

Gillen Review

Report into the law and
procedures in serious
sexual offences in
Northern Ireland

Part 1

Sir John Gillen



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Preface

And if there may seem to be a weight of tradition against change, at least it is worth remembering that the apparent heresies of one generation become the orthodoxies of the next. The ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility.

Sir Owen Woodhouse¹

Sexual crime is one of the worst violations of human dignity. It can deeply traumatise the victims, their family and even whole communities. Serious sexual offences in general and rape in particular are crimes of alarming prevalence. They are unique in the way they strike at the bodily integrity and self-respect of the victim. All genders, children and people of all ages, classes and ethnicities can become victims. It happens across all cultures and in some cultures, including here in Northern Ireland, shame and social pressures will prevent it being reported. These crimes are a blight on our society with profound consequences for victims and for society at large.

Deep concerns about how serious sexual offences are processed and determined have been expressed for several years. In the wake of recent trials of such offences both here and in England and Wales, public disquiet about the law and procedures governing serious sexual offences has clearly grown. Hence the Criminal Justice Board, which exists to oversee reform, change and openness in the criminal justice system, commissioned me on 24 April 2018 to undertake an independent review of arrangements around delivery of justice in serious sexual offences.

Despite many positive changes in law and procedure and various governmental initiatives over the past three decades, these offences still seem to defy the ordinary trial processes.

As potential offences, they are seriously under-reported, with complainants regularly opting out of the very system that is supposed to recognise their rights. This is despite the fact that most sexual crime is more often than not perpetrated by someone known to the victim, not always well known but sufficiently acquainted to bedevil the subsequent attempts to secure justice. However, this is not a moment to look defeat in the eye and make peace with it.

The obligations of the State to those who have suffered a violent sexual crime that strikes at the whole concept of human rights and bodily integrity are much wider than simply working for the conviction of a perpetrator.

¹ New Zealand Royal Commission to Inquire into and Report upon Workers' Compensation *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* Wellington, Government Printer, (1967) at p. 33.

We want to ensure that victims of sexual offences are treated with dignity and respect on the path to trial and in the court. Sexual violence is a traumatic crime, and it is crucial that victims have confidence in the criminal justice system to report abuse and thereafter travel through the process unscathed, while ensuring that those who are accused are accorded a fair trial.

Once cases come before the notice of our police, Public Prosecution Service (PPS) and courts, not only must complainants and accused be treated with sensitivity and respect, but they must be secure in the knowledge that current perceptions that rape myths and stereotypes may potentially have invaded our legal process for so long are soundly based and, if they are, are dispelled as far as is possible. Social media must not be permitted to pollute the stream of justice and defeat the interests of both complainants and accused persons.

In making this plea, I take the opportunity to record that, during the course of this Review, I have come across a wide range of deeply dedicated and committed men and women in the Judiciary, the legal professions, the voluntary sector, representatives from victims' groups, the police, the prosecution service, politicians from all the main parties, the press and members of the public at large who are enthusiastically working hard to address most if not all of the problems that I have observed in the criminal justice process.

My fervent hope is that these good people, who have already embarked to some extent on the changes necessary, will not only be encouraged but be empowered to do more on the path of radical change that this Review recommends and convince others working with them that this is an urgent and important priority.

Equally importantly, I sincerely hope that this Review will also be read by the general public who are not employed at the coalface in processing serious sexual offences but whose informed support is vital if many of the changes I propose are to carry weight and gather momentum. To that end, I trust that this Review is bereft wherever possible of the patronising legal jargon that so often afflicts people in my profession and that the messages are simple and clear.

Many of the topics to which I have devoted individual chapters could have merited inquiries in their own right. Many of the issues clustered in the chapters would have justified consideration in individual chapters on their own. They have been individually the subject of a plethora of previous reviews, learned academic treatises, research and controversial assessments. Two examples will suffice although doubtless there are more. First, the issue of serious sexual offences against children is a topic in its own right, and we could have taken up not a mere chapter but the entire review process dealing with it alone.

Secondly, I am acutely aware that the Men's Advisory Project was disappointed that the topic of male rape was included within the chapter on marginalised communities. The issue of male complainants punctuates several of the chapters and I trust that therein all the issues have been raised. I fear however, that each of the groups in that chapter, including males, could have merited a separate chapter if only time and space had permitted. Each of

these groups is an extremely important part of this Review and I strongly hope that none of them feel relegated in importance by being contained in one chapter.

My concern, therefore, has been to create signposts for those in authority in these fields of law and procedure. It should be seen as part of a wider response of the community to these particularly invasive and traumatic aspects of serious sexual offences.

My perception is that public concern over issues raised by sexual offending has never been higher. The problems we face in this jurisdiction are not unique. Interestingly, the demand for a review of the law and procedure of serious sexual crimes and ancillary issues has surfaced for some time now not only in Northern Ireland but, as our research has shown, in neighbouring jurisdictions and countries worldwide.

Thus we have researched experiences and literature on these topics worldwide to 16 other countries as this Review will reveal in each chapter. I have personally spoken to Judiciary/lawyers/victims' groups and advocates etc. in many jurisdictions.

I am acutely aware that cultural differences exist in our various countries and that problems experienced and solutions sought are far from being necessarily transferable to a small jurisdiction such as ours.

Nonetheless, when different systems have virtually identical issues and similar outcomes — as they clearly have — we must take note of those experiences particularly when they inform our own conclusions and strive to benefit from the solutions proffered. Hence in virtually every chapter of this Review I have introduced a section on existing international standards, which we must seek to emulate in Northern Ireland.

The task I faced in taking up the Review was to assess and make recommendations on how the law and procedure governing complainants might be improved while not compromising the fundamental trial rights of those who are accused (or, indeed, in some cases not even yet accused) of such offences.

The chapters, whilst recognising the great improvements in recent years, are calculated to establish a number of confidence-building blocks, none of which will solve our existing problems on their own, but which cumulatively are intended to introduce radical overall change.

When we published the Preliminary Report on 19 November 2018 I indicated that the purpose was to ensure that no voice was left unheard. The terms of reference of my Review were written to give me latitude to take the Review where the evidence would lead me. I was determined to ensure that I would be led to receive evidence from the general public in order to help inform my views.

A central dilemma for lawyers such as myself is always the tension between the so called "experts" and stakeholders in the criminal justice system on the one hand and on the other hand the "ordinary common sense" of the public. How far should the rule of law be based on everyday understanding and buy-in of the majority of the population, and how far on the specialised, often less easily intelligible, wisdom of the experts?

I firmly believe that for the rule of law and the administration of justice to maintain public confidence it needs always to navigate between the Scylla of legal expertise and the Charybdis of popular sense.

Understanding this, particularly in the sensitive personal area of serious sexual offences, should help us to revitalise the norms and institutions that have allowed societies over the years to harmonise expert knowledge and popular common sense for the common good. That is what I have attempted to do in this Review.

As emerged from the responses, I appreciate that for a few I have not gone far enough in removing the perceived barriers to justice for complainants and accused alike. For others I have gone much too far proposing legal and procedural changes, which will be either too expensive or too radical a departure from conventional legal practices and procedures.

However, the overwhelming majority of respondents have come out in favour of the thrust of the majority of all of the recommendations.

I have been enormously encouraged by the sheer wealth of responses that the Preliminary Report has triggered. There were 422 responses to an online survey structured by the Review Team (and which is found in part 1 of this Report). In addition there were over 140 written/online responses containing hundreds of pages of material and a large number of individuals who attended at the Review offices for individual responses. I also attended 3 outreach meetings at Derry/Londonderry, Dungannon and Belfast where large numbers of the public raised with me matters of great moment relevant to this Review and which I found invaluable. Finally, I willingly granted extensions of time for a number of respondents beyond the limit we had originally fixed albeit this has marginally delayed the completion of this Review.

So great a number of respondents/ responses has made it impossible for me not only to name all the respondents in the body of the Review, although I have striven to acknowledge quite a number in footnotes, but also to embrace the myriad of points that have been made. I sincerely apologise to all those – and there may be many – who may feel I have overlooked or failed to give adequate consideration to the issues they have taken the time and trouble to so carefully share with me. Not only am I utterly fallible in this regard, but time and space has prevented me dealing with every matter raised.

I made a promise to each of the complainants, accused persons and families that I met during the entirety of the Review that I would afford them complete confidentiality and anonymity. Hence, although I have hopefully addressed most if not all of their concerns, I have steadfastly avoided naming any of them in the Review and when in doubt as to whether or not they wished anonymity I have opted for caution.

Two final matters of note. First, we must ensure, as Baroness Stern asserted eight years ago, that the low conviction rate for these crimes, however measured, does not take over the debate to the detriment of other important outcomes for victims and those accused. It is, of course, important to prosecute and convict but a range of priorities needs to be balanced.

Secondly, resources are always the elephant in the room in the realm of law reform. First-class services cost money. Finance is scarce and the government is beset with an abundance of priorities. However, it has to be recognised that in the field of serious sexual offences a sound service saves money in the medium and longer term by preventing years of ill health and instability in those who have been victims. We have to invest to save.

Counselling for victims of these offences is vital. Resources need to be allocated to the voluntary sector to help victims to recover and get on with their lives.

Similarly, changing public attitudes to these offences is important if we are to lay claim to live in a civilised society, and we need financial allocations to the education of young people and society generally about these crimes.

A system that unflinchingly prosecutes perpetrators needs a police and prosecution service that are properly funded to meet these needs.

I finish with four beliefs that I formed within days of taking up this task and to which I have remained wedded throughout this odyssey into serious sexual offences. I believe they reflect the mood of the times, especially a growing sense among women and men that the legal tools at our disposal can be put to better use. They form the very spine of this Review and course through all my recommendations.

- First, the degree of under-reporting of these crimes and the high attrition rate are unacceptable in a society that lays claim to the rule of law. The criminal justice system in Northern Ireland must provide an outlet for such persons.
- Secondly, the pathway from initial complaint through to trial is too steep, too long and too unwieldy for both complainant and accused. It needs urgent reform.
- Thirdly, the current trial process is too daunting and uncompromising for complainants and needs radical revision.
- Fourthly, many of the problems in the present law and procedures adversely affecting both complainants and accused spring from the culture within which we all currently live. Positive affirmative education on the realities of serious sexual offences and their consequences must be given not only to juries actually hearing these cases but, perhaps more importantly, to the public at large and our children in particular if we are to embrace a truly just, fair and civilised concept of the rule of law.

The Right Honourable Sir John Gillen
April 2019

Acknowledgements

I wish to express my sincere thanks to those who participated in this Review, in particular those complainants and acquitted defendants whose courage and generosity in volunteering to come and share their experiences has enabled me to understand the issues in a manner I could not otherwise have done.

I also wish to thank all the individuals and groups who contributed to the Review and who gave so generously of their time and information. These included judges, the legal profession, civil servants, prosecutors, victims' groups, human rights groups, police, the press and politicians throughout Northern Ireland and the rest of the UK, Ireland and numerous countries abroad. It has been impossible to name all of them and I apologise for the unavoidable omissions.

I record a special note of gratitude to all those in England and Wales, Scotland, Ireland, the states of Massachusetts and New York, South Africa, New Zealand, Australia, the Caribbean and Canada who so generously gave me their time, skills and experience in lengthy, time-consuming, face-to-face and telephone meetings. They were a paradigm of cross-jurisdictional and international cooperation in these matters of common concern. Without exception they all contributed invaluable to my thinking on these matters. It is my fervent belief that the subjects dealt with in this Review are international in their scope. It is by joint endeavours and a sharing of knowledge and information that we can meet the challenges most effectively in the future.

Special thanks are also due to the 11 members of my Advisory Panel and Mrs Kathryn Logue BL who worked tirelessly to assist me to complete this task within the assigned timetable. I have rarely come across such a gifted and stimulating group of professionals, whose cumulative creativity and insight far outshone my efforts. They have all made indelible marks on this Review. I make it clear, however, that ultimately they are not responsible for the views I have expressed or what is omitted from this Review. This was an entirely independent Review by me and any brickbats should shower down solely on me.

Last, but most certainly not least, I wish to thank the simply brilliant Review team that was assembled to assist me in this task, namely Siobhán Fitzpatrick, Aileen Gordon, Rebecca Jackson, Dianne Lowry, Una McNeill, Ken Mack, Noel Marsden, Claire Milliken and Caroline Perry.

Under the inspiring leadership of Angela Ritchie, they have worked unceasingly to meet every onerous demand I made of them on a daily basis — many of which in hindsight were overtaxing and unreasonable. Their opinions, which I sought on many occasions, were invariably a bellwether of reason and good sense. Without their contribution, this task would never have been completed.

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Terms of reference

1. The Criminal Justice Board has commissioned a review of the law and procedure in prosecutions of serious sexual offences. The Review will be led by a former Lord Justice of Appeal, the Right Honourable Sir John Gillen, and will operate under the following terms of reference.

Terms of reference

- The Review will investigate the law and procedure covering the prosecution of serious sexual offences¹ in Northern Ireland. In conducting its work, the Review will have regard to the practice and procedure for progressing such cases in other jurisdictions.
- The purpose of the Review is to determine whether current arrangements deliver the best outcomes for victims, defendants and justice, and to make recommendations for improvements.
- The Review will consider the 'victim's journey', from the initial complaint through to the point of court disposal. It will take appropriate account of the views of individual victims and victims' organisations, legal practitioners, and the criminal justice organisations involved in the conduct of such cases.
- The Review will be supported by an advisory panel. It will also seek input from external stakeholder groups and members of the public will be encouraged to contribute on the basis of their personal experiences.

¹ For the purposes of this review serious sexual offences are defined as those offences tried in the Crown Court on indictment.

Scope

2. The scope of the Review will include, but is not limited to, the following areas:
- disclosure of evidence;
 - support for complainants, victims and witnesses — from the time of the initial complaint through to post-trial support;
 - measures to ensure the anonymity of the complainant;
 - the arguments for defendant anonymity;
 - pre-recorded cross-examination;
 - the impact of social media on the conduct of court hearings;
 - provisions for restrictions on reporting; and
 - restrictions on public attendance at court hearings.

Timing

3. The Review will commence in May 2018 and will report at the end of April 2019.

Definition of Serious Sexual Offences

The main sexual offences within the remit of this Review are contained in The Sexual Offences (Northern Ireland) Order 2008 and they are summarised below for ease of reference.

- Article 5 Rape - A person (A) commits an offence if—
- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis
- Article 6 Assault by penetration
- Article 7 Sexual assault
- Article 8 Causing a person to engage in sexual activity without consent where the activity involves penetration, if the activity caused involved:
- penetration of B's anus or vagina;
 - penetration of B's mouth with a person's penis;
 - penetration of a person's anus or vagina with a part of B's body or by B with anything else; or
 - penetration of a person's mouth with B's penis.
- Article 12 Rape of a child under 13
- Article 13 Assault of a child under 13 by penetration
- Article 14 Sexual assault of a child under 13
- Article 15 Causing or inciting a child under 13 to engage in sexual activity where the activity involves penetration, if the activity caused or incited involved:
- penetration of B's anus or vagina;
 - penetration of B's mouth with a person's penis;
 - penetration of a person's anus or vagina with a part of B's body or by B with anything else; or
 - penetration of a person's mouth with B's penis.

Article 16	Sexual activity with a child where the activity involves: <ul style="list-style-type: none">• penetration of B’s anus or vagina with a part of A’s body or anything else;• penetration of B’s mouth with A’s penis;• penetration of A’s anus or vagina with a part of B’s body; or• penetration of A’s mouth with B’s penis.
Article 17	Causing or inciting a child to engage in sexual activity where the activity involves penetration, as outlined at Article 15 above
Article 18	Engaging in sexual activity in the presence of a child
Article 19	Causing a child to watch a sexual act
Article 20	Sexual offences against children committed by children or young persons
Article 21	Arranging or facilitating commission of a sex offence against a child
Article 22	Meeting a child following sexual grooming etc.
Article 23	Abuse of position of trust: sexual activity with a child
Article 24	Abuse of position of trust: causing or inciting a child to engage in sexual activity
Article 25	Abuse of position of trust: sexual activity in the presence of a child
Article 26	Abuse of position of trust: causing a child to watch a sexual act
Article 32	Sexual activity with a child family member where the accused is over 18 and the activity involves penetration as outlined at Article 16 above
Article 33	Inciting a child family member to engage in sexual activity where the accused is over 18 and the activity involves penetration as outlined at Article 16 above
Article 37	Paying for sexual services of a child where the child is under 13, or where the child is under 16 and the activity involves penetration as outlined at Article 16 above
Article 38	Causing or inciting child prostitution or pornography
Article 39	Controlling a child prostitute or a child involved in pornography
Article 40	Arranging or facilitating child prostitution or pornography
Article 43	Sexual activity with a person with a mental disorder impeding choice where the activity involves penetration as outlined at Article 16 above
Article 44	Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity where the activity involves penetration as outlined at Article 15 above

Article 45	Engaging in sexual activity in the presence of a person with a mental disorder impeding choice
Article 46	Causing a person, with a mental disorder impeding choice, to watch a sexual act
Article 47	Inducement, threat or deception to procure sexual activity with a person with a mental disorder where the activity involves penetration as outlined at Article 16 above
Article 48	Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception where the activity involves penetration as outlined at Article 15 above
Article 49	Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder
Article 50	Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception
Article 51	Care workers: sexual activity with a person with a mental disorder where the activity involves penetration as outlined at Article 16 above
Article 52	Care workers: causing or inciting sexual activity where the activity involves penetration as outlined at Article 15 above
Article 53	Care workers: sexual activity in the presence of a person with a mental disorder
Article 54	Care workers: causing a person with a mental disorder to watch a sexual act
Article 65	Administering a substance with intent with the intention of stupefying or over powering a person to engage in a sexual activity
Article 66	Committing an offence with intent to commit a sexual offence where the offence is committed by kidnapping or false imprisonment, or where the offence is committed by assault and the intended sexual offence is rape or assault by penetration (Article 5 or Article 6)
Article 67	Trespass with intent to commit a sexual offence where the intended offence is rape or assault by penetration
Article 68	Sex with an adult relative: penetration
Article 69	Sex with an adult relative: consenting to penetration
Article 70	Exposure: the intentional exposure of genitals with the intention of causing alarm or distress
Article 71	Voyeurism: observing another person doing a private act for the purposes of sexual gratification

Article 73 Intercourse with an animal; penetration by penis of the vagina or anus of a living animal

Article 74 Sexual penetration of a corpse; penetration by a body part of anything else to a part of the body of a dead person

A number of other legislative instruments include provisions for sexual offences in Northern Ireland.

Section 69 of the Serious Crime Act 2015: Possession of a paedophile manual

Section 90 of the Justice Act (Northern Ireland) 2015: Sexual communication with a child

Section 51 of the Justice Act (Northern Ireland) 2016: Disclosing private sexual photographs/ films with intent to cause distress

Section 63 of the Criminal Justice and Immigration Act 2008: Possession of extreme pornographic images

Article 3 of the Protection of Children (Northern Ireland) Order 1978: Indecent photographs of children

Executive Summary

The rise in Prosecutions for sexual offences presents one of the most profound challenges for the courts ... in the early 21st century. These cases are almost invariably of the utmost importance because of the direct impact ... on victims and the indirect impact it has on the well-being of our society.

**Lord Justice Fulford,
Senior Presiding Judge for England and Wales, May 2016¹**

1. The Criminal Justice Board,² which exists to oversee reform, change and openness in the criminal justice system in Northern Ireland, commissioned an independent review of the law and procedures concerning the delivery of justice in serious sexual offences in Northern Ireland in April 2018. I was appointed to lead this Review.
2. I was supported by a completely independent advisory panel made up of a wide cross section of stakeholders in and observers of the criminal justice system in Northern Ireland. The panel was made up of representatives from the Northern Ireland Human Rights Commission, the Judiciary, the legal profession who both defended and prosecuted in such cases, the Police Service of Northern Ireland (PSNI), the Public Prosecution Service (PPS), the National Society for the Prevention of Cruelty to Children (NSPCC), victims' groups, those with legislative responsibility for justice and the law, and academia.
3. The work of the Review team encompassed and was focused on the formal terms of reference. Where it was considered in the public interest and it would bring necessary context or add value to the Review, other related topics have also been considered.
4. The scope of the Review included, but was not limited to, the following areas:
 - support for complainants, victims and witnesses, from the time of the initial complaint through to post-trial support;
 - restrictions on public attendance at court hearings;
 - pre-recorded cross-examination;
 - the impact of social media on the conduct of court hearings;

1 Rook, P, & Ward, R. (2016) *Sexual Offences: Law and Practice* 5th ed. London: Sweet and Maxwell (Foreword)

2 *The Criminal Justice Board is responsible for overseeing and progressing justice-led Programme for Government commitments, agreeing shared priorities across justice, monitoring progress towards achieving them change and openness in the criminal justice system. The Board is currently chaired by the Permanent Secretary of the Department of Justice and comprises the Lord Chief Justice, the Chief Constable, the Director of Public Prosecutions, and senior officials from the Department of Justice.*

- delay in the court system;
 - disclosure of evidence;
 - the definition of consent;
 - the arguments for defendant anonymity;
 - the voice of marginalised communities;
 - support for children and vulnerable adults;
 - arguments for jury trials in serious sexual offences;
 - complementary mechanisms to the criminal justice system; and
 - provisions for restrictions on reporting.
5. The Review formally commenced in May 2018 and focused on the time frame of an offence, beginning when it was committed to its eventual disposal in the justice system.
 6. The work of the Review team has involved direct contact with well over 200 organisations and individuals to hear first-hand evidence and accounts from a wide range of interested parties. Contributors included complainants, defendants who were subsequently acquitted, family members of both the former and the latter, a large number of statutory and voluntary organisations, members of the Judiciary, the legal professions, politicians, the press, academics and interested members of the public. The work has also drawn on the experiences of 16 countries and various jurisdictions across Europe, the US, South Africa, Australia, New Zealand and the Caribbean.
 7. It is widely believed, and acknowledged by me, that the UK has one of the finest justice systems in the world. However, in relation to serious sexual offences specifically, the essential background to the Review is that there appears to be a lack of public understanding and confidence, and profound professional concern about, the process of the law in investigating, processing and determining serious sexual offences.
 8. Public concerns abound. Criticisms of the law and procedures surrounding serious sexual offences have been voiced by a number of people and organisations for several years. Reaction to recent trials in Northern Ireland and other parts of the UK involving high-profile individuals, the outcry in England over a series of collapsed trials, and issues around disclosure failings that have contributed to miscarriages of justice in England are just a few examples of those very real concerns.
 9. Equally troubling are the perceptions that there are myths around rape and other serious sexual offences, which need to be robustly challenged and that the criminal justice system needs protection from the dangers of social media. These concerns and others sit against a backdrop of lengthy delays in the court process in Northern Ireland compared with other parts of the UK.

10. This Report is the result of listening closely to the voices of those involved in the criminal justice system both here and abroad and also the wider public in Northern Ireland. It attempts to address the flaws that appear to exist in the law and procedures in serious sexual offences. My conclusion is that we need some radical rethinking of the law and procedures together with societal attitudes surrounding sexual abuse.
11. While within the terms of reference there was no requirement to publish a Preliminary Report, I chose to make such a report publicly available for consultation purposes and responses. This stretched from 20 November 2018 to 25 January 2019 although in a number of instances we extended the timeframe with responses still occurring at the beginning of March 2019.
12. I was determined to ensure that this Review would be informed not only by the lawyers and stakeholders within the criminal justice system but also by the general public whose voice can so often go unheard in the legal firmament. As well as inviting written responses we also carried out an online survey on a number of the salient issues in the Review.
13. Between 1st May 2018 and 4th March 2019 there were 3,482 users of the Gillen Review website with 18,277 page views. Users were predominately from the UK but there were also users from the US, Ireland, Canada, New Zealand and others. The Preliminary Report was downloaded 1,215 times and the Executive Summary on 791 occasions.
14. Each chapter synthesises the main points that emerged in the extremely large number of informed and thoughtful responses that were received in the wake of the Preliminary Report.
15. Finally, I have placed an asterisk against each recommendation that may require legislative or Crown Court Rule consideration. I have listed all such recommendations in a concluding chapter.

Chapter 1 – Background

16. It has not been the intention of this Review to reinvent the wheel. Whilst I am satisfied that much needs to be changed in terms of the law and procedures relating to serious sexual offences, it cannot be ignored that in recent years there have been many improvements made in the law relating to such offences. These improvements have occurred in the treatment of complainants, in the standards of investigation, in a far more coherent and enlightened approach to prosecutions than before and in improved court processes and procedures. This opening chapter rehearses some of the salient background issues.

Chapter 2 – The voice of complainants

17. This chapter is the result of my listening to complainants and victims' groups alongside reading the extensive research literature about impediments to justice and a fair trial that confront complainants in serious sexual offences. Attempting to navigate a system designed for police and professional lawyers at probably the most vulnerable point in their lives can prove insuperable. It addresses the challenges that they feel they face legally and procedurally. Indeed, one of my recommendations is that this vital listening process should continue, with complainants being invited to give feedback of their experience after every trial. The thematic architecture of the criminal justice system has to change to meet their needs and this Review should be merely the opening words in a continuing conversation with complainants.
18. The chapter investigates why there is substantial under-reporting of these crimes, with England and Wales figures for 2016/17 suggesting that of those who had experienced rape or assault by penetration (including attempts) since the age of 16, only one in six (17%) had told the police.³ The level of reporting has undoubtedly increased somewhat in Northern Ireland and elsewhere in the UK recently but it is still unacceptably low.
19. For those who do complain to police, the path from complaint is harrowing and the attrition rate is high. Of those who venture into the process, around 40% drop out⁴ although the most recent small survey by the PPS suggests that the dropout rate may be falling.
20. Complainants who follow the whole process through to the end face the reality that conviction rates are very low. This chapter sets out a raft of relevant statistics on the process but two merit brief reference in this summary.
21. First, in cases that are actually heard in the Crown Court involving sexual offences, the overall conviction rate is falling. It was 63.8% in 2017/18 compared with 73.8% in 2016/17.⁵
22. Secondly, in the Crown Court where the charge was rape, 45.0% of defendants were subsequently convicted of at least one offence of some nature. However, only around one in six defendants (15.0%) were convicted of an offence of

3 Office for National Statistics (2018) *Sexual Offences in England and Wales: year ending March 2017* London: Office for National Statistics

4 PPS review of cases in which there was a no prosecution decision. Includes victim withdrawal and those where a report had been made by a third party to police but the victim did not wish the matter to be investigated. Similar findings by PSNI of 41% from research completed for rape incidents reported during January to July 2017. However in a more recent and smaller survey of 58 cases conducted by PPS in January 2019, only 14% had withdrawn. Hopefully this heralds a gathering improvement in building complainant confidence.

5 Public Prosecution Service for Northern Ireland (2018) *Statistical Bulletin: Cases Involving Sexual Offences 2017/18* Belfast: PPSNI

rape.⁶ All these figures for sexual offences are in stark contrast to non-sexual offences, where the conviction rate in the Crown Court is 88.2%.⁷

23. Doubtless one explanation for these differences is that in many serious sexual offence cases it is a question of one person's word against another, without any independent objective evidence. However whilst the conviction rate is troublingly low in these cases, it is important to appreciate that the purpose of this Review is not to increase convictions but rather to ensure complainants and accused persons alike receive a fair and just outcome.
24. All of these concerns are explored and remedies proposed in detail in the succeeding chapters.

Chapter 3 – Restricting access of the public

25. I favour confining access to trials of serious sexual offences to officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant and parent or relative of the accused, to remain in court together with such other persons (if any) as judges may in their discretion permit to remain.
26. In saying this, I fully appreciate that a criminal trial is a public event. The principle of open justice puts the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process.
27. However, open justice is never an absolute concept. In Northern Ireland we already exclude the public, for example in family cases and youth justice cases.
28. Members of the public are excluded from attending rape trials and certain other sexual offences in the Irish courts. In New Zealand, New South Wales and, even more relevantly, Scotland, the public are excluded when the complainant gives evidence.
29. In the context of a small jurisdiction with local courts public familiarity with the complainant is often present. There is also the risk of jigsaw identification where revelation of disparate matters such as location, addresses, schools, friends and family members of the complainant can all be easily pieced together locally to identify the complainant despite the presence of special measures to protect identification.
30. Moreover, confidence-building measures are vital for complainants who understandably fear the cruel glare of public exposure (particularly in high-profile trials in front of packed public galleries) at a time when they are revealing the most intimate, stressful and personal details of their life.

6 As above.

7 Information provided by PPS.

31. If we are to challenge the under-reporting, high dropout rates and an unacceptably daunting trial process, I consider the arguments in favour of restricted access measures carry convincing weight provided the press, as the eyes and ears of the public, are admitted. It did not surprise me to discover that the public response to the Preliminary Report in our online survey was overwhelmingly in favour of this restriction.

Chapter 4 – Pre-recorded cross-examination

32. The evidence-in-chief of a complainant is often video recorded shortly after the initial report has been made to police. This regularly takes place at a police station. The recorded evidence is subsequently made available to be presented at trial in that video format.
33. In addition to evidence-in-chief, I am in favour of the facility of pre-recorded cross-examination, away from the court, being afforded initially to children and vulnerable complainants⁸ and eventually, after an analysis of the success of these early phases, to all complainants.
34. Provided all the relevant documentation had been disclosed to the defence, this cross-examination could take place long before the trial itself and in a location remote from the court setting if necessary. This would take place without public presence, with the defendant observing by a live link and, in the case of children, with questions approved in advance by the judge. The cross-examination would be recorded and shown to the jury in this format, which can be edited to exclude any prejudicial material.
35. This would represent another vital building block in restoring the confidence of complainants in the criminal justice system and procedure. It would potentially reduce or eliminate the need for a complainant to give evidence in person at trial. It would permit them to give evidence remotely in a safe and secure environment away from the court and the defendant.
36. The risks of secondary victimisation and traumatisation for the complainants would thus substantially be reduced.
37. It lends itself to better-quality evidence as it is given closer to the alleged event and is recalled at a time when the complainants are removed from court stressors.
38. This is particularly relevant in the case of young children and vulnerable complainants whose memories can fade more rapidly than others and who are more prone to guessing when unsure.
39. It was another recommendation that found favour with the general public in the online survey carried out by the Review.

⁸ The definition of 'vulnerable' should be extended to include all complainants in serious sexual offence cases as is the case in Scotland.

Chapter 5 – Separate legal representation

40. Complainants are often shocked, and members of the public surprised, to discover that complainants do not have legal representation. Prosecuting counsel represents the State and complainants are simply witnesses.
41. I consider that a measure of publicly funded provision of legal representation for complainants is essential and would represent yet another confidence-building block for complainants.
42. This concept is neither novel nor uncommon in both inquisitorial and adversarial systems worldwide.
43. The right to have legal representation to oppose cross-examination on previous sexual history and to oppose disclosure of personal medical records seems eminently sensible.
44. I also consider a measure of legal advice to explain the complexities of, and the legal developments occurring in, the legal process should be available from the time the matter is first reported to the police up until the commencement of the trial although not during the trial. This would be time-limited. In no instance would the legal representation involve attendance during the trial itself. Such an attendance might confuse the jury as to the respective roles of counsel. A classic example of the assistance given might be to advise on whether police were unreasonably seeking complainants to declare excessive amounts of personal data under the threat of not proceeding with the case.
45. This was a measure that received very substantial public support in our online survey.

Chapter 6 – Myths and stereotypes surrounding serious sexual offences

46. Frustratingly, there is a widely held perception that many people, men and women, still harbour often unspoken views about appropriate behaviour for individuals according to their gender.
47. These voices gesture to something deeply ingrained in our culture and may be all too readily ignored. In so far as they exist, they present a dangerous potential to challenge the integrity of our jury system in serious sexual offences.
48. I am in favour of positive steps being taken to combat the presence of rape myths and stereotypes about sexual offences that may be embraced by juries and that may influence their judgement.
49. These myths may include that:
 - rape only occurs between strangers;
 - victims provoke rape by the way they dress or act;

- victims who drink alcohol or use drugs are asking to be raped, a concept so exquisitely vacuous that those who cling to it ought to hang their heads in shame;
- rape is a crime of passion;
- if complainants did not scream, fight or get injured, it was not rape;
- you can tell if someone 'really' has been raped by the way they act;
- victims cry rape when they regret having sex or want revenge;
- only gay men get raped/only gay men rape men;
- sex workers cannot be raped;
- a woman cannot be raped by her husband/partner;
- victims who have remained in an abusive relationship are responsible for any rape that follows;
- handsome young men do not need to rape women;
- victims will report immediately and give consistent accounts; and
- false allegations are rife.

50. To investigate the presence and effect of these myths on jurors, the Department of Justice has commissioned a highly distinguished academic to carry out local research with real jurors to ascertain the existence, prevalence and impact on juries in Northern Ireland of these myths. It is vitally important that we learn whether jurors in Northern Ireland do accept these myths and, if so, what steps can be effectively taken to address them.

51. The early preliminary conclusions of this research are that whilst most jurors do not hold to these myths a substantial minority of jurors are not sure if they are true. This alone creates the imperative to address such myths in a structured and meaningful manner. This chapter sets out various methods of doing this.

52. We need to consider introducing educational material for the benefit of the jury which might include a short video outlining the fallacy of these myths and judicial directions to this effect for the benefit of educating jurors at the very commencement of the trial, together with, if necessary, expert evidence on the subject.

53. Of crucial importance is the need for well-funded public and school campaigns to debunk these myths and address the consequences of serious sexual offences.

54. The responses to our Review supported these measures in large numbers with 91.0% of respondents to our online survey agreeing with the recommendation for a public campaign to raise awareness of such myths.

Chapter 7 – Social media

55. I am in favour of strong measures to control the current impact that social media is potentially having on trials of serious sexual offences.
56. Use of social media is having an adverse impact to the extent that in some instances it is potentially:
 - removing the right to complainant anonymity;
 - destroying the reputations and lifestyles of complainants and innocent accused persons;
 - nullifying the integrity of judicial orders;
 - rendering jury trials unfair; and
 - impairing the administration of justice overall.
57. This is a widespread concern throughout jurisdictions worldwide. We need to avoid piecemeal approaches and instead push forward a cohesive national framework to meet a problem that is national in nature and potentially strikes at the heart of our criminal justice system.
58. That joint approach needs to be based on empirical evidence rather than broad assumptions often based on anecdotal accounts.
59. There is currently a government inquiry into the whole issue being carried out in England and Wales, and we should be wary of taking unilateral steps in Northern Ireland until that is completed in early 2019.
60. To an extent, we are belatedly addressing the problem. In dealing with social media, we need to see a mix of persuasion balanced with regulation.
61. Hence we have recommended borrowing from those other jurisdictions a suite of legislative and procedural steps to combat the current menace.
62. These include a raft of measures to:
 - restate and control the status of these social media platforms;
 - enact strong judicial powers to control access to websites in the course of the trial process;
 - create fresh offences aimed specifically at jurors who offend against judicial guidance on this issue;
 - improve attempts to encourage jury understanding of the dangers; and
 - provide a publicly funded public/school education campaign to promote appreciation of the problems social media throws up for the rule of law.
63. Responses to this chapter indicate unhesitatingly that the public is becoming increasingly aware of the dangers that lie in the wake of social media and of the need to address this problem as a matter of urgency.

Chapter 8 – Cross-examination on previous sexual history

64. I am committed to invoking measures to enforce the law prohibiting cross-examination about previous sexual history save in the rare circumstances that the law currently admits it under the Criminal Evidence (Northern Ireland) Order 1999.
65. It is not difficult to understand how research evidence and witness testimony over decades have raised concerns about the extent to which rape complainants are facing humiliating and traumatic trial processes.
66. Phrases such as ‘second rape’ or ‘judicial rape’ have become common parlance due to the enduring evidence from complainants of their adverse treatment in court.
67. There are many voices being raised both in the responses to the Preliminary Report and elsewhere, particularly in some research documents, suggesting that our present restrictions on such cross-examination are being ignored and that courts are insufficiently robust in protecting complainants in such matters. The voices challenging this perception are equally compelling with data evidence produced by the government and the Criminal Bar Association in England to the contrary. We need to ascertain through evidence based research whether this is true or not in the Northern Ireland context. There are also, on the other hand, some evidence based reports suggesting criticisms of the current procedure are being overstated and that breaches of the legal restrictions are rare. I have recommended the Department of Justice carry out such an exercise which will doubtless be informed by the existing Court Observers Panel.
68. Restrictions on sexual history evidence, by limiting evidence and cross-examination to only highly probative material, are justified by the need to reduce the humiliating and distressing nature of cross-examination in serious sexual offence trials as well as protecting a complainant’s right to privacy.
69. This chapter recommends a number of measures to encourage a more robust judicial attitude to restricting cross-examination on previous sexual history including, as earlier set out, the right for the complainant to be legally represented should it arise.

Chapter 9 – Delay

70. The criminal justice system, from the beginning of the process to the end,⁹ in Northern Ireland takes twice as long as the system in England and Wales. The delays are increasing year-on-year for serious sexual offences.

9 From offence reported to case dealt with at court.

71. For adults, the greatest delay is found in rape cases.¹⁰ The 943 days average¹¹ in 2017/18 for rape cases is 69.0% longer than the overall Crown Court average (558 days).
72. However, the greatest delay of all is found in serious sexual offences involving children,¹² where cases take an average of 986 days to complete.
73. The average time taken for sexual offences excluding rape in the Crown Court (based on principal offence disposed) has increased by 22.1% since 2015/16 from 687 days to 839 days in 2017/18.
74. Tackling the inordinate delay in the system is one of the cornerstones of this Review. The delay is found in the PSNI investigation, the Public Prosecution Service (PPS) allocation of cases for consideration and in the court process itself. There are far too many adjournments and a failure to mandate early engagement of both defence and prosecution counsel to address the issues in a timely fashion.
75. I sense an air of organised hypocrisy around this issue. Everyone loudly recognises that the delay in processing serious sexual offences is too long and yet insufficient steps are taken to address a feature that is growing and deteriorating year by year and which threatens the fundamental right to a fair and timely trial.
76. In this chapter I outline a number of root-and-branch changes, which include:
- the urgent need for the PSNI to be guided in its inordinately drawn-out investigative procedures with prosecutorial advice from the very outset by the PPS;
 - the disclosure process, in itself probably the major cause of delay, to be gripped from day one of the investigation (see chapter 10, below);
 - the PPS to urgently end a system that can allow files to lie unallocated for too long;
 - the ending of the committal process and the extension of the Indictable Cases Process to serious sexual offences;
 - PSNI and the PPS to be properly resourced to achieve these ends;
 - a completely fresh approach to judicial case management, with the assistance of court progression officers, with firm time limits, an end to a culture of unjustified committal proceedings and unmerited adjournments, and early mandatory engagement of defence lawyers in the entire process; and

10 Information provided by DoJ. Based on principal offence disposed and relates to substantive versions of the offence only.

11 Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.

12 Relates to cases where the principal offence was a sexual offence that specified the victim was a child in the offence description.

- provision of properly coordinated technology so that valuable court and jury time is not wasted by interminable breakdowns in current systems.

77. The sense of shock that emerged in the responses to the Preliminary Report at the extent of the delay in our system was tangible and demands urgent changes to address it.

Chapter 10 – Disclosure

78. Disclosure is fundamental to a fair trial and involves the obligation on the part of the Public Prosecution Service to disclose relevant material collected by the PSNI in the course of an investigation to the defence. The obligation is to disclose any material found that may undermine the prosecution case or support the defence case. In England and Wales disclosure errors have led to miscarriages of justice and some people have gone to prison as a result.
79. The significant growth in the use of digital technology in society has meant that the way in which crimes are investigated and prosecuted has evolved. This has placed a significant strain on the capacity and capability of those carrying out investigations.
80. It continues to blight our criminal justice system, despite the flaws having been highlighted for some years. The recent history of reform, despite a plethora of reviews and guidelines, in this area discloses a saga of protracted dimensions and continued inertia.
81. The current system is being operated in a completely outmoded, inadequate and inefficient manner, bereft of modern technology and sufficiently skilled operators.
82. If the seemingly immutable problem of disclosure is not addressed in Northern Ireland, delay in the system will remain endemic, innocent people may be convicted, complainants may be deterred and justice will be irreparably damaged. Whilst the topic may on first sight appear more worthy than inspiring it is in fact one of the cornerstones of this Review which, if not remedied, will threaten the success of many other recommendations.
83. The legislation that governs disclosure, namely the Criminal Procedure and Investigations Act 1996, although predating the enormous expansion in electronic communication and social media, is perfectly adequate to meet the challenge. The problem has been, and continues to be, the flawed implementation over several years.
84. At about the same time my Preliminary Report was published, the Attorney General in England published the results of a year long review in England and Wales on the topic of disclosure. I have found this to be an invaluable document and it has very substantially informed my current thinking. It has caused me to revise and add to the recommendations I had already proposed.

85. This chapter makes a large number of detailed recommendations to address these flaws. These include:
- challenges to the PSNI culture, which too often fails to see disclosure of third-party material/schedules of unused material at the very core of the investigative process and the imperative of timely decision-making;
 - that disclosure is currently seen merely as an add-on at the end of investigations, which then produces enormous delay to the whole matter. That mind-set has to change. Disclosure must become an investigative imperative at the outset of the process;
 - the need for specially trained designated police Disclosure Officers, working with PPS guidance, in all serious sexual offence cases where disclosure is an obvious issue;
 - early positive and enthusiastic meetings between, and the engagement of, the defence and the Public Prosecution Service to exchange disclosure schedules is another vital ingredient;
 - the continuing need for this process and the recommendations I have made to be informed by input not only from PPS and PSNI but also the legal profession as a whole;
 - firm judicial case management, with judges setting time limits for disclosure schedules to shape expectations and allow for measurement and evaluation of progress, is also pivotal. Consideration needs to be given to imposing sanctions for repeated non-compliance;
 - this matter is of such cardinal importance that it should be placed on the agenda of the Criminal Justice Board on a regular basis and managed by the Criminal Justice Programme Delivery Group;
 - the imperative for PSNI/PPS/legal profession to become involved with and closely monitor the various bodies in England and Wales who are currently meeting the challenge of disclosure; and
 - finally resources have to be invested in training skilled disclosure operators and technological advances to hasten the process. Digitisation and technology developments are crucial ingredients in solving this problem of disclosure.
86. The responses to the Preliminary Report make clear that the problem of disclosure is widely recognised and desperately needs redress. The recommendations that I have made appear to receive welcome approval.

Chapter 11 – Consent

87. Consent is often the crucial issue in serious sexual offences, and yet it is a very complex and difficult legal area.

88. It is defined under The Sexual Offences (Northern Ireland) Order 2008 (the 2008 Order) as follows: 'A person consents if he agrees by choice, and has the freedom and capacity to make that choice.' It was designed to centre sexual offence law upon respect for individual sexual autonomy and freedom of choice.
89. The difficulty is that the definition is vague, with the result that juries may bring sexual stereotypes into play in determining whether there was consent.
90. Moreover, requiring the defendant, as the law does, to ensure he has a reasonable belief that consent has been given does not clearly define or suggest what should and should not be considered reasonable, again leaving the door open for stereotypes to determine assessments of reasonableness.
91. I believe there should be a discernible shift towards a requirement for some measure of affirmative or participative expression of consent and away from a focus on resistance as a means to prove the absence of consent.
92. Accordingly, we have proposed amendments to the 2008 Order as follows:
- to follow the example in New Zealand and to provide that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
 - to expand the range of circumstances as to when there is an absence of consent to include, for example (i) where the complainant submits to the act because of a threat or fear of violence or other serious detriment such as intimidation, coercive conduct or psychological oppression to the complainant or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where the complainant is overcome, voluntarily or not, by the effect of alcohol or drugs; and
 - to add that, in determining whether there was a reasonable belief in consent, the jury should take account of a failure to take any steps to ascertain whether the complainant consented.
93. Separately, I have considered introducing the concept of gross negligence rape, as in Sweden. This would apply if the accused genuinely believed there had been consent but had no reasonable grounds for so believing as they had failed to take reasonable steps to ascertain consent. I have rejected it as it might risk undermining the egregious nature of the offence and establish an unwelcome hierarchy of rape.

Chapter 12 – The voice of the accused

94. Currently, the complainant in serious sexual offence cases is anonymised because otherwise complainants would be unlikely to come forward. The accused is not anonymised unless there would be a risk to their life or to do so would cause the complainant to be identified.

95. I believe that the accused should be anonymised pre-charge. I do not favour a change in the current law to anonymise the identity of the accused post charge.
96. This matter generated more controversy and division of opinion than any other issue in this Review. The responses online to the Preliminary Report reflected that same division of opinion amongst the general public. In our online survey 57.2% of 421 respondents agreed that those accused of serious sexual offences be named after they have been charged while 35.9% disagreed. Interestingly 64.3% of females agreed with this recommendation but only 34.5% of males did so.
97. Despite the severe consequences, both physical and mental, often suffered by accused persons (and their close family members) who have been acquitted of serious sexual offences, together with the public opprobrium often visited on them (and their families), I currently consider there are two key reasons for maintaining the status quo.
98. First, a crucial advantage of the publication of the name of the accused post charge — and I emphasise post charge — is that there is clear evidence in Northern Ireland and elsewhere that it serves to bring forward other complainants, for example, in institutional abuse or serial offender cases.
99. Such additional witnesses can be vital in a genre of crime where it is often a case of one person's word against another with little further evidence, where a large number of complainants do not report serious sexual offences to the police, the dropout rate of those who do report is too high and where acquittal rates are already very substantial.
100. Secondly, it is extremely difficult to justify the identity of an accused being anonymised in serious sexual offences and not in other heinous offences such as murder, crimes of unspeakable cruelty to children and other offences of non-sexual extreme violence etc.
101. It is not without significance that Ireland is the only common law country that we know of that grants anonymity automatically as a matter of course to accused persons post charge. Even this is limited to only certain sexual offences and not all. It should be noted that Northern Ireland courts follow the same path as that in Ireland in that anonymity is given to defendants even after conviction if the identity of the complainant would be revealed and in cases where a threat to life etc. can be established.
102. The principle of publication post charge should therefore remain.
103. Publication of a person's identity pre-charge clearly falls on the other side of the line and I recommend that this be prohibited save in the rare instance where it can be established it is in the public interest not to do so when, for example, an accused has taken flight. In addition it is noted that teachers should have the same statutory protection as in England and Wales pre charge.

Chapter 13 – The voice of marginalised communities

104. If the law and procedures in serious sexual offences are to be fairly applied to all our citizens, it must embrace those in marginalised communities including, minority black, Asian and ethnic groups, those with physical, sensory and learning disabilities or mental ill health, the LGBT+ community, older people, Traveller communities, sex workers and, purely in the context of serious sexual offences, males who for a number of reasons may be even more reluctant than others to report these crimes and come within the criminal justice system.
105. We must reach out to these groups. We desperately need empirical research commissioned by government to learn the prevalence, extent, nature and experiences of serious sexual offences among these groups. Consideration should be given to what laws, procedures and mechanisms, including specialist sexual violence services, alone or in combination with the conventional law and procedures in the legal system, may establish a construct of victim justice for them.
106. The responses to our Preliminary Report, virtually with one voice, supported the recommendation that the Department of Justice should carry out the empirical research that was proposed.

