia' (2021), p xx.

96 See CP 259, paras 9.33-9.49 for consideration of trial observation studies and their limitations.

12.100 We noted further alternatives which help achieve best evidence and treat complainants fairly, such as Anneleise Williams' "fair treatment model".[97] This approach emphasises respect and dignity for participants "beyond basic civility" and recommends measures such as welfare checks, increased interventions, and more breaks to alleviate distress.

12.101 As such, we did not make any provisional proposals in relation to specialist examiners. Instead, in Consultation Question 108, we invited consultees' views on whether a pilot scheme of specialist examiners should be introduced.

Should a pilot scheme of specialist examiners be introduced?

Consultation responses and analysis

12.102 Consultation responses showed strong quantitative and qualitative opposition to a pilot scheme of specialist examiners.[98] Consultees highlighted particular concerns about the impact on fair trial rights and the defendant's ability to test the evidence fully.

12.103 Some consultees expressed generalised support for specialist examiners, with West Mercia Police describing the use of specialist examiners as "well overdue". Others expressed more qualified support. The Open University's FLAG research cluster, for example, supported the use of a pilot on the basis that the issues are "complex … with no clear answer". Dr Amelia Shooter thought that more detail would be required via a further separate Law Commission project and observation of inquisitorial systems.

Reducing reliance on myths and misconceptions

12.104 Consultees suggested that using specialist examiners may reduce reliance on myths and misconceptions.[99] For example, Refuge stated:

> Defence lawyers often play on myths and misconceptions in the courtroom to either confuse a complainant or play on the previously held opinions of the jury in sexual violence trials. The appointment of a specialist examiner could focus on trauma-informed practice, which could allow a complainant to communicate more effectively and ensure appropriate questioning from the outset, limiting the use of myths and misconceptions by the defence.

12.105 We note that there is dispute as to the extent to which advocates rely on myths and misconceptions. Recent research conducted on behalf of the Nuffield Foundation found that during trial observations, "blatant and overt appeals to rape myths and stereotypes … simply were not observed".[100] The report found while there were "somewhat veiled and vague appeals to what might conceivably be construed as rape

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97 A Williams, *Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials*, University of the West of England PhD thesis (2020).

98 We received 68 substantive responses to this question. Of these, 16 consultees supported a pilot scheme; however, three of these were qualified by the need for further research. 39 consultees did not support a pilot scheme, while 13 consultees gave answers classified as 'other'.

99 JURIES; and Refuge.

100 J Jackson, J Doak, C Saunders, D Wright, and D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (2024) p 118.

myths" in a small number of trials, these were generally contained in closing speeches rather than cross-examination. Where such references arose, they did not appear to make a difference to trial outcomes.[101]

12.106 In contrast, Dr Charlotte Herriott considers that:

> findings of recent court observation research reflect somewhat less optimism. Indeed, whilst noting that rape myth endorsement has become distinctly more subtle and nuanced in the courtroom, Smith (2018) observed that barristers often sought to frame similarities between previous, consensual sexual history evidence and the latter alleged rape.[102]

12.107 We examined this issue in the consultation paper, concluding that, even taking account of their limitations, "trial observations in England and Wales do consistently reveal examples of barristers deploying myths and misconceptions about sexual offences". Considering the current evidence base in the round, we maintain that view.[103]

Benefits for complainants

12.108 The use of specialist examiners may carry two particular benefits for complainants: achieving best evidence, and reducing traumatisation in the trial process. Professor Anne Cossins suggests that the use of a specialist examiner is "the only way to ensure the necessary conditions of reliability when a vulnerable witness is being cross-examined on their evidence".[104] In consultation, Refuge agreed that traumatisation can make complainants "susceptible to misleading questions or attempts to discredit them which are not based upon genuine credibility issues". Naturally, procedures which encourage more reliable evidence will also benefit the court and the administration of justice.

12.109 Not all consultees agreed that specialist examiners would benefit complainants. The Six Circuits of England and Wales ("Six Circuits")[105] described this rationale as "ill founded", arguing that it is not possible to remove trauma entirely in the context of sexual allegations, and that special measures are already "routinely deployed to minimise the inherent trauma present". They were unpersuaded by the best evidence argument, noting that a complaint "may in fact not be a true complaint at all and still needs to [be] fairly and rigorously tested in cross examination".

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101 Above, p 118.

102 C Herriott, *SBE in Rape Trials – Is the Jury Out?* (2023) p 43-44, citing O Smith, *Rape trials in England and Wales: Observing justice and rethinking rape myths* (2018).

103 CP 259, para 9.34.

104 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assau*lt (2020), p 613.

105 Consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

Fair trial rights and the adversarial process

12.110 One of the principal arguments made against the use of specialist examiners is the risk that their use would interfere inappropriately with fair trial rights and the adversarial system. This concern, raised in the consultation paper, was echoed by a significant proportion of consultees.[106] The Six Circuits raised concerns about the detriment arising from removing defence counsel's ability to cross-examine "the most fundamental witness in the case". Gwent Police stressed that "the defendant's voice must be heard", while Martin Rackstraw believed this would "undermine the adversarial process, almost certainly to the detriment of the Defence". He added:

> Much would depend on the qualifications and expertise of a 'specialist examiner' but questioning by someone other than an advocate who is familiar with the case and acts under a duty to use all means to secure their client's acquittal within professional boundaries risks the defence case not being advanced with sufficient robustness or forensic force.

12.111 Consultees noted that specialist examiners would need details of the defence case in order to cross-examine the complainant fully, and expressed concerns as to how the process would work.[107] HM Council of Circuit Judges questioned how specialist examiners would operate in cases where the veracity of the complainant is in issue, which would call for more direct and adversarial cross-examination.

12.112 Although forms of specialist examiner are used in other jurisdictions,[108] these comparisons may be of limited assistance. Fair trial rights must be considered in the context of the procedural traditions of England and Wales. There is merit to the argument that a specialist examiner will have difficulty in cross-examining the complainant and fully testing their account. An example given by the Law Society further underlines this point. It compared the specialist examiner role to that of special counsel in public interest immunity hearings to determine disclosure to the defence:

> This is when an advocate who is not instructed by the accused tries to ensure that the accused's interests are safeguard[ed]. Many advocates view that role as being extremely challenging, as they lack sufficient information about the defence case.

12.113 The role of the specialist examiner would arguably be more challenging in certain aspects. A specialist examiner would be cross-examining the main prosecution witness before a jury, rather than challenging disclosure before a judge.

12.114 Given the above, we accept that the introduction of specialist examiners could have significant implications for the conduct of the defence case.

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106 Fourteen who opposed a pilot scheme, and five whose answers were classed as "other".

107 HM Council of Circuit Judges; and the Law Society of England and Wales ("Law Society").

108 In Norway, for example, evidence in chief and cross-examination of children under 14 is conducted in one go by an independent expert, usually a highly trained police officer. The judge and parties watch remotely and can suggest questions. In Scotland, evidence in chief and cross-examination may be recorded in front of a judge at a pre-trial hearing, which the defendant does not attend but is entitled to watch and hear (known as taking "evidence on commission"). This is preceded by a GRH where the parties discuss the form and content of the proposed questions. For further information, see CP 259, paras 13.57-13.79.

Impact on perceptions of fairness

12.115 There is a further risk that specialist examiners may impact on participants' perceptions of the trial process. HM Council of Circuit Judges suggested that specialist examiners would result in convicted defendants "feeling aggrieved that their case has not been adequately presented on their behalf or at all", cautioning that this could give rise to a substantial body of appeals.

12.116 Some consultees thought that the use of specialist examiners would confuse the jury. Rachel Snaith[109] suggested that "introducing another person into a case would cause more confusion about who does what in the process and what people's roles are". We acknowledge this concern; to some extent, this could be addressed by the judge giving a clear explanation to the jury at the outset and close of the case.

12.117 Two stakeholders were concerned that a specialist examiner would damage the jury's perception of the defendant and their representative, with one suggesting that "the optics to the jury are appalling".[110] Conversely, Solace Women's Aid was concerned that using specialist examiners could damage juror perceptions to the detriment of the complainant. It stated that this could "give juries the perception that the defendant is not getting a fair trial, and may lead to a more sympathetic view of the defendant".

Sufficiency of existing protections

12.118 As we considered at paragraph 12.94 above, there are already adaptations for vulnerable and intimidated witnesses within the existing process, including: guidance, mandatory or expected training, GRHs, judicial intervention, disciplinary consequences for practitioners, and special measures. A number of consultees believed that these existing protections for complainants are sufficient to meet the aims of specialist examiners. They argued that if there is an issue, the focus should be on improving these options, which are less restrictive of the defence case.[111]

12.119 In Chapter 14, we consider the full picture of our recommendations and their impact on the trial process. We agree that less restrictive options should be pursued, and that effective change can be implemented without impact, actual or perceived, on fair trial rights.

Additional concerns

12.120 Consultees also raised operational issues about the implementation and resourcing of any pilot of specialist examiners.

12.121 HM Council of Circuit Judges identified numerous concerns about case management and procedure. These included the qualifications and experience of specialist examiners, and how this would be assessed; when the specialist examiner would meet the complainant; how much information would be provided by the defence; how

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109 Employee of Northumbria Office of the Police and Crime Commissioner.

110 Kate Goold, solicitor.

111 Thirteen consultees, including HM Council of Circuit Judges; Cardiff University Law School Innocence Project; the Law Society; the Bar Council; the Criminal Bar Association ("CBA"); Richard English, barrister; South Wales Police; and South Wales Office of the Police and Crime Commissioner.

adequate questioning would be ensured; the process for further questions; and how direct challenges to veracity would be dealt with. It further questioned how judges will fairly manage the process and intervene without knowledge of the working practices of specialist examiners.

12.122 The Law Society was concerned that without full details of the defence case, a specialist examiner would have a very limited role and would not be able to challenge the prosecution case fully. Martin Rackstraw described the issues regarding legal professional privilege as "insurmountable". One practitioner stakeholder thought that advocates would be unwilling to take on cases where a "key aspect of the case", namely the examination of the complainant, is not within their control.

12.123 Some consultees thought that specialist examiners would add unnecessary delay and expense.[112] South Wales Office of the Police and Crime Commissioner raised concerns about the impact of consequent delays on the complainant. Although it noted evidence supporting specialisation in other fields, nia (a service provider for women and girls who have been victims of sexual violence) was concerned about potential lack of availability of sufficiently qualified and specialist lawyers to act as specialist examiners.

Conclusion

12.124 We recommend that a pilot scheme of specialist examiners is not introduced. While we acknowledge the possibility of benefits to complainants, this aim can be met through the less restrictive reforms we recommend elsewhere in this report. We do not consider that these possible benefits form a sufficient evidence base for such a substantial reform of the existing adversarial trial process; indeed, we heard contrasting arguments that specialist examiners may not always be beneficial or effective for complainants.

12.125 There are compelling arguments about the impact of specialist examiners on defendants' fair trial rights, and the risk of actual or perceived bias. The use of specialist examiners is, in principle, compatible with article 6.[113] However, we do not at present have sufficient evidence or support from consultees about how specialist examiners might be used compatibly with article 6 within our own procedural traditions. We note that there were limited views on how a pilot could be operationalised, with some generally supportive consultees expressing uncertainty as to the shape and parameters of any scheme.

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112 Martin Rackstraw; South Wales Office of the Police and Crime Commissioner; the CBA; the Bar Council; and Andrew Wilkins, barrister.

113 See, for example, *SN v Sweden* App No 34209/96 (2004) 39 EHRR 12. In that case, the Court considered that the defendant's article 6 rights had not been violated where defence counsel was not able to directly cross-examine a young witness in court; instead, issues identified by the defence were explored by a police officer in a further interview requested by defence counsel. The Court commented on the "special features" of criminal proceedings for sexual abuse and accepted that in such proceedings, "certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence". The Court reiterated that evidence obtained under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention "should be treated with extreme care". However, in the present case, it held that care had been taken; the defence had the opportunity to request further interviews and to indicate areas to be explored with the witness. and the national court had regard to the nature of the witness' evidence in reaching its decision.

12.126 We also considered additional concerns raised by those opposed to such a pilot about delay, expense and legal professional privilege. While some of these could be addressed through procedure and practice, they represent an additional challenge for any pilot scheme.

12.127 Given these substantial concerns, and the difficulties with the evidence base in support of specialist examiners, we agree that less restrictive options should be explored. These would involve improved use of existing protections, such as mandatory training, greater use of GRHs, judicial intervention, disciplinary consequences for practitioners, and improved access to measures to assist with giving evidence. As consultees submitted, the introduction of specialist examiners would create delay and expense that we are not satisfied would be justified. These less intensive options should be explored first.

Recommendation 67.

12.128 We recommend that a pilot scheme of specialist examiners should not be introduced.

JUROR SCREENING

Introduction

12.129 In England and Wales, jurors are selected at random from the electoral register; any eligible member of the public over the age of 18 may be summoned to do jury service.[114] Regardless of the type of case, there is no requirement for any particular expertise. Under the Juries Act 1974 and the common law, prospective jurors may be excused or ruled out in a number of ways; none of these extend to specific questioning about jurors' level of acceptance of rape myths and misconceptions.[115]

12.130 As we considered in Chapter 1, there are deep-seated concerns that entrenched myths and misconceptions about rape may impact juror deliberation in sexual offences trials. In this section, we consider whether this could be addressed by screening prospective jurors to identify and exclude those with high levels of rape myth acceptance ("RMA").

12.131 The provisional position we reached in the consultation paper was that juror screening would be neither viable nor desirable.[116]

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114 To be eligible, the potential juror must be registered as an elector, between 18 and 76 years old, and have been resident in the UK for at least five years since the age of 13. See the Juries Act 1974, s 1.

115 For example, under the Juries Act 1974, s 9, a potential juror may be excused from jury service where there is a "good reason" to do so. Where there are doubts that a person's understanding of English is sufficient, s 10 provides that the person can be brought before a judge to determine whether or not they should act as a juror. Under s 12, parties may challenge jurors "for cause" – that is, with a legitimate reason. For further detail, see CP 259, para 13.17.

116 See CP 259, paras 13.200-13.206.

12.132 First, juror screening has practical and financial implications. It will cause complexity and delay, and there may be difficulties in ensuring the reliability of any RMA scale used. It may also raise questions about wider screening for other types of cases, or for criminal justice professionals. Secondly, screening may not be effective. There is no guarantee that those with low scores would not go on to express myths and misconceptions during deliberations or be influenced by other jurors who did so. Thirdly, screening could significantly limit the available pool of jurors. Fourthly, the process would be far removed from the current model for discharging jurors, which is transparent and conducted in open court, with submissions from the parties about the questions that should be asked, and the opportunity to raise concerns arising from those answers. The use of RMA scales does not provide for that opportunity. Finally, it could be perceived as influencing the composition of the jury, weighting the jury against the defendant or leading to the exclusion of jurors from certain sections of the community, which is currently prohibited by the Criminal Practice Directions.[117] Doing so could damage the legitimacy of the trial process by creating perceived or actual bias among jurors.

12.133 We also noted concerns that screening might pre-dispose the jury towards conviction, as demonstrated by research into capital cases in the United States.[118]

Consultation responses and analysis

12.134 In Consultation Question 114, we asked whether consultees agreed that jury screening would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions. Our provisional position received considerable support, with consultees expressing strong opposition to juror screening for both principled and practical reasons.[119]

Arguments in support of juror screening

12.135 In the consultation paper, we noted Dr Dominic Wilmott's support for jury screening via validated RMA questionnaires. In his view, RMA can be ingrained, and may be drawn on in the absence of direct evidence in RASSO cases. He told us that while there is some evidence that education methods may work for a subset of jurors, some jurors are unlikely to set aside attitudes and belief systems underpinning their decision-making.[120] He suggests that there are limited opportunities for RMA to be identified and reported during a trial, at least until deliberations begin, or afterwards due to prohibitions on jurors disclosing their deliberations.[121] We cited his mock jury

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117 See Criminal Practice Direction (2023) 8.1.1.

118 See WC Cowan, CL Thompson and PC Ellsworth, "Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation" (1984) 8 *Law and Human Behavior* 53.

119 29 consultees responded to this question; of these, 20 consultees agreed with the proposal that screening would not be helpful. Four consultees disagreed, while five gave answers categorised as "other". 43 respondents did not answer this question.

120 CP 259, paras 13.178-13.183.

121 D Willmott, *An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials*, University of Huddersfield PhD thesis (2018), p 19.

research which found that higher levels of RMA result in increased tendency to acquit and greater belief in the defendant's account.[122]

12.136 We also set out Professor Cossins' views in favour of jury screening. In her opinion, the pressure to reach a unanimous group decision in an out-of-the-ordinary situation leads to a tendency for jurors to consider information which supports the group's pre-existing preferences.[123] She argues that as "hard evidence" is uncommon in sexual offences, "it can be expected that jurors will rely on extra-legal factors (myths, biases and misconceptions)..." in an unregulated way, with beliefs and approaches derived from a wider "rape supportive culture".[124]

12.137 In consultation, we received some support for the use of RMA screening.[125] JURIES cited Dr Wilmott's mock jury research findings that RMA scores "were the most consistent predictor of verdict". It accepted the limitations on the effectiveness of RMA screening but supported the use of RMA screening as part of a package of measures. In its view, RMA screening is "vital in order to facilitate a fair trial" by filtering out individuals "who will be the hardest to reach via traditional educational methods".

Effectiveness of screening

12.138 Other consultees doubted the effectiveness of screening. Dr Matt Thomason stated that "there is no reliable method by which this could be done", while the CBA and the Six Circuits referred to screening as "inherently unreliable". Similarly, the Law Society commented that there is "insufficient evidence" of effectiveness of RMA screening.

12.139 The Open University's FLAG research cluster raised concerns about effectiveness because "the use and impact of myths is increasingly subtle and indirect". This was supported by Dr Herriott, who stated that "research findings are increasingly showing rape myth endorsement to have become more subtle and covert over time".[126]

12.140 Consultees' responses on this issue are supported by existing research on the increasingly subtle application of myths and misconceptions. In the consultation paper, we noted that the dynamics of the jury room may mean that the "effectiveness of screening procedures may be overestimated", according to Professor Vanessa Munro.[127] We cited Professor Munro's research, which found that jurors may give socially acceptable answers in the abstract when screened and then revert to myths when deliberating over a concrete scenario, particularly where there are gaps and inconsistencies in the evidence. Similarly, Dr Sarah McMahon and Dr G. Lawrence Farmer express concerns that more subtle myths and misconceptions may not be

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122 See CP 259, para 13.180, and C Lilley, D Willmott and D Mojtahedi, "Juror Characteristics on Trial" (2023) 13 *Frontiers in Psychiatry* p 2.

123 CP 259, para 13.187, and A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) p 121.

124 A. Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020) pp 121 and 177.

125 From consultees including Tricia O'Sullivan, solicitor; JURIES; and Pan-London Rape Crisis Centres Experts by Experience Panel.

126 C Herriott, *SBE in Rape Trials – Is the Jury Out?* (2023) p 8.

127 V Munro, "Judging Juries: The Common Sense Conundrums of Prosecuting Violence Against Women" (2019) 3 *New Zealand Women's Law Journal* 13, 31-32.

accurately assessed due to the phrasing and language of the RMA screening questions, and the social desirability bias arising from those questions.[128] They argue that society has shifted towards viewing overt victim-blaming and sexist beliefs as intolerable; however, despite this progress, studies suggest that belief in myths and misconceptions may still influence decision making.[129]

Inroads into the role and function of the jury

12.141 In the consultation paper, we referred to Professor Munro's comments that excluding "the less enlightened" is a substantial inroad "into the role and function of the jury as a vehicle for democratic participation". Several consultees agreed, describing it as "potentially dangerous"[130] and a "blunt tool that should be used sparingly".[131] We note that these are more general criticisms of screening jurors at all, rather than specific criticisms of screening jurors for RMA.

12.142 Some consultees highlighted the risks inherent in selecting jurors for specific cases, arguing that one of the dangers of jury screening lies in its use for participants, types of cases, or views or attributes viewed as "problematic". Dr Thomason stated that "it is obvious that we should not be screening our population for the appropriateness of their opinions and views before allowing them to perform their civic duty". Similarly, the Bar Council suggested it was inappropriate to try to "engineer juries to be representative of only the currently approved views".

Fairness & transparency

12.143 Juror screening may carry the risk of creating perceived or actual bias among jurors. Doing so could damage the legitimacy of the trial process by creating juries with a pre-disposition towards conviction.

12.144 Random selection of jurors has been described as "central to the very nature of the jury".[132] The 1986 report of the Fraud Trials Committee ("the Roskill Report") considered issues surrounding the composition of the jury in fraud trials. It noted that the efficacy of the jury system "depends upon the principle of random selection",[133] and that this principle had already been "necessarily" eroded to an extent "for reasons which are perfectly understandable … but nevertheless regrettable".[134]

12.145 In *R v Abdroikof*,[135] the House of Lords considered the issue of actual or perceived bias in jurors, arising out of three joined appeals in which individual jurors had been members of the police or CPS. The court outlined the "detailed rules" governing

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128 S McMahon and G L Farmer, "An updated measure for assessing subtle rape myths" (2011) 35 *Social Work Research* 71.

129 Above, 72.

130 Andrew Wilkins.

131 Martin Rackstraw.

132 Fraud Trials Committee, *Report of the Fraud Trials Committee* (1986), ("the Roskill Report"), para 7.37. See also *R v Ford* [1989] Criminal Law Review 828.

133 The Roskill Report, para 7.21.

134 The Roskill Report, paras 7.21 and 7.37.

135 [2007] UKHL 37.

qualification and disqualification of jurors, noting that these reflected the "familiar truth, that if its metal be flawed a bell will not ring true".[136] It might be suggested that jurors with high levels of RMA represent a flaw in the bell which could justify the use of screening. However, the court also considered that in reality, juries operate *despite* prejudice, not without prejudice.[137] It outlined the safeguards in the jury process, including the oath or affirmation to give a true verdict according to the evidence, judicial directions on impartiality, the number and diversity of the people on a criminal jury, [138] and the discussion undertaken by the jury to reach a consensus.[139] It further noted that the use of a hearing "to try to select jurors who are free from relevant prejudices", as practised in the United States, had been specifically rejected in England and Wales.[140]

12.146 While other methods of challenging jurors exist in this jurisdiction, juror screening for RMA may be considered less transparent and open. Existing methods of challenging jurors allow parties the opportunity to make submissions about the questions that should be asked, to hear jurors' answers and to raise concerns arising from those answers. The use of RMA scales would not allow that opportunity. Even where juror vetting is permitted in exceptional cases, such as terrorism or national security cases, a high bar is generally placed on the use of such powers.[141]

12.147 There is a further risk of introducing bias into juries through the selection process. In the consultation paper, we noted research undertaken in the United States into the use of "death-qualified" juries.[142] In states in which the jury is required to determine whether to pass the death penalty,[143] jurors may be questioned on their views on capital punishment; those who object to the death penalty may be removed in order to ensure that the jury would be willing to pass a death sentence if the crime warranted it.[144] Research has shown that death-qualified juries are more likely to convict defendants.[145] While we have not been directed to evidence suggesting that the same effect results from RMA screening, there is sufficient similarity to warrant concern.

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136 *R v Abdroikof* [2007] UKHL 37, para 7.

137 Above, para 34.

138 Above, para 33.

139 Above, para 67.

140 Above, para 34.

141 The prosecution can seek to ask a member of the jury panel to stand by "in rare circumstances" if there are strong reasons for believing that potential juror might be a security risk or susceptible to improper approaches, and should only do so with the personal permission of the Attorney General. See *Archbold Criminal Pleading, Evidence and Practice* (2025), 25-275 and Attorney General's Office, "Jury vetting: right of stand by guidelines" (30 November 2012).

142 CP 259, paras 13.198-13.199.

143 25 of the 27 states which retain the death penalty. In Montana and Nebraska, the sentence is decided by a single judge and a panel of three judges respectively. For further information, see Death Penalty Information Centre, "State by state data: State Summaries".

144 See *Witherspoon v Illinois* (1968) 391 US 510 and *Lockhart v McCree* (1986) 476 US 162.

145 See eg R Salgado, "Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in *United States v. Green*" (2005) 2 *Brigham Young University Law Review* 519; C Haney, A Hurtado and L Vega, ""Modern" death qualification: New Data on its Biasing Effects" (1994) 18

12.148 We therefore consider that any extension of the existing methods for challenging jurors and subsequent erosion of the principle of random selection would require a strong evidence base in support of its necessity and efficacy.

Practical concerns

12.149 In light of these concerns, three consultees argued that RMA screening would add complexity and delay without any clear benefit, describing it as "time-consuming".[146] Two consultees added that screening is also unnecessary because RMA is already addressed via detailed directions.[147] We consider these and other alternative methods of juror education, including the use of expert evidence, in Chapter 10.

12.150 Beyond administrative delay, RMA screening may have the unintended result of limiting the pool of jurors, potentially leading to further delays. A psychologist told us that RMA is so endemic that screening for it will result in a limited pool of jurors, and will do nothing to address RMA amongst criminal justice professionals, limiting its impact on reducing rape myth acceptance in the overall criminal justice process.[148] If RMA is so endemic that screening results in the exclusion of a significant subset of the population from sexual offences trials, there may be further risks to public access to and confidence in the justice system.

Calls for further research

12.151 Dr Lara Hudspith told us that further research is required to determine what screening methods should be used, and the effectiveness of these methods. Both RCEW and the CPS considered that there was insufficient evidence to answer this consultation question fully; Rape Crisis England and Wales stated, "it may be worth piloting", while the CPS suggested further research with juries.

12.152 Calls for more research are considered in more detail in Chapter 10. In that chapter, we make recommendations in relation to further commissioning of and permission for research with real jurors, and statutory exemptions from section 20D of the Juries Act 1974 to enable such research to take place. Such research might assist future decision makers when considering screening; for example, it may include insights into the impact of RMA on deliberations, and findings from work with real jurors might help to develop a more reliable RMA scale that could be used for screening. However, at present, the evidence base is insufficient to displace the clear arguments we heard against jury screening.

Conclusion

12.153 We heard both principled and practical objections to the use of screening of jurors in this way. Consultees were concerned that screening would be ineffective, and would represent an unacceptable interference with the role and composition of the jury.

Law and Human Behavior 619; M Allen, E Mabry and D-M McKelton, "The impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment" (2004) 22 *Law and Human Behavior* 715; M Lynch and C Haney, "Death Qualification in black and white: racialized decision making and death-qualified juries" (2018) 40 *Law and Policy* 148.

146 The CBA; nia; and the Six Circuits.

147 The CBA; and the Six Circuits.

148 CP 259, paras 13.178-13.184.

There were cogent criticisms of the risk of actual or perceived bias, and the possibility for unnecessary complexity or delay.

12.154 We therefore maintain the provisional position reached in the consultation paper that jury screening is neither viable nor desirable on the evidence currently available.

Recommendation 68.

12.155 We recommend that screening jurors for rape myth acceptance should not be introduced.

REASONED JURY VERDICTS

12.156 What happens in the jury deliberation room is confidential. When a jury returns a verdict, they select a foreman to speak for the jury in open court. The jury are asked, using set wording, whether they have reached a verdict on which they are all agreed.[149] If the foreman confirms that they have reached a verdict, the court clerk will ask what that verdict is.[150] The foreman will respond either "guilty" or "not guilty"; no further information will be given about the reasons for the jury's decision. There is a different formulation where the majority direction has been given; even then, there is no further information given.[151]

12.157 In this section, we consider suggestions for reform that would require juries to give further information about the reasons underlying their verdict.

Summary of consultation paper

12.158 In 2001, the Review of the Criminal Courts of England and Wales ("the Auld Review") concluded that juries should be required to give reasons by answering a set of questions tailored to the case.[152] In the consultation paper, we summarised the Report's reasons, which were that:

> this would reduce perverse verdicts; increase honesty and openness; encourage more structured deliberations and thus reduce the influence of prejudice; identify the impact of evidence which was admissible but controversial; and lead to better informed appellate decisions.[153]

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149 See the Criminal Procedure Rules 2020 ("CrimPR") r 25.14(6).

150 This is the procedure for a unanimous verdict. Juries can also return a majority verdict, on which 10 (if there are at least 11 people on the jury) or nine (if there are 10 people on the jury) of them agree – see s 17 of the Juries Act 1974. The court must not accept a majority verdict unless it considers that the jury have deliberated for a reasonable amount of time given the nature of the case; in the Crown Court, there is an additional requirement that the jury must have deliberated for at least two hours.

151 Save for the numbers in the event of a conviction only – see CrimPR r 25.14(6).

152 A review of "the purpose, structure and working of the criminal courts in the criminal justice system" by the Rt Hon Lord Justice Auld; see Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (September 2001), ch 11, para 52.

153 CP 259, para 13.210.

12.159 Professor McDonald has also identified further benefits such as better "consideration of the reasonableness of the outcome", and the benefits to the complainant in knowing the reasons for the verdict.[154]

12.160 However, we provisionally concluded against reasoned verdicts. We considered that any requirement would be unworkable in practice. We cited the Dorrian Review, which concluded that requiring reasons "could lead to confusion, call the verdict into question, lead to longer trials and increase the number of appeals".[155] We were not persuaded that reasoned verdicts would reveal jurors' reliance on myths. We noted that Professor McDonald, too, had considered that the current jury system "could not support the provision of reasons".[156] We stated that the tick box yes/no questions on the elements of the offence envisaged by the Auld Review would not necessarily show the influence of myths, particularly where it was subtle. We also noted arguments that requiring more detail from jurors would be too burdensome.[157]

Consultation responses and analysis

12.161 In Consultation Question 115, we asked whether consultees agreed that a requirement for reasoned verdicts in sexual offences cases would not be useful in addressing myths and misconceptions.[158]

Benefits to the parties

12.162 RCEW pointed to the benefits of greater transparency for all parties, particularly complainants. It suggested that reasoned verdicts would improve understanding of juror decision making in RASSO cases, and would "bring clarity and possibly closure to all parties involved, but especially for survivors". JURIES suggested that reasoned verdicts would increase public confidence in the trial process, and improve transparency and access to justice. The LCCSA thought that reasoned verdicts would mean that the Court of Appeal Criminal Division ("CACD") need not "speculate as to a jury's potential reasoning", leading to better informed appellate decisions.

12.163 Consultees also highlighted the potential benefits for longer-term research, policy, and public education. RCEW suggested they could be used to identify "where educative prevention work needs to take place". The LCCSA suggested that they "may form the basis for research and study by future Law Commissions, the Crown Prosecution Service, academia and other bodies".

Effectiveness

12.164 Opinions were mixed as to the effectiveness of reasoned jury verdicts in addressing the impact of myths and misconceptions on juror deliberations.

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154 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022) p 12.

155 Dorrian Review (2021), paras 5.24-5.26.

156 E McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022) p 314.

157 CP 259, para 13.213.

158 Of the 28 consultees who responded substantively to this question, 13 agreed that this proposal would not be useful. Nine consultees disagreed, while six consultees gave answers classed as "other". Twenty-two consultees did not answer this question.

12.165 Two consultees believed reasoned verdicts would be effective. JURIES stated that they would "inevitably facilitate better more structured decision making". Dr Hudspith expressed qualified views on the effectiveness of reasoned verdicts. She said that reasoned verdicts are effective based on the limited available research, but that further research is required.

12.166 Four consultees disagreed.[159] This was articulated by the Bar Council, who suggested that this would not achieve better-reasoned verdicts for jurors unaware of their own prejudice. It argued that there is "no reasonable basis to suppose that a jury would be able to articulate an unconscious bias".

Resourcing

12.167 Some consultees argued that reasoned verdicts would be too burdensome.[160] Jurors may reach a single verdict for differing reasons; the process of producing agreed reasons may be difficult, and could substantially increase the time needed for deliberation.[161]

12.168 Other, less burdensome alternatives are already used in practice. Two consultees[162] told us that the aim of producing better, more structured juror deliberations can be achieved though routes to verdict, which are provided to the jury by the trial judge at the end of the summing up.[163] The Bar Council told us that the use of written routes to verdict is "generally thought to engender appropriately structured decision-making by juries", and did not consider that a requirement for reasoned verdicts would add anything to this.