Chapter 14 – The voice of the child

107. The issue of child serious sexual abuse is a topic in its own right.
108. In Northern Ireland in 2011/12, there were 985 sexual offences recorded in relation to children.¹³ In 2017/18 this had almost doubled to 1,936. Sexual offences against children make up the majority of reported sexual crime to the PSNI. As already indicated, these cases generate the longest delay.
109. However, the under-reporting and attrition rate of sexual crime against children and young people is enormous. The Children's Commissioner for England found that only one in eight children who are sexually abused were identified by professionals.¹⁴
110. Our concern, therefore, has been to create signposts for those in authority in this field as part of a wider response of the community to this particularly invasive and traumatic aspect of serious sexual offences.
111. I do not consider the interests of children as complainants or as accused require legislative change.
112. The fact of the matter is that there is overwhelming evidence that the law as it stands is not being employed consistently or, in some cases, at all as it was intended.

13 Police Service of Northern Ireland (2018) *Police Recorded Crime Statistics in Northern Ireland 1998/99 to 2017/18* Belfast: PSNI

14 Children's Commissioner (2015) *Protecting children from harm: A critical assessment of child sexual abuse in the family network in England and priorities for action* London: Children's Commissioner for England

113. The weaknesses in the system include:
- lack of awareness of the nature of child trauma amongst professional lawyers/judges/police;
 - refusal to adequately address special measures at court for them;
 - excessive and damaging waiting times;
 - lack of adequate court facilities for children;
 - less than satisfactory Achieving Best Evidence (ABE) interviews at an early stage in many instances with technical failures in many instances albeit I note that a PSNI ABE Strategic Working Group has recently been established to address existing problems; and
 - failure on the part of the Department of Justice to adequately introduce reforms suggested some time ago by the Independent Inquiry into Child Sexual Exploitation.
114. These are but some of the problems besetting the treatment of children in these cases, which require new and creative procedures. We have addressed each of these problems in a specific set of recommendations.
115. There needs to be a radical rethinking of the current training that judges and the legal profession receive on the approach to the law and procedures governing child sexual abuse.
116. In particular, we have recommended a fresh culture of cross-examination, where the defence must produce written questions in advance for judicial approval, certain facts should be agreed in advance and questions must accommodate the age and frailties of a child's memory with simple language, without additional comment. Moreover, we have recommended a greater emphasis on the training of all involved in the criminal justice system and a much firmer case management process with a strong emphasis on protecting children from being traumatised by the very process that is meant to protect their rights.
117. Finally, I have urged that informed and creative consideration be given by the Department of Justice to the Barnahus scheme in Iceland and its offshoot, now being piloted in The Lighthouse in England and contemplated in Scotland. The Barnahus model seeks to embed the justice process within child protection disclosure procedures by ensuring legal, social care and medical professionals work collectively under one roof. In the Barnahus scheme ABEs with children are, wherever possible, carried out by child psychologists. The paucity of available child psychologists in Northern Ireland and the pressing need to train them in the use of Police and Criminal Evidence legislation may render that implausible. Hence I have recommended that the PSNI should carefully select and train a small specialised cadre of officers to carry out these interviews. In short this model aims to provide a comprehensive service for children in serious sexual offences.

118. Virtually without exception the responses to this chapter were all positive and supportive of the proposed recommendations which I had made.

Chapter 15 – Training

119. I share the concerns of a number of complainants who perceive there to be a continuing lack of understanding throughout the process about the impact that trauma can have on a victim and how they respond to the trauma.
120. Training on the prevalence and changing character of serious sexual offences should be undertaken on a regular basis, regularly refreshed and include an assessment of those identified as most vulnerable (for example, children, people with disabilities, older people, ethnic minorities and those with insecure immigration status).
121. Thus all publicly funded advocates should have to undergo specialist training on the issues surrounding serious sexual offences and working with children and vulnerable victims and witnesses together with those in marginalised communities before being allowed to take on serious sexual offences. It is noteworthy that legally aided family practitioners are on an approved list.
122. Issues surrounding appropriate procedures do not operate in isolation but rather interact with and compound one another. Successful measures of training should engage multiple stakeholders simultaneously, including not only key service providers but also community leaders, non-governmental organisations and peer groups among others.
123. Training of participants in the criminal justice system surrounding serious sexual offences requires a coordinated approach in which common practice threads are included by each different discipline. The Department of Justice, I suggest, is best placed to take the lead in coordinating such a training strategy.
124. Training on the use of digital technology should become an integral part of the work of all stakeholders involved with serious sexual offences.

Chapter 16 – The jury system

125. A growing number of credible voices are asking whether the jury system remains fit for purpose in serious sexual offences in the wake of low convictions, the alleged polluting effect of rape myths and stereotypical characterisation and the menace of social media intrusion. Arguably abolition of juries in these cases would solve the problem of jury myths and social media intrusion, and provide reasoned judicial decisions for both complainants and accused persons instead of what some see at times as imponderable jury verdicts.
126. Whilst increasingly I see the strength of the arguments in favour of a judge-alone or 'judge with two assessors' remedy (and a growing number of legal professionals and laypeople have strongly pressed me on this latter suggestion),

I am not persuaded at this time that there is an evidential basis for such a fundamental change to our long-standing commitment to jury trial.

127. The jury system in criminal trials is based on the principle that the determination of guilt or innocence of an accused should be undertaken by members of the community in Northern Ireland who can be relied on to follow judicial direction in order to guarantee a fair trial. Our whole system is based on faith in juries to be loyal to their oath and to follow judicial directions.
128. Moreover, in the troubled context of Northern Ireland, it is important to have citizens actively engaging in the administration of justice. A clear majority of respondents to our online survey still favoured retention of juries.
129. In any event, juries of 12 coming fresh to the task arguably are quintessentially better suited than battle-hardened judges, who have ‘heard it all before’, to determine truth or fiction in cases where often it is a pure question of credibility.
130. However, I believe legislation should make broad provision for those rare cases where the judge, ‘in the interests of justice’ or ‘the effective administration of the law’ accedes to an application by the defence for a judge-alone trial.
131. This should occur only where the defence consents and makes the application in the first place. A classic example might be where a high-profile case had received such widespread publicity that it would be difficult for any jury to form a view untainted by the publicity to which it had inevitably been exposed.
132. I found no basis for the Scottish concept of not proven verdicts as it might only introduce further uncertainty and doubt about jury verdicts.
133. I found no basis for introducing a gender quota for juries. No evidence based research justifying such an introduction came before me.
134. The responses to the Preliminary Report still favoured retention of the jury system. The online survey revealed 68.0% of 419 respondents were in favour of retaining juries. Interestingly those showing least agreement with this recommendation (59.1%) were in the 25-34 age bracket.

Chapter 17 – Measures complementing the criminal justice system

135. One of the key themes of this Review is the need to increase the sense of autonomy and free choice of complainants. The fact of the matter is that there is substantial under-reporting of serious sexual offences and, of those who do come forward, an unacceptable number then drop out.
136. For many reasons the criminal justice system is not meeting the needs of all complainants. If we are to address this problem, we need to balance seemingly contradictory imperatives: individual autonomy versus collective good; and adherence to rules versus common-sense flexibility.

137. Hence this chapter recommends that the Department of Justice consider the concept of restorative practice and alternative provision of facilitator services as an additional aspect within the criminal justice system for serious sexual offences, whilst canvassing the possibility of alternative solutions outside the system for those complainants who find it currently unacceptable.
138. Such an approach must be completely victim-led. By victim-led, I mean the victim alone must be able to exercise their choice to explore this avenue in a totally unpressurised and open fashion. Arguably it is only by adopting this approach that we will avoid the risk of re-traumatising complainants. It should only be invoked in those cases where complainants have specifically requested to engage this process and, of course, where the perpetrator not only agrees but has admitted guilt. Absent the express wish of the victim and the unequivocal admission of the perpetrator, it cannot and should not be used.
139. There will clearly be circumstances where it cannot be permitted. These would include, for example, where the use of extreme physical violence had been used, multiple perpetrators, use of a weapon, where there was obvious evidence of abuse of power and manipulation during the process, and, of course, child sexual abuse.
140. To aid this process and to provide further avenues of autonomy and control to complainants, I recommend repealing section 5 of the Criminal Law Act (Northern Ireland) 1967 in relation to serious sexual offences to permit doctors, nurses, social workers and counsellors to discuss the complainant's account with them, without the legal obligation to report the matter to police save where children and vulnerable adults were involved.
141. Many respondents on the issue of restorative justice, whilst voicing concern about the concept, felt it was worthy of further exploration particularly within the criminal justice system. Of the 420 responses on the online survey 53.1% agreed with its implementation within the criminal justice system but only 37.6% were in favour of a model outside the criminal justice system. It was noteworthy that in each instance approximately one third of the public responses were neutral or did not know of the issue. Public education on the concept is clearly necessary if an informed decision is to be taken.

Chapter 18 – Resources

142. The estimated cost of domestic violence and abuse in Northern Ireland for 2011/12 was calculated by the then Department of Health, Social Services and Public Safety as £674.3 million.¹⁵

¹⁵ Department of Health, Social Services and Public Safety and Department of Justice (2016) *Stopping Domestic and Sexual Violence and Abuse in Northern Ireland: A Seven Year Strategy* Belfast: Department of Health, Social Services and Public Safety

143. The costs for sexual violence and abuse occurring outside of the partner setting and excluding child victims of rape and sexual assault was calculated to be £257.3 million for 2011/12.
144. These Northern Ireland figures are unsurprising in light of a report from the Home Office in July 2018, *The Economic and Social Costs of Crime*, which recorded the annual cost of rape in 2015/16 prices was £4.8 billion (for an estimated 121,750 rapes) and for other sexual offences (an estimated 1,137,320 crimes) £7.4 billion.
145. These figures are chilling and constitute an indelible stain on the fabric of all our daily lives. We cannot lay claim to be part of a civilised society if we permit our law and procedures to be so under resourced that they contribute materially to this exercise in unmitigated human misery for both women and men although mainly the former.
146. The State and policymakers have two fundamental and unbreakable obligations: first, to those who have suffered unspeakable sexual crimes that strike at their human dignity and bodily integrity, with life-changing consequences in many cases; and, secondly, to those who are accused of these offences so as to ensure a fair trial and the innocent are not convicted.
147. Resources necessary to implement this Review have to be seen in the context of the cost of sexual violence to victims and the community at large. It is staggering in its dimensions.
148. In this Report, I have made a series of recommendations, both strategic and operational. All of these seek to deliver both short-term and long-term improvements to our current arrangements for delivering justice in serious sexual offence cases, many with potentially far-reaching benefits. They have the potential to have a powerful physical and mental impact on both complainants and accused.
149. Resourcing, to a large extent, lies at the heart of our system's ability to deliver many of these improvements. It is not a case of doing more with less or simply working smarter, but of properly identifying where additional resource is required to deliver my recommendations and ensuring that it is in place as soon as possible. Without this investment, many of the recommendations cannot be successfully implemented, and if efforts are made to do so in the absence of adequate resourcing, they are liable to fail in their aspiration.
150. The relevant statutory agencies need to conduct a comprehensive resource impact assessment, with the assistance of affected stakeholders, into my recommendations, individually and cumulatively. This should include both the direct costs arising, for example, from deployment of additional PSNI and PPS resources and indirect/consequential costs, for example, revisions required to the legal aid regime to support any enhanced services from counsel and solicitors at court.

Key recommendations

This report contains a large array of individual recommendations, all of them important and relevant. Together they create a pattern of coordinated reform. Cherry picking will not work. The system needs a holistic approach. However, 16 key recommendations have emerged around which perhaps the others revolve.

1. Access of the public to trials involving serious sexual offences to be largely confined to close family members of the complainant and the defendant and such others as the judge shall permit. Access for bona fide press members should be maintained as the eyes and ears of the public.
2. Introduction of early pre-recorded cross-examination, initially of children and vulnerable adults, to be conducted away from the court setting. In time, consideration should be given to extending this to include all complainants in serious sexual offences.
3. A measure of publicly funded independent legal representation should be offered to complainants from the outset up to but not including the trial.
4. Measures should be introduced at the outset of the trial to combat rape myths for example, jury educational material, a short video and written judicial directions. In the wider context there is a need for an extensive public awareness and school education campaign.
5. New legislation should be developed and introduced to manage the dangers created by social media. There is a need to increase jury awareness of the risks social media creates, specifically in serious sexual offence trials.
6. A more robust judicial attitude and case management approach to prevent improper cross-examination about previous sexual history.
7. Radical steps to combat excessive delay in the criminal justice system. A wholly new mind-set is required, which will involve front-loading the legal system with an early-time-limited and case managed system that has at its core early joint engagement by both prosecution and defence representatives.
8. A restructuring of the disclosure process with greater and earlier trained Police Service of Northern Ireland (PSNI) specialists, prosecutorial guidance from the Public Prosecution Service (PPS) from the outset, early defence engagement, firm time-limited and early judicial management, and resource-led development of relevant digital technology.

9. Amendments to the Sexual Offences (Northern Ireland) Order 2008 to ensure juries do not bring sexual stereotypes into play and to impose a discernible shift towards a measure of affirmative expression of consent.
10. There should be no change in the current law concerning publication of the identity of the accused post charge. The identity of the accused should be anonymised pre-charge and the accused should have the right to apply for a judge-alone trial in the rare circumstances where the judge considers it to be in the interests of justice.
11. The Department of Justice should commission individual research projects to gather knowledge and data in Northern Ireland on the prevalence, extent, nature and experiences of serious sexual offences. This should include identifying how current law and procedures impact on black, Asian and minority ethnic groups, immigrants, LGBT+ groups, Traveller communities, sex workers, older people, males and those people with a physical, sensory and learning disability or mental ill health.
12. Introduction of a radical departure from the traditional style of advocacy when dealing with children and vulnerable adults in order to address the potential traumatisation of children and vulnerable adults. In particular the Department of Justice should give serious consideration to introducing the Barnahus system of child investigation and treatment. New advocacy skills are required by the legal professions to match this new culture.
13. The Judicial Studies Board, the Bar Council and the Law Society should afford a higher priority to training and awareness from outside agencies on such matters as the trauma suffered by victims including children, rape mythology, jury misconceptions and jury guidance. Training should also include topics such as under-reporting and the reasons around withdrawal of complainants from the process of sexual offences, and how best to approach the cross-examination of children and vulnerable witnesses.
14. All serious sexual offences should continue to be tried in the Crown Court with a jury, without the need for a gender quota or a not proven verdict. However, the pool of eligible jurors needs to be widened.
15. Alternative mechanisms, including an entirely victim-led concept of restorative practice, should be considered both inside the criminal justice system and parallel to it.

16. The appropriate statutory agencies should deliver a comprehensive resource impact assessment, with the assistance of affected stakeholders, into my recommendations, individually and cumulatively. This should include both the direct costs arising — for example, from the deployment of additional PSNI and PPS resources, and also indirect and consequential costs — for example, revisions required to the legal aid regime to support any enhanced services from counsel and solicitors at court.

The Gillen Review

Consultation Survey

Overview

The Criminal Justice Board has commissioned an independent review of the arrangements to deliver justice in serious sexual offence cases. A former Lord Justice of Appeal, the Right Honourable Sir John Gillen, will lead the review supported by an Advisory Panel.

The Review has been established to consider law, procedure and practice covering the development and progression of cases of alleged serious sexual offences, taking account of experience in Northern Ireland and developments in other jurisdictions. The purpose of the Review is to determine whether current arrangements deliver the best outcomes for victims, defendants and justice, and to make recommendations for improvements.

Privacy Notice

The data collected in this consultation will be used for informing the review of arrangements to deliver justice in serious sexual offences in Northern Ireland.

The information that you provide is voluntary. In providing information you are consenting to its use by the Review.

All the information you provide will be treated in strict confidence and will not be used to identify you personally. The analysis will be carried out on an anonymous basis under the guidelines of GDPR.

No information will be shared or passed to any other body and will only be used for the purposes of this consultation.

Public access to trials

The Review recommends access to trials involving serious sexual offences to be confined to the press and close family members.

1. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Anonymity for defendants

Currently those accused of a serious sexual offence can be named after they have been charged with the alleged offence. The Review recommends no change to this so those accused of a serious sexual offence will still be named.

2. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Myths about serious sexual offences

Evidence shows that many myths and stereotypes exist about serious sexual offences e.g.

- Victims are partially responsible due to the way they dress / act / how much alcohol they have consumed;
- Victims will always report the alleged offence immediately and give a very consistent account of events;
- Victims will scream, fight or get injured; and
- False allegations are common.

3. The Review recommends a public campaign to raise awareness of these myths. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

4. The Review also recommends a number of ways of helping jurors in their understanding of serious sexual offences and the myths around them. To what extent, if at all, do you agree with this recommendation for each of the following?

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
Video	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Directions from the judge	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Evidence from an expert	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Social media

Social media can have a negative impact in trials of serious sexual offences e.g.

- Removing the defendant's right to a fair trial;
- Making trials unfair; and
- Removing the complainant's right to not be named.

5. The Review recommends helping jurors understand the risks associated with social media. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

6. The Review also recommends making new criminal offences for jurors who do not follow Judges’ orders on this issue. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Separate legal representation

At present complainants in serious sexual offence cases do not have their own lawyer representing them; the prosecution lawyers represent the state and public interest. The Review recommends that complainants receive legal advice and representation. This would include:

- To explain the criminal justice process; and
- To represent their interests where their medical records or previous sexual history experience may be brought up.

7. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Jury trials

In general, all serious sexual offence cases that are tried in the Crown Court are in front of a jury. The Review recommends no change to this, that serious sexual offence trials should still be held in front of a jury, save in exceptional circumstances where a defendant persuades a judge it is in the interest of justice for a judge alone trial.

8. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Pre-recorded cross-examination

The Review recommends allowing children and vulnerable complainants in serious sexual offence cases to have their questioning by defence lawyers recorded on video before the trial. This could happen away from the court and could later be offered to all complainants in serious sexual offence cases.

9. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Duty to report

Currently section 5 of the Criminal Law Act (Northern Ireland) 1967 requires a person with knowledge of an offence to report it to the police. The Review recommends removing this duty to report an offence, except in cases concerning a child or vulnerable adult where the obligation would still exist to report to the police.

10. To what extent, if at all, do you agree with this recommendation?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Measures complementing the criminal justice system

Only a small number of victims report alleged offences to police. Many later drop out of the criminal justice process. The Review recommends that the Department of Justice consider the idea of victim-led restorative practice. This would take place only when the victim wishes to meet the perpetrator (who must have admitted the offence) with highly skilled facilitators. It would not be available in certain circumstances e.g. child abuse cases, where extreme violence has been used or where there were multiple perpetrators. Depending on the wishes of the victim, this process could be operated within the criminal justice system or outside it.

11. To what extent, if at all, do you agree with restorative practice within the criminal justice system e.g. following sentencing?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

12. To what extent, if at all, do you agree with restorative practice outside the criminal justice system as an alternative for those who do not wish to report the alleged offence to the police?

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Don't Know
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you wish to make any comment please use the box below

Further comments

13. If there are any other areas of the consultation that you would like to comment on that have not been addressed in this survey please use the box below

Additional questions

14. If you are responding on behalf of an organisation please note it here.

Organisation	
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Organisation

15. Gender

Male	Female	Other	Prefer not to say
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other – please specify	
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16. Age

Under 18	<input type="checkbox"/>
18 – 24	<input type="checkbox"/>
25 – 34	<input type="checkbox"/>
35 – 44	<input type="checkbox"/>
45 – 54	<input type="checkbox"/>
55 – 64	<input type="checkbox"/>
65 or over	<input type="checkbox"/>
Prefer not to say	<input type="checkbox"/>

17. Anonymised comments may be published on this site or on the Gillen Review website and in the resulting report on the consultation. Do you give permission for your anonymised views to be published?

Yes	No
<input type="checkbox"/>	<input type="checkbox"/>

Contact Us

If you wish to contact the Review you can do so by telephone, letter or email using the following details:

Email: enquiries@gillenreview.org

Telephone: 028 9026 1361

Address: The Gillen Review, 6th Floor, Millennium House, 25 Great Victoria Street, Belfast BT2 7AQ

Analysis of Online Survey

The online consultation survey opened on 20/11/2018 and closed on 25/01/2019. A total of 422 responses to the survey were received. The majority of respondents were female (73.0%) with 20.9% of responses from males.

Gender	Count	%
Female	308	73.0%
Male	88	20.9%
Prefer not to say	20	4.7%
Not Answered / Other	6	1.4%
Grand Total	422	

Most respondents were in the 35 – 44 age band (29.9%) followed by those aged 25 – 34 (22.3%) and 45 – 54 (19.9%). 3.6% chose not to answer the age question.

Age	Count	%
Under 18	0	0.0%
18 - 24	36	8.5%
25 - 34	94	22.3%
35 - 44	126	29.9%
45 - 54	84	19.9%
55 - 64	42	10.0%
65 or over	25	5.9%
Prefer not to say	10	2.4%
Not Answered	5	1.2%
Grand Total	422	

Please note throughout where the term agree is used, this is a combination of both 'strongly agree' and 'agree'. Similarly the term disagree is a combination of both 'disagree' and 'strongly disagree'.

Where respondents provided comments these have been grouped together by main theme of the comment. Only those who answered yes to having their anonymous comments published have been included. Therefore, the actual number of comments made in the survey will be higher than those stated.

Question 1: The Review recommends access to trials involving serious sexual offences to be confined to the press and close family members.

420 respondents chose to answer this question with the majority (86.7%) agreeing with the recommendation. Females were more likely to agree (90.9%) than males (73.6%).

Respondents aged 55 – 64 and 25 – 34 showed least agreement with this recommendation at 83.3% and 83.9% respectively.

121 respondents provided comments to this question. 28 stated that the press should also be excluded from the court while 21 respondents also had issues with how the press report trials of serious sexual offences.

Public access to trials	Count
Press should also be excluded	28
Comment re-emphasising need to exclude public	27
Issue with how press report	21
Will help with anonymity of complainant	11
Other	11
Comment that public should be allowed to attend trial	10
Less traumatic / intimidating / stressful for complainants	9
Those studying these fields / court researchers should be allowed to attend	4
Total	121

Question 2: The Review recommends those accused of a serious sexual offence will still be named after they have been charged.

421 respondents answered this question with opinion divided. 57.2% of respondents agreed with the recommendation, 35.9% disagreed while the remaining 6.9% answered neutral / don't know.

Females were more likely to agree with the recommendation (64.3%) than males (34.5%).

Agreement decreased with age, dropping from 77.8% of 18 – 24 year olds to 53.6% of those aged 45 – 54. There was a slight increase to 57.1% of 55 – 64 year olds but a drop to one in five (20.0%) of those aged 65 or over agreeing with naming the accused after charge. 52.0% of those aged 65 or over answered strongly disagree.

134 respondents provided comments to this question. 41 comments suggested that the accused should only be named if they are found guilty while 24 noted that those who are named and then acquitted still have their lives ruined / reputations tarnished. 23 respondents mentioned that naming the accused would help other complainants or witnesses to come forward.

Defendant anonymity	Count
Should only be named if found guilty	41
Those named and acquitted still have lives ruined / reputations tarnished	24
Naming helps others come forward	23
Comment re-emphasising need to name accused	15
Comment that accused should not be named	13

Defendant anonymity	Count
Other	11
Unsure comment	5
Limits to reporting of accused's details	2
Total	134

Question 3: The Review recommends a public campaign to raise awareness of myths about serious sexual offences.

421 respondents answered question 3 relating to a public campaign around myths about serious sexual offences. The majority of respondents agreed with this recommendation (91.0%). There were differences between males (78.4%) and females (95.8%) showing agreement although both showed a majority.

127 respondents provided comments to this question, mostly from those who agree with the recommendation. 22 respondents raised the point that education should begin in school while 7 noted that those involved in the criminal justice system also need education in this area.

Myths public campaign	Count
Comment re-emphasising the need for a public campaign	43
Other	30
Education should begin in school	22
Lawyers shouldn't be using these myths in court	10
Comment that campaign is not needed	8
Judges / lawyers / police need educated too	7
Campaign should not be one sided	4
Unsure comment	3
Total	127

Question 4: The Review recommends a number of ways of helping jurors in their understanding of serious sexual offences and the myths around them.

Part a) Juror Video

413 respondents answered this question with the vast majority (86.2%) agreeing with the recommendation. Over nine in ten females (92.1%) agreed with this recommendation compared to around seven in ten males (70.9%). 6.8% responded neutral / don't know to this question.

Most agreement was shown by those aged 25 – 34 (93.5%) with least agreement shown by those aged 65 or over (72.0%).

Part b) Directions from the judge

410 respondents chose to answer this question regarding directions from the judge. Almost four-fifths of respondents (79.0%) agreed with this recommendation with

around one in ten (10.7%) having neutral feelings. There were again some differences between male and female agreement, 74.4% and 81.0% respectively.

Agreement for this recommendation was highest among the 55 – 64 age group (85.7%). Two-thirds (66.7%) of those aged 18 – 24 showed agreement while around one in five (19.4%) 18 – 24 year olds were neutral.

Part c) Evidence from an expert

A total of 416 respondents answered this question with nine in ten (90.1%) agreeing with this recommendation. Females again showed the highest level of agreement (94.4%) compared to males (81.6%).

113 respondents provided comments in relation to helping jurors in their understanding of serious sexual offences and the myths around them. 17 respondents felt that the recommendation did not go far enough and that jurors should have to attend some form of training or a workshop before being a juror on a serious sexual offence case.

Myths jurors	Count
Other	26
Comment re-emphasising they agree with recommendation	20
Jurors should attend training / workshop	17
Guidance / opinions should be neutral	16
Comment that this recommendation is not needed	9
Issue with judge's directions	8
Jurors have prejudices / bias, will take time to change	8
Ensure defence do not use these myths	6
Jurors should be checked / questioned before selection	3
Total	113

Question 5: The Review recommends helping jurors understand the risks associated with social media.

419 respondents gave their level of agreement with this recommendation with 97.1% agreeing.

Comments were made by 72 respondents to this question. Seven respondents suggested that there should be a ban on jurors using social media during a trial while others highlighted the fact that use of social media is hard to monitor.

Social media - jurors	Count
Other	30
Comment re-emphasising they agree with recommendation	21
Ban on social media for jurors	7
Difficult to monitor / police	5
Should be strict reporting restrictions	4

Social media - jurors	Count
Jurors should already be directed to look at evidence in court only	3
Unsure comment	2
Total	72

Question 6: The Review recommends making new criminal offences for jurors who do not follow Judges' orders on the issue of social media.

There were 420 responses to this question. Agreement with this recommendation was again high at 90.0%. There was a difference of 8.7 percentage points between male (85.1%) and female (93.8%) agreement. 4.5% of respondents were neutral to the recommendation while 1.9% answered don't know.

Agreement was lowest with those in the 45 – 54 age group (86.9%).

There were 63 comments relating to the making of a criminal offence for jurors, the majority of which were from those agreeing with the recommendation.

Social media - criminal offence	Count
Comment re-emphasising they agree with recommendation	28
Other	18
Unsure comment	6
Contempt should already cover this	4
Difficult to monitor / police	3
Comment that this recommendation is not needed	2
Should be restrictions on press reporting	2
Total	63

Question 7: The Review recommends that complainants receive legal advice and representation.

419 respondents answered this question. Almost nine in ten respondents (89.5%) agreed with this recommendation. Females again show more agreement (94.1%) than males (78.2%).

Agreement was lowest in the 65 or over age group at 76.0%.

110 survey respondents provided comments in relation to separate representation. Half of comments were re-emphasising that separate representation is needed.

Separate representation	Count
Comment re-emphasising that separate representation is needed	55
Other	19
Help to protect complainant / stop re-traumatisation	14
Comment that separate representation is not required	10
Previous sexual history should not be allowed as evidence	8

Separate representation	Count
Would help vulnerable complainants	2
Unsure comment	2
Total	110

Question 8: The Review recommends that serious sexual offences remain heard by a jury, save in exceptional circumstances.

419 of those who responded to the survey answered the question relating to jury trials. 68.0% of respondents agreed with this recommendation. 16.2% responded neutral / don't know. Males were more in favour of this recommendation (78.2%) than females (66.1%).

25 – 34 year old respondents showed least agreement with this recommendation (59.1%) with 22.6% of this age group responding neutral / don't know.

113 respondents provided comments to this question with 18 comments relating to the idea that serious sexual offence trials should be heard by a judge or panel of judges.

Jury trials	Count
Other	30
Should be a judge / panel of judges	18
Jury trials so long as jurors are educated about myths / trauma	16
Unsure Comment	13
Comment that jury trials should remain	11
Jurors have prejudices / bias / not educated in this area	11
Juries should have gender quotas	8
Comment disagreeing with jury trials	4
Additional screening of jurors	2
Total	113

Question 9: The Review recommends allowing children and vulnerable complainants to have their questioning by defence lawyers recorded on video before the trial.

420 respondents answered this question. Around nine in ten (90.5%) agreed with this recommendation with 4.8% disagreeing and a further 4.8% responding neutral / don't know. Females (94.5%) showed more agreement than males (82.8%).

Younger respondents showed more agreement with this recommendation with 93.3% of those aged 44 and under agreeing compared to 86.1% of those aged 45 and over.

94 respondents provided comments on pre-recorded cross-examination. The majority of comments were from those who agreed with the recommendation. Many comments related to the use of pre-recorded cross examination helping to reduce re-traumatization for complainants and making their experience easier.

Pre-Recorded cross examination	Count
Comment re-emphasising agreement with recommendation	30
Will reduce re-traumatization / make experience easier for complainants	29
Other	17
Unsure Comment	5
Comment disagreeing with recommendation	5
Not to be extended to all sexual offence complainants	3
Only for child complainants	3
Should be available to defendants also	2
Total	94

Question 10: The Review recommends removing the duty to report an offence except in cases concerning a child or vulnerable adult.

There were 420 responses to this question with opinion varied when it came to removing the duty to report. 49.3% agreed with the recommendation, 27.9% disagreed, 15.5% were neutral and 7.4% answered don't know. There were differences between males (37.9%) and females (52.3%) showing agreement.

Agreement was lowest among the 55 – 64 age group (33.3%) followed by those aged 45 – 54 (46.4%). Over three in ten (31.0%) 55 – 64 year olds responded neutral / don't know.

81 respondents provided comments to this question. Comments from those who disagreed with the recommendation noted that people who are aware of a crime must report it.

Duty to report	Count
Comment re-emphasising agreement with recommendation	24
Unsure comment	15
If you know of a crime you must report it	11
Comment disagreeing with recommendation	11
Other	11
Will make it easier for people to speak to professionals / therapists	9
Total	81

Question 11: The Review recommends that DoJ consider the idea of victim-led restorative practice within the criminal justice system.

Responses were mixed when asked about restorative practice within the criminal justice system. A total of 420 people responded to this question. 53.1% agreed with the recommendation with 12.6% disagreeing. Just over a third of respondents were either neutral (27.4%) or answered don't know (6.9%). Males showed more agreement (57.5%) than females (51.6%).

Those aged 25 – 34 were most unsure about this recommendation with 43.0% responding neutral / don't know.

99 respondents provided comments relating to restorative practice within the criminal justice system. It was re-iterated in many comments that this must be entirely the choice of the victim.

Restorative practice within CJS	Count
Unsure comment	19
Comment disagreeing with recommendation	18
As long as it is up to the victim	18
Help to give closure to victims	13
Other	14
Comment agreeing with recommendation	9
Not sure this would help victims	3
Unlikely that suspect would admit to it	3
Difficult to facilitate and control	2
Total	99

Question 12: The Review recommends that DoJ consider the idea of victim-led restorative practice outside the criminal justice system.

Responses were again varied when asked about restorative practice outside the criminal justice system. 418 people provided responses to this question. 37.6% agreed with the recommendation while around three in ten respondents (30.4%) disagreed. Just under a third of respondents answered neutral (22.5%) or don't know (9.6%). Males were more likely to agree with the recommendation (43.7%) than females (36.6%).

Those aged 25 – 34 again responded highly (39.8%) in the neutral / don't know categories.

85 respondents provided comments relating to restorative practice outside the criminal justice system. Seven respondents felt that serious sexual offences must be dealt with through the criminal justice system.

Restorative practice outside CJS	Count
Comment disagreeing with recommendation	21
Unsure comment	16
Comment agreeing with recommendation	10
The system needs fixed so people will report to police	9
Other	8
These matters must be dealt with through criminal justice system	7
Not sure how this would work	4
Will not deter reoffending / public will be at risk	4

Restorative practice outside CJS	Count
Gives alternative option to those who do not wish to report to police	2
Help to give closure to victims / help in their recovery	2
Research needed in this area	2
Total	85

Overall Results

	Strongly agree		Agree		Neutral		Disagree		Strongly disagree		Don't know		Total
	Count	%	Count	%	Count	%	Count	%	Count	%	Count	%	
1. Public Access to Trials	275	65.5%	89	21.2%	10	2.4%	19	4.5%	27	6.4%	-	-	420
2. Defendant Anonymity	160	38.0%	81	19.2%	25	5.9%	53	12.6%	98	23.3%	4	1.0%	421
3. Myths Public Campaign	349	82.9%	34	8.1%	18	4.3%	6	1.4%	14	3.3%	-	-	421
4a. Myths Juror Video	271	65.6%	85	20.6%	21	5.1%	9	2.2%	20	4.8%	7	1.7%	413
4b. Myths Judges Directions	227	55.4%	97	23.7%	44	10.7%	11	2.7%	22	5.4%	9	2.2%	410
4c. Myths Expert	301	72.4%	74	17.8%	19	4.6%	4	1.0%	15	3.6%	3	0.7%	416
5. Social Media Jurors	365	87.1%	42	10.0%	5	1.2%	*		#		*		419
6. Social Media Criminal Offence	298	71.0%	80	19.0%	19	4.5%	9	2.1%	6	1.4%	8	1.9%	420
7. Separate Representation	308	73.5%	67	16.0%	15	3.6%	11	2.6%	15	3.6%	3	0.7%	419
8. Jury Trials	167	39.9%	118	28.2%	54	12.9%	30	7.2%	36	8.6%	14	3.3%	419
9. Pre-Recorded Cross-Examination	289	68.8%	91	21.7%	13	3.1%	11	2.6%	9	2.1%	7	1.7%	420
10. Duty to Report	116	27.6%	91	21.7%	65	15.5%	61	14.5%	56	13.3%	31	7.4%	420
11. Restorative Within CJS	86	20.5%	137	32.6%	115	27.4%	27	6.4%	26	6.2%	29	6.9%	420
12. Restorative Outside CJS	61	14.6%	96	23.0%	94	22.5%	56	13.4%	71	17.0%	40	9.6%	418

* refers to a count less than 3.

refers to a number ≥ 3 which has been suppressed to prevent disclosure of small numbers elsewhere.

Notes

Rounding Conventions

Percentages have been rounded to one decimal place and may not always sum to 100%.

Disclosure Controls

Disclosure controls have been applied and numbers less than three have been suppressed. Where necessary, numbers greater than or equal to three have also been suppressed to prevent disclosure of small numbers elsewhere. These disclosure controls have not been applied to the comments made in the survey as respondents gave their agreement for their comments to be published.

Chapter 1

Background

For many of the reforms which have been introduced to ameliorate the experience for the complainant ... none of the reforms seem to really work. Women are blamed for drinking too much and behaving in ways deemed provocative. Their credibility is impugned and their reputation laid bare. Their mental health explored intrusively. Their Facebook entries and other social media accounts examined to find salacious material for cross-examination... where one person's word is set against that of another and the subject matter is the febrile one of sex, it does not take great skill to undermine a complainant.

Baroness Helena Kennedy QC, Scotsman, 2018

- 1.1 It has not been the intention of this Review to reinvent the wheel. Whilst I am satisfied that much needs to be changed in terms of the law and procedures relating to serious sexual offences, it cannot be ignored that in recent years there have been many improvements made in the law relating to such offences, in the treatment of alleged victims and in the standards of investigation, in a far more coherent and enlightened approach to prosecutions than before, and in improved court processes and procedures.
- 1.2 It is appropriate, therefore, that in this chapter I give some indication of what has already been achieved and the foundation upon which I believe improvements can be made.

International Human Rights Standards

- 1.3 Before turning specifically to the current law and procedures governing serious sexual offences in Northern Ireland, it is important to set the background of the range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe and United Nations systems. These have enormous potential and value in guiding the State on its obligations in this area of serious sexual offences. I record my gratitude to the Northern Ireland Human Rights Commission¹ for generously assisting me in summarising these international standards.
- 1.4 International Human Rights Law places a number of specific positive obligations on the Northern Ireland Executive to safeguard the rights of individuals who have been a victim of crime and witnesses, in particular of those serious sexual offences, which are the subject of this Review.
- 1.5 Serious sexual offences engage a number of rights under international standards, including the prohibition on torture, inhuman and degrading

¹ The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.

treatment and the right to private and family life (including the inherent dignity of the person).² There is also a positive obligation on the State to ensure that an appropriate legal framework is in place to protect individuals from human right abuses and violations.

- 1.6 Pursuant to international human rights law, the State must prevent, investigate, prosecute and punish human rights violations.
- 1.7 The UN Human Rights Treaty Bodies, including but not limited to the Committee on the Elimination of Discrimination against Women (CEDAW)³, have regularly emphasised States Parties' obligations in relation to domestic and sexual violence and abuse.
- 1.8 In 2015, the EU Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime (the EU Directive) was placed on a statutory footing in Northern Ireland.⁴ This aims to provide a practical and detailed framework for the enjoyment of the rights protected under the Directive, for all victims of crime.
- 1.9 Specifically on the issues of violence against women and the sexual abuse of children, the Council for Europe has developed two treaties of note. First, the Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) applies to all forms of violence against women, in particular gender based violence.⁵ The UK Government has signed but not ratified the Istanbul Convention.⁶
- 1.10 Secondly, the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) ratified by the UK in 2018, requires States to adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators.⁷
- 1.11 Where an allegation of torture, inhuman and degrading treatment is made, there is a requirement for an official investigation, which is prompt and

2 Article 3 and Article 8 of the European Convention on Human Rights

3 See for example, *CEDAW General Recommendation No. 19: Violence against women, 1992 and CEDAW General Recommendation No.24: Article 12 of the Convention (Women and Health) 1999, A/54/38/Rev.1*

4 Department of Justice (2015) *Victim Charter: A charter for victims of crime* Belfast: Department of Justice

5 Article 2, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, November 2014

6 The UK Mission at Geneva has stated, "The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter." See, UK Mission at Geneva, Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008 (March 2010) on recommendation 22 (France).

7 Article 1, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse*, 12 July 2007

effective.⁸ The jurisprudence of European Court of Human Rights has, in the context of Article 3 of the ECHR, identified that such an investigation must be: prompt; impartial; have hierarchical independence from those implicated; provide sufficient involvement of next of kin; and have the ability to hold those responsible to account.⁹

- 1.12 In broader terms, the right to remedy is also protected for those individuals whose rights have been violated; the legal source of this will be dependent on the origin of the right violated.¹⁰ The UN Human Rights Committee has stated “such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children”.¹¹
- 1.13 Human Rights Standards require that States take the necessary measures and special protection to avoid “re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation”.¹²
- 1.14 The EU Directive recognises that victims of gender based violence are particularly susceptible to secondary and repeat victimisation¹³ and requires that Member States ensure that measures are available to protect such victims.¹⁴ The Istanbul Convention also identifies that all measures to provide protection and support to victims should be made with the aim of preventing secondary victimisation.¹⁵
- 1.15 The UN Declaration on the Elimination of Violence against Women requires States to ensure that “the re-victimisation of women does not occur because of laws insensitive of gender considerations, enforcement practices or other interventions”.¹⁶ Similarly, the UN Committee against Torture (CAT) requires that “judicial and non-judicial proceedings shall apply gender-sensitive procedures, which avoid re-victimisation and stigmatization of victims of torture or ill-treatment”.¹⁷ The UK was examined by the CEDAW committee in February

8 UN Human Rights Committee, General Comment no.31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (2004) para 15; Article 12 UNCAT; *Assenov v. Bulgaria* (1998) ECHR 98, para 102; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006) A/RES/60/147, para 3(a) and 3(d).

9 *Jordan v the United Kingdom* (2001) ECHR 327, paras 106-9

10 See for example, Article 2 ICCPR; Article 13 ECHR

11 UN Human Rights Committee, General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para 15

12 UN Committee against Torture General Comment 3: Implementation of Article 14 v State Parties CAT/C/GC/3 (13 December 2012)

13 Preamble, para 57, EU Directive 2012/29/EU

14 Article 18, EU Directive 2012/29/EU

15 Article 18(3), Istanbul Convention

16 A/RES/48/104 (Article 4(f))

17 UN Committee against Torture, General Comment 3: Implementation of Article 14 by States parties, CAT/C/GC/3 (13 December 2012) para 33

2019 and my Preliminary Report was submitted by the Northern Ireland Women's European Platform.

- 1.16 The Lanzarote Convention also requires that the State Party adopt a protective approach towards child victims, "ensuring that the investigators and criminal proceedings do not aggregate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate".¹⁸
- 1.17 I pause therefore to specifically highlight the importance of the Istanbul and Lanzarote Conventions and their value to guiding the Northern Ireland State on its obligations in this area of serious sexual offences.

The Law in Northern Ireland

- 1.18 The fact of the matter is that The Sexual Offences (Northern Ireland) Order 2008, which has sprung from the Sexual Offences Act 2003 in England and Wales, represents the most important overhaul of the law at least since Victorian times. In the precursor to the 2003 Act, the White Paper, *Protecting the Public*, stated:¹⁹
- "The law on sex offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in the Sexual Offences Act 1956, and most of that was simply a consolidation of nineteenth-century law. It does not reflect the changes in society and social attitudes that have taken place since the Act became law and it is widely considered to be inadequate and out of date."
- 1.19 The key objective of the legislation was to modernise the law of sexual offences by refocusing it on critical issues such as consent and the protection of sexual autonomy. The main principles underling it were non-discrimination between men and women, non-discrimination between those of different sexual orientation, the protection of the public, especially vulnerable people and children, and, finally, compliance with the ECHR. The legislation has achieved many of its aims even though it is far from problem-free.
- 1.20 We in Northern Ireland have built on our legislation and the ensuing summary that I set out is but part of the canvas that contains our law and procedures.

Charters

- 1.21 The Victim Charter was placed on a statutory footing in November 2015, accompanied by a range of supplementary documents including an easy-read guide and a young person's guide to the Charter. The Charter provides victims

18 Article 30(2), *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse*, 12 July 2007

19 Home Office (2002) *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences* (CM 5668) London: Home Office

with relevant information and clearly sets out what they can expect as they move through the criminal justice system.

- 1.22 To complement the Charter, an information leaflet for victims of crime has been available since December 2014. This should be given to all victims of crime by the police, setting out information on key stages of the process and highlighting where further information can be obtained. Organisationally, the PSNI has met with Victim Support NI to improve compliance in providing this information.
- 1.23 A Witness Charter was also published in 2017, setting out the entitlements of, and standards of service for, witnesses of crime. It will be placed on a statutory footing soon when the necessary legislative mechanism becomes available.

The Attorney General for Northern Ireland

- 1.24 The Attorney General for Northern Ireland has been active in providing guidance on domestic abuse and stalking (and the definition of domestic abuse includes sexual violence); on co-operation and independence; on support for victims and witnesses and to the PPS generally, which includes guidance on making decisions in cases of violence against women, disclosure, delay, victims and witnesses, special measures and specialist training.²⁰

Public Prosecution Service

- 1.25 The Public Prosecution Service (PPS) established a Serious Crime Unit in 2016, which deals with serious sexual offences. The formation of the Serious Crime Unit in the PPS and the Public Protection Branch in the Police Service of Northern Ireland (PSNI) means that, there are clear dedicated staff in both organisations working on sexual offences.
- 1.26 These structures help to develop case strategy as a prosecution team, encompassing all aspects of the investigation and prosecution of the case. There is a greater emphasis now on collaborative working with the PSNI. All of the team have received extensive training in managing these cases.
- 1.27 The PPS policy on prosecuting cases of rape also sets out the responsibilities of the prosecutor at each stage of the prosecution process, including the test for prosecution. In respect of public interest, the policy notes: "If the Evidential Test is passed, whilst each case must be considered on its own merits and particular circumstances, rape is considered so serious that it is likely that prosecution is required in the public interest."²¹

20 Guidance by the Attorney General for Northern Ireland pursuant to Section 8 of the Justice (Northern Ireland) Act 2004 no 4 "Human Rights Guidance for the Public Prosecution Service"; no 7 "Human Rights Guidance for the Northern Ireland Courts and Tribunals Service; support for the victims and witnesses"; no 12 "Human Rights Guidance for the PSNI, PPS and Forensic Science Northern Ireland on Co-operation and Operational Independence"; no 13 "Human Rights Guidance for PSNI, PPS, the Probation Board for Northern Ireland and the Northern Ireland Courts and Tribunal Service on Domestic Abuse and Stalking".

21 Public Prosecution Service for Northern Ireland (2010) *Policy for Prosecuting Cases of Rape* Belfast: PPSNI

- 1.28 It also sets out the views and interests of the victim and the action to be taken if a victim withdraws support for the prosecution noting that:
- “Sometimes a victim will ask the police not to proceed any further with the case or will ask to withdraw the complaint or, where he/she has made a statement, indicate that they no longer wish to give evidence. This does not necessarily mean that the case will be stopped.”
- 1.29 The PPS, in joint working with the PSNI, has established dedicated Victim and Witness Care Units (VWCUs), which are staffed by PPS and PSNI staff who have access to both the PPS and PSNI information systems.
- 1.30 Victim and Witness Care Unit:
- Provide a dedicated case officer for each case to act as a single point of contact for victims and witnesses at all stages from receipt of the police investigation file through to the conclusion of court proceedings.
 - Will ensure that victims are informed of the progress of the case in which they are involved using, where possible, the victim’s preferred means of communication — for example, phone, email, letter and, where practicable, at their preferred time of day.
 - Will also conduct a three-tier needs assessment for each victim and witness at a key stage of the process. The initial assessment will be conducted when a file is received. An enhanced assessment will be conducted when a decision to prosecute is taken and the case is to be listed for trial. A final assessment will be conducted prior to the trial commencing.
- 1.31 The purpose of the assessments is to ensure that the particular needs of victims and witnesses are met as far as possible and to identify as early as possible whether a victim or witness may require the assistance of special measures to enable them to give their best evidence at court or other measures such as a witness anonymity order.
- 1.32 The PPS will ask the court to have regard to the availability of victims and witnesses when the court is fixing a date for trial. Victims and witnesses will be contacted by the VWCU and consulted about the dates they are available to attend court. A requirement to attend court will be sent to the victim and witnesses advising them of the dates that they are required to attend to give evidence.
- 1.33 The PPS has hosted a number of stakeholder events. For example during 2018 it delivered a “Connecting with the Community” event to explain its work and two events to explain its Sexual Offences Statistical Bulletin.