12.169 However, JURIES argued that the benefits of reasoned verdicts outweigh the concerns about resourcing and delay:

> Reducing perverse verdicts and improving access to rape justice is a critical goal and if a requirement for reasoning has a resource impact through longer trials and increased volume of appeals we believe that this is a price worth paying.

Exceptionality

12.170 Some consultees objected to exceptionality for sexual offences cases in this context.[164] They argued that this would lead to the creation of a distinction in the jury system between sexual and non-sexual offences.[165]

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159 HM Council of Circuit Judges; CWJ; Professor Joanne Conaghan and Professor Yvette Russell; and the Bar Council.

160 HM Council of Circuit Judges; the Six Circuits; the CBA; Martin Rackstraw; the Bar Council; the Law Society.

161 Martin Rackstraw; the Law Society.

162 The Bar Council; the Law Society.

163 Sometimes this is done after legal directions have been given and before closing speeches.

164 Including Dr Amelia Shooter; Martin Rackstraw; the CBA; and the Law Society.

165 The Six Circuits; the CBA.

12.171 HM Council of Circuit Judges were concerned about over-extension of reasoned verdicts, suggesting that requiring reasoned verdicts in sexual offences cases "raises the spectre of the need for every jury in every case being required to provide reasons lest there be an element of subconscious bias in other types of case".

12.172 We consider a similar exceptionality argument in the context of SSOCs from paragraph 12.53 above. We reach the same conclusion in relation to reasoned jury verdicts; exceptionality alone is not a sufficient reason to reject a suggestion for reform.

Conclusion

12.173 We do not recommend that juries should be required to provide reasons for their verdicts. While there are evidently some arguments in support of doing so, we find, on balance, that the arguments against reasoned verdicts are stronger.

12.174 First, there is a limited evidence base in support of the effectiveness of reasoned verdicts in addressing reliance on myths and misconceptions. Some consultees raised reasons to doubt their effectiveness, with one pointing to the prevalence of subconscious bias which is unlikely to be expressed in a reasoned verdict. Further, we remain doubtful as to whether group answers to a tick box series of yes/no questions would be helpful in achieving these goals. Such answers would not necessarily reveal relevant detail about jurors' reasoning or whether they were influenced by myths. Secondly, practitioner and judicial stakeholders told us that providing reasoned verdicts would be too burdensome. While resourcing concerns alone are not always sufficient grounds to reject a proposition, in the present case we also find that there is no principled argument for the introduction of reasoned verdicts that would outweigh those concerns. Thirdly, three consultees argued that one of the justifications for requiring written reasons, namely encouraging better structured and reasoned verdicts, could instead be achieved through other, less resource-intensive means such as routes to verdict. We acknowledge that routes to verdict are only a partial solution, and cannot rule out myth-based reasoning, but we consider that this is a suitable alternative to reasoned jury verdicts, at least with regards to improving juror deliberations, particularly when viewed against the backdrop of our other recommendations.

12.175 Consultees described the benefits of reasoned verdicts as providing closure for the parties, increasing transparency and public confidence, and potentially assisting other bodies, including the CACD. They also referred to the benefits for longer-term research, policy, and public education. A reasoned verdict may arguably enhance fair trial safeguards by providing greater transparency and scrutiny of verdicts and better-informed appellate decisions. However, the absence of clear evidence about the effectiveness of reasoned verdicts and the extent to which they would achieve these potential benefits, coupled with concerns about resourcing and delay, leads us to maintain our view that they should not be introduced.

12.176 The benefits of informing research, policy and public education could instead be realised by a change to the rules relating to research with jurors; we make recommendations in relation to this in Chapter 10.

Recommendation 69.

12.177 We do not recommend that juries be required to provide reasons for their verdicts.

REMOVAL OF JURIES IN SEXUAL OFFENCES CASES

12.178 Juries occupy a particularly significant position in the criminal justice system of this jurisdiction. Supporters of the jury system often recall Lord Devlin's famous statement that trial by jury is "more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives".[166] As we have explored throughout this report, however, there have been a number of concerns with the jury system in the sexual offences context: susceptibility to myths and misconceptions, the possible influence of other biases, difficulty with complex legal or factual decisions, and the risk of harm to complainants. These issues have led to calls to review the role of the jury in these cases.[167] Professor Cossins, for example, suggests that the jury is "the metaphorical elephant in the room that seems to be an intractable problem that is not able to be reformed".[168]

12.179 We consider that no area of the criminal law is so sacrosanct that it cannot be open to scrutiny and potential reform where the evidence suggests it is necessary. In this section, we consider possible alternatives to jury trials in sexual offences prosecutions. On 9 July 2025, Sir Brian Leveson published Part 1 of his Independent Review of the Criminal Courts ("the Leveson Review").[169] This addresses the use of juries more widely in the context of reform of the criminal justice system; we consider this further from paragraph 12.185 below.

Summary of the current law

12.180 There are a number of circumstances where a defendant may currently be tried without a jury in England and Wales. These include summary-only trials,[170] either-way offences where the defendant consents to summary trial in a magistrates' court, youth court trials, trials where there is a danger of jury tampering,[171] and cases involving the trial judge giving a verdict after the defendant has been convicted on sample

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166 P Devlin, *Trial by Jury* (1956), p 164.

167 See, for example, Rape Crisis Scotland, "Why we support single judge trials" (April 2023), P Jackman, "Is it time to end jury trials in rape cases?" (2022), and J Bindel, "Juries have no place in rape trials. They simply can't be trusted", *The Guardian* (21 November 2018).

168 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 494.

169 The Rt Hon. Sir Brian Leveson, Independent Review of the Criminal Courts*: Part 1* (July 2025) ("the Leveson Review").

170 "Minor" offences which can be heard only in the magistrates' courts, such as common assault or driving while uninsured. Note that summary-only offences may be heard alongside more serious offences in the Crown Court under certain circumstances.

171 Criminal Justice Act 2003, ss 44-46.

counts.[172] Although there was an additional legislated exception to jury trials for serious and complex fraud in the Criminal Justice Act 2003, this was never brought into force, and was repealed in 2012.[173]

12.181 In the consultation paper, we drew particular attention to the position in New Zealand. In that jurisdiction, there is a right to jury trial for cases attracting sentences of 2 years or more. However, judge-alone trials are possible for cases which are likely to be long and complex, "except where there is a maximum penalty of more than 14 years imprisonment".[174]

12.182 We reviewed academic commentary and previous reviews regarding the role of the jury, both in sexual offences cases and more widely. We identified a number of significant arguments in favour of removing juries in sexual offences prosecutions, and equally significant arguments for retaining them. Proponents of removing the jury highlight the limited evidence available in many sexual offences cases, and the greater risk of reliance on myths and misconceptions in those circumstances. They argue that professional judges are more likely to be objective, easier to provide with specialist training, and better equipped to deal with complex questions of law and fact. They point to potential improvements in the way that complainants are treated without the "theatre of a trial" before a jury, and suggest that all parties would benefit from a reasoned verdict given by a judge. Further, they argue that judge-only trials would be less time-consuming and could reduce delays.[175]

12.183 Those in favour of retaining juries argue that juries are an important feature of a democracy; they act as a check on oppression and ensure public participation and engagement in the criminal justice process. They suggest that judge-alone trials would dilute diversity, and would not remove prejudice from the system all together. They highlight the risk of case-hardening amongst the judiciary, and the significant pressure and scrutiny that would be placed on judges in such cases. In light of strong public support for the jury system, they warn that the removal of juries in sexual offences cases could undermine the use of juries more widely, and may cause serious damage to public faith in the justice system.[176]

12.184 This is a brief and non-exhaustive outline of the key issues; we explore these and further arguments in greater detail below.

12.185 There have been a number of previous reviews of the use of the jury in England and Wales. In 1986, the Roskill Report examined the use of juries in complex fraud trials and concluded that "despite all its shortcomings, we find trial by jury an acceptable

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172 Domestic Violence, Crime and Victims Act 2004, s 17. As we noted in CP 259, para 13.220 and n 299, this does not appear to have been widely used and case law indicates how restrictive the conditions are. See, for example, *R v Hartley* [2011] EWCA Crim 1299, [2012] 1 Cr App R 7 at [22].

173 Criminal Justice Act 2003, s 43, repealed by Protection of Freedoms Act 2012, ss 113 and 120, sch 10, pt 10. See *Archbold Criminal Pleading, Evidence and Practice* (2025), 4-329.

174 CP 259, para 13.265.

175 CP 259, para 13.270.

176 See CP 259, para 13.269.

procedure for the vast majority of fraud cases".[177] For particularly complex fraud cases, however, the Committee recommended the establishment of a "Fraud Trials Tribunal'" consisting of a judge and two specialist assessors.[178] This recommendation was made on the basis that such trials are lengthy and involve complex evidence that is difficult for lay jurors to understand.[179] In 2001, the Auld Review proposed the creation of an intermediate tier of jurisdiction between the magistrates' court and Crown Court, consisting of a mix of professional and lay judges.[180] The Leveson Review includes within its terms of reference the introduction of an Intermediate Court and "any other structural changes to the courts or changes to mode of trial that will ensure the most proportionate use of resources".[181]

12.186 We do not seek to replicate the work of these reviews. In this report, we look at the law, guidance and practice relating to the trial process for sexual offences cases. The arguments and analysis set out below are ultimately considered in light of the specific issues we have identified in sexual offences trials, rather than the wider criminal justice system. While there is some overlap with the Leveson Review, our project is focused on the criminal trial process for these specific offences. We have considered the need for reform with the aim of improving the understanding of consent and sexual harm and the treatment of sexual offences complainants and ensuring that defendants receive a fair trial.

12.187 The terms of reference of the Leveson Review are distinct from those of this project. The stated purpose of the Leveson Review is to "produce options and recommendations for a) how the criminal courts could be reformed to ensure cases are dealt with proportionately, in light of the current pressures on the Crown Court; and b) how they could operate as efficiently as possible".[182] The Review considers the significant delays and pressures facing all offences being dealt with in the Crown Court, not only those concerning sexual offences. That is a different, and far wider, remit to ours.

12.188 The removal of juries for any offences is a significant step. However, there are many other jurisdictions across the world that do not use juries, and there are also many different ways of conducting fair trials. Whilst we are aware of the recommendations made within the Leveson Review, we restrict our recommendations below to the offences expressly within our terms of reference, namely sexual offences. We have not consulted on or evaluated the wider issues which form part of the Leveson Review.

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177 The Roskill Report, ch 8.

178 One member of the Committee dissented. Walter Merricks CBE observed that the submissions made by those "closest to the existing system" – including the police, solicitors, magistrates and the Bar – were "overwhelmingly in favour" of retaining the jury. He further noted that "even those in the legal profession who called for a change often indicated that the matter was not self-evident, that procedural changes might well suffice to cure the major mischiefs, and that only a tiny number of cases should be affected by any change." – see the Roskill Report, pp 192-193, paras C5-C8.

179 The Roskill Report, paras 8.35-8.40.

180 Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (September 2001), ch 7.

181 See Ministry of Justice, "Independent Review of the Criminal Courts" (10 February 2025).

182 The Leveson Review, pp 5-6.

Mandatory removal of juries in sexual offences cases

12.189 In Consultation Question 116, we asked for consultees' views on the mandatory removal of juries in sexual offences cases in the Crown Court. Given the balance of the arguments set out above, we did not reach a provisional position; instead, we sought views and evidence from a broad spectrum of opinion.

12.190 In line with the general public opinion on the merits of juries,[183] we received considerable opposition to the removal of juries in RASSO cases, with over half of consultees firmly opposed to doing so.[184] While there was strong support for maintaining juries in sexual offences cases, a significant minority of responses supported their removal. Below, we consider the main arguments expressed by consultees, many of which were explored in detail in the consultation paper.

Key arguments in favour of retaining juries

Public confidence in the justice system

12.191 Given public support for jury trials, we were told of concerns that removing juries would cause a loss of public confidence in the criminal justice system. These views were expressed by a range of consultees, including police, legal practitioners, academics and organisations who support victims and defendants.[185]

12.192 The Bar Council identified a number of ways in which juries contribute to public confidence, including the right of the defendant to be tried by their peers on matters of community importance, democratic participation, oversight of the court process as a protection against oppression, and developing public awareness of the legal process. Rights of Women described the jury applying its collective life experience as the "cornerstone of our justice system" and referred to studies indicating strong public support for juries.[186] Juries have been described as a way of "securing accountability" from the prosecution and the courts.[187] Further, both the common law and statute law of England and Wales often rely on subjective societal standards to judge conduct, such as "reasonable belief" and the "reasonable person". In that context, there may be particular benefits to increased input from a cross-section of the community when applying those subjective standards.

12.193 This argument is reinforced by a substantial body of research over the last 20 years. Support for juries is not unanimous, indicating the consistent presence of concerns,

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183 We consider the data in relation to public support for the jury system in more detail from para 12.191 below.

184 Of 83 responses, 47 considered that juries should be retained. Fourteen consultees supported the removal of juries, while 22 consultees gave answers categorised as "other". Thirty-one consultees did not answer this question.

185 The Bar Council; Rights of Women; the Law Society; Feminism Law and Gender ("FLAG") research cluster at the Open University Law School; the LCCSA; the Six Circuits; the CBA; False Allegations Watch/Empowering the Innocent; and Gwent Office of the Police and Crime Commissioner.

186 See for example J Roberts and M Hough, "Public Attitudes to the Criminal Jury: A Review of Recent Findings" (2011) and additional research considered below.

187 Courts and Tribunals Judiciary, "35th Blackstone Lecture by Lady Justice Hallett: Trial by Jury – Past and Present" (May 2017).

but the majority of respondents tend to prefer trial by jury and support maintaining that right.

12.194 The results of a substantial number of polls were drawn together in a 2009 review of public attitudes towards the jury system.[188] The review found that juries attract high confidence ratings from the public, and that the public believe that juries are representative of the communities from which they are drawn. It stated that

> Polls repeatedly suggest that the public strongly support the concept of the jury. The right to trial by jury is seen as one of the most important rights in a democratic society.[189]

12.195 More recently, a 2023 YouGov survey of 4,065 respondents found that 56% would prefer a jury to decide whether they were guilty of a crime; only 20% favoured trials conducted solely by judges.[190] In 2024, YouGov asked about trust in juries. 8% of respondents had a great deal of trust in juries to reach the right verdict, while 55% had a fair amount. 22% said they did not have very much trust, while 5% had no trust at all.[191]

12.196 There is a highly respectable argument that measures curtailing access to trial by jury are likely to impact upon public confidence in, and engagement with, the criminal justice system. This will undoubtedly be debated more widely following the publication of the recommendations in the Leveson Review.

Potential for actual or perceived judicial bias

12.197 Some consultees and stakeholders expressed concern about the potential for bias amongst the judiciary; these included legal practitioners, police, academics and victims support groups.[192] One of the key arguments put forward in favour of juryless trials in sexual offences cases is rape myth susceptibility and bias amongst jurors; we consider this argument from paragraph 12.212 below. In this context, it is only proper that we consider the equivalent arguments and evidence in relation to bias in judicial decision making across the court system.

12.198 Consultees observed that judges may be as susceptible as the general public to rape myths, despite training. They further commented on the lack of diversity amongst the judiciary, and raised concerns about the potential for increased discriminatory outcomes for black and minoritised ethnic defendants. Professor Yvette Tinsley suggested that some might view a single judge as an "unscrutinised 13th juror", while Women Against Rape described juries as "a crucial antidote" to discrimination. The Bar Council commented:

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188 J Roberts and M Hough, "Public Opinion and the Jury: An International Literature Review" (2009).

189 Above, p i.

190 YouGov, "Who would you prefer to make the decision on whether you were guilty or not guilty of committing a crime – a jury, or a judge?" (20 June 2023).

191 YouGov, "How much, if at all, do you generally trust the jury system used in criminal trials to deliver the right verdict?" (4 March 2024).

192 Eight consultees, including the Bar Council; Women Against Rape; Open University's FLAG research cluster; and Martin Rackstraw.

> Judges are human too, and while they can receive all the training that can be mustered, there is an inevitable risk that they will themselves carry prejudices and misconceptions about human conduct – and unlike a jury deliberation, which provides a forum for ventilation and challenge of any preconceptions, there would be no check against any judicial unconscious bias…
>
> Even if it were conceded that the conclusion – that in many cases alleging sexual offending juries are reliant on the inexact "science" of credibility assessments – may be correct, one might reasonably ask what additional resource judges possess that would enable them to determine guilt to the criminal standard in a different way?

12.199 Some consultees accepted the presence of bias amongst the judiciary, but thought this could be addressed by using a panel of judges and providing specialist training. Refuge noted that that it is much easier to train judges than jurors, as they are a "small body of people who are able to engage in interactive and evaluative training sessions in a way juries cannot … due to resource restrictions".

12.200 Judges are embedded in society and are not necessarily immune to myths and misconceptions prevalent in that society, although they will have additional training on, and awareness of, those myths. However, we accept that concerns about judicial bias, both actual and perceived, may undermine the justification for introducing juryless trials to remove reliance on myths and misconceptions.

Case-hardening and impact on the judiciary

12.201 The Bar Council raised the risk of case-hardening, and added that this may damage public perceptions of the justice system and the judiciary. It also noted that there may be increased media pressure and scrutiny of judges.

12.202 Given the concerns raised regarding vicarious trauma in the context of jurors, which we consider at paragraph 12.227 below, it is also right that this be borne in mind in relation to the judiciary, who will sit on such cases far more frequently.

12.203 Case-hardening and vicarious trauma were also raised in the context of SSOCs, where we considered that this could be addressed through measures such as rotation of judges and the provision of support and specialist training. However, the risks of case-hardening may be higher in the context of a judge-alone trial, where greater responsibility for the facts and law is placed on the judge. In such cases, judges would be required to manage the conduct of the trial whilst simultaneously scrutinising the evidence and reaching a verdict.

Fair trial rights and broader fair trial concerns

12.204 Some have argued that juries play an important role in reaching a fair result and counteracting bias. In the context of racial bias within the criminal justice system, the Lammy Review argued that juries are a "success story" of our system, and the "guardians" of the principle that the law will be applied impartially.[193] The Review argued that:

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[193] David Lammy MP, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2017), p 31.

> The way that juries make decisions is key to this. Juries comprise 12 people, representative of the local population. When a jury retires to make a decision, its members must consider the evidence, discuss the case and seek to persuade one another if necessary. This debate and deliberation acts as a filter for prejudice – to persuade other jurors, people must justify their position. In the final decision, power is also never concentrated in the hands of one individual. If consensus cannot be reached, then a majority verdict can be delivered. Those holding an outlying point of view can be outvoted. This is a case study for a key theme of this review: the best way to deliver fair results is to bring decisions out into the open, subjecting them to scrutiny. This helps both to prevent bias in the first place and to correct it where it occurs.[194]

12.205 In addition to the specific fair trial issues considered above, such as the impact of judicial bias and case hardening, consultees expressed generalised concerns about the impact of removing the jury on defendants' fair trial rights. However, two consultees expressly rejected the suggestion that removing juries may impact on fair trial rights. Refuge referred to the "considerable experience within other jurisdictions for judge-only trials". Professor Munro noted that the European Court of Human Rights ("ECtHR") has ruled that article 6 does not require a jury.[195]

12.206 We agree that the right to a fair trial under article 6 does not require a jury trial. This does not necessarily resolve all fair trial concerns in the context of the adversarial traditions of England and Wales. Professor Paul Roberts expressed concern about the impact of removing juries on fair trial rights as understood in our own procedural traditions:

> … I detect an implicit backsliding, whereby so long as Article 6 is complied with, everything is fine. But Article 6 is merely a baseline, not a full specification of fair trial rights. If, for example, jury trial for indictable offences is a constitutional right in England and Wales (as I believe it is), then removing this right is not compatible with the right to a fair trial, as that concept is understood in our procedural tradition.

12.207 It is right to note that the case of *Twomey*[196] was decided in a UK context; there, a trial conducted by a judge sitting alone following allegations of jury tampering was held not have breached article 6. As we discuss in Appendix 1, the approach of the ECtHR to such cases is generally to evaluate the fairness of the particular proceedings as a whole, rather than focusing on isolated or abstract considerations. *Twomey* represents a narrow and fact-specific exception; that decision alone cannot be interpreted as stating that *all* juryless trials in other contexts would necessarily be treated the same. Further, we accept that comparisons with other jurisdictions which do not use a jury system cannot necessarily resolve the concerns expressed about the loss of fair trial rights in this jurisdiction. Some jurisdictions have inquisitorial systems, which are procedurally very different to the adversarial system used here. Others use variations. In Spain, for example, jury trials have been used for certain serious offences since 1995; these are made up of nine citizens and a presiding judge who sits as part of the

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194 Above, p 32.

195 We consider this in further detail in Appendix 1. See in particular *Twomey, Cameron and Guthrie v United Kingdom* (2013) App Nos 67318/09 and 22226/12 (admissibility).

196 *Twomey, Cameron and Guthrie v United Kingdom* (2013) App Nos 67318/09 and 22226/12 (admissibility).

jury.[197] In England and Wales, the jury trial is the culmination of a long process of investigation and court procedure, all of which has evolved around and alongside the jury trial. It sits within a societal context where those accused of more serious offences have long had an expectation of trial by their peers alone, without any involvement by a judge in the fact-finding element of the trial. We acknowledge consultees' concerns about defendants' fair trial rights in this context, which must be weighed against any purported benefit of juryless trials in sexual offences cases.

Exceptionality

12.208 Consultees raised strong principled and practical objections to exceptionality in sexual offences cases created by the removal of juries. As we set out at paragraph 12.180 above, there are a number of circumstances in which criminal trials in England and Wales are not heard by a jury, including summary-only offences and either-way offences where the defendant consents to summary trial in a magistrates' court. However, in the context of serious offences, the default mode of trial on indictment is trial by jury. When discussing exceptionality for rape and serious sexual offences, therefore, the appropriate comparison is to other adults charged with serious offences with equivalent penalties.[198]

12.209 Professor Roberts strongly objected to procedural exceptionality for sexual offences, arguing that "we either support, endorse and respect trial by jury, or we don't". He suggested that arguments can be made for special procedures in other offence types, and that this would be the "thin end of the wedge" for the abolition of jury trials more generally. Dr Thomason similarly argued that the issue could not be confined to sexual offences cases alone, and that "either juries are an appropriate, legitimate, and justifiable decision-maker in criminal cases or they are not".

12.210 The Bar Council noted the risk of creating differentiated access to jury trials for different offences. It also argued that there were potential practical difficulties in cases where there are mixed charges.

12.211 While we do not consider the practical difficulties to be insurmountable, we accept consultees' concerns about creating differentiated access to an entirely different form of trial. We have previously addressed and dismissed concerns about exceptionality in relation to other proposals; we consider that these are justified by the existing exceptionality in relation to how RASSO cases are investigated, prosecuted and tried. However, we acknowledge that these are narrower forms of exceptionality, confined to a limited number of evidential and procedural rules. A stronger case would be required to justify exceptionality on a broader scale, such as that created by the removal of juries in certain types of cases.

Key arguments in favour of removing juries

Addressing bias and misconceptions

12.212 As we explain in Chapter 1, while there is a lack of consensus in the academic research, the evidence points to the likelihood that rape myths and misconceptions

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197 See, for example, M Jimeno-Bulnes, "Jury Selection and Jury Trial in Spain: Between Theory and Practice" (2011), 86:2 *Chicago-Kent Law Review* 585.

198 For further consideration of this point, see the Roskill Report paras C13-C15.

have some impact on juries. Academics such as Professor Cossins argue that due to the nature of evidence in sexual offences cases, there is a greater risk of reliance on extra-legal reasoning.[199] Whilst Professor Cossins concedes that both judges and jurors are susceptible to such reasoning when there is less concrete evidence to rely on,[200] some commentators suggest that professional judges will be better placed to assess evidence objectively.[201]

12.213 Eight consultees disputed evidence of the prevalence and impact of myths, and did not believe that it justifies such radical reform.[202] Professor Roberts considered that this body of research has "significant methodological limitations". He suggested that even if there are issues, the question is whether "further procedural tinkering" can really address these without incurring unacceptable collateral costs.

12.214 Based on existing research, including his own empirical research, Professor John Jackson stated:

> I have concerns about even piloting such a scheme in the absence of a sound evidence base for it, as such a proposal would mark a very serious inroad into the right to jury trial.

12.215 Some consultees argued that juries can be trusted to follow directions and deliberate fairly. HM Council of Circuit Judges commented:

> Our collective experience of juries in such cases is that their verdicts are either clearly correct, or understandable by applying a rational assessment of the basis upon which a verdict could be reached on the evidence – even in cases where a judge may not agree with the verdict(s) had he/she/they been sitting on the jury.

12.216 There is some evidence that juror deliberation can act as a check against myths and misconceptions accepted by individual jurors. In her mock jury research into the impact of sexual history evidence on juror deliberation, Dr Herriott considered trends suggesting the potential influence of sexual history evidence on individual jurors' initial interpretation of case facts. Dr Herriott observed that this trend "lessened in post-deliberation, adding support to the assertion that the deliberation process can mitigate against individual biases and reduce the impact of these on final case outcomes".[203]

12.217 Dr Herriot concluded that

> Though my findings exemplified distinct and problematic rape myth endorsement, they also revealed encouraging myth rejection by a body of jurors and an

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199 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 225. See also, R Helm, "Constructing truth in the jury box in serious sexual offence cases" (2023) and C Phillips "An examination of the impact of language, rape myth beliefs and juror education on decision-making within rape trials" (2024), p 53.

200 A Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), p 229.

201 See, for example, Dorrian Review (2021), paras 5.16 and 5.17.

202 Including Professor Paul Roberts and Professor John Jackson; Behind the Gown (an organisation founded in 2017 to "combat sexual harassment and abuse of power at the Bar"); the CBA; and HM Council of Circuit Judges.

203 C Herriott, *SBE in Rape Trials – Is the Jury Out?* (2023), p 125

unwavering diligence towards the deliberation, with jurors noting the potential real-world consequences of their decision and necessity to follow judicial directions.[204]

12.218 Eight consultees justified removing juries by specific reference to the susceptibility of the general population, criminal justice participants and jurors to bias more generally, and the impact of bias on juror deliberations. We note that others have argued that jury discussion is an effective tool for mitigating bias beyond rape myths and misconceptions; one example, considered at paragraph 12.204 above, is the Lammy Review's suggestion that juror deliberation exposes prejudice and bias through open discussion.[205] We acknowledge that some models of juryless trial might be more capable of replicating this effect than others. By way of example, a trial could be heard by a panel made up of a single judge and two lay assessors, the model currently used in appeals from magistrates' courts to the Crown Court.[206] However, this would inevitably require smaller panel sizes drawn from a limited pool of judges and magistrates, and is not comparable to a jury of 12 randomly selected members of the public in this context.

Improving the conduct of the trial

12.219 In the consultation paper, we referred to views that trials before a judge alone would reduce the "theatre of the trial", leading to more focussed cross-examination and lessening the perceived incentive for advocates to rely on myths and misconceptions to sway the jury. Those arguments were echoed by some consultees, who thought that juryless trials would incentivise better conduct of the trial by counsel and improve complainants' experience of the process.

12.220 Based on her research, Professor McDonald told us that complainants in New Zealand could actually experience worse treatment in cross-examination in judge-alone trials, because judges were less interventionist in relation to myths and misconceptions without a jury present. However, she identified steps that may be taken to address this. She commented that there is a growing understanding amongst judges that they should intervene in judge-alone trials when questioning deploys myths. Further, there is now a mandatory requirement for judges to intervene when a question is improper, supported by recently published myths directions. In light of this, Professor McDonald believed that single judge trials have the greatest capacity for effective reform if accompanied by training and other measures to guide judges. However, she did not support a model based on exceptionality for sexual offences.

12.221 However, some stakeholders considered that juries had a positive influence on the way cases are presented. One stakeholder referred to research which found that juries actually act as a check on advocates, because they limit their examination in order to avoid alienating the jury. A similar point was raised in Professor Jackson's research, which found that

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204 C Herriott, *SBE in Rape Trials – Is the Jury Out?* (2023), p 167.

205 David Lammy MP, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2017), p 31.

206 Senior Courts Act 1981, ss 74(1) and (3), and CrimPR 2020, r 34.11.

> Certain counsel said that there was always a sense in which you treat vulnerable witnesses and complainants in sexual offences cases more gently because you did not want to look bad in front of a jury and 'it does you no favours when you defend in those circumstances to have the witness breaking down all the time … the jury just thinks you're bullying'.[207]

12.222 Rights of Women stated that the requirement for advocates to present their case before a jury makes proceedings more accessible for all, "so they can be understood by lay people – including defendants, victims, witnesses, members of the press and the general public".

12.223 Alternatively, Professor Yvette Tinsley told us that any perceived benefit from reduced "showmanship" is offset by the fact that there is one decision maker who may unconsciously subscribe to misconceptions. We have considered the possibility of judicial bias further from paragraph 12.197 above.

Resourcing benefits

12.224 Some consultees referred to resourcing benefits of removing juries. RCEW thought that judge-alone trials would be shorter, and would therefore help to address court backlogs, as well as bringing economic benefits. Along with End Violence Against Women and Girls Coalition UK ("EVAW"), it suggested that a pilot should target areas with high volumes of cases and court backlogs.

Reasoned judgments

12.225 Some consultees noted that judges, unlike juries in this jurisdiction, give reasons for their judgments. They argued that this would provide much needed clarity and transparency for complainants and defendants. Further, consultees argued that reasoned judgments would act as a safeguard against myths permeating judicial reasoning. They suggested that any delays caused by formulating these verdicts could be offset by savings elsewhere in the criminal process.

12.226 We considered reasoned verdicts in the context of jurors from paragraph 12.156 above. As above, there are doubts that subconscious bias would be articulated in written reasons, and so the effectiveness of reasons in identifying myths and misconceptions may be limited.

Vicarious trauma for jurors

12.227 One stakeholder suggested that judge-alone trials will reduce the risk of vicarious trauma amongst jurors. Concerns have previously been highlighted about the impact of distressing evidence on jurors' mental health.[208] There are, however, other measures which may address this without requiring the wholesale removal of the jury. In May 2024, for example, the Government announced a pilot scheme of specialist

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[207] J Jackson, J Doak, C Saunders, D Wright, and D Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* (2024), p 105.

[208] E Rhodes, The British Psychological Society, "Towards 'proper psychological support' for jurors" (December 2024).

support for jurors exposed to disturbing evidence, involving free counselling sessions and access to a support helpline.[209]

Conclusions

12.228 While there are convincing arguments raised by both sides of the debate, we have concluded that we ought not to recommend such a substantial alteration of the criminal process as a tool to address the issues we have identified as necessitating reform in sexual offences cases. We agree that there is an insufficient evidence base for such a significant change, both in terms of the overall impact of myths and misconceptions on trial procedure and outcomes, and how effective juryless trials would be in addressing those issues.

12.229 We received strong opposition to the possibility of removing juries. We acknowledge the strong public support for the use of juries to try serious offences, and that removal of juries in sexual offences cases can present risks of a loss of public confidence and perceived legitimacy. We accept concerns raised by consultees about the issues associated with a single-person tribunal (including bias, loss of diversity and absence of discussion between individuals); we note that these concerns were raised by both practitioners and victim support groups.

12.230 Many consultees thought that before moving forward with such radical reform, we should first explore a range of other options, including those suggested in the consultation paper. Professor Clare McGlynn KC (Hon) described removing juries as creating an unhelpful "distraction" from this task. Other options suggested by consultees included: improving the gathering and presenting of evidence, introducing expert evidence, prosecutors confronting myths in speeches, use of directions, improving advocates' questioning of witnesses, use of routes to verdict, educative tools for jurors, SSOCs, measures to assist with giving evidence, and public information and education campaigns. We have made recommendations on many of these options elsewhere in this report.

12.231 We consider that the case for making such a significant change to the criminal justice system for the trial of sexual offences is not made out on the basis of our work to date and the evidence that we have received. In the following sections, we consider more limited ways of implementing juryless trials that might mitigate those concerns – the use of a pilot scheme, and a defendant's right to elect trial by judge alone.