Police Service of Northern Ireland

- 1.34 The PSNI Public Protection Branch was established in April 2015. The branch is part of the crime operations department and is staffed by those having

responsibility for proactive and reactive investigations in relation to adult safeguarding, child sexual abuse and exploitation, child internet protection and e-safety, domestic abuse, rape crime and management of sexual and violent offenders.

- 1.35 The teams are based across Northern Ireland, with a majority attached to five public protection units, coterminous with the five Health and Social Care boundaries, to support effective partnership working and safeguarding. Rape Crime Units and Child Internet Protection Teams are not coterminous with Trusts. They provide a regional service.
- 1.36 Joint protocol investigations are carried out in partnership with social services in the areas of child abuse and adult safeguarding, together with social workers specialising in dealing with child sexual exploitation who are co-located within each of the units.
- 1.37 The PSNI/PPS Sexual Assault Advice Clinics assist in bringing about speedier outcomes for complainants of sexual violence and suspects. They are internal clinics attended by a senior PPS prosecutor and a detective sergeant from the child abuse investigation unit (CAIU) and rape crime unit (RCU) to obtain advice on prosecutions. The purpose is to identify those cases which have minimal prospect of meeting the test for prosecution, for police to obtain advice on cases and for the prosecution to take a prompt decision.
- 1.38 It results in a reduction in the resource requirement for police investigations in cases that are unlikely to meet the test for prosecution and aims to increase confidence levels.
- 1.39 The PSNI has also published a number of leaflets and guidance documents. *Sex & the Law* is a leaflet published in 2014 that provides information to adults and young people about what is meant by consent, matters concerning possessing/taking indecent images, legal ages for certain activity and who to contact if you are a victim or concerned about someone's behaviour.
- 1.40 Moreover the PSNI in conjunction with the Safeguarding Board for Northern Ireland have led on work relating to e-safety with a bespoke training program for primary school age, post-primary school age and parents centring on risks of online activity. There has also been training for student teachers and inter faith groups.
- 1.41 For the past number of years, the PSNI has delivered the "Without Consent it is Rape" campaign to secondary schools, presented by the RCU and uniformed officers. The campaign was also distributed to the wider public through social media and is available on the PSNI website.
- 1.42 The PSNI has partnered with a number of sexual support agencies to develop a campaign to raise awareness and understanding of the issues of sexual crime and the topic of consent. The first phase, which will be targeted at young

adults aged 16–28, commenced in October 2018. The strapline that there is ‘No Grey Zone’ underpins the campaign, which will seek to reach audiences through social and mainstream media channels. This campaign has already been supported and adopted by a number of local council areas.

- 1.43 The RCU provides an information pack to all victims, containing various leaflets from Nexus NI, Victim Support NI and The Rowan centre etc. They also provide a leaflet that explains to victims the pathway they will follow after making a report to the police. This leaflet contains the telephone numbers of several organisations that can provide support.
- 1.44 The PSNI has led a project in relation to sex workers and introduced sex worker liaison officers to build confidence in reporting incidents where sex workers have been the victims of crime.
- 1.45 The PSNI also sits on the Regional Rape Working group across the UK, the National Regional Research Group, the Safeguarding Board for NI and are actively involved in advocacy services for victims through Victim Support NI and ISVA Steering Group. The PSNI co-fund the Rowan Sexual Assault Referral Centre.
- 1.46 The Service takes the training of officers very seriously in relation to serious sexual offences. The Review team attended two training courses. One was a foundation course for student police officers, focusing on the role of police when responding to reports of rape and other serious sexual offences. Addresses were given by Nexus NI on the work of that organisation, and the work of a registered psychotherapist, Zoe Lodrick, who specialises in sexual trauma. We were struck by the enthusiasm and the knowledge of the student officers, who clearly had prepared well for the course.
- 1.47 Detectives are given training in the Initial Crime Investigators Development Programme, with input from the Public Protection Branch specifically dealing with sexual offence investigations involving adults.
- 1.48 Qualified police officer trainers with experience of duties in a RCU and CAIU deliver specialist detective training to detective constables, detective sergeants and detective inspectors with the RCU who investigate serious sexual assaults.
- 1.49 The PSNI also provides a Specialist Child Abuse Investigator Development Programme covering both alleged sexual and physical assault. That course runs over a ten day period and also includes a helpful presentation by Nexus NI. Completion of this training course results in professional accreditation on a national database. Completion of continuous professional development is necessary to maintain the accreditation. The Specialist Sexual Assault Investigative Development Programme focuses on rape and sexual assault. Input from external agencies e.g. Nexus NI and PPS are involved. PSNI also work collaboratively with such groups as Disability Research on Independent Living and Learning.

Government strategies

- 1.50 The Department of Justice (DoJ) became responsible for the legislative and policy framework for the justice system in April 2010. The Department has taken a number of important steps in the area. The undermentioned is by no means an exhaustive list, but includes the following:
- First, the five-year victim and witness strategy, *Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime*, was published in 2013 along with a two-year and three-year action plan.
 - That strategy, including the new three-year Victim and Witness Action Plan 2017–20, sets out a range of steps to improve the experience of victims and witnesses moving through the criminal justice system, including the introduction of the Victim and Witness Charters, use of registered intermediaries (RIs), the Victim and Witness Care Unit, the PPS Serious Crime Unit and the Rowan Sexual Assault Referral Centre.
 - The current plan includes legislation to reform the committal process, rolling out the Indictable Cases Pilot, the RI schemes to Magistrates' court, evaluating the work of the Independent Sexual Violence Advocates (ISVAs), undertaking work to reduce victim/witness waiting time at court, reviewing the work of the Serious Crime Unit, use of special measures including a registered intermediary, and the rolling out and expanding the work of the Victim Information Portal.
 - Under the five-year strategy, the work would include obtaining the views of victims and witnesses about their experience of the criminal justice system and using this to review and improve the services.
 - The Department of Justice has undertaken programmes of qualitative research into the experiences of young victims of crime within the criminal justice system.
 - A paper relating to research into the experiences of victims of sexual violence and abuse was published in November 2015. A Sexual Violence and Abuse Action Plan was developed by the DoJ as a result of this research.
 - This tied in with the PPS publishing an updated victim and witness policy in 2017 that included details of the service's approach to meeting the needs of vulnerable and intimidated witnesses.
- 1.51 A seven-year strategy, "Stopping Domestic and Sexual Violence and Abuse in Northern Ireland", was published in March 2016 by the then Health and Justice Ministers. The strategy is intended to tackle both domestic and sexual violence and abuse as well as having a society in Northern Ireland in which domestic and sexual violence is not tolerated.
- 1.52 Action plans have been published yearly since 2016/17, with the most recent year 3 action plan published in August 2018.

- 1.53 A number of procedural changes are under way, including the Indictable Cases Process, which began a rolling single phase implementation on 2 May 2017 across all regions and districts for four offence types, which sadly does not include serious sexual offences.
- 1.54 Proportionate forensic reporting across all forensic classifications has been implemented, including biology, which is most closely associated with sexual offences. This project commenced in May 2016 and completed in August 2017. A Terms of Reference was initiated between Forensic Science Northern Ireland (FSNI) and Public Protection Branch in 2017. PSNI have taken on further processes to promote and enhance forensic opportunities for every rape case.
- 1.55 The cybercrime unit, in collaboration with the PPS, has introduced proportionate forensic reporting for certain cases requiring cyber evidence.
- 1.56 A pilot scheme for Belfast District Electronic Support Unit and the Child Internet Protection Unit was launched on 1 May 2018. Work is under way to roll out proportionate forensic reporting across all cyber support units.
- 1.57 The problems facing the department were highlighted in a Criminal Justice Inspection Northern Ireland (CJINI) report, which provided a thematic inspection of the handling of sexual violence and abuse by the criminal justice system in Northern Ireland.²²
- 1.58 Various reports have emanated from the CJINI report. For example, in 2013 it concluded that many of the issues arising in the investigation and prosecution of sexual violence and abuse would need to continue to be a priority for the criminal justice system, particularly the PSNI and the PPS, noting a specific need to focus on attrition rates and victims.²³ The topic of sexual violence and abuse is a priority for CJINI.
- 1.59 CJINI looked at the issues relating to victims in 2011 and highlighted in its report the care and treatment of victims and witnesses in the criminal justice system in Northern Ireland.²⁴ It published a further report on the use of special measures in the criminal justice system in Northern Ireland in April 2012.²⁵
- 1.60 It provided a follow-up report on the care and treatment of victims and witnesses, incorporating the use of special measures in 2015 and noted the

22 Criminal Justice Inspection Northern Ireland (2010) *Sexual Violence and Abuse: a thematic inspection of the handling of sexual violence and abuse cases by the criminal justice system in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

23 Criminal Justice Inspection Northern Ireland (2013) *Sexual violence and Abuse: A follow-up review of inspection recommendations* Belfast: Criminal Justice Inspection Northern Ireland

24 Criminal Justice Inspection Northern Ireland (2011) *The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

25 Criminal Justice Inspection Northern Ireland (2012) *The use of special measures in the criminal justice system in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

considerable progress that had been made in relation to services for victims and witnesses, with 96% of recommendations having been achieved.²⁶

- 1.61 A report in November 2015 from CJINI found significant failings in terms of the quality of case files and the timeliness of their submission to the PPS from the PSNI although this was not a finding confined only to sexual crime offences.²⁷ As a result, the PSNI and the PPS have taken forward a joint project of work based on those recommendations. A further report from CJINI was published in November 2018 and references to that report are found in the succeeding chapters of this Review.²⁸
- 1.62 The Speeding up Justice Programme has led to the Indictable Cases Process and proportionate forensic reporting as indicated above.
- 1.63 In recent years the Department of Justice has also liaised extensively with partners who represent what might be considered ‘minority groups’ or ‘hard-to-reach/ seldom heard’ groups. This is through public consultation as well as ongoing and proactive engagement under the Stopping Domestic and Sexual Violence and Abuse in Northern Ireland strategy and associated governance arrangements.

Future developments

- 1.64 There are still pieces of work being carried out by the DoJ and its criminal justice partners in relation to sexual offences and services to victims and witnesses. These include:
- pre-recorded cross-examination is to be introduced;
 - considering the provision of a streamlined advocacy support service;
 - a review of sentencing policy to consider victims’ understanding of the sentencing process;
 - introduction of a statutory case management scheme and work is continuing towards the implementation of the remaining sections of the Justice Act (Northern Ireland) 2015, including sections as they relate to committal proceedings;
 - committal reform to be implemented by April 2019, subject to the legislation being passed;
 - currently, a public consultation of the law on child sexual exploitation and sexual offences against children is being carried out following the report of

26 Criminal Justice Inspection Northern Ireland (2015) *The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland, incorporating the use of special measures* Belfast: Criminal Justice Inspection Northern Ireland

27 Criminal Justice Inspection Northern Ireland (2015) *An inspection of the quality and timeliness of police files (incorporating disclosure) submitted to the Public Prosecution Service for Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland.

28 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A thematic inspection of the handling of sexual violence and abuse cases by the criminal justice system in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

the *Independent Inquiry into Child Sexual Exploitation in Northern Ireland* (the Marshall Report) and a *Report on Justice in the 21st Century: Innovative Approaches for the Criminal Justice System in Northern Ireland*; and

- consideration of section 5 of the Criminal Law Act (Northern Ireland) 1967.

Other agencies

- 1.65 Outside the DoJ, a considerable amount of help is open to those who have suffered as a result of serious sexual offences. The help includes, for example:
- Nexus NI, which is the trading name for the organisation also registered as the Northern Ireland Rape Crisis Association. Hence, although the Rape Crisis and Sexual Abuse Centre no longer has a presence in Northern Ireland, that service is arguably not strictly necessary given developments within Nexus NI and the partnership by groups representing victims developing a regional rape crisis service.
 - Training for the volunteers in that organisation has started, although interaction with victims/complainants did not start until December 2018, when the training was completed.
 - Women's Aid Federation Northern Ireland provides a 24-hour domestic and sexual violence helpline. The organisation is sending more people affected by sexual violence for specialist counselling.
 - Victim Support NI, which provides familiarisation visits to courts for the victim. All staff and volunteers undergo internal core learning, which is accredited to Open College Network (OCN) level 3 standard. This training has been designed to meet the Skills for Justice National Occupational Standards for working with victims and survivors. The organisation adopts the World Health Organisation's psychological first aid model, which is a trauma-informed model designed to support individuals in the immediate aftermath of a significantly stressful event or crisis. Staff and volunteers undertake ongoing training and development throughout their time with the organisation, including applied suicide intervention skills training (ASIST), accompanying officer training (accredited to OCN level 3), mental health training, safeguarding and sexual and domestic violence awareness.
- 1.66 Victim Support NI successfully obtained funding from Comic Relief and the Department of Justice in 2016 to create Northern Ireland's first two Independent Sexual Violence Advocates (ISVAs). The programme was originally established as a three-year pilot.
- 1.67 The ISVAs provide an informative non-judgmental support service to victims who have already engaged with the police or the criminal justice system, or those who are thinking of reporting their crime. The service is also available to those with complex advocacy needs and those at risk of further violence.

- 1.68 There are currently only two ISVAs. Both have received specialist ISVA training through Lime Culture, which is one of the UK's leading training and development organisations for sexual violence.
- 1.69 ISVAs also undertake specialised ISVA training, accredited by NCFE (a national awarding organisation and registered educational charity), which focuses on the core skills and competencies required for ISVAs and designed to meet the Skills for Justice National Occupational Standards relevant for ISVAs.
- 1.70 The ISVAs have had 763 referrals for their service to the end of September 2018. Over the last ten months to January 2019, the ISVAs have carried an average case load of 178 between them.
- 1.71 The Stern Review in 2010 identified 'unanimous praise' for the work of ISVAs, noting that they can have a particularly strong role in supporting victims aged under 18 through the process. Stern reported that ISVAs are 'effective, cost-effective and affordable'.²⁹ Research in 2009 found that complainants identified the support of ISVAs as essential to their recovery.³⁰
- 1.72 The Men's Advisory Project exists to offer males who are the victims of sexual assault support and assistance.
- 1.73 The Rowan centre is the regional Sexual Assault Referral Centre (SARC) for Northern Ireland. The service, which opened in 2013, is jointly funded, managed and governed by the Department of Health and the Police Service of Northern Ireland.
- 1.74 Staff at the Rowan deliver a range of support and services 24 hours a day, 365 days a year to children, young people, women and men who have been sexually abused, assaulted or raped, whether this happened in the past or more recently.
- 1.75 The Centre provides victims of crime with a comprehensive and coordinated package of care to promote recovery and well-being. The Centre itself also has facilities for a high standard of forensic examinations and other methods of collecting evidence including Achieving Best Evidence (ABE) interviewing suites.
- 1.76 Self-employed Registered Intermediaries, of whom there are currently 27 with a further eight being recruited, are available and are communication specialists who can help vulnerable persons to give evidence to the police or at court if they have significant communication difficulties.
- 1.77 From May 2013 to March 2018, there have been just over 2,000 requests from all users — the PSNI, the PPS and defence practitioners. In 2017/18, 81.0% were requested by the PSNI, 9.5% by the PPS and 8.5% by solicitors.
- 1.78 Registered intermediaries tend to be used mostly in cases involving young children or those with learning disabilities. In terms of offence type, the largest

29 Stern, V. (2010) *The Stern Review: a report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* London: Government Equalities Office and the Home Office

30 Robinson, A. (2009) *Independent Sexual Violence Advisors: A process evaluation* Cardiff: University of Cardiff

category is sexual offences, with 40% of requests for this crime type. Using communication aids such as alphabet boards is usual.

- 1.79 The DoJ funds the provision of support services at court through Victim Support NI and the National Society for the Prevention of Cruelty to Children (NSPCC) Young Witness Service. These services include support for witnesses (trained staff from the witness service) for adult witnesses, and the Young Witness Service (for witnesses under 18).
- 1.80 Court familiarisation visits with trained staff from Victim Support NI for adult witnesses or from the NSPCC for witnesses who are under 18 will provide a tour of the court buildings and explain the court process. They will also point out the appropriate court facilities in terms of waiting rooms and entrances.
- 1.81 In this context, I also mention the Safeguarding Board for Northern Ireland, established in 2012, which is underpinned by the Safeguarding Board Act (Northern Ireland) 2011. This places a statutory duty on member agencies, including the PSNI, to cooperate with one another and to make arrangements to safeguard and promote the welfare of children.
- 1.82 There are several subgroups and panels, including a Child Sexual Exploitation subgroup, which has organised media campaigns and supported performances in schools and youth forums to raise awareness of child sexual exploitation.

Conclusion

- 1.83 Accordingly, despite the flaws outlined in the course of this Review, it would be a mistake on the part of the public to think that nothing has been done or is being done to change the face of the law and procedures relating to serious sexual offences. It is a complex and difficult task, and this Review is but one more voice in the chorus crying out for change.

Responses

- 1.84 Relevant to this chapter was the response of the Northern Ireland Women's European Platform (NIWEP).³¹ NIWEP's core objectives involve raising awareness and promoting implementation of key international human rights treaties and initiatives, including the Convention on the Elimination of All Discrimination against Women (CEDAW) as well as UN Security Council Resolution 1325, which acknowledged the disproportionate and unique impact that armed conflict has on women and girls. It highlights the link between sexual and gender based violence and Northern Ireland's past. Existing evidence indicated

31 NIWEP is a membership organisation of women's NGOs in Northern Ireland. It is the Northern Ireland link to the European Women's Lobby, the EU's expert body on women's rights and gender equality. NIWEP's core role is to ensure the voice of women in Northern Ireland is heard at the national and international level. It represents the Northern Ireland Women's Sector at the UN, as an NGO with special consultative status.

to them that this issue continues to affect women and that women in these circumstances may remain reluctant to seek redress in Northern Ireland.

- 1.85 Of importance it noted the UK being examined by the CEDAW Committee in February 2019 and “both the Review and the events leading up to the Review will be highlighted in the shadow report being submitted by NIWEP on behalf of the women’s sector in Northern Ireland.”

Chapter 2

The voice of complainants

*But the most beautiful of all doubts
Is when the downtrodden and despondent raise their heads and
Stop believing in the strength
Of their oppressors.*

**Bertolt Brecht
"In Praise of Doubt"**

Issue

Has the criminal justice system failed complainants and do the present law and procedures afford them a fair trial process in serious sexual offences?

Background

- 2.1 Nomenclature is always important and difficult in this sensitive field. The legal process demands that a person complaining of a serious sexual offence is a 'complainant' or 'alleged victim'. The accused person is innocent until proved guilty and is therefore described as an 'accused'. Hence, this is the nomenclature that I have largely observed throughout this Review in an attempt to forge a mutually fortifying congruence between what the language means to say and what it actually expresses.
- 2.2 Of all the experiences I had personally interviewing many individuals for the purpose of this Review, the most harrowing were the meetings with those, males and females, who had volunteered bravely to share their experiences of the criminal justice system with me and the Review team. These were not self-pitying narratives. Virtually without exception these people, some of whom were often living lives of quiet desperation, justifiably felt they had been let down by our criminal justice system.
- 2.3 Some had delayed for many years before reporting. This reflected the substantial under-reporting of these crimes. Some, having reported the matter to the police, had withdrawn from the process reflecting examples of the high attrition rate. Some had gone through the full daunting process until verdict. All expressed grave disquiet about disparate aspects of the current law and procedures.
- 2.4 The response to the Preliminary Report from Victim Support NI referred to their staff and volunteers time and time again encountering individuals who were disillusioned with or mistrustful of the justice system. That body summarised the position well when it stated:
- "Some victims testify to the fact that nothing would convince them to report sexual crime with the system as it stands and they reference the public image of the criminal justice system. Others, who do report the crime, speak of the

delays they face, how their lives have been put on hold and how, when the trial finally happens, they feel they have not been given the opportunity to give their best evidence and have had their lives paraded publicly causing them shame and despair.”

- 2.5 The complainants I met swooped at their subject from unexpected angles — a cubist portrait of the whole experience. Aflame with a sense of injustice, they remained burdened with the thought that the criminal justice system had been in many instances a source of creative malice. The secondary victimisation experienced by many of these complainants was clear to me from the outset.
- 2.6 Each of those complainants were given two promises. First, we would not re-traumatise them by discussing the details of those assaults to which they had been subjected, save to identify the generic nature of the attack alleged.
- 2.7 Secondly, nothing would be reported in this Review that would serve to identify them. Save where they chose to identify themselves, I neither learned nor sought their surnames or any other identifying feature. I promised them all strict confidentiality.¹
- 2.8 The narrative that emerged echoed precisely what we discovered in the literature worldwide which we researched surrounding such experiences and in the lengthy exchanges I had with victims’ groups.²
- 2.9 The wisdom in meeting them was to observe the subtle expansion of the lens from that of their own despair to a systemic and devastating criticism of the system which currently underlies our laws and procedures.
- 2.10 I have at all times in this Review been conscious of what the UN noted in 1999.
- “Victims should be supported in their efforts to participate in the justice system through direct and indirect means; timely notification of critical events and decisions, provision in full of information on the procedures and processes involved; support of the presence of victims at critical events; and assistance when there are opportunities to be heard.”³

1 (i) The Gillen Review cannot provide a third party/media with personal data/information/confidential contributions- to do so would be a breach of confidence and/or privacy and/or data rights.

(ii) There is/are no exemptions under GDPR that would permit disclosure of the personal/special personal data as identified above.

(iii) There is no/no sufficient public interest in the public disclosure of information provided/recorded by the Gillen Review. The disclosure of information provided to the Gillen Review would be contrary to the public interest- i.e. the public interest in public confidence relating to independent reviews and the “chill” effect on contributions to such reviews if confidences are broken. The right to freedom of expression is engaged but this right has to be balanced against the data, privacy and confidentiality rights of contributors as identified above.

(iv) The Gillen Review is not subject to the FOIA because it is not a public authority for the purposes of the Act – **section 3 and Schedule 1 FOIA.**

2 Including Victim Support NI, Women’s Aid Federation Northern Ireland, Nexus NI, the Men’s Advisory Project (MAP), One in Four Ireland, Independent Sexual Violence Advocates (ISVAs) in terms of challenges that victims have raised with them and discussions at the Rowan Sexual Assault Referral Centre.

3 United Nations Office for Drug Control and Crime Prevention (1999) *Handbook on Justice for Victims*. New York: Centre for International Crime Prevention. p. 34.

International Standards

- 2.11 Participation in legal and administrative procedures for a complainant in a serious crime may lead to secondary victimisation. UN Human rights standards require that State Parties take the necessary measures and special protections to avoid “re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”⁴ An EU Directive recognises that victims of gender-based violence are particularly susceptible to secondary and repeat victimisation and requires that Member States ensure that measures are available to protect such victims.⁵
- 2.12 The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) identifies that all measures to provide protection and support to victims should be with the aim of preventing secondary victimisation.⁶
- 2.13 The UN Declaration on the Elimination of Violence against Women requires States to ensure that:
- “...the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.”⁷
- Similarly the UN Committee against Torture requires that:
- “Judicial and non-judicial proceedings shall apply gender sensitive procedures which avoid re-victimisation and stigmatisation of victims of torture or ill treatment”.⁸
- 2.14 The Lanzarote Convention requires that the State Party adopt a protective attitude towards child victims:
- “ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate”.⁹

Statistics

- 2.15 PSNI have recorded that the number of rape offences reported increased by around 11% — or 108 offences — in Northern Ireland from January 2018

4 UN Committee Against Torture (CAT), *General Comment no.3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Implementation of Article 14 by State Parties* 13 December 2012, Para 21

5 European Union: Council of the European Union, *Directive 2012/29/EU of the European Parliament and the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* 14 November 2012

6 Council of Europe *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* November 2014, Article 18 (3)

7 UN General Assembly, *Declaration on the Elimination of Violence against Women* 20 December 1993, A/RES/48/104

8 UN Committee Against Torture (CAT), *General Comment no.3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Implementation of Article 14 by State Parties* 13 December 2012, Para 33

9 Council of Europe, *The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* 12 July 2007

to December 2018, compared to the preceding 12 months.¹⁰ In the 2017/18 financial year there were 967 rapes reported and in 112 (11.6%) of these, the victim was male. In 2017/18 there were 2,476 other sexual offences reported, of which 2,350 had a person victim.¹¹ Males accounted for 25.1% (589) of victims.¹²

- 2.16 As in England and Wales, the number of rapes reported to the PSNI has shown an increasing trend since 2000/01, with the level recorded in 2017/18 (967) over four times that recorded in 2000/01 (232). There was a 17.8% increase in the number of rapes reported between 2016/17 and 2017/18. The increase in the number of rape offences during 2014/15 may in part be due to clarification received from the Home Office in relation to the redefinition of consent in the Criminal Justice (Northern Ireland) Order 2008.
- 2.17 The number of rape recorded crimes for male victims has remained fairly steady over the last three years. Rapes with a male victim make up 11.6% of rape recorded crimes in 2017/18.
- 2.18 The figures for historic sexual offence cases suffer from a dearth of consistent figures.
- 2.19 Sexual abuse and rape has more recently been associated with intimate partner violence, with approximately one-third to one-half of abused women reporting it.¹³ The PSNI data for 2017/18 shows that there were 675 sexual offences with a domestic motivation and accounts for 19.6% of all sexual offences. In 2017/18, offences of rape with a domestic abuse motivation accounted for 29.4% (284) of all rape offences recorded by the police.¹⁴
- 2.20 Sexual offences and offences with a domestic motivation are thus an increasing proportion of the work of the criminal justice system.
- 2.21 A review of rape and sexual assault by penetration cases¹⁵ reported to the police from 1 April 2017 to 30 September 2017 revealed the following background

10 Police Service of Northern Ireland (2019) *Police Recorded Crime in Northern Ireland: Update to 31 December 2018* Belfast: PSNI

11 State based crimes and crimes where the victim was a police officer on duty are not included. Much of the difference in 2017/18 between sexual offences recorded crime totals and those with a person victim relate to offences of exposure and attempted offences within classification 88A Sexual Grooming.

12 Police Service of Northern Ireland (2018) *Police Recorded Crime Statistics in Northern Ireland 1998/99 to 2017/18* Belfast: PSNI and information provided by PSNI

13 Yllö, K. and Torres, M. G. (2016) *Marital Rape: Consent, Marriage and Social Change in Global Context*. Oxford: Oxford University Press

14 Police Service of Northern Ireland (2018) *Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2017/18* Belfast: PSNI

15 Information provided by PSNI and correct as at 2nd October 2018 but may be subject to change.

findings, based on the information gleaned from 566 incidents where there were 546 victims and 410 identified suspects:

	Victim	Suspect
Total	546	410
Age range	2 to 88	5 to 73
Under 18	219 (40%)	81 (20%)
Over 60	16 (3%)	15 (4%)
Mental health condition/vulnerability	218 (40%)	74 (18%)
Had consumed alcohol	197 (36%)	133 (32%)
Had taken drugs	42 (8%)	22 (5%)
10% of victims were male		
31% of incidents were reported to police within 24 hours of the incident occurring		
35% of incidents reported to police were 'historic' in that they were more than one year old prior to being reported		
47% of reports to police were made by the victim while 53% were reported by a third party		
Of reports made by a third party:		
<ul style="list-style-type: none"> • 33% were made by social workers • 26% were made by a relative of the victim • 17% were made by friends of the victim • 16% were made by healthcare professionals • 7% were made by other police officers or counsellors 		
Within the incidents reported, there were 17 repeat victims		
90% of suspects were known to the victim either as an acquaintance, family member or intimate partner at the time of the alleged offence		

2.22 The PPS published a bulletin in October 2018 regarding statistics on sexual offences during the 2017/18 financial year.¹⁶ These figures included the following:

- The PPS received a total of 1,587 files involving a sexual offence. This was an increase of 21.0% on 2016/17 (1,312). There was a rise of 34.2% in the number of files received involving a rape offence, from 395 to 530.
- Files received included a total of 1,700 suspects, 567 of whom were charged or reported for rape (an increase of 36.6% on 2016/17) and 1,133 for other sexual offences (an increase of 15.1%).
- A total of 1,478 information requests were submitted to police during 2017/18 in relation to cases involving a sexual offence, an increase of 11.1% on 2016/17 (1,330).
- 1,652 prosecutorial decisions were issued by the PPS in respect of suspects in cases involving sexual offences. The evidential test for prosecution was met in relation to a sexual offence in 23.2% of decisions, which included 351 decisions for prosecution and 32 for diversion from the courts. At

23.2%, the percentage of decisions meeting the test in relation to a sexual offence represents a reduction on 2016/17 (34.7%).

- Of the 1,212 decisions for no prosecution, the vast majority (97.0%) did not pass the evidential test. The remaining 3.0% did not pass the public interest test.
- Indictable prosecution decisions (prosecution in the Crown Court) in respect of sexual offences were issued in an average of 285 calendar days (229 days in 2016/17). Summary prosecution decisions (prosecution in the Magistrates' or youth courts) required an average of 87 days (70 in 2016/17).
- 224 defendants were dealt with in the Crown Court in relation to sexual offences. The overall conviction rate was 63.8% compared with 73.8% in 2016/17.
- 60 defendants were dealt with in the Crown Court for an offence of rape and 45.0% of these were convicted of at least one offence (that is, any offence). Approximately one in six defendants (15.0%) were convicted of an offence of rape.

Table showing Defendants Dealt with in the Crown Court¹⁷

		13/14	14/15	15/16	16/17	17/18
Rape	Convicted of rape	21.5%	31.0%	25.7%	23.4%	15.0%
	Convicted of any offence	49.4%	65.5%	65.7%	57.8%	45.0%
Sexual Offences Excluding Rape	Convicted of at least one sexual offence (excluding rape)	63.3%	71.3%	73.3%	72.9%	62.8%
	Convicted of any offence	71.7%	74.3%	80.2%	78.8%	70.7%
All Sexual Offences	Convicted of at least one sexual offence	59.2%	68.9%	71.3%	67.4%	56.7%
	Convicted of any offence	66.1%	72.0%	76.5%	73.8%	63.8%

2.23 A 2007 report from the UK government¹⁸ states that fewer than 6% of rapes reported to the police result in an offender being convicted of this offence. Some measure of caution must be entered here about this figure as the data represented relates to a UK wide action plan on sexual violence and abuse in 2007 and may not necessarily therefore reflect current figures.

2.24 I can deduce the following from these figures:

- The eventual conviction rate for sexual offences from time of reporting is very low especially in cases of rape.
- The number of suspects on files received by the PPS for sexual offences has increased year on year.

17 Information provided by PPS. Please note 2013/14 and 2014/15 figures have not been published as official statistics and are based on management information data contained within the PPS Case Management System.

18 HM Government (2007) *Cross Government Action Plan on Sexual Violence and Abuse* London: HM Government

- The proportion of these suspects that police recommend prosecution for has been decreasing, from 46.5% with a prosecution recommendation in 2015/16 to 41.2% in 2017/18.¹⁹
 - The number of decisions issued for suspects for a sexual offence has increased.
 - The number of decisions issued for no prosecution has increased. The proportion of those being prosecuted on indictment for sexual offences has shown a decline.
 - The conviction rate for defendants dealt with in the Crown Court for sexual offences has also dropped. This includes convictions for any offence, not specifically related to a sexual offence.
- 2.25 Recent figures from the CPS in England and Wales revealed that the number of rape charges had fallen by 23.1%, the lowest in a decade, despite a rise in reports of rape to police.²⁰ The CPS charged 849 fewer defendants in 2017/18 than in the previous year according to the service's annual Violence Against Women and Girls (VAWG) report.²¹
- 2.26 The fall in charging is related to a drop in cases being put forward by the police. Police referred 9.1% (599) fewer rape cases in 2017/18, which contributed to the fall in the number of the accused charged. The figures show the charging rate, the proportion of cases referred by police that lead to charges from prosecutors, fell by 8.6 percentage points to 46.9%. This is the lowest recorded rate since 2010/11, when it was 41.7%.
- 2.27 The number of cases 'administratively finalised', when cases are dropped by police at an early stage following consultation with the CPS, jumped by 71.7% to an all-time high, with more than a fifth (21.7%) of pre-charge decisions for rape being "administratively finalised".
- 2.28 These figures emerged in the wake of allegations made in *The Guardian* newspaper, firmly denied by the CPS, that prosecutors in England and Wales have been quietly urged in training seminars to take a more risk-averse approach in rape cases to help stem widespread criticism of the service's low conviction rates.²²

19 Public Prosecution Service for Northern Ireland (2018) *Statistical Bulletin: Cases Involving Sexual Offences 2017/18* Belfast: PPSNI and Public Prosecution Service for Northern Ireland (2018) *Statistical Bulletin: Cases Involving Sexual Offences 2016/17* Belfast: PPSNI

20 Please note that Public Prosecution Service conviction data for rape in Northern Ireland includes substantive offences only while conviction data for the Crown Prosecution Service in England and Wales includes attempts etc. It should also be noted that a rape flag is applied to CPS files from the start of the case following an initial allegation of rape. This flag remains in place even if the decision is taken to charge an offence other than rape, or where a rape charge is subsequently amended. Therefore not all defendants in CPS data will be in court specifically for rape whereas all defendants in PPS data will be.

21 Crown Prosecution Service (2018) *Violence against women and girls Report 2017/18* London: Crown Prosecution Service

22 Barr, C. and Pegg, D. (2019) "Rape prosecution rate in England and Wales falls to five-year low" *The Guardian*. Wednesday 6 March

- 2.29 The conviction rate in 2017/18 in rape-only trials in England and Wales involving 18-24 year old men was 31.6%. The number of successful prosecutions against men aged 25-59 was much higher, at 45.6%. In the past five years, the conviction rate for 18-24 year old men who stood trial in rape-only cases has not risen above a third. Of the 1,343 rape-only cases the CPS has taken against young men, only 404 were convicted, an average of 30.1%. The conviction rate for 18-24 year olds in all rape cases, including those involving child abuse and domestic abuse, stood at 35.0% in the five years to 2017/18. However, the conviction rate in the same types of cases for men aged 25-59 was significantly higher, 48.5%.²³
- 2.30 Interestingly, these developing figures are not echoed in Northern Ireland although our figures for comparison purposes are very small and relate to a three-year period.
- 2.31 In Northern Ireland for male defendants dealt with during 2015–17, based on those where any of the offences was rape,²⁴ the conviction rate for rape for 18–24 year olds was 23.5% compared with 15.8% for 25–59 year olds.
- 2.32 The number of 18–24 year old males dealt with for rape (34) is much lower than those males aged 25–59 (101). Figures for 18–24 year old males make up 19.1% of those dealt with for rape while 25–59 year old males make up 56.7%.
- 2.33 It is of interest to note that in Ireland the Minister for Justice and Equality has announced in January 2019 that the Department of Justice and Equality signed a Memorandum of Understanding with the Central Statistics Office on the undertaking of a comprehensive national survey on the prevalence of sexual violence in Ireland. The signing follows the Government’s decision in November 2018 to carry out a major survey to look in detail at the experience of women and men of sexual violence and ensure that policy is better informed by contemporary and robust data. It is intended that the survey will be repeated every decade to see how these experiences are changing over time.
- 2.34 It is one of my recommendations that the Department of Justice in Northern Ireland should carry out a similar survey across Northern Ireland on the prevalence of sexual violence.

Under-reporting

- 2.35 Sexual offences have historically been a significantly under-reported crime. There is reportedly substantial under-reporting of these crimes on a scale few of us fully appreciate. Individuals, males and females alike, do not report the incident.

23 CPS FOI Release 18 (21/09/18) *Number of contests for rape flagged cases – additional data to Disclosure 17 - Attachment*

24 Information provided by DoJ and relates to substantive versions of the offence only.

The Office for National Statistics in February 2018 published 'Sexual Offences in England and Wales' and looked at this issue. Those who had experienced rape or assault by penetration (including attempts) since the age of 16 were asked who they had personally told. Nearly one third of victims (31%) had not told anyone about their most recent experience, while 58% told someone they knew personally and 30% told someone in an official position. Only around one in six (17%) had told the police.²⁵

- 2.36 Men are even less likely to report rape, with only around 4% of male complainants likely to report rape.²⁶ Men may be less likely to report for fear of being disbelieved, blamed and exposed to other forms of negative treatment.
- 2.37 The statistics branch of the PSNI advised their analysts do not hold any statistics on the under-reporting of sexual offences. We sought statistics from the PPS and the Department of Justice but none were held. This is a gap that needs to be filled in Northern Ireland. Nonetheless, it is likely that there have been increases in reporting to the police similar in proportion to that in England and Wales²⁷ and thus the percentages in paragraph 35 above have probably increased to some extent.
- 2.38 The increases in sexual offence recorded crimes do not mean, of course, that more sexual offences are being committed. Increased reporting is an encouraging sign that more complainants are prepared to come forward, that there is greater public understanding and that the system is increasingly approachable. Moreover the increase in police recorded sexual offences is thought to reflect also an improvement in the recording of sexual offences.
- 2.39 However, an organisation providing counselling for complainants and who served on the Review's advisory panel asserted at the same time that its workload had increased by 50%.²⁸ Nexus NI supports people from aged eight and above due to a rising demand.

25 For those that doubt the sincerity of those who have not reported to the police, I recommend reading Roxane Gay's anthology, "Not that Bad: Dispatches from Rape Culture", published by Allen & Unwin. A detailed critique of my Preliminary Report was published on the blog entitled, "The Illustrated Empathy Gap". It challenged the degree of under-reporting and insisted that recent data had not been used. I found no data more recent in his critique or in my research than the 2018 ONS statistics cited above.

26 Pino, N. and Meier, R. (1999) "Gender differences in rape reporting" *Sex Roles* 40 (11-12): 979-990 cited in Spruin, E and Reilly, L. (2018) "An exploration into the acceptance of male rape myths within the UK." *Journal of Forensic Sciences and Criminal Investigation*, 9 (3).

27 The Northern Ireland crime survey currently only asks a respondent about sexual offences in a domestic context. The CJINI thematic inspection of the handling of sexual violence and abuse cases by the criminal justice system in Northern Ireland (November 2018), records at paragraph 1.7 that "In Northern Ireland there has likely been a similar increase in reporting in response to the high-profile cases reported on across the UK and the Historical Institutional Abuse Inquiry in Northern Ireland....It is difficult therefore to estimate the true nature of sexual offences and it is clear that there will always be victims who do not wish to report offences to the police, either at the time of offence or indeed ever in their lifetime."

- 2.40 In December 2018 an official statistics bulletin²⁹ was produced by the Office for National Statistics, working in collaboration with the Home Office, Ministry of Justice and Crown Prosecution Service. It provides information on the prevalence and nature of sexual assault from the Crime Survey for England and Wales (CSEW) and the journey of the victims, offences and offenders through the criminal justice system. It provides an update to *'An Overview of Sexual Offending in England and Wales'* which was published in 2013, which brought together for the first time a range of official statistics across the criminal justice system.
- 2.41 Based on combined data from the CSEW in 2015/16, 2016/17 and 2017/18, it is estimated that of adults aged 16 to 59, 3.4% of females and 0.9% of males had experienced sexual assault (including attempts) in the previous 12 months. This represents around 700,000 adults being complainants of sexual offences (around 560,000 females and 140,000 males) on average per year.
- 2.42 These experiences span the full spectrum of sexual offences, ranging from the most serious offences of rape and sexual assault to other sexual offences such as indecent exposure and unwanted touching. The vast majority of incidents reported by respondents to the survey fell into the 'other sexual offences' category.
- 2.43 For the year ending March 2016 to year ending March 2018 CSEW, approximately 100,000 adults aged 16 to 59 experienced rape or assault by penetration. It was estimated that 0.5% of females and 0.1% of males report being a victim of the most serious offences of rape or sexual assault by penetration (excluding attempts) in the previous 12 months.
- 2.44 CSEW records that 7.7% of females aged 16 to 59 reported in the 2017/18 survey that they had experienced rape or penetration (including attempts) since the age of 16. This increased to almost one in four (24.4%) females aged 16 to 59 being a victim since the age of 16 when causing sexual activity without consent, unwanted touching and indecent exposure were included.
- 2.45 Combined data for the 2013/14 and 2016/17 CSEW reports that for 15% of women aged 16 to 59 who had experienced rape or assault by penetration (including attempts) since the age of 16, the perpetrator was a stranger. The figure for men was similar at 17%.

29 The former Chief Executive of Nexus NI, Cara Cash-Marley, confidently asserts that a large number of people are still afraid to report cases to the police. Ms Cash-Marley reported that demand for Nexus NI counselling service has risen significantly in the last few years and has been used by children under the age of 10, with a 50% increase in referrals for the specialist counselling service in two years. In February 2019, Conor McCrave, writing for the *Irish Independent* reported that Rape Crisis Centres in Ireland have warned the number of young teenagers seeking counselling has risen dramatically in the last year. The article also records that the Minister for Children and Youth Affairs has prioritised the establishment of regional centres for supporting children who have suffered sexual abuse, in a way that would minimise their trauma while accessing care or health services.

- 2.46 Based on combined CSEW data for 2013/14 and 2016/17 it is estimated that around one in six (17%) female victims aged 16 to 59 reported the rape or assault by penetration (including attempts) experienced since the age of 16 to police. Just over one in five males (21%) reported to police.
- 2.47 This under-reporting figure is sadly unsurprising. In Northern Ireland the Queen’s University Belfast (QUB) student-led organisation SCORE (Student Consent Research Collaboration), in which the PSNI were involved through its Rape Crime Unit (RCU), produced the *Stand Together Report*.³⁰ The Stand Together Survey is the first report on non-consensual student experiences at QUB and in Northern Ireland as a whole. Around 3,000 QUB students surveyed anonymously recorded that 246 students had experienced an episode of an attempted penetrative assault and 169 students had experienced an episode of a penetrative assault. However, only 4.4% (14) reported to police and 1.9% (6) reported to the university.
- 2.48 The results from the SCORE Initiative assisted to inform the development of the PSNI “No Grey Zone” campaign in collaboration with QUB and Ulster University student unions as well as several other key partners. In addition to this, RCU of the PSNI are actively involved in initiatives with universities across Northern Ireland, in particular, during their Freshers’ Weeks through awareness raising sessions.
- 2.49 Finally, in Ireland, *The SAVI Report: Sexual Abuse and Violence in Ireland*³¹ in 2002 recorded that 42% of women and 28% of men had undergone some sort of sexual abuse or assault in their lifetime. Ireland is considering a further report along these lines.

Why is there under-reporting?

- 2.50 Frequently cited reasons for not reporting the crime in the Office for National Statistics report of 2018 were “embarrassment”, they saw it as a “private or family matter”, they “didn’t think anyone would believe me”, or they “didn’t think they would do anything about it”.³²
- 2.51 According to *An Overview of Sexual Offending in England and Wales* published in 2013 a large majority of offenders sentenced for sexual offences each year had not previously been cautioned or convicted of a sexual offence — over 80% in each of the years from 2005 to 2011.³³

30 Haughey, E., Smyth, A., Liu, H., Lowenstein, M., McCue, R., Elder, J., and Patterson, C. (2017) *Stand Together Report* Belfast: QUBSU

31 McGee, H., Garavan, R., de Barra, M. Byrne, J. and Conroy, R. (2002) *The SAVI Report: Sexual Abuse and Violence in Ireland*. Dublin: The Liffey Press in association with Dublin Rape Crisis Centre

32 ONS (2018) *Sexual offending: victimisation and the path through the criminal justice system* London: ONS

33 Ministry of Justice, Home Office and the Office for National Statistics (2013) *An Overview of Sexual Offending in England and Wales* London; Ministry of Justice, Home Office and the Office for National Statistics

2.52 The PPS, in its *Policy for Prosecuting Cases of Rape*, recognised that complainants of rape have difficult decisions to make that will affect their lives and the lives of those close to them.³⁴ Barriers exist that mean that some people are less likely to report offences.

2.53 Examples cited of reasons for not reporting, which reflected our experience interviewing complainants, included the following:

- Complainants who are or have been in a relationship with their attacker may blame themselves or feel that others will blame them.
- Perceptions of shame and the fear of not being believed or of being blamed and judged abound. In this context, I strongly recommend a useful short video about rape myths, “*James Is Dead*”, produced by Nexus NI.³⁵
- Complainants may also face additional difficulties such as disruption to the lives of their children and extended families.
- People from Black, Asian and minority ethnic communities and members of the Traveller community may have experienced racism or prejudice and may fear that they will not be believed or not be treated properly. As a result, they may be reluctant to report offences or support a prosecution.
- Cultural and religious beliefs and norms may also prevent some people from reporting offences or supporting a prosecution.
- In cases involving rape within same-sex relationships, complainants may fear homophobic reactions from the criminal justice system, as well as being outed by the process.
- Disabled people may fear reporting rape if the offender is a carer. In addition, some may fear the loss of residential care.
- Communication issues may also be a barrier to disabled people reporting rape. Older people, in particular, may be deterred from reporting rape by feelings of shame or embarrassment.
- People with learning difficulties or mental health problems may feel that they will not be believed if they report being raped.

2.54 Frequently cited other reasons that emerged in our discussions with complainants for not reporting the crime were:

- Somehow feeling responsible for what had happened.
- Feelings of worthlessness — “I am nobody” — and that any complaint “would not get anywhere”. A general feeling that they will not be believed is prevalent.

34 Public Prosecution Service for Northern Ireland (2010) *Policy for Prosecuting Cases of Rape* Belfast: PPSNI at para. 1.7

35 Please see the Nexus NI video, “James is dead” via YouTube.
Available at: <https://www.youtube.com/watch?v=Op14XhETfBw>

- There is a perception, amongst the general public underlined by complainants who have in fact reported serious sexual offences, that the chances of conviction are very low. This perception can be encouraged on occasions by ill-advised police officers, who are perhaps seeking to manage expectations as best they can, declaring to complainants who have reported that this is the situation and that complainants might be better “getting on with their lives”.
- Family pressures to withhold accusations: no one was on their side.
- A desire to avoid the perpetrator going to jail, particularly if they were a close family member or partner.
- Fears about what the court procedure would involve after a long protracted process.
- Concern about publicity, social media coverage and exposure to the public gaze. Interestingly, the Dublin Rape Crisis Centre, which made a most helpful submission to the Review, recorded:

“In the aftermath of the verdict [of a recent high-profile case in Belfast], rape crisis centres around the country reported receiving similar calls to ourselves, from victims of sexual violence who were glad they did not report their incidents to the authorities and those who had expressed a wish to withdraw complaints already made. They spoke about the extent of the media coverage and how for many it infiltrated their day to day lives because it was on every media outlet and the topic of everyone’s conversation.”

- 2.55 A troubling point raised by Northern Ireland Women’s European Platform was to highlight the link between sexual and gender based violence and Northern Ireland’s past. “Existing evidence indicates that this issue continues to affect women, and that women in these circumstances may remain reluctant to seek redress.”

Why is there a high withdrawal rate?

- 2.56 For those who did complain, the path from complaint was harrowing and the attrition rate was high. Of those who venture into the process, around 40% choose not to proceed.³⁶
- 2.57 The issue of attrition in rape cases, or dropout from the criminal justice system, has been highlighted by researchers as a concern for many years. Since the 1970s, it has been apparent that rape cases are less likely to progress from

36 PPS review of cases in which there was a no prosecution decision. Includes victim withdrawal and those where a report had been made by a third party to police but the victim did not wish the matter to be investigated. Similar findings by PSNI of 41% from research completed for rape incidents reported during January to July 2017. However in a more recent and smaller survey of 58 cases conducted by PPS in January 2019, only 14% had withdrawn. Hopefully this heralds a gathering improvement in building complainant confidence.

reporting to prosecution and conviction than other types of offences³⁷ and attempts have been made to reduce attrition, in particular through changing police attitudes and practice.

- 2.58 For instance, police circulars³⁸ were issued in England and Wales as long ago as the 1980s to shift practice regarding police treatment of victims and the criming of rape cases, although without much impact at that time.³⁹
- 2.59 Since the mid-2000s, a more concerted process of government review regarding criminal justice approaches to sexual offences has involved a series of critical reports and inspections, again highlighting the large attrition rate in rape cases and the need for a more victim focused approach.⁴⁰
- 2.60 In the past decade in Northern Ireland, there have been efforts by the PSNI, the PPS and the courts to improve their responses to the investigation, prosecution and conviction of rape offences through training, better recording and provision of information, support and anonymity for complainants, and monitoring of files (see chapter 1, 'Background').
- 2.61 The Stern Review into rape cases in England and Wales in 2010 suggested that ISVAs are the most cost-effective and affordable example of a reform to a system, making an enormous difference to how complainants feel about what is happening to them as they progress through the criminal justice system.⁴¹
- 2.62 Limited evidence from Crown Prosecution Service (CPS) data suggests that ISVAs may reduce the number of retractions by complainants.⁴²
- 2.63 Yet, notwithstanding recognition of the problem for decades and steps taken to address the issue, the rate of dropout remains stubbornly high.
- 2.64 In terms of reasons for withdrawal, the ISVAs in Northern Ireland to whom I spoke identified a number of key challenges that complainants have raised with them:
- Stories about, and fear of, aggressive and sexually intrusive cross-examination at trial abound. Complainants fear techniques that seek to victim blame

37 For example, Wright, R. (1984) "A note on the attrition of rape cases" *The British Journal of Criminology* 24(4) pp.399-400; Grace, S., Lloyd, C. and Smith, L.J.F. (1992) *Rape: From recording to conviction* London: Home Office; Gregory, J. and Lees, S. (1996) "Attrition in rape and sexual assault cases" *The British Journal of Criminology* 36(1) pp.1-17; Kelly, L., Lovett, J. and Regan, L. (2005) *A gap or a chasm? Attrition in reported rape cases* London: Home Office Research, Development and Statistics Directorate

38 Circular 25/1983 concerning the treatment of rape victims and circular 69/1986 which informed police practice in respect of criming.

39 Lea, S., Lanvers, U., and Shaw, S. (2003) "Attrition in Rape Cases. Developing a Profile and Identifying Relevant Factors" *The British Journal of Criminology* 43(3) pp.583-599

40 Criminal Justice Joint Inspection (2012) *Forging the links: Rape investigation and prosecution: a joint review by HMIC and HMCPSP* London: HM Inspectorate of Constabulary and Fire & Rescue Services

41 Stern, V. (2010) *The Stern Review: a report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* London: Government Equalities Office and the Home Office

42 Brown, J, Horvath, M., Kelly, L. and Westmarland, N. (2010) *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* London: Government Equalities Office

by questioning complainants on their dress, how they have conducted themselves, previous unrelated sexual histories, questions about alcohol consumption, mental health issues and questioning based often on rape myths. I pause to observe that this echoes the experience related to me by complainants who reported being cross-examined in a fashion that was less than the dignified and courteous manner guaranteed by the Victim Charter. Victim Support NI reports this as the reason given by many complainants as to why they would never report again if something similar happened.

- Criminal injuries compensation: complainants are asked if they have applied for criminal injury compensation and, in a number of recent cases, some complainants have been asked this question even if they have not applied for compensation.
- Delays and court adjournments: the ISVAs report that complainants are frustrated with the length of time it takes to bring cases to completion. They report that adjournments contribute to the attrition rates of complainants who wish to withdraw from their cases. I found the seemingly endless delays a not infrequently stated cause of attrition when speaking to complainants.

2.65 I was concerned to note that, in the course of the response to the Preliminary Report, the PPS asserted that “there is no evidence that delay causes complainants to withdraw in any significant numbers”. Sadly I fear this may betray some basis for the complainants’ assertions that there is a lack of understanding throughout the process about the impact that trauma can have on victims and in particular how they respond. This Review has received overwhelming evidence to the effect that delay most certainly contributes to the attrition rate from a wide diversity of sources.⁴³ The Chief Inspector of Criminal Justice in Northern Ireland highlighted this phenomenon when he launched CJINI Report of November 2018 which examines how criminal justice organisations handle sexual violence and abuse cases. He said,

“Victims who experience delay in the overall progress of their case can choose to withdraw their support for the criminal justice process.”⁴⁴

2.66 In England and Wales the Attorney General’s “Review of the efficiency and effectiveness of disclosure in the criminal justice system” of November 2018, raised the concern that complainants must not be subjected to unwarranted intrusion into their privacy with unacceptable demands for disclosure. It records as follows:

43 PSNI, Chief Superintendent Paula Hilman, Head of Public Protection Branch, PSNI, Women’s Aid Federation NI, Women’s Regional Consortium, Belfast Feminist Network, Victim Support NI and also Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection: A Thematic Inspection of the Handling of Sexual Violence and Abuse cases by the Criminal Justice System in Northern Ireland* Belfast: CJINI

44 Belfast Telegraph (2018) ‘Northern Ireland justice system failing sex crime victims time and time again – inspectors’, *Belfast Telegraph*, Tuesday 13 November

“Complainants must not be deterred from reporting criminal offences and participating in the criminal process by the fear that private information about them will be unnecessarily divulged.”⁴⁵

2.67 We noted there were a number of areas in the most recent Northern Ireland Victim and Witness Survey⁴⁶ and elsewhere lending weight to all of these concerns from a different angle. These included:

- Complainants not being kept informed about case progression despite the various protocols in place by the PSNI and the PPS. The complainant has no access to ICOS (integrated court operations system) to find out the progress of the case/any variation made to the accused’s bail conditions etc. Without a solicitor, no access is permitted. However, the Survey did record that “compared with 2011/12, there has been a significant increase in the proportion of respondents who reported that they had been kept informed by a CJS source on how their case was progressing (up from 70% in 2011/12 to 79% in 2016/17).”
- Cases being dropped without adequate explanation: levels of dropped cases and formal police cautions/warnings need to be researched and recorded.

2.68 Concern in historical sexual abuse cases. It is the experience of my Review that complainants in this category were at times being discouraged, being told by PSNI officers that a conviction was unlikely even before a detailed statement had been taken, that there was a problem because there was no DNA evidence available, that there was a lack of resources to cover all areas and exhorting a complainant to “put it behind [them] and get on with [their] life”.

2.69 Lack of understanding about the impact of trauma: ISVAs report that complainants perceive there is a continuing lack of understanding throughout the process about the impact that a trauma can have on a victim, in particular, how they respond to the trauma, their recall of that trauma and how this is articulated in court. There is a genuine concern that, despite legislative cover in the Northern Ireland Victim Charter, the PSNI is not referring a sufficient number of complainants to Victim Support NI. Recent figures show a referral level of 37%. The crucial importance of this is that all referrals received by Victim Support NI are contacted by telephone within two working days and undergo a needs assessment that includes referral on to the ISVA service and all other services available to them.

45 Attorney General's Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (Cm.9735) London: Attorney General's Office p.40

46 Department of Justice and Northern Ireland Statistics and Research Agency (2017) *Victim and Witness Experience of the Northern Ireland Criminal Justice System: 2008/09-2016/17* Belfast: Department of Justice. The findings from this survey are used to monitor progress in the area of service delivery to victims and witnesses of crime in Northern Ireland.

- 2.70 A defendant not giving evidence is another source of misunderstanding and frustration as some complainants do not realise that the defendant does not have to take the stand in their own defence.

Are these challenges to withdrawal being met?

- 2.71 It should be noted that the PPS has changed its practice in relation to what constitutes the 'public interest' in allowing victims/witnesses to withdraw from prosecution. Previously, there had been a reluctance to force witnesses to attend court and give evidence against their wishes, at least in domestic violence cases. There is increasing effort being applied to 'case build', that is, to gather supporting evidence in anticipation of the witness not being willing to attend court and greater use of witness summonses to require victims and witnesses to attend court.
- 2.72 The PPS also participate in Sexual Assault Advice Clinics which relate to sexual offences only. The aim of these clinics is to identify at an early stage those cases that will not be able to progress to a prosecution and also to provide advice to police with regard to other lines of investigation that may be able to strengthen a weak case.
- 2.73 The issue of compelling witnesses to testify, where they are reluctant to do so, remains contentious, with the PPS attempting to give increasing support to those considered to be especially vulnerable or intimidated.
- 2.74 Training has been delivered to all prosecutors with regard to domestic abuse and additional guidance provided with regard to the decision to summons a witness and, should they fail to attend, seek an arrest warrant. The PPS have a number of Domestic Violence Champions across the jurisdiction who provide advice and support to colleagues within the PPS but do not solely specialise in directing on domestic violence cases.
- 2.75 Guidance was issued to all public prosecutors and panel counsel in May 2016 with regard to consulting with victims and witnesses. Training was subsequently provided on sexual offences and domestic abuse in June 2017 with further sessions to be provided.
- 2.76 The PSNI is now obliged to provide victims of crime with a written acknowledgement, including a crime reference number, the name and contact details of the investigating officer and the location of their police station. This enables victims to contact the officer or, if unavailable, be put through to the contact management centre. The duty officers are trained to assist or pass a message on to the appropriate officer. In relation to contacts within the criminal justice system, victims find it helpful to deal with the same police officer for the

duration of their case and Department of Justice research has confirmed this.⁴⁷ In more serious incidents, the police have appointed specialist domestic abuse officers who provide continuity for the victim in terms of a point of contact for the duration of the investigation.

- 2.77 During the police investigation stage, complainants are entitled to receive an update from the police within ten days on what they are doing to investigate the crime. The police are trained to liaise with the complainant on what further updates are to be provided as appropriate on what to expect from the criminal justice system. The PSNI assert that they have a 96% compliance rate on this obligation to update complainants.
- 2.78 Whilst these measures all sound very sensible and progressive, the fact of the matter is that there is evidence that they are simply not being implemented in a sufficiently adequate manner.
- 2.79 The CJINI Report of November 2018 records:
“There continued to be challenges for the PPS in terms of victim withdrawal...Communication and consultation with victims was also found to be an area which the PPS need to undertake further work on in order to fully deliver the required standards.”⁴⁸
- 2.80 That same review also identified inconsistencies in the quality of letters sent to complainants, with just under half the cases assessed to be insufficiently empathetic.⁴⁹
- 2.81 The CJINI review further records that whilst there was evidence that the PPS prosecutors were offering to meet with complainants and a significant number of complainants were accepting that offer, there were examples in some cases where the venue and nature of the meetings itself (for example held in the formal atmosphere of Belfast Chambers sometimes with a prosecutor, police investigating officer and one or two counsel for the prosecution) clearly caused distress to the complainant. This, on some occasions, contributed to the case being stopped as the decision was made that the complainant would not be able to cope with the process of giving evidence in court.⁵⁰
- 2.82 Unsurprisingly it was a recommendation of that report that:
“the PPS undertake further work within six months of this report to fully deliver the standards contained in the Victim Charter and in the PPS

47 Department of Justice (2016) *Research into the criminal justice experiences of victims of Domestic Violence and Abuse: Department of Justice Response* Belfast: Department of Justice

48 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland* Belfast: CJINI, p.10

49 As above at paragraph 4.36.

50 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland* Belfast: CJINI at paragraph 4.38

Victim and Witnesses Policy, to ensure communication with victims is more empathetic, understandable, accurate, consistent and appropriate for the needs of the recipient.”⁵¹

- 2.83 Furthermore, the report asserted that one of the most significant concerns for complainants was the transparency of the decision making by the PPS, particularly cases where the decision was made not to prosecute the case. Complainants did not appear to understand the role of the PPS or felt that a no prosecution decision meant that they were not believed.⁵²
- 2.84 A concern which featured in complaints made to this review surfaced also in the 2018 CJINI report. This was that in terms of the outcome of the case complainants also wanted to see justice being done and to seek closure on the trauma they had suffered. Even if the case resulted in a conviction, the complainant could feel let down if they did not feel sufficiently or meaningfully consulted on, or informed about, the process that led to that conviction. One complainant described to the Inspectorate that she still did not understand the sentence that the defendant received or what difference him being on the sex offenders register would make:
- “There appeared to be a focus on achieving a successful ‘outcome’ in terms of the criminal justice system without sufficient consideration of what a successful outcome is in terms of the victim experience.”⁵³
- 2.85 Several complainants to whom we spoke shared the view expressed in the Northern Ireland Victim and Witness Survey that complainants were not being kept informed about case progression despite the various protocols in place by the PSNI and PPS. Information, even if it is passed on, has to be meaningful and explained in plain English rather than being regarded as a “tick box” exercise.
- 2.86 Finally in this section, I draw attention to complaints to this Review about the stressful nature of giving a statement in a small office in a police station close to the main reception area where the complainant in question could hear the daily “goings on” of the station and where those in the reception could hear signs of the complainant’s distress.

Why is the trial process itself so daunting?

- 2.87 The interviews I had with complainants frequently raised the issue of the trial process itself re-traumatising them and echoed the contents of the literature on the matter. The concerns included the following:

51 As above at Operational recommendation 4.

52 As above at paragraph 6.7.

53 As above at paragraph 6.10.

- Giving humiliating and intensely personal evidence in public is a major and understandable concern, particularly where there is the ever-present fear of what may be reported or alleged on social media.
- The waiting time before giving evidence was at times unacceptably long, adding to the stress on the complainant without adequate explanation as to why it was taking so long.
- Current committal proceedings (which I recommend in this Review should be discontinued) are often listed as a mixed committal, which then turns into a conventional preliminary enquiry hearing on the morning of the matter, after the complainant has suffered the stress and worry of a court appearance, only to be told that they are not required. This is quite unnecessary and that practice should be strongly deprecated, given the additional stress and delay this process is causing.
- Complainants to whom I spoke echoed precisely what has been reported elsewhere⁵⁴ expressing disappointment with the brevity of the meetings with the legal team, the lack of opportunity or time to build a rapport with the legal representatives before going into court, the lack of information provided about what would happen in court, communication difficulties with some barristers referring to them as stand-offish, cold and clinical whilst others noted the lack of updates from the PPS on the progress of their respective cases.
- Moreover, the lack of information found expression also in not being given adequate explanation as to why a particular sentence had been passed, why the defendant was being registered as a sex offender, and, in the case of the PSNI, not being told of the imminent release of the defendant and the general whereabouts of his habitation.
- Rape myths are a trial reality and can often form the basis of aggressive cross-examination and may attract the unreasonable thinking of jurors. Moreover, for all kinds of societal reasons, complainants often buy into these myths, blaming themselves. I regard them as potentially a major challenge to the concept of a fair trial.
- The prospect of having previous medical and sexual history disclosed to the defendant and then ruthlessly explored in cross-examination are major fears of the trial process.
- Concern has been raised about the admissibility of a woman's clothing as evidence of consent. The view has been expressed that "if forensics have done their homework properly there should be no need for this". I pause to observe at this stage that there is no doubt that the clothing a complainant

54 McWilliams, M. and Doyle, J. (2017) *Violent conflict, political settlement and intimate partner violence: lessons from Northern Ireland*. Edinburgh: Political Settlements Research Programme; Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: CJINI at paragraphs 5.16-5.19

is wearing has no relevance whatsoever to whether she consented or not. That is one of the rape myths that needs to be robustly dispelled. However it is right to say that there may be instances where clothing which, for example, is torn or bloodied might be relevant to the issues in the case. Accordingly, a hard and fast rule excluding clothing as evidence would not be possible, but I agree entirely that it should not be permitted to be produced in order to determine whether or not consent was given as a general rule.

- The reality of facing one experienced barrister, or often more than one, on behalf of the defendant(s) in circumstances where complainants see themselves as alone and having no legal representation. Perfectly properly, prosecuting counsel will have informed them that counsel represents the State and not the complainant. This was highlighted, in particular in a recent high-profile case in Belfast where there were four accused. The complainant was without legal representation in relation to the issue of whether the sexual activity had happened at all or was consensual, whereas each of the four accused, had a separate legal team of lawyers and were entitled to cross-examine her.
- In some of our older courthouses there is a real fear and indeed a real risk of encountering the defendant and their families. Even where there are separate witness waiting areas (and the quality of many of these need upgrading), access to toilets or smoking areas and limited options for entering the building all raise this risk. In a recent report⁵⁵ the most frequently identified concerns related to coming into contact with the defendant and their supporters (48% of respondents), intimidating behaviour of the defendant or their supporters (46%) and being cross-examined (33%). The proportion of respondents who reported feeling intimidated at some point in the process has remained relatively stable across the various years of the survey (25% in 2008/09; 24% in 2016/17).
- Victim personal statements (VPSs) are potentially a source of therapeutic relief to complainants after conviction of the accused. In line with the Victim Charter obligations, victims are first made aware by the PPS/PSNI Victim and Witness Care Unit of the option to make a VPS at the point they are advised of the decision to prosecute. Victim Impact Reports are requested by the trial judge post-conviction and the Victim and Witness Care Unit does not have any involvement in advising complainants about these reports.
- However, they are clearly not understood and rarely invoked. Whilst it is right to say that the DoJ has revised and reprinted the VPS leaflet and will be working with the PPS, the PSNI and the voluntary sector to increase their awareness of this and establish what refresher training could be undertaken,

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Department of Justice and Northern Ireland Statistics and Research Agency (2017) *Victim and Witness Experience of the Northern Ireland Criminal Justice System: 2008/09 – 2016/17* Belfast: Department of Justice

the statistics show how rarely they are used. The number of VPSs made in the financial years 2016/17 and 2017/18 in cases which involved a decision of indictable prosecution in relation to a sexual offence was 35 and 27 respectively. Victim Support NI and the NSPCC Northern Ireland at present assist individuals with preparing their statement and also provide guidance.

2.88 I summarise the position overall by citing how Baroness Helena Kennedy QC in March 2017 summed the matter up:

“for many of the reforms which have been introduced to ameliorate the experience for the complainant ... none of the reforms seem to really work. Women are blamed for drinking too much and behaving in ways deemed provocative. Their credibility is impugned and their reputation laid bare. Their mental health explored intrusively. Their Facebook entries and other social media accounts examined to find salacious material for cross-examination... where one person’s word is set against that of another and the subject matter is the febrile one of sex, it does not take great skill to undermine a complainant.”⁵⁶

Cost and Effect of serious sexual violence

2.89 Sexual violence offences are associated with a wide range of serious physical and psychological effects for women and men, including injuries, depression, anxiety, post-traumatic stress disorder, a shattering of self-confidence, years of flashbacks and nightmares and increased drug and alcohol dependency.⁵⁷ Research consistently shows that women victims suffer more from these negative effects than men.⁵⁸ These physical and psychological effects are often long term and affect not only victims of violence but their children and other family members.⁵⁹ One complainant, in her response to our Preliminary Report summed up the situation when she said,

“I cannot, honestly, think of one area of my life that has not been detrimentally affected by the abuse I went through.”

2.90 In terms of financial impact, the estimated cost of health and social care support in Northern Ireland as a result of domestic violence and abuse was approximately £50.2 million for 2011/12, with the total estimated economic

56 Kennedy, H. (2018) ‘Insight: #MeToo is a wake-up call to the legal system’, *The Scotsman*, Saturday 20 October

57 Small, M. J., Gupta, J., Frederic, R., Joseph, G., Theodore, M., & Kershaw, T. (2008), “Intimate partner and nonpartner violence against pregnant women in rural Haiti” *International Journal of Gynecology and Obstetrics*, 102(3) pp. 226–231; Campbell, J. C. (2002) “Health consequences of intimate partner violence” *The Lancet*. 359 (9314); Coker, A. L., Smith, P.H., Bethea, L., King, M. R., and McKeown, R. R. (2000) “Physical health consequences of physical and psychological intimate partner violence” *Archives of Family Medicine*. 9(5)

58 Swan, S., Gambone, L., Caldwell, J., Sullivan, T., Snow, D. (2008) “A Review of Research on Women’s Use of Violence with Male Intimate Partners” *Violence and Victims* 23(3) pp. 301-341

59 World Health Organization (2012) *Understanding and addressing violence against women: Intimate partner violence*. Geneva: World Health Organization

cost of domestic violence and abuse in Northern Ireland for the same year standing at around £674 million.⁶⁰

- 2.91 The same report calculated that the costs for sexual violence occurring outside of the partner setting for Northern Ireland were estimated at £257 million for 2011/12. This cost estimate excludes costs for child victims of rape and sexual assault, which it has not been possible to calculate. In this respect the cost estimate is considered to be an underestimate.

(all figures in £ million)

	Females		Males		Total	
	2010/11	2011/12	2010/11	2011/12	2010/11	2011/12
Health and social care services	4.3	4.0	0.7	0.7	5.0	4.7
Criminal justice services	26.2	27.1	4.6	4.8	30.8	31.9
Local economic output	31.2	28.4	5.5	5.0	36.7	33.4
Intangible human costs	173.2	159.2	30.6	28.1	203.8	187.3
Total economic costs	234.9	218.7	41.4	38.6	276.3	257.3

- 2.92 There can be little doubt that the current criminal justice process in dealing with serious sexual offences plays a role in this shocking tale. A complainant who responded to the Preliminary Report, typical of many others to whom we have spoken, wrote;

“In conclusion I feel completely failed by the justice system. I only agreed to go through with the process as I was aware I was not the first person to be treated this way by this man, I was however the only person either brave enough to do something or with enough proof to do so, so I took the responsibility and stood up in the hope he would not be able to do it to anyone else again... I have struggled massively with anxiety after my experience in court, I was afraid to leave my house, I could not do normal tasks like grocery shopping or walking down the street alone, I got some help and started to get better... My life has changed in more ways than you can imagine, I am getting better and stepping closer back to the strong confident person I used to be with each day that passes but I will never be the same again”.

Discussion

- 2.93 These concerns are not without objective foundation. My experience in this Review of the law and procedures in serious sexual offences persuades me that many of these fears are justifiable, rational and compelling.

60 Department of Health, Social Services and Public Safety and Department of Justice (2016) Stopping Domestic and Sexual Violence and Abuse in Northern Ireland: A Seven Year Strategy Belfast: Department of Health, Social Services and Public Safety

- 2.94 These concerns course through both the process after reporting and leading up to trial, and during the trial procedures. Brief reference to the issues that are being considered in this Review will suffice to make the point.

Concerns surrounding the process before trial

Training of lawyers

- 2.95 Lawyers, must capture the mood of the times, and recognise a growing sense among ordinary men and women that the legal tools at their disposal can be put to better use. To reduce the instances and dispel the image of complainants facing an unnecessarily traumatic cross-examination, publicly funded advocates should have to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences as set out in chapter 15.

ABE interviews

- 2.96 Achieving Best Evidence (ABE) is the process by which complainants in serious sexual offence cases have their evidence presented at trial by means of a digitally recorded interview conducted by a police officer.
- 2.97 ABEs have been the subject of trenchant criticism by lawyers and, indeed, the Judiciary during this Review. They are said to be unduly lengthy, rambling, filled with repetition and irrelevancies, often devoid of vital material that is used against the complainant at trial, and at times incomprehensible. I hasten to add that this is precisely the same criticism that I have heard from judicial colleagues in England about their experience of ABEs in their jurisdiction.
- 2.98 They become fertile ground for cross-examination of the complainant at trial. In some cases they are so poor that the prosecution no longer relies on them and in a recent trial where this occurred, the defence played the ABE before the jury as part of *their* case.
- 2.99 In the Preliminary Report of this Review I considered that professionally qualified barristers should carry out these reviews. Indeed in the response to the Preliminary Report, this was the view of the Bar Council Northern Ireland and of the Law Society who felt that the interviews could be delivered by solicitors and advocates and not simply professionally qualified barristers.
- 2.100 However I have been persuaded by representations from the PSNI and PPS that such a step is implausible. The role of barristers is one of advocacy not investigation and the two concepts should not be conflated. It risks building in unnecessary complications to the process of evidence collection which may impede enquiries. The fact of the matter is ABE interview is an investigative tool and an integral part of the police investigation with PSNI being the statutory investigative authority. Advocates might well not have been given the general training received by police officers and might not be bound by the Police and

Criminal Evidence Act (PACE) codes of practice. Moreover, participating in the ABE process could require advocates to become a witness, making a statement to prove the recording, the circumstances of the recording and potentially having to give evidence at trial.

- 2.101 Obviously some of these problems could be mitigated by employing “in-house” counsel who would be fully inducted into the PSNI training processes and who could be contracted to fulfil their duties to standards equivalent to the PACE Codes. Nonetheless I doubt their roles as investigators would be sufficient.
- 2.102 I consider the position is wholly different in the case of children and vulnerable adults who may well require the services of, at least in the former case, a child psychologist to conduct the interview as occurs in the Barnahus system to which I make reference in chapter 14 ‘Voice of the child’. Of course I recognise that there may be a very small limited number of child psychologists in Northern Ireland dealing with a huge number of cases. Hence it may be necessary to be selective in choosing those children who are given the benefit of child psychologists in the course of interviews and to that extent some discretion must be vested in the interviewing officers to decide which cases merit such input. However, the Barnahus system is predicated on such facilities being available in the designated Child Houses and with the benefit of some creative organisation, I am satisfied that this is a problem that can be overcome in most cases.
- 2.103 In the normal setting however, I consider that there is some merit in the PPS recommendation whereby an enhanced PSNI training programme is designed, with contributions from experienced PSNI interviewing officers who are exemplars of best practice, prosecutors, and members of the Bar (and I include also the Judiciary in this). This should be implemented as soon as possible. In terms ABE interviews should be regarded as a specialist task requiring specialist training. Specialist officers should be selected with appropriate flair and skills in this area.
- 2.104 I had also recommended that ABE interviews should be carried out with a first interview dealing with the broad narrative and the second being shorter, ordered and chronologically presented. In light of the submissions by the PSNI I recognise that such an approach falls outside the current ABE National guidelines and may have wider adverse repercussions in terms of the interview being victim centric. The initial commencement of the interview will centre on the opportunity for the complainant to provide a “free narrative” which is then broken down into smaller topic areas and probed for detail. The concept of a shorter ordered and chronologically presented interview may be extremely difficult to achieve when dealing with complainants who have suffered significant trauma and are extremely brittle.
- 2.105 On the other hand these interviews can be of crucial importance in outlining the complainant’s account to the jury in a manner that the jurors can find

comprehensible and easy to grasp. If judges are finding current ABEs at times incomprehensible, I can only tremble at what juries make of them. Perhaps the solution is to more carefully select the officers who have a flair for this kind of interviewing and who have had specialised training in the discipline. I strongly recommend the PSNI consider outside agencies such as members of the Bar, Law Society and Judiciary (as occurs in England and Wales) to assist in training such carefully selected officers who are deemed appropriate candidates for this work.

- 2.106 I strongly recommend the practice adopted in the Child House pilot (also known as the Lighthouse) in London where the performance of interviews are carefully reviewed by appropriate experts and advice given for future interviews.
- 2.107 In saying this I appreciate that the PSNI already provide three courses specifically aimed at training officers in interviewing in accordance with the Achieving Best Evidence guidance for practitioners⁶¹ as legislated for in Article 15 of the Criminal Evidence (Northern Ireland) Order 1999, video-recorded evidence-in-chief. In addition there is a fourth Specialist Interviewer course more aimed at providing training in enhanced cognitive techniques. Officers are also trained to carry out ABE interviews as well. The three courses are:
- Child Joint Investigative Training – how to interview children in a joint protocol investigation framework.
 - Adult Joint Investigative Training – how to interview adults at risk of harm and in need of protection in a joint protocol investigation framework.
 - Vulnerable and Intimidated interviewing including children and adults.
- 2.108 This training also includes modules on Special Measures including the entitlements of child witnesses and the use of opt out means if children wish to avail of any method of giving evidence other than ABE. Students are also advised of the importance of planning any interview. Elements of interviewing skills will be broken down into rapport, free narrative, questioning and evaluate narratives. Training is also given in the use of new digital systems, ensuring regular breaks are taken and the need for focused interviews. Guest speakers at these courses include experts in child development and adult safeguarding as well as Registered Intermediaries.
- 2.109 I recognise that not all ABEs are defective and there are pockets of excellence. However the breadth of informed criticism is such that changes simply have to be made. No purpose is served by the PSNI putting heads in the sand, extolling the virtues of their current training system and carrying on as before. I am greatly encouraged therefore by the recent establishment of the PSNI Strategic Working Group to address ABE problems.

61 Department of Justice and Criminal Justice System Northern Ireland (2012) *Achieving best evidence – a practitioner guide* Belfast: Department of Justice

Committal Proceedings

- 2.110 I have dealt in chapter 9 of this Review with my conviction that there is no justification for continuing with the present system of committals in serious sexual offences. Not only is their use now largely redundant since any application to dismiss can be made directly to the Crown Court judge, but their removal represents yet another step to reduce the overall fears and stress for complainants that contribute to under-reporting and high rates of attrition.

Information

- 2.111 To demystify and lessen the stress element, the DoJ should set up a Victims' Information Service, including a helpline and website, to ensure better information and support. That service should offer a one-stop shop, enabling complainants to submit complaints and feedback about their experience. I understand that the issue of a one stop shop was previously considered by the Department of Justice but it was decided not to progress this given that key bodies (including support services) provide this. I fear this misses the point that it is the duty of the Department to provide this central service.
- 2.112 As mentioned above, complainants should be enabled to track the progress of their case throughout the criminal justice system. The system whereby the Victim and Witness Care Unit is meant to provide a single point of contact for victims is clearly not working with adequate efficiency.
- 2.113 The Information Commissioner's Office has helpfully pointed out that the introduction of a single online case management system so that all parties can access one digital case file is likely to require a Data Protection Impact Assessment for a new technology involving the processing of special category data of vulnerable data subjects on a large scale.

Facilities

- 2.114 All Crown Court buildings, no matter how old, should have separate waiting areas and separate entrances for victims of crime. A review of current facilities in all courts needs to be carried out.
- 2.115 In addition, all vulnerable victims and witnesses should be given the opportunity to give evidence remotely from the court building.
- 2.116 Witnesses attending should be given pagers (particularly if the venue is close to retail centres or cafes) or be contacted via their mobile phone so they do not have to wait interminably in the stressful court precincts.

Criminal Law Act (Northern Ireland) 1967

- 2.117 There should be no added pressure in terms of reporting these crimes. Complainants need time to come to terms with what has happened and to talk their way through the process. Those with whom they discuss these matters

should not be at risk of criminalisation by not reporting the offences. I discuss this and an amendment to section 5 of the Criminal Law Act (Northern Ireland) 1967 in the context of an obligation to report the crime to the police in chapter 17 'Measures complementing the criminal justice system'.

Technology

- 2.118 As discussed in chapter 9, 'Delay', in England and Wales, the CPS and HM Courts and Tribunals Service (HMCTS), are jointly leading a project to introduce a single online case management system from pre-charge to disposal, so that all parties (including complainants and witnesses) can access one digital case file. It also aims to introduce Wi-Fi to all courts, new equipment for presenting digital evidence in court and to roll out video link systems. At the very least, this would permit complainants to access the progress of their case without awaiting human intervention from the PSNI or the PPS. I recommend such introduction in Northern Ireland.
- 2.119 In suggesting this, I note that in 2017 the PPS launched a new online Victim Information Portal ('Track My Crime') which allows adult complainants to track the key milestones in their case via their computer or any web-enabled phone or mobile device. This aims to improve the complainant's access to information about their case.
- 2.120 Technology is absolutely a crucial aspect of providing confidence to complainants. Criticisms abound from all sides and parties about the inefficient and inadequate technology surrounding ABEs. Poor camera angles, poor sound, incompatible digital systems etc. are damaging the whole concept. Funding into a modern well-co-ordinated, digital system is absolutely crucial. It is my strong recommendation that the Department of Justice through the Criminal Justice Board must as an absolute priority, produce a digital strategy compliant with 21st Century requirements. Resources must be found to meet the level of expectation which now exists and is already being developed in other parts of the UK.

Crown Counsel

- 2.121 It is crucial that the PPS recognises the damage that is done to the system by prosecution counsel meeting complainants for the first time on the morning of court, at times seemingly improperly briefed, and being less than empathetic. The inadvisability of this occurring has to be given a very high priority in the selection and monitoring of prosecution counsel. I note that the CJINI report of November 2018 supported measures by the PPS to make use of counsel who are considered to have the most appropriate experience and skills for handling the complex and sensitive nature of sexual offence cases particularly in dealing with victims who may have significant vulnerabilities, children or young people

rather than basing selection decisions on seniority.⁶² It also indicated that the PPS needed to take a more proactive approach to setting out the essential instructions in the briefing to counsel. That was found to be included in only three of the 16 relevant cases considered by the inspectorate.⁶³

Training

2.122 Training on the consequences of serious sexual offences for those involved in the criminal justice system is crucial. I believe that there is ample justification for ISVAs reporting that complainants perceive there is a continuing lack of understanding throughout the process about the impact that a trauma can have on a victim and how they respond to the trauma. I deal with this in chapter 15. I note, for example, in England and Wales, solicitor advocate members sit with barristers on a judicially-led committee working to develop specific training aimed at advocates who appear in trials involving such witnesses. In England and Wales Ministry of Justice proposals, still not perfected, oblige all publicly funded advocates to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences.

Legal Representation

2.123 For the most part, a complainant is not legally represented even though the only issue may be whether the evidence of consent of the complainant or accused will be preferred by a jury. Particularly in cases where consent is contested, complainants and accused people should arguably receive some measure of legal support to explain the process as the matter proceeds up to trial and where their sexual history and their medical records are to be explored. I consider changing this in chapter 5.

Delay

2.124 Rape cases⁶⁴ for the years 2015/16, 2016/17 and 2017/18 were not only taking far longer to be disposed of than in England and Wales but longer than the average⁶⁵ time for all cases. The average time taken from offence reported to case dealt with at court in rape cases during those three years respectively was 827, 921 and 943 days. It is getting worse year by year.

62 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: CJINI at paragraph 5.17

63 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: CJINI at paragraph 5.18

64 Information provided by DoJ. Based on the principle offence disposed and relate to substantive versions of the offence only.

65 Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.

- 2.125 Delay is dealt with in chapter 9. It contributes substantially to the attrition rate of sexual offence cases from the criminal justice system as the pressure of an inordinately lengthy process punctuated by on average six/seven adjournments increases the stress to breaking point.
- 2.126 There are delays in the investigation of the crime, including gathering evidence; in the examination of the file by those prosecuting; in getting a date for the hearing to the commencement of the trial and then adjournments thereafter; in obtaining consistent and comprehensive case management regimes; in unacceptable waiting times at the hearing.
- 2.127 Fundamental changes to our practices and procedures must be implemented as a matter of absolute urgency.
- 2.128 We should be looking at options such as enabling complainants to be able to track the progress of their case throughout the criminal justice system and starting trials in the afternoon so all preliminary matters are dealt with, leaving the complainant to start promptly the next morning.
- 2.129 Examining the systemic causes for attrition rates and identifying a workable methodology for streamlining the handling of prosecutions for sexual offences would contribute to minimising both delay and harm to the victim.

Children

- 2.130 Children face unique challenges within our system and require urgent creative thinking on our part if we are to afford them true justice. We have to question whether the conventional adversarial system is appropriate or just for children. There needs to be a new approach to cross-examination in which defence questions are approved in advance, and thereafter monitored, by the judge. These questions need to be fashioned with all the frailties and vulnerabilities of children in mind. We should also be looking abroad to other jurisdictions and at the Barnahus concept being currently explored in England, with particular attention to how this sits within the adversarial system.
- 2.131 Proper court facilities for both adults and children are but one aspect of the problem. We need to view these problems of courthouse accommodation constructively, even in old unsuitable courthouses, by such steps as providing telephone calls to their mobiles or pagers for witnesses so that they do not have to wait in the court building, choosing alternative remote sites outside court buildings, creating separate entrances where none is available etc. I address issues regarding children in chapter 14.

Low Conviction Rate

- 2.132 The perceived low conviction rates in serious sexual offences contribute to the sense of hopelessness that is a factor in withdrawal and, indeed, in under-reporting. It may be that a part this perception is misconceived. Recently, for

example, the Parliamentary Under-Secretary of State for Justice (Lucy Fraser QC) claimed that in the year ending December 2017, approximately 44% of 5,784 not guilty pleas for sexual offences resulted in a conviction, “a higher figure than for robbery and offences of violence against the person.”⁶⁶ However, importantly, that is not the public perception and in any event the figures for convictions in serious sexual offences, especially rape, are low.

- 2.133 It is worth repeating what is mentioned earlier in this chapter. In Northern Ireland during 2017/18, 224 defendants were dealt with in the Crown Court in relation to a sexual offence, a decrease of 16.1% on 2016/17.⁶⁷
- 2.134 Of the 224 defendants, 63.8% were convicted of at least one offence (that is, of any offence). Just under three fifths (56.7%) were convicted of a sexual offence. The overall conviction rate in 2017/18, at 63.8%, is ten percentage points lower than 2016/17 (73.8%). During 2017/18, 60 defendants were dealt with in the Crown Court for an offence of rape. Of these defendants, 45.0% were convicted of at least one offence (that is, any offence). Around one in six (15.0%) defendants were convicted of an offence of rape. It has to be borne in mind that these figures are those who make it to court. The percentage of those who report a rape and after the full process, many months later, see a conviction is less than 6% according to a UK government report of 2007⁶⁸ albeit hopefully those figures are now increasing.
- 2.135 The figures outlined above in England about the disparity in conviction rates for young men aged 18–24, and the publicity attendant on the falling rate of rape prosecutions for whatever the reason, all serve to elevate the fears that the justice system is not keeping pace with the public outcry about these offences. The belief is that juries are reluctant to convict young men, making allowances for a defendant the younger he is, on the basis that he may not have known what he was doing at 24, but, if he was older than that, he does. In addition, jurors may have the fear of the consequences a ‘rapist’ label will have on the future of such young men.
- 2.136 The often unspoken, despairing view of the complainants I met was to question why as a society we make excuses for the behaviour of young men and why we leave young women and girls to live with the life changing consequences of serious sexual offences.

66 Hansard HC Deb. vol 649 col 350, 21 November 2018.

67 Public Prosecution Service for Northern Ireland (2018) *Statistical Bulletin: Cases Involving Sexual Offences 2017/18* Belfast: PPSNI

68 HM Government (2007) *Cross Government Action Plan on Sexual Violence and Abuse* London: HM Government

- 2.137 Equally, it has to be appreciated that there are inbuilt aspects of most serious sexual offences that distinguish them from many other offences and give some measure of rational explanation for low conviction rates:
- rarely evidence of a physical injury — the presence or absence of an injury is a neutral finding;
 - inconsistency in memory is an effect of trauma;
 - late reporting, which often erroneously damages credibility;
 - piecemeal accounts: with time, support and encouragement, complainants feel ready to disclose, the most serious disclosures often made later;
 - there is rarely supporting or forensic evidence;
 - rarely, if ever, eyewitnesses; and
 - most defendants are of previous good character; it is usually one word against another.
- 2.138 I pause to make some observations about statistics on conviction rates. It is difficult to make any comparisons with England and Wales because of different methods of calculation by the CPS and our own PPS/DoJ. Moreover the Chief Inspector of Criminal Justice in Northern Ireland, when launching the CJINI report of November 2018 stated:
- “we estimate that in Northern Ireland in 2016-2017 the number of convictions for rape as a proportion of the number of rapes recorded by the police was less than 2% and for other sexual offences the proportion was less than 10%.”⁶⁹
- 2.139 The danger in such extrapolation is that it may be comparing recorded figures in 2016/2017 of rape reported with convictions in that year. The convictions in that year may have no relevance whatsoever to the number of cases recorded due to the passage of time since the recording took place. A case recorded in 2016/2017 is very unlikely to have been determined one way or another in that year due to the delay endemic in the system.

Specialist Courts

- 2.140 Specialist courts focus on a specific type of crime and aim to reduce delays and fast-track cases. They aim to improve conviction rates and the effectiveness of the court system in addressing the issues, and experiences of court processes for victims and their families. While only a few comprehensive reviews of the impact of specialised courts have been conducted to date, these studies have generally recorded positive outcomes. Specifically, specialised domestic violence courts have been linked to significantly lower rates of rearrest among defendants, and significantly higher rates of conviction; nearly twice that of

69 Criminal Justice Inspection Northern Ireland (2018) *A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland* [Press release] 17 November.

other courts in one study from South Africa.⁷⁰ A study from England and Wales reported that domestic violence courts enhanced the effectiveness of court and support services for victims, improved advocacy and information sharing, and increased levels of victim participation and satisfaction, thereby increasing public confidence in the criminal justice system.⁷¹

- 2.141 However, to introduce specialised courts in Northern Ireland for all serious sexual offences in the Crown Court is probably unnecessary because already a very large proportion of Crown Court trials involve serious sexual offences and accordingly in practice they would make little difference as discussed in chapter 17.

Measures complementing the criminal justice system

- 2.142 We should be exploring methods of encouraging victims who deliberately eschew coming within the ambit of the criminal justice system to step forward and be afforded an opportunity to confront the perpetrator in circumstances not confined to a criminal justice setting. The concept of victim-led restorative justice as another option for victims who wish to preserve a sense of autonomy and control which they feel the conventional criminal justice system does not afford them is discussed in chapter 17.

Concerns surrounding the trial process

Open Justice

- 2.143 Open Justice is dealt with in chapter 3. Our insistence on the concept of open justice and the full admission of any member of the public who wishes to attend trials of serious sexual offences provides for, at times, a humiliating and stressful experience for complainants. The prospect of facing this experience contributes to under-reporting and withdrawal.

Pre-recorded cross-examination

- 2.144 I deal with the concept of pre-recorded cross-examination in chapter 4, especially in the context of children and vulnerable adults. Currently, gruelling cross-examination awaits the complainant at trial, which is often long delayed, before the public in a court building. Pre-recorded cross-examination in the investigation of sexual offences is not yet introduced in Northern Ireland. Evidence should be gathered and recorded when it is fresh in the complainant's mind, in a way that makes it acceptable as evidence in court and, at the same time, allows the complainant to deal with the trauma and, hopefully, heal. This will require adjustments to both the collection of the evidence for evidence-in-

70 Sadan, M., Dikweni, L. and Cassiem, S. (2001) *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and related services* Cape Town: IDASA

71 Cook, D., Burton, M., Robinson, A., and Vallely, C. (2004) *Evaluation of Specialist Domestic Violence Courts/Fast Track Systems* London: CPS and Department for Constitutional Affairs

chief as well as for cross-examination. As I have made clear elsewhere resolution of disclosure issues is a vital prerequisite for this step.

Myths surrounding serious sexual offences

2.145 Complainants are fearful of the myths that can surround serious sexual offences and with which they are often confronted at trial. They have to be addressed if trials are to be fairly conducted both from the practical view of educating the jury and the wider vista of educating the public and school children. I consider such steps in chapter 6.

Social Media

2.146 In some trials the untruthful and inaccurate vilification of complainants on social media can be the greatest burden of all and is one of the strongest chill factors in impeding complainants' fair participation in the criminal justice system. I deal with the almost insoluble problem of controlling social media in chapter 7.

Cross-Examination on previous sexual history

2.147 Despite legislation restraining cross-examination on previous sexual history, the experience and perception of complainants, supported to some extent by research, such as the Observer Panels in Northumbria, is that this is all too common. I deal with this in chapter 8.

Consent

2.148 The complexities surrounding consent are often beyond the comprehension of many complainants and are dealt with in chapter 11. Arguably, our law is too vague in this area and permits a jury's understanding of what evidence constitutes reasonable belief in consent on the part of an accused person to be invaded by misguided rape myths and stereotypical thinking.

Cross-examination of complainants and witnesses by counsel

2.149 Defence counsel must be free to robustly challenge the complainant's evidence. My experience is that most counsel do this in a thoroughly professional and fair manner. However, reports from Victim Support NI and complainants speaking to me are to the effect that this is not always the case. As indicated earlier in this chapter, the tone, pace and volume of cross-examination in some instances is less than the courteous and dignified treatment that should be accorded to all witnesses. Judges need to be more interventionist to discourage this in all instances where it arises.

Cross-examination by accused persons

2.150 In Northern Ireland, as in most other countries, litigants in person (LiP) charged with a sexual offence are prohibited from cross-examining the complainant in

connection with that offence or in connection with any other offence (whatever the offence) that the LiP is charged with in the proceedings under Article 22 of The Criminal Evidence (Northern Ireland) Order 1999.

- 2.151 They are prohibited from cross-examining child complainants and child witnesses under Article 23 and other relevant witnesses under Article 24 of the 1999 Order.
- 2.152 The court may appoint a legally qualified representative if the defendant is unable to do so (Article 26). Article 26(5A) provides that the DoJ will pay reasonable costs, fees and expenses properly incurred.
- 2.153 Article 27 of the 1999 Order allows the judge to give a warning to the jury to ensure the accused is not prejudiced by any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person and by the fact that the cross-examination has been carried out by the legal representative.
- 2.154 Consequently, the complainant need have no concerns about this type of cross-examination occurring.

Marginalised Communities

- 2.155 Undoubtedly, people from Black, Asian and minority ethnic communities and members of the Traveller community may well have experienced racism or prejudice and may fear, understandably, that they will not be believed or that they will not be treated properly. As a result, they may be reluctant to report offences or support a prosecution. Cultural and religious beliefs may also prevent some people from reporting offences or supporting a prosecution. The Traveller community has also mentioned through a member of Tóme Anoshá that complainants are frightened to report sexual assault in case their children are taken away from them. Other research on Black, Asian and minority ethnic communities point to a reluctance to report an offence where there is financial dependency.
- 2.156 Those who have physical, sensory and learning disabilities or mental ill health, older people, the LGBT+ community, men and sex workers all have complainants who find the current criminal justice system too daunting in reporting and processing serious sexual offences. I address these issues in chapter 13.

Further confidence building measures in the process

The Press

- 2.157 A number of complainants and for that matter accused persons and their families, have complained to this Review about the unbalanced coverage in some serious sexual offence trials. The use of photographs of acquitted persons

and family members, when referring to the trial long after the acquittal itself is a particular concern of these persons and their families. As I mention in chapter 7 mainstream media with a presence on social media should be encouraged to turn off and disable public comment facilities about a trial in the course of live proceedings as happens in England and Wales.