Use of a pilot scheme

12.232 Consultees and stakeholders generally rejected the use of a pilot scheme for juryless trials in this jurisdiction.

12.233 We consider that the use of a pilot scheme would be subject to the same general objections that we have outlined above regarding fair trial rights, damage to public confidence, potentially limited practical benefits, and risk of judicial bias. We also see force in the argument that as a pilot is, by nature, designed to obtain evidence of impact, it is unlikely that sufficient numbers of defendants would participate in a pilot scheme without knowing the likely impact on their case. If a pilot scheme were to be

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[209] Ministry of Justice and HM Courts & Tribunals Service, "Pioneering free therapy pilot to support jurors" (May 2024).

made mandatory, rather than voluntary, we anticipate that this would lead to increased challenges to case outcomes on the basis of defendants' fair trial rights. In addition, the CBA told us that, as in Scotland, practitioners would be most likely to boycott a pilot in England and Wales.[210] The practical and evidential value of such a pilot would therefore be limited.

12.234 We were referred to the objections to a similar proposed pilot scheme in Scotland, included in the original text of the Victims, Witnesses, and Justice Reform (Scotland) Bill. We discussed this proposal in the consultation paper; that pilot scheme has subsequently been removed from the Bill due to concerns raised by the Criminal Justice Committee of the Scottish Parliament and the lack of cross-party support.[211]

12.235 In making its recommendations, the Criminal Justice Committee observed the difficulties with the evidence base in relation to data on conviction rates and the extent to which juries are influenced by rape myths.[212] It set out similar arguments for and against the introduction of judge-only trials to those we have considered above. The Committee further noted that complainants themselves had expressed mixed opinions on the proposal, with reservations "about both the current jury system and the proposal for judge-only trials".[213]

12.236 Members of the Committee were ultimately divided on support for a pilot scheme. Four Members concluded that a pilot should be supported "subject to a number of important safeguards", arguing that the scheme would provide a "unique and valuable" opportunity to collect practical evidence.[214] Four Members opposed the pilot in principle, noting the general concerns surrounding juryless trials and the practical difficulties involved implementing and assessing a pilot scheme.[215]

12.237 The Bill was subsequently amended at Stage 2, with proposals for a pilot scheme of judge-only trials removed. Angela Constance MSP stated that other measures would be explored to address the underlying issues the pilot was intended to address. This includes legislative amendments to allow for research to be carried out into jury deliberations.[216] We make similar recommendations in the context of England and Wales in Chapter 10.

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210 Scottish Parliament (Criminal Justice Committee), "Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report" (2024), paras 1244 to 1248.

211 Letter from the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, "Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 2 Amendments" (31 October 2024).

212 Scottish Parliament (Criminal Justice Committee), "Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report" (2024) paras 1253-1254.

213 Above, paras 1153-1163.

214 Above, para 1268.

215 Above, paras 1269 and 1670.

216 Letter from the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, "Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 2 Amendments" (31 October 2024).

Election for judge-only trials

12.238 In Consultation Question 117, we asked whether defendants in sexual offences cases should be able to elect to have a juryless trial. This would preserve the right to trial by jury, potentially addressing the fair trial concerns raised above.

Consultation responses and analysis

12.239 Consultees strongly rejected the notion of defendants being able to elect to have a juryless trial.[217] Five of these did so on the basis that they were generally opposed to the notion of juryless trials for sexual offences. The Law Society told us that it did not agree with the defendant being able to elect trial without a jury, "given the importance of the right to trial by jury to the English and Welsh criminal trial".

Opposition to election for juryless trials

12.240 The benefits of juryless trials suggested above would only be realised if defendants were to exercise their right to elect in practice. Several consultees thought that defendants would not elect to have a judge-alone trial, or that their legal representatives would not advise them to do so.[218] HM Council of Circuit Judges suggested that defendants would never elect, adding that "all professional advice would, in our view, be to insist on a jury even if the opportunity for an earlier trial was a consequence of such an election".

12.241 Examination of other jurisdictions shows mixed support for this argument. In Canada, some research suggests that defendants are more likely to select trial by a judge alone.[219] This research was not specific to sexual offences cases. In New Zealand, almost all sexual violence cases fall into "category 3", meaning that the default position is trial by judge alone, but the defendant can elect to be tried by a jury.[220] According to the NZLC, "most defendants charged with offences of sexual violence elect to be tried by jury".[221]

12.242 The LCCSA were concerned that defendants may be pressured into electing to have a juryless trial when it is not in their best interests. We understand this to relate to pressure by circumstances or by the court, rather than improper pressure from legal representatives.

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217 Of 25 substantive responses, 17 consultees opposed it, five supported it, and three were classed as other.

218 Including HM Council of Circuit Judges; the LCCSA; Chief Constable Sarah Crew; the CBA; the Bar Council; and Andrew Wilkins.

219 According to R Schuller and N Vidmar, "The Canadian Criminal Jury" (2011) 86 *Chicago-Kent Law Review* 497, 500: "It is difficult to obtain nationwide statistics on the absolute number of criminal jury trials or what percentage of accused persons elect for jury trial when they have that option. However, in 1994 in Ontario, the largest province with a population of eleven million persons (approximately one-third of Canada's entire population), there were 1,018 criminal jury trials in the general Division Court, a superior court. In contrast, there were 1,368 nonjury trials. Some of the jury trials involved murder or other offenses that are required to be tried by judge and jury".

220 NZLC, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (December 2015) Report No 136 para 6.10.

221 In 2014 to 2015, 76% of defendants with the right to elect for a jury trial in the District Courts did so. From 2009 to 2014, between 75 to 80% of defendants elected trial by jury in the District Courts, and all but one defendant elected for a trial by jury in the High Court.

12.243 Some consultees rejected election from the complainant's perspective. Two consultees did not think that this would produce better experiences or outcomes for complainants.[222] One stakeholder added that such a trial may not be attractive to complainants, who may also value their complaint being heard by their peers.

Potential benefits of election

12.244 Although Martin Rackstraw doubted that there would be much take-up, he noted the potential benefits for stigmatised defendants, where there is "a real risk of jury prejudice against a particular defendant". We acknowledge this argument, but do not consider that it provides sufficient grounds for reform, particularly where such prejudice may be addressed through alternative methods such as directions.

12.245 Professor Roberts and Professor Jackson rejected juryless trials generally, but considered election by the defendant more palatable. Professor Jackson cited his 1997 article on this topic,[223] which identifies grounds for defendants being permitted to elect to have a judge-alone trial. These include that there is some evidence that "the portrayal of the jury as 'defence-friendly' has become increasingly outdated", and that judges may be better equipped to handle certain types of evidence, such as forensic or identification evidence.[224] While we acknowledge these arguments, we do not consider that they outweigh the substantial wider concerns surrounding juryless trials.

Conclusion on election for juryless trials

12.246 We do not consider that there are compelling reasons for introducing election for juryless trials for sexual offences; further, we received little support from consultees for doing so.

12.247 Many of the arguments raised against mandatory juryless trials are equally applicable to juryless trials on election. These include loss of public confidence, dilution of diversity, risks of case-hardening, and the possible susceptibility of judges to RMA. We acknowledge that concerns about fair trial rights may be diluted where it is the defendant who opts for a juryless trial. We do not consider that this necessarily or adequately addresses the other persuasive arguments we considered above.

12.248 We also note that a number of practitioners, police officers and judges told us that defendants would be unlikely to elect to have a juryless trial; this was echoed by consultees who work with victims.[225] If so, these proposals would make little material difference to reliance on myths and misconceptions. It is, in any event, difficult to predict how successful such a process would be in this jurisdiction, given that the right to elect for a juryless trial does not currently exist, and therefore there is no way of knowing with certainty the degree to which it would attract defendants.

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222 JURIES; and CWJ.

223 S Doran and J Jackson, "The Case for Jury Waiver" [1997] *Criminal Law Review* 155.

224 Above, 158.

225 Including the CBA; the Bar Council; the LCCSA; JURIES; and CWJ.

Conclusions on juryless trials

12.249 We do not recommend the removal of juries in sexual offences prosecutions. We are persuaded by the arguments about pursuing other options for reform before making any changes such as these to the jury system. While we have considered options such as an evidence-gathering pilot or juryless trials on election, we do not consider that these would be effective or sufficient to address these objections. The measures proposed elsewhere in this report have strong independent rationales for their introduction, and are more justifiable within our current procedural traditions.

Recommendation 70.

12.250 We recommend that juries should be retained in serious sexual offences trials.

12.251 We recommend that defendants in serious sexual offences cases should not be entitled to elect to have a juryless trial.

Chapter 13: Pre-trial hearings

INTRODUCTION

13.1 Throughout the issues considered in this project, pre-trial hearings have been flagged as a potential source of delay and increased use of resources, as well as an opportunity to streamline the trial process resulting in efficiencies overall.

13.2 We have made recommendations for increased scrutiny of personal records, sexual behaviour evidence ("SBE"), and Criminal Injuries Compensation evidence ("CICE"). Applications relating to such evidence where possible should be considered at a hearing before the trial; this helps reduce potential delay to the trial itself, particularly where the complainant is an additional party to the application (but not the trial) or where there is a right of appeal.[1] We have also made recommendations to reform the framework of measures to assist the complainant with giving evidence. Early identification of the need for measures, and early notification to the court to allow for the adjustments to the trial process to be made, will help to ensure that the framework operates well. Pre-trial hearings can be used to support such early identification.

CONSULTATION

13.3 In the consultation paper, we identified several benefits of greater use of a particular type of pre-trial hearing: a Ground Rules Hearing ("GRH").[2] GRHs are held after the first hearing in any trial (the Plea and Trial Preparation Hearing), and are usually close in time to the start of the trial. They allow judges to make directions to facilitate the appropriate treatment and effective participation of a witness or defendant. Generally, they are used in cases that have a witnesses or defendant who is considered vulnerable, for example, because they have a communication need and require an intermediary. Indeed, it is expected that, "save in very exceptional circumstances", a GRH should be held in all cases involving a vulnerable witness.[3] At the GRH the judge will set the rules about the style and lines of questioning to be used at trial, and any trial adjustments required to accommodate vulnerabilities of a witness or defendant. They can also be used to make decisions on applications for measures to assist witnesses give evidence and on evidentiary rulings including applications regarding bad character evidence ("BCE") and SBE.

13.4 GRHs may improve early identification and consideration of issues in the case; a dedicated hearing at which all parties and the court must turn their minds to trial adjustments needed can help to ensure they are considered, and necessary adjustments made, in advance of the trial. Similarly, a dedicated hearing at which applications regarding specific types of evidence requiring particular judicial scrutiny

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1 Although we recognise when making our recommendation for greater scrutiny that in some cases it will be necessary and appropriate for the application to be made mid-trial, where for example the need to adduce the evidence arises from evidence given at trial of which parties were not previously aware.

2 Criminal Procedure Rules ("CrimPR"), r 3.9.

3 *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579 at [42].

can be decided may help ensure timely decision making, reducing the risk of ineffective trials.

13.5 In the consultation paper we noted that evidence indicates that judges and advocates do not request GRHs consistently, even in cases where such a hearing would be appropriate (and indeed expected).[4] We therefore considered whether GRHs should be mandatory for all sexual offences cases.[5] We noted that other reports have recommended mandatory GRHs in sexual offences cases,[6] and that jurisdictions including Ireland and some Australian states use GRHs more frequently than in this jurisdiction.[7]

13.6 However, we also explained the costs associated with mandatory GRHs, in particular, the resource limitations and listing difficulties.[8] Allocating resources to additional GRHs, without expanding court resources and time, could have knock-on effects elsewhere causing further delays to other proceedings. There could also be time and resource savings (in particular reducing inefficient trials), it is therefore unclear what the overall impact would be.

13.7 In the consultation paper we asked for consultees' views on:[9]

(1) the benefits and costs of having GRHs in every sexual offence prosecution;

(2) if GRHs should be mandatory, or presumptive where the complainant is required to give evidence;

(3) if the role and purpose of GRHs should be made clearer in guidance, training or legislation; and

(4) for any other views on how to encourage the use of GRHs where useful.

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4 CP 259, para 7.91; JUSTICE, *Prosecuting Sexual Offences* (May 2019), para 4.8. H Henderson and M Lamb, "Pre-recording Children's Testimony: Effects on Case Progression" [2017] *Criminal Law Review* 348.

5 CP 259, paras 7.98-7.99.

6 CP 259, paras 7.89, 7.93-7.94; Office of the Victims' Commissioner ("OVC"), *Next steps for special measures: A review of the provision of special measures to vulnerable and intimidated witnesses*, (May 2021), Recommendation 7 (mandatory GRHs for all vulnerable and intimidated witnesses in sex offences prosecutions); Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland*, (May 2019), Recommendation 127 (mandatory GRHs for all serious sexual offences cases); Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offences Cases Final Report from the Lord Justice Clerk's Review Group* (March 2021), Recommendation 1(c) (mandatory GRHs where vulnerable witnesses give evidence on commission or at trial).

7 CP 259, paras 7.95-7.96, the Australian states include New South Wales and Victoria.

8 CP 259, paras 7.88, 7.91, 7.99-7.100.

9 Consultation Question 44, CP 259 para 7.101.

ANALYSIS

13.8 There was support for our analysis of the potential benefits of GRHs. Consultees[10] from law enforcement, legal practice, the judiciary and academia agreed that greater use of GRHs could:

(1) encourage parties to engage with issues earlier in proceedings.[11] It was noted that this earlier identification and resolution of issues could lead to efficiency savings. For example, the London Criminal Courts Solicitors' Association stated it should "avoid unnecessary expenditure at a later stage and assist in a more cost-effective running of the case". GRHs in particular are beneficial as they take place shortly before the trial, allowing for early resolution but not so early in the case that there has not been time for the relevant issues to manifest.[12] They would also provide the opportunity to "incorporate the role of an [independent legal representative]".[13]

(2) help support the process for accessing measures to assist witnesses and defendants give evidence,[14] and resolve issues in relation to: controlling lines of questioning,[15] improving the style and structure of cross-examination,[16] dealing with applications to admit evidence,[17] or determining the need for expert evidence or additional directions.[18] This is particularly pertinent following our recommendations in this report for greater scrutiny of evidence, including a new regime for SBE (including extending to the complainant a right to be heard and independent legal representation), FAE, personal records, and CICE.

(3) reduce the distinction between complainants in relation to the support they receive. Consultees noted that in practice, GRHs are only held for complainants of sexual offences who have specific vulnerabilities in addition to the vulnerability arising from the nature of the offence of which they are a complainant.[19]

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10 13 consultees provided responses supportive of the benefits of GRHs.

11 Including Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences; HM Council of Circuit Judges; Criminal Bar Association ("CBA"); The London Criminal Courts Solicitors' Association ("LCCSA").

12 For example, the Crown Prosecution Service ("CPS") and the organisation Juries Understanding Rape Is Essential Standard ("JURIES") noted that issues are more likely to have "crystallised" closer to trial.

13 Dr Natalie Kyneswood.

14 Including the Law Society; the CPS; Dr Samantha Fairclough.

15 Including nia (a service provider for women and girls who have been victims of sexual violence); Professors Julia Quilter and Luke McNamara.

16 Dr Natalie Kyneswood.

17 The CBA; Dr Natalie Kyneswood.

18 nia; Professors Julia Quilter and Luke McNamara.

19 Dr Natalie Kyneswood; Northumbria Centre for Evidence and Criminal Justice Studies.

13.9 Similarly, consultees[20] from law enforcement, legal practice, the judiciary and academia raised concerns about the costs of having GRHs in every sexual offences prosecution. Responses echoed the consultation paper analysis that an increased use of GRHs would increase resourcing and listing issues.[21] Consultees raised the impact on counsel; reflecting concerns about supply of qualified practitioners and ensuring there would be sufficient funding for this additional work.[22]

13.10 Concerns about resourcing were persuasive for many. Some consultees opposed either a presumption in favour of, or mandatory GRHs arguing that the burden on resources and listing outweighed the benefits of mandatory or presumptive GRHs.[23] In contrast, Clare Waxman, Independent Victims' Commissioner for London, advocated mandatory GRHs arguing that pressures on listing "should not be a reason to undermine the administration of justice".

13.11 Just under half of the consultees who responded on this issue expressed support for increased use of GRHs, with most of these supporting a presumption in favour of GRHs rather than making them mandatory. We think that a presumption in favour of a GRH in each case would best reflect the benefits and concerns. A presumption would ensure that a GRH takes place in every case where they will be beneficial, but offers some flexibility if such a hearing in an individual case would offer no benefit.

13.12 As we explain in Chapter 9 there is an inherent vulnerability that arises solely from the fact of being a complainant in a sexual offence. As noted by Northumbria Centre for Evidence and Criminal Justice Studies, all complainants of sexual offences should therefore be considered "vulnerable" witnesses (if they are to give evidence) for the purposes of requiring a GRH. However, in practice the power to order a GRH appears to be exercised when the witness has an additional vulnerability. A presumption in favour of a GRH in all sexual offences cases where the complainant is expected to give evidence (and should therefore be considered a vulnerable witness) would improve consistency. However, where an individual complainant's needs are such that the additional support considered at a GRH is not required, the presumption could be rebutted.

13.13 Further, if the facts of the case mean that there are no evidential rulings to be determined, or approval of lines of questioning is not required,[24] or they could be resolved at a different pre-trial hearing, the presumption could also be rebutted.

13.14 A number of consultees[25] told us that guidance and training is needed to help clarify the role and purpose of GRHs. As explained in paragraph 13.5 above there is concern that GRHs are not currently being used in cases that would benefit from them, despite

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20 Nine consultees provided responses flagging potential costs.

21 Chief Constable Sarah Crew; HM Council of Circuit Judges; the CBA; LCCSA; Dr Samantha Fairclough; Dr Natalie Kyneswood.

22 Including the Law Society; the CBA; Martin Rackstraw; LCCSA.

23 The Bar Council; the CPS; HM Crown Prosecution Service Inspectorate ("HMCPSI"); Andrew Wilkins.

24 For further discussion, see Chapter 11.

25 Including Chief Constable Sarah Crew; West Mercia Police; HM Council of Circuit Judges; the CPS; HMCPSI; LCCSA; Professor Susan Edwards; JURIES.

their inclusion in the Criminal Procedure Rules. We agree that guidance and training can support law reform, and here embed the presumption.[26]

Forensic disadvantage

13.15 GRHs are used to agree lines of questioning where pre-approval is required due to the vulnerabilities or communication needs of the witness. Relatedly, they can be used to order measures for assisting complainants, vulnerable or intimidated witnesses, and defendants with vulnerabilities to give their evidence. While not their primary purpose, as indicated above GRHs can also be used for determination of applications for admission of evidence, including BCE, SBE, and CICE. The CrimPD notes that applications regarding BCE and SBE must be made, and responded to, in time to allow the judge to rule on it at a GRH.[27] There is a concern that a greater use of GRHs would have the effect of requiring the defence to put more of their case before the court before the trial, resulting in forensic disadvantage. Martin Rackstraw has suggested that an increased use of GRHs could undermine the defendant's right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR"). He argued that GRHs require the defence "to disclose its case more fully than it would do otherwise, and in much more detail than currently required under the overriding statutory framework for disclosure in criminal cases" and that this was "an example of the burden of proof and adversarial process being undermined".

13.16 We do not think these concerns attach to the GRH itself (indeed, holding a GRH in an individual case does not infringe the defendant's right to a fair trial), but rather to some of the matters that can be determined, or are required to be determined, at a GRH.[28] Applications relating to admission of evidence or pre-approval of lines of questioning will require some exposure of the defence case prior to trial. However, we have separately explained in this report the justification for requiring approval for admission and lines of questioning relating to particularly problematic types of evidence (BCE, SBE and CICE), and explained how they are individually compatible with article 6. The need for pre-approval of lines of questioning for vulnerable witnesses or those with communication needs is well-established. As such applications relate to evidence to be adduced at trial, it is beneficial to determine them in advance to enable all parties to prepare and for the trial to be effective. The CrimPD already requires such applications to be made in advance of the GRH (although we recognise that the need to make an application relating to such evidence may only arise after the GRH and therefore can be determined at a later stage of the trial process).

13.17 In Chapter 11 we conclude that pre-approval of lines of questioning beyond these circumstances is not justified.[29] The GRH itself does not carry additional requirements for pre-approval or disclosure of the defence case,

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26 For further discussion, see Ch 14.

27 Criminal Practice Directions 2023 (as amended in 2024) ("CrimPD") 6.3.29.

28 Which are the matters described in para 13.3 above. Assessing the need for measures to assist a witness or defendant with giving evidence does not require the defence to disclose the substance of their case, therefore there is minimal risk of forensic disadvantage by determining such matters in advance of the trial.

29 In that chapter we conclude that it is not necessary to require any additional prior approval of lines of questioning beyond those already required and those where we have made recommendations in relation to judicial scrutiny of categories of evidence in this report.

13.18 Where it is necessary for the court to make alterations to the trial process to facilitate the engagement of a vulnerable witness or defendant, or to determine applications concerning the complainant's privacy, a GRH is a way of the court fulfilling their obligations in respect of articles 6 and 8.

13.19 We do not think therefore that a presumption in favour of a GRH infringes article 6. A GRH is the mechanism for providing scrutiny of lines of questioning (amongst other case management issues) that are separately justified and compatible with a fair trial.[30]

Alternatives

13.20 We have identified the GRH as an appropriate existing hearing of which better use could be made given its purpose (to establish necessary alterations to the trial process to enable witnesses to give their best evidence) and timing in the trial process. We consider that the recommendation below is an efficient way of maximising the benefits of a pre-trial hearing. We recognise however that there are other types of hearing that could be introduced or modified to improve the efficacy of the trial. We note, for example, the recommendation recently made in the Independent Review of Disclosure and Fraud Offences for mandatory Disclosure Management Hearings in all cases.[31] We also received a submission from the Six Circuits[32] that suggested replacing GRHs with a set of three pre-trial hearings.[33]

Recommendation 71.

13.21 We recommend that there should be a presumption in favour of holding a Ground Rules Hearing in every sexual offences case where the complainant is expected to give evidence.

13.22 This presumption could be rebutted where the facts of the case indicate that a Ground Rules Hearing is not required to determine: directions for appropriate treatment and questioning of a witness or the defendant; measures to assist the complainant, or any other witness, to give evidence; or admissibility decisions.

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30 For further discussion of compatibility, see Chs 2, 3, 5, 9 and Appendix 1.

31 J Fisher KC, *Disclosure in the Digital Age: Independent Review of Disclosure and Fraud Offences* (March 2025) CP 1285, Rec 34.

32 A consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits").

33 First a Plea and Trial Preparation Hearing; second a Sexual Offences Case Preparation Hearing after service of the defence statement; finally a Witness Examination and Special Measures Hearing on the day of the witness' evidence.

PRE-TRIAL HEARINGS IN PRIVATE

13.23 Certain pre-trial hearings must be heard in private: hearings of applications for leave to introduce SBE;[34] whether material held by the prosecution attracts public interest immunity;[35] and where a special measures application contains information the applicant thinks ought not to be revealed to another party unless the court so directs.[36] Other pre-trial hearings may be heard in private or in public, such as hearings on applications for leave to introduce evidence of a non-defendant's bad character, or case management hearings including GRHs.[37]

13.24 In the consultation paper we considered the process for SBE applications which include, currently, a hearing in private, and asked about exclusion of the public at pre-trial hearings more generally.[38] In Chapter 3 we have recommended that the current process for making and determining applications be retained. Here we bring the considerations relating to pre-trial hearings in private together.

13.25 We explained in our consultation paper that holding such hearings in private, effectively excluding the public from the courtroom, is a justifiable interference with the principle of open justice. Sensitive and private information about the complainant will be discussed. The court may well decide that it is not in the interests of justice to admit the private sensitive information into evidence. In relation to SBE applications specifically, the court will (under our recommended framework) explicitly consider the complainant's right to privacy under article 8 of the ECHR. Allowing the public to hear the private sensitive information before such a determination undermines to some extent the purpose of that deliberation; upholding the complainant's right to privacy. Further, in order to avoid prejudicing the trial, reporting on sensitive applications may also need to be restricted. We also recognised that complainants may feel discouraged from attending and engaging with the trial process if members of the public attend at points other than when they give evidence.[39]

13.26 We provisionally proposed that the current powers to direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant should continue. We asked if consultees agreed.[40]

13.27 The majority of consultees who responded to this question agreed that the current powers to exclude the public at pre-trial hearings should be retained.[41] We received no responses which disagreed or raised concern about the use of the existing power. We note that it is a power to exclude, it does not mean that all pre-trial hearings *must*

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34 Youth Justice and Criminal Evidence Act 1999, s 43(1) and CrimPR r 22.2(1)(a).

35 CrimPR r 15.3(6)(a).

36 CrimPR 18.12.

37 CP 259, para 7.188 (3); CrimPR 3.21(3), .

38 Consultation Question 55, CP 259 para 7.189 and para 4.50. See Ch 9 for further discussion on excluding the public from the trial when the complainant gives evidence.

39 CP 259, para 7.188.

40 Consultation Question 55, CP 259, para 7.189.

41 26 out of 31, 5 gave an answer categorised as "other", no one disagreed.

be held in private. It allows courts to determine on the needs of individual cases, whether it is appropriate and justified to hold particular hearings, or parts of a hearing, in private. This enables courts to hold GRHs in private where sensitive private information is being discussed.

13.28 We have recommended that the current process for SBE applications should be retained. This means that all hearings on admissibility of SBE must be held in private. The decision however is given in public. The Criminal Bar Association suggested that if the decision is to refuse the application, that arguably should be given in private. We agree. The rationale for holding the application hearing for admissibility (and decision if it is to refuse) for SBE in private also applies to applications relating to access of personal records, and admissibility of CICE. This means that if an application regarding the admissibility of SBE or CICE, or access to personal records, is heard or rejected at a GRH (or any other pre-trial or mid-trial hearing), that part must be heard in private. It would remain at the discretion of the judge whether the rest of the hearing is also in private or public, as discussed above.

13.29 Four consultees commented on the need for an exemption for academic researchers in the current powers to exclude the public at pre-trial hearings.[42] For example, Dr Matt Thomason noted that "the current lack of exception means that there is effectively no way for researchers to analyse what goes on in these hearings". We consider the benefits of permitting academic research in greater detail in Chapter 9 and recommend a suitable exemption that enables the court to allow their attendance in appropriate circumstances. Where there is discretion for whether the hearing is held in private, the court currently has the flexibility to consider this issue. Where it is mandatory (paragraphs 13.23 above), an exemption for academic researchers similar to that recommended for powers to exclude the public while the complainant gives evidence, could assist.[43] We have considered whether a broader exemption is required, as we have recommended when the public is excluded from court while the complainant gives evidence.[44] However, given the pre-trial nature of these applications, the existing process for hearing them in private, and the responses received on this issue, we do not think there is an evidential basis for providing a specific exemption for any other groups.

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42 Dr Natalie Kyneswood; Dr Matt Thomason; Feminism Law and Gender (FLAG) research cluster at the Open University Law School; Dr Olivia Smith.

43 See Ch 9. Our recommendation clarifies that the exemption would apply in cases where there is ethical approval from a university research ethics committee, to ensure suitable scrutiny of the research.

44 See Ch 9.

Recommendation 72.

13.30 We recommend that the judge should continue to have the power to exclude the public at pre-trial hearings where there are applications concerning information about the complainant in relation to which they have a reasonable expectation of privacy.

13.31 We recommend that the requirement for the hearing of an application to admit sexual behaviour evidence to be held in private should be retained and extended in the following way:

(1) to the hearing of an application to admit Criminal Injuries Compensation evidence;

(2) to the hearing of an application for compelled production of personal records; and

(3) to a decision on an application for the admission of sexual behaviour evidence or Criminal Injuries Compensation evidence, and an application for access to personal records if the decision is to refuse the application.

13.32 We recommend that where the public are excluded from the hearing while an application to admit sexual behaviour evidence or Criminal Injuries Compensation evidence, or an application for compelled production of personal records, is being heard or refused, there should be an exemption to allow academic researchers conducting research that has been approved by a university research ethics committee to attend.

Chapter 14: Holistic reform

INTRODUCTION

14.1 Throughout this report we consider a range of potential reforms and make recommendations to give effect to the aims of this project: to improve understanding of consent and sexual harm, to improve complainants' experiences of the trial process and to ensure defendants receive a fair trial. In this final chapter we consider reform holistically.

14.2 As we described in our consultation paper:

> A holistic approach is necessitated by the very broad nature of our terms of reference. Our terms of reference require us to consider reform of the various mechanisms of the trial process – the law, procedure, guidance and practice. They also require us to examine issues that arise in both the pre-trial and trial process.[1]

14.3 It is important to consider how the recommendations made throughout this report work together. First, because they all need to operate effectively within the same trial process, from the point of charge onwards.[2] Secondly, because many are interrelated and rely on other measures to fully achieve their purpose and have the necessary impact.

14.4 Further, we are conscious of the limitations of piecemeal reform in this context. Appendix 1 of our consultation paper lists the many major reviews, inspection reports, strategy and policy documents relating to rape and serious sexual offences in this jurisdiction over the last 50 years. Reform has followed many of those, yet as we describe in our consultation paper and throughout this report, concerns remain about the effective operation of sexual offences prosecutions. To achieve effective, sustainable improvement, reform needs holistic consideration. Both this chapter, and Chapter 12 seek to address the shortcomings of incremental piecemeal reform in achieving meaningful change.

14.5 This chapter has three parts. First, we set out the overall model of reform achieved by the recommendations made in this report and explain how they operate as a package to best achieve the aims of this project. Secondly, we outline the approach we took in the consultation paper for considering holistic reform. Thirdly, we explore two core holistic themes from our consultation process: resourcing and delay; and training and education.

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1 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259 ("CP 259"), para 12.4.

2 Our recommendations exist as part of a wider ecosystem of work ongoing to improve the criminal justice system generally (including The Rt Hon. Sir Brian Leveson, *Independent Review of the Criminal Courts – Part 1* (July 2025); for victims (including the Victims' Code); and for sexual offences specifically (including Operation Soteria Bluestone).

14.6 As explained above, one of the aims of this project is to ensure that defendants in sexual offences prosecutions receive a fair trial. In the introductory chapter of this report we explain our approach to this important aspect; we consider the impact on the defendant's right to a fair trial for all individual topics in each chapter. We asked consultees whether there was any further or particular impact on the defendant's right to a fair trial from any combination of measures, or from our proposed reforms cumulatively. We heard generalised concerns from consultees about the potential for infringement on such rights from the measures we proposed;[3] we did not receive evidence that the potential impact comes from any combination or cumulative effect necessitating further holistic consideration. This reinforced our view that the most appropriate way to ensure the defendant's rights are protected is by considering the impact of each measure individually as we do throughout this report. In each chapter we provide further detail about how our recommendations ensure a fair trial. Where we make recommendations relating to evidential thresholds, we explain how the new frameworks are designed to admit all evidence necessary for a fair trial. Where we make recommendations relating to procedural changes, we explain how they do not compromise the defendant's entitlement to examine witnesses effectively, test the evidence, and participate in the trial. Therefore, we conclude that the recommendations individually, and the framework they create cumulatively, are compatible with the defendant's right to a fair trial.

OVERALL SYSTEM FOR IMPROVING SEXUAL OFFENCES PROSECUTIONS

14.7 One of the key threats to the integrity of the trial process for sexual offences is the introduction and reliance on myths and misconceptions about sexual violence. Throughout this report we have recommended measures that protect the trial process from that risk. We explained in the consultation paper that our provisional proposals "provide a strong basis for avoiding jurors hearing evidence and comment during the trial which introduces myths and misconceptions". We then explained that:

> Even if myths are stripped away from the evidence and from counsels' lines of questioning, comments and speeches … jurors may nevertheless inadvertently bring to their deliberations their own prejudices and misconceptions, leading them into error.[4]

14.8 We therefore need both to prevent myths and misconceptions from being introduced inappropriately, and to mitigate any negative impact of such myths if they still arise. This is also true for improving the complainant's experience. The trial process should support the complainant's engagement and enable them to give their best evidence. The system should prevent unnecessary distress and inhumane treatment, and unjustified infringement of their right to privacy. However, it cannot remove all potential distress or intrusion into their privacy; in an adversarial system, cross-examination on distressing topics, and some exploration of private information is necessary for a fair trial in sexual offences cases. The system should therefore operate to minimise the harmful effects where they cannot be entirely prevented.

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3 From twelve consultees including False Allegations Watch/Empowering the Innocent; Dr Oriola Sallavaci; FACT; London Criminal Courts Solicitors' Association ("LCCSA"); and 8 anonymous consultees.

4 CP 259, para 12.22.

14.9 Our recommendations create a system that achieves this. First, we introduce greater protections for the use of the most problematic types of evidence. This includes: a new enhanced relevance threshold and scrutiny of access to the third-party records; a new enhanced relevance threshold for admissibility of sexual behaviour evidence ("SBE") and evidence of Criminal Injuries Compensation claims ("CICE"); and a clearer approach to scrutinising evidence of previous allegations of sexual offending (including false allegation evidence ("FAE")). These evidential threshold reforms are supported by additional measures to make them more effective. This includes: providing the complainant with a right to be heard and independent legal advice and representation ("ILA" and "ILR"); a modest extended right of appeal; the introduction of written reasons for judicial decisions on admissibility of SBE and CICE to improve consistency and transparency; improved regulation of advocates' conduct; greater clarity on the use of judicial directions; and the limited use of expert evidence of general behavioural responses to sexual violence.

14.10 Secondly, we ensure that the mechanisms in the system are informed by the most up to date evidence. This includes: improving access to jurors to conduct research; furthering research into the impact of measures to assist with giving evidence and ensuring that training and legal advice reflects such research; data collection to better evaluate the impact of certain measures; and permitting the use of expert evidence that will reflect current understandings of responses to sexual violence.

14.11 Thirdly, we recommend measures that improve complainants' engagement in and support for the trial process, that better support their agency,[5] and improve their experience. This includes: a right to be heard supported by ILA and ILR for applications that most engage their privacy rights; extending the same right of appeal from admissibility decisions made before trial that currently applies to the defendant and prosecution; clearer more consistent scrutiny of the admissibility of problematic types of evidence; and improved access to measures to assist complainants to give evidence. All of the improvements to the system ultimately should reassure complainants that the trial process will be fair, transparent, and conducted by professionals who have undertaken appropriate training.

14.12 Finally, we recommend measures that will improve the wider system beyond individual trials. This includes: guidance and training for court staff, legal professionals and the judiciary; additional example directions; greater clarity on roles including Independent Sexual Violence Advisers; and measures that will support all parties to fulfil their respective duties to the court.

14.13 These four aspects work together holistically to improve the trial process for all, and ensure that individual reforms can embed properly and realise their full intended impact. In Chapter 12 we explain the rationale for introducing a specialist court for sexual offences. In part, one of the benefits is in creating a system within the wider criminal justice system that helps achieve these four aspects for prosecutions of

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5 The word "agency" is used here, and throughout this chapter, to refer to the ability or capacity of an individual to act independently or make decisions for themselves. For example, see UK Trauma Council, "Complex trauma: evidence-based principles for reform of children's social care" (2022) p 6.This is not intended to mean a "legal agent", who is someone acting on behalf of a principal.

sexual offences. The specialist court model is just one way of operationalising our recommendations.

A HOLISTIC APPROACH TO CONSULTATION

14.14 In our consultation paper we explained our interest in better understanding the effect of our proposals cumulatively, or with any particular combination. Such insight would further inform our recommendations and in particular: whether any measures could only operate effectively alongside others; if any could operate independently of others; and whether any measures should be prioritised or deprioritised.

14.15 We suggested factors that consultees could use for holistic assessment of our provisional proposals:

(1) positive impact on complainants' experiences;

(2) positive impacts elsewhere in the process;

(3) negative impact on the defendant's right to a fair trial;

(4) delay;

(5) costs;

(6) burden on the parties (prosecution and defence), court, police, and complainants;

(7) unintended consequences or side effects; and

(8) other ongoing reform.[6]

14.16 We asked consultees if there:

(1) are any particular combinations of measures which may be particularly impactful and beneficial;

(2) are any unintended consequences if more than one reform option is implemented and if there are any options that should only be implemented together rather than separately;

(3) are any that should take priority if resources are too limited to reform all aspects; and

(4) is any available data which will assist us in measuring impact?[7]

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6 CP 259, para 12.11.

7 Consultation Question 107, CP 259 paras 12.31 to 12.34: "Considering the measures on which we invite views or make provisional proposals throughout the consultation paper and taking account of the following factors, are there particular combinations of measures which are particularly impactful and beneficial? What are these measures and their impact? (1) positive impacts on complainants' experiences of the trial process; (2) positive impacts elsewhere in the criminal process; (3) negative impacts on the defendant's right to a fair

14.17 We received 56 substantive responses to this consultation question. In general, the responses supported the need for reform, and the benefits of reform in the areas explored in our project. A number of responses to this question included benefits, and concerns for individual measures. We have considered these as part of the evidence base for reform of those measures in their individual chapters.

14.18 Some consultees expressed support for particular combinations of measures. First, there was support for the combination of evidential thresholds and independent legal advice and representation for complainants. For example, Behind the Gown suggested the proposals relating to ILA and ILR would "work well in tandem" with the reform to personal records as they "increase judicial and adversarial accountability, and positively impact complainant experiences". Solace Women's Aid also suggested:

> The new rights for complainants around special measures, higher thresholds for sexual behaviour evidence and [evidence of Criminal Injuries Compensation claims], and rights of appeal should be implemented in tandem with independent legal advice to ensure that complainants have the support to access these new rights.

We have considered the interaction between evidential thresholds with a right to be heard supported by ILA and ILR for the complainant in Chapters 7 and 8. We agree that a right to be heard with ILA and ILR is an important part of protecting the complainant's right to privacy and improved judicial scrutiny, alongside the evidential thresholds themselves. We explain this further in Chapter 7.

14.19 Secondly, consultees' responses suggested that including education and training as part of a combination of measures would be key to successful implementation. This was a core theme of responses. We consider it further below.

14.20 Another core theme from consultees' responses was resourcing and delay, as we noted in Chapter 1. A number of responses focused on the costs and delay associated with implementing reform, as well as the impact of current funding concerns and ongoing court backlogs.[8] We consider this further below.

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trial; (4) delay; (5) costs; (6) burdens on the parties, court, police, and complainant; (7) unintended consequences; and (8) other ongoing reform.

Are there particular combinations of measures which are a cause for concern? What are these measures and their impact?

Are there any combinations of measures which should be prioritised? Why?

Is the data we describe above regarding costs, case volumes, case delays and rates of attrition accurate and is there any other available data which will assist?"

8 Including Criminal Bar Association ("CBA"); a consultation response submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit ("Six Circuits"); the Law Society of England and Wales ("Law Society"); LCCSA; The Offices of the Police and Crime Commissioner for Gwent, South Wales, Dyfed-Powys and West Midlands; Gwent and South Wales Police (Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views have been considered individually); nia (a service provider for women and girls who have been victims of sexual violence); Andrew Wilkins; Dr Amelia Shooter.

14.21 There were a range of measures that consultees suggested should be prioritised. The most common response was to prioritise training and education. Consultees also suggested prioritising: reform to scrutiny of the use of personal records[9] and SBE;[10] introducing ILA and ILR;[11] specialist courts;[12] and measures to assist with giving evidence.[13]

14.22 From this overview, we are reassured that the approach we take throughout this report provides the most effective model of reform. We consider the relevant costs (financial and otherwise) and benefits of each individual measure and make recommendations where we believe the benefits justify the costs. We make recommendations for the measures that we believe are the most necessary and proportionate to meet the aims of the project and the concerns of stakeholders. We have concluded against some options for reform where we believe that the costs do not justify the measure, or that another measure should be prioritised, and set out our decision making in such cases.[14] We explain in each chapter where we believe that a particular measure is best supported by the implementation of another.[15] In the consultation paper we explored potentially competing options for reform. We now refine these and in this final report, focus on the recommendations that should operate together. We explain throughout where we reach a conclusion that makes other options explored in the consultation paper obsolete.[16] As described above, we make individual recommendations that together provide an improved system for the trial process for sexual offences.

14.23 While we did not receive specific data sets in response to this question, we will consider the evidence gathered during consultation for our impact assessment, published separately.[17] As described in the introduction to this report, our impact assessment will provide further evaluation of monetised and non-monetised costs and benefits of reform, including our overall model and combination of measures. We explore the holistic theme of resourcing and delay below. In this chapter we consider

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9 Including End Violence Against Women Coalition; Refuge; Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences; Six Circuits; and a Circuit Judge.

10 Including Behind the Gown; The Office of the Police and Crime Commissioner for Dyfed-Powys and Dyfed-Powys Police; nia; Solace Women's Aid; Six Circuits.

11 Including the Law Society; End Violence Against Women Coalition; JURIES; Rachel Snaith, employee of the Northumbria Office of the Police and Crime Commissioner; and a Circuit Judge.

12 Including The Offices of the Police and Crime Commissioner for Durham and Dyfed-Powys; and Solace Women's Aid.

13 Including The Office of the Police and Crime Commissioner for Dyfed-Powys and Dyfed-Powys Police; and Chief Constable Sarah Crew.

14 See, for example, our conclusions in Ch 8.

15 See, for example, Ch 7.

16 See, for example, Ch 2 where our conclusion not to apply a new enhanced relevance threshold to the disclosure and admissibility of personal records means our provisional proposals on the details of such a threshold are obsolete.

17 An impact assessment is a document that focuses on measurable impacts of potential reform often used by Government departments as part of policy analysis.

how issues of resourcing and delay shaped our recommendations. In the impact assessment we consider the resource impact of our final recommendations.

TRAINING AND EDUCATION

14.24 One of the core themes that arose from responses to our consultation on holistic reform is the need for training and education. Training and education for all involved in the system can help to support other reforms, and have an important role in their own right.

14.25 Consultees supported the combination of training and education alongside reforms to procedure and evidential thresholds. For example:

(1) The Office of the Police and Crime Commissioner for Dyfed-Powys and Dyfed-Powys Police commented that directions on rape myths and education for juries would "work well together" given "the direction should reinforce jury members' learning".

(2) West Mercia Police suggested the combination of measures that "educate judges, legal teams and jurors on rape myths would be beneficial".

(3) Martin Rackstraw stated that the advantage of reform to the framework of SBE "would be maximised if combined with mandatory training of practitioners and judges on myths and misconceptions".

14.26 Further, training and education for juries and practitioners in relation to myths and misconceptions was the reform the most consultees thought should be prioritised.[18]

14.27 We agree that training and education is vital, to ensure those with responsibility for delivering justice in sexual offences cases have the necessary and appropriate information to best perform their duties. We make specific recommendations regarding training (for the judiciary and legal practitioners) and education (of jurors) in sexual offences cases. Where we recommend changes to process or evidential thresholds, we envision that these would be implemented alongside appropriate training for practitioners and the judiciary so they are aware of the changes and the rationale.[19] As described above, we also make recommendations that will continue to improve the body of academic research that ultimately informs training and implementation.

14.28 We also reinforce the value of guidance throughout this report. Guidance for legal practitioners can help embed training and provide practical support for day-to-day implementation and interpretation. There are existing forms of guidance that the judiciary and legal practitioners use regularly to inform their conduct of sexual offences prosecutions. They include the Crown Court Compendium, the Equal

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[18] Including Gwent and Dyfed-Powys Police; the Office of the Police and Crime Commissioner for Dyfed-Powys; Behind the Gown; Dr Georgina Clifford; Chief Constable Sarah Crew; and nia.

[19] The Lady Chief Justice, through the Judicial College, is responsible for judicial training, the Bar Standards Board and Solicitors Regulation Authority are responsible for ensuring practitioners meet their professional competencies, including having the requisite training, knowledge and skills. For further discussion of training for judiciary and practitioners, see Ch 11.

Treatment bench book, guidance from the Attorney General's Office, interview guidelines for Achieving Best Evidence, and CPS guidance. As many aspects of sexual offences trials are distinct from other types of criminal trials, there is real benefit to bespoke guidance brought together for this purpose. We note for example that in New South Wales, the Judicial Commission have introduced a Sexual Assault Trial Handbook[20] that is intended to be used alongside their judicial bench book. Cautious not to introduce duplication, however, we simply note this approach that bodies responsible for producing guidance may wish to consider.

14.29 Training and education can have cost-efficiencies with wide-ranging benefits for the trial process. Training and guidance on specific matters for sexual offences can be included in existing training packages and the ongoing professional development requirements for the legal professions. Training materials and guidance can be routinely updated to ensure it reflects the most modern accepted research in the field.

14.30 Training however has its limitations; it is not sufficient alone to improve the understanding of consent and sexual harm. We note, for example, in Chapter 8 that it is not a viable alternative to a right of appeal for improving decision making in the trial. It does not, for example, replace the need for introducing appropriately high thresholds for the admissibility of problematic types of evidence. It most effectively therefore sits alongside reform of the trial process itself.

RESOURCES AND DELAYS

14.31 A second core message from engagement throughout this project are the concerns about delay and resourcing. While connected, they are distinct. There is a concern about the length of time it takes for cases to come to trial within the criminal justice system generally, and for sexual offences specifically. The "court backlog" became a national talking point following the COVID-19 pandemic and has remained in the public eye.[21] We are alert to the risk that reform to the trial process can exacerbate such delays both in relation to individual cases, and in the wider criminal justice system. Resourcing concerns are about the capacity and funding for the criminal justice system to deliver the trial process effectively: from staff to court facilities. New or different trial processes and law reform may require additional resources whether just to implement the change initially, or to support a new process indefinitely.

14.32 At the time of publishing this report, there are significant concerns about the sustainability of the criminal justice system. A 2025 report by the National Audit Office identified a system with more ineffective trials, fewer criminal practitioners, more people remanded in custody, and longer trials.[22] As Solace Women's Aid described in the context of sexual offences:

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20 The New South Wales Judicial Commission, *Sexual Assault Trials Handbook,* (December 2024). For more detail, see the discussion in Ch 11.

21 Leading to debates in the House of Lords (see, for example, C Brader, Briefing for the House of Lords debate on 20 March 2025). In December 2024, the Government commissioned Sir Brian Leveson to conduct an independent review of the criminal courts, part 1 was published in July 2025 (The Rt Hon. Sir Brian Leveson, *Independent Review of the Criminal Courts – Part 1* (July 2025)), part 2 is expected later in 2025.

22 National Audit Office, *Reducing the backlog in the Crown Court* (March 2025).

> This [project] comes at a time when complainants are already facing record highs in the backlog within the Crown Court. Ministry of Justice data published in June (covering April – June 2023) found that there has been a 31% increase in sexual offences currently waiting to start in the Crown Court compared to the same period in 2022. The number of sexual offences waiting to go to the Crown Court now sits at a record high of 9,324 cases and adult rape cases are now taking around two years to complete in court.

14.33 Long delays can have a devastating impact on the individuals involved.[23] We have heard of complainants not wanting to access therapy until after the trial out of fear that their therapy notes will be used against them by the defence, meaning they face the years immediately after a traumatic event without professional support. Defendants remanded in custody away from their support system await a trial that can be years away. Delays impact witness' ability to recall events or even to attend court and give evidence. Delays in one case often have a knock-on effect on other trials. An unjustified, unreasonable delay can infringe the right to a fair trial; article 6 of the European Convention on Human Rights ("ECHR") provides for the right to a fair and public hearing within a *reasonable* time (emphasis added).[24]

14.34 This is important context for considering reform. Stakeholders emphasised to us that addressing the current delays in sexual offences trials is critical when considering reform in this area.[25]

14.35 The London Criminal Courts Solicitors' Association ("LCCSA") described the criminal justice system as "already overstretched and underfunded". In the 2021 report of the Independent Review of Criminal Legal Aid, Lord Bellamy KC's "central recommendation" was to increase the funding for criminal legal aid by at least 15% to make the system sustainable.[26] There are concerns about a lack of suitably qualified lawyers to undertake sexual offences work.[27]

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23 See, for example, S Murray, S Welland, and M Storry for the Victims' Commissioner, *Justice Delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system* (March 2025), pp 7 to 8.

24 As we explain in Ch 9 the European Court of Human Rights have assessed "reasonableness" in the context of delays to proceedings. See, for example, *Boddaert v Belgium* App No 12919/87 and *König v Germany* App No 6232/73.

25 Including Refuge; Offices of the Police and Crime Commissioner for Durham and Dyfed-Powys; Solace Women's Aid; the CBA; Six Circuits.

26 C Bellamy, *Independent Review of Criminal Legal Aid* (November 2021), para 1.37. The Government responded in 2022 announcing an intention to increase funding: Ministry of Justice, *Response to Independent Review of Criminal Legal Aid* (updated December 2022). The Law Society in 2024 successfully brought judicial review proceedings against the Government for failing to implement the central recommendation. Additional funding increases have since been announced.

27 "The number of criminal law barristers and criminal law duty solicitors has been reducing since at least 2017-18. The number of criminal law barristers that completed any public criminal work decreased by 10% between 2016-17 and 2021-22, while the number of criminal law duty solicitors contracted by the government to provide criminal legal aid reduced by 25% between 2017 and 2023": National Audit Office, Ministry of Justice and HM Courts and Tribunals Service, *Reducing the backlog in the Crown Court (Summary)* (March 2025), p 10. See also the CBA's 2024 RASSO survey: two-thirds of respondents said: "they will not currently consider accepting more RASSO cases": CBA, *RASSO survey results* (12 December 2024). For further discussion, see Ch 1.

14.36 In the holistic reform chapter of our consultation paper, we asked for consultees' views on the impact of our proposals on resourcing and delay. Our proposals, we recognised, could lead to new or more applications within trials, require new or more pre-trial hearings, introduce an additional party to some applications, and require new technology or updated facilities. We recognised the additional burden such changes could bring and sought views on whether they are justified, if they may be offset by efficiencies, and whether the resourcing implications suggest some reform should be prioritised over others.

14.37 We did not receive evidence that pointed to specific impact on delay and resourcing not already considered in individual chapters in this report. Instead, consultees highlighted the importance of a properly resourced criminal justice system, and properly resourced reform. The Criminal Bar Association submitted that "for the system to regain credibility in the eyes of the public there needs to be substantial investment in the police service, CPS, and courts." The LCCSA commented:

> It is vital that any measures which increase the workload on practitioners in the system [are] properly remunerated. Otherwise, any changes are unlikely to have their full intended effect.

14.38 HM Council of Circuit Judges added that the implementation of our proposals would require "a substantial increase in resources" and "resourcing should be prioritised to improve the processes currently available rather than the introduction of new measures."

14.39 Solace Women's Aid submitted:

> With the introduction of the measures set out by the Law Commission, there is a need for increased funding to the court system to address the backlog in sexual violence cases and ensure that the new measures do not lead to victims waiting even longer for their day in court.

14.40 We recognise that some of our recommendations require more resourcing than others, and that some pose greater risk of delay than others. However, this does not lessen their importance. This challenge was reflected in consultees' responses. For example, consultees were particularly concerned that our proposal to introduce ILA and ILR for complainants would present a specific strain on time and resources. It would require additional court time by introducing an additional party for certain applications, time and resource would be needed to ensure the legal representative is fully briefed, and it would place higher demand on a finite pool of qualified lawyers specialising in sexual offences work. However, our proposals for ILA and ILR received significant support and, in response to our questions about holistic reform, were listed as one of the top three priority reform areas.

14.41 Change nearly always requires some resourcing, and is likely to lead to delay at least while the change is embedding. This presents two challenges for law reform. First, what will the impact of any reform be on delay and resourcing and is that justified and proportionate? Secondly, what is the impact of the current delay and resourcing concerns on the system's ability to absorb change?

14.42 In respect of the first challenge, throughout this report we have made recommendations where we believe they are justified, proportionate, and will improve the trial process for sexual offences for all. We have prioritised recommendations that we think will have the most benefit, and where we think there is more proportionate use of resources elsewhere, we have reflected that in our conclusions. For example, we have recommended a narrow model of ILR that most efficiently provides the necessary protection for the complainant's right of privacy. We have also concluded that it would not be proportionate to extend appeal rights from evidential rulings beyond introducing a very limited appeal right for complainants. Instead, the other recommendations we make to improve decision making at trial should take effect first, given the potential for delay from appeals. We also make recommendations that we believe will produce efficiency savings. For example, we focus our bespoke regime for personal records on access, reserving judicial scrutiny for applications for compelled production. This will help ensure that only appropriate material is accessed, shaping the subsequent procedures for disclosure and admissibility.

14.43 In respect of the second challenge, we recognise that resilience in the system is currently low. Our recommendations need to be appropriately funded to ensure they have the intended beneficial impact. The resourcing required for some recommendations may be obvious. Others may require different approaches. For example, most of our recommendations would take effect in the Crown Court where most rape and serious sexual offences will be tried, however some of our recommendations will have an impact on magistrates' courts.[28] As the latter may have less experience of dealing with such issues, the Government may wish to consider the resources needed to embed the practice in the magistrates' courts.[29]

[28] See, for example, in Ch 3 our recommendation for the Government to consider extending the application of the SBE framework to all cases including those heard in the magistrates' courts, and in Ch 2 our recommendation for applications for compelled production for personal records which may be heard in the magistrates' courts.

[29] This may include, for example, additional training, or allocation of cases involving SBE to District Judges.

Chapter 15: Recommendations

Recommendation 1.

15.1 We recommend that for access by and compelled production to the police or prosecution, personal records held by third parties

(1) must be likely to be relevant to an issue at trial or to the competence of a witness to testify; and

(2) such access and production must be necessary in the interests of justice.

15.2 For the purposes of this recommendation, the phrase "likely to be relevant" means a reasonable possibility that the information sought is logically probative to an issue at trial or the competence of a witness to testify.

15.3 When deciding what is necessary in the interests of justice, the following factors should be considered:

(1) The extent to which the record may be necessary to ensure a fair trial.

(2) The likely probative value of the record to an issue at trial.

(3) The nature and extent of the reasonable expectation of privacy with respect to the record.

(4) Whether the request for access to or production of the record is based on a discriminatory belief or bias or may invoke or rely on myths and misconceptions.

(5) The potential prejudice to the personal dignity and right to privacy of any person to whom the record relates.

(6) The effect of the determination on the integrity of the trial process.

Paragraph 2.84

Recommendation 2.

15.4 We recommend that a judge should continue to be responsible for deciding whether personal records held by third parties should be produced via compelled production to the police and prosecution.

15.5 We recommend that when allocated, the trial judge should determine such applications. However, when a trial judge has not yet been allocated, an available judge should be used where appropriate, to avoid delaying an application.

Paragraph 2.98

Recommendation 3.

15.6 We recommend that prior to charge, if the complainant refuses consent to access, then police and prosecutors should be permitted to apply to the court for an order for personal records held by third parties to be produced.

15.7 We recommend that prior to charge, where the complainant consents to access but the record holder does not consent, then police and prosecutors should be permitted to apply to the court for an order for personal records held by third parties to be produced.

15.8 We recommend that the Criminal Procedure Rule Committee consider the need for rules setting out a threshold with factors, which would limit the entitlement to apply for production pre-charge to when an application is absolutely necessary because information is required to reach a charging decision.

Paragraph 2.127

Recommendation 4.

15.9 We recommend that at any time post-charge, if the complainant refuses consent to access to their personal records held by third parties, then police, prosecutors and the defence should be permitted to apply to the court for an order for those records to be produced.

15.10 We recommend that at any time post-charge, where the complainant consents to access to their personal records held by third parties but the record holder does not consent, then police, prosecutors and the defence should be permitted to apply to the court for an order for those records to be produced.

Paragraph 2.133

Recommendation 5.

15.11 We recommend that there should not be a complete prohibition on access, disclosure or admissibility of pre-trial therapy records.

Paragraph 2.148

Recommendation 6.

15.12 We recommend that there should not be a complete prohibition on access, disclosure or admissibility of support records.

Paragraph 2.158

Recommendation 7.

15.13 We recommend that the regime regulating access and compelled production of personal records should apply to records created by a professional third party or the complainant which are held by a professional third party, in which the complainant has a reasonable expectation of privacy.

Paragraph 2.171

Recommendation 8.

15.14 We recommend that medical records related to physical evidence directly associated with the events that are the subject of the criminal complaint should fall outside of the bespoke regime and should remain within the existing general framework.

Paragraph 2.181

Recommendation 9.

15.15 We recommend that if there is a criminal complaint about a professional's interactions with the complainant, where the complainant's personal records are a contemporaneous record of the allegation, this part of the records should fall outside of the bespoke regime and should remain within the existing general framework

Paragraph 2.189

Recommendation 10.

15.16 We recommend that, where the complainant's personal records concern the complainant's recent complaint, namely a complaint made by the complainant about conduct which would, if proved, constitute the offence or part of the offence, this part of the records should fall outside of the bespoke regime and should remain within the existing general framework.

Paragraph 2.190

Recommendation 11.

15.17 We recommend that the Government consider the following matters:

(1) whether in sexual offences cases, defendants' personal records are currently disproportionately sought by the police/prosecution;

(2) whether the current framework for accessing defendants' personal records is insufficient; and

(3) whether our recommended personal records regime should be extended to defendants' personal records (adapted to the particular considerations that arise for accessing defendants' records).

Paragraph 2.201

Recommendation 12.

15.18 We recommend that there should be a statutory code of practice to accompany our statutory framework explaining our recommended threshold and procedures, and the duties of the parties and the police.

15.19 We recommend the Government drafts non-statutory guidance on the same topics directed to complainants, third parties, and the defence.

15.20 We recommend that the Government collects data evaluating compliance with our recommended framework.

15.21 We recommend that HMCPSI considers conducting thematic inspections regarding the CPS' compliance with our recommended framework.

Paragraph 2.208

Recommendation 13.

15.22 We recommend that there should not be a complete ban on the admission of sexual behaviour evidence.

Paragraph 3.30

Recommendation 14.

15.23 We recommend that sexual behaviour evidence should only be admissible if:

(1) the evidence 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 ("stage 1"); and

(2) its admission would not significantly prejudice the proper administration of justice ("stage 2").

15.24 For stage 1, we recommend that the following factors should guide assessment of the probative value of the evidence:

(1) the nature and number of the events, or other things, to which the evidence relates;

(2) when those events or things are alleged to have happened or existed;

(3) where it is suggested that the evidence has probative value by reason of similarity between it and the sexual behaviour alleged to have occurred, the nature and extent of the similarities and the dissimilarities between the evidence and the sexual behaviour alleged to have occurred;

(4) the extent to which the evidence is necessary to rebut or explain evidence adduced by another party;

(5) the extent to which the evidence may distract the factfinder from the main issues in the case; and

(6) the risk that the probative value of the evidence relies on myths or misconceptions.

15.25 For stage 2, we recommend that the judge must consider the following factors when determining if admission of the sexual behaviour evidence would significantly prejudice the proper administration of justice:

(a) protection of the complainant's legal rights, including respect for the complainant's private life and dignity;

(b) the interests of justice, including the defendant's right to a fair trial; and

(c) the risk of introducing or perpetuating myths or misconceptions within the trial.

Paragraph 3.99

Recommendation 15.

15.26 We recommend that relationship evidence that is relevant as explanatory or background evidence only should not be within the scope of any framework that restricts the admissibility of sexual behaviour evidence.

Paragraph 3.132

Recommendation 16.

15.27 We recommend a prohibition on sexual behaviour evidence where it seeks solely to support an inference that, by reason of the sexual nature of that activity, the complainant is less worthy of belief.

Paragraph 3.153

Recommendation 17.

15.28 We recommend that the framework for admitting sexual behaviour evidence should apply to sexual behaviour evidence sought to be adduced, and questions sought to be asked, by both the defence and prosecution.

Paragraph 3.165

Recommendation 18.

15.29 We recommend that the Government consider whether the framework for admitting sexual behaviour evidence should apply to:

(1) evidence sought to be adduced of the sexual behaviour of any victim of homicide;

(2) evidence sought to be adduced, and questions sought to be asked, of the sexual behaviour of any witness; and

(3) sexual behaviour evidence sought to be adduced in a trial for any criminal offence.

Paragraph 3.174

Recommendation 19.

15.30 We recommend that the judge should be required to provide written reasons for their decision on an application to adduce sexual behaviour evidence, and that their written reasons should address stage 1, stage 2, and all of the factors under stage 2 they are required to consider.

Paragraph 3.182

Recommendation 20.

15.31 We recommend that the prosecution should be required to inform the complainant about an application to adduce evidence of or ask questions about their sexual behaviour, once that application is made (and not wait for the outcome of the application) unless:

(1) telling the complainant at that stage would interfere with the investigation;

(2) the complainant does not wish to be told then or at all; or

(3) there is a risk of harm to the complainant or another if they are told.

Paragraph 3.187

Recommendation 21.

15.32 We recommend that the admissibility of evidence of, or questioning relating to, an allegation by a complainant of sexual assault not the subject of the trial should be considered:

(1) under the sexual behaviour evidence framework when any aspect of the evidence or questioning falls within the definition of "sexual behaviour" (currently in section 42 of the Youth Justice and Criminal Evidence Act 1999); or

(2) where no part of the evidence or questioning falls within the definition of "sexual behaviour" either:

(a) under the bad character evidence framework (currently in section 100 of the Criminal Justice Act 2003) where the allegation is sought to be adduced as evidence of misconduct; or

(b) absent any question or suggestion that the complainant misconducted themselves in relation to the allegation, under the general relevance threshold.

15.33 We recommend that when considering whether evidence of an allegation sought to be adduced as evidence of misconduct in a sexual offences trial meets the criteria for admission as bad character evidence for a non-defendant under subsections 100(1)(a) or (b) of the Criminal Justice Act 2003, the court must have regard to the risk of the evidence introducing or perpetuating myths and misconceptions in the trial.

Paragraph 4.40

Recommendation 22.

15.34 We recommend that, on their own, the following should not constitute a "proper evidential basis" that a previous allegation of sexual offending is false:

(1) raising and not pursuing a complaint;

(2) a decision to take no further action, not to charge or not to prosecute; or

(3) acquittal.

Paragraph 4.55

Recommendation 23.

15.35 We recommend that there should not be a complete prohibition on the admissibility of evidence that the complainant has made an application for Criminal Injuries Compensation.

Paragraph 5.29

Recommendation 24.

15.36 We recommend that evidence of a Criminal Injuries Compensation claim should only be admissible if:

(1) the evidence has substantial probative value in relation to a matter in issue in the proceedings that is of substantial importance in the context of the case as a whole ("stage 1"); and

(2) its admission would not significantly prejudice the proper administration of justice ("stage 2").

15.37 For stage 1, we recommend that a non-exhaustive list of factors should be developed by government to aid in the assessment of the probative value of the evidence.

15.38 For stage 2, we recommend that the judge should consider the following factors when determining if admission of the Criminal Injuries Compensation evidence would significantly prejudice the proper administration of justice:

(1) protection of the complainant's legal rights, including respect for the complainant's private life and dignity;

(2) the interests of justice, including the defendant's right to a fair trial; and

(3) the risk of introducing or perpetuating myths or misconceptions in the trial.

Paragraph 5.80

Recommendation 25.

15.39 We recommend that a similar procedure to that required under the framework for admitting sexual behaviour evidence should be developed for applications made to adduce Criminal Injuries Compensation evidence.

Paragraph 5.100

Recommendation 26.

15.40 We recommend that the admissibility framework for evidence of a Criminal Injuries Compensation claim should apply to evidence sought to be adduced, and questions sought to be asked, by both the defence and prosecution.

Paragraph 5.101

Recommendation 27.

15.41 We recommend that the judge should be required to provide written reasons for their decision on an application to adduce evidence of a Criminal Injuries Compensation claim, and that their written reasons should address all the factors under stage 2 they are required to consider.

Paragraph 5.104

Recommendation 28.

15.42 We recommend that there should be no reform to the admissibility of good character evidence for defendants in sexual offences prosecutions.

Paragraph 6.73

Recommendation 29.

15.43 We recommend that there should be no reform to expand the admissibility of good character evidence for complainants in sexual offences prosecutions beyond the principles set out in R v Mader.