- 2.158 OFCOM provides a code of conduct for the press which includes television and radio as well as mainstream media. In response to a request from this Review OFCOM revealed that between 1st January 2014 and 31st January 2019 it received 138 complaints about programmes broadcast exclusively from Northern Ireland of which only 5 related to news coverage of sexual offences.
- 2.159 The question arises as to how the entry of press can be formulated in the event of a prohibition on the public access to trials with admission for bona fide members of the press. This is a matter that the senior family judge in Belfast, Mr Justice O’Hara is confronting. I recommend that in the event of dispute as to whether someone is a bona fide member of the press, it should be obligatory to produce an accredited media organisation photographic identification or a business card from that organisation together with a letter from the editor of that organisation confirming the press member’s position.
- 2.160 It also seems to me that mainstream press should subscribe to a voluntary protocol for the reporting of serious sexual offences (including for example some consideration being given to the subsequent use of photographs). That protocol should be drawn up voluntarily by the press themselves and I suggest it be drafted after consultation with the Bar Council, the Law Society and groups such as Nexus NI, Women’s Aid Federation Northern Ireland and Victim Support NI. There is already a Media and Justice Protocol dated February 2016 between the Media, PSNI, NICTS, the Office of the Lord Chief Justice and PPS which is subject to a bi-annual review by relevant parties. This could be expanded to include reporting of serious sexual offences.
- 2.161 In truth, if this Review is to bring about a change in culture in how we all view serious sexual offences, the press should be part of that movement and their voluntary protocol should represent a part of that new movement.

Scrutiny Panels

- 2.162 Area scrutiny panels were established in CPS areas in England and Wales to scrutinise cases involving allegations of rape and serious sexual offences. The local panels allow members of the local community to examine the details of anonymised cases, an opportunity to provide their perspective on the way cases are prosecuted and provide feedback on the way people and communities perceive CPS decision making and the way it handles cases locally. They provide for a further assurance of casework and an opportunity to be informed by the third sector.

- 2.163 This is an example of a practice that is also followed in New York with sound local success.
- 2.164 We have seen in Northern Ireland the creation of the Court Observer's panel. Observers will attend all aspects of a case from arraignment to trial and, where it occurs, the plea and sentence. The Court Observer evidence is limited at present as it is currently one third of the way through the process. I applaud this development and look forward to its informed input into the criminal justice system.
- 2.165 I consider that in the wake of our own local Court Observer project, informed consideration should be given to extending this project to embrace the notion of local panels comprised of local members of the community, being permitted to examine details of anonymised cases to provide feedback about the way people and communities perceive decision making. I believe this could engender further confidence in the criminal justice process in serious sexual offences. It is however a project for the future.

Post-trial

- 2.166 An issue that emerged during my interviews with complainants and which also surfaced in the 2018 CJINI report⁷² was the failure on the part of the PSNI and PPS to make complainants aware of and understand the sentencing process. They found it difficult to access information to assist in understanding sentencing decisions. It is important that complainants understand the factors which have determined the sentence that the defendant has received in order to ensure transparency. It is necessary that counsel, prosecutors and defence lawyers also have this understanding in order to advise complainants or defendants appropriately and to enable them to make decisions about whether to appeal against sentences. Complainants should be informed of the imminent release of those who are convicted and, wherever possible, the general location where he is going to live so that they do not, as happened in at least one case that I came across, meet the released person without any notice whatsoever that it was likely to occur. The Victim Information Scheme, whereby victims can register with the PBNi regarding offender release, needs to be given greater publicity.

Conclusion of proceedings

- 2.167 In order to reassure complainants that the justice system does care about the manner in which they have been treated, and to properly inform other stakeholders in the criminal justice system how the general public is viewing progress, I recommend that all complainants, at the end of their role in

72 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse cases by the Criminal Justice System in Northern Ireland*. Belfast: CJINI at paragraph 5.43

the criminal justice system, be invited to give feedback to the PPS of their experiences.

- 2.168 I also recommend we adopt the approach of the CPS in England and Wales who ensure the completion of 'Adverse Outcome Reports'. This practice seeks prosecutor's views on a range of matters such as investigation, victim care and the use of special measures, consultations with witnesses and counsel's perceptions of why the prosecution was unsuccessful. In Northern Ireland, the PPS should introduce a standardised "Adverse Outcomes Report" form. The PPS should also issue accompanying guidance as to how to complete these reports which would enable practitioners to provide the necessary information in a meaningful and timely fashion. Routine review would also facilitate a cycle of continuous learning.

Responses

- 2.169 The responses of those who addressed this particular chapter were all sympathetic to the plight of complainants within the procedures in the criminal justice system dealing with serious sexual offences. The theme was well captured by the SDLP response which asserted, "the listening process should continue". I regard this as a very important theme and one that is vital if we are to build public confidence in the law and procedures governing this type of offence.

ABEs interviews.

- 2.170 The PPS and the PSNI provided extremely helpful and comprehensive feedback on the problems that arise in this vitally important early stage of the process when the complainant is first giving their account and which is later to be used in the subsequent trial. As I have already indicated, the responses have persuaded me that advocates should not be involved in the interview process, that the concept of a narrative followed by a short succinct chronologically ordered statement may not always reflect the realities of dealing with brittle and vulnerable witnesses, and resources are a principal impediment to ensuring that the current technological and digital problems that beset the production of ABEs in court are resolved. I strongly recommend that the Department of Justice grip this problem and through the Criminal Justice Board, set up as a matter of urgency a digital strategy working group. The frustration of both PSNI and PPS on this issue was crystal clear and it mirrors the frustration of lawyers and Judiciary alike. It has to be grasped.
- 2.171 In this context a particularly helpful response emanated from Dr Kevin Smith⁷³ who is presently employed as the National Vulnerable Witness Adviser for

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Dr. Kevin Smith CPsychol AFBPsS.

Major Crime Investigative Support in the National Crime Agency. He made the following points with which I am in total agreement:

- A lack of planning, often preceded by the absence of an adequate witness assessment to feed into the planning process, has been a problem for some time in England and Wales in ABEs. A Her Majesty's Inspectorate of Constabulary (HMIC) inspection that took place four years ago concluded that, "the absence of effective planning was the root of many failings observed."⁷⁴ HMIC view the shortcomings in the interview process that they identified, including in planning and preparation, as a failure of implementation rather than of the guidance and go on to recommend the development of planning booklets and greater supervision as a result. I agree with the need entirely for planning booklets but even more importantly I strongly recommend that greater emphasis be given to planning interviews by the specialist interviewers in ABEs bearing in mind that this interview will be presented as a major part of the prosecution case.
- The Barnahus model has been operating in South London but only to a very limited extent (from The Haven at Kings College Hospital where interviews take place on a Friday only with two psychologists, according to Dr Smith). However a more extensive pilot has started at the Lighthouse in North West London. This will need evaluation.
- Interestingly Dr Smith draws attention to the fact that Durham Police are currently piloting another version of Child House in which the police conduct the interview after the child has been assessed by a clinical psychologist. I consider that this project is well worth following up and echoes my concerns that there may not be enough child psychologists to deal with every case in Northern Ireland. There may have to be selectivity in those cases where a child psychologist is to be involved in the interview due to a paucity of resources in the child psychologist field.
- Counsel are not trained to investigate allegations of crime and therefore it is inappropriate that they should conduct interviews.
- More training of interviewers to the highest standard is likely to be beneficial. This is particularly true when one considers developing research on the role of rapport in managing trauma.⁷⁵
- The involvement of judges, counsel and psychologists in training of police is certainly a feature of many of interviewing conferences in England and Wales.

74 Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary (2014) *Achieving Best Evidence in Child Sexual Abuse Cases: A Joint Inspection* London, HMCPSP at paragraph 1.4

75 Risan, P., Binder, P-E and Milne, B (2017) "Establishing and maintaining rapport in investigative interviews of traumatized victims: a qualitative study", *Policing* Vol.12, Iss.4 pp. 372-387

- Asking younger children and children with learning disabilities a series of questions with a view to effectively summarising what they already told the police in a previous interview is likely to confuse them.
- The idea of a chronological summary may not be entirely consistent with the way that a witness has stored the material in their memory. Adopting a witness compatible style of questioning that takes account of the way in which the material is stored in their memory, as, for example, suggested by the order in which it is recalled, is generally considered by psychologists to be a more productive method of encouraging them to access their account.
- There is a necessity for a competent camera operator to be present at every interview.

2.172 Amongst the several beneficial points made in this response was the clear importance attached to the notion that conducting ABE interviews is a highly skilled exercise and one that I firmly believe may not be within the gift of all the members of the PSNI. There should be careful selection of those who have a flair for conducting these interviews and striking a rapport with complainants if the present impasse is to be circumvented. Rapport with the witness is very important and therefore there may be a need for careful selection for the appropriate interviewer depending upon the particular person or child to be interviewed. One size of interviewer does not fit all complainants.

Early Engagement of defence and prosecution

2.173 Without exception all the respondents to this issue agreed that early engagement between prosecution and defence to define the key issues could and should be a vital development in reducing delay and streamlining the process of disclosure.

Specialist Training for all publicly funded advocates

2.174 This was a recommendation that found favour with the PPS, and the Bar Council in Northern Ireland. No respondent took a contrary view.

2.175 It is right to say that the PPS argued that extensive training has already been delivered at various intervals to all prosecutors who currently conduct serious sexual offence cases but it accepts the need for ongoing training and awareness in understanding the varied needs of complainants and other witnesses. The PPS recognise that training and awareness across a range of themes brings clear benefits to complainants, particularly vulnerable complainants and witnesses for whom, "the experience of engaging with all parts of the Criminal Justice System can be especially daunting." The PPS also indicated that it would welcome the option of sharing training with PSNI, NICTS or others where this would maximise the use of resources.

- 2.176 The Northern Ireland Bar welcomed the recommendation that advocates for the prosecution and for the defence should be required to attend specialist training in all areas pertaining to sexual offence trials. They also highlighted the recommendation that the Bar Council and Law Society should insist on attendance at a sufficient number of CPD sessions in vital areas of law, practice and procedure before competence can be demonstrated in areas of serious sexual violence.
- 2.177 It should not go without mention that the Bar Council has for some time been active in developing opportunities for members to attend specialist training relevant to serious sexual offences. For example, the Bar undertook to deliver a programme of specialist training to publicly funded barristers following the publication of the Marshall Report in 2014. The Bar participates in a European training project initiated by the Council of Bars and Law Societies of Europe, it has developed a Vulnerable Witness CPD Resource Pack and I welcome the fact that a cross-jurisdictional seminar on the topic of advocacy in sexual offence cases was delivered in Northern Ireland in April 2019.

Attrition

- 2.178 I observe the fact that the PSNI recognise that the high rates of attrition are a concern and a point of focus for the PSNI. Their response asserts that they are, “actively involved in several initiatives and research projects in an effort to address the rates of attrition and underreporting, many of which are referenced in the report.”
- 2.179 I agree entirely with the response emanating from the, “End Violence against Women Coalition” which strongly advocated the collection of robust data on the experience of victims/complainants if we are to better understand where it is failing and why there appears to be so much under-reporting of serious sexual offences and a high dropout rate of those entering the criminal justice system. I consider that the Department of Justice should take steps to institute a research project into the degree of under-reporting and attrition rate locally in Northern Ireland, notwithstanding the presence of the figures that exist in England and Wales. If we are to truly grasp and resolve the problem, we need to know the local prevalence and extent of the issue. I note that Ireland is to carry out a comprehensive survey of the prevalence of sexual violence in that country and I consider we should be embarking upon a similar exercise which should embrace the under-reporting and attrition rate as part of the survey.

Facilities

- 2.180 There was general agreement amongst those who responded to this chapter⁷⁶ that there is a need for separate court facilities available for complainants and

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For example, the PPS and Dame Vera Baird QC, Police and Crime Commissioner for Northumbria.

defendants no matter how old the building, in terms of entrances/exits/toilets/ waiting rooms. The Northern Ireland Victim Charter, like the Code of Practice for Victims of Crime in England and Wales, highlights this as important.

- 2.181 Interestingly, HMCTS conducted a review of the court facilities for victims and witnesses in the six Magistrates' courts in Northumbria in 2017 showing that it is somewhere on a spectrum between likely and inevitable that victims/ witnesses will meet up with the defendant/their families or associates in most courts, which, at a stroke, can undermine much of the point of special measures. I am certain that the same problem exists in Northern Ireland and needs to be addressed.
- 2.182 As Dame Vera Baird QC points out, "Remote evidence centres are also a key resource in ensuring the safe separation of victims from any risky contact at court." The availability of Remote Evidence Centres, and the use of pagers and mobile devices so that witnesses and complainants can wait outside the building until they are needed, are all innovations which I strongly recommend for consideration.
- 2.183 The PPS response summed the points above up rather well when it said that,
- "such an outcome would be likely to increase the confidence and peace of mind of complainants and thereby create the potential to enhance the quality of their evidence, reduce rates of attrition and improve their overall experience of the criminal justice system."

It makes the point that where there are *remote evidence centres*, it works optimally where the, "remote" location is near to the court house, enabling the prosecutor to leave court to meet the complainant/witness face to face when required.

Criminal Injuries Compensation

- 2.184 The Police and Crime Commissioner for Northumbria made the point that it is common place that defence barristers accuse complainants of fabricating an allegation of rape in order to make a criminal injuries compensation claim. I agree entirely with her deep concern about this and recommend that judges should scrutinise such cross-examination to ensure that there is some evidence to support the various suggestions.

Complainants' Information Service

- 2.185 I am encouraged by the response from the PPS that it is due to launch a new website around April 2019 which will provide more accessible and user friendly information and will include material relating to PPS processes, the wider CJS processes and information and links to support services. I also welcome that it accepts that a centralised online information system would be useful to provide the public with an end to end overview of the investigation and trial processes

and should be continued to the very end point of release of a defendant from custody with links to organisations concerned at each stage. Currently there is no “joined up” central location for accessing up to date information, so each part of the process provides its own information, independently of each other. If developed this would be of most value if each criminal justice system organisation could host the information on the PPS websites in addition to the Department of Justice. Such a resource of course would be required to design meaningful content, remain updated and handle the likely increase in queries seeking additional information arising from increased public awareness. I regard this as an important potential development.

Effect of sexual violence and the criminal justice process

2.186 I conclude these responses by referring to the number of wrenching responses that we have had from complainants. I am fully aware that there may well be a large number of complainants who have found the system to have worked tolerably well for them. I understand that it is unlikely that they will contact this Review to praise the system. However, the number of complainants from whom we have heard and who have suffered in the system cannot be ignored. That they are to remain anonymous and that I will not reveal any details of what they told me which might serve to identify them, must not mean that their voices go unheard. These are complainants who have been indelibly traumatised and the criminal justice system that we have has not served them well.

Scrutiny Panels

2.187 Interestingly the PPS responded to the issue of Scrutiny Panels by indicating that independent to my report it had considered establishing Rape Scrutiny Panels. The terms of reference have not yet been discussed but it was intended this would include agencies involved in the case e.g. PSNI, PPS, FSNI, Nexus NI, The Rowan etc. The PPS had not envisaged extending to community input and wondered how confidentiality could be guaranteed. To this I simply say that since this has been successfully achieved in England and in New York, why not in Northern Ireland? The PPS has indicated that it intends to establish a Victims’ Advisory Forum and Stakeholder Advisory Forum in 2019 to receive views from victims and stakeholders about such issues, the quality of PPS communications and consideration on new policy statements etc.

Miscellaneous

2.188 Whilst strictly speaking it is outside my terms of reference I draw attention to certain matters raised with me in responses about the plight of victims/ complainants of serious sexual offences:

- Although traumatized they have great difficulty bringing themselves within the current rules for assessing disability.

- Victims often need to move house but such circumstances do not seem to render them a priority case.
- Children of victims may need to move school and the crime perpetrated against the parent should be taken into account in securing a child placement.
- Complainants should be given immediate advice about the danger of contracting HIV.

Reassurance

2.189 I end this chapter by offering some small measure of reassurance to complainants. Professor Cheryl Thomas QC, a distinguished academic from England to whom I refer in more detail in chapters 4 and 6, generously spent time discussing her previous enormous experience of jury research with me. She made the following compelling, albeit perhaps surprising, points about jury verdicts in rape cases, having analysed every single jury verdict in every rape case in every Crown Court in England and Wales (over 40,000 jury verdicts) over a ten-year period (2006–16).

2.190 Juries in England and Wales generally convict more often than they acquit on rape charges (albeit this clearly does not apply to young men). The jury conviction rate for all rape charges in England and Wales in the ten-year period is 55%. This is higher than the jury conviction rate for many other serious offences including grievous bodily harm, manslaughter and attempted murder.

2.191 Most reports of rape conviction rates in England and Wales cite a figure of 6% to 10%. This refers to the percentage of allegations of rape made to the police that result in convictions. It is impossible to compare this figure to any other offences because no other offences are calculated in this way by official statistics.

2.192 Jury conviction rate is specifically the percentage of rape charges put to a jury that juries deliberate on that result in conviction; this is the 55% finding from her research covering every rape charge put to a jury over ten years. There is no single offence of rape in England and Wales or Northern Ireland. There are, in fact, 11 different rape offences, which vary according to the gender and age of the complainant and whether it is a historical allegation or current. She has analysed the jury conviction rate for each of these 11 different rape offences and finds:

- There is no evidence of systemic jury bias against female complainants.
- Jury conviction rates for rape offences vary by the specific rape offence, but some of the highest jury conviction rates in rape cases are for female complainants and some of the lowest are for male complainants.
- The majority of rape charges that juries decide involve female complainants under 16. Jury conviction rates in these cases are as high as 63%. There

are very few criminal offences of any kind with a higher jury conviction rate than this. This is not a new development — that is, it is not a result of an increase in charges of historical sex offences.

- 2.193 I regard the matters set out in the above paragraph as small comfort to complainants. I am satisfied that, whilst there has not been a collapse in justice in rape and other serious sexual offences, nonetheless, the law and procedures need radical revision if we are to recapture the confidence of complainants in the administration of justice and the rule of law. That is the task I have set myself in the succeeding chapters.

Recommendations

Virtually all the issues raised in this chapter are the subject of recommendations in succeeding chapters, so they are not repeated here. However, it is worth setting out some of the steps to reduce the trauma of this process that may not fit easily into those chapters.

1. The Department of Justice should undertake a comprehensive province wide survey and collection of data on the prevalence of sexual violence in Northern Ireland and the degree of under-reporting and attrition rates in the system.
2. All publicly funded advocates should have to undergo specialist training on working with children and vulnerable victims and witnesses before being allowed to take on serious sexual offence cases.
3. The PPS should make use of counsel who are considered to have the most appropriate experience and skills for handling the complex and sensitive nature of sexual offence cases, particularly in dealing with victims who may have significant vulnerabilities or children or young people, rather than basing selection decisions on seniority.
4. PPS should develop an action plan to further improve how counsel is utilised in cases involving serious sexual offences.
5. Achieving Best Evidence (ABE) interviews should be conducted by a cadre of specially trained and carefully selected police officers. In the case of children, the Barnahus system of employing the use of child psychologists should be considered.
6. The Department of Justice should set up a complainants' information service, including a helpline and website, to ensure better information and support. That service should offer a one-stop shop, enabling victims to submit complaints and feedback about their experience.
7. Complainants should be enabled to track the progress of their case throughout the criminal justice system.
8. All Crown Court buildings, no matter how old, should be given separate waiting areas and separate entrances for complainants in serious sexual offences.
9. Remote Evidence Centres should be made available in serious sexual offence cases.
10. In addition, all vulnerable victims and witnesses should be given the opportunity to give evidence remotely from the court building.

11. Witnesses attending court should be given pagers or be contacted via their mobile phones so they do not have to wait interminably in the stressful court precincts.
12. Availability of victim personal statements should be more carefully explained to victims.
13. The Judiciary should carefully scrutinise at preliminary or Ground Rule Hearings, the admissibility of cross-examination on the subject of criminal compensation claims made by complainants. In particular cross-examination on the subject of Criminal Injuries Compensation should only be permitted where there is evidence to support its introduction.
14. The Judiciary should be more interventionist to ensure complainants and other witnesses are treated in a courteous and dignified manner.
15. Complainants, at the end of their role in the criminal justice process in serious sexual offences, should be invited in all cases to give feedback to the PPS of their experience of the system.
16. Prosecuting Counsel, at the end of their role in unsuccessful prosecutions for serious sexual offences in court, should be requested in all such cases to give feedback to the PPS on the reasons for the acquittal and the trial process itself. Routine review would also facilitate a cycle of continuous learning.
17. The Court Observer's Project should be carefully analysed and future developments considered as a means of building public confidence in the criminal justice system. Such 'Scrutiny Panels' should be extended to allow members of the local community to examine details of anonymised cases.
18. The press and media should be party to a voluntary protocol governing how serious sexual offences are reported.

Chapter 3

Restricting access of the public

In the final analysis, the open court principle is not an end in itself, but a means to promote the rule of law and the administration of justice. It follows that openness may yield where the paramount object that it serves — preserving the integrity of the administration of justice — so requires ... Likewise, the principle of openness does not extend to measures that may bring the administration of justice into disrepute by impairing the fairness of court proceedings or transforming them into a means of entertainment.

The Right Honourable Beverley McLachlin¹

Issue

Should access of the general public to Crown Court cases involving serious sexual offences be restricted?

Current law

- 3.1 The principles of open justice and freedom of the press are two of our most fundamental principles and have long existed in our criminal justice system.
- 3.2 Lord Diplock² famously set out two requirements of open justice: first, that proceedings be held in open court to which the press and public can be admitted; and secondly, that nothing should be done that discourages the publication of 'fair and accurate reports of proceedings'.³
- 3.3 Open justice therefore demands that all proceedings and written judgments of the courts are to be held in open court and be freely reported unless the judge or the law determines otherwise. This means the members of the press are free to report on proceedings including details of the accused.
- 3.4 The openness of judicial proceedings is a fundamental principle enshrined in Article 6(1) of the European Convention on Human Rights (ECHR) — the right to a fair trial.
- 3.5 This underpins the requirement for a prosecution witness to be identifiable not only to the defendant but to the open court. It supports the ability of the defendant to present their case and to test the prosecution case by cross-examination of prosecution witnesses. In some cases, it may also encourage other witnesses to come forward.
- 3.6 Lord Steyn summarised the position as follows:⁴

1 McLachlin, B (2003) "Courts, Transparency and Public Confidence - To the Better Administration of Justice" *Deakin Law Review* Vol.8, Iss.1, pp.1-12

2 In *Attorney General v Leveller Magazine Ltd* [1979]

3 See also *Al Rawi and others (Respondents) v The Security Service and others (Appellants)* (2011) UKSC 34

4 In *Re S (FC) (a child)* [2004] UKHL47 at paragraph 30 of the judgment in the case.

“A criminal trial is a public event. The principle of open justice puts, as has often been said, the Judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.”

- 3.7 The Sexual Offences (Amendment) Act 1992 provides that where there is an allegation that a sexual offence has been committed against a person, that person’s name or image should not be published if it is likely to identify them.
- 3.8 The rationale for the rule that anonymity granted to a complainant in serious sexual offence cases is that, without a guarantee of anonymity, the victim of a rape offence may not be prepared to report it or to give evidence against the perpetrator in court. This is what distinguishes complainants from those who are accused of serious sexual offences. As indicated in chapter 12, accused persons may make representations seeking anonymity for themselves when it is established their human rights are potentially engaged and at risk.
- 3.9 In addition, the name of the accused is not published if to do so would identify the complainant.
- 3.10 In the Crown Court between 2016-2018, when defendants faced at least one sexual offence charge, reporting restrictions were made in 28, 27, and 15 cases respectively. In the Magistrates’ court during the same period the numbers were 40, 45 and 31 respectively. The 2018 figures are provisional.⁵
- 3.11 Section 11 of the Contempt of Court Act 1981 empowers the court to impose a ban on the publication of any name or other matter in connection with the proceedings before it and which it has allowed to be withheld from the public. The section complements the common-law power of the court, sitting in public, to receive a small part of the evidence (such as the name and address of a witness) in a form that is not communicated to the public.
- 3.12 Current practice is that the witnesses should not be required to disclose their address to the defence or in open court generally unless it is necessary.
- 3.13 The law is littered with other examples of where the principle of open justice can sometimes act as a bar to successful prosecutions and, accordingly, legislative breaches to the monolith often occur.

5 Please note defendants committed from the Magistrates’ Court to the Crown Court may appear in both figures. When a reporting restriction is made in a case in the Magistrates’ Court which is then committed to the Crown Court, a new reporting restriction order will be made for that defendant in the Crown Court. While it is unlikely that a reporting restriction will only be made in the Crown Court in sexual offence cases, the number of orders made in the Magistrates’ Court is more reflective of the volume of reporting restrictions made in sexual offence cases.

- 3.14 Thus, for example, Articles 4 to 21 of The Criminal Evidence (Northern Ireland) Order 1999 (the '1999 Order') enacted special measures relating to vulnerable witnesses. These included evidence given in private (Article 13), whereby the judge/magistrate may clear the courtroom of those who do not need to be in the courtroom when the witness is giving their evidence. Only legal representatives connected with the case and one nominated press member will be allowed to remain. This measure applies to sexual offence and intimidation cases only.
- 3.15 Interestingly, an English case of Richards in 1999 was helpfully drawn to my attention,⁶ which suggested that the court may go beyond the statutory framework if it believes that clearing the court is 'strictly necessary' to ensure justice is done. Open justice had to yield to the broad principle that justice had to be done.
- 3.16 Section 9 of the Justice Act (Northern Ireland) 2011 inserted a new Article 10A in the 1999 Order, providing that adult complainants alleging sexual offences are entitled to give video recorded evidence-in-chief.
- 3.17 The Youth Justice and Criminal Evidence Act 1999 in England and Wales sets out a range of special measures that are available to witnesses in criminal proceedings who are deemed to be in fear or distress — for example, screening the witness from the accused, evidence by live link or evidence given in private.
- 3.18 Section 46 of the Act (brought into effect in Northern Ireland by The Youth Justice and Criminal Evidence Act 1999 (Commencement Order No. 1) (Northern Ireland) Order 2004) enables courts to make a reporting direction in relation to adult witnesses, which prohibits any matter relating to the witness to be included in any publication during the lifetime of the witness if it is likely to lead members of the public to identify the individual as a witness in criminal proceedings.
- 3.19 The classic case, where members of the public are excluded, is of course in family courts. Hearings in the family courts are in private and only those who are involved can attend. Developments concerning admission of the press are currently under review by the senior family judge in Northern Ireland. Interestingly the children that the judge is dealing with have their own lawyer in public cases and can have a lawyer in private cases if the judge thinks they should.
- 3.20 In addition, there are certain situations where proceedings can be heard in camera — namely in private — when the public are excluded and the doors of the courtroom are closed.

6 (R v Richards (1999) 163 JP 246) Drawn to my attention in a first class submission made to the Review by QUB School of Law.

- 3.21 Excluding the public by virtue of the court's inherent common-law powers is justifiable if the administration of justice so requires— for example, if there is a possibility of disorder. A decision to sit in camera is not justified merely on the grounds that a witness will find it embarrassing to testify.
- 3.22 The necessity principle may be of relevance if a witness is unable or unwilling to give evidence unless the public gallery is cleared.
- 3.23 The main object of the courts is to ensure that justice is done. Before making an application for a hearing or part of a hearing to be held in camera, prosecutors must consider whether the concerns of the witness could be adequately met by use of appropriate special measures. A prosecutor can make an application for proceedings to be held in camera for reasons of national security or for the protection of the identity of a witness or any other person.
- 3.24 The disadvantage of applying for all or part of a case to be heard in camera is that the outcome of the application will not be known until the trial is underway, which may not provide the reassurance necessary in advance.
- 3.25 The trial judge, in the exercise of their inherent jurisdiction to control the proceedings, may permit a departure from this practice in appropriate cases. The witness will not be required to give their name in public and will usually be allowed to write their name down. In certain types of cases — blackmail, for instance — this has become accepted practice so that the name of the witness is not in the public domain.
- 3.26 However, it has to be recognised that, under the current system, the anonymity of the complainant in serious sexual offences is often undermined by use of the complainant's name in the bill of indictment and throughout the court trial, despite the name not being displayed on the notice board outside the court.
- 3.27 Moreover, the public can normally see complainants on the live link and hear their voices (albeit voice modulation has been carried out in some English cases) even when they are shielded by a screen from seeing the accused if they so choose.
- 3.28 This, of course, contrasts with police officers or soldiers who are granted anonymity for Article 2 of the ECHR reasons/security issues, who have true anonymity as they are only ever referred to by a cipher and are not revealed on a screen save to counsel.

International Standards

- 3.29 The provisions of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms both permit the exclusion of press or the public from all or part of a trial, “where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special

circumstances where publicity would prejudice the interest of justice”.⁷ However the European Court of Human Rights has found a violation of Article 6(1) where the Domestic Authorities did not provide sufficient reasoning to demonstrate that closure of a court was necessary.⁸ Moreover the ICCPR requires that a hearing be open to the public “apart from exceptional circumstances”.⁹ Under European Union Directive 2012/29 EU,¹⁰ States are required to conduct an individualised assessment of the victim in order to identify any specific protection needs and to what extent special measures could be used in the course of proceedings. Such an assessment would need to take into account the personal characteristics of the victim and the nature and circumstances of the crime, with particular attention to those suffering considerable harm or a victim of crime committed with a discriminatory motive.¹¹

- 3.30 In short the International Standards permit criminal proceedings to be carried out in the absence of the public, in particular regarding child victims. However arguably this appears to be considered a special measure which should only be used for such a protective need as identified.

Background

- 3.31 The principle of open justice has thus always been one of the fundamental pillars of our criminal justice system¹² and one of the foundations of a democratic society.¹³ It protects against the administration of justice in secret with no public scrutiny. It is one of the means whereby confidence in the courts can be maintained.
- 3.32 Accordingly, unlike Ireland, the public in Northern Ireland are admitted to serious sexual offence cases.
- 3.33 What has to be addressed is whether the unrestrained admission of the public in serious sexual offence cases is contributing to or detracting from the need to ensure that justice is done.
- 3.34 There is very considerable under-reporting of serious sexual offences to the Police Service of Northern Ireland (PSNI). Moreover, seemingly over 40% of those who do report, then drop out of the criminal justice system in the course

7 Article 6(1) of the ECHR and Article 14(1) of the ICCPR

8 *Chaushev and others v Russia*, Application nos. 37037/03,39053/03,2469/04(25 October 2016 paragraph 24)

9 UN Human Rights Committee general comment 32: Article 14 and the right to equality before the courts and tribunals and to a fair trial, CCPR/CGC/32 (23 August 2007) paragraph 29.

10 Establishing minimum standards on the rights, support and protection of victims of crime.

11 Articles 22(2)(3), EUD 2012/29/EU

12 Article 6 of the ECHR

13 *B. and P. v UK*, Appl.Nos.36337/97 (24 April 2001) at para 36 where the court observes; “the public character of proceedings protects litigants against the administration of justice in secret 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 visible, publicity contributes to the achievement of the aim of Article 6(1), a fair hearing”.

of the continuing process. There are victims of rape and other serious sexual offences who suffer in silence, masking their pain in rueful pragmatism and for whom the criminal justice system seemingly has nothing to offer. (See chapter 2 of this Review)

- 3.35 The cited reasons for this under-reporting are set out in chapter 2 of the Review. Often when I met with complainants, the reasons for fear of reporting included the sense of trepidation at the prospect of laying bare their most humiliating experience openly before the public, reflecting their feelings of shame and embarrassment in reporting the crime in the first place.
- 3.36 A recent high-profile trial in Northern Ireland, in which charges of rape were included in the indictment, heard over 40 days before a packed court, illustrated well the fears some of these complainants hold. Anecdotally, - and I recognise this may dilute the strength of the point - the press have reported that some members of the public had attended the trial literally in busloads from outside the jurisdiction on a regular basis solely, in some instances, for the voyeuristic purpose of witnessing the evidence of the young female complainant spread over eight/nine days and also that of the accused.
- 3.37 In a small jurisdiction such as Northern Ireland, with Crown Courts scattered across the country, complainants are regularly giving evidence about their most intimate personal details in sexual offence trials in their local courts. Whilst experience shows that these trials are usually heard before admittedly small public attendances, nonetheless, the hearing takes place in circumstances where the identities of all the parties are widely known throughout the locality. Even one spectator can be enough to spread the lurid details. It can thus be an exercise in abject public humiliation and witness identification, the details of which are relayed widely across the locale.
- 3.38 Can this situation possibly contribute to ameliorating the under-reporting and high attrition rate, much less ensuring a witness gives of their best in the witness box despite the presence of special measures?

Other Jurisdictions

- 3.39 Whilst most jurisdictions in Europe and common law countries elsewhere permit public attendance at trials involving serious sexual offences, there is no shortage of jurisdictions which exclude the public in such trials.
- 3.40 In Ireland, the Criminal Law (Rape) (Amendment) Act 1990 precludes the general public from attending trials for rape and aggravated sexual assault or attempts at such offences. Only officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press and such other persons (if any) as the judge or the court may in their discretion permit to remain have access. In addition, a parent, relative or friend of the complainant,

or where the accused is not of full age, of the accused have a right to remain in court. The verdict or decision and sentence is announced in public.

- 3.41 In Scotland, the public are excluded during the entirety of the complainant's evidence but not otherwise. Whilst there is no statutory obligation to do this, the exclusion is invariably successfully made upon the application of the procurator fiscal in every serious sexual offence trial.
- 3.42 In New Zealand the Criminal Procedure Act 2011 provides that in sexual offence cases the court is required to exclude all persons while the complainant gives evidence. The exceptions are the judge and jury, counsel, officers of the court, the police employee in charge of the case, any member of the media, anyone whom the complainant requests to be present and anyone permitted by the judge to remain.
- 3.43 In Australia the judge is empowered to exclude the public in high profile cases attracting publicity if they deem it to be "in the public interest". An array of public issues inform these restrictions. They include the perceived vulnerability of complainants, their privacy and the important likelihood that complainants might not come forward to bring charges of this nature if they sense they might be in the media spotlight.

Discussion

- 3.44 I am acutely aware of the fundamental principle of open justice which has, with certain limited exceptions, been a pillar of our criminal justice system and a crucial component in commanding public confidence in the courts for many years.
- 3.45 I also recognise that public confidence in the process is necessary. The risk of closed courts is that the public become suspicious of what is being done in its name without having the right to be present and observe. The public may ask why they are being excluded from these offences and not, for example, sordid sadistic murders, child cruelty cases, humiliating robberies of elderly people who have been tortured etc.
- 3.46 The trend is towards more open justice rather than less. In my review of Family Justice in Northern Ireland, published in September 2017, it was noted:
- "Those who operate in the family justice system need to be proactive in shining a light on our work so as to generate a far greater understanding amongst the public of what lies behind the important decisions that are taken about children by the courts, as an arm of the State, in the public's name".¹⁴

14 Review of Civil and Family Justice in Northern Ireland (2017) Review Group's Report on Family Justice Belfast: Office of the Lord Chief Justice

- 3.47 It can be argued that criminal justice merits public discussion particularly in the context of Northern Ireland where transparency and accountability in the justice system is of paramount importance.
- 3.48 It has been argued during the course of this Review that the advent of special measures, the possible introduction of pre-recorded cross-examination (albeit currently confined in statute to children and vulnerable witnesses), the possible establishment of Remote Evidence Centres (which would preclude the necessity of complainants to attend a court building, attending, for example, at the Rowan Sexual Assault Referral Centre), and better control of social media could all ameliorate the stress of attendance at courts for many complainants. There already exist statutory provisions for clearing the court when children give evidence, albeit rarely invoked.
- 3.49 The strength of all these points is not lost on me. Nonetheless, the right to a public hearing is not absolute. Serious sexual offences are in many ways unique in the criminal justice system. They delve into the very soul of all that is private and intimate in the personal lives of complainants and accused. They elicit intense feelings of shame and self-blame which are major contributors to the refusal of so many to bring these crimes within the criminal justice system. Public revelation of this intensely humiliating experience is an important factor in both the under-reporting and the high attrition rates. Procedures have to be adopted to address this phenomenon which constitutes a blight on the criminal justice system. I consider that this is a classic instance where there is a requirement to take radical measures in order to protect the rights of this class of complainant. This state of affairs “require specific positive measures ... in order to ensure that victims of abuses such as sexual violence and abuse, rape ... are able to come forward and seek and obtain redress.”¹⁵
- 3.50 It is the uniqueness of these crimes which has led to complainants being given anonymity. That development recognises that if this privilege of anonymity was not afforded to complainants even fewer would come forward. However, the degree of under-reporting illustrates that this step is not enough. Something more needs to be done to radically change this situation and that underlies why such steps as excluding the public have been taken in other common law jurisdictions when the complainant is giving evidence. Indeed if we were to exclude the public in Northern Ireland, England and Wales would remain the only jurisdictions in both the UK and Ireland where such steps were not taken at least to some degree.
- 3.51 The argument in favour of excluding the public is even more compelling in the context of a small jurisdictions such as Northern Ireland with local courts where public familiarity with witness identity is a reality of life.

15 See UN Committee Against Torture, General Comment No.3: Implementation of Article 14 by States parties CAT/C/GC/3 19 November 2012) at paragraph 33.

- 3.52 In truth, experience reveals that very few people do attend serious sexual offence trials albeit there are highly publicised exceptions to this where high profile defendants are involved. However the fact that few people attend is no protection in a small community where everyone is easily identified and the presence of even very few people is enough to render the identity of the complainant and the sordid facts of the case a matter of public knowledge within a very short time. The advent of social media and its use by members of the public who attend trials has made this danger all the greater.
- 3.53 In small jurisdictions, an individual can be identified and the complainant's right to anonymity nullified through voice recognition, the presence of their friends and family, witnesses and the concept of jigsaw identification (i.e. through location, addresses and other demographic and geographical factors). These all contribute to an insoluble problem. The recommendation I make is that the law in Northern Ireland should be brought into line with the law in Ireland save that it should be extended to all serious sexual offences.
- 3.54 I regard this as a modest intrusion into the principle of open justice based on the special circumstances which apply to complainants in this jurisdiction. Such an intrusion is confined so long as we afford full attendance rights to *bona fide* accredited press representatives and family members/close friends of both complainant and accused, together with a general discretion vested in the judge to admit others. These others might well include for example members of the legislative assembly, research students, academics, the Children's Commissioner etc. I add one rider. There might be circumstances where for good reason a complainant might not want family members to be included and the judge would still retain the power to clear the court public gallery under the special measures provisions.
- 3.55 It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would normally be entitled to attend but for purely practical reasons usually do not or cannot do so. As earlier indicated, experience reveals that usually very few people in fact attend serious sexual offence cases and to that extent the exclusion of the public will have little effect on the public itself but maybe of an inestimable value to complainants and for that matter, some accused.
- 3.56 The presence of the press secures several objectives of open justice:
- it enables the public to know that justice is being administered impartially;
 - it reduces the likelihood of uninformed or inaccurate comment about the proceedings; and

- it deters inappropriate behaviour on the part of the court.¹⁶

- 3.57 I recognise that indisputably some members of the public may attend such trials with the best of motives. However, recent experience has shown that in certain high profile trials, where the national or local profile of the parties is high, the process of permitting uncontrolled public access can lead in some instances to gross abuse and blatant sexual and unsavoury voyeurism to some degree. Such attendance serves not only to deter, intimidate and humiliate witnesses, whose right to anonymity is destroyed even when special measures are invoked, but also brings the whole legal process into disrepute fuelling already existing fears about reporting to the police. It is not calculated to afford appropriate respect to the accused and complainants as well as the administration of justice. There is a clear distinction to be made between what interests the public and what is in the public interest.
- 3.58 The advent of social media – with spectators for example tweeting regularly what they have heard - has made instant reporting of witness identity and other salacious and often untruthful information about such witnesses almost impossible to control from a practical level. Restricting public access is yet one more method, albeit an imperfect one, of preventing that happening. Information emanating from spectators at a trial, which has the potential to be spread through social media conversations in a manner that is not as easily controlled as information disseminated through mainstream media, can easily influence jurors and prejudice an ongoing trial.
- 3.59 There exists the compromise adopted in Scotland and New Zealand of excluding the public only during the evidence of the complainant.
- 3.60 While this does ease the burden on the witness of giving humiliating and personal evidence before a public gallery, it does not address the problem in a small jurisdiction of protecting the identity of the complainant. Jigsaw identification from other parts of the evidence as indicated above is all too easy in local courts. For similar reasons, the use of ciphers (which ought to be introduced in any event, at least as an interim measure) applied to a complainant's identity in all court hearings would not remove the jigsaw identification issue in small jurisdictions like Northern Ireland. However, it would be a step in the right direction and I recommend that ciphers should be applied to a complainant's identity in all court hearings including the initial charge sheet and bill of indictment albeit that full identify must be revealed to the accused and the legal representatives. Moreover images of complainants should not be publicly displayed on a screen during any hearings save to the accused and their legal representatives.

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R-v-Legal Aid Board ex parte Kaim Todner (1999) QB 966 and R v Sarker and the BBC (2018) EWCA Crim 1341

- 3.61 I am not in favour of vesting a wide discretion on a case by case basis in the court to decide which cases should be heard in public and which should not, based on some vaguely worded “interest of justice” or “strict necessity” test. The current discretion to clear the court is extremely rarely used in light of the principle of open justice. Moreover vesting a wider description in the court is, in my view, a recipe for judicial inconsistency, potential unfairness to different complainants in different parts of the country, and uncertainty in terms of application.
- 3.62 Complainants coming forward to the police would not know whether or not that anonymity was going to be preserved. Even when they did come forward, and the case is before the court, the question of public access would have to be applied at the earliest stage of the proceedings. At this stage in most cases it is impossible to know the full circumstances that may unfold at trial, how much publicity the case is going to generate in the locale and what damage is likely to occur to the complainant. Applying it at the later stages of the proceedings is probably too late to be effective.
- 3.63 The law always has a preference for clarity and certainty in its application and I therefore consider we should apply the same approach as that now carried out in Ireland.
- 3.64 In passing I note that the anonymity of the complainant lasts for the complainants’ lifetime and ceases when they die. This no doubt reflects the fact that the primary purpose of granting anonymity is to spare the victim the indignity and potential harm of being identified as such and the risk that this could deter them from coming forward.¹⁷
- 3.65 This could deter some victims coming forward if, for example, they have a terminal illness. Moreover it might also be extremely distressing for their families. I therefore believe anonymity for complainants should be made permanent.

Responses

- 3.66 Numerically there has been overwhelming support for the proposal that the admission of the public should be restricted in serious sexual offence trials. 420 respondents to our online survey dealt with this recommendation and 86.7% agreed, 90.9% of females and 73.6% of males.
- 3.67 The responses to our online survey were echoed in a questionnaire completed by 67 women for the Consortium for the Regional Support for Women in Disadvantaged and Rural Areas where 91% of the respondents favoured this restriction.

- 3.68 Public approval in these surveys was reflected in the fact that the 5 major political parties spoke with one voice in agreeing that these were appropriate recommendations given the circumstances that operate in Northern Ireland.¹⁸
- 3.69 The vast majority of other respondents, both individuals and representative bodies, similarly approved.¹⁹
- 3.70 Fairly typical of that support came from the Law Society. The Society is the representative body for over 2,600 solicitors working in private practice, the public sector and business. The membership as a whole were asked for their views on this and other matters arising out of the Review and the Society hosted a round table meeting of criminal practitioners from across Northern Ireland reflecting the membership gender balance.
- 3.71 The Society recorded that almost without exception members agreed that there was no reason not to introduce a ban on members of the public being present at such trials. Indeed some members felt such a step should be introduced as a matter of urgency. Members felt that complainants were deterred from advancing their case due to the fact that the public would be present.
- 3.72 Amongst those that supported the recommendation that access to trials involving serious sexual offences should be confined to the press and close family members, there were those who felt I had not gone far enough in this direction.
- 3.73 Nexus NI suggested that the press should be subject to controls as to what can be reported, how it can be reported, and when it can be reported to avoid sensationalist reporting. They encouraged the need to work with the media to develop clear guidelines with stronger more forceful restrictions developed around reporting. They welcomed the opportunity to engage with the media to help establish a productive way forward in this direction.
- 3.74 Of the respondents to our own online survey, 28 stated that the press should also be excluded from the court with 21 respondents specifically raising issues with how the press report trials of serious sexual offences.
- 3.75 The need to ensure that only accredited members of the press should be present surfaced and some respondents suggested there should be a Gagging Order imposed on the press until a verdict was reached.
- 3.76 Of particular interest to me was the response from the Rape Crisis Network Ireland which has lengthy experience of the exclusion of the public. That body

18 The Democratic Unionist Party, Sinn Fein, the Social Democratic and Labour Party, the Ulster Unionist Party and the Alliance Party. In the pre-consultation period Clare Bailey of the Green Party had indicated her support. Jim Allister of the Traditional Unionist Voice was the only politician who indicated his opposition. In addition the Belfast City Council had indicated their approval.

19 For example the Law Society, Barnardo's, Nexus NI, Victim Support NI, End Violence Against Women, Members of the Retired Association Probation Officers, individual complainants such as Maira Cahill and Sabrina Barton, and other individuals such as Sheila Simons, Chair of the South Eastern Area Domestic and Sexual Violence Partnership.

not only agreed with my recommendations, but felt Ireland should extend their exclusion. It stated:

“We think it would be better if such exclusion were automatic for all but the most minor of offences (tried in the District Court), not least because many sexual offences which do not carry the heaviest penalties in law are still devastating in their effects on their victims. These effects should not be made worse by being obliged to give evidence about extremely intimate matters in open court.”

3.77 Nonetheless the recommendations were not without some dissenting voices.²⁰ The Bar Council response, incorporating the Criminal Bar Association of Northern Ireland, who consulted the most senior practitioners practicing at the Criminal Bar in Northern Ireland, evinced a number of reservations and they can be summarised as follows:

- There might be significant implications for the transparency and accountability of the criminal justice system by excluding the public. It could restrict opportunities to promote a more informed public discourse and understanding of important court decisions.
- Members of the public attending court can witness the demeanour of the complainant and it allows the public to see how the jury has reached its verdict and understand that this was done on a sound evidential basis.
- There are already means of protecting complainants with the wide array of special measures e.g. ABE interviews, live link connections, screening, rendering the environment less intimidating for complainants.
- If the recommendations of this Review were implemented additional protection such as pre-recorded cross-examination, control of social media etc. would also serve to protect complainants.
- There must be doubts as to how the law would define those offences which qualify as serious sexual offences for the purpose of excluding the public. Moreover this could herald exclusion in other non-serious sexual offences.
- Excluding the public would undermine public confidence in the administration of justice and the rule of law.
- Judges have powers to regulate the trial process and could, on appropriate application, exclude members of the public where their presence would frustrate or render impractical the administration of justice. Judges are best placed to regulate the trial process having regard to the particular circumstances of the case and danger of the evidence.

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For example the blog “The Illustrated Empathy Gap” felt that public confidence would not be enhanced in that the comparison with family law was ill advised since this was purely to protect children whereas in serious sexual offences the alleged victim already has anonymity; a private individual, who pointed out that the press were not always independent and fair and raised the fear that this step in serious sexual offences could lead to public access being removed in other court proceedings. The family members of some accused who had been acquitted feel that the presence of the public was a means of acquiring public approval and understanding of an acquittal.