Paragraph 6.94

Recommendation 30.

15.44 We recommend that the Judicial College should consider whether the Crown Court Compendium should include an example direction to be given in a sexual offences prosecution where the jury has heard evidence about the defendant's character, but has heard no evidence of the complainant's character. The direction should explain why the jury has heard no evidence of the complainant's character (because the defendant is the one on trial and not the complainant) and instruct the jury not to speculate.

Paragraph 6.122

Recommendation 31.

15.45 We recommend that the Judicial College should consider whether the Crown Court Compendium should include an example direction to be given where evidence of the complainant's good character has been admitted in a sexual offences prosecution.

Paragraph 6.127

Recommendation 32.

15.46 We recommend that complainants in sexual offences cases should have a right to be heard in respect of applications:

(1) for pre- and post-charge compelled production of their personal records; and

(2) to adduce evidence of their sexual behaviour.

15.47 We recommend that complainants in sexual offences cases should have access to independent legal advice, assistance and representation in respect of requests and applications relating to their personal records and sexual behaviour evidence.

Paragraph 7.46

Recommendation 33.

15.48 We recommend that independent legal advice and assistance should include, where appropriate, legal information leaflets, online and telephone advice and assistance, and in-person advice and assistance.

Paragraph 7.56

Recommendation 34.

15.49 We recommend that independent legal representation for complainants should include representation at court when applications for the admission of their sexual behaviour evidence and compelled production of their personal records are determined, whether that is pre-trial or during the trial in the absence of the jury.

Paragraph 7.67

Recommendation 35.

15.50 We recommend that the complainant's independent legal representative should have no role at the trial in the presence of the jury.

Paragraph 7.77

Recommendation 36.

15.51 We recommend that independent legal advice and independent legal representation for complainants should only be provided by qualified legal professionals.

15.52 We recommend that those providing independent legal representation for complainants in sexual offences cases should, at a minimum, be required to undertake the same mandatory training on myths and misconceptions that is required of prosecution and defence practitioners in sexual offences cases.

Paragraph 7.84

Recommendation 37.

15.53 We recommend that independent legal advisers and representatives should be permitted to access documents necessary to provide full and frank legal advice, assistance and representation relating to applications about complainants' personal records and sexual behaviour.

Paragraph 7.96

Recommendation 38.

15.54 We recommend that complainants' independent legal advisers and representatives should be permitted to engage directly with the police, prosecution and defence where necessary to provide full and frank legal advice, assistance and representation to the complainant.

Paragraph 7.105

Recommendation 39.

15.55 We recommend that a complainant who has a right to be heard on an application concerning the admissibility of evidence of their sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant, where that decision is made at a preparatory hearing.

15.56 We recommend that a complainant who has a right to be heard on a public interest immunity application relating to the disclosure of their personal records should have the same right to appeal a decision as is afforded to the prosecution and defendant, where that decision is made at a preparatory hearing.

Paragraph 8.38

Recommendation 40.

15.57 We recommend that a complainant should have access to independent legal advice and representation when they have a right to appeal a judicial ruling relating to evidence of their sexual behaviour.

Paragraph 8.46

Recommendation 41.

15.58 We recommend that in sexual offences cases, the term "measures to assist with giving evidence" should be used instead of "special measures".

15.59 We recommend that the Government should consider whether the term "measures to assist with giving evidence" should be used in all cases.

Paragraph 9.11

Recommendation 42.

15.60 We recommend that complainants in sexual offences cases should be entitled to the use of standard measures when they give their evidence.

15.61 We recommend that the provision of standard measures should be subject to the availability of the measure in that court and the defence's ability to effectively test the evidence.

Paragraph 9.56

Recommendation 43.

15.62 For the purposes of measures to assist with giving evidence, we recommend that the evidence of a complainant should include their evidence in chief, cross-examination, re-examination and their reading of their victim personal statement.

Paragraph 9.63

Recommendation 44.

15.63 We recommend that the entitlement of a complainant in a sexual offences case to pre-record their evidence should not be dependent upon there being an admissible video-recorded Achieving Best Evidence ("ABE") interview. Where there is no admissible ABE interview, evidence in chief should be able to be pre-recorded at a separate hearing conducted by the prosecution.

15.64 We recommend that the Government should consider further review of whether ABE interviews should continue to be used as evidence in chief in criminal prosecutions, or should be reformed for this purpose.

Paragraph 9.92

Recommendation 45.

15.65 We recommend that the current provisions governing the ability to edit the recordings of a witness' evidence in chief, cross-examination and re-examination should be consolidated within the statute that governs the power to order pre-recorded evidence.

Paragraph 9.99

Recommendation 46.

15.66 We recommend that the Government should consider whether the use of pre-recorded evidence should be extended to sexual offences prosecutions in youth courts.

Paragraph 9.101

Recommendation 47.

15.67 We recommend that where the complainant:

(1) gives evidence using a screen;

(2) gives evidence using a live link; or

(3) is pre-recording their evidence;

the effect of these measures should be that the defendant cannot see the complainant while they are giving their evidence.

15.68 We recommend that when the recording of the complainant's pre-recorded evidence is disclosed to the defence or played back at court, the defendant should be permitted to see the complainant in the recording when watching the recorded evidence.

Paragraph 9.117

Recommendation 48.

15.69 We recommend that where the public are excluded during the evidence of a complainant in a sexual offences prosecution, there should be an exemption to allow the following categories of individuals to attend:

(1) persons directly involved in proceedings;

(2) bona fide representatives of news gathering or reporting organisations;

(3) academic researchers conducting research that has been approved by a university research ethics committee; and

(4) a supporter for the complainant, where requested by the complainant.

15.70 We recommend that, on application from an individual, the judge should retain discretion to allow that individual to attend where it is in the interests of justice for them to do so, considering the impact on the quality of the complainant's evidence, the need for humane treatment of the complainant, the complainant's privacy rights and the wishes of the complainant.

Paragraph 9.148

Recommendation 49.

15.71 We recommend that complainants in sexual offences cases should be entitled to the following standard measures when they give their evidence:

(1) screens;

(2) live link;

(3) pre-recorded evidence;

(4) exclusion of the public during their evidence, with the exception of:

(a) persons directly involved in proceedings;

(b) bona fide representatives of news gathering or reporting organisations;

(c) academic researchers conducting research that has been approved by a university research ethics committee;

(d) a supporter for the complainant, where requested by the complainant; and

(e) on application from an individual, the judge should retain discretion to allow that individual to attend where it is in the interests of justice for them to do so, considering the impact on the quality of the complainant's evidence, the need for humane treatment of the complainant, the complainant's privacy rights and the wishes of the complainant;

(5) removal of wigs and gowns;

(6) presence of a supporter, including but not limited to an Independent Sexual Violence Adviser; and

(7) separate and accessible entrances and waiting rooms.

15.72 We recommend that the provision of standard measures should be subject to the availability of the measure in that court and the defence's ability to effectively test the evidence.

Paragraph 9.165

Recommendation 50.

15.73 We recommend that the Government should consider whether reform is needed to the use of intermediaries where complainants in sexual offences cases have communication difficulties as a result of trauma.

Paragraph 9.173

Recommendation 51.

15.74 We recommend that complainants in sexual offences cases should have access to independent legal advice in relation to their entitlement to measures to assist with giving evidence.

Paragraph 9.188

Recommendation 52.

15.75 We recommend that where sexual offences are charged alongside other offences, complainants of the sexual offences in those prosecutions should be entitled to use standard measures to assist with giving evidence throughout the trial.

15.76 We recommend that the Government should consider whether complainants of other offences, including an offence under sections 1 or 2 of the Modern Slavery Act 2015, or an offence where it is alleged that the behaviour of the accused amounted to domestic abuse within the meaning of section 1 of the Domestic Abuse Act 2021, should be entitled to standard measures to assist with giving evidence.

Paragraph 9.194

Recommendation 53.

15.77 We recommend that complainants in sexual offences prosecutions should be entitled to the following measures to facilitate their attendance at the trial, verdict and sentencing hearing when not giving evidence:

(1) live link; and

(2) separate and accessible entrances and waiting rooms.

15.78 We recommend that the provision of measures to facilitate the complainant's attendance should be subject to the availability of the measure in that court.

Paragraph 9.208

Recommendation 54.

15.79 We recommend that the Judicial College should consider providing training to the judiciary on the evidence base of the impact on juries of measures to assist with giving evidence.

15.80 We recommend that legal professionals should receive training on the evidence base of the impact on juries of measures to assist with giving evidence.

Paragraph 9.215

Recommendation 55.

15.81 We recommend that the Government should consider the need for a further review of measures to assist with giving evidence for defendants. This should include a review of the measures available to support vulnerable defendants in criminal prosecutions.

Paragraph 9.228

Recommendation 56.

15.82 We recommend that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion.

Paragraph 10.12

Recommendation 57.

15.83 We recommend that the Judicial College consider including guidance in the Crown Court Compendium that directions on myths and misconceptions should be given when:

(1) evidence is or will be led relating to the myth or misconception;

(2) questions are or will be asked relating to the myth or misconception;

(3) a statement is made that relates to a myth or misconception;

(4) an application is made for a direction by the parties; or

(5) the judge considers that a direction may be needed

unless, in the circumstances of the case, no reasonable jury would consider the evidence, question, or statement to be material.

Paragraph 10.45

Recommendation 58.

15.84 We recommend that the Judicial College consider whether the example direction on "avoiding assumptions about rape and other sexual offences" should be amended along the lines of the direction that was approved in Andreous.

15.85 We recommend that the Judicial College consider whether the example direction on "fear, although no use or threat of force, physical struggle and/or injury" should be amended to refer to the range of common responses to sexual offending, including freeze, befriend, flight, fight, and flop.

15.86 We recommend that the Judicial College consider whether the example direction on "background of domestic abuse" should be amended to refer to the common response of a victim of domestic abuse taking steps to placate and/or appease an abuser.

15.87 We recommend that the Judicial College consider whether the existing example directions about giving evidence using special measures should be amended to explain that the jury should draw no inference from a complainant's decision to watch the rest of the trial when they have used special measures to give evidence.

Paragraph 10.85

Recommendation 59.

15.88 We recommend that the Judicial College consider whether to add example directions on the following topics to the Crown Court Compendium:

(1) An example direction to respond to the myth that a male complainant will make false allegations about sexual offending due to shame or fear of reprisal in connection with consensual homosexual sexual activity.

(2) An example direction on misconceptions about complainants and defendants who have a mental health condition, have a learning disability, or are neurodiverse.

(3) An example direction about false allegation evidence to respond to misconceptions about the prevalence of false allegations.

(4) An example direction that provides clarification about Criminal Injuries Compensation evidence and the Criminal Injuries Compensation scheme.

(5) An example direction about sexual behaviour evidence.

(6) An example direction responding to the misconception that certain groups of people are more sexually promiscuous and therefore less worthy of belief and/or more likely to have consented, including:

(a) homosexual men;

(b) sex workers and escorts;

(c) complainants who met a defendant through a dating application or who have shared sexualised messages or images of themselves online.

(7) An example direction about the misconception that a victim of sexual offending would not continue to be in contact with the person who raped them.

Paragraph 10.133

Recommendation 60.

15.89 We recommend that expert evidence of general behavioural responses to sexual violence should be admissible to address myths and misconceptions in particularly complex sexual offences trials where it is necessary because:

(1) the evidence is directed to something that is outside the knowledge and experience of the jury; and

(2) other forms of juror education, including by means of judicial directions, would not provide sufficient help to the jury.

Paragraph 10.174

Recommendation 61.

15.90 We recommend that there should be further commissioning, and permission for, research that engages real jurors.

15.91 We recommend that there should be a further exception to section 20D of the Juries Act 1974 for those conducting research with real jurors and for juror participants in such research.

Paragraph 10.201

Recommendation 62.

15.92 We recommend that the test for determining acceptable lines of questioning of a witness on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour, claims for criminal injuries compensation and bad character.

Paragraph 11.35

Recommendation 63.

15.93 We recommend that legal practitioners should be required to undertake training on myths and misconceptions in order to work on sexual offences cases.

Paragraph 11.80

Recommendation 64.

15.94 We recommend that the Bar Standards Board should consider amending its Code of Conduct and/or introducing guidance to:

(1) make explicit reference to the potential for professional misconduct consequences to arise from reliance on myths or misconceptions in sexual offences cases; and

(2) state explicitly that generalisations relying on myths or misconceptions about sexual offences in barristers' speeches are prohibited as they constitute a breach of the duty not to mislead the court.

Paragraph 11.110

Recommendation 65.

15.95 We recommend that the Judicial College should consider developing guidance on the following topics:

(1) identifying when lines of questioning may be irrelevant because they rely on myths or misconceptions, including consideration of the following factors:

(a) whether the line of questioning constitutes or relies upon a generalisation, unsupported by evidence;

(b) whether the line of questioning will be used to invoke an impermissible stereotype; and

(c) whether the line of questioning is based upon a factual conclusion derived from the evidence in the case.

(2) how best to respond to generalisations which rely on myths or misconceptions where they are raised in advocates' speeches. These generalisations include:

(a) suggesting that complainants as a class are unreliable witnesses or that their evidence requires greater scrutiny than evidence given by other witnesses; or

(b) suggesting that delayed reporting, in itself, makes complainants less credible.

Paragraph 11.172

Recommendation 66.

15.96 We recommend the introduction of a specialist sexual offences court within the existing court structure.

15.97 We recommend the adoption of a model of specialisation within the existing court estate, combined with specialist listing practices. This should include features such as trained personnel, appropriate technology to access measures to assist with giving evidence, and specialist support for participants.

Paragraph 12.88

Recommendation 67.

15.98 We recommend that a pilot scheme of specialist examiners should not be introduced.

Paragraph 12.128

Recommendation 68.

15.99 We recommend that screening jurors for rape myth acceptance should not be introduced.

Paragraph 12.155

Recommendation 69.

15.100 We do not recommend that juries be required to provide reasons for their verdicts.

Paragraph 12.177

Recommendation 70.

15.101 We recommend that juries should be retained in serious sexual offences trials.

15.102 We recommend that defendants in serious sexual offences cases should not be entitled to elect to have a juryless trial.

Paragraph 12.250

Recommendation 71.

15.103 We recommend that there should be a presumption in favour of holding a Ground Rules Hearing in every sexual offences case where the complainant is expected to give evidence.

15.104 This presumption could be rebutted where the facts of the case indicate that a Ground Rules Hearing is not required to determine: directions for appropriate treatment and questioning of a witness or the defendant; measures to assist the complainant, or any other witness, to give evidence; or admissibility decisions.

Paragraph 13.21

Recommendation 72.

15.105 We recommend that the judge should continue to have the power to exclude the public at pre-trial hearings where there are applications concerning information about the complainant in relation to which they have a reasonable expectation of privacy.

15.106 We recommend that the requirement for the hearing of an application to admit sexual behaviour evidence to be held in private should be retained and extended in the following way:

(1) to the hearing of an application to admit Criminal Injuries Compensation evidence;

(2) to the hearing of an application for compelled production of personal records; and

(3) to a decision on an application for the admission of sexual behaviour evidence or Criminal Injuries Compensation evidence, and an application for access to personal records if the decision is to refuse the application.

15.107 We recommend that where the public are excluded from the hearing while an application to admit sexual behaviour evidence or Criminal Injuries Compensation evidence, or an application for compelled production of personal records, is being heard or refused, there should be an exemption to allow academic researchers conducting research that has been approved by a university research ethics committee to attend.

Paragraph 13.30

Appendix 1: Fair trial rights in the case-law of the European Court of Human Rights

INTRODUCTION

1.1 This Appendix expands on the right to a fair trial in relation to the prosecution and trial of sexual offences, adding further depth to the human rights frameworks introduced in each chapter.[1] The aim of this Appendix is to examine the impact of rules of evidence and procedure in sexual offences proceedings on the defendant's right to a fair trial. In particular, this Appendix will focus on the relationship between the right to a fair trial and the protection of complainants of sexual offences during criminal proceedings. The overarching purpose of this enquiry is to provide guidance about the compatibility with the human rights framework of both the existing rules of evidence and procedure in sexual offence proceedings and our provisional proposals for reform.

1.2 This Appendix is not intended to provide a comprehensive account of every aspect of the right to a fair trial and the rights of the complainants in sexual offences proceedings. Rather, it will focus on issues which are relevant to our review of the use of evidence in sexual offences proceedings, namely: addressing rape myths and misconceptions, the use of special measures, the disclosure and admissibility of personal records, character evidence, restrictions on the use of evidence of the sexual behaviour of the complainant and whether the complainant should be a party to the application to admit evidence of their sexual behaviour. We will also discuss additional issues of independent legal representation and juryless trials in sexual offence cases that arose from our pre-consultation engagement with stakeholders.

1.3 The analysis will focus primarily on the provisions contained in the European Convention on Human Rights ("ECHR"), as interpreted by the European Court of Human Rights ("ECtHR"). When relevant, references will be made to other international human rights instruments and the case law of other human rights bodies in order to broaden the analysis of applicable provisions in International Human Rights Law.

1.4 The interpretation of Convention rights given by the ECtHR plays a significant role in guiding the interpretation of domestic provisions by courts in England and Wales. This is made clear in section 2 of the Human Rights Act 1998, which requires courts and tribunals in the UK to take into account the case law of the Strasbourg organs when deciding issues which arise in connection with a right set out in the ECHR. In addition, section 3 of the Act specifies that legislation must be interpreted, so far as it is possible to do so, in a way which is compatible with Convention rights.

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[1] This appendix is a copy of Evidence in Sexual Offences Prosecutions (2023), Law Commission Consultation Paper No 259, Appendix 2.

THE RELEVANT HUMAN RIGHTS FRAMEWORK

1.5 Given that we will discuss not only the right to a fair trial, but also the interrelationship between this and the protection of complainants in sexual offences proceedings, we will consider article 6 (right to a fair trial) and article 8 (right to respect for private and family life) of the ECHR.[2]

1.6 It is important to note that, in criminal proceedings, article 6 and article 8 apply in different ways. The criminal limb of the right to a fair trial[3] applies to those "charged with a criminal offence" (defendants and suspects in a criminal investigation).[4] Complainants, as well as witnesses, do not enjoy fair trial rights, but they are afforded protection to their right to respect for their private and family life in criminal proceedings by virtue of article 8. However, article 8 might also apply to defendants and suspects, for example when a violation of the right to a fair trial results in a failure to protect the right to respect for their private life. Since the ECtHR is the "the master of the characterisation to be given in law to the facts of a case",[5] when the applicant relies on both articles 6 and 8 the Court is free to decide under which article(s) the complaint should be examined.[6]

1.7 In the following sub-sections, we will provide an overview of the scope of article 6 and article 8 of the ECHR, as relevant for the discussion in this Appendix.

The right to a fair trial

1.8 Article 6 of the ECHR contains a set of guarantees aimed at ensuring the defendant's fair trial, including the right to a public hearing, the right to equality of arms, the right to be informed promptly of the nature and cause of the accusation, the right to have adequate time and facilities for the preparation of the defence, the right to defend oneself in person or through legal assistance, the right to examine or have examined witnesses, and the right to an interpreter. The ECtHR has observed that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) restrictively".[7] Due to the serious consequences that criminal proceedings might have on a defendant's liberty, the right

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2 Both articles are incorporated in sch 1 to the Human Rights Act 1998.

3 Article 6(1) of the ECHR applies to both criminal and civil proceedings, whereas article 6(2) and (3) apply only to criminal proceedings.

4 As clarified by the ECtHR, "criminal charge" for the purpose of article 6 has an autonomous meaning, independent of the categorisation employed by national laws: *Blokhin v Russia* App No 47152/06 (Grand Chamber decision) at [179]. Even though not formally charged, a person arrested or questioned on suspicion of having committed a criminal offence enjoys the protection of article 6: *Heaney and McGuinness v Ireland* App No 34720/97 at [42]; *Aleksandr Zaichenko v Russia* App No 39660/02 at [42]-[43].

5 *Söderman v Sweden* App No 5786/08 (Grand Chamber decision) at [57].

6 For example, in *Anghel v Italy* App No 5968/09 at [69] the ECtHR found that the complaint raised under article 6 was closely linked to the complaint under article 8, but decided to examine the case under the latter. Conversely, in *McMichael v UK* App No 16424/90 at [91] the ECtHR held that the particular circumstances of the case justified the examination of the same set of facts under both articles 6 and 8.

7 *Perez v France* App No 47287/99 (Grand Chamber decision) at [64].

to a fair trial requires a greater protection in the sphere of criminal law than in civil proceedings.[8]

1.9 The case law of the ECtHR has clarified that what constitutes a "fair" trial cannot be determined in the abstract but depends on the circumstances of each particular case.[9] In assessing whether a trial has been fair, the general approach has been to evaluate the fairness of the proceedings as a whole, rather than focussing on isolated considerations.[10] The Court has increasingly framed this evaluation by considering whether, "notwithstanding" the failure to comply with a particular right in article 6, the proceedings as a whole were fair.[11] However, there are instances in which a specific failure may be so decisive as to undermine the overall fairness of the proceedings.[12] This means, in practice, that the ECtHR usually retains a quite wide discretion in deciding whether a single failure to comply with a particular right in article 6 has rendered the proceedings unfair or, conversely, has had no adverse impact on the overall compliance with article 6. As a result, it is often difficult to infer general principles from the case law on article 6, since decisions are inextricably tangled with the singularities of each proceeding under scrutiny by the ECtHR. In that respect, Malcolm Birdling has questioned "whether there is now any coherent guidance" at all in the case law on article 6.[13]

1.10 The ECtHR's general approach of evaluating the overall fairness of the proceedings has been applied also to issues related to the admissibility of evidence. The Strasbourg Court has repeatedly stressed that:

> While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.[14]

1.11 For the ECtHR, a fundamental aspect of the overall fairness of the proceedings in relation to the use of evidence concerns the safeguarding of the rights of the defence.

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8 *Moreira Ferreira v Portugal (No. 2)* App No 19867/12 (Grand Chamber decision) at [67].

9 *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [250]; *O'Halloran and Francis v UK* App Nos 15809/02 and 25624/02 (Grand Chamber decision) at [53].

10 *Ibrahim v UK*, para 250; *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [101].

11 See *Beuze v Belgium* No 71409/10 (Grand Chamber decision) at [130]. This approach has been criticised for ambiguity, vagueness and (with respect to article 6(3) rights) as providing "a blank cheque for the domestic courts": *Murtazaliyeva v Russia* No 36658/05 (2018) at [71] (dissenting opinion of Judge Pinto de Albuquerque); R Goss, *Criminal Fair Trial Rights* (2014) pp 124ff.

12 *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [251].

13 M Birdling, "Self-incrimination Goes to Strasbourg: O'Halloran and Francis v United Kingdom" (2008) 12 *International Journal of Evidence and Proof* 3.

14 *Khan v UK* App No 35394/97 at [34]; *Allan v UK* App No 48539/99 at [42].

The defendant must be provided with the opportunity to challenge the authenticity of the evidence, oppose its use and cast doubt on its reliability and accuracy.[15] The ECtHR has developed several principles applicable to the use of evidence and fair trial rights, that will be discussed in the appropriate sections below.

The right to respect for private life in criminal proceedings

1.12 Article 8 of the ECHR provides for the right to respect for private and family life:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

1.13 To understand why article 8 of the ECHR is engaged in criminal proceedings, it is important to examine the meaning of "private life".[16] As the ECtHR has held, the concept of "private life" under article 8 is very broad and "not susceptible to exhaustive definition".[17] In general terms, "private life" covers the physical and psychological integrity of a person,[18] as well as the individual's physical and social identity (including the ability to establish relationships with other human beings).[19] More specifically, the concept encompasses also aspects of private life relevant to the individual's sexual sphere, such as sexual orientation and sexual life,[20] individual reputation[21] and the right to personal development and autonomy.[22] In general, the ECtHR has found that the rights of victims of criminal offences fall within the ambit of article 8.[23]

1.14 Article 8 protects individuals against arbitrary interferences with private life by public authorities. However, the right to respect for private life is a qualified right, since restrictions of its enjoyment are allowed provided that they are in accordance with the law, necessary in a democratic society and pursue the legitimate aims explicitly mentioned in paragraph 2 of article 8, namely: national security, public safety, the economic well-being of the country, prevention of disorder or crime, protection of health or morals and the protection of the rights and freedoms of others. Therefore,

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15 *Bykov v Russia* App No 4378/02 (Grand Chamber decision) at [90].

16 Article 8 mentions "private and family life". For the purpose of this Appendix, we will focus only on private life.

17 *Pretty v UK App* No 2346/02 at [61].

18 *X and Y v The Netherlands* App No 8978/80 at [22].

19 *Mikulić v Croatia* App No 53176/99 at [53].

20 *Dudgeon v UK* App No 7525/76 at [41]; *Sousa Goucha v. Portugal* App 70434/12 at [27].

21 *Axel Springer AG v Germany* App No 39954/08 (Grand Chamber decision) at [83].

22 *Christine Goodwin v UK* (Grand Chamber decision) App No 28957/95 at [90].

23 *JL v Italy* App No 5671/16 (translated from French here and in subsequent references) at [119].

article 8 imposes upon states a negative obligation (non-interference with the right), unless interferences comply with the requirements of article 8(2).

1.15 The case law of the ECtHR has clarified that not only must states abstain from interfering with the right to respect for an individual's private life, but they must also take positive action to ensure that the right is effectively protected. Therefore, article 8 imposes positive obligations upon states.[24] However, as the ECtHR has observed, "the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition".[25] This is demonstrated by the fact that, in practice, the principles applicable to both negative and positive obligations are similar, since "in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation".[26]

1.16 Scholars have often questioned the theoretical and practical significance of the distinction between negative and positive obligations.[27] As Dickson has observed, there is "some potential for a lack of clarity in this context. In reality, while the distinction between negative obligations and positive obligations may seem attractive, the dichotomy is a false one".[28] He further noted that "negative obligations can easily be restated as positive obligations (and vice versa), and all rights can just as readily be described as having correlative obligations that are both positive and negative".[29] Even rights that are not traditionally construed as imposing positive obligations, such as the right to a fair trial, might be seen from the perspective of both positive and negative obligations, because "a right to a fair trial means that the state must not stack the odds against a claimant or defendant during a trial but, in addition, it must also ensure that others do not create such an imbalance either".[30]

1.17 The lack of clarity regarding such a distinction raises more than just theoretical problems and has potentially far-reaching implications in relation to article 6. This is because the more the ECtHR extends the scope of the positive obligations to protect the right to respect for private life in criminal proceedings, the more there will be a tension with fair trial rights. Since the confines of the positive obligations to protect the right to respect for private life are not clearly demarcated, it might be often unclear how far states should go in ensuring the rights of the complainant to the detriment of the defendant, and vice versa.

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24 *Kroon v The Netherlands* App No 18535/91 at [31]; *Lozovyye v. Russia* App No 4587/09 at [36].

25 *Kroon v The Netherlands* at [31].

26 *Kroon v The Netherlands* at [31].

27 A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); L Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2017).

28 B Dickson, "Positive Obligations and the European Court of Human Rights" (2010) 61 *Northern Ireland Legal Quarterly* 203.

29 Above.

30 Above.

1.18 The positive obligations to enhance the protection afforded by article 8 to complainants and witnesses in sexual offence proceedings can be divided in two categories.

1.19 First, article 8 imposes positive obligations to protect victims of sexual offences, which requires states to ensure an effective response against perpetrators. To this end, the ECtHR has held that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions".[31] In addition, there is a procedural obligation upon states to carry out an effective investigation into alleged sexual offences to safeguard the individual's right to respect for their private life.[32] The investigation should be capable of leading to the establishment of the facts and to the identification and punishment of those responsible. To do so, the authorities must take reasonable steps to secure the evidence and conduct the investigation expeditiously.[33]

1.20 Since the obligation to investigate is one of means, it follows that article 8 does not ensure a right to obtain a prosecution or conviction where there are no culpable failures by the State in seeking to hold perpetrators of criminal offence accountable.[34]

1.21 Second, article 8 requires states to protect witnesses and victims in the course of the investigation and trial of criminal offences. "Witness" in the ECHR includes the alleged victim of a crime.[35] The ECtHR has held that states "must organise their criminal proceedings in such a way as not to unjustifiably imperil the life, liberty and security of witnesses, and in particular of the victims called upon to testify".[36] States are under an obligation to protect victims of sexual offences, because "criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant".[37] The Strasbourg Court has emphasised on multiple occasions that states must adopt measures to protect victims of sexual offences from "secondary victimisation" in criminal proceedings.[38] In the sections below we discuss in more detail the case law regarding measures to protect victims and witnesses.

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31 *MC v Bulgaria* App No 39272/98 at [150].

32 *MP v Bulgaria* App No 22457/08 at [109]; *MC v Bulgaria* at [152].

33 *CAS. and CS v Romania* App No 26692/05 at [70].

34 *Brecknell v UK* App No 32457/04 at [66].

35 *Romanov v Russia* App No 41461/02 at [97].

36 *JL v Italy* App No 5671/16 at [119]; *Doorson v The Netherlands* App No 20524/92 at [70].

37 *Y v Slovenia* App No 41107/10 at [103].

38 *Y v Slovenia*, para 104; *JL v Italy* App No 5671/16 at [141]; *A and B v Croatia* App No 7144/15 at [121]. Secondary victimisation is "victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim": Council of Europe, *Recommendation (2006)8 of the Commission of Ministers to member states on assistance to crime victims*, para 1.3.

Balancing the right to a fair trial with the right to respect for private life

1.22 While the right to respect for private life is a qualified right and can be subject to restrictions,[39] the right to a fair trial is an unqualified right.[40] The wording and the structure of article 6 of the ECHR do not provide for any explicit restriction on the safeguards contained therein, with one exception: the requirement of a public hearing may be restricted on certain grounds.[41] In practice, however, the safeguards contained in article 6 have been interpreted in the case law on grounds "that do not immediately transpire from a textual interpretation of the particular provision".[42]

1.23 Among such grounds, the case law has included the need to protect victims and witnesses. In *Doorson v the Netherlands*, a case concerning potential witness intimidation, the ECtHR noted that:

> [i]t is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of article 8 of the Convention.[43]

The applicant in *Doorson*, convicted of drug-trafficking, argued that his article 6 rights were violated where witnesses had anonymity as he could not question them directly. The ECtHR held that maintaining anonymity would not violate article 6 "if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities"[44] and any conviction "should not be based either solely or to a decisive extent on anonymous statements".[45] The ECtHR reiterated that its task under the Convention was to determine whether the "proceedings as a whole" were fair.[46] In doing so the Court concluded that "none of the alleged shortcomings" of the trial, considered in isolation or together, rendered the proceedings as a whole unfair.[47]

1.24 It is evident that, since article 8 imposes upon states positive obligations to protect victims and witnesses in criminal proceedings, measures adopted to ensure the right to respect for private life might conflict with the defendant's rights to a fair trial. Article 6 might need to be balanced against article 8 to a certain extent.

1.25 The ECtHR has used the logic of balancing to reconcile the tension between the two articles:

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39 See para 14 of this appendix above.

40 As also recognised in *Ibrahim v UK* at [250].

41 See also paras 53 to 59 of this appendix below.

42 Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009) p 81.

43 *Doorson v The Netherlands* App No 20524/92 at [70].

44 *Doorson v The Netherlands* App No 20524/92 at [72].

45 *Doorson v The Netherlands* App No 20524/92 at [76].

46 *Doorson v The Netherlands* App No 20524/92 at [67]; see also paras 10 to 11 of this appendix above.

47 *Doorson v The Netherlands* App No 20524/92 at [83].

> In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention.[48]

1.26 The necessity of balancing fair trial rights with the interests of the victims has been specifically emphasised where sexual offences are concerned:

> In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.[49]

1.27 To reconcile protection of victims with the defendant's fair trial, "the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours".[50]

1.28 Even though the need to balance the two competing rights seems unavoidable, the position of the ECtHR is not entirely unproblematic. Scholars have warned that subjecting the right to a fair trial to competing considerations risks weakening the protection afforded to the defendant. Ashworth has observed that, unlike some qualified Convention rights (including article 8), article 6 is a "strong right" and "any rationale for curtailing a strong right must, at a minimum, be more powerful than the kind of 'necessary in a democratic society' argument that is needed to establish the acceptability of interference with one of the qualified rights".[51] Similarly, Choo has warned that the right "might lose its symbolic significance, and in time actually become devalued, if it can simply be 'balanced away' on an apparently ad hoc basis".[52] In applying the logic of balancing, the difficulty is heightened by the existence of two simultaneous, and often conflicting, obligations incumbent upon states: the obligation to secure the defendant's right to a fair trial[53] and the positive obligations to protect victims and witnesses in criminal proceedings.

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48 *PS v Germany* App No 33900/96 at [22]; *Doorson v The Netherlands* App No 20524/92 at [70].

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

50 *SN v Sweden* App No 34209/96 at [47]; *Doorson v The Netherlands* at [72]; *D v Finland* App No 30542/04 at [43].

51 A Ashworth, "The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence" in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) p 147.

52 A L-T Choo, "'Give Us What You Have' – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right" in P Roberts and J Hunter (above) p 251. While these concerns are mostly related to cases in which the right to fair trial is balanced with public interests (for example, national security or public order), the risk that fair trial rights might be weakened exists also when article 6 is balanced against article 8 considerations. See also para 65 of this appendix below in relation to the right to confront witnesses.

53 This is a general obligation stemming from article 1 of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

1.29 Further, in the absence of a clear hierarchy of rights, the risk is that an arbitrary priority of one right over the other is established.[54] As scholars have noted, the ECtHR's jurisprudence does not provide a clear methodology to answer the question of which right should be accorded priority, whose answer seems to be found in a case-by-case assessment.[55] In that respect, Professor Laura Hoyano comments that it is becoming increasingly difficult to predict how the ECtHR will determine the content of the right to a fair trial when competing considerations are at stake.[56]

1.30 We will discuss in the following sections how balancing of article 6 and article 8 has been applied in the context of sexual offences proceedings.

MYTHS AND MISCONCEPTIONS

1.31 In this section, we discuss whether, and to what extent, embedded myths and misconceptions in sexual offences cases may violate the rights protected by article 8 and, more generally, international human rights law.

The case law of the ECtHR regarding myths and misconceptions

1.32 Since myths and misconceptions may affect the complainant in sexual offences cases, the right to respect for private life (article 8) may be engaged. As we noted above, article 8 covers issues related to a person's sexual sphere, including sexual life, sexual orientation, reputation and autonomy, whose enjoyment might be undermined by the existence of myths and misconceptions in the prosecution and trial of sexual offences cases.[57]

1.33 The ECtHR has dealt with myths and misconceptions in sexual offences cases. In *JL v Italy*,[58] the applicant (a rape complainant) argued that the judgment of the domestic appellate court, which acquitted seven defendants of charges of gang rape, was based on passages in the court's judgment that were guilt-inducing, moralising and conveyed sexist stereotypes. The applicant contended that the proceedings as a whole had caused severe distress to her and that she had been subject to secondary victimisation, resulting in a violation of article 8 of the ECHR.

1.34 In relation to the examination of witnesses and the conduct of the proceedings, the ECtHR underscored the need to balance the protection afforded by article 6 to defendants and the protection afforded by article 8 to victims. States must strike:

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54 M Daniele, "Testimony Through a Live Link in the Perspective of the Right to Confront Witnesses" [2014] *Criminal Law Review* 189, 194.

55 L Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] *Criminal Law Review* 4; A L-T Choo, "'Give Us What You Have' – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right" in P Roberts and J Hunter (above) p 251; A Ashworth, "The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence" in P Roberts and J Hunter (above), pp 160-161.

56 L Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] *Criminal Law Review* 4, 5.

57 See para 13 of this appendix above.

58 *JL v Italy* App No 5671/16.

a fair balance between the interests of the defence, in particular the right of the defendant to examine or have examined witnesses pursuant to Article 6(3), and the rights ensured to the victim by Article 8. The manner in which alleged victims of sexual offences are questioned must ensure that a fair balance is achieved between the victim's personal integrity and dignity and the defendant's rights. Even though the defendant must be able to defend themselves by challenging the credibility of the alleged victim and potential contradictions in their testimony, the cross-examination must not be used as a means to intimidate or humiliate the victim.[59]

1.35 In relation to the content of judgments, several passages in the appellate court's judgment were found by the ECtHR to give rise to a breach of article 8. These included statements made by the appellate court regarding the red underwear shown by the applicant during the incident, her bisexuality, her past casual sexual relationships (including with one of the defendants), her "ambivalent attitude towards sex" and her "non-linear life" (mostly inferred from the applicant's involvement in artistic activities). The appellate court concluded that the applicant's choice to lodge a complaint of rape against the defendants was the result of her wish to condemn the events and to repudiate a "moment of fragility and weakness".[60] The ECtHR observed that these comments were regrettable and irrelevant for the purpose of assessing the applicant's credibility and the defendants' criminal liability.[61] Therefore, the ECtHR concluded the interference with the applicant's private life and image had not been necessary to ensure the defendants' right to a fair trial.[62]

1.36 The ECtHR held that:

> The positive obligations to protect presumed victims of gender-based violence also impose a duty to protect their image, dignity and private life, including through the non-disclosure of personal information and data that were unrelated to the facts. This obligation is moreover inherent in the judicial function and arises from national law as well as from various international texts. Accordingly, judges' entitlement to express themselves freely in decisions, which is a manifestation of the judiciary's discretionary powers and of the principle of judicial independence, is limited by the obligation to protect the image and private life of persons coming before the courts from any unjustified interference.[63]

1.37 In finding a violation of article 8, the ECtHR concluded that:

> Criminal proceedings and penalties play a crucial role in the institutional response to gender-based violence and in combatting gender inequality. It is therefore essential that the judicial authorities avoid reproducing sexist stereotypes in court decisions, playing down gender-based violence and exposing women to secondary

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59 *JL v Italy* App No 5671/16 at [128].

60 *JL v Italy* App No 5671/16 at [136].

61 *JL v Italy* App No 5671/16 at [136].

62 *JL v Italy* App No 5671/16 at [138].

63 *JL v Italy* App No 5671/16 at [139].

> victimisation by making guilt-inducing and judgmental comments that are capable of undermining victims' trust in the justice system.[64]

1.38 In line with the established case law, the ECtHR reiterated that article 8 not only imposes negative obligations upon states (abstaining from arbitrary interferences with private life), but also positive obligations. In sexual offence cases this includes protecting the victim from secondary victimisation.[65] However, the lack of clarity in the distinction between positive and negative obligations is apparent in the judgment.[66] As Ilieva has observed, the ECtHR's positioning of the sexist remarks as a violation of a positive obligation is doubtful, as judicial stereotyping could have been seen as a breach of a negative obligation not to interfere with the victim's sexual integrity.[67] While framing the analysis from the perspective of positive obligations, the Court itself termed the sexist remarks as a violation of the obligation to protect victims from "unjustified interference".[68]

The case law of the ECtHR regarding gender-based stereotypes

1.39 Outside the issue of rape myths in the prosecution and trial of sexual offence cases and more generally, the ECtHR has ruled on other occasions that gender-based stereotypes are contrary to the rights ensured by the Convention, including article 8 rights.

1.40 In *Carvalho Pinto de Sousa Morais v Portugal*, the ECtHR found that the comments made by the Portuguese court perpetuated gender-based discriminatory stereotypes regarding women.[69] In the judgment, the court had reduced the amount of damages awarded to a woman left disabled after a gynaecological operation because she was already fifty years old and had children, thus her sexuality was not as important as in her younger years.[70] The ECtHR observed that such an assumption:

> reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality in the specific case of the applicant.[71]

1.41 The increased attention devoted by the ECtHR to these themes and gender-based stereotypes over the years is a reflection of the evolutive interpretation of the ECHR or, to use the Strasbourg Court's terminology, the interpretation of the Convention as a "living instrument which… must be interpreted in the light of present-day

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64 *JL v Italy* App No 5671/16 at [141].

65 *JL v Italy* App No 5671/16 at [117]-[119]; see para 21 of this appendix above.

66 See paras 16 to 17 of this appendix above.

67 M S Ilieva, "J.L. v Italy: A Survivor of Trivictimisation – Naming A Court's Failure to Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation", *Strasbourg Observers* (6 September 2021).

68 *JL v Italy* App No 5671/16 at [139].

69 *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 at [54].

70 *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 at [49]-[50].

71 *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 at [52].

conditions".[72] In interpreting Convention rights, the ECtHR takes account of the evolving consensus among states regarding pressing issues that deserve the protection of the human rights framework.[73] Among these issues, the ECtHR has explicitly included the protection of sexual autonomy. In *M.C. v Bulgaria*, it held that legislation criminalising rape should focus on the issue of consent, rather than on violence or threat, emphasising that:

> [h]istorically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area.[74]

1.42 Since the victim's physical resistance is no longer a key element of the offence of rape, the law and practice must reflect "the evolution of societies towards effective equality and respect for each individual's sexual autonomy".[75]

The United Nations Committee on the Elimination of Discrimination against Women

1.43 Other human rights treaty bodies have dealt with myths and misconceptions in the prosecution and trial of sexual offences. In this section, we discuss the case law of the United Nations Committee on the Elimination of Discrimination against Women ("the Committee"), which is the body in charge of overseeing states' compliance with the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[76]

1.44 Relevant to the issue of myths and misconceptions in sexual offence cases are article 2 and article 5 of CEDAW. Article 2 reads:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: […]
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

Article 5 reads:

> States Parties shall take all appropriate measures:

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72 *Tyrer v UK* App No 5856/72 at [31].

73 K Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" (2011) 12 *German Law Journal* 1730.

74 *MC v Bulgaria* App No 39272/98 at [156].

75 *MC v Bulgaria* App No 39272/98 at [165].

76 Adopted in 1979 and entered into force in 1981. The UK ratified it in 2004.

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; […]

1.45 *Vertido v Philippines*[77] is a landmark case decided by the Committee which addresses myths and misconceptions in sexual offence cases. The applicant complained of the defendant's acquittal of rape charges. She alleged that the national court's decision was based on several myths and stereotypes, including the belief that a rape victim must try to escape and that there must be evidence of a direct threat. The decision also speculated on the submissive character of the victim and on the inability of the defendant to rape her due to his age as a man in his sixties.[78]

1.46 In its consideration of the merits, the Committee:

> [s]tresse[d] that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.[79]

1.47 On the issue of (for example) the victim's failure to resist and her character, the Committee found that the national court disregarded:

> the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the [applicant], who was perceived by the court as not being "a timid woman who could easily be cowed". It is clear from the [national court's] judgement that the assessment of the credibility of the [applicant's] version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation.[80]

1.48 The Committee concluded that "there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence".[81]

1.49 The Committee identified other stereotypes in the national court's decision:

> Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the

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77 *Vertido v Philippines* Comm No 18/2008.

78 *Vertido v Philippines* Comm No 18/2008, para 3.1.5-3.1.8.

79 *Vertido v Philippines* Comm No 18/2008, para 8.4.

80 *Vertido v Philippines* Comm No 18/2008, para 8.5.

81 *Vertido v Philippines* Comm No 18/2008, para 8.5.

> victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the [applicant] and the [defendant] knew each other, constitute a further example of "gender-based myths and misconceptions".[82]

1.50 In finding a violation of articles 2 and 5 of CEDAW, the Committee stressed that the applicant had suffered "moral and social damage and prejudices", caused "by the revictimization through the stereotypes and gender-based myths relied upon in the judgement".[83]

SPECIAL MEASURES

1.51 In Chapter 7, we discussed special measures available in sexual offences trials in England and Wales and the related safeguards to ensure the defendant's right to a fair trial. In this section, we discuss the ECtHR's case law regarding a broad range of measures that courts can impose to protect the rights of witnesses and complainants. For consistency, we refer to these measures as "special measures", even though the case law does not always employ this terminology.

1.52 The compatibility of special measures with the ECHR can be assessed from two different angles. On the one hand, the issue arises of the compliance of special measures with the defendant's fair trial rights (whether a given measure has breached article 6 of the ECHR). On the other hand, the issue arises of whether failure to adopt special measures has breached the positive obligation under article 8 to protect victims and witnesses. As we noted above, "witness" in the ECHR includes the alleged victim of crime.[84] Accordingly, in this section any reference to witnesses in the case law must be understood as also including the complainant in a sexual offences case.

Exclusion of the public and the press from the hearing

1.53 Article 6(1) of the ECHR expressly states that in criminal proceedings "everyone is entitled to a fair and public hearing" and that "judgment shall be pronounced publicly". The ECtHR has stressed the importance of publicity, holding that:

> This public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[85]

1.54 Ordinarily, a trial complies with the requirement of publicity when the public is able to obtain information about the date and place of the hearing and the courtroom is

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82 *Vertido v Philippines* Comm No 18/2008, para 8.6.

83 *Vertido v Philippines* Comm No 18/2008, para 8.8.

84 See para 21 of this appendix above.

85 *Riepan v Austria* App No 35115/97 at [27].

capable of accommodating spectators.[86] The ECtHR has also emphasised the importance of the press in a democratic society, holding that the press has a duty to impart information and ideas on all matters of public interest, provided that it respects the reputation and rights of others and prevents the disclosure of information received in confidence.[87] In addition, the ECtHR has clarified that:

> it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. However, consideration must be given to everyone's right to a fair hearing as secured under article 6(1) of the Convention, which, in criminal matters, includes the right to an impartial tribunal and the right to the presumption of innocence.[88]

1.55 However, the right to a public hearing is not absolute. Article 6(1) of the ECHR authorises the exclusion of the press and the public from a hearing on a number of different grounds, including where "the protection of the private life of the parties so require".[89] The ECtHR has clarified that derogations from the right to a public hearing must be "strictly required by the circumstances of the case"[90] and that in criminal proceedings "there is a high expectation of publicity".[91] Even though the general approach adopted by the ECtHR is to scrutinise the fairness of the proceedings as a whole, the ECtHR has held that the right to a public hearing can be violated irrespective of the overall compliance of criminal proceedings with fair trial rights.[92] The approach adopted by the ECtHR is to scrutinise the reasons for the decision to hold a hearing in camera (ie, in closed court) and assess, in light of the facts of the case, whether those reasons are justified.[93] Lack of reasons as to why a hearing in private is strictly necessary will inevitably result in the breach of article 6(1).[94]

1.56 The ECtHR has recognised that the vulnerability of some witnesses (in particular, juveniles) might require courts to impose limitations on the open and public nature of proceedings in order "to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice"[95] and ensure that witnesses "feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment".[96] In addition, the ECtHR has recognised that

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86 *Riepan v Austria* App No 35115/97 at [29].

87 *Bédat v Switzerland* App No 56925/08 (Grand Chamber decision) at [50].

88 *Bédat v Switzerland* App No 56925/08 (Grand Chamber decision) at [51].

89 Other grounds are the interests of morals, public order, national security, the interests of juveniles or where publicity would prejudice the interests of justice.

90 *Martinie v France* App No 58675/00 (Grand Chamber decision) at [40]; *Welke and Białek v Poland* App No 15924/05 at [74].

91 *B and P v UK*, App Nos 36337/97 and 35974/97 at [37].

92 *Kilin v Russia* App No 10271/12 at [111]-[112].

93 *Yam v UK* App No 31295/11 at [55].

94 *Chaushev v Russia* App Nos 37037/03, 39053/03 and 2469/04 at [24].

95 *B and P v UK* App Nos 36337/97 and 35974/97 at [37].

96 *B and P v UK* App Nos 36337/97 and 35974/97 at [38].

some degree of flexibility might achieve the aim of protecting juveniles charged with criminal offences, for example by employing "a modified procedure providing for selected attendance rights and judicious reporting", rather than excluding the press and the public from the entirety of the proceedings.[97] Depending on the actual circumstances of a case, the same approach is likely to be followed by the ECtHR in cases where an adult victim in a sexual offences trial is deemed vulnerable to the scrutiny of the public or the press and therefore should be afforded some protection.[98]

1.57 With regard to whether measures to exclude the public and the press from the hearing must be imposed as part of the state's obligations to protect the rights of both defendants and victims, the ECtHR has stated that courts "are not obliged, but have the right to order hearings be held in camera if they consider that they warrant such a restriction".[99] Nonetheless, in one instance the ECtHR has found a violation of article 8 in relation to a defendant. There was a violation because the national court's refusal to order an in camera hearing had resulted in the disclosure of the applicant's confidential medical records to the public, without the disclosure being necessary for the examination of the merits.[100] Therefore, it appears that, in the ECtHR's view, courts may, and in some circumstances will, be obliged to impose limitations on the publicity requirement to protect the private life of a party to criminal proceedings.

1.58 The ECtHR has also found that a national court's failure to exclude the press and the public from proceedings can constitute a breach of article 6. In *T v UK*, the ECtHR found the measures adopted by the national court insufficient to protect the fair trial rights of the defendant (a minor), holding that:

> Although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.[101]

1.59 In sum, failure to order the exclusion of the public and the press from criminal proceedings might have an adverse impact on the right to a fair trial, at least in some circumstances, in so far as it might hinder the participation of a vulnerable defendant to the trial. This is true also regarding complainants and witnesses, whose right to respect for their private life might be undermined by the presence of the public or the press at the hearing.

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97 *T v UK* App No 24724/94 at [85].

98 For example, In *JL v Italy* App No 5671/16 at [131]-[133], the president of the court had ordered that some hearings be held without the press, even though the complainants had not made such a request. The ECtHR did not rule specifically on this point, which was not raised in the complaint, but accepted that the national court had taken measures to protect the right to respect for private life of the complainant, including by excluding the press.

99 *Toeva v Bulgaria* App No 53329/99 (admissibility).

100 *Frâncu v Romania* App No 69356/13, paras 62-75 (translated from French).

101 *T v UK* at [88].

Use of video-link technology

1.60 The use of video-link technology in criminal proceedings has been scrutinised by the ECtHR in relation to two distinct aspects of the right to a fair trial. First, the ECtHR has considered the use of video-link technology as a means to ensure the defendant's effective participation in criminal proceedings. Second, with specific regard to sexual offence proceedings, the ECtHR has dealt with the testimony of complainants and witnesses via video-link technology and its impact on the defendant's fair trial rights.

Defendant's participation

1.61 The ECtHR has held that the defendant's participation by video-link is not to article 6 of the ECHR, provided that the measure serves a legitimate aim and the arrangements for the giving of evidence are able to ensure the defendant's due process.[102] To comply with article 6, the video-link link must ensure that the defendant is able to hear and see what is said during the proceedings, to be heard and seen by other parties (including the judge and witnesses), and has the opportunity to make a statement and confer confidentially with the defence lawyer present in the courtroom.[103] A defendant's refusal to appear via video-link might be construed as a waiver of the right to take part in the hearing.[104]

Witness testimony

1.62 Article 6(3)(d) of the ECHR provides that anyone charged with a criminal offence has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". As part of the general approach to assessing the fairness of the proceedings as a whole, the ECtHR will take into consideration also the way evidence was obtained, having regard to the rights of the defence as well as the interest of the public and victims in seeing crime properly prosecuted and, finally, the rights of witnesses.[105]

1.63 Although not expressly provided for by the text of article 6(3)(d) of the ECHR, the right to examine or have examined witnesses can be subject to exceptions. These exceptions:

> Must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[106]

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102 *Marcello Viola v Italy* App No 45106/04 at [67]; *Asciutto v Italy* App No 35795/02 at [64] (in French); Sakhnovskiy v Russia App No 21272/03 (Grand Chamber decision) at [98].

103 *Marcello Viola v Italy* at [73]-[75]; *Asciutto v Italy* at [69]-[71]. In *Sakhnovskiy v Russia* App No 21272/03 (Grand Chamber decision) at [104], the ECtHR found a violation of article 6 ECHR because the video-link did not ensure confidential communications between the defendant and the lawyer.

104 *Dijkhuizen v The Netherlands* App No 61591/16 at [60].

105 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [101].

106 *Al-Khawaja and Tahery v the United Kingdom* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [118]; see also para 34 of this appendix above.

1.64 Due to the importance of the rights of the defence in ensuring the defendant's fair trial, any restriction must be strictly necessary and a less restrictive measure should be applied whenever possible.[107]

1.65 Against this general background, allowing the testimony of a witness via video link might be seen as weakening the defence's ability to put questions to the witness while assessing the witness's behaviour and credibility in the courtroom. Scholars have observed that "physicality", albeit not strictly speaking indispensable, is an important element of the right to confront witnesses, warning that measures resulting in a limitation of this right should not be adopted lightly.[108] Similarly, the ECtHR has stressed multiple times the importance of observing the behaviour and credibility of a witness.[109] First, confronting the witness in the presence of a judge is a fundamental fair trial right, because it is the judge who will eventually decide the case and therefore their observations of the witness's behaviour and credibility carry significant consequences for the defendant.[110]

1.66 At the same time, allowing a witness to testify via video-link is a way to limit the exposure of a witness to what the ECtHR has repeatedly described as the "ordeal" of sexual offence proceedings,[111] in particular by avoiding direct confrontation of the witness with the defendant. In these circumstances, the use of video-link technology is a technique by which states might seek to comply with the positive obligation to protect the witness's private life during sexual offence proceedings. Even though not expressly framed in the case law as a positive obligation, the ECtHR has acknowledged that the use of video link technology is an option, alone or in combination with other measures, available to courts to ensure that the witness's rights are adequately protected while at the same time guaranteeing the right of the defence to examine the witness.[112]

Pre-recorded interviews of witnesses

1.67 The ECtHR has dealt on multiple occasions with pre-recorded interviews of witnesses. Playing a pre-recorded interview during the trial raises issues similar to those already discussed in the previous section: on one hand, a pre-recorded interview may affect the defendant's ability to examine witnesses; on the other hand, it constitutes a measure to protect the witness from a direct confrontation with the defendant during the trial.

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107 *Graviano v Italy* App No 10075/02 at [38]; *Van Mechelen v The Netherlands* App Nos 21363/93, 21364/93, 21427/93 and 22056/93 at [58].

108 I Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] *Criminal Law Review* 255; M Daniele, "Testimony Through a Live Link in the Perspective of the Right to Confront Witnesses" [2014] *Criminal Law Review* 189.

109 *Bocos-Cuesta v The Netherlands* App No 54789/00 at [71].

110 *Graviano v Italy* at [38] (in French). This does not entitle the defendant to personally cross-examine the witness: *Y v Slovenia* App No 41107/10 at [106].

111 *Y v Slovenia* App No 41107/10 at [103]; *JL v Italy* App No 5671/16 at [119]; *Aigner v Austria* App No 28328/03 at [37].

112 *WS v Poland* App No 21508/02 at [61]; *SN v Sweden* App No 34209/96 at [49].

1.68 In general terms, the ECtHR has observed that:

> The use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings. However, Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness.[113]

1.69 In *Al-Khawaja and Tahery v UK* the Grand Chamber addressed, among other things, a statement made to the police by a complainant of indecent assault who had then committed suicide and therefore could not have been called to testify at the hearing. The Grand Chamber held that:

> Article 6(3)(d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[114]

1.70 The Grand Chamber added that two general standards of scrutiny apply:

> Firstly, there must be a good reason for the non-attendance of a witness. Secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule").[115]

1.71 On the first of these, a witness's fear of testifying (even when their fear is not directly attributable to threats made by the defendant) might constitute a good reason for non-attendance. However the trial court must determine "firstly, whether or not there are objective grounds for that fear, and, secondly, whether those objective grounds are supported by evidence".[116] Since the absence of a witness during the trial negatively affects the rights of the defence, admitting a witness statement in lieu of live evidence at trial must be a measure of last resort that the court must adopt when other special measures are impracticable.[117]

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113 *Bocos-Cuesta v The Netherlands* App No 54789/00 at [68].

114 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision at [118].

115 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [119].

116 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [124].

117 *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (Grand Chamber decision) at [125].

1.72 On the second, the "sole or decisive rule" was explained further in *Schatschaschwili v Germany* where the Grand Chamber observed that "the more important the evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair".[118] Among these counterbalancing factors will be:

(1) the existence of a video-recording of the absent witness's questioning at the investigation stage that allows the court, the prosecution and the defence to observe the witness's demeanour and form their own impression of their reliability;[119]

(2) in cases where a witness is absent and cannot be questioned at the trial, the possibility offered to the defence to put questions to the witness indirectly, for instance in writing, in the course of the trial;[120]

(3) the fact that the defence counsel had the opportunity to question the witness during the investigation stage.[121]

1.73 As a general rule, when live testimony at the trial does not take place:

> the defendant must further be afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness. Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation.[122]

1.74 These principles have been applied also to sexual offence proceedings. The ECtHR, having emphasised that a pre-recorded interview of a witness constitutes a measure to protect the witness, has nonetheless found a violation of article 6(3)(d) of the ECHR in cases where the defendant had not been afforded the possibility to put questions to the witness either during the trial or at the investigation stage.[123] In the ECtHR's words:

> By way of viewing the videotape the courts, as well as the applicant, were able to listen to [the witness]'s own account of the alleged events. The recording also enabled them to observe the manner in which the interviews were conducted and to assess for themselves, at least to a certain degree, the credibility of [the witness]'s account. It was open to the applicant to contest and comment on the evidence produced before the trial courts. While the Court acknowledges the significance of such a recording as evidence, it cannot alone be regarded as sufficiently

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118 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [116].

119 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [127].

120 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [129].

121 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [130].

122 *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [131].

123 *D v Finland* App No 30542/04 at [50]-[52]; *AL v Finland* App No 23220/04 at [41]-[45].

safeguarding the rights of the defence where no opportunity to put questions to a person giving the account has been afforded by the authorities.[124]

1.75 By contrast, the ECtHR has found no violation of article 6(3)(d) of the ECHR where the defendant's counsel was able to ask questions of the complainant of sexual offences during the pre-trial investigation and the recorded interview was shown at the trial.[125] For the ECtHR, these measures were sufficient to enable the applicant to challenge the witness's statement and credibility in the course of the criminal proceedings.[126]

Use of two-way mirrors

1.76 The ECtHR has ruled on the compatibility with article 6 of the use of mirrors to protect the victim during the testimony in sexual offence proceedings. In *Accardi v Italy*,[127] the victims (two minors), assisted by a psychologist, were heard in the courtroom while the defendants, the lawyers and the prosecutor were allowed to follow their testimony behind a two-way mirror in an adjacent room. At some point during the hearing, the investigating judge also moved to the adjacent room because one of the witnesses replied that she was too ashamed to talk. The ECtHR found no violation of the right to a fair trial since the defendants were able to hear the questions and the replies of the witnesses, observe their demeanour and put questions to them through the intermediary of the investigating judge.

1.77 In *W.S. v Poland*,[128] the ECtHR has suggested that a two-way mirror could have been a less invasive method than direct questioning to enable the parties to test the reliability of a vulnerable victim in sexual offence trials.

PERSONAL RECORDS

1.78 In Chapter 3, we discussed the issue of disclosure in sexual offences proceedings of the complainant's personal records that are held by third parties.

1.79 The ECtHR has stressed on several occasions that personal information, including medical data, falls within the scope of article 8. In *Mockutė v Lithuania*, the ECtHR held that respecting the confidentiality of personal data, including medical data, is crucial not only to respect patients' privacy, but also to preserve their confidence in the medical profession and in the health services. Without such protection, those in need of medical assistance might be deterred from revealing information of a personal and intimate nature which might be necessary to receive appropriate treatment. Therefore, the domestic law must afford appropriate safeguards to prevent disclosure of health data which might be inconsistent with article 8.[129] Furthermore, the ECtHR has added

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124 *D v Finland* at [50]; *A.L. v Finland* at [41].

125 *SN v Sweden* App No 34209/96 at [48]-[54].

126 *SN v Sweden* App No 34209/96 at [52]; see also *B v Finland* App No 17122/02 at [44]-[50].

127 *Accardi v Italy* App No 30598/02 (admissibility decision).

128 *WS v Poland* at [61].

129 *Mockutė v Lithuania* App No 66490/09 at [93] (with references to other cases).

that information about a person's sexual life, moral integrity and mental health is highly sensitive and thus also attracts the protection of article 8.[130]

1.80 In discussing the issue of disclosure of personal records in sexual offences proceedings, the ECtHR has distinguished between personal records already in the possession of the prosecution and personal records still held by third parties.

Personal records already held by the prosecution

1.81 When the prosecution is in possession of the complainant's personal records, it is possible that it might seek to withhold the evidence on public interest grounds. Whether the prosecution may seek to withhold personal records on public interest grounds has never been dealt with in Strasbourg's jurisprudence, especially since the content of undisclosed evidence (and whether it includes personal records) is usually not known to the ECtHR.[131] However, some general principles on the disclosure of evidence might be inferred from the case law which might help understand whether, and to what extent, disclosure of personal records affects the defendant's fair trial rights and the right to a private life in respect of the complainant of sexual offences.

1.82 Article 6 of the ECHR does not explicitly mention disclosure of evidence in criminal proceedings. However, the case law has stressed that disclosure of evidence is fundamental to ensure an adversarial trial and equality of arms between the prosecution and defence, both of which "must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party".[132] Furthermore, the ECtHR has linked disclosure of evidence with article 6(3)(b), that provides the right of the defendant "to have adequate time and facilities for the preparation of his defence". As explained by the ECtHR, "the accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings".[133]

1.83 In *Rowe and Davis v UK*,[134] the Grand Chamber laid down some ground rules governing disclosure that can be summarised as follows:

(1) Article 6 requires that the prosecution disclose to the defence all material evidence in their possession for or against the accused.[135]

(2) The entitlement to disclosure of relevant evidence is not an absolute right, because "in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold

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130 *Mockutė v Lithuania* App No 66490/09 at [94] (with references to other cases).

131 See also para 10 of this appendix above.

132 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [60].

133 *Leas v Estonia* App No 59577/08 at [60].

134 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision).

135 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [60].

certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest".[136]

(3) However, in order to comply with article 6, measures restricting the entitlement to disclosure must be "strictly necessary". In order to ensure the defendant's fair trial, any difficulty caused to the defence as a result of the limitations on disclosure must be counterbalanced by the procedures followed by the judicial authorities. Decisions by the judicial authorities must ensure the requirements of adversarial proceedings and equality of arms to protect the interests of the accused.[137]

1.84 The principles developed by the ECtHR confirm that the logic of balancing countervailing rights applies also in relation to disclosure (and non-disclosure) of evidence in criminal proceedings. Even though the Grand Chamber does not explicitly refer to the protection of complainants and witnesses in criminal proceedings, it nonetheless recognises the aim of preserving "the fundamental rights of another individual" as a ground to justify non-disclosure. As is usually the case with the Strasbourg jurisprudence,[138] the fairness of the proceedings as a whole does not depend on a single instance of non-disclosure, but on the overall measures that courts have adopted to ensure the defendant's fair trial.

1.85 Following these principles, the Grand Chamber in *Rowe and Davis* decided that the prosecution's decision to withhold certain evidence on the basis of public interest immunity breached article 6, since the prosecution itself assessed the importance of the evidence and weighed it against the public interest without notifying the judge. The Court of Appeal had the opportunity of reviewing the undisclosed evidence and hearing the prosecution's submission on the matter. However this procedure was not sufficient to remedy the unfairness of the trial as a whole, since the Court of Appeal had to assess the relevance of the undisclosed evidence on the basis of the transcripts of the Crown Court hearing and of the prosecution's arguments alone.[139]

1.86 In *Jasper v UK*,[140] using an amended framework, the prosecution had made an *ex parte* application to the trial judge to withhold material in its possession on the basis of public interest immunity. The defence was notified of the application, without the content of the undisclosed evidence being revealed, and permitted to make submissions. In finding no violation of article 6, the Grand Chamber observed that the undisclosed material formed no part of the prosecution case and was never put to the jury, and that the defence was allowed to participate in the decision-making.[141] Furthermore, it emphasised that "the fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it

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136 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [61].

137 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [61]-[62].

138 See para 10 of this appendix above.

139 *Rowe and Davis v UK* App No 28901/95 (Grand Chamber decision) at [63]-[67]. The ECtHR reached a similar conclusion in *Atlan v UK* App No 36533/97 at [42]-[46].