- 3.78 The Northern Ireland Human Rights Commission²¹ (nihrc), whilst welcoming the recognition of the importance of open justice with the proposal to continue to allow the press to attend the hearings of serious sexual offences, raised concerns about a blanket approach being taken to the exclusion of the public for particular forms of criminal trials, rather than a case by case consideration of the merit of a closed hearing. The Commission recommended that I look again at the current recommendations to see if an individualised approach within a structured framework, asking the judge to make a formal decision at the commencement of the trial, could be adopted.
- 3.79 The Information Commissioner in his response, in the context of my recommendations that ciphers be applied to a complainant's identity in all court hearings and for their image not to be publicly displayed during the hearing, recorded that it would be important to clarify as part of this processing whether the data is anonymised or pseudonymised as each has different implications in relation to the definition of personal data and, in turn, the legislative obligations. Controllers under the General Data Protection Regulation 2016 (GDPR), should refer to the guidance available on the Commissioner's website in relation to this aspect.

Conclusions

- 3.80 I consider that the general public appetite for restricting admission to serious sexual offences is unmistakable. It reflects my own views.
- 3.81 In most cases very few members of the public attend these trials and the press is already the existing means of transparency and accountability in terms of explaining to the public the circumstances of such trials. The public's understanding of these trials already comes largely from the press.
- 3.82 The present means of protecting complainants has proved inadequate to dispel the existing fears that clearly contribute to the deterrent factors, which cause so many complainants to remain outside the criminal justice system and, once inside, to fail to remain therein. The sense of humiliation of being obliged to recite the most intimate and private details in a public arena has not abated.
- 3.83 The sheer weight of approval to my recommendations emanating from public representatives and individual members of the public responding to this Review must dispel any question of public confidence in the administration of justice and the rule of law being undermined. It is the lack of confidence in the current administration of justice and the rule of law in serious sexual offences that is deterring so many complainants from entering the criminal justice system despite the current presence of special measures.

21 The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function it made its response to the Preliminary Report.

- 3.84 The current powers open to judges are clearly inadequate to persuade them to exclude the public. It is not happening either in Northern Ireland or in England and Wales. The discipline of applying open justice principles precludes such a step being taken in the absence of firm legislative action along the lines followed in Ireland.
- 3.85 Ireland has no difficulty defining the offences from which the public are prohibited to attend. This Review has set out in detail the serious sexual offences to be considered and all of those which are heard in the Crown Court will fall within the remit of the definition.
- 3.86 I have carefully considered the representations NIHRC so helpfully set out. I have outlined already in this chapter the dangers of uncertainty and inconsistency which lie in the wake of a case by case approach. I am satisfied that the circumstances of deterrence, which currently preclude so many complainants from advancing their case, are as such that they represent exceptional circumstances justifying special measures in terms of the recommendations I have made. Complainants have rights which they are entitled to have protected. If we are to restore confidence in the criminal justice system for these complainants, then I consider this to be a vital building block along the way.
- 3.87 Accordingly, the responses I have received have strengthened my views on this matter and my recommendations remain unchanged.

Recommendations

- 19.* That the public at large be excluded in all serious sexual offence hearings in the Crown Court save for officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant or, a parent or relative of the accused together with such other persons (if any) as the judge, or the court, as the case may be, may in their or its discretion permit to remain. The public will be admitted for the verdict and sentencing in the event of conviction.
- 20.* A cipher be applied to the complainant's identity in all court hearings, including the initial charge sheet and the bill of indictment (albeit the identity must be revealed to the accused and their representatives) and their image shall not be publicly displayed during any hearing save to the accused and their representatives.
- 21.* Anonymity of complainants shall be made permanent so that it applies even after death.

Chapter 4

Pre-recorded
cross-examination

The key aims of s.28 are for the cross-examination to happen earlier in the process than if cross-examination occurred at trial (to help aid recall); and to improve the quality of the evidence provided by the witness. It is envisaged that this will be achieved by:

- *Making it easier for the vulnerable/intimidated witnesses to recall/recount events clearly by reducing the length of time to cross-examination.*
- *Improving the experience for witnesses (e.g. less stressful/traumatic/ accessing the full range of support earlier).*

**“Process Evaluation of Pre-recorded Cross-examination Pilot (section 28).”
Ministry of Justice Analytical Series 2016¹**

Issue

Should the practice of pre-recording the cross-examination of the complainant contained in Article 16 of The Criminal Evidence (Northern Ireland) Order 1999, but not yet introduced, be now commenced in serious sexual offences?

Current law and Practice

- 4.1 The Criminal Evidence (Northern Ireland) Order 1999 (the 1999 Order) extends to Northern Ireland a range of provisions in the Youth Justice and Criminal Evidence Act 1999 (YJCEA) enabling Special Measures Directions (SMDs) to be issued. These measures include what is sometimes referred to as the ‘full Pigot’, in which both the evidence-in-chief and the cross-examination of a witness is pre-recorded before trial (as opposed to the ‘half Pigot’ option in which only the evidence-in-chief is pre-recorded).
- 4.2 Article 16 of the 1999 Order makes specific provision for video recorded cross-examination and re-examination to complement video recorded evidence-in-chief ahead of trial. The judge and legal representatives must be able to see and hear the examination and communicate with persons in whose presence the recording is being made. However, the recording is in the absence of the accused, although the accused is to be able to see the examination and communicate with their legal representative.
- 4.3 Once the recording has been made, further cross-examination is not possible without a further SMD and permission for this will be given only if the party seeking it can show that they have become aware since the recording was made of a matter that they could not have ascertained by reasonable diligence before the time of the recording.

¹ Ministry of Justice (2016) *Process evaluation of pre-recorded cross-examination pilot (section 28)* London: Ministry of Justice

- 4.4 Article 16 of the 1999 Order was commenced on 3 April 2017 insofar as it relates to proceedings in the Crown Court and committal proceedings in the Magistrates' court in relation to an offence that is alleged to have occurred in the local government district of Belfast (see The Criminal Evidence (Northern Ireland) Order 1999 (Commencement No. 11) Order 2017). However, my understanding is that no applications have yet been made in Northern Ireland for this particular SMD.
- 4.5 Complainants in sexual offence cases benefit from a presumption of eligibility for certain special measures on the ground of fear or distress under Article 5(4) of the 1999 Order, unless the witness has informed the court of a wish not to be eligible by virtue of the presumption. These measures include video recorded evidence-in-chief (see Article 10A of the Order inserted by the Justice Act (Northern Ireland) 2011), but do not yet include pre-recorded cross-examination. Essentially, then, Northern Ireland operates a half Pigot option for complainants in sexual cases.

International Standards

- 4.6 The Istanbul Convention requires the State to take measures to protect the rights and interests of victims in judicial proceedings by enabling victims to testify according to the rules provided by their internal law without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.²
- 4.7 The EU Directive establishes a right to protection, in which measures should be made available to "protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying."³
- 4.8 While the international standards highlight the need to provide for protective measures for victims, the particular measures to give effect to this right are left to the State. The focus of this is on victims of serious sexual offences. Any consideration of particular protective measures would also have to consider the fair trial rights of the defendant.
- 4.9 The international standards do not make specific comment on the concept of a pre-recorded cross-examination, but it has been recognised that the issue of admission of evidence is a matter for the domestic legislatures and national courts.⁴

2 Article 56(1)(i), Istanbul Convention. The Council of Europe Convention on preventing and combating violence against women and domestic violence

3 Article 18, EU Directive 2012/29/EU. See also United Nations (1985) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* New York: United Nations, para 6(d)

4 UN Human Rights Committee, General Comment No.32: Article 14, Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 39

Background

- 4.10 The Department of Justice (DoJ) has made a commitment through the Victim and Witness action plan and received ministerial agreement to pilot the special measure of pre-recorded cross-examination for vulnerable or intimidated witnesses in Belfast Crown Court, with a view to extending the scheme to all Crown Courts. This is the only special measure, provided by Article 16 of The Criminal Evidence (Northern Ireland) Order 1999, which has not yet been commenced.
- 4.11 Work undertaken by the pilot project group⁵ had been based on the idea that all vulnerable or intimidated witnesses who were eligible for special measures in Belfast Crown Court, and who had recorded their evidence-in-chief, would have the opportunity to have their cross-examination recorded before the trial.
- 4.12 This pilot has been on hold since February 2017. A major issue is that it is the experience of the Judiciary in Northern Ireland that timely disclosure is not being achieved, with it often being delivered up to the last minute or, indeed, even during the trial, thus impacting on the viability of the prospect of early cross-examination. Further concerns were also raised about the concept of questions being agreed in advance and how it could impact on the introduction and success of the pilot.

Other jurisdictions

- 4.13 Pre-recorded cross-examination, at the very least involving children and vulnerable adults, is an idea whose time has come across other jurisdictions. England and Wales and Scotland within the United Kingdom are already well ahead of us in Northern Ireland in developing and running with the concept in a creative and novel fashion. Countries as wide apart as New Zealand, Australia, Iceland, Norway, and France all invoke the concept. It is on the list of matters to be considered by Ireland in the review instituted in April 2018 by the Minister for Justice in Ireland of legal protections offered to complainants in sexual assault cases.

England and Wales

Background

- 4.14 I make no apology for delving into the English and Scottish experiences in considerable detail because it is my recommendation that in Northern Ireland we should benefit from and follow the identical path being pursued in both

⁵ Comprising representatives from the Public Prosecution Service (PPS), the Police Service of Northern Ireland (PSNI), the Office of the Lord Chief Justice (OLCJ), the Northern Ireland Courts and Tribunals Service (NICTS), Victim Support NI, the National Society for the Prevention of Cruelty to Children's (NSPCC) Young Witness Service, the Law Society and the Bar Council, and chaired by the Department of Justice.

these countries. It is by closely observing and analysing their experience that a successful pilot scheme in Northern Ireland can be introduced.

- 4.15 In 1989, the Home Office issued its publication, *Report of the Advisory Group on Video Evidence* (known as the Pigot report),⁶ which recommended that the whole of a child's or vulnerable witness's testimony, including cross-examination, should be pre-recorded. Although this proved controversial, the Pigot report has been highly influential and laid the ground for reform in Australia, England and Wales, and New Zealand, as outlined below.

Implementation

- 4.16 Pre-recorded cross-examination under section 28 of the YJCEA ("section 28 cases") is being slowly implemented across England and Wales.
- 4.17 A commencement order introduced it on a pilot basis from 30 December 2013 in three Crown Court centres (Kingston upon Thames, Leeds and Liverpool) for witnesses who had received a section 27 direction (that is, one enabling a vulnerable or intimidated witness to have their evidence-in-chief video recorded) and were vulnerable on the basis of their age (being under 16) or if they suffered from some learning or physical disability.
- 4.18 The key policy aims of section 28 cases were for the cross-examination to happen earlier in the process in order to improve the quality of the evidence given by the vulnerable witness. It is also meant to decrease the amount of waiting time for vulnerable witnesses.
- 4.19 During the pilot, section 28 hearings were scheduled a number of months after the preliminary hearing to allow for full disclosure and consideration of the Achieving Best Evidence (ABE) interview. The Crown Prosecution Service (CPS) in England must apply for special measures, including a section 28 hearing, and a date for the Ground Rules Hearing (GRH), will be agreed. This GRH usually occurs in the week before the section 28 hearing. The judge may also require regular updates prior to these hearings on the preparedness of counsel for the section 28 hearing.
- 4.20 In practice, applications for special measures were rarely objected to and even more rarely refused.
- 4.21 Pilot protocols made a GRH mandatory for section 28 cases. The principal matters discussed and determined at this hearing are: the likely length of cross-examination; the nature of the questioning (including limitations on "putting the defence case"); and any particular considerations required given the particular vulnerability of the witness.

6 Home Office (1989) *Report of the Advisory Group on Video Evidence*. (Chairman Judge Thomas Pigot QC.) Home Office: London

- 4.22 In both Leeds and Liverpool, it was the practice to require defence counsel to submit their proposed questions in advance for approval in a GRH form. This form also required counsel to certify that they had read the judicial protocol on the implementation of section 28, and the relevant toolkit on the Advocate’s Gateway, (which provides guidance on the way to cross-examine children in an age and development-appropriate manner).⁷
- 4.23 The section 28 hearings took place in a court setting, with a live link to a video interview suite within the court building. A day or so before the hearing the witness viewed a video of their ABE interview. On the day of the hearing, they arrived at the interview suite and in most cases the judge and counsel met them to introduce themselves before going to court. In court, the entire proceedings were recorded, including the preliminary stages of establishing video-link contact.
- 4.24 The cross-examination was conducted with the witness being able to see counsel on screen. In the courtroom there was a screen showing the vulnerable witness. The process was then similar to a normal video-link examination.
- 4.25 In some cases the presiding judge deemed it appropriate that they and counsel should join the witness in the video suite in order to carry out the questioning. This occurred where the vulnerable witness had particular communication difficulties or where the vulnerable witness was very young and close interaction was necessary to hold their attention.
- 4.26 At the end of the hearing, there was a brief discussion with counsel about whether the recording should be edited. As the questions are predetermined, this did not happen often.
- 4.27 Elements of the section 28 pilot include: rigorous judicial control driven by the Criminal Procedure Rules, practice directions and new plea and trial preparation hearings; heightened awareness of inappropriate questioning reinforced by robust Court of Appeal judgments; and tighter rules on disclosure and discounts for guilty pleas. Courts must now take every reasonable step to facilitate witness participation.
- 4.28 Many practitioners involved in the process recognised the importance of the GRH in the success of the pilot because questions asked were more relevant and focused as a result of the additional scrutiny.
- 4.29 However, practitioners reported issues with technology including sound quality during playback, insufficient amount of screen space dedicated to witnesses, and the fact that the section 28 equipment caused live link rooms to be unable to be used for other live link evidence. Some defence barristers felt pre-recording cross-examination hindered their ability to effectively question the vulnerable witness.

7 See chapter 15 of this Review on ‘Training’.

Evaluation of Pre-recorded Cross-Examination

- 4.30 The England and Wales Ministry of Justice (MoJ) evaluation⁸ found it difficult to assess whether pre-recorded cross-examination under section 28 of the YJCEA improved witness recall because there were still long periods that passed between incidents occurring and the witness giving evidence. A high proportion of witnesses included in the pilot gave evidence many months after the offences were said to have occurred.
- 4.31 At the same time, section 28 cases (where pre-recorded cross-examination took place) took on average around half the time for cross-examination to take place compared with section 27 cases (where witnesses' evidence-in-chief was recorded but they had to attend trial to be cross-examined).
- 4.32 Most practitioners considered that there were benefits for witnesses in section 28 cross-examinations that helped their recall.
- 4.33 There was a view among practitioners that the questioning style in section 28 cases was better than in other cases because questions were more focused and relevant. This seemed to be due to the GRHs prior to the hearing.
- 4.34 The cross-examination period was much shorter in section 28 cases, generally between 20 and 45 minutes as opposed to 45 minutes to three hours in section 27 cases.
- 4.35 Although the content of cross-examinations was stressful for both witnesses in section 27 and 28 cases, section 28 witnesses reported more positive experiences of cross-examination than section 27 cases (although not all section 28 witnesses reported positive experiences).
- 4.36 Practitioners also considered that the trauma from cross-examination was reduced in section 28 cases.
- 4.37 In addition, witnesses benefited from much less waiting time in court; pre-set listing times of cross-examinations and start times were nearly always kept.
- 4.38 There were fewer cracked trials (i.e. trials where witnesses withdraw or where the witness does not turn up) for section 28 cases than section 27 cases and there were more guilty pleas before trial in section 28 cases. Although the reasons for this were unclear, one perception was that this was because evidence was being gathered and disclosed to defendants earlier.
- 4.39 Trial durations were slightly shorter on average in section 28 cases than in section 27 cases.
- 4.40 There was little difference in the rates of conviction at trial for section 27 and section 28 cases.

⁸ Ministry of Justice (2016) *Process evaluation of pre-recorded cross-examination pilot (section 28)* London: Ministry of Justice

Further developments

- 4.41 Following the largely positive evaluation of the pilot by the MoJ in 2016, the government announced its intention to roll out section 28 across Crown Courts in England and Wales for children and persons suffering from incapacity who are eligible for special measures under section 16 of the YJCEA.⁹
- 4.42 This has yet to occur and there is no commencement order yet signed because of the need to ensure there are robust and secure IT systems in place for national roll out. We understand that is still the position although progress is being made with thorough technology specific testing carried out and developments invoking the principle for intimidated witnesses may be imminent for a roll out in the three original courts. Thereafter a further roll out in six other courts may occur for children, vulnerable witnesses and intimidated witnesses. Thereafter hopefully a full national roll out will occur.
- 4.43 Our understanding is that section 28 will be extended slowly for child complainants, eligible witnesses (as defined by section 17(4) of the YJCEA) and adult victims following technological improvements and showing final recordings to section 28 pilot judges. If the judges are content with the quality of the recordings, it will be signed off. Once the process is ready to go live, the CPS have been allowed eight weeks for training purposes.
- 4.44 HMCTS has indicated to us that it is open minded about the possibility of extending the concept to all complainants in the fullness of time.

Conclusions

- 4.45 Whilst there are some dissident voices in the Judiciary and legal profession in England, we believe from the inquiries we have made that the use of section 28 with children by and large has been particularly successful in the following respects:
- More guilty pleas have emerged, since without the issue of consent being a live issue, there can be less room for manoeuvre for defendants.
 - It allows children to give their evidence more quickly (three to four months). It is very beneficial for children to get it over and done with. Therapy cannot start until the trial has occurred in case it affects the child's understanding or memory of the alleged event.
 - The GRH is very effective. In the pilot sites, defence practitioners are on board, judges are more confident and everyone is now more experienced. It means that there are no leading or complicated questions. This often results in a 10–20 minute hearing, which means children can be cross-examined with minimal disruption. They can arrive at court at 9.30 am and leave by 10.00 am.

9 See CPD V Evidence 18E [2017] EWCA Crim 1076

- The drama of the courtroom is removed. Barristers are not performing for the jury or their client. The hearing is short with only the necessary questions asked.
- There is more flexibility to get better evidence. Rooms have been changed to respond to a child's needs — for example, one child gave evidence from a tent.

- 4.46 The roll out for children has not been without difficulty. Technology remains a problem. A lot of capacity is required and there have been issues with playback. The whole network needs to be upgraded. The section 28 pilot sites used DVDs, which are not fit for purpose. It must move to cloud-based technology. Once this is resolved, they should be in a position to progress.
- 4.47 The success of the pilot was helped by dedicated practitioners and judges working in small pilots. It is interesting to note that the Department of Justice considers this to be crucial to the success of the pilot and I commend it for the future implementation of this concept.
- 4.48 In cases with adult complainants, section 28 may not necessarily be granted. Our enquiries suggest there may be downsides to this concept in the following respects.
- 4.49 Cross-examination of adult complainants is lengthier. GRHs with adults are more complicated. Questions are more nuanced and there is less control.
- 4.50 It may not be in the complainant's best interests to invoke section 28. For some, attending court and being involved in the process is part of the process of closure.
- 4.51 There are, therefore, different considerations with adults. A selection of special measure options for adults may be more suitable as one size may not fit all.
- 4.52 Police training is required on this concept.
- 4.53 There is no conclusive evidence either way as to the impact of an adult complainant's pre-recorded evidence on a jury.
- 4.54 Complainants, therefore, have to be made aware of the potential risks of section 28 pre-recording for adult complainants.
- 4.55 There is also a huge volume of these types of cases and this may have resource and financial implications. However, our inquiries lead us to believe that once provision for child witnesses are rolled out, another pilot for adult complainants will take place in Leeds, Liverpool and Kingston.

Scotland

4.56 Scotland is increasingly invoking the use of pre-recorded cross-examination.

Vulnerable Witnesses

4.57 A very important additional development however has also occurred in Scotland, which I recommend to be considered in Northern Ireland. Provisions in the Victims and Witnesses Act (Scotland) 2014 extended the definition of vulnerable witnesses in criminal proceedings to include witnesses under 18, *alleged victims or complainants of sexual offences (my emphasis)*, domestic abuse, human trafficking and stalking. These witnesses have an automatic entitlement to use standard special measures, which include the use of a live TV link to provide evidence, a screen and supporter. Victims of sexual offences and trafficking are deemed intimidated witnesses within Northern Ireland with access to special measures since 2011 and 2015 respectively. We need to extend the category.

Implementation

4.58 The Criminal Procedure (Scotland) Act 1995 has provided for the taking of evidence by a commissioner, which is recorded and used for both evidence-in-chief and cross-examination, as special measures that can be authorised by the court for the purposes of taking the evidence of a vulnerable witness. However research for the Scottish Courts and Tribunal Service (SCTS) indicated that pre-recorded evidence was rarely used in comparison to other types of special measures up until about 2015. Since then however there has been an increase in the use made for special measures in general in cases being tried in the High Court.

4.59 In March 2017 a High Court Practice Note¹⁰ was issued setting out steps to improve the process of taking evidence by a commissioner. Similar to a Ground Rules Hearing, it requires that before a commission can take place, the parties must appear at a court hearing to discuss in detail all the measures that will ensure that a witness can give their evidence fully and with the minimum risk of further trauma. The following matters need to be considered in advance of the hearing:

- determining the best location and environment for the recordings to take place;
- the timing of the session;
- the nature of the communication that may be required;
- the lines of inquiry to be pursued;
- the form of questions to be asked; and
- the extent to which it is necessary for the defence case to be put to the witness.

10 High Court of Justiciary, Practice Note No.1 of 2017

- 4.60 In the same year the Government launched the consultation on a proposal to include the use of prior statements of evidence-in-chief and evidence taken by a commissioner to become a standard special measure. There was overwhelming support for the long term aim of a presumption that children and other vulnerable witnesses should have all of their evidence taken in advance of a criminal trial.
- 4.61 An inter-agency report¹¹ recommended in 2017 that the entire evidence of child victims under 16 should be taken by an expert forensic interviewer and pre-recorded with no questioning by lawyers at all in the majority of cases, taking as its model the Scandinavian ‘Barnahus’ or ‘Child’s House’ model. The report proposed that this model should also be used occasionally for child complainants under 18 and for vulnerable adult complainants very occasionally. This is the system followed in Iceland and Norway.
- 4.62 In chapter 14 ‘The voice of the child’ of this Review, I have extolled the virtues of the Department of Justice investigating the Scandinavian Barnahus model. I am satisfied that the concept of the evidence of children being taken by an expert forensic interviewer rather than a police officer has much to recommend it.

Future Developments

- 4.63 The programme for government 2017/18 announced the Scottish Government’s intention to introduce a Vulnerable Witnesses and Pre-recorded Evidence Bill to further reduce the need for children and vulnerable witnesses to give evidence in a courtroom and creates a new rule in favour of children (defined as those under 18) having their evidence pre-recorded in advance of trial in the most serious of cases.
- 4.64 A secondary legislative power is also included in the Bill to extend the new rule to categories of adults ‘deemed vulnerable witnesses’ in solemn cases. The policy intention is that a GRH will take place before every commission. It is to be noted that interestingly, a Scottish Court Service review observed that anecdotally there is little evidence of an improvement in conviction rates since the introduction of special hearings.¹² This was a finding replicated in England after the introduction of the pilot cases mentioned above. All of this should reassure defendants that their rights are not being impugned.

The Barnahus Concept

- 4.65 I have gone into some detail in the instances of England and Scotland because, as I have indicated, I recommend that Northern Ireland should follow in this path. However this trend is replicated elsewhere. In Iceland and Norway,

11 Scottish Courts and Tribunals Service (2017) Evidence and Procedure Review: Child and Vulnerable Witness Project. Pre-Recorded Further Evidence Work-Stream Project Report Edinburgh: Scottish Courts and Tribunals Service

12 Scottish Court Service (2015) Evidence and Procedure Review Report Edinburgh: Scottish Court Service

cross-examination of children is based on the Barnahus concept where cross-examination is significantly removed from traditional cross-examination. In both jurisdictions, it takes place via an investigative interview away from the courtroom. In Iceland, the interviewer questions the child while professionals, including the defence attorney, watch via video link and put questions to the child via the interviewer using an earpiece.

- 4.66 In Norway, a specially trained police interviewer is the only person who questions the vulnerable witness.
- 4.67 I recommend that careful analysis be given by the Department of Justice to the present system we have of interviewing children by police officers. I do not believe it is either an adequate or an efficient means of enlisting the evidence of children unless that need is met by a small cadre of highly trained, carefully selected group of accredited officers to conduct these interviews. The concept of specially trained interviewers is one that we should grasp. I have dilated further upon this concept in chapter 14 of this Review.

Australia

- 4.68 Western Australia (since 1992), Queensland, South Australia, Victoria, the Australian Capital Territory and the Northern Territory in Australia are all jurisdictions where legislation has been introduced permitting the pre-recording of both the vulnerable witnesses evidence-in-chief and cross-examination.

New Zealand

- 4.69 In New Zealand, the New Zealand Cabinet has agreed to a number of reforms relating to child witnesses that include a legislative presumption in favour of pre-recording the entire evidence of child witnesses under the age of 12.

France

- 4.70 In France, a child complainant of an alleged sexual assault is questioned by a specially trained professional.
- 4.71 In short, pre-recorded cross-examination of children and vulnerable witnesses is gathering momentum across the globe and I see no reason why we should not replicate that momentum here in Northern Ireland.

Research on the impact of pre-recorded cross-examination

- 4.72 An argument made against pre-recorded cross-examination is that jurors prefer theatre to film¹³ and that evidence by video has a reduced impact, thus affecting the trial outcome. The Review team researched that matter in cross-jurisdictional literature.

13 Stern, V. (2010) *The Stern Review: a report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* London: Government Equalities Office and the Home Office

- 4.73 The Scottish Government recently carried out an evidence based review which examined the impact of pre-recorded evidence and/or live link testimony upon juror decision-making in criminal trials across a range of legal jurisdictions internationally drawing on evidence from simulated or mock jury experiments.
- 4.74 It concludes that there is no compelling evidence that the use of pre-recorded evidence or live links, whether by child or adult witnesses, has an effect on verdict outcomes in (mock) criminal trials.
- 4.75 These studies may contain frailties because of the different nature of legal systems and the use of undergraduate students as mock jurors. Nonetheless, the study concludes that, while individual jurors may initially favour a child's live testimony, the evidence suggests that where a group deliberation component is built into the research design (to simulate the trial process), this preference does not translate in any consistent or reliable way into verdict outcomes.
- 4.76 The review finds that, in respect of adult witnesses, the evidence base is more limited.¹⁴ A number of studies in Australia and England show that the use of pre-recorded evidence or live links by adult female rape complainants does not significantly influence (mock) jurors' evaluations and verdicts.¹⁵
- 4.77 The position in respect of adults in other trials is less clear and requires further investigation, but there is not as yet compelling evidence of a verdict impact on (mock) jury decision-making.
- 4.78 The evidence review highlights a number of operational factors that may influence jurors, such as the length and format of forensic interviews, audio and visual quality of evidence, and camera perspective, which, it is suggested, should be considered when using pre-recorded evidence to avoid undue influence upon jurors.
- 4.79 I share the views expressed by the Scottish Government who recommended that further research is carried out to provide a richer and more diverse range of studies in relation to adult complainants and modes of evidence delivery. The research examining the use of pre-recorded testimony by adult male complainants is also much less established.
- 4.80 The evidence concerning children is much clearer. Many commentators and practitioners believe that enabling a child complainant to give evidence without entering an unfamiliar courtroom or facing the accused will ameliorate stress and increase their ability to give the best evidence.

14 Munro, V. (2018) *The Impact of the use of Pre-recorded Evidence on Juror Decision-making: An Evidence Review* Edinburgh: Scottish Government

15 Ellison, L. & Munro, V. (2014) 'A Special Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' *Social and Legal Studies* 23(1) pp.3-29 and Taylor, N. & Joudo, J. (2005) 'The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision making: an experimental study' *Australian Institute of Criminology Research and Public Policy Series (No. 68)* Canberra: Australian Institute of Criminology

- 4.81 The Scottish review notes that existing research provides a convincing evidence base for rejecting the idea that removing children from court and presenting their evidence via a screen reduces the ability of (mock) jurors to accurately interpret behavioural cues and distinguish truth from fiction.
- 4.82 Importantly, Professor Cheryl Thomas (from University College London's Faculty of Law), with funding from the Nuffield Foundation, is leading the first empirical research study on the impact of the digital courtroom on jury trials, the impact of special measures for vulnerable witnesses, whether jurors believe myths and stereotypes in some cases, how to prevent juror misconduct, how to improve jury deliberations and how best to provide support for jurors during and after trial.
- 4.83 Professor Thomas, who is currently extending her research to Northern Ireland, is using a rigorous, multi-method approach to understanding jury decision-making and is working exclusively with real juries in courts. This study is scheduled to complete in late 2019.

Discussion

- 4.84 Pre-recorded cross-examination is an idea whose time has clearly come. It is being rolled out not only in the rest of the UK, but also across other common law and non-common law jurisdictions. I recommend that a pilot scheme implementing provisions of Article 16 of the Criminal Evidence (Northern Ireland) Order 1999 should be initiated as soon as possible in Northern Ireland subject to what I say below.
- 4.85 Pre-recorded cross-examination is part of the necessary changing face of law and procedures to encourage complainants, particularly children and vulnerable adults, to be able to come forward and give their evidence in circumstances which are more likely to elicit the truth than at present. As we set out in chapter 14 of this Review in 'The voice of the child', it will require a new culture of cross-examination, which departs from the conventional adversarial approach. It also tackles head-on a system where delays and intimidating court atmospheres are not conducive to true justice.
- 4.86 It lends itself to better quality evidence as it is given more contemporaneously to the alleged event and is recalled at a time when the complainants are removed from court stressors. This is particularly relevant in the case of young children whose memories can fade more rapidly than in the case of adults. Moreover it reduces the risks of secondary victimisation and traumatisation for complainants.
- 4.87 If eventually in time it could be extended to all complainants in serious sexual offences, it would constitute a further vital building block in restoring the confidence of complainants in the justice system and procedure by potentially reducing or eliminating the need for a complainant to give evidence in person

at trial after a lengthy delay. It would permit them to give evidence remotely in a safe and secure environment away from the daunting court atmosphere and from the defendant. This procedure could reduce the duration of the trial itself and thus reduce costs. It would facilitate pre-trial decisions by the prosecution and defence, irrelevant or inadmissible material can be edited out, and it could provide finality for complainants since in the event of a retrial the evidence has already been captured.

- 4.88 There are genuine concerns in Northern Ireland about the process. The first is that technical difficulties have bedevilled the procedures in England. I find it impossible to believe that in this modern era the technical problems cannot be soon solved and eradicated. However, such a development is without doubt a vital precursor to its introduction here in Northern Ireland and we should already be closely monitoring developments in England in this regard.
- 4.89 There are also genuine concerns that pre-recorded cross-examination will not work until we have solved the problem of late disclosure. The argument is made that since disclosure is not often completed until the last moment, or indeed even during trial, cross-examination will have to be either postponed or revisited during the trial and, in any event, cannot be carried out on an informed basis without all the relevant documentation being disclosed.
- 4.90 Whilst I share the concerns expressed, I pause to observe at this stage that the recommendations I have made in the course of this Review must be looked at holistically. They cannot be taken in isolation.
- 4.91 Disclosure is dealt with in chapter 10 of this Review wherein I make it clear that radical changes have to be made in the approach that we have hitherto adopted to disclosure. Not only has it been occasionally an instrument of injustice in England and Wales, but it has the potential to create similar miscarriages in Northern Ireland unless it is gripped as a matter of absolute urgency. That chapter outlines proposals to be made to speed up the process of appropriate disclosure from the earliest stages of the investigation with more specially trained Disclosure Officers in the PSNI guided by the PPS, both of whom should now have Disclosure Champions throughout the process. Moreover the system urgently requires much earlier defence engagement in the process with robust case management, timetabling and monitoring of the disclosure process. It is crucial that all relevant parties (including the Judiciary and legal representatives) have addressed the issues around disclosure in order for the pre-recorded cross-examination pilot to be progressed.
- 4.92 It is not without significance that the Recorder of Liverpool, who has vast experience in processing pre-recorded cross-examinations since the inception of the scheme in England, assured me that in his lengthy experience dealing with these section 28 cases, disclosure had not surfaced as an insuperable problem and it was only in the rarest of instances that a witness needed to be recalled.

Provided disclosure has been completed, there is no greater risk of recall than occurs in the current system.

- 4.93 In fact one of the effects on investigators and prosecutors in England of the introduction of section 28 was that the disclosure process became an integral part of the start of the investigation so that the defence had the material needed in advance of their opportunity to challenge the witness's account. This can only be a positive step in upgrading conceptually the vital importance of an early grip on disclosure.
- 4.94 Indeed a further advantage of the concept of early pre-recorded cross-examination from the accused's point of view is that they have the opportunity to see and consider the evidence against them from an early stage affording them a timely opportunity to reflect on their own evidence and witnesses in rebuttal or to make a plea deal.
- 4.95 Creative thought should be given, especially in the case of all children and all vulnerable witnesses (the term vulnerable of course includes those aged under 18), to conducting such hearings in appropriate centres, remote from the court building, for example, in an NSPCC office or The Rowan Centre. The Rowan would be keen to facilitate this in the event of a dedicated suite being funded and added to the existing buildings.
- 4.96 The Barnahus or a similar concept needs to be the subject of early and strong consideration by our Department of Justice. I urge that research be carried out into the model currently being introduced in England, being encouraged in Scotland, and implemented for some time now in Iceland and Norway.
- 4.97 The widely expressed view that pre-recorded cross-examination somehow dilutes the effect of the evidence has no empirical or research foundation, and the findings in Australia that the conviction rates were unchanged should reassure defendants and complainants. The fact of the matter is that we are all well used to watching TV screens in our everyday life and viewing evidence on a screen is now a societal norm.
- 4.98 The presence of prepared and judicially approved questions should not provide an impediment to cross-examination since highly experienced Crown Court judges in Northern Ireland will obviously act with flexibility in widening the permissible questioning in the event of evidence taking an unexpected turn.
- 4.99 Moreover, I see no reason why a plea of guilty entered after the cross-examination but before the trial should not be afforded some measure of discount.
- 4.100 I am in full agreement with the Criminal Justice (Victims of Crime) Act 2017 in Ireland that transposes into law directive 2012/29/EU, which establishes minimum standards on the rights, support and protection of victims of crime

and defines a child as someone who is under the age of 18. This will increase the number of children who can avail themselves of this process.

- 4.101 Serious sexual crimes are very often perpetrated by those who have chosen victims who are vulnerable. Hence those currently qualifying for special measures in Northern Ireland are often vulnerable and intimidated adult witnesses and children.
- 4.102 There is much to be said for following the Scottish example of extending the definition of vulnerable witnesses in criminal proceedings to include all alleged victims of sexual offences, domestic abuse, human trafficking and stalking. The fact of the matter is that virtually all such complainants in serious sexual offences are at least temporarily vulnerable and deserve to be treated as such. Vulnerable witnesses should have an automatic entitlement to use standard special measures, which include the use of pre-recorded cross-examination.
- 4.103 I recognise the argument made that not all victims are vulnerable in the sense that is conventionally used in legislation. If this argument prevails then I believe there is a strong basis for suggesting that the categories of those to whom special measures, including pre-recorded cross-examination, should be extended must include those defined in the Scottish legislation without specifying they are vulnerable as such. That would represent yet another confidence-building block for a genre of complainants who as a group are extremely reluctant to come forward – a phenomenon that is not present in other offences and requires special attention.
- 4.104 In the meantime, pre-recorded cross-examination of children at least in serious sexual offence cases but preferably in all Crown Court cases involving children, should commence on a carefully phased basis to ensure that, before commencement, the police, the PPS, practitioners and the court are all appropriately trained and that the necessary IT is in place.
- 4.105 Training for the professions and Judiciary is important. I have dealt with this in some detail in chapters 14 on ‘The voice of the child’ and 17 on ‘Training’. A judicial protocol should be drawn up on the manner of implementing such hearings. The Bar Council and the Law Society should produce a manual dealing with the concept.
- 4.106 There are also fears that once pre-recorded cross-examination has been completed, Article 16 cases will go to the back of the queue and lead to longer delays before trials are completed, resulting in a lack of closure for complainants. The perceived benefits of pre-recorded cross-examination in terms of relieving the stress might therefore not be as great as is claimed. I have no doubt that this risk can be avoided by a Case Progression Officer keeping a careful eye on these cases and ensuring that they are properly placed in the list for hearing.
- 4.107 The hearings themselves should be carefully orchestrated. There should be an obligatory GRH for all pre-recorded cross-examination hearings.

- 4.108 It should be the practice to require defence counsel to submit their proposed questions in advance for approval in a GRH form.
- 4.109 In order to ensure there has been proper training and preparation, the precedent set in Liverpool should be followed, whereby counsel should be required to certify prior to the GRH that they have read the judicial protocol and the Bar Council manual on the implementation of the concept.
- 4.110 I recognise that introducing pre-recorded cross-examination will require the Department of Justice for Northern Ireland to make provision for separate fees for what is essentially front-loaded work. The fact of the matter is that there will be increased work for practitioners in preparing for pre-recorded cross-examination.
- 4.111 The Ministry of Justice evaluation in 2016 reported that the section 28 pilot process had a perceived impact on the workload of all practitioners because of the expedited timeframes at the outset of cases and the additional hearings required for section 28 cases. I have dealt with the question of resources in chapter 18 of this Review where I have indicated that a bespoke system of payment is required for these early steps.
- 4.112 Such hearings should be treated as the first day of the trial and the legal aid rules should reflect this.
- 4.113 I also appreciate that there is a downside to the roll out of this scheme being contemplated at a time when there are already considerable pressures on the PSNI and the PPS. The work required to ensure investigations and disclosure are completed in time for pre-recorded cross-examination is in practice going to increase the pressure on available resources. This may be particularly the case in serious sexual offences where social media output can be considerable. However, once again, as I indicate in chapter 18 of this Review on 'Resources', the moment has arrived when the injustices in the present system have to be confronted and resources must be made available to change the present system.

Responses

- 4.114 With the exception of the Bar Council of Northern Ireland,¹⁶ there was close to unanimous support from all the respondents to this chapter to the effect that all children and vulnerable adults should have the right of pre-recorded cross-examination.¹⁷

¹⁶ In addition the blog "The Illustrated Empathy Gap" objected on the basis that it was contrary to Article 6 of the Convention and Ms Pdraigin Drinan who whilst recognising the concept was attractive expressed the concern about the weight that the jury might apply to a video as opposed to seeing the defendant in person.

¹⁷ The Law Society, NIHRC, the five main political parties, Belfast City Council, PSNI, Men's Advisory Project, Victim Support NI, Women's Aid Federation Northern Ireland, Positive Futures, Rowan SARC Northern Ireland, NSPCC, Barnardo's, the Attorney General, the Retired Association of Probation Officers, Dame Vera Baird QC, the Women's Regional Consortium, Dr Alison Livingstone, paediatrician, NICCY, Rape Crisis Network Ireland, Academics e.g., Dr Eithne Dowds, Belfast Feminist Network, Nexus NI and many complainants who responded to the Review.

- 4.115 In terms of the general public, the response to the Review’s online survey revealed 90.5% of the respondents agreed that children and vulnerable complainants should have their questioning by defence lawyers recorded on video before trial (94.5% of women and 82.8% of men). Only 4.8% disagreed. Those who disagreed mentioned that the jury should be able to witness a cross-examination in person to assess credibility. Those who agreed commented that it would alleviate some of the trauma/stress associated with being cross-examined in court, making it easier for a complainant to come forward.
- 4.116 This echoed a survey carried out by the Women’s Regional Consortium who found that 89% of women surveyed thought that cross-examination of the victim of a serious sexual offence should be pre-recorded away from the court for all complainants. That group indicated that the process in court brings about a real risk of re-traumatisation and secondary victimisation and that this option should be made available for all complainants as soon as possible.
- 4.117 The advantage of the exercise of reducing secondary victimisation was raised by the NIHRC so long as the right of the defendant to adequately question the witness was not restricted unreasonably.
- 4.118 The NIHRC advised an evaluation should be carried out at the end of the recommended phased period to ensure that any issues can be resolved.
- 4.119 Whilst recognising that some complainants may wish to have their “day in court” and should have a free choice to do this, a large number of respondents indicated that the right to pre-recorded cross-examination should be extended to all complainants.
- 4.120 Dame Vera Baird QC (PCC Northumbria) drew our attention to the fact that pilot schemes in the UK limited to children have shown no increase in conviction rates to justify any concerns by defendants that their rights have not been upheld.
- 4.121 The Law Society, whilst agreeing with the various recommendations which were adjuncts to the main thrust of providing the option of pre-recorded cross-examination, objected to the recommendation which suggested an extension of the right to all complainants of sexual offences. It was felt that not all such witnesses are vulnerable and indeed the making of a complaint should not automatically give them this status. The complainant has to be tested and the prosecution have to prove their case.
- 4.122 This argument was countered by Women’s Aid Federation NI who supported the extension of the definition along the lines of that adopted in Scotland, on the basis that by implementing a “presumption of vulnerability”, this might help better protect victims going through the criminal justice process in sexual violence cases, especially if there is a move away from the court setting for vulnerable victims.

- 4.123 Nexus NI strongly agreed with this extension pointing out that many of their clients simply will not go to court because they fear they will be traumatised. The view that the extension would help keep complainants within the criminal justice system was echoed by others.¹⁸
- 4.124 The responses to this Review illustrate clearly the tension that can exist between lawyers on the one hand and those members of the public working in the voluntary sector at the coalface on the other hand. As I have said throughout this Review, at least one of its main aims is to holistically approach the matter of heavy under-reporting and substantial attrition rates of these crimes. This is a genre of crime which is different from most others. I consider that the views of those who are dealing with complainants on a daily basis carry great weight, provided it does not detract from the rights of an accused to present his case. Hence I am still of the view, that provided the assessment of the project carried out after the initial pilots schemes with children and vulnerable adults is favourable, it should be extended to all complainants in this genre of case.
- 4.125 The Attorney General, whilst welcoming the general principle, considered that the issue of prepared questions submitted to the judge for approval should be confined to areas or topics to be explored and that this would be more obviously compatible with equality of arms and fairness. Whilst I recognise the strength of this argument, it does not meet the need to address, for example, the precise manner in which language is used and questions framed for children or those with a learning disability. Such matters as tag questions etc. have to be addressed with impressionable children and those with a learning disability. I therefore remain convinced that at least in the case of children and vulnerable adults the precise questions need to be approved.
- 4.126 In resisting the general thrust of the recommendations, the Bar Council raised a number of perfectly reasonable objections, some of which have already been answered in this chapter. They included concerns that:
- Significant investment would be needed to allow for timely disclosure before this process could be introduced. I agree entirely. Immediate steps need to be taken to address the issue of disclosure, but I am satisfied that this can be dealt with in a relatively short period provided the steps that I have recommended in chapter 10 of this Review are followed. I am already aware that the Criminal Justice Board is taking hold of this issue and addressing means to ameliorate the problems that arise. The problem has been met and solved in the pilot schemes already operated in England.
 - The defence need the opportunity to address issues raised by the prosecution case with registered intermediaries, psychologists' reports and other experts etc. Once again I agree with this concern. But I see absolutely no reason why, provided these cases are case managed robustly from the

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For example, Belfast Feminist Network.

very start of the process, such reports cannot be obtained in timely fashion. With my experience in the civil justice courts, I am well aware how sound case management can ensure that relevant reports are speedily dealt with once time limits are imposed.

- The risk of change of counsel between the cross-examination and the hearing would cause a real problem. In the first place, this is a rare occurrence. Secondly, fresh counsel may well be satisfied with the pre-recorded cross-examination. Thirdly, the process is sufficiently flexible to allow fresh counsel to persuade the judge that a fresh cross-examination is necessary on the rare occasions that this would occur.
- Use of IT, and examination of witnesses via video live link is now a regular occurrence. There would be an imbalance between the video evidence of the complainant and the live evidence of the defendant. Moreover the pre-recording would have the benefit of interaction between counsel and jury. What would happen if a juror was to ask a question? The issue of interference between the relationship of advocate and jury has never arisen as a matter of concern in the past and I doubt very much whether it would now arise. Exhibits can be clearly shown on screen. Juries very rarely raise matters of concern and, if it did happen, the matter can be adequately dealt with by a flexible approach within the system. If necessary, the witness could be recalled. I am bound to relate however that in my 18 years as a judge, I have never come across a case where the question posed by a juror required the main witness to be recalled. It is therefore an extremely rare occurrence and can be accommodated if it should arise.

4.127 I am satisfied that the new system, which after all is currently enshrined in statute although not yet implemented, can easily accommodate these matters.

Conclusion

4.128 I am firmly convinced that everything that can be done should be done to ensure that complainants can participate fully and effectively in the criminal justice system provided it does not interfere with the rights of a defendant. These recommendations will reduce the possibility of secondary victimisation which is present within the current system and will provide yet another vital building block to restoring confidence of reluctant complainants in the process. The overwhelming support for these proposals, which has emerged in the responses, serves to satisfy me that the public are on the right side of the argument in welcoming this change to the current law and procedures.

Recommendations

22. Pre-recorded cross-examination of vulnerable victims and witnesses (which includes children under 18) at least in serious sexual offence cases but preferably in all Crown Court cases involving vulnerable witnesses and victims, should commence on a carefully phased basis.
23. My recommendations on the issue of disclosure should be addressed prior to commencement of this concept.
24. Before commencement, the police, the Public Prosecution Service, practitioners and the courts should all be appropriately trained and the necessary steps have been taken to ensure timely disclosure will be made and the necessary IT is in place.
25. An evaluation process, including participation by both the legal profession and the Judiciary, should be carried out by the Department of Justice at the end of the phased approach.
26. If this roll out is successful, it should be followed by a pilot scheme involving all adult complainants in all serious sexual offences.
27. A judicial protocol should be drawn up on the manner of implementing such hearings.
28. The Bar Council and the Law Society should produce a manual dealing with the concept for guidance purposes.
29. There should be an obligatory Ground Rules Hearing for all pre-recorded cross-examination hearings.
30. In cases involving children it should be the practice to require defence advocates to submit their proposed questions in advance for approval in a Ground Rules Hearing form.
31. At the Ground Rules Hearing, advocates should be required to certify that they have read the judicial protocol on the implementation of the concept.
32. Such pre-recorded cross-examination hearings should take place in a court setting (or a Remote Evidence Centre) with a live link to a video interview suite within the building.
33. In the case of children and vulnerable witnesses, consideration should be given to centres remote from the court building with the use of live link.
34. Prior to the hearing, the witness should have an opportunity to view a video of their Achieving Best Evidence interview.
35. On the day of the hearing, in most cases, the judge and counsel should meet the child witness to introduce themselves before going up to court.