140 *Jasper v UK* App No 27052/95 (Grand Chamber decision).

141 *Jasper v UK* App No 27052/95 (Grand Chamber decision) at [55].

was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld".[142]

1.87 What transpires from these judgments is that non-disclosure of evidence must be accompanied by sufficient safeguards, among which scrutiny by the trial judge and participation of the defence play a fundamental role. Provided that these safeguards are in place, it is open to the prosecution to argue that evidence such as the complainant's personal records should be withheld to protect the complainant's rights in criminal proceedings, including the right to respect for their private life.

Personal records held by third parties

1.88 Where the records are in possession of a third party then an issue arises of whether parties not involved in the proceedings should disclose these records in the course of criminal proceedings (to the prosecution or by court order) or whether the disclosure would breach the complainant's right to respect for their private life.

1.89 The ECtHR has ruled on the compatibility of the disclosure of medical records in criminal proceedings with article 8. In *Avilkina v Russia*, the applicants (subject to an enquiry by the prosecution but not formally charged) submitted that the information requested by the prosecutor was confidential medical information which was disclosed to the prosecutor by the medical institutions without their consent.[143] The ECtHR, having recognised that disclosure of medical records constitutes an interference with the right to respect for private life within the meaning of article 8(2), held that such interference pursued the legitimate aim of law enforcement.[144] However, the ECtHR held that the interference was not proportionate to the aim pursued, since it was not necessary for the purpose of the enquiry conducted by the prosecution and no safeguard was in place to prevent unauthorised disclosure of the records.[145] Referring to the balancing technique, the ECtHR stated that it

> discern[ed] no mention in the text of the judgments of any efforts by the national authorities' to strike a fair balance between the applicants' right to respect for their private life and the prosecutor's activities aimed at protecting public health and individuals' rights in that field. Nor did the authorities adduce relevant or sufficient reasons which would have justified the disclosure of the confidential information.[146]

1.90 In *Z v Finland*, it was the witness in sexual offence proceedings who complained about the court's order to disclose her medical records.[147] The applicant, an HIV carrier, was a witness in the proceedings against her husband, also HIV-positive, who was charged with deliberately trying to infect other women. The ECtHR held that the interference with the witness's private life pursued the legitimate aims mentioned in article 8(2), namely the prevention of crime and the protection of the rights and

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142 *Jasper v UK* App No 27052/95 (Grand Chamber decision) at [56].

143 *Avilkina v Russia* App No 1585/09 at [28].

144 *Avilkina v Russia* App No 1585/09 at [40].

145 *Avilkina v Russia* App No 1585/09 at [47]-[54].

146 *Avilkina v Russia* App No 1585/09 at [51].

147 *Z v Finland* App No 22009/93.

freedoms of others.[148] In that respect, the ECtHR held that "the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings where such interests are shown to be of even greater importance".[149] The Court concluded that the inclusion of medical records in the prosecution file was proportionate, since records constituted relevant evidence and the witness was given the opportunity to be heard and challenge the disclosure order.[150] However, the ECtHR found that the disclosure of the witness's name and her HIV status in the judgment was an unlawful interference with her private life, observing that her anonymity should have been ensured in light of her opposition to the disclosure of the medical records.[151]

1.91 In light of these decisions, it appears that disclosure of complainants' personal records, including medical records, might be necessary in the presence of overriding public interests, such as the prosecution of crime and the protection of the rights and freedoms of others. In any event, complainants must be given the opportunity to make submissions and challenge the disclosure. Even though the ECtHR has to date not had the opportunity to deal specifically with potential conflicts between non-disclosure of personal records and the right to a fair trial, arguably the key principle to reconcile the right of the complainant with the right of the defendant is to be found in the balancing technique. For example, it can be argued that the disclosure of personal records in sexual offence proceedings is a legitimate interference with the complainant's private life in order to protect the defendant's right to a fair trial (one of "the rights of others" mentioned in article 8(2)), provided that such disclosure is relevant and effective safeguards are in place. In such a case, as Leahy has argued, that the ECHR jurisprudence requires that the legislature "ensure that the law is sufficiently robust to protect complainants' privacy by limiting disclosure of personal information to where this is strictly necessary".[152] The balance to be struck and whether disclosure is required will depend on a case-by-case assessment of the set of measures adopted by judicial authorities to ensure the overall fairness of the proceedings.

SEXUAL BEHAVIOUR EVIDENCE

1.92 In Chapter 4, we observed that the UK courts have acknowledged that section 41 of the Youth Justice and Criminal Evidence Act 1999, which restricts the admissibility of evidence regarding the complainant's sexual behaviour, could potentially have an adverse impact on the defendant's fair trial rights.

1.93 The issue of the compliance of evidentiary restrictions on sexual behaviour evidence with article 6 has not been examined by the ECtHR to date. However, on a few occasions, the Strasbourg Court has dealt with questioning regarding the

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148 *Z v Finland* App No 22009/93 at [76].

149 *Z v Finland* App No 22009/93 at [97].

150 *Z v Finland* App No 22009/93 at [106]-[110].

151 *Z v Finland* App No 22009/93 at [113].

152 S Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] *Criminal Law Review* 229, 230.

complainant's sexual behaviour during criminal proceedings and its compliance with the complainant's right to respect for their private life.

1.94 In *JL v Italy*, the applicant invoked article 472(3bis) of the Italian Code of Criminal Procedure, according to which, in sexual offences proceedings, "questions regarding the complainant's private and sexual life are prohibited, unless they are necessary for the reconstruction of the facts of the case".[153] This case concerned both the investigation stage of the proceedings as well as the trial. The applicant argued that the defendants' lawyers had asked her questions regarding her private and sexual life that were not pertinent to the facts and whose aim "was not to clarify the facts, but to show that her lifestyle and her sexual choices were anomalous".[154]

1.95 The ECtHR emphasised that "the existence of two contradictory versions of the events unavoidably requires an appreciation of the credibility of the statements made by each party, which must be duly verified".[155] It falls on the judicial authority to strike the right balance between the interests of the defence and the need to protect the rights of the alleged victim.[156] The Court observed that defence lawyers had tried to undermine the applicant's credibility, by putting personal questions to her (often unrelated to the facts in issue) regarding her family life, her sexual orientation and her sexual choices.[157] However, the Court noted that both the prosecutor and the president of the first-instance court had taken measures to protect the applicant's private life, intervening whenever defence lawyers had asked questions which were discrediting or unrelated to the facts, with a view to preventing distress to the applicant as much as possible. In addition, the president of the court had prohibited the press from filming the examination of the applicant in order to protect her private life and had ordered some recesses so that she could regain her composure. Even though the ECtHR recognised that the applicant's experience during the investigation and trial had been inevitably upsetting, it concluded that there was no violation of her right to respect for her private life.[158]

1.96 It is important to note that the ECtHR did not assess the suitability, in the abstract, of the Italian law to strike the correct balance between the defendant's right to a fair trial and the complainant's right to respect for their private life. Rather, the focus of the Court's reasoning is on whether the judicial authorities, in the concrete case, had struck the correct balance, concluding that they did so. This means, in practice, that the ECtHR accepted that some intrusive questions regarding the complainant's sexual behaviour might be relevant to the facts at issue, and that it is the duty of the judicial authority to ensure that such questions remain relevant throughout the examination of the complainant.

1.97 Ilieva has criticised the decision, arguing that the mere fact that judges had interrupted the lawyers when they asked irrelevant questions regarding the applicant's sexual life

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153 Italian Code of Criminal Procedure, art 472(3bis) (translated from Italian).

154 *JL v Italy* App No 5671/16 at [96].

155 *JL v Italy* App No 5671/16 at [127].

156 *JL v Italy* App No 5671/16 at [128].

157 *JL v Italy* App No 5671/16 at [132].

158 *JL v Italy* App No 5671/16 at [96], [133].

was not sufficient to prevent her "public courtroom harassment" and noting that "the trial symbolically replicated the original violence: intrusive lawyers ganged up, unhindered by the weakly reactive judges".[159] Ilieva argues that the duty towards victims of violence should be to "actively minimise the harm, not merely not actively compound it".[160]

1.98 In contrast to *JL*, the ECtHR held in *Y v Slovenia* that the judicial authorities had failed adequately to protect the right to respect for private life of the applicant (an alleged victim of rape) during her questioning at the trial.[161] As in *JL,* the president of the court had at times intervened to prohibit some questions of personal nature put to the applicant and had ordered occasional adjournments. However, on this occasion it was considered insufficient by the ECtHR, especially in light of the fact that the defendant (a family friend) was often allowed to put questions directly to the applicant, even though he was represented by a lawyer.[162] The ECtHR noted that, even though the president of the court had prohibited irrelevant questions, the defendant's:

> [o]ffensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction [the president's intervention]. Considering the otherwise wide scope of cross-examination afforded to [the defendant], in the Court's opinion curtailing his personal remarks would not have unduly restricted his defence rights. Yet such an intervention would have mitigated what was clearly a distressing experience for the applicant.[163]

The ECtHR concluded that the judicial authorities had not struck the right balance between article 6 and article 8 because the manner in which proceedings had been conducted "substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial".[164]

1.99 Therefore, it appears that the main difference between *JL* and *Y* concerns the degree of intervention by the judicial authority to prevent the types of questions that might undermine the protection afforded to the complainant by article 8. The ECtHR requires courts actively to supervise the examination of the complainant and oversee the nature of the questions asked by the defence. Since balancing plays a key role as part of this supervision, it can be argued that the ECtHR would not accept a complete ban on questions regarding the applicant's sexual behaviour, since such a ban would negate the very logic of balancing and restrict unacceptably the right to a fair trial. Rather, courts must perform the balancing exercise between article 6 and article 8 on a case-by-case basis, prohibiting questions which bear no connection with the facts in

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159 M S Ilieva, "J.L. v Italy: A Survivor of Trivictimisation – Naming A Court's Failure to Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation", *Strasbourg Observers* (6 September 2021).

160 M S Ilieva, "J.L. V. Italy: A Survivor of Trivictimisation – Naming A Court's Failure to Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation", *Strasbourg Observers* (6 September 2021).

161 *Y v Slovenia* App No 41107/10 at [101]-[116].

162 *Y v Slovenia* App No 41107/10 at [107].

163 *Y v Slovenia* App No 41107/10 at [109].

164 *Y v Slovenia* App No 41107/10 at [114].

issue. As McGlynn observed, "the right to a fair trial neither takes precedence over other interests nor requires admission of all relevant evidence".[165] Balancing article 6 and article 8 rights seeks to ensure that neither is unduly restricted.

CHARACTER EVIDENCE

1.100 The ECtHR has ruled on character evidence only in a limited number of cases. The case law appears to deal with evidence regarding the defendant's character at the sentencing and appeal stages, rather than referring specifically to the type of character evidence adduced at trial that we discussed in Chapter 5.

1.101 The ECtHR has clarified that the right to be presumed innocent (article 6(2) of the ECHR) does not apply to allegations made about the defendant's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge".[166]

1.102 On many occasions, the ECtHR has reiterated that, where the appellate court is competent to modify, including increasing, the sentence imposed by the lower court and when the appeal proceedings raise issues involving an assessment of the defendant's personality, character and state of mind at the time of the offence, it is essential to the fairness of the proceedings that defendants are able to be present at the hearing and afforded the opportunity to participate in it.[167] Where the assessment of the defendant's personality and character is at issue in the appellate proceedings, the court cannot examine the case properly without having heard the defendant directly and gaining a personal impression of them.[168]

INDEPENDENT LEGAL REPRESENTATION

1.103 This section will discuss whether a right to Independent Legal Representation ("ILR") for complainants exists under human rights law. For the purpose of the discussion, we will consider a general right of ILR, without restricting the analysis to specific instances in which such a right could be introduced.

1.104 Keane and Convery have proposed the introduction in the Scottish criminal system of independent legal representation ("ILR") to assist complainants in sexual offences cases.[169] The authors do not propose a general right to ILR but suggest that ILR should be confined to cases in which an application is made to introduce evidence regarding the complainant's sexual behaviour or character, pursuant to section 275 of the Criminal Procedure (Scotland) Act 1995.[170]

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165 C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *The Journal of Criminal Law* 367, 377.

166 *Phillips v UK* App No 41087/98 at [35]; *Bikas v Germany* App No 76607/13 at [57].

167 *X v The Netherlands* App No 72631/17 at [45]; *Talabér v Hungary* App No 37376/05 at [128].

168 *Zahirović v Croatia* App No 58590/11 at [57]; *Cooke v Austria* App No 25878/94 at [42]; *Kremzow v Austria* App No 12350/86 at [67].

169 E P H Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020).

170 Above, pp 2-3.

1.105 Keane and Convery identify article 8 of the ECHR as a possible legal basis for the introduction of the right to ILR. They rely on the established case law of the ECtHR, mentioned throughout this Appendix, according to which states are under positive obligations to protect complainants in sexual offences cases (in particular, their right to respect for their private life) and protect them from secondary victimisation. The authors also refer to the established case law regarding the need to balance the right to a fair trial with the right to respect for the private life of complainants and witnesses.[171] They note that the balancing exercise to be performed by courts is rendered difficult if the complainant is not given the opportunity to be heard and properly participate in the process.[172] The prosecution, in the authors' view, cannot adequately represent the interests of the complainant.[173]

1.106 The possibility for complainants of sexual offences to be provided with legal representation can be construed as a way through which states might seek to discharge their positive obligations to protect complainants in sexual offence cases (and indeed in criminal proceedings more generally). It must be recalled, however, that states enjoy a certain margin of appreciation in choosing the measures aimed to comply with the positive obligation to ensure respect of article 8. It follows that states might choose to introduce ILR for complainants of sexual offences, but there is no obligation to do so under the ECHR.

1.107 In the ECHR, there is no explicit *right* to ILR (or otherwise a *right* to legal representation for alleged victims of criminal offences). In criminal proceedings, only those "charged with a criminal offence" have a right to legal representation (article 6(3)(c)). The ensuing implication is that complainants have no legal entitlement to ILR under the ECHR, thus the absence of specific provisions in national laws regarding legal assistance to complainants of sexual offences would not arguably constitute a breach of article 8. However, in our pre-consultation engagement, Professor David Harris told us that he doubted that the positive obligation under article 8 to protect complainants would be interpreted by the ECtHR as requiring the introduction of ILR in the absence of a proven consensus among Convention states in their practice. Conversely, providing complainants of sexual offences with ILR might be a means through which states seek to protect article 8. That is to say that ILR is an option that states might consider, but not a right that states must ensure.

1.108 In addition, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention)" places an obligation on contracting states to "provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law" for complainants of gender-based violence, including complainants of sexual offences.[174] The extent of

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171 E P H Keane and T Convery, *Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character* (2020) pp 16-17.

172 Above, pp 20-21.

173 Above, pp 18-19.

174 "Violence against women" and "domestic violence" include also physical, sexual and psychological harm (article 3(a) and (b) of the Istanbul Convention). Sexual violence and rape thus fall within the scope of the Convention (article 36). "Gender-based violence against women" means "violence that is directed against a woman because she is a woman or that affects women disproportionately" (article 3(d)). This could include a male complainant.

this obligation is unclear. Article 57 does not specify whether the right to legal assistance should encompass also legal assistance during criminal proceedings, including the trial. In addition, the right should be exercised in accordance with national laws. The Convention was ratified by the UK on 22 July 2022 and entered into force as regards the UK on 1 November 2022. Arguably, states are under an obligation to ensure some form of legal assistance (including free legal aid) to complainants, but it is for the national law to spell out the concrete modes through which such a right should be exercised.

JURYLESS TRIALS OF SEXUAL OFFENCE CASES

1.109 The Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Part ("Gillen Review")[175] discusses in detail the benefits and deficiencies of trial by jury in sexual offence cases, concluding that sexual offences should continue to be tried by a judge and a jury, with the possibility for a defendant to apply for a judge-alone trial if it is in the interests of justice.[176] Among the arguments against trial by jury, the Review mentions the difficulty for jurors to understand the complexities of sexual offence cases; the presence of myths and stereotypes among jurors as opposed to the ability of trained judges to be more objective (including vis-à-vis information contained in the media); and the lack of a reasoned verdict in jury trials.[177]

1.110 In this section, we discuss whether some of these arguments against jury trials might raise human rights concerns.

1.111 The starting point is that states enjoy "considerable freedom" regarding the organisation of their judicial systems, so long as they comply with the requirement of ensuring a fair trial.[178] It follows that article 6 does not contain a right to be tried before a jury.[179] The existence of lay jury systems is "guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences" and "a State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention."[180]

1.112 On multiple occasions the ECtHR has dealt with the lack of a reasoned verdict by the jury and its relevance to fair trial. As a general rule, the ECtHR has observed that:

> The Convention does not require jurors to give reasons for their decision and … Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial

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175 Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (May 2019).

176 Above, p 562.

177 Above, pp 549-553.

178 *Twomey, Cameron and Guthrie v UK* App Nos 67318/09 and 22226/12 (admissibility decision) at [30].

179 *Twomey, Cameron and Guthrie v UK* App Nos 67318/09 and 22226/12 (admissibility decision) at [30].

180 *Twomey, Cameron and Guthrie v UK* App Nos 67318/09 and 22226/12 (admissibility decision) at [30].

to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.[181]

1.113 Procedural safeguards against arbitrariness are, for example, directions or guidance provided by the presiding judge to the jurors on the relevant legal issues or evidence and precise, unequivocal questions put to the jury by the judge to form a framework on which the verdict is based in order to sufficiently offset the fact that no reasons are given for the jury's verdict.[182]

1.114 In addition, the ECtHR has stressed the importance of safeguards to allow defendants to exercise their right to appeal against the judgment.[183] When multiple defendants are tried, the ECtHR requires the questions put by the judge to the jury to be specific enough to allow each defendant to understand the factual and legal basis on which they had been convicted.[184] In *Judge v UK*, the Court emphasised that "in Scotland the jury's verdict is not returned in isolation but is given in a framework which includes addresses by the prosecution and the defence as well as the presiding judge's charge to the jury",[185] concluding that appeal rights available under Scottish law are sufficient to remedy any improper verdict by the jury.[186]

1.115 Although the ECtHR has not tackled the issue of myths and misconceptions in sexual offence cases in relation to jurors, it has ruled on multiple occasions regarding jurors' personal convictions and the impact of the media on them. The issue is relevant to fair trial rights, namely because article 6(1) and (2) of the ECHR provides for the right to be tried by an impartial tribunal and the right to be presumed innocent.[187] In that respect, the ECtHR has held that "a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused".[188]

1.116 The Court has observed that, unlike juries, judges possess appropriate experience and training enabling them to resist any outside influence (including from the press).[189] In *Beggs v UK*, the ECtHR found that the judge had appropriately warned the jury to disregard any extraneous material which had come to their attention (referring explicitly to material in the press and on television), thus concluding that the applicant

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181 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [90]. See also *Legillon v France* App No 53406/10 at [53]; *Lherrmitte v Belgium* App No 34238/09 (Grand Chamber decision) at [67].

182 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [92]; *Legillon v France* App No 34238/09 (Grand Chamber decision) at [54]; *Lherrmitte v Belgium* App No 34238/09 (Grand Chamber decision) at [75]-[85].

183 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [92].

184 *Taxquet v Belgium* App No 926/05 (Grand Chamber decision) at [96]-[100] (finding a violation of article 6).

185 *Judge v UK* App No 35863/10 (admissibility decision) at [36].

186 *Judge v UK* App No 35863/10 (admissibility decision) at [38].

187 The requirement of impartiality applies to both judges and juries: *Hanif and Khan v UK* App Nos. 52999/08 and 61779/08 at [138]-[140].

188 *Akay v Turkey* App No 16849/12 (admissibility decision).

189 *Craxi v Italy (No 1)* App No 34896/97 at [104].

had failed to demonstrate that the jury could not have been relied upon to follow the judge's instructions.[190]

1.117 When suspicions arise as to the lack of impartiality of a juror, it is the duty of the judge to deal with the matter in the appropriate manner to dispel any appearance of lack of impartiality. For example, in *Remli v France*, the ECtHR found that the judge, during a trial against a French national of Algerian origin, had failed to investigate the allegations (made by a juror who overheard a conversation) that one of the jurors harboured racist beliefs.[191]

1.118 In *Sander v UK*, another case concerning racial bias within a jury, the ECtHR accepted that "although discharging the jury may not always be the only means to achieve a fair trial, there are certain circumstances where this is required by Article 6(1) of the Convention".[192] In this case the applicant complained that he was tried by a "racially prejudiced" jury in violation of article 6(1) of the ECHR.[193] The applicant, an Asian man, believed the jury was not impartial after a juror complained that at least two of the other jurors had been making "openly racist remarks and jokes" about Asians.[194] Another juror, after being confronted with these allegations, notably admitted to making such racist jokes. In response, the judge "redirected the jury in a clear, detailed and forceful manner" and "sought and received an unequivocally positive assurance from them as to their impartiality."[195] In finding a violation of article 6(1), the ECtHR held that the judge "should have reacted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence".[196] The serious allegation that the applicant "risked being condemned because of his ethnic origin" coupled with the open admission by one of the jurors to making racist remarks necessitated further action beyond a direction and a written assurance from the jury.[197]

1.119 These cases concern racist beliefs of jurors and we note the Court said it:

> considers this to be a very serious matter given that, in today's multicultural European societies, the eradication of racism has become a common priority goal for all Contracting States.[198]

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190 *Beggs v UK* App No 15499/10 (admissibility decision) at [128]; see also *Abdulla Ali v UK* App No 30971/12 at [92]-[99].

191 *Remli v France* App No 16839/90 at [92]-[99]. See also *Tikhonov and Khasis v Russia* App Nos 12074/12 and 16442/12 at [44]-[53] (regarding the court's failure to deal with an accusation made by a juror, interviewed by a journalist, alleging that some jurors exerted undue pressure to convict the defendant).

192 *Sander v UK* App No 34129/96 at [34].

193 *Sander v UK* App No 34129/96 at [24].

194 *Sander v UK* App No 34129/96 at [11].

195 *Sander v UK* App No 34129/96 at [20].

196 *Sander v UK* App No 34129/96 at [34].

197 *Sander v UK App* No 34129/96 at [34].

198 *Sander v UK App* No 34129/96 at [23].

To the extent that the same might be said of tackling sexual violence, the approach in *Sander* and *Remli* may arguably be applicable to other prejudicial beliefs, including prejudicial attitudes towards rape complainants.

CONCLUSION

1.120 From the overview of the case law, it emerges that the ECtHR has increasingly recognised the importance of ensuring the complainant's right to respect for their private life in criminal proceedings (including sexual offences proceedings). The ECtHR has developed the doctrine of positive obligations to enhance the protection afforded to complainants by article 8. It is now established that it is not sufficient for states to abstain from interfering with the complainant's private life, because the effective protection of complainants in criminal proceedings requires positive actions. This is key in relation to sexual offence proceedings, given the vulnerability of complainants in such cases and the distressing experience of the investigation and trial.

1.121 The ECtHR's primary concern is that national courts should strive to accommodate as much as possible the complainant's right to respect for their private life and the defendant's right to a fair trial. To reconcile the possible tension between the rights, the ECtHR has resorted to the logic of balancing: courts must find an equilibrium between private life and fair trial to ensure that neither is unduly compressed. However, there is no hard-and-fast rule on how such a balance should be achieved. The logic of balance does not explain, in a more generalisable way, whether a right should have priority over the other in a given circumstance. Rather, the answer is usually dependent upon a multitude of factors at issue in each individual case. The assessment of whether a defendant has received a fair trial, and whether the complainant has been sufficiently protected during the trial, should usually be conducted by looking at the proceedings as a whole. In most cases, it is the sum of measures adopted by courts which will determine whether the right to a fair trial has been unduly compromised to protect the complainant's rights or, on the contrary, the complainant's rights have been sacrificed in the name of a fair trial.

1.122 Nonetheless, some general principles can be inferred from the case law. Firstly, with regard to special measures, it appears that the ECtHR usually accepts that measures to protect the complainant's rights in sexual offence proceedings might be required. Unless the defendant is put in a position of substantial disadvantage by the imposition of special measures, the ECtHR in most cases understands these measures as an effective means to achieve the required balance between the right to a fair trial and the right to respect for private life.

1.123 Secondly, with regard to personal records and sexual behaviour evidence, the ECtHR appears to have adopted a rather flexible position. Usually, relevance seems to play a key role in assessing whether personal records should be disclosed and whether questions regarding the complainant's sexual behaviour should be admitted. In that respect, there must be procedural requirements in place to act as safeguards. The most important one is that it is the duty of the court to establish relevance. It is not for the parties to the trial, either the prosecution or the defence, to determine whether disclosure of records, or some types of questions, are relevant to the facts. In addition, regarding personal records, the complainant must be afforded the opportunity to

oppose the disclosure and to be heard before the court makes a determination. Regarding these two issues, the logic of balance seems to play a limited role: when relevance is established, it tilts the balance strongly in favour of the defendant's right to a fair trial.

1.124 The only instance in which the logic of balance finds no application concerns the introduction of myths and stereotypes. The ECtHR has made it clear that no exigency of ensuring a fair trial can ever justify the incorporation of myths and stereotypes into the content of judicial decisions. However, in making decisions about the conduct of the case and to regulate cross-examination, a fair balance must be struck between the defendant's rights under article 6 and the victim's right to respect for their private life under article 8.

1.125 Regarding issues such as ILR and juryless trials, arguably their introduction in England and Wales might further enhance the protection afforded to the complainant's right to respect for their private life in sexual offence proceedings. In that respect, they can be seen as policy choices to consider in order to discharge the State's positive obligation to ensure that article 8 is protected. Being policy choices, and not legal obligations, their unavailability in the current criminal justice system implies that complainants in sexual offence cases have no enforceable right to ILR or to juryless trials under the ECHR.

1.126 In conclusion, reform of the law in England and Wales with respect to most of the issues discussed in this Appendix could usefully specify the extent of the positive obligations to ensure the rights of the complainant in sexual offence cases. However, reform should avoid inflexible solutions that might disregard the need to balance the rights of both the defendant and the complainant. Such a balancing exercise, as the ECtHR has made clear, ultimately has to be carried out by the court in light of the multitude of factors at issue in each case. Put simply, any reform of the law should seek to achieve clarity regarding the positive obligation to ensure respect for the complainant's private life, while at the same time afford enough flexibility to allow the court to retain the power to decide how best to reconcile the complainant's right to respect for their private life with the defendant's right to a fair trial.

Appendix 2: Evidence base regarding personal records

2.1 We describe below the key literature and evidence we considered to inform the conclusions we reach in Chapter 2, and in particular paragraphs 2.26 to 2.27.[1] These sources concern the nature and extent of inappropriate determinations regarding complainants' personal records in sexual offences cases; the stage of the criminal process where they most commonly occur; and their impact.

2.2 The table below is intended to provide an overview of the wider evidence base we considered on this topic, along with selected consultees' responses which cited relevant literature, or provided information regarding requests for complainants' personal records they have encountered.[2]

Title	Summary of key information
Consultation response of HM Crown Prosecution Service Inspectorate ("HMCPSI"), citing HMCPSI, *Area Inspection Programme Composite Report of the base line assessments of the 14 Crown Prosecution Areas in England and Wales* (September 2023).	Based on its review of post-charge disclosure in 189 rape and serious sexual offences ("RASSO") cases conducted between 2021 and 2022, HMCPSI found that third-party material ("TPM") was appropriately dealt with in 69% of them, and 31% did not meet or only partially met the required standard.[3] It also found that: the majority of Areas dealt with third-party material in Crown Court and RASSO cases very well. It was a notable strength and a real positive, since disclosure of third-party material can present a significant challenge to the prosecution. If they get it wrong, material such as medical or social services records, or forensic data may be wrongly disclosed or withheld.[4]
HMCPSI, *An inspection of early advice and pre-charge decision making in adult rape cases: A thematic inspection of the quality of the Crown Prosecution Service's*	HMCPSI inspected six Crown Prosecution Service ("CPS") areas, which had been involved in Operation Soteria for varying lengths of time. It examined 90 adult rape pre-charge advice files submitted to the CPS for early advice or a pre-charge decision after August 2023. It also interviewed CPS and police

1 We cited further sources in the consultation paper; in particular, see CP 259, paras 3.59-3.75. We cite a selection of the material we describe in the table below in Ch 2, along with other sources.

2 See Ch 2 for further details of other consultation responses received on this topic.

3 This data was in HM Crown Prosecution Service Inspectorate's ("HMCPSI") consultation response and was not in its report. See also HMCPSI, *Area Inspection Programme Composite Report of the base line assessments of the 14 Crown Prosecution Areas in England and Wales* (September 2023) para 4.50.

4 Above, para 4.52.

early advice and pre-charge decision-making following implementation of the national operating model for prosecuting adult rape cases (July 2025).	personnel at a local and national level.[5] The focus of its inspection was "the quality of early advice and pre-charge decision casework" and the impact of the CPS National Operating Model.[6] It found that the CPS provided timely early advice to police in most cases,[7] though the quality of police files was poor.[8] However, the goals of early advice, namely early CPS consideration of evidential requirements, ensuring only reasonable lines of enquiry are pursued, and adopting a suspect-centric approach, were not always met.[9] It stated: > We assessed only one third of cases as fully meeting the standard for providing advice that added value and was relevant and meaningful to the investigation. While we assessed half of the cases as partially meeting the standard, two out of ten cases did not meet the standard.[10] Pre-charge advice has similar objectives and HMCPSI observed a similar pattern. It found poor police file quality,[11] and poor-quality CPS case analysis in some cases.[12] It noted that cases which met the standard "had a clear and proportionate case strategy", took a suspect-centric approach, and evaluated the evidence which supported the prosecution case and likely defences.[13] As regards prosecutors' dealings with unused material pre-charge, where files did not meet or only partially met the standard, for 3.5% of them, the most significant failing was prosecutors not dealing appropriately with TPM. However, the most common significant failing was prosecutors not addressing

5 See HMCPSI, *An inspection of early advice and pre-charge decision making in adult rape cases: A thematic inspection of the quality of the Crown Prosecution Service's early advice and pre-charge decision-making following implementation of the national operating model for prosecuting adult rape cases*, (July 2025) paras 4.5-4.9.

6 Above, para 2.6.

7 Above, para 2.17.

8 Above, para 2.15.

9 Above, para 2.18.

10 Above, para 2.19.

11 Above, para 2.23.

12 It found that "less than two in ten cases fully met the standard for a proper case analysis and strategy. Just under half partially met the standard, and we assessed just under two fifths of cases as not meeting the standard". See above, para 2.26.

13 Above, para 2.26.

	the impact of unused material on the case (which occurred in 26.3% of the files).[14] It identified further cases > where whilst not assessed as the most significant failing, the handling of third-party material required improvement. Examples included prosecutors commenting that they had reviewed the material but not identifying what the third-party material reviewed was or what exactly it contained and third-party material such as medical notes not being adequately described, reviewed nor endorsing any decisions about their disclosure.[15] It also cited a notable example of good practice, where all items of unused material had been considered, and there was a "thorough and comprehensive approach to third-party material".[16] Drafting action plans and disclosure management documents ("DMD") are a further mechanism for ensuring that only reasonable lines of enquiry are pursued, including in relation to third-party material. It found that in some cases, DMDs were not completed when they should be, and were of variable quality.[17] It found a similar pattern for action plans, noting > In seven cases (14.6%) we assessed the first action plan as not meeting a satisfactory standard because items were requested that were not needed. We found several instances where the prosecutor had actioned the police to obtain and review third-party material, when there was no suggestion that such material existed or that it contained relevant material. The action was therefore assessed as speculative and not a reasonable line of enquiry.[18]
Consultation response of Professor Vanessa Munro, citing A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS*	An Operation Soteria[19] project conducted independent research which engaged with 115 cases; it examined internal systems and materials including interview transcripts; conducted 146 stakeholder interviews; observed 36 Early Advice discussions, 15 Scrutiny Panels, seven Crown Prosecution Service ("CPS") or Independent Sexual Violence Adviser ("ISVA") forums, and

[14] Above, para 7.61 and p 111.

[15] Above, para 7.64.

[16] Above, para 7.65.

[17] Above, paras 7.68-7.71. At para 7.70, it stated that of the DMDs that it reviewed, it assessed "nine (45.0%) as fully meeting the standard for accuracy and completeness, five cases (25.0%) as partially meeting the standard and the remaining six (30.0%) as not meeting the standard".

[18] Above, para 7.78.

[19] Operation Soteria is a policing and research programme aimed at increasing "the number of adult rape and serious sexual assault cases reaching charge, and, in addition, deliver[ing] sustained improvement in the criminal justice whole system response". See *Operation Soteria – Transforming the Investigation of Rape*.

Responses to Rape Complaints and Complainants Interim Findings from Independent Academic Research (April 2023). Subsequently the following final findings were published. A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants Summary Briefing from Independent Academic Research* (December 2023). A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants Final Findings from Independent Academic Research* (December 2023).	four RASSO training events; and reviewed 24 randomly selected case files.[20] In relation to requests for access, the summary report explains that Early Advice meetings between the police and the CPS were helpful to reduce "expansive disclosure excursions". Yet the CPS commented to researchers that police "were still routinely gathering disproportionate volumes of material" and police reported reviewing lawyers were still "setting parameters too widely".[21] The authors conclude that in addition to early advice, > Ongoing training, monitoring and review of investigative strategy and case progression, across both policing and the CPS, with a keen eye to disclosure, within and beyond the Early Advice space, is also going to be required.[22] The interim report explains that action plans are created by RASSO prosecutors and identify tasks which the police must conduct before submitting the file to the CPS. An action plan could be set at any stage such as following Early Advice, or later in the investigation or even post-charge, if further lines of inquiry become apparent.[23] It refers to interviewees' views that action plans are being used to develop "a greater shared understanding… regarding the appropriate parameters for third-party material… and how this should feed into the development of more proportionate, reasonable lines of inquiry".[24] The interim report notes recent developments which may assist decision making, including the Attorney General's Guidelines on Disclosure, case law, a "bespoke podcast for police and CPS" and "dedicated training on Disclosure Management" for RASSO lawyers.[25] In her consultation response, Professor Munro said this study had identified > examples of improved practice, which reinforced the suggestion of a shift from more extensive requests driven by a "just in case" attitude that disproportionately harmed

20 A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants Summary Briefing from Independent Academic Research* (December 2023) p 3.

21 Above, p 3 and 5.

22 Above, p 5.

23 A King, V E Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants: Interim Findings from Independent Academic Research* (April 2023) p 46.

24 Above, p 49.

25 Above, p 50.

	complainants. Equally, however, [it] also saw evidence of expansive requests still being made without a clear or apparently compelling basis. For example, in "Case File 19" where, in a case that involved a suspect who had not been known to the complainant prior to the evening in question, the lawyer advised that "the issue in this case is likely to be her credibility and reliability," and instructed the police to obtain her GP records, spanning over a decade, as well as her counselling records. According to the interim report, police and CPS interviewees expressed concerns about how their decisions would be received by prosecution and defence counsel, and by the judiciary as cases progress to trial. For example, a CPS interviewee reported that a judge supported the defence's challenge to their decision not to search and disclose medical, educational, counselling and Children's ISVA records. However, once the interviewee set out their objections in writing, the defence did not proceed with its request.[26] In relation to engagement between the CPS and trial counsel, the interim report notes "the handling of disclosure strategy and use of evidence to address myths and stereotypes … as a further area for potential conflict".[27] However, it also cites an interviewee who thought that even where there were differences of opinion, "the vast majority understand what we're driving at with the offender-centric approach" and will "prosecute robustly... what is put in front of them".[28] As regards disclosure to the defence and admissibility, the final report refers to some stakeholders' concerns about "the impact of, and legal professionals' support for, more delimited parameters of enquiry and disclosure during the trial process".[29] It considers that that disclosure and admissibility of complainants' personal data may require further investigation, but that this is "clearly beyond the scope" of its report.[30] The final report describes mixed views from judges on disclosure and admissibility. Three judges commented that disclosure and admissibility is dealt with well. They stated that: defence requests are now more targeted (but too often rejected

[26] A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants: Interim Findings from Independent Academic Research* (April 2023) p 53.

[27] Above, p 63.

[28] Above, p 63.

[29] A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants: Final Findings from Independent Academic Research* (December 2023) p 121.

[30] Above, p 76.

	by the prosecution); disclosure works well, is collaborative and rarely requires judicial oversight; and defence use of third-party material is "exceptionally rare" and "effectively delimited by judicial scrutiny as to relevance".[31] In contrast, one judge thought that there are disputes regarding disclosure requiring judicial oversight; and two appeared to suggest that materials are being under-disclosed to the defence.[32] On myths and misconceptions and evaluation of trauma responses, the summary report concludes: > Our findings highlight the existence of an ongoing disconnect between what lawyers understand, in theory, regarding trauma reactions and the danger of reliance on myths and stereotypes, and the way in which some cases were understood and evaluated in practice.[33] The summary notes particular areas of concern including: > A preoccupation with interrogating complainants' credibility over suspects' behaviour, and a lack of nuance regarding the relevance of factors such as mental ill-health to that credibility.[34] > An inconsistent approach to documenting and recognising the impacts of coercive control or grooming behaviours on the perpetration of, and victims' responses to, RASSO offences.[35] > A potential reliance on 'new' myths in relation to 'modern' or 'non-conventional' sexual practices. Consensual involvement in such practices was suggested to make establishing lack of consent to the reported incident more difficult …[36]
Consultation response of Dr Olivia Smith, citing Operation Soteria research.	Dr Smith's early 2022 Operation Soteria survey of 417 rape investigators across13 forces found confusion over TPM rules, which she partly attributed to "the piecemeal and complex legal framework governing use of TPM". 59% of respondents felt confident that they understood complainants' legal rights in relation to TPM, but 41% did not. She added that the survey "showed that most investigators sought access to TPM in at

31 A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants: Final Findings from Independent Academic Research* (December 2023), p 75, judges 7, 4 and 6.

32 Above, p 75, judges 5, 4 and 9.

33 A King, VE Munro, L Young Andrade, *Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants Summary Briefing from Independent Academic Research* (December 2023) p 6.

34 Above, p 6.

35 Above, p 7.

36 Above, p 7.

	least half of recent rape investigations, and almost a quarter of respondents said they had accessed TPM in every recent rape case".
Home Office, *Third Party Material Case File Review Report* (April 2024).	The Home Office's ("HO") data came from 139 rape investigations which contained TPM, from eight police forces, and typically started in 2021.[37] The HO suggested the following caveats: due to the small sample size, it is not representative and cannot be generalised;[38] the data reflects the approach to TPM in around 2021;[39] files were not randomly selected;[40] files were not selected to reflect a spread of complainant characteristics which could be a critical factor in relation to requests;[41] researchers only reviewed information on the electronic case files, and not paper, verbal, or email records.[42] Across the 139 files, there were 342 TPM requests. On average there was more than one TPM request per file; for adult complainants, there were an average of 2.2 requests per file.[43] 29% of the 342 requests were for GP records; 19% for social services; 18% for education; 12% for counselling; 10% for hospital; 4% for Sexual Assault Referral Centre ("SARC;") and 3% for ISVA records.[44] The majority of requests were initiated by the police, some came from the CPS, and some were jointly agreed between the CPS and police. Based on a variety of metrics, the defence did not appear to be the source of the requests.[45] Requests for TPM were not generally a source of delay; TPM was found to have caused a delay in 3% of cases.[46]

37 Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024) p 3.

38 It is a sample of "less than 2% of all rape cases for the time period" and "for each force is even smaller, ranging from 15 to 23 cases". It is a sample of cases where charges were brought and where a defence statement was served. It is not representative of the vast majority of cases because only 3.6% of cases lead to the suspect being charged. See above, paras 3.4, 3.5.1, and 3.5.2.

39 The "average year of recording the incident was 2021". See above, para 3.5.1

40 The "eight participating forces chose a sample of their most recent rape cases that fit a set of criteria chosen by the Home Office". See above, para 3.5.5.

41 Above, para 3.5.4.

42 Above, para 3.5.3.

43 Above, para 4.2.3. A large proportion of the files concerned child complainants (50 out of 139); the remaining 89 files related to adult complainants.

44 Above, para 4.2.1, Table 2.

45 Above, para 4.4.

46 Above, para 4.5.2, Table 11.

	The HO concluded that TPM requests were frequently not necessary and were disproportionate and provided the following key data in support of this assertion: • Of the 342 requests, 166 (49%) contained no recorded rationale.[47] • 10% of requests were made to establish perceived reliability and 22% were made to establish credibility.[48] • There were 44 (out of 197, 22%) rationales which did not give specifics about the incident, and where a rationale lacked such specifics, it tended to concern reliability or credibility.[49] • Requests focused on reliability or credibility were more common for child complainants, which the HO considered unjustified. Rationales given for adult complainants predominantly focussed on the incident (77%), whereas for child complainants, rationales predominantly focused on reliability or credibility (71%).[50] • Amongst the 185 TPM forms that were reviewed, the majority lacked appropriate detail regarding the basis for the request.[51] • 62% of TPM forms did not limit the volume of the material requested by suggesting a time frame or "theme". There were much higher proportions of requests which lacked parameters amongst ISVA notes (75%); counselling records (74%); and GP records (69%).[52] • There was no evidence of police seeking the complainants' views in 26% of TPM requests.[53]

47 Home Office, *Third Party Material Case File Review Report Policy Exercise* (April 2024), para 4.2.2.

48 Above, para 4.2.2, Table 3. However, 64% of requests were made to establish details of the incident.

49 Above, para 4.2.2, Table 4. 70% of the non-specific requests were directed at reliability or credibility.

50 Above, para 4.22, Table 5.

51 Above, para 4.3, Table 7. They did not specify the precise type of TPM (63%); did not explain the legal basis for the request (41%); did not explain why the request was made (38%); did not explain storage or retention (56%).

52 Above, para 4.3, Table 8.

53 Above, para 4.3.1.

	• Where the complainants' views were obtained, "78% of these requests did not specify the type of TPM, and 79% of these requests did not contain limits or parameters such as a timeframe".[54]
Consultation response of HMCPSI regarding delay, citing HM Inspectorate of Constabulary and Fire and Rescue Services ("HMICFRS") and HMCPSI, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape: Phase one: From report to police or CPS decision to take no further action* (July 2021) and HMICFRS and HMCPSI, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape – Phase 2: Post-charge* (February 2022).	HMCPSI told us that securing, receiving and reviewing TPM results in delays in investigations and charging decisions. Post-charge it said disclosure issues are also a source of delay. The 2021 Joint Inspection found that pre-charge, delay was caused by securing TPM in 16 out of 352 case files, and from receipt and review of TPM in eight and seven files respectively. By contrast, receipt of "medical forensics" was a cause of delay in three files and review of it in one file.[55] The 2022 Joint Inspection also found that disclosure issues[56] were a source of delay in four out of 54 case files post-charge.[57] Other sources of delay were much more prevalent pre- and post-charge.[58]
Consultation response of Solace Women's Aid.	Solace Women's Aid gave the following examples of poor practice: Police routinely requesting personal records from our ISVAs to, as one ISVA said, "chance their arm" that the recipient is not as experienced as to know that they should not do this.

54 Above, para 4.3.1.

55 HM Inspectorate of Constabulary and Fire & Rescue Services ("HMICFRS") and HMCPSI, *A Joint Thematic Inspection of the Police and Crown Prosecution Service's Response to Rape: Phase one: from report to police or CPS decision to take no further action* (July 2021) figure 14.

56 The report does not specify the source of these disclosure issues, and the disclosure issues could therefore be the product of matters other than TPM.

57 HMICFRS and HMCPSI, *A Joint Thematic Inspection of the Police and Crown Prosecution Service's Response to Rape: Phase 2 – Post-Charge* (February 2022) figure 15. We considered the 2021 and 2022 Joint Inspection reports in detail in the consultation paper.

58 For example, see above, figure 14, pre-charge delays were caused by: initial police actions, 59 files; securing digital communications, 29 files; and receipt and review of digital forensics, 11 and 16 files respectively. See above, figure 15, post-charge delays were caused by: defence not being ready, 10 files; and court availability, 7 files.

	Due to the volume of requests, we have had to develop template responses to these requests as well as to requests for counselling notes that are unspecific and again feel like a "fishing" exercise rather than looking at a specific time period or an incident that is relevant to the case. Requests for sensitive personal information being issued before the survivor has got support from an ISVA, so the ISVA role is to challenge an existing request rather than to work with the survivor to ensure a proportionate request at the onset. This creates unnecessary confusion and distress for the victim. Education records being requested and then a single incident of the witness cheating on a school exam is submitted to undermine the reliability of her testimony years later. ISVA notes being requested on the day of the trial, leaving advocates working with the victim to obtain the materials or face the prospect of the trial being delayed again at the point when the victim has psychologically prepared herself to testify. Victims being asked to sign broad consent forms for all counselling and medical notes directly after their formal video recorded statement, and with the ISVA outside in the waiting room. ISVAs and their clients being informed by investigating police officers that unless they are able to show the CPS that they have requested and assessed extensive third-party material, including counselling notes related to the victim, the CPS will not authorise a charge. It also cited the following example in relation to requests for witness summons. Whilst not common, we have also seen examples of judges' summons being wide requests for disclosures including asking for ISVA notes which are generally not something we have seen day to day from the police and prosecution. This greatly undermines guidance that already exists around avoiding unnecessary or disproportionate requests for sensitive personal information, and the important changes that have been made following the Rape Review. Advocates would generally successfully push back on these through using the guidance, but it is concerning to see such requests being made.
Consultation response from the Centre for	The CWJ stated it has: been seeing disproportionate requests for TPM for several years, including routine blanket requests for a broad range of

Women's Justice (CWJ).	materials, (therapy records, ISVA records, GP and other health records, social services and education records) and requests which constitute trawls for any matter relevant to credibility. In 2021 we collated a dossier of case examples which we submitted to Sarah Crew (National Police Chief Council's lead on adult sexual offences and Chief Constable of Avon and Somerset Police) and the CPS with a detailed submission calling for the practice to end and highlighting its negative impact on survivors. A shortened version of our dossier of case studies, which contains the rationales provided by the police, but the facts of cases removed, is attached as an Annex at the end of this consultation response document at page 71 below.[59] It provides a flavour not only of the blanket nature of requests but also contains some communications between police and ISVAs which shows how insistent some officers are, even when it is brought to their attention that the request is not a reasonable line of enquiry.
Consultation response of Rape Crisis England and Wales ("RCEW").	RCEW cited the experiences of its ISVAs. Rape Crisis ISVAs have express concerns with frequent police requests for third-party material that is unnecessary and disproportionate, the victims and survivors we support are asked to consent to alarmingly broad requests for their personal information which do not follow a reasonable line of enquiry. There is a great deal of inconsistency with forces and even amongst individual officers across England and Wales; despite some improvements in some areas, others continue to make routine requests for third-party material. Rape Crisis workers highlight that the key issue with requests for third-party material is rooted in a lack of understanding of the law, unclear or non-application of guidance, and a reliance on finding material that could undermine the credibility of the survivors.
K Hohl, A-K Reid, S Molisso, M Pullerits, *Operation Soteria Bluestone Rape and sexual assault survivors' experience of the police in England and Wales. Survey Report I: January –*	Operation Soteria researchers surveyed 1,968 complainants of rape or sexual assault. The survey was advertised by police forces and victim support organisations, and respondents self-selected and participated between January and June 2023. It is not representative as it is not a randomised sample, and contains resulting variability in geographic location and characteristics of respondents.[60] Its main findings were as follows:

[59] Its consultation response included a summary of 11 case studies.

[60] K Hohl, A-K Reid, S Molisso, M Pullerits, *Operation Soteria Bluestone Rape and sexual assault survivors' experience of the police in England and Wales. Survey Report I: January – June 2023* (September 2023) pp 13, 17-19.

June 2023 (September 2023).	• 16% of participants said that police wanting their personal records and data such as mobile phones was a reason for their decision not to proceed. Other reasons given (which may be overlapping) included impact on mental health (60%); feeling unsupported (49%); fear of the suspect (38%); how officers treated them (37%); impact on family and loved ones (32%); other (21%); other things going on (17%).[61] • When asked about actions taken by the police, 16% reported that police had requested their counselling notes; and 20% said their phone, tablet or laptop content had been sought, and 32% reported that police had asked for medical, social services or school records.[62]
K Hohl, M Pullerits, S Molisso and AK Reid, *Rape and sexual assault survivors' experience of the police in England and Wales Survey Report II: July 2023 - June 2024* (November 2024).	Following on from part one of their research (above), Operation Soteria researchers reviewed the responses of 2,858 complainants of rape and sexual assault for the second period of the survey, for the year from 1 July 2023 to 30 June 2024. Its main findings were: • "The most common reasons for not reporting were embarrassment or shame (57%), followed by not thinking that the police would believe them (44%), the impact on loved ones (42%), and fears they were partly to blame (38%)".[63] • The reasons respondents gave for not continuing with the process were in similar proportions to part one. 11% of participants said that police wanting personal data was a reason for their decision not to proceed. Other reasons given (which may be overlapping) included impact on mental health (58%); feeling unsupported (46%); how officers treated them (31%); impact on family and loved ones (30%); other (22%); other things going on (23%) and pressure from the police (20%).[64] • As regards requests for personal data, the proportions of respondents who reported requests was similar to part one. When asked about actions taken by the police, 22% reported that police had requested their

61 Above, p 37.

62 Above, pp 40-41.

63 K Hohl, M Pullerits, S Molisso and AK Reid, *Rape and sexual assault survivors' experience of the police in England and Wales Survey Report II: July 2023 - June 2024* (November 2024) p 39 and p 41.

64 Above, p 42.

	counselling notes; and 25% said their phone, tablet or laptop content had been sought, and 35% reported that police had asked for medical, social services or school records.[65] The report notes some indicators of improvements in policing practice regarding requests for personal data. When looking at the whole data set from January 2023 to June 2024, researchers found that: > Compared to those who reported before 2021, respondents who reported since 2021 (and even more so since 2023) were substantially less likely to say that the police requested counselling notes or other third-party material from them… Importantly, these significantly better experiences in most cases only apply to respondents who still had police contact within the three months before completing the survey.[66]
Consultation response of the Law Society of England and Wales ("the Law Society"), citing views expressed by the CPS.	When asked about disproportionate requests from the CPS for sensitive data, then Director of Public Prosecutions ("DPP"), Max Hill KC said to the Justice Committee: > I would say that this is not endemic, but there are examples of it, and there are examples of insufficient thought about reasonable lines of inquiry, whether you are talking to a police investigator or a CPS prosecutor. Frankly, in any system that requires effort by human beings, things will not be universal. There will be instances where there is more to do, but speaking for my staff, a lot of training and support has gone into ensuring that necessity and proportionality are baked into prosecuting thinking. That means that you look for additional information relating to a victim only when necessary, and the way you look must be proportionate to the needs of the case.[67] When asked for her views on judicial scrutiny of disclosure, Jan Lamping, Chief Crown Prosecutor for Yorkshire and Humberside said in oral evidence to the Public Bill Committee regarding the Victims and Prisoners Bill: > …we apply the law as it is now, and our guidance that is in place now should provide adequate safeguards, in that we should request such material only if it is relevant and necessary, and only in pursuance of a reasonable line of inquiry. That should provide safeguards. As for it being a judicial decision, there is a danger that that would introduce

65 Above, pp 44-45.

66 Above, p 9 and p 57.

67 House of Commons Justice Committee, *Oral evidence: the work of the Director of Public Prosecutions*, HC 662, Question 113 (3 July 2023).

	further delays. It is important that we follow our guidance and the police follow their guidance, so that victims are protected from unreasonable intrusion into their private lives.[68]
J Fisher KC, *Independent Review of Disclosure and Fraud Offences: preliminary findings* (April 2024). J Fisher KC, *Disclosure in the Digital Age: Independent Review of Disclosure and Fraud Offences* (March 2025).	The Review conducted 50 stakeholder meetings, several roundtables, and was assisted by two advisory panels of practitioners and representative bodies.[69] The Review's preliminary findings were that the Criminal Procedure and Investigations Act ("CPIA") 1996 framework is broadly "sound" and problems "occur largely in its practical application". It noted that aspects of the legislation are "either too restrictive or ambiguous".[70] It considered ways to modernise and simplify the legislative framework in cases where the "burden of disclosure is high" (including RASSO cases due to the "proliferation of digital evidence").[71] It noted that the definition of relevant material[72] in the Code of Practice issued pursuant to the CPIA 1996 ("CPIA Code") is wide and there are concerns that it leaves scope for subjective and inconsistent decision making and confusion.[73] It agreed to consider whether "there is scope to narrow and/or clarify its application".[74] It referred to the benefits of early engagement between the parties to resolve disclosure issues via greater use of the Plea and Trial Preparation Hearing ("PTPH") or the listing of an early hearing after transfer of a case to the Crown Court. However, it recognised the balance to be struck between the cost savings which might be achieved by this, and the costs of additional hearings.[75]

68 Hansard (Public Bill Committee), Victims and Prisoners Bill, 20 June 2023, col 60, Question 129.

69 J Fisher KC, *Independent Review of Disclosure and Fraud Offences: preliminary findings* (April 2024) paras 11-15.

70 Above, para 15.

71 Above, paras 6 and 15.

72 See Ministry of Justice, Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice ("CPIA Code") (September 2020), paras 2.7-2.8 which states: "Material may be relevant to an investigation if it appears…that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case".

73 J Fisher KC, *Independent Review of Disclosure and Fraud Offences: preliminary findings* (April 2024) para 21.

74 Above, para 20.

75 Above, paras 24-30.

	It commented on the benefits of using training to achieve cultural change, and the need to consolidate codes, guidelines, protocols and practice directions.[76] The Review's final report broadly maintains and expands on these views. It notes that "the structure and architecture of the CPIA is broadly sound, with problems crucially occurring in its practical application".[77] It goes on to make detailed recommendations regarding clarifying the disclosure threshold, directing early engagement between the parties, improving policing and CPS practice, improving judicial oversight, and increasing the use of technology to review materials. Some key recommendations include: • Recommendation 15, which suggests a "cross-agency disclosure learning standard for investigators and disclosure officers". • Recommendation 35, which invites the "Judicial College to consider specific training on judicial case management of disclosure matters … and the use of a new Consolidated Guidance". • Recommendation 38, which suggests consolidation of "the Attorney General's Guidelines and Judicial Protocols into a refined single guidance document referenced in legislation".[78]
A Moroz, T Dinisman, Victim Support, *Suffering for justice Sexual violence victim-survivors' experiences of going to court and cross-examination* (October 2024).	Victim Support conducted interviews with 12 complainants (8 adults and 4 children), and with ISVAs. ISVAs also provided data on 38 cases that occurred between March and October 2023. The report provides four qualitative comments from complainants regarding pre-trial therapy. It comments that complainants told the researchers that because they were concerned about the risk of their therapy notes being accessed, disclosed and used at trial, they delayed their therapy, even after they had pre-recorded their cross-examination. The report notes that some complainants were told that they could not undertake therapy, contrary to CPS guidance. Others were not offered therapy even where it was clear that it was needed. One respondent thought the therapy that they did receive was

[76] Above, para 33 and 35-39.

[77] J Fisher KC, *Disclosure in the Digital Age Independent Review of Disclosure and Fraud Offences* (March 2025) para 17.

[78] Above, pp 184-191.

	compromised because they were inhibited from speaking about what had occurred. [79]
Dr Natalie Kyneswood's consultation response, citing her thesis, N Kyneswood, *The Application of Section 28 and Related Measures in Sex Offence Cases: Is Pre-recorded Cross-examination Achieving Best Evidence for Intimidated Complainants?* (November 2022).	Dr Kyneswood observed 36 cases[80] from 1 April to 29 November 2019, of which seven did not involve the complainant pre-recording their cross-examination ("non-section 28 cases"), and 29 did involve the complainant pre-recording their cross-examination as permitted by Section 28 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999 ("section 28 cases"). Amongst the latter, 16 involved vulnerable complainants, 12 related to intimidated complainants,[81] and one was a mixed vulnerable/intimidated case. She attempted to observe Ground Rules Hearings ("GRHs"), section 28 hearings in which the complainant's cross-examination was pre-recorded, and trial for all cases. Some trials did not proceed. She observed 36 cross-examinations: 11 of intimidated complainants at section 28 hearings; 9 of intimidated complainants in non-section 28 hearings at trial; 14 of vulnerable child complainants in section 28 cases at section 28 hearings; and 2 of vulnerable adult complainants in a non-section 28 case at trial. She conducted 21 interviews with counsel.[82] In Case 18 (a section 28 case with intimidated complainants, involving a historic allegation against a neighbour, which resulted in a not guilty verdict), she noted that defence counsel "used the fact that the complainant had received counselling to ask why the complainant had not reported the incident to their counsellor, though the therapy they received was for an entirely different reason". In Case 35 (a section 28 case with intimidated complainants, involving a historic allegation against family, which resulted in a retrial), she stated that counsel focused on the accuracy of disclosures made by the complainant to their therapist. The cross-examination on the records revealed "the breakdown of the complainant's relationship, family court proceedings regarding the custody of her children, and also the fact that a previous partner had raped her" but without an application to admit sexual behaviour evidence at the GRH. She explained that Case 9 (a section 28 case with intimidated complainants, involving a historic allegation against family and a

79 A Moroz, T Dinisman, *Victim Support, Suffering for justice Sexual violence victim-survivors' experiences of going to court and cross-examination* (October 2024) pp 25-26.

80 34 RASSO cases, one murder and one domestic abuse case.

81 See YJCEA 1999, ss 16-18 for the definitions of vulnerable and intimidated witnesses.

82 N Kyneswood, *The Application of Section 28 and Related Measures in Sex Offence Cases: Is Pre-recorded Cross-examination Achieving Best Evidence for Intimidated Complainants?* (November 2022) pp 82-85.

	neighbour, resulted in a guilty verdict) featured 14 questions regarding the complainant's problems with alcohol, which "the defence pointed out was contained in the complainant's medical records". In this case, records were used to suggest that the complainant "had convinced themselves that things were much worse than they actually were, or were "lying"". She stated that in Case 1 (a non-section 28 case involving an intimidated complainant) records were used to suggest the complainant was delusional.[83]
Consultation response of Dr Olivia Smith citing M Burman, O Smith, O Brooks-Hay and Y Brunger, *Digital Communications as Evidence (DCE) in Sexual Offence Applications to the Criminal Cases Review Commission* (April 2025).	In her consultation response, Dr Smith told us that her research with Professor Michele Burman, Dr Oona Brooks-Hay and Yassin Brunger on 119 Criminal Cases Review Commission ("CCRC") sexual offences case files: shows frequent access and consideration of TPM relating to rape complainants [by the CCRC]. These files were specifically focused on using such TPM as a "victim credibility check" and did not consider the relevance of informing victims about this access other than for medical records (and none of the 119 case files showed victims actually being informed about the very extensive access that occurred). Once more, part of this issue is about a lack of detailed understanding of the complex balance of different rights at play for different types of TPM.

[83] N Kyneswood, *The Application of Section 28 and Related Measures in Sex Offence Cases: Is Pre-recorded Cross-examination Achieving Best Evidence for Intimidated Complainants?* (November 2022) pp 202-203.

Appendix 3: Consultees

3.1 We received 133 written responses to the consultation. We are most grateful to all the individuals and organisations who took the time to share their views and experiences with us. The responses we received reflected the significant effort and thought that consultees have put into our proposals and the issues associated with sexual offences prosecutions more widely. The consultation process has strengthened our report and enabled robust recommendations.

3.2 26 consultees provided an anonymous and/or confidential response.

3.3 We received responses on behalf of the following organisations: Durham Police and Crime Commissioner's Office; West Mercia Police; the British Transport Police; Policing Wales (Gwent Office of the Police and Crime Commissioner; Gwent Police; North Wales Office of the Police and Crime Commissioner; North Wales Police; South Wales Office of the Police and Crime Commissioner; South Wales Police; Dyfed-Powys Office of the Police and Crime Commissioner; Dyfed-Powys Police)[1]; HM Council of Circuit Judges; the Judicial Office; the Law Society of England and Wales; the London Criminal Courts Solicitors' Association; the Six Circuits of England and Wales[2]; the Criminal Bar Association; the General Council of the Bar of England and Wales; the Crown Prosecution Service; HM Crown Prosecution Service Inspectorate; Cardiff University Law School Innocence Project; Northumbria Centre for Evidence and Criminal Justice Studies; Feminism Law and Gender research cluster at the Open University Law School; JiCSAV – Justice in Covid-19 for Sexual Abuse and Violence; Tizard Centre, University of Kent; London Met University, Child and Women Abuse Studies Unit; nia; Juries Ending Violence Against Women and Girls; Victim Support; Rape Crisis England and Wales; Centre for Women's Justice; Pan-London Rape Crisis Centres Experts by Experience Panel; The Blue Door Support Service CIC; Women Against Rape; Refuge; End Violence Against Women Coalition; Solace Women's Aid; Rights of Women; Men and Boys Coalition; Juries Understanding Rape is Essential Standard; Muslim Women's Network UK; False Allegations Watch/Empowering the Innocent; JusticeIsNow; Behind the Gown; ManKind Initiative; FACT; Falsely Accused Day Steering Group; British Association for Counselling and Psychotherapy; Medical Defence Union; Independent Television News Ltd; Guardian News and Media; Media Lawyers Association; and the Central Scotland News Agency Ltd; British Broadcasting Corporation; Crime Reporters Association; News Media Association; and Society of Editors.

3.4 We received responses from the following individuals: Rachel Snaith, employee of Northumbria Office of the Police and Crime Commissioner; Rt Hon Liz Saville Roberts MP; Dame Maria Miller; Sarah Bowditch; Richard Gunner; Philipp Tanzer; Helen St

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1 Policing in Wales provided one response on behalf of four police forces and four Offices of the Police and Crime Commissioner from across Wales. This response reflected the individual views of each body and therefore their views were considered individually.

2 A consultation response was submitted by Circuit Leaders on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit, which was produced collaboratively by taking account of the views of individual barristers from each circuit.

Luce; Natasha Clewley; Daniel Prout; Dr Georgina Clifford; Geraldine Hanna, Commissioner Designate for Victims of Crime in Northern Ireland; Sandy Brindley; Claire Waxman, Independent Victims' Commissioner for London; Professor Findlay Stark; Dr Susan Leahy; Tricia O'Sullivan; Eamon Keane; Martin Rackstraw; Andrew Wilkins; Richard English; Tracy Harris; Lyall Thompson; Kate Goold; Professor Edward J Imwinkerlried; Professor Paul Roberts; Professor Julia Quilter and Professor Luke McNamara;[3] Professor Vanessa Munro; Professor Clare McGlynn; Dr Oriola Sallavaci; Professor John Jackson; Professor Heather Flowe; Dr Dominic Willmott and Dr Lara Hudspith;[4] Alexander McCulloch; C.D.G Williams; Dr Rebecca Helm; Dr Samantha Fairclough; Dr Charlotte Herriott; Dr Olivia Smith; Dr Matt Thomason; Polly Hernandez; Dr Amelia Shooter; Dr Federico Picinali; Professor Patrick Haggard; Dr Lara Flynn Hudspith; Professor Susan Edwards; Dr Natalie Kyneswood; Dr Siobhan Weare and Dr Dominic Willmott;[5] Professor Joanne Conaghan and Professor Yvette Russell;[6] Simon Foster, Police and Crime Commissioner for West Midlands; and Chief Constable Sarah Crew, National Police Chiefs' Council lead for Adult Sexual Offences.

[3] Professors Julia Quilter and Luke McNamara provided a joint response.

[4] Dr Dominic Willmott and Dr Lara Hudspith provided a joint response.

[5] Dr Siobhan Weare and Dr Dominic Willmott provided a joint response.

[6] Professors Joanne Conaghan and Yvette Russell provided a joint response.

Appendix 4: Terms of Reference

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

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

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

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

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

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

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

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

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

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

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

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

4.2 The project will not consider:

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

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

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

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

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

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978-1-5286-5875-1