36. The presiding judge may deem it fitting that they and counsel should join the child or other vulnerable witness in the video suite in order to carry out the questioning.
37. In time, the option of pre-recorded cross-examination should be extended to all complainants of sexual offences, domestic abuse, human trafficking and stalking.
- 38.* The Department of Justice in Northern Ireland should make provision for separate fees for pre-recorded cross-examination.
- 39.* Hearings of pre-recorded cross-examinations should be treated as the first day of the trial and the legal aid rules should reflect this.

Chapter 5

Separate legal representation

“The purpose of the criminal law is to permit everyone to go about their daily lives without fear or harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”

Lord Steyn in Attorney-General’s Reference¹

Issue

Should our system provide publicly funded independent legal representation for complainants?

The Current Law

- 5.1 There is no publicly funded legal aid for complainants in Northern Ireland connected to serious sexual offences.
- 5.2 Complainants generally have no formal standing in most common law jurisdictions. In the UK they are normally called as a witness in the trial. In our criminal justice system in Northern Ireland, as in England and Wales, there are only two parties - the State and the accused. Invariably prosecuting counsel will explain to a complainant that they are simply a witness in the prosecution case and they are not separately represented by counsel. A lawyer representing complainants has no right of audience at a trial for serious sexual offences.
- 5.3 It is thus important to remember that the Public Prosecution Service is neither the legal advisor of the complainant nor does it act as their legal advisor. It is an independent prosecuting authority, which is required to have regard to the overall public interest and not only the particular interests or concerns of any one individual.

International standards

- 5.4 Whilst Articles 13 & 14 of the EU Victims’ Rights Directive 2012/29/EU give victims a right to legal assistance it is only applicable where they have the status of parties to the criminal proceedings.
- 5.5 The European Convention on Human Rights (ECHR) provisions are of course relevant to our law in Northern Ireland. The literature shows that, traditionally, member States have treated complainants’ rights as secondary to those of the

¹ Judgments – Attorney General’s Reference (No. 3 of 1999) HL 14 December 2000

accused. On the other hand, a growing body of academic opinion argues that the ECHR does place positive obligations on the State to protect victims.

- 5.6 The Istanbul Convention requires that victims have the right to legal assistance and free legal aid under conditions provided by their internal law.² It further recognises that the State shall take measures to protect the rights and interests of victims in judicial proceedings by “enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered”.³
- 5.7 Article 6 of the ECHR enshrines the right to a fair trial. It requires equality of arms. Each party must “be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent”.⁴
- 5.8 Both the EU Directive and the Lanzarote Convention (in respect of child victims) require that victims have access to legal assistance where warranted and where they have the status of parties to criminal proceedings.⁵
- 5.9 The International Human Rights Standards provide the minimum required in respect of the provision of support to victims. States are permitted to raise the bar in terms of this protection and so an enhanced level of representation for victims is a means by which participation is supported and secondary victimisation can be reduced.
- 5.10 The European Court of Human Rights has held⁶ that a *partie civile* has a right to a fair trial under Article 6 of the Convention.
- 5.11 However, the European Court of Human Rights has not determined the compatibility of auxiliary prosecutors or complainants’ lawyers with the defendant’s right to a fair trial in Article 6.
- 5.12 ECHR Article 8 enshrines the right to respect for private and family life.
- 5.13 Finally, Article 13 provides that everyone whose rights and freedoms, as set forth in the Convention, are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

2 Article 57, The Council of Europe Convention on preventing and combating violence against women and domestic violence, (Istanbul Convention)

3 Article 56(1)(d), The Council of Europe Convention on preventing and combating violence against women and domestic violence, (Istanbul Convention)

4 CJEU – C – 205/15 Judgment

5 Article 13, EU Victims’ Rights Directive 2012/29/EU; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (Lanzarote Convention)

6 *Perez v France*, Admissibility and merits, ECHR [2004] application number 47287/99

Background

- 5.14 It has been argued that there are inequalities between the complainant and defendant in the courtroom, as the complainant is not a party to proceedings. For example, the complainant's testimony is often treated with disbelief and the defendant, who can call good character evidence, may seek to undermine their character or actions whereas the complainant is not accorded the right to call character evidence or witnesses on their behalf.
- 5.15 One of the recurring criticisms heard from complainants is that they often feel that they themselves are placed on trial as well as the accused. The perception is that defence counsel routinely, in pursuing their defence of consent, utilise rape myths, seek disclosure of the complainant's medical and sexual history, and question their motives in coming forward.
- 5.16 In reviewing the effectiveness, efficiency and fairness of the legal system, concerns have been raised about the extent to which victims are able to exercise opinion and raise their voice in an arena where their personal lives are also so affected.
- 5.17 My interviews with complainants and discussions with support agencies reveal low levels of satisfaction from those accessing services. Many report that given what they have read and/or seen they would not engage with the criminal justice system. Low prosecution rates, "fierce" cross-examination and sensational press coverage have all added to this. There is also a visible ripple effect with family members and friends also losing confidence in the system.
- 5.18 In Sara Payne's 2009 "*Redefining Justice*" report in England and Wales many victims were angry that their place within the criminal justice system was effectively as a witness in their own case and were concerned that in contrast to the defendant who had their own legal representation, the complainant had no such representation.
- 5.19 Research by Victim Support in 2013⁷ in England and Wales found that many complainants did not understand that the prosecution counsel was acting for the prosecution, rather than for the complainant. A lack of communication between the prosecution barrister and complainant in a number of cases contributed to this misunderstanding.
- 5.20 This mirrors precisely grave concerns that surfaced in my interviews with complainants in Northern Ireland.
- 5.21 Unquestionably the position in Northern Ireland has improved over time. The Victim Charter, which is on a statutory footing, places an obligation on the police and the Victim Witness Care Unit to keep complainants and witnesses informed at various points in the process and provides a single point of contact

7 Hunter, G., Jacobson, J., Kirby, A. (2013) *Out of the Shadows: Victims' and witnesses' experiences of attending the Crown Court* London: Victim Support

should they have any queries. Both the PSNI and the PPS have put in place firm policies for keeping the complainant up to date with developments in the case and providing a named person with whom the complainant may make contact about the progress of the trial.

5.22 Moreover, a great deal of support from voluntary organisations is now available to a complainant during the process in a manner that was not the case 20 years ago. It should be noted that an advocacy support service is to be introduced in 2020 by the DoJ providing support at various stages of the process.

5.23 Good examples of the new approach are found with:

- the Rape Crime Unit (RCU) of the PSNI which provide a pack to all victims with various leaflets from support services and the pathway they will follow after making a report; and
- the establishment of the Rowan Sexual Assault Referral Centre in 2013, to enhance collaborative working relationships and practices between the PPS, PSNI and Forensic Science Northern Ireland (FSNI) in relation to investigations with the purpose of ensuring speedy decision making and explanation to the complainant.

5.24 However, the key factor is that none of this provides informed legal advice. Virtually without exception every complainant to whom we spoke voiced the desire to have access to free legal advice during the whole process from report of the crime to trial. The absence of this arguably provides yet another impediment to complainants on the steep path from reporting to trial. It contributes to the troubling concept of complainants being alone against an array of defence lawyers which in turn feeds into the unacceptably high under-reporting and attrition rates.

Other jurisdictions

5.25 We have looked at the policy, practice and experience across 16 jurisdictions worldwide namely Australia, Canada, England and Wales, France, Germany, Iceland, the Netherlands, Belgium, Sweden, New Zealand, Norway, Ireland, Scotland, South Africa, Caribbean countries and the US.

5.26 It is clear that around the globe there is growing awareness of complainants' rights, along with a rise in policies to support their participation in the criminal justice process.

5.27 A wide range of models are in place internationally, ranging from non-legal advocates providing general support to complainants, to specialised legal representation beginning just prior to, or around the time of, reporting the alleged offences.

Non Legal Representation

- 5.28 It is worth briefly looking at the degree of non-legal representation available in order to highlight and contrast this with the advent of legal representation.
- 5.29 Non-legal advocates typically provide support to complainants, particularly in relation to their physical safety, emotional and health needs and rights. They often provide information and may accompany complainants to court, carrying out a supportive role without intervention rights. They may be community-based or system-based.
- 5.30 “One-stop-shop” centres for complainants are common across many jurisdictions and aim to limit the amount of steps a complainant must take to access justice. The UN has described the Thuthuzela Care Centres in South Africa as the best practice model internationally. These centres are situated within public hospitals and have introduced, as part of a national anti-rape strategy, a provision of integrated services including medical care, counselling and court preparation for all complainants in serious sexual offences.
- 5.31 The Rowan Centre in Antrim (The Rowan) is a first class example of what can be done. Having had the privilege of viewing this facility, I believe it is a real centre of excellence. It shares a number of international characteristics, including that their services are tailored to the individual complainant, it collaborates with other agencies and service providers, offers ongoing support and empowers the complainant. As indicated in chapter 2 of this Review, other services in Northern Ireland, such as the ISVA Pilot and the NSPCC Young Witness Service (YWS) are extremely skilled and helpful non-legal services.

Scotland

- 5.32 Scotland has developed a non-legal advocate service extremely well. In December 2013 the Scottish Government, Rape Crisis Scotland and Police Scotland launched “Support to Report”, a National Advocacy Project which is a 24-hour advocacy support service to support complainants at the initial stage of reporting to the police. It aimed to improve available support, reduce attrition by developing a better understanding of a complainant’s motivation for not proceeding with the criminal justice process, and to grow experiences of the system. It quickly grew to include support provided before, during and after reporting to police, including at trial. Findings of an 18-month evaluation of the service⁸ included:
- 991 complainants had been supported;
 - advocacy support had a positive impact on the ability of complainants to engage with the criminal justice process;
 - complainants valued the practical and emotional support provided;

- the project underlines wider evidence that supporting complainants through the criminal justice process reduces attrition and, as a result, increases rates of conviction; and
- there was a high take-up of the service and complainants were 'overwhelmingly positive' about the support they received. Aspects particularly valued included: the extensive support available; its consistency and flexibility; information provision; and emotional support and assistance through the court process.

- 5.33 In March 2018 the pilot scheme was extended, allocating £1.7m to do so. There are now 23 advocacy workers within the rape crisis network.
- 5.34 I strongly recommend that the Department of Justice Advocacy Support Scheme, which is to be introduced in Northern Ireland in 2020, should borrow heavily from the Scottish experience. In particular, I note the aim to reduce attrition by developing a better understanding of a complainant's motivation for not proceeding with the criminal justice process. Whether our Advocacy Support Scheme needs to be a 24-hour service may well depend on the existence of any other 24-hour helplines available at the time of introduction.
- 5.35 In the United States at the federal level complainants are entitled to information, support, compensation and to make a victim impact statement. The prosecutor's office provides these entitlements, which do not include legal representation.
- 5.36 Victim advocates who I met are placed in the District Attorney's Office of New York. They impressed me enormously. They provide crisis intervention, information and emotional support to complainants, and seek to support them in regard to their physical safety, health, emotional well-being and rights.
- 5.37 They also support complainants through the criminal justice process, including accompanying them to the medical forensic examination, attending police and other investigative procedures, and court. They may carry out roles such as developing a safety plan and supporting the complainant in obtaining a protective order. However, they expressly made the point to me that they were not lawyers despite being employed in the District Attorney's Office.
- 5.38 Robust evidence on the efficacy of non-legal advocates is limited. However, in general, research suggests that such advocacy supports complainants in their recovery and increases their engagement with other services, including the criminal justice system.
- 5.39 I trust that the Northern Ireland proposed Advocacy Support Scheme will open a door for informed analysis of the benefits of non-legal advocates after the scheme has been running for some time.

Legal Representation

- 5.40 Legal representation for complainants is fundamentally different to non-legal representation. Whilst in continental European systems with a judge led inquisitorial approach, independent legal representation for complainants is integral to the process, in common law jurisdictions in the past it was comparatively rare. The rationale for its absence was that in common law systems complainants have no formal standing and can only express views when being questioned as a witness.
- 5.41 Examples of legal representation in continental European systems abound and include:
- In France the complainant has *partie civile* status, entitling them to a lawyer to pursue civil claims which are heard as part of the criminal trial proceedings. The complainant's lawyer has rights akin to those of the prosecution and defence counsel including accessing evidence, cross-examining the defendant and addressing the court.
 - In Germany a complainant has two key State funded options for legal advocates. First, legal representation for witnesses allowing applications to exclude the public or the defendant during the complainant's testimony and presence during the complainant's questioning. Secondly, legal representation for Private Accessory Prosecutors who have similar rights at trial to the public prosecutor.
 - Similarly in Sweden, which is predominantly adversarial in nature, complainants have a strong procedural position and can be a party to the trial alongside the prosecutor. Complainants in rape cases have the right to court appointed legal counsel who have competence to act from the start of the preliminary investigation.
 - In Iceland independent legal representatives assist the complainant and protect their interests with presence during police questioning.

Common Law Jurisdictions

- 5.42 In the common law jurisdictions however, there is a clear discernible trend towards provision of legal representation.
- 5.43 All of our nearest neighbours have either introduced or are contemplating the presence of legal representation in some measure.

Ireland

- 5.44 In Ireland, under the Sex Offenders' Act 2001, where a defendant wishes to introduce evidence about the complainant's previous sexual history, (introduced only at the judge's discretion), the complainant has a right to separate representation before the court for that application process.

- 5.45 The Legal Aid Board provides a legal service free of charge (non-means tested) for complainants in prosecutions for rape and certain sexual assault cases. The legal representation is strictly limited to the application stage so if the judge grants the application the complainant is no longer represented at trial. Nonetheless, 2010 research⁹ found that in the cases observed, the separate legal representative remained in court during the complainant's cross-examination even when their formal role was complete.
- 5.46 This has not been a costly exercise. The Department of Justice and Equality in Dublin has indicated to our Review that the Legal Aid Board advised that 43 Legal Aid Certificates were issued in 2017 to provide for complainant representation in rape trials. For the same period the total expenditure was €66,389 which includes €7,023 in respect of advice in 5 cases before they went to trial.
- 5.47 Additional representation for complainants is under consideration as part of the review instituted in Ireland by the Minister for Justice and Equality into the investigation and prosecution of sexual offences.
- 5.48 A TD in Ireland introduced the Criminal Justice (Victims of Crime) (Amendment) Bill 2018 to the Dail in June 2018 to provide for legal representation at the earliest stages of reporting by "affording relevant information and legal advice to victims of alleged offences involving sexual violence, gender based violence or violence in a close relationship and to provide for related matters."¹⁰ In particular the Bill aims to ensure that complainants of sexual or gender based violence are provided with legal advice by a departmental funded solicitor advising the victim of the process involved and the actions required in order for criminal proceedings to be brought and heard. The full extent of what is contemplated will doubtless emerge in the course of the Irish review. Our understanding is that the Government is awaiting the outcome of the current Irish review before adopting a stance on this proposal.
- 5.49 More recently, s39 of the Criminal Justice (Sexual Offences) Act 2017 has introduced a further form of independent legal representation where counselling records (but not medical records, psychiatric records or social work records) are being sought. The representation is administered by the Legal Aid Board. No evaluation on this form of independent legal representation has as yet been conducted although a recent article recorded that "the implementation of this suggestion could help to reduce the trauma experienced

9 Bacik, I., Hanley, C., Murphy, J. and O'Driscoll, A. (2010) 'Separate legal representation in rape trials' *Rape Law – Victims on Trial?* Dublin Castle, 16 January

10 Houses of the Oireachtas (2018) *Criminal Justice (Victims of Crime) (Amendment) Bill 2018* Dublin: The Stationery Office (No.67 of 2018)

by women routinely re-victimised in court by the very person from whom they are seeking protection.”¹¹

Scotland

- 5.50 In Scotland, whilst complainants have no right to legal representation, a recent judicial review established that complainants had the right to obtain legal aid to object to disclosure of their medical records to the accused’s defence team to ensure it is restricted to the minimum necessary.¹²
- 5.51 The Court of Session ordered the provision of legal aid in a case of a complainant who objected to the disclosure of her medical records to the lawyers for the alleged perpetrator, in compliance with her right to privacy under Article 8 of the ECHR.
- 5.52 The case for independent legal representation for complainants is also gathering momentum in Scotland.¹³

England and Wales

- 5.53 In England and Wales, the Office of the Police and Crime Commissioner for Northumbria is currently piloting the use of qualified solicitors as Sexual Violence Complainants’ Advocates (SVCA) for victims of sexual violence. This Home Office funded project provides a form of independent legal representation at the following stages:
- reporting advice on the process and what to expect;
 - ABE: attendance at interviews to ensure procedures are followed and victims are aware of their options;
 - investigation/disclosure: ensuring the complainant’s Article 8 rights are considered; and
 - pre-trial/trial: acting in the best interests of the complainant at hearings for the right to cross-examine on previous sexual history and attending trial as a silent party to ensure no sexual history evidence is introduced without a successful application.
- 5.54 In Dame Vera Baird QC’s response to the Review, she noted that:
- “Although at the outset this was a cause of concern, in particular to some members of the judiciary, there has been high-level judicial input into

11 Iliadis, M., Fitz-gibbon, K., Walklate, S. (under review) ‘Improving Justice Responses Per Victims Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation’

12 WF, Petitioner [2016] CSOH 27

13 Raitt, F.E. (2010) *Independent legal representation for complainants in rape trials* in McGlynn, C., Munro (2010) *Rethinking Rape Law: International and Comparative Perspectives* New York: Routledge; Raitt, F.E. (2013) “Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings” *Criminal Law Review* Vol. 9, pp.729-749

drafting the working documents and an oversight group is fortunate to have as an observer Newcastle's most senior judge."

5.55 SVCAs do not provide representation throughout the whole criminal justice system and trial but essentially in preparatory stages as and when required. Moreover it should be noted that work in relation to applications about cross-examination on the issue of previous sexual history is still being discussed and has not yet been taken on by SVCAs.

5.56 The concept of legal representation for complainants in this type of crime has been around for some time in England and Wales. The former Labour Government in its 2005 manifesto had advocated specialist advocates to support victims of crimes such as rape.¹⁴

5.57 The Stern Review of 2010 had also looked at the concept of separate legal representation in Ireland and France and had concluded:¹⁵

"When we looked at the role of these lawyers for the victims, it seemed to us that the contribution they made to the victim's experience was an important one ... These ideas are worthy of consideration and we are glad we were able to include these details in this report. We hope they will stay on the agenda."

Denmark

5.58 In Denmark, which includes some inquisitorial elements although it is largely adversarial in nature, State-funded legal representation has been extended to all victims of crime. The police must advise the complainant of this right when the crime is reported and the complainant's advocate can be present at the police interview and ensures complainants are kept updated about the progress of the case in an informed manner. The advocates have the right to be present throughout the victim's examination and cross-examination and can object to questions put by both the prosecution and the defence. At sentencing they may call witnesses to address the impact of the crime on the complainant.

Norway

5.59 Norway operates a similar model to Denmark.

Australia

5.60 In Australia, although complainants do not currently have a right to legal representation, recently there have been calls to consider implementing complainant legal representation.

14 "Britain Forward Not Back" Chapter 3, Labour Manifesto 2005

15 Stern, V. (2010) *The Stern Review: a report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* London: Government Equalities Office and Home Office

- 5.61 New South Wales has introduced a State-funded legal representation scheme for complainants of sexual offences when addressing the court in relation to the prevention or restriction of disclosure of sexual assault communications. All complainants of sexual assault may access a lawyer free-of-charge.

US

- 5.62 In the US, Special Victim Counsel (SVC) are legal assistance attorneys who have received specialised training and represent the views of complainants as appropriate.
- 5.63 In several states including Wisconsin, West Virginia and New Hampshire, complainants are entitled to legal representation in relation to applications to adduce sexual history evidence.

Canada

- 5.64 Similarly in Canada, in June 2017 legislation was introduced to provide a complainant with a right to legal representation in rape shield proceedings.
- 5.65 Nonetheless, complainants of sexual assault have limited opportunity for participation. They are able to invoke section 7 of the Charter of Rights and Fundamental Freedoms and the Criminal Code to defend their privacy and equality rights and oppose defence applications for the disclosure of their personal records.
- 5.66 However, only British Columbia and Manitoba provide complainants with legal representation for *third party* disclosure applications.
- 5.67 Interestingly, in 2016 Ontario launched a pilot programme offering vouchers for up to four hours of free legal advice to complainants of sex offences, who may speak to the lawyer in-person or by phone. Under the programme lawyers can answer particular questions, but cannot represent complainants through the justice system.
- 5.68 In April 2018 Quebec developed a hotline whereby complainants of sexual violence can speak to a Crown prosecutor free-of-charge. The aim is to encourage more complainants to report offences to the police.

International Criminal Court

- 5.69 Finally, it is worthy of note that in the International Criminal Court complainants' views and concerns are represented where their personal interests are affected. The Office of the Public Counsel for Victims acts as an independent body and is responsible for providing legal research and advice to complainants as well as acting as legal counsel for unrepresented complainants.

Discussion

5.70 Ensuring everyone can resolve legal problems is vital to a just society. This is particularly so for complainants in serious sexual offences navigating a system designed for professionals at probably the most vulnerable point in their lives. I consider that a measure of publicly funded provision of legal advocate representation for complainants is necessary and would represent yet another confidence building block for complainants. It would also reflect the fact that over the last three decades, greater credence has been given to victims' rights and interests due to growing concerns over the role and treatment of victims in the criminal justice system. This is a movement which has gained international traction and serves to recognise the "triangulation of interest" noted in the quotation at the commencement of this chapter.

5.71 I am of course aware of the arguments against such an introduction which include:

- In a criminal trial there are only two parties, namely the prosecution representing the public interest and the accused. Auld LJ articulated the difficulty in his review of the Criminal Courts of England and Wales [2001]:¹⁶ "To put an alleged victim whose account the defendant challenges – as will often be the case – in the ostensibly privileged role of an auxiliary prosecutor would be unfair. Whilst the current concern for the plight of victims in the criminal justice process and the steps being taken to right it are thoroughly justified, care must be taken, in particular when there is an issue as to guilt, not to treat him in a way that appears to prejudge the resolution of that issue."
- The principle of equality of arms is misplaced in this context because the accused is not in the same position as the complainant. The former is at risk of losing freedom and that explains why they are entitled to a defence lawyer.
- Third party representation of complainants will elevate private interests of the complainant to a par with those of the State, contravening criminal justice norms of public prosecution.
- Complainants' rights are protected by complainants' advisors, support persons, the public prosecutor and the judge. It would risk displacing the responsibilities of the judge and prosecutor.
- Independent legal representation would be a costly and elongating process.
- Complainants in other trials have no such right.

5.72 Notwithstanding these objections however, I am satisfied that the current arguments in favour of granting a measure of independent separate

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Auld, R. (2001) *Review of the Criminal Courts of England and Wales* London: The Stationery Office

representation publicly funded far outweigh the objections for the following reasons.

- 5.73 Our extensive and detailed research has shown that the concept of legal representation for complainants in serious sexual offences is neither novel nor uncommon in both inquisitorial and adversarial systems. In truth, we in Northern Ireland appear to be one of the very few jurisdictions where even discussion of such a concept has been ignored. I believe we are out of step, not only with our nearest neighbours but also with developments in other common law countries.
- 5.74 For many complainants, the absence of a legally trained advocate acting on their behalf is both shocking and upsetting. Complainants are often left feeling vulnerable and exposed, merely seen as “collateral damage” in a process in which they are not a party and have no independent voice. Some research shows that complainants’ fear of mistreatment by the criminal justice system is a factor in under-reporting and that a lack of willingness to testify on the part of complainants can lead to prosecutorial withdrawal.
- 5.75 Research suggests that providing legal representation to complainants to support them through the criminal justice process can be effective at reducing secondary trauma, reducing attrition and may increase current conviction rates. It is the most effective way of supporting complainants during trials.¹⁷
- 5.76 Moreover, as chapter 13 on ‘Marginalised Communities’ reveals, there are particular difficulties for many of those groups with understanding the criminal justice system including legal documents, terms and concepts which really can only be met by legal representation.
- 5.77 Legal representation should, in the first place, be available for complainants who wish to be advised on obligations to disclose their personal data including medical records, personal emails etc. There is anecdotal evidence in England recently of police insisting on complainants disclosing such personal material on pain of the case being dropped in the event of non-compliance. Complainants are entitled to advice on such matters from a legal perspective. Moreover, legal representatives should be available to appear in preliminary or Ground Rules Hearings before a court to resist applications for disclosure.
- 5.78 It is symptomatic of the apathy that exists in this area that the Legal Services Agency identified only one occasion when exceptional funding was sought and granted to enable a complainant to personally challenge the right to their medical records being disclosed contrary to Article 8 of the ECHR, the matter always seemingly being left to the PPS notwithstanding developments in Scotland.

17 Bacik, I. Maunsell, C., Gogan, S. (1998) *The Legal Process and Victims of Rape* Dublin: The Dublin Rape Crisis Centre and the School of Law, Trinity College

- 5.79 The right to have legal representation to oppose cross-examination on previous sexual history is a further example of where such a step could radically address another widespread fear held by complainants. In fact this right should only rarely arise and would not be expensive as the experience in Ireland has shown. Moreover the presence of counsel, at a time limited pre-trial hearing to determine this issue (provided it is not belatedly raised at trial), would highlight the issue in a manner that would help address the perceived abuse of this restraint during trial.
- 5.80 However, I consider the need for a measure of legal representation goes beyond these two situations. I endorse entirely the proposal in Ireland (and echoing developments in Denmark etc.) that legal advice should be available from the time the matter is first reported to the police up until, but not including, trial. This would be confined to a limited number of hours save in exceptional circumstances.
- 5.81 The non-legal advice available, although providing invaluable support, is simply inadequate when the need for explanation about the highly complex legal process in these cases arises. I share entirely the view reportedly expressed by the former Chair of the Criminal Law Committee that solicitor practitioners are ideally placed to provide wraparound support to complainants. A lawyer could meet with the complainant in an office environment before the trial to talk about legal issues and provide an overview of the process. Solicitors could offer this service in a way that does not impact on the running of the case and would be acutely aware of the dangers of alleged coaching in a way that may not be in the gift of persons without legal training who often feel constrained in the manner they give advice.
- 5.82 The example of Ontario, outlined above, where the provision of free legal advice is limited in terms of hours, is a good example of how costs can be capped, save in exceptional circumstances.
- 5.83 The use of independent, legally trained advocates makes it easier for complainants to access the specific information that they need regarding the trial. Both prosecutors and witness service supporters are working within tight guidelines regarding contamination of evidence or alleged coaching. Lack of information is often cited by complainants as a primary complaint with criminal justice engagement and they can often feel unprepared for the nature of questioning.
- 5.84 Moreover, when advice is being given on disclosure/previous sexual history etc. the presence of professional privilege assures the complainant of unchallengeable confidentiality.
- 5.85 This service would, through a single channel of communication to the complainant and the authorities, allow the complainant to obtain legally

informed information about their rights and what is going on during the process.

- 5.86 In addition however, the presence of a solicitor on behalf of the complainant at the ABE, raising queries thereafter on their behalf to the police and the PPS about such matters as delay, disclosure being sought by both PSNI and the defence, progress of the case, reasons why adjournments are being sought, the nature of special measures open to them, meeting with Crown counsel prior to trial, notice of and presence at preliminary and Ground Rules Hearings and what they involve etc., will all supply the reassurance and information which at the moment appears to be sadly lacking and which could operate as another confidence building block in the whole system.
- 5.87 I consider that public knowledge of such a facility and an obligation on the PSNI to inform the complainant of its existence at the very outset of the process would be extremely important in highlighting their rights.
- 5.88 This should not lead to an open ended increase in costs for these reasons:
- Experience in Ireland has shown that a limited admission of legal representation is not expensive. Such hearings are held at a preliminary stage before the actual trial, are tightly focused, time limited, and few in number.
 - It could limit inappropriate and inadmissible questions and objections to such questions, thereby reducing trial length.
 - Such costs as may arise may be offset to an extent through savings made elsewhere. For example, fewer non-legal advocates for complainants may be required, and there may be longer-term savings for the health sector if legal advocates have the effect of reducing traumatisation for complainants.
- 5.89 One of the most important reasons for providing independent legal representation is that research suggests that providing legal representation to complainants to support them through the criminal justice process can be effective at reducing secondary trauma, reducing attrition and thus may increase current conviction rates. It is the most effective way of supporting complainants during trials.
- 5.90 The adversarial focus, which underpins cross-examination at trial, provides a risk of re-traumatisation for complainants. The use of advocates who are legally trained, means that complainants are likely to see less use of the previous sexual history myths and misconceptions that may be invoked currently by defence teams. These are damaging on many levels.
- 5.91 When complainants are offered this level of support it can lead to them being a more effective witness. The stress that complainants are under when giving evidence can be reduced when a legal advocate is present as they are more confident in their presence.

- 5.92 A complainant's legal advocate could, even at a Ground Rules Hearing dealing with case management, challenge the appropriateness of intended questioning and ensure that the complainant's rights under the EU Victims' Directive and NI Victim Charter to dignified and respectful treatment are upheld alongside their Article 3 and Article 8 rights. Rape trials, due to their very nature, have greater risk of impacting on the rights of the complainant. Whilst they may have no inherent claim to special status, the human rights and dignity of the complainant must also be ensured throughout the process. In the absence of any actor whose key role is to safeguard these rights, complainants are rendered vulnerable.
- 5.93 There is evidence in the literature to show that court-related stress can make complainants more vulnerable to suggestion by counsel as a result of retrieval failures of short-term memory, which reduces the quality of testimony. In addition, this causes incomplete description of events and an increase in errors and inconsistencies in testimony, with that testimony taking longer to provide.
- 5.94 One academic report¹⁸ argues that giving complainants procedural rights in their case can empower them and provides an opportunity to remove a perceived hierarchy between the active party and the passive complainant. Its author suggests that legal representatives for complainants would increase the degree of agency that complainants possess.
- 5.95 Arguably there is an imbalance in the current system. Defendants are given individual legal representation, which includes the ability to call character witnesses and challenge the complainant directly through counsel. The complainant is not given any ability to be considered a party in proceedings and therefore cannot access character witnesses even though character is so often used by defence when discussing behaviours of complainants. An interesting study in Scotland¹⁹ found that prosecutors were reluctant to shield witnesses from character attacks as they feared to do so would convince the jury that the prosecutor was hiding something.
- 5.96 Whilst provision of independent legal representation will mean complainants in serious sexual offences being treated differently to other complainants, the former are already treated differently by affording them anonymity because of the special circumstances of such cases. The complainants of sexual assault may face a higher risk of re-traumatisation through the criminal justice process than in other crimes. Complainants of sexual violence may have greater and more complex needs, with many suffering trauma and negative implications for their health, relationships and employment.

18 Wolhuter, L. (2010) "German and Swedish procedures as models for the empowerment of racial minority women in rape trials" *International Journal of Law, Crime and Justice* Vol. 38 pp. 1-16

19 Brown, B., Burman, M., & Jamieson, L (1993) *Sex crimes on trial: The use of sexual evidence in Scottish courts* Edinburgh: Edinburgh University Press

- 5.97 Whilst the trial judge and prosecution counsel can be relied on to ensure a complainant is fairly treated, arguably safeguarding the complainant's rights is not the main role of the courts or public prosecutor, who must also consider the public interest and the accused's right to a fair trial. As a result, it can be plausibly suggested that they cannot give the complainant's interests due attention at all times.
- 5.98 There is a belief widely held by complainants and victims' groups that it is difficult for judges to balance their duties towards the complainant, fearing that excessive intervention may form grounds for an appeal if a defendant believes they have been unfairly treated. In addition, there is a general acceptance amongst the Judiciary of the importance of allowing counsel to carry out their role fully.
- 5.99 In any event, the arguments against a general right to legal representation for complainants in criminal trials do not mean that complainants should be denied legal representation in particular situations where public prosecutors may be unable to protect their legitimate privacy interests.
- 5.100 A possible variation on this legal advice coming from solicitors in private practice, could be to utilise the services of in-house lawyers from the voluntary sector. For example, a trained solicitor working for a charity on a flat annual salary could be used to provide the level of advice necessary and who would employ advocates when something required a challenge before the court itself. For my own part, I entertain some doubts as to whether such lawyers would have the necessary day-to-day experience in ongoing trials so as to give practical legal advice to the complainants, whereas those in active private practice will undoubtedly have such skills.
- 5.101 Great care would also need to be taken to ensure that there was not an overlap with current support services and the advocacy services, which I understand the DoJ are intending to introduce. Legal representation would be strictly confined to legal issues and rights arising and fees would only be paid for that work.
- 5.102 In its most ambitious form the role would encompass legal advice, advocacy and representation from reporting to trial, appeal and compensation. However few, if any, of the common law jurisdictions provide this (with the possible exception of some of the Scandinavian countries). At this stage I am not currently minded to recommend such a full role of legal representation albeit, I recognise the strength of the logic and the argument for it.
- 5.103 My hesitation springs from the following matters:
- The costs of solicitor and counsel sitting through an entire trial in every serious sexual offence, or indeed even every rape trial, would be prohibitive in an era of financial austerity. A recent high profile rape trial in Northern Ireland lasted over 40 days, albeit that was untypical.

- The presence of further lawyers acting on behalf of the complainant with rights to raise issues or even to cross-examine on behalf of the complainant does not fit easily into the adversarial system in which a criminal trial has only two parties, namely the prosecution on behalf of the public and the accused. To put an alleged victim whose account the defendant challenges in the ostensibly privileged role of an auxiliary prosecutor during the course of the trial in front of the jury is potentially unfair. It has the potential not only to complicate an already complex process but may protract the whole trial.
- The presence of solicitor or counsel for a complainant would be potentially confusing for a jury. Potential problems would arise if there were four or five complainants who were all wishing to object to evidence etc. If the prosecutor and all the complainants objected in tandem, one has to question what the perception of the jury would be and what effect it would have on the concept of equality of arms. It might have the appearance of two or more prosecutors similar to the German Private Accessory Prosecutors (PAP) system where the complainant's lawyer has the status of a second or auxiliary prosecutor. I have concern that third party representation at trial therefore elevates private interests onto a par with those of the State, contravening criminal justice norms of public prosecution.
- There is no reason why all the information that the complainant requires and the issues they wish to raise cannot be dealt with in a timely, comprehensive cost effective manner in pre-trial preliminary and robust Ground Rules Hearings. The attendance, if necessary, of a lawyer on behalf of the complainant at these hearings would lift the profile of any such issues and I am confident that these rulings would be robustly defended by judicial intervention at the trial.

5.104 Finally, five necessary adjuncts to my proposals for legal representation for complainants are as follows. First, irrespective of whether or not there is independent legal representation for complainants, there must be consistency in the attendance of the same Crown Counsel (either junior or senior counsel) during the various Ground Rules/preliminary/committal hearings as well as at trial. This is important where a complainant may have earlier raised issues of disclosure, previous sexual experience cross-examination, reasons for delays and adjournments etc.

5.105 I am informed by the PPS that their policy is that the complainant should meet the prosecuting counsel not less than one to two weeks in advance of trial. Regrettably that has not been the experience of a number of the complainants to whom I have spoken and who have contacted this Review. Their experience was that they only met counsel for the first time on the morning of trial.

5.106 I appreciate that exceptional circumstances can arise such as illness or another trial overrunning. However, greater emphasis must be placed on this

requirement so that counsel, for example, does not heedlessly take the risk of another case overrunning. In cases of this genre, counsel should pass over the papers at least two weeks in advance if there is the slightest risk of such an occurrence. New Crown Counsel should immediately arrange to meet the complainant. The PPS should take a grave view of instances where late passing on occurs in serious sexual offence cases. Complainants find the late arrival of hitherto unknown counsel on the morning of trial extremely disconcerting and unsettling at a time when they are feeling vulnerable, especially where last minute developments occur in the case requiring detailed explanation.

- 5.107 Secondly, we should coordinate early advice support and borrow from the Scottish model referred to earlier in this chapter.
- 5.108 Thirdly, the Legal Services Agency for Northern Ireland does operate an Advice and Assistance (Green Form) Scheme. It may be that with some creative thought this scheme could be extended or appropriately adjusted to finance the kind of advice to complainants throughout the process from reporting up to, but not including, trial which I am now recommending.
- 5.109 Fourthly, this proposal for separate legal representation would be funded through legal aid. A decision would have to be taken if this was to be means tested. My preference is that it should not be means tested in order to avoid different treatment of different complainants. Such steps may require amendments to primary legislation to allow criminal legal aid certificates to be awarded to non-defendants or, alternatively, affirmative secondary legislation to bring the representation within the scope of civil legal aid.
- 5.110 Fifthly, University Law Clinics can also play a role in developing access to justice potential. Already the University of Ulster has an established law clinic and whilst Queen's University Belfast does not have at the moment, it does partner with the Law Centre. Neither University are providing legal advice and support to complainants in this area. I see no reason why the Department of Justice cannot work directly with universities to support law clinics in areas of legal need such as that which I have advocated in this chapter. Whilst these law clinics would not be able to provide representation before the courts, they could have a role in signposting complainants to other legal service providers. There has been an increase in the number of university law clinics across the UK from the 1990s with a recent acceleration.²⁰
- 5.111 However if, as I believe should be the case, universities in Northern Ireland are to play a role in developing the access to justice potential of law clinics, there needs to be external financial support from governments.²¹

20 Drummond, O. & McKeever, G. (2015) *Access to Justice through University Law Clinics* Belfast: Ulster University Law School and the Legal Education Foundation

21 As above, see recommendation 7 of the Executive summary.

Responses

- 5.112 With very few exceptions, there was strong support for the recommendations made at the end of this chapter for the introduction of a measure of independent legal representation for complainants.²²
- 5.113 The public response has been similarly welcoming of the proposals. Our online survey received 419 respondents to the issue, 89.5% of whom agreed with the recommendations (94.1% of females and 78.2% of males).
- 5.114 A separate questionnaire completed by 67 women for the Women's Regional Consortium recorded that 96% of women surveyed agreed that legal aid should be available for victims in serious sexual offence cases.
- 5.115 Yet a third survey by Victim Support NI between 3 December 2018 - 7 January 2019 with 72 respondents, recorded that of those who had actually been complainants in serious sexual offence trials, 80.0% believed legal representation would have helped them. Of that section of the survey for complainants whose cases had not proceeded to trial, 95.6% believed their own legal representation would have helped them.
- 5.116 Reasons given for welcoming such representation in the Victim Support NI survey included:
- someone to represent their interests;
 - a legal representative to explain what was happening during the process;
 - it would have increased confidence in the criminal justice system;
 - made the complainants feel less alone;
 - would have taken some of the stress away;
 - would have aided the learning and understanding of the legalities and expectations of the court system; and
 - would have ensured supervision of the process including at the PSNI stage.
- 5.117 Of course the rejoinder might be made that this overwhelming public support for legal representation for complainants merely reflects the fact that few, if any, complainants would turn down the possibility of legal representation when offered, but that that does not necessarily prove the case for need.
- 5.118 I consider that this rejoinder ignores three factors that clearly surfaced in the course of the responses to the Preliminary Report in this context. First, the right of victims to legal assistance and free legal aid under conditions provided by internal law has emerged as part of a number of international

22 For example, Law Society of Northern Ireland; Northern Ireland Human Rights Commission; PSNI; Queen's University Belfast and the University of Ulster; Dame Vera Baird QC (PCC) Northumbria; Dr Alison Livingstone, paediatric consultant; Dr Olivia Smith; Dr Mary Iliadis; Retired Associates of Probation Service; The Rowan SARC; NICCY; Barnardo's; Women's Aid Federation Northern Ireland; SBNI; Victim Support NI; MAP; Women's Resource and Development Agency; EVAW; Belfast Feminist Network; Nexus NI; The National Organisation for the Treatment of Abuse; West Belfast Partnership Board, all complainants who responded and who must remain anonymous.

standards.²³ These standards are gaining international recognition. Independent representation for complainants is emerging in other countries, not least Ireland and Scotland. Public opinion in Northern Ireland is merely reflecting an obvious reality. It is the law that is out of step.

5.119 Secondly, the need is being expressed time and time again by complainants, victims' groups and virtually every other respondent in this Review. The PSNI summarised it well when its response stated:

“It is the experience of the PSNI that many victims wrongly believe that the role of the PPS is to work on their behalf. The proposal of separate legal representation may fill this void and further support the complainant in remaining on their criminal justice journey, thereby improving outcome and attrition rates.”

5.120 Thirdly, Dame Vera Baird QC in her response as Northumbria Police and Crime Commissioner made a point which is often forgotten, namely:

- “It seems sometimes to be forgotten that complainants in sexual violence cases give evidence as a public duty in the interests of the community, exactly like complainants in every other kind of case.
- Sexual violence cases are often treated as if they are trials between the complainant and defendant personally, and that as a consequence the state must make exhaustive examination of the complainant's character to ensure that she is fit to be supported.
- This is far more so than if the same person brought an uncorroborated allegation of physical assault.
- ...extensive disclosure of the complainant's personal material will be required. When scrutinized, if this material shows something that casts a shadow on the complainant's character, however irrelevant to the issues in the case, since it has been seen cannot be left out of disclosure to the defence. This level of scrutiny is unknown in other cases.
- It is salutary to consider how many people would complain to police of burglary, assault or any other crime if they were required to undergo a detailed search of their personal history [including their previous sexual history in some cases] with a view to allowing the defence to use anything found to publicly discredit them.”

5.121 There was an abundance of evidence in the course of this Review, out of the mouths of complainants themselves and from victims' groups who represent many such complainants, that the absence of legal representation is a factor contributing to the low reporting rate and attrition occurrences.

23 The Council of Europe Convention on preventing and combating violence against women and domestic violence, (Istanbul Convention); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (Lanzarote Convention); Article 13, EU Directive 2012/29/EU

5.122 The widespread chorus of approval for publicly funded legal representation did raise a number of issues concerning the implementation of the principle. These included:

- That the advent of this principle might introduce further delay into the system. I am satisfied that this is not the case, provided it is limited to such matters as preliminary applications dealing with previous sexual history/disclosure etc. These are at most two hour applications dealt with by way of preliminary hearings and closely case managed.
- The funding of this concept could prove prohibitive in a time of strident financial circumstances for legal aid. The experience in Ireland dealing with applications for previous sexual history has not proved expensive and I do not see why, given the rarity of such applications in Northern Ireland, it should be any different in this jurisdiction. In terms of disclosure, as Scotland has illustrated, there is in any event an outstanding Article 8 right and all the present recommendation does is to place that on a statutory basis. The use of a solicitor to ascertain information about such matters as delay, information as to what is happening in a timely fashion etc. can all be capped as happens in Canada.
- It is right to say that in Ireland the research of Dr Mary Iliadis suggests that on the issue of legal argument as to whether the victim's past sexual history should be allowed in evidence, on occasions the court does ask the legal representative to participate in the actual trial to ensure that the spirit of what has been agreed is followed. For my own part, as I mention below, I would be slow at this stage to admit representation during the trial itself until a full cost analysis has been made of the rather more measured recommendations that I am making at this stage. Consequently the cost factor should not come into play in terms of attendance at the trial itself.
- An overlay of roles between the prosecution and counsel representing the complainant. I do not consider that this is likely given the limited nature of the recommendations I have made. It is this limited nature of independent legal representation which will also prevent any alienation between prosecution counsel and the complainant.

5.123 I recognise that there is considerable momentum behind those who press for the logical conclusion of this set of recommendations, namely that there should be independent legal representation appearing throughout the trial itself. This is to ensure that the spirit of the earlier findings about rulings on previous sexual history/disclosure of documents at the late stage/further delays etc. can all be marshalled by a representative on behalf of the complainant. I remain of the view that we should pursue this avenue with a degree of caution. The limited nature of the recommendations I have made should first be introduced with a cost analysis within a reasonable time and an assessment

made of how successful those steps have been in building confidence into the system. If further analysis reveals that these steps have proved inadequate, then extension of this into the trial process can be considered but that would need a cost analysis exercise before it could be introduced. I emphasise that I believe that this radical step of introducing independent legal representation for complainants should be embarked on cautiously until the full ramifications can be assessed and analysed.

- 5.124 A special case for introducing these measures can be made on behalf of children. Dr Livingstone, Consultant Paediatrician and Clinical Lead for Paediatrics at the Rowan SARC compellingly argued that they are often involved in a family dynamic and therefore some measure of independent legal advice (rather as in family cases where children's interests are often represented by a guardian ad litem in public law cases or the Official Solicitor) should be introduced. I am sympathetic to this point.
- 5.125 A number of respondents,²⁴ whilst supporting the proposal to provide publicly funded legal assistance to complainants, were mindful of the costs of representation and indicated that such representation could perhaps be provided in-house through a specialised unit or existing organisations providing victim support.
- 5.126 NIHRC felt that the benefits of creating such a specialised function might support a number of other recommendations in the Review such as research, evaluation of the implementation of the Review, or the provision of training.
- 5.127 Victim Support NI believe that in-house lawyers, perhaps situated at Victim Support NI, could provide the best answer for the provision of legal representation. There are already skilled staff there, including existing ISVAs. In-house lawyers could be a natural development to the skill set within the organisation. Currently ISVAs and Witness Service staff and volunteers are limited in what they can discuss with clients on the basis of disclosure and contamination of evidence. In-house lawyers would provide the opportunity for victims to discuss the legalities around their case, specifically in relation to previous sexual history and disclosure. It was felt that this would be a cost effective and manageable way to respond. In-house lawyers could draw on the experience of other professionals within the organisation, identify themes and trends together with effective responses to challenges within the system, as well as holding privileged supportive conversations with victims to assist them in understanding the process and giving them a voice within it. A key component of course would be that this would place the support outside the legal aid system, which is already under considerable financial pressure. It was felt that this resource should be made available to ensure victims are supported at least until the point at which they complete their evidence.

24 For example, NIHRC; Victim Support NI.

- 5.128 I do not lightly dismiss the proposition involving the use of in-house lawyers. On the other hand, it has to be recognised that when applications are being made, for example, dealing with disclosure and previous sexual history applications, the defendant and the prosecution (who may not be taking the same line as the advocate on behalf of the complainant) could well be represented by highly experienced senior or junior counsel. I am somewhat concerned that in-house lawyers, whilst in their own field unique and highly skilled, might not be as well versed as the opposition in the complex law surrounding these issues, particularly where they were being argued in an adversarial context in front of a judge. If this process is to work, it must not work on a basis of an equality of legal representation. However, it might be that the earlier stages of advice could be undertaken by in-house lawyers and if necessary court appearances come into the frame, counsel could then be briefed.
- 5.129 I was grateful to find assistance from Queen’s University Belfast and Ulster University in terms of the concept of law clinics. As the representatives from both of these universities pointed out to me, this type of work is closely supervised by academic staff, confidentiality is strongly emphasised, and training is at a premium.
- 5.130 Law clinics have a number of advantages in that they may be much less intimidating than the prospect of attending professional legal offices in the first place, they may very often be the first port of call and can be operated as an extremely useful signpost to appropriate legal services within the professions. Whilst the concept of “referral fatigue” is a danger, nonetheless law clinics operate a spectrum of models. A model in which complainants could go for initial advice (recognising that any discussions would have to be confined to legal principles and would not be clothed in the mantle of legal privilege) could be important as the first step in a relationship between law clinics and external service providers.
- 5.131 This concept is already delivered by a number of university clinics across the UK and I believe may well have a role to fill the void of lack of legal advice which complainants currently suffer.
- 5.132 However, “If universities are to play a role in developing the access to justice potential of their law clinics, there should be external support from government to enable universities to align their core activities with this role, and to receive appropriate recognition for their work. This could include reassessing the funding allocations for teaching clinical legal education, providing additional funding for enhanced employability outcomes, and creating REF-focused research initiatives to connect researchers to law clinics.”²⁵ In short the State would have to provide system support for a measure which is resource intensive.

25 Drummond, O. & McKeever, G. (2015) *Access to Justice through University Law Clinics* Belfast: Ulster University Law School and the Legal Education Foundation. This is an excerpt from this Ulster University paper to which I lend my firm encouragement.

5.133 I am grateful for the response of the Information Commissioner’s Office who drew attention to the fact that the data minimisation principle set out in Article 5(1)(c) of the EU General Data Protection Regulation (GDPR) 2016 requires that personal data must be adequate, relevant and limited to what is necessary. The Commissioner notes:

“This is especially crucial for cases involving information of such a sensitive nature which constitutes special category data under data protection law and warrants additional protection. This is an example of where controllers should be implementing data protection by design and by default as per Article 25 of the GDPR, whereby they consider the data protection implications before the processing begins. If there are concerns over whether the complainant’s entire medical records should be disclosed to the defence team, these should be addressed at the outset of the case.”

5.134 Finally, I welcome the indication from Dr Mary Iliadis²⁶ in the response to the Preliminary Report that she has plans to further her research with colleague Dr Olivia Smith²⁷ “to critically analyse varying modes of independent legal representation for victims operating in Ireland and inquisitorial systems (i.e. France, Germany, Sweden) in order to determine whether, and indeed how, such modes of independent legal representation can be applied to Northern Ireland’s criminal justice system. In doing so, our project seeks to develop an evidence-base with which to evaluate the potential introduction of complainants’ lawyers in the adversarial context of Northern Ireland.” She adds: “Given the very recent release of Sir John Gillen’s Review, we see our researches to be very timely in its execution.” Dr Iliadis has sought from this Review our views about priority areas to be investigated in relation to this topic.

5.135 The only substantive objection to the concept of publicly funded legal representation for complainants emanated from the Northern Ireland Bar. Their objections were as follows:

- They note that only a small number of cases that proceed to trial have had special counsel appointed in Northern Ireland.²⁸ Appointments only occur in exceptional circumstances outside the normal course of proceedings aimed at dealing with highly sensitive issues primarily of disclosure. Of course the proposals that are being made in this Review are of a wholly separate genre and spring from the need to give special protection to complainants in cases of serious sexual offences where particularly intimate and personal details are the source of enquiry and revelation.
- The prosecution will have direct engagement with the complainant as a witness and a person to whom the prosecutor owes duties as set out in

26 Lecturer in criminology, at the School of Humanities and Social Sciences Deakin University (Australia) and editor for the Australian and New Zealand Society of Criminology.

27 Senior Lecturer, Criminology, Anglia Ruskin University (UK).

28 *R v H, R v C* [2004] UKHL 3

the Victim and Witness Charters. Moreover, it is argued that once a case comes to trial and the issues of previous sexual experience, or disclosure of medical documents are encountered, a senior prosecution counsel being conversant with all of the circumstances, having access to all the witnesses, knowing how decisions are reached and being familiar with the disclosure in the case, could adequately deal with these matters. I fear this objection fails to address the private interests of the complainant which they are entitled to have protected. Now that these concerns are being highlighted and beginning to be understood, the rights of privacy of complainants adds persuasively to the reasons why separate legal representation ought to be available at the State's expense. Moreover, the Bar's argument perhaps fails to address the gathering momentum of international standards to protect the victim and the recognition of the inadequacy of the current system in countries such as Ireland, England & Wales and Scotland.

- The adoption of Sexual Violence Complainants' Advocates (as is occurring in Northumbria) is submitted to be premature since this is an explorative project taking place in another jurisdiction. Whilst we in Northern Ireland should look carefully at the experience of the SVCAs in England, the fact remains that legal representation is already working well in both Ireland and Scotland and the question has to be raised as to why we are not keeping pace with this and other international developments.
- In the current era of constrained public finances the provision of separate legal representation for serious sexual offence cases alone risks creating a hierarchy of offences and additional pressure on the Legal Services Agency. I am not satisfied that this point addresses the unique nature of serious sexual offences, the obvious lack of complainant confidence in the current system as evidenced by the extremely high non-reporting and high attrition rates, and the need to institute a system of building blocks to recreate public confidence in the criminal justice system in this area. Provision of independent legal representation is a vital building block in this process. Moreover, as I have indicated earlier in this chapter, the cost factor is not a strong point.

Conclusion

5.136 I therefore have come to the conclusion that the recommendations I have made in the Preliminary Report, with some small amendments, should remain.

Recommendations

- 40.* Publicly funded legal representation should be granted to all complainants in all serious sexual offence cases in the following circumstances:
- to afford relevant information and general legal advice on a time limited basis throughout the process up to the commencement of the trial, with the option of bringing such matters to the attention of the court prior to trial;
 - where complainants wish to exercise the right to appear in court to object to disclosure of private material to the accused’s defence team or to ensure it is restricted to the minimum necessary; and
 - where complainants wish to appear in court to object to the introduction of their previous sexual history.
- 41.* That consideration be given to and a cost analysis made of extending legal representation during examination-in-chief and cross-examination at the trial itself after the recommendations above at number one have been piloted and analysed.
42. An amendment to the Victim Charter imposing an obligation on the PSNI to inform the complainant of the existence of such legal advice at the very outset of the process.
43. The Public Prosecution Service should make it a term of counsel’s retention that, save in very exceptional circumstances, the same counsel (either junior or senior counsel) shall attend any preliminary/Ground Rules/committal hearings as well as the trial itself.
44. The Department of Justice should ensure that the Advocacy Support Service to be introduced in 2020 is similar to the Scottish government “Support to Report” project.

Chapter 6

Dispelling rape myths

s“When you watch court cases you really do have empathy with the victims because you see how human it is to change your story. All the things that disqualify your account to a court are what we do as human beings”.

Gayle, a character in “Consent” a play by Nina Raine

Issues

- Do rape myths exist and who holds them?
- If they exist is there evidence that they pollute jury verdicts despite the directions of the Judiciary?
- How should we best address the problem?

Current Practice

- 6.1 Judges in Northern Ireland recognise the potential dangers of what may be the presence in some members of our society of misconceptions, myths and stereotypes about rape and other sexual offences.
- 6.2 Hence, conventionally in the course of the closing address to a jury in such trials, judges address this mischief.¹
- 6.3 In Northern Ireland, in the absence of judicial templates in our *Crown Court Bench Book*, we borrow from templates provided to English Judiciary in their Crown Court compendium.
- 6.4 Judges point out to jurors that experience shows that a number of myths are erroneously held and should be dispelled.
- 6.5 The conventional direction to juries states, *“Experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, have been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.”*

¹ R v JD (2008) EWCA Crim 2557 and Judicial College (2017) *The Crown Court Compendium, Part 1: Jury and Trial Management and Summing up* London: Judicial College

6.6 Additionally, the potential for expert evidence to be introduced to address the danger of stereotypical thinking has been a matter of debate over the years. To date it has usually been resisted in Northern Ireland and the rest of the UK on the basis that generic evidence is generally inadmissible. Moreover, it invites elongated, costly and witness rich procedures which overcomplicate an already complex set of offences.

International Standards

6.7 The Council of Europe Istanbul Convention,² which came into force in August 2014, continues to have a strong focus on the prevention of all forms of violence against women. The Convention calls on all members of society, in particular men and boys, to help reach its goal of creating a Europe free from all forms of violence against women and domestic violence. Article 14 states that parties to the Convention should take necessary steps to include teaching material in formal curricula at all educational levels on issues including non-stereotyped gender roles, gender-based violence and the right to personal integrity.

Background

6.8 There appears to be a growing recognition that some people still harbour often unspoken views about appropriate behaviour of women and men. Such rape myths may be impacting on outcomes. The Home Office in London has confirmed that it is scoping new policies with a view to educating the public on rape myths and the Judicial College in England is planning to pilot a new jury information video which addresses myths.

What are Rape Myths?

6.9 The Public Prosecution Service (PPS) *Policy for Prosecuting Cases of Rape*³ states that prosecutors are aware that there may be myths and stereotypes around rape. It notes that the PPS does not allow these to influence decisions. It provides a number of examples of such myths, namely:

- rape occurs between strangers in dark alleys;
- victims provoke rape by the way they dress or act;
- victims who drink alcohol (especially whilst in the company of others or men) or use drugs are asking to be raped;
- rape is a crime of passion;
- if victims did not scream, fight or get injured, it was not rape;

2 Council of Europe, Convention on Preventing and Combating Violence against women and domestic violence (Istanbul Convention)

3 Public Prosecution Service for Northern Ireland (2010) *Policy for Prosecuting Cases of Rape* Belfast: PPSNI

- you can tell if someone ‘really’ has been raped by the way they act;
 - victims ‘cry rape’ when they regret having sex or want revenge;
 - only gay men get raped/only gay men rape men;
 - sex workers cannot be raped. Sex workers have no limits in terms of the sexual services they may provide;
 - a woman cannot be raped by her husband/partner;
 - victims who have remained in an abusive relationship are responsible for any rape that follows; and
 - some consensual sexual activity is consent to all sexual activity.
- 6.10 The literature and the legal authorities⁴ on the subject note that a multitude of rape stereotypes are in existence. Additional examples not within the PPS Policy document include that rape victims will be bruised, particularly in the genital area;⁵ that there will always be incontrovertible evidence that such a crime has happened; threats of violence will be used; a woman can always withhold consent no matter how drunk she is; genuine victims will always report rape immediately, give a thoroughly consistent account of events and will display emotion when recounting them; and an attractive male does not need to have sex without consent.
- 6.11 Alcohol presents substantial problems for jurors. A recent piece of research⁶ in July 2018 revealed that jurors often negatively evaluate complainants making allegations of rape when those complainants were intoxicated at the time of the assault.
- 6.12 It is, therefore essential that legal practitioners have effective methods of ensuring that jurors use evidence of intoxication for the legally permissible purpose, which is to determine the complainant’s cognitive capacity to consent.
- 6.13 A further rape myth is that false allegations are very common, with many believing that they make up a large proportion of rapes reported to the police. A “culture of scepticism” has led to an over-estimation of the scale of false allegations.⁷

4 MM (2007) EWCA Crim 1558, Doody (2008) EWCA Crim 2557, Miller (2010) EWCA Crim 1578, ER (2010) EWCA Crim 2522, C17 in Crown Court Bench Book 2010, C20 in the Crown Court Compendium, Andreous (2014) EWCA Crim 2886

5 Dr Alison Livingstone, Consultant Paediatrician and clinical lead for Paediatrics at the Rowan SARC, adverts to the misconception that any child who has been sexually abused will have physical findings.

6 Nitschke, F.T., Masser, B.M., McKimmie, B.M. and Riachi, M. (2018) “Intoxicated But Not Incapacitated: Are There Effective Methods to Assist Juries in Interpreting Evidence of Voluntary Complainant Intoxication in Cases of Rape?” *Journal of Interpersonal Violence* pp.1-25

7 Kelly, L., Lovett, J. and Regan, L. (2005) *A gap or a chasm? Attrition in reported rape cases* London: Home Office Research Studies, Development and Statistics Directorate

- 6.14 Our Review team visited Common Youth.⁸ In February 2019 Common Youth carried out an exercise through a self-reporting questionnaire during Belfast and Coleraine sessions on the topic of rape myths. 58 young people took part. Most dismissed the most common myths but, disturbingly, 83% did not believe that the suggestion that “false allegations are common” was a myth.
- 6.15 When a prosecution for perverting the course of justice for falsely alleging rape does occur, the publicity attendant upon it is often wholly disproportionate to the rarity of the offence and serves only to feed the myth.
- 6.16 The PPS has concluded a manual exercise for defendants dealt with at court for perverting the course of justice (including attempts) and wasting police time by false report for false allegations of rape. There was one defendant dealt with at court in 2017/18 and three defendants in 2016/17 with all four pleading guilty. In 2017/18 there were 60 defendants dealt with at court for rape offences and only one defendant dealt with arising out of false allegations of rape. In 2016/17 64 defendants were dealt with for rape and only three dealt with on charges arising out of false allegations of rape.
- 6.17 The Crown Prosecution Service in England and Wales conducted a review over a 17 month period between January 2011 and May 2012 related to persons who were said to have made a false complaint of rape and/or domestic violence who were being considered for prosecution. There were a total of 159 suspects, 121 involving an allegedly false allegation of rape, 27 involving allegedly false allegations of domestic violence and 11 involving both rape and domestic violence. Of the 132 involving allegedly false rape allegations, 38 were prosecuted (28 for perverting the course of justice and ten for wasting police time).
- 6.18 During this time there were 5,651 prosecutions for rape.⁹ Furthermore, the report shows that a significant number of these prosecutions involved young, often vulnerable people. About half of the cases involved people aged 21 years old and under, and a number involved people with mental health difficulties. In certain instances, the person alleged to have made the false report had undoubtedly been the victim of some kind of offence, even if not the one which he or she had reported.
- 6.19 It will be seen therefore that there were only a very small number of individuals prosecuted for having made a false complaint and therefore the argument that there are a large number of false allegations is a myth without any factual foundation. These are the only figures available on the issue and whilst prosecution figures may not reflect the totality of false allegations, there is

8 Common Youth has been providing sexual health services and education for young people across NI for the past 25 years and regularly consults with young people to inform its practice and enables it to advocate on their behalf.

9 Levitt, A. and the Crown Prosecution Service Equality and Diversity Unit (2013) *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* London: Crown Prosecution Service

no other data to justify the claim made by some that they regularly occur. In an attempt to find some more evidential data I recommend that the PPS should record annually any case in which a person is said to have made a false complaint of rape and/or serious sexual offences and was being considered for prosecution.

- 6.20 However, recently the CPS in England and Wales has been criticised by MPs for its allegedly exceptionally aggressive prosecution of false rape claims, which they warn could deter victims from reporting rape.
- 6.21 It is inaccurately believed that many of the allegations of rape or serious sexual assault are fuelled by a desire for compensation. In fact, as the figures for criminal compensation show (see Appendix A) most claims are for children under 18 and only a minority are by adults.
- 6.22 The purpose of these myths and stereotypes is thought to be to move blame from the perpetrator towards the alleged victim. It is argued that they also serve to minimise the harmfulness of rape, particularly in cases involving an intimate partner.
- 6.23 There is also the “Safety Myth” theory to the effect that the world is a safe place and if something happens it must have been something unsafe or foolish that the complainant did to make the unsafe thing happen. Therefore placing the blame on the complainant for the unsafe or foolish action reinforces my belief that I am safe and that you are to blame. There is allegedly an internal system in place in most people to disregard any evidence which shakes their world view on their family’s safety.
- 6.24 Recent research that End Violence Against Women (EVAW) conducted with YouGov revealed:
- 33% of people in Britain think it is not usually rape if a woman is pressured into having sex but there is no physical violence.
 - One third of men think if a woman has flirted on a date it generally would not count as rape even if she is not explicitly consenting to sex.
 - A third of men believe a woman cannot change her mind after sex has started.
 - 24% of people believe sex without consent in long term relationships is usually not rape.

Male rape myths

- 6.25 Studies suggest that a number of factors mean that sexual violence perpetrated against men receives less attention than against women and that men are less likely to report such offences. The plight of male rape victims has been almost totally ignored in research literature and elsewhere.¹⁰ The stigma and taboos

¹⁰ Rumney, P. (2001) “Male rape in the courtroom: Issues and concerns” *Criminal Law Review* pp. 205-212

surrounding male rape are enormous.¹¹ “Rape is still seen as something that affects women”.¹²

- 6.26 In line with rape myths applying to women, it is argued in a recent study¹³ (albeit one confined to university students) that those myths applying to men are often deeply rooted in traditional gender norms and stem from the same patriarchal structure.
- 6.27 These gender norms hold that men possess traits such as independence, toughness, power, aggressiveness, control and dominance, while victims of rape are often portrayed as weak, defenceless and feminine. Myths in the study included:
- ‘real’ men would not put themselves into a position where they could be raped;
 - men cannot be forced to have sex against their will;
 - sexual assault of men by women is improbable, as women are sexually passive and men sexually dominant and assertive;
 - only gay men can be raped, or rape other men (the article notes that media coverage of allegations against Kevin Spacey and their conflation with homosexuality has contributed to this myth);
 - men are less affected by sexual assault than women; and
 - male victims show lower levels of masculinity.

Who holds these myths?

- 6.28 Research identifies a number of groups in society that are more likely than others to hold rape myths. These are as follows:
- men in comparison to women, although some women also hold them;
 - older people in comparison to their younger counterparts;
 - people from less well-off backgrounds;
 - individuals who hold negative attitudes towards women and other groups (such as people of different races, sexual orientation, class); and
 - participants with high levels of “rape myth acceptance” tend to allow this to influence their judgements. Indeed, the evidence suggests that rape myths can influence every stage of the criminal justice process.
- 6.29 Many women who have experienced rape are more likely to interpret their own behaviour in line with these myths, and may for years afterwards blame

11 Kramer, E. J. (1998) “When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape” *New York University Law Review* Vol. 73, pp. 293-318

12 Response of Men’s Advisory Project in its submission to the Gillen Review.

13 Spruin, E. and Reilly, L. (2018) “An exploration into the acceptance of male rape myths within the UK” *Journal of Forensic Sciences and Criminal Investigation* Vol. 9, No. 3

themselves for not resisting during the offence, or even may not label their experience as rape.

- 6.30 A 2018 study¹⁴ from Denmark suggests that the majority of reported rapes are closed during the police investigation. Results of that research into Danish police indicated that prominent characteristics of rape stereotypes significantly influenced whether the case was continued for prosecution.
- 6.31 The PSNI have recently undertaken a research project, affiliated with the Institute of Criminology at Cambridge University, on the subject of rape myths.¹⁵ The research was designed and conducted by a police practitioner and took the form of a randomised control trial. It was aimed at testing the impact of a training programme on the measured attitudes of police officers towards victims of rape. Findings reflected that the training programme had a positive effect on the levels of rape myth acceptance and officer assessment of victim credibility. Given that police officers are the gateway to the criminal justice system and victims are often reluctant to engage for fear of not being believed, any positive change in officer approach to victims of rape may improve victim satisfaction of their treatment by police and, more broadly, victim willingness and confidence to report sex crimes and contribute to greater public safety, to justice, and to public confidence in police and their legitimacy. This research illustrates the level of importance the PSNI attribute to this subject, displaying an innovative approach to explore and address the challenges of rape myths in the investigation of sexual crime.
- 6.32 Rape myths typically apply to adults, but not typically to offences involving children. Research suggests that aspects of a child's moral character, reputation or risk taking are irrelevant in seeking justice.
- 6.33 While rape myths are often rooted in traditional gender norms, there is also evidence of their use by defence counsel in sexual offence trials involving male complainants.
- 6.34 Two additional points have to be made. First, a note of controversy. Much of the relevant research comes from research with mock juries in England and Wales and some care is required in extrapolating from this experimental context to a "real" courtroom. Research with real jurors has been carried out in England and Wales and currently in Northern Ireland by Professor Cheryl Thomas.¹⁶ Secondly, substantial cross jurisdictional research literature on the topic, including a recent

14 Hansen, N.B., Hansen, M., Campbell, R., Elklit, A., Hansen, O.I. and Bramsen, R.H. (2018) "Are rape cases closed because of rape stereotypes? Results from a Danish police district" *Nordic Psychology* Vol. 71, Iss.1, pp.51-61

15 McKee, Z. (2018) *Testing the Impact of a Training Program on the Measured Attitudes of Police Officers Towards Victims of Rape: A Randomised Controlled Trial* (unpublished Masters of Studies in Applied Criminology and Police Management Dissertation) Institute of Criminology, Cambridge University

16 Professor of Judicial Studies and Director of the University College London Jury Project

doctoral thesis¹⁷ which was submitted to the Gillen Review reveals that although a range of factors contribute to challenges in obtaining convictions in sexual offence cases, such as the burden of proof, the complexity of cases, and a frequent lack of corroborating evidence, rape myths and stereotypes have the potential to influence jurors in their determinations.

6.35 In short there is some research evidence that those who endorse rape myths tend to judge complainants harshly and defendants leniently.¹⁸

Other Jurisdictions

6.36 We have considered practice in relation to dispelling rape myths in some Australian states, Canada, New Zealand, Norway, Ireland, Scotland, England and Wales.

6.37 We have considered these practices under the following headings:

- Use of statutory judicial directions.
- Use of discretionary judicial directions.
- Timing of these directions.
- Use of expert evidence.
- Training and selection of jurors.
- Public and school awareness programmes.
- Benefits of research with real jurors.

6.38 Before embarking on this analysis, I observe a number of preliminary points that have emerged across the jurisdictions. First, there is substantial evidence suggesting that many jurors struggle to understand and apply judicial directions.

6.39 Secondly, even where judges employ specific legislative language with the aim of dispelling rape myths within trials, such myths and stereotypes continue.¹⁹

6.40 Thirdly, observations across the jurisdictions record that the defence tend to strongly undermine any challenge to rape myths by the judge or prosecution and that the myths often remained relevant to juries through a focus on identifying inconsistencies and discussions around “rationality” and “normality”.

6.41 These issues were further complicated by the use of rape myths by the prosecution where they supported the complainant’s evidence, for example,

17 Wilmott, D. (2018) *“An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials”* (Doctoral thesis) University of Huddersfield

18 Burrowes, N. (2013) *Responding to the challenge of rape myths in court. A guide for prosecutors* London: NB Research

19 For example in Victoria, Australia, changes to jury directions on consent introduced in 2006/07, which included provisions to dispel myths around lack of resistance or injury, or previous consensual sexual activity, appear to have had very little effect on the running of rape trials, with conviction rates at historical lows. Court observations in England and Wales found no link between the use of ‘myth-busters’ and conviction rights, although the evidence was limited to 28 trials.

where the complainant reported immediately and displayed distress when giving evidence. Such use by the prosecution could be viewed as legitimising the use of rape myths by the defence.

Use of statutory judicial directions

- 6.42 In New South Wales and Victoria in Australia judicial directions are imposed by statute. Even the timing of the directions (during the charge after all the evidence has been heard) was imposed by statute on Judiciary.
- 6.43 Victoria, Australia has a variation on this in sexual offences. The prosecution or defence may request that the trial judge warns the jury that evidence of any of the following alone does not amount to consent:
- that the person did not protest or physically resist;
 - that the person did not sustain physical injury; and
 - that on any particular occasion the person consented to another sexual act.
- 6.44 The legislation in Victoria also precludes the judge, prosecution or defence from saying or suggesting that complainants in sexual offence cases are unreliable witnesses or that complainants that delay or do not make a complaint are less credible than other complainants or that they should be scrutinised more carefully. However, in a particular case, the counsel or judge may suggest that the complainant's delay or lack of reporting may affect their credibility *provided* there is an evidential basis for suggesting this.
- 6.45 Scotland also has statutory judicial directions.

Use of discretionary judicial directions

- 6.46 Directions in order to dispel myths are to date left entirely to the discretion of the judge in England and Wales (and Northern Ireland), Ireland, Canada and New Zealand.
- 6.47 Thus, for example in England and Wales, the Crown Court Compendium (updated in 2018) highlights a "real danger" that juries will make, and/or be invited by advocates to make unwarranted assumptions and emphasises the importance of a judge alerting the jury to guard against this.

Timing of judicial directions

- 6.48 Our research suggests that timing is an important factor in the delivery of directions.
- 6.49 In most jurisdictions, including Northern Ireland, directions are conventionally given following the evidence and immediately prior to deliberation of the jury which may result in jurors forming an opinion on the case prior to the judicial instruction in the applicable law.

- 6.50 However, there is a widely held belief contained in the research material that juror reaction to the opening statements of the case is a key determinant in juror attitudes. Some authors suggest that pre-trial directions may therefore be more effective.
- 6.51 For example, a study in Victoria²⁰ found that where the judge gave direction influenced decisions about key pieces of evidence discussed at the pre-trial hearing which were then excluded, this inhibited the use of many of the rape myths that may have overwhelmed the trial.
- 6.52 The trial then had less of a focus on negative narratives, meaning that directions given at the end “*had much less work to do*”. It concluded the end of the trial is too late to disrupt problematic narratives applicable in law.
- 6.53 In England and Wales, the Crown Court Compendium states that relevant directions may be given at the beginning of the case or as part of the charge to the jury and notes that it is advisable to discuss the proposed direction.
- 6.54 Interestingly in this context Sir Brian Leveson in his recent “*Review of Efficiency in Criminal Proceedings*”,²¹ encourages identification for the jury of the issues in the case by both defence and prosecution before the evidence is called and the giving of directions at points in the trial when they are of most use to the jury.
- 6.55 In the wake of that review, judges now regularly invite defence counsel to open the defence case briefly after the prosecution opening. Moreover judges then proceed to alert the jury to the legal issues of the case. The benefit of this is that the issues are identified at the outset of the trial by a judge who is seen by the jury as neutral.
- 6.56 In addition there is now a much greater emphasis on written directions to the jury.

Use of Expert Evidence

- 6.57 Expert testimony as part of the court procedural attack on rape myths has been the subject of many research papers. Literature consistently suggests that the role of expert testimony should, where it is permitted, be to provide a neutral summary of relevant research and to leave it to the jury to determine whether an adverse inference is justified given the facts of the individual case.
- 6.58 Concerns around expert testimony, even where it can meet the criteria of “expert evidence”, include that it could lead to a lengthy and costly “battle of experts”. The counter argument is that if the expert limits their testimony to minimal claims for which there is consensus in the scientific literature, this is unlikely to lead to such a battle.

20 Henderson, E. and Duncanson, K. (2016) “A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?” *University of New South Wales Law Journal* Vol. 39, No. 2, pp.750-778

21 The Right Honourable Sir Brian Leveson, President of the Queen’s Bench Division, January 2015.

- 6.59 A leading academic report²² asserts that provided the expert does not meet with the complainant and that their testimony is not case-specific, there would not be a question of the expert encroaching on the jury's role by appearing to vouch for the complainant.
- 6.60 In terms of calling expert evidence on rape myths, mock jury research in England and Wales found that the mock jurors responded in broadly similar ways regardless of whether an expert or the judge presented educational guidance. Although perhaps some measure of caution is required in interpreting the findings in relation to a real trial, the authors note that the research findings "give cause for optimism" regarding the ability of general expert testimony and/or extended judicial direction to educate jurors about rape myths.
- 6.61 In New Zealand, legislation provides for expert evidence to be given in court. The New Zealand Supreme Court has confirmed the legitimacy of using expert evidence to address mistaken beliefs and assumptions in sexual violence cases. The Law Commission²³ in that country has proposed that expert evidence to address misconceptions about sexual offences should be considered on a case by case basis. The New Zealand Court of Appeal has suggested that admitting an agreed statement could counteract the need for an expert.
- 6.62 In the US, the prosecution in rape cases occasionally offers a psychological expert to provide evidence on general rape myths or the victim's state of mind following the alleged offence. The testimony is admissible in light of the evidence that most jurors accept rape myths and because judges often believe it is relevant and helpful to jurors in their deliberations.
- 6.63 However, it is important to emphasise that, as in the United Kingdom, testimony involving general or generic rape myths is usually ruled inadmissible. Moreover for any expert evidence to be admissible it must provide information which is likely to be outside a judge's or a jury's knowledge and experience which the court needs in order to form its conclusion.

Training and selection of jurors in rape myths

- 6.64 Training is an important concept. An interesting proposal, albeit not a recommendation, emanating from the Law Commission in New Zealand (and which quite independently was proposed by a number of consultees²⁴ in Northern Ireland) was to provide training sessions to educate jurors after they have been empanelled using information packs covering the problematic features that sometimes arise in sexual offence cases and noting what is or is not relevant to the fact-finding exercise.

22 Ellison, L. and Munro, V. (2009) "Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" *British Journal of Criminology* Vol. 49, No.3, pp.363-383

23 Law Commission (2015) *The Justice Response to Victims of Sexual Violence* Wellington: The Law Commission

24 For example Claire Sugden MLA, former Minister of Justice in the Northern Ireland Executive.

- 6.65 A recent petition to Parliament for “All jurors in rape trials to complete compulsory training about rape myths” was signed by over 10,000 people. The response of HMG has been to say that this is a matter for the Judiciary to decide.
- 6.66 A variation on this theme is that the US operates a jury selection process, whereby the prosecutor, defence attorney and judge question each potential juror about whether they or someone close to them have been victims of a crime similar to that alleged in the case. In addition, they ask questions in relation to the case in hand.
- 6.67 I found in discussing this issue with judges in New York and Boston that they regard the rigour with which they select jurors as a useful antidote to jurors with rape myths serving on the cases in hand.

Public and School Education about rape myths

- 6.68 Public education in other jurisdictions is another potential approach to addressing rape myths and misconceptions.
- 6.69 Amnesty International²⁵ notes that it is the voluntary sector organisations that mainly conduct education and awareness-raising regarding sexual violence, and that this is not a priority in schools. While the statutory curriculum in Northern Ireland sets out the minimum content for Relationship and Sexuality Education (RSE) under the Personal Development and Mutual Understanding (primary) and the Learning for Life and Work (post-primary) areas of learning,²⁶ schools are required to develop their own policy for addressing RSE in lessons, in line with their ethos and in consultation with parents and pupils. This means teachers have as much flexibility as possible in what they choose to teach. While the legislation indicates that by Key Stage 4 (ages 14 to 16) pupils should have developed their understanding of relationships and sexuality and the responsibilities of healthy relationships,²⁷ research has shown that the majority of students do not receive such education in practice.
- 6.70 A programme of public awareness of sexual violence has been introduced in Ireland. Cosc, the National Office for the Prevention of Domestic, Sexual and Gender-based Violence is conducting a six-year awareness campaign through television, radio, outdoor and internet advertising. The campaign aims to change societal behaviours and attitudes, and to “activate bystanders with the aim of decreasing and preventing this violence”.
- 6.71 RSE within schools provides an avenue for raising awareness, and research suggests that in order to be effective, this should provide an evidence-based narrative that counters traditional gender norms.

25 Amnesty International (2017) *Norway: Submission to the United Nations* London: Amnesty International

26 The Education (Curriculum Minimum Content) Order (Northern Ireland) 2007

27 As above.

- 6.72 The Minister for Education and Skills in Ireland announced on 3 April 2018 a major review of RSE in schools. The review will cover both the content of the RSE curriculum and support materials, as well as the delivery of the curriculum to students.
- 6.73 In relation to the content of the curriculum, the Minister has asked that the review specifically consider a number of areas including;
- consent, what it means and its importance;
 - developments in contraception;
 - healthy, positive sexual expression and relationships;
 - safe use of the internet;
 - social media and its effects on relationships and self-esteem; and
 - LGBT+ matters.
- 6.74 The Minister for Justice and Equality in Ireland has announced that the Department for Justice and Equality has signed in January 2019 a Memorandum of Understanding (MOU) with the Central Statistics Office (CSO) on the undertaking of a comprehensive national survey on the prevalence of sexual violence in Ireland.²⁸
- 6.75 In Scotland, shortly before the introduction of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, a public awareness campaign, 'I just froze' was launched by Rape Crisis Scotland and funded by the Scottish Government to raise awareness of responses to rape. It sought to challenge and change myths and stereotypes about the "normal" way in which people react to rape.
- 6.76 The English and Welsh Governments have promised Statutory Relationships and Sex Education from 2020 following s34 of the Children and Social Work Act 2017. However it is not known what the content will look like yet and the social and justice imperatives are such that its proposal to allow opt outs should be considered.
- 6.77 I halt this analysis of other jurisdictions to record that Northern Ireland is as adept as any jurisdiction at setting up public campaigns on social issues to change societal attitudes. There is a history of successful public social education being conducted by the Government in a wide variety of areas, for example, drink driving, use of seatbelts, etc. These provide ample positive blueprints for how I believe a similar public campaign can be launched in timely fashion in Northern Ireland on the subject of rape myths, consent and the reality of serious sexual offences.

28 Press Release - Department of Justice and Equality and the Central Statistics Office sign Memorandum of Understanding on the Undertaking of a National Sexual Violence Prevalence Study. Available at: https://merrionstreet.ie/en/News-Room/Releases/Department_of_Justice_and_Equality_and_the_Central_Statistics_Office_sign_Memorandum_of_Understanding_on_the_Undertaking_of_a_National_Sexual_Violence_Prevalence_Study.html

6.78 The Department of Justice (DoJ) is conducting a three year promotional campaign on domestic violence and abuse to change societal attitudes and behaviours. It aims to encourage potential victims, or other members of the public, to come forward to report incidents of domestic violence and abuse. It also proposes to provide information on how to report incidents and the various ways they can seek help and support from within the criminal justice system.

Researching rape myths with real jurors

6.79 However, I complete this section of research into other jurisdictions with reference to very important and relevant current research which has been taking place in England and Wales with Professor Cheryl Thomas, a leading academic expert on juries and jury research.

6.80 This research has been recently extended to Northern Ireland where we are not alone in being bereft of empirical evidence with real jurors' attitudes to rape. Professor Thomas shall determine whether these attitudes have any bearing on actual verdicts in rape cases and how jurors may best be informed in rape cases.

Discussion

6.81 There really can be no doubt that rape myths exist in some parts of our society.

Research

6.82 The fact of the matter is that there is no empirical evidence to say whether actual individual jurors or jury verdicts in serious sexual offences in Northern Ireland are or are not affected by misconceptions in light of judicial directions to ignore them, albeit there is substantial evidence of research with moot jurors.

6.83 Whilst undoubtedly concerns continue to be expressed as to the potential for misleading stereotypical thinking on the part of jurors to have an impact on the decisions they make, the need for research in Northern Ireland is important to underline and confirm these concerns. Public discussion and policy should be based on research that has a high level of credibility and the distinguished research of Professor Thomas will materially add to the existing research.

6.84 Although Professor Thomas has not completed her research in Northern Ireland she has generously shared with me and the Judicial Studies Board (JSB) some of her preliminary findings as follows:

- The Northern Ireland findings mirror those that she has researched in England and Wales.
- Very few jurors believe the obvious rape myths, e.g. that it is not rape if the victim does not fight back, that rape victims will be bruised, that provocative clothing contributed to rape, that allegations should be reported immediately etc.

- However a significant minority said they were not sure about many myths, e.g. that people were more likely to be raped by a stranger than one would expect the complainant to be emotional giving the account, that allegations are likely to be fabricated against famous people etc. Hence guidance to juries on rape myths is necessary in her opinion. Those who are “not sure” (together with the very small minority who positively embrace the myths) constitute a problem which generally needs to be addressed.

Dealing with rape myths

- 6.85 A key question is whether or not rape myths are affecting jury outcomes and whether our present method of addressing rape myths by the judge dealing with the matter at the end of their charge is sufficient.
- 6.86 In discussing this matter in this part of the Review I have adopted the following approach:
- Preliminary comments on the method of giving directions.
 - Is statutory intervention necessary for judicial directions?
 - How should judge’s best give directions on rape myths?
 - Is expert evidence necessary?
 - Training and selection of jurors.
 - Public and school awareness programmes.

Preliminary comments on the method of giving directions

- 6.87 The research into real jurors in Northern Ireland should gather evidence as to whether jurors here are experiencing difficulties in understanding and applying oral judicial directions illustrating what Professor Thomas’ research in England and some mock jury research elsewhere has already suggested. There should be a greater emphasis on simple, clear written directions together with consideration of the appropriate timing of such directions.
- 6.88 The public should be reassured that we have in Northern Ireland, Crown Court judges of enormous experience and distinction in the field of criminal justice. Hence my recommendations on this issue do no more than remind these judges of the overwhelming need to ensure their directions to the jury are couched in simple terms without jargon or unnecessary legalese.
- 6.89 There is no reason why the law governing such cases, e.g. what amounts to consent etc. should not be explained by the judge to the jury at the outset rather than leaving juries at times in blissful ignorance of what the guiding legal principles are until the end of the trial when views may already have been formed. Professor Cheryl Thomas has carried out research on juries in England and Wales which led her to conclude that directions given at an early stage, for example before the prosecution opening, are likely to have a great impact.

Moreover I believe we should encourage defence counsel to give a brief outline of the defence after the prosecution has opened its case.

- 6.90 The timing of those directions should of course be influenced by the length of the trial and its complexity but I firmly encourage strong consideration be given to the literature that extols the virtues of early invocation of the concept of dispelling rape myths at the commencement stage of such trials.
- 6.91 Professor Thomas has also revealed in her preliminary research in Northern Ireland a strong jury preference for written directions. Therefore there is also a legitimate case to be made that more written directions should be given by the Judiciary in these serious sexual offences. They should include not only a route to verdict at the end but also, the legal ingredients of the offences and even directions to prevent false assumptions at the end of the trial. These should be tailored to the complexity of the case.²⁹ There is no reason why these should not be given before the closing speeches of counsel.

Is statutory intervention necessary for judicial directions?

- 6.92 It is my faith in our Judiciary that persuades me that it is quite unnecessary, and indeed potentially counterproductive, to recommend we follow the example of Scotland and other jurisdictions in introducing mandatory statutory provisions as to the content of such directions.
- 6.93 Mandatory directions produce a judicial straitjacket which may not fit the facts of a particular case and can highlight factors which may have no relevance to the case in hand. The absence of certain myths in the statute may unfairly relegate their importance in the context of the case under consideration. Judicial flexibility is crucial on a case by case basis. The England and Wales Crown Court Compendium is entirely adequate for this purpose allowing as it does flexible room for amendment according to the facts of the case.
- 6.94 I am also concerned about legislative intrusion into the independence of the Judiciary and the precedent this may set for any incoming Executive, bereft of experience of criminal trials, dictating how experienced judges should direct juries.
- 6.95 If despite my reservations about the utility of statutory directions, they are to be introduced under the existing 2015 legislation, I believe there is much to be said for the approach adopted in Victoria, Australia under the Jury Directions Act 2015 which simply provides for jury directions to be given on request of counsel without being prescriptive about their contents. This will promote shorter and more tailored directions improving clarity for the jury.

29

R v Atta - Dankwa [2018] EWCA Crim 320; R v K [2017] EWCA Crim 2214

How should judge's best give directions on rape myths?

- 6.96 I consider that the option of a pre-trial video of the type being tested by Professor Thomas for a jury is potentially preferable to other methods of educating a jury depending on the outcome of her current research in both England and Northern Ireland on the usefulness of such a video.
- 6.97 There is, in my view, a strong argument in favour of juries being given more than what at times may amount to a somewhat bland judicial assurance that "experience has shown" the validity of a direction provided. This may be inadequate to address what may be deeply held perceptions of a misguided nature.
- 6.98 Jurors want the 'how' and the 'why' in respect of such matters. It is potentially unwise to take it on trust that they will be prepared to act upon the experience of the judge without being given the capacity to understand the basis for that.
- 6.99 A prescribed film from an authoritative source such as a number of judges in a video at the outset of the trial would have the benefit of uniformity, in the sense that cases would not depend upon the capacity of individual judges to 'sell' the concept of that which 'experience' has shown to the jury. There can be little doubt that some may be better at doing so than others or that there may even be some variation in enthusiasm for the content of a particular direction.
- 6.100 It has been suggested that scientific information is liable to be more forceful than a judge simply saying "experience shows". Would the use of a video film featuring a psychologist presenting a peer reviewed message carry greater authority than the comment of a judge? I think not because there is a danger that the jury might react adversely to some experts rather than neutral judges and their presence might trigger applications for the calling of counter experts.
- 6.101 A video shown at the outset would be relatively short (the current proposal is about 7 minutes) thus not representing an unwarranted increase in, or costly intrusion into, the length of the trial process. Presented to the jury at the start of the trial process it would allow for an informed and fair assessment of the evidence and would guide the approach of counsel in the case. It would represent a further confidence building factor for complainants and encourage public confidence in the criminal justice system.
- 6.102 Importantly the advocates would have a firm foundation upon which they could seek to craft their own comments and cross-examination. The judge could swiftly intervene, either at the Ground Rules Hearing if the matter of rape myths has been raised or at trial, in the event of counsel unwittingly or otherwise attempting to unjustifiably invoke rape myths in the course of the case. Should counsel wish to challenge any of these assertions given the particular facts of the case, the matter could first be dealt with pre-trial or in the absence of the jury, during the hearing.

- 6.103 I recognise that in making this recommendation serious consideration will have to be given to the content of the video before it is introduced. Care would have to be taken to ensure that the potential for such presentation does not equate to an expression of opinion on the ultimate issue. There would be a need for input from practitioners and judges in Northern Ireland, e.g. through the Crown Court Rules Committee/the LCJ/Crown Court judges/Bar Council and Law Society on the video which might be proposed by Professor Thomas in light of her research.
- 6.104 One size would not fit all. There would be a need for a series of videos from which the appropriate one would be chosen, e.g. for a case involving a child or a male complainant.

Is expert evidence necessary?

- 6.105 I entertain grave concerns about the alternative of expert witnesses being called during the course of the trial unless it is admissible as being specifically referable to the particular facts of the case and the particular complainant or accused. As I have indicated earlier in this chapter, generic evidence and evidence which is not outside the knowledge or experience of judges and juries are usually inadmissible in our law.³⁰
- 6.106 Moreover one has to be aware that introduction of expert evidence by the prosecution will almost inevitably lead to demands by the defence to call competing evidence which in turn will be more costly, will delay and elongate the trial and introduce perhaps even more complexity into an already complex situation.
- 6.107 Evidence from New Zealand about the use of expert witnesses raised concerns about the availability of appropriate witnesses, the effectiveness of their testimony and the potential cost burden.
- 6.108 Accordingly, calling of expert witnesses may still remain an option only in rare cases where the scientific evidence is uncontroversial but outside the common experience of the jury or the ability of the judge to explain a common pattern. For example, in cases of children and their reactions as regularly occurs in the US or where a particular religious or ethnic affiliation required a specific reaction to be explained. Even here it may be possible for defence and prosecution to agree written expert statements.
- 6.109 In conclusion I consider that the use of a jury video coupled with the early directions, particularly if those directions are in writing, given by the judge about rape myths have the potential to be the preferable method of combatting this problem of rape myths subject to the findings of Professor Thomas.

Training and selection of jurors

- 6.110 A further useful suggestion emerged during our discussions to the effect that jurors should be given training exercises once they have been empanelled and before the trial commences. Once again however I consider that the video option is less time consuming, cheaper, less open to controversy and challenge and results in a more consistent approach.
- 6.111 In our legal system it is rare for the courts to ask prospective jurors any questions to assess their suitability to make decisions in a case.
- 6.112 Whilst jury selection in Northern Ireland is currently a random selection unless there is good cause to deselect, there is generally discussion between counsel and the judge as to questions that should be put to jurors to ensure there is no risk of unintended bias. In serious sexual offence cases it seems that greater care should be given to inquiries that should be made, for example as to whether any juror or a close friend or relative has had experience of a serious sexual offence etc.

Training of the Judiciary and legal professions

- 6.113 Finally, training is a vital ingredient if the new procedures set out in this chapter are to work fairly. It is crucial to the process that the Judiciary and the legal profession be aware of the issues of rape mythology and that there are consistent approaches to the issue. The Judicial Studies Board, the Bar Council and the Law Society should set up regular training sessions on these matters with participants from the voluntary services and psychologists. It is very important that the legal profession be involved in a discussion of these procedures before they are invoked.

Public and school awareness programmes

- 6.114 In order to change societal attitudes on the subject of serious sexual offences and to awaken a new realisation of the possible presence of ingrained myths in some members of our society on the issue, a preventative approach needs to be taken which emphasises the need for education of the public at large from which juries are drawn and follows the lead of the Istanbul Convention.³¹
- 6.115 I recommend the Department of Justice and the Department of Education, using the precedents to which I have already adverted in detail in Ireland and Scotland, conduct a public awareness campaign with an evidence based narrative through press, television, radio, outdoor and internet advertising specifically on the myths surrounding serious sexual offences.
- 6.116 I record that my conversations with all the main local press and all the political parties revealed a strong enthusiasm for such a campaign.

- 6.117 Schools also should provide a rich vein of exploration by our Department of Education on this same issue.
- 6.118 In Ireland, RSE is a *mandatory* subject throughout compulsory education primarily within Social, Personal and Health Education (SPHE).
- 6.119 In Northern Ireland all publicly funded schools must cover RSE under the Personal Development and Mutual Understanding (PDMU) area of learning at primary level and the Learning for Life and Work (LLW) area of learning at post-primary level.
- 6.120 Whilst RSE is mandatory for all pupils of compulsory school age (4 to 16) from Foundation Stage to Key Stage 4, it is the responsibility of the Board of Governors of each school to ensure that a comprehensive programme is delivered. The Northern Ireland curriculum *does not* imply a mandatory list of subject content that everyone must cover.
- 6.121 To support schools in the delivery of the curriculum the Council for the Curriculum Examinations and Assessment (CCEA) develops and produces curricular guidance. In 2018/19 the Department of Education requested that the CCEA carry out a further review of existing guidance and resources to support teachers in the teaching of RSE and to ensure it is up to date and relevant to modern society.
- 6.122 Therefore the key difference between Northern Ireland and Ireland, is in the extent and detail of the prescribed content. As is the case for all areas of learning within the Northern Ireland statutory curriculum, the prescribed content for PDMU and LLW is high level and has been kept to a minimum to provide teachers with the flexibility to decide which specific topics are most appropriate to meet the needs of their pupils and to update their resources in line with the fast pace of societal change. Teaching and learning are further supported by curricular guidance.
- 6.123 By contrast, the statutory content for SPHE in Ireland is more detailed, in keeping with the more prescriptive and subject-based nature of the curriculum.
- 6.124 The argument made in Northern Ireland is that national curriculum changes introduced in response to contemporary issues, and which are based on detailed subject content, often suffer from time lag between recognition, decision making, implementation and impact. The Northern Ireland curriculum has been specifically designed to prevent such a problem.
- 6.125 My firm conviction is that it is crucial that the RSE curriculum includes the very areas of which this chapter and this Report speak. It is not enough to leave Boards of Governors to pick up these points. The State, and in this case the Department of Education, has a duty to play a positive role in addressing the justice gap that exists in our approach to serious sexual offences.

- 6.126 I strongly recommend that the Department of Education draw up a plan to exhort all schools to include these matters within their curriculum and, if that proves ineffective, to be the subject of legislation mandating such education.

Responses

- 6.127 Of the responses to the online survey of this Review dealing with the recommendations as to the methods of assisting jurors to understand serious sexual offences and the myths surrounding them, 86.2% agreed to the use of a video, 79.0% agreed with judge led directions and 90.1% agreed with evidence from an expert. 91.0% agreed with a public campaign to raise awareness. A minority suggested jurors should have to attend some form of training or a workshop before being a juror on a serious sexual offence case.
- 6.128 During the course of the responses to this chapter, a clear conflict arose. On the one hand there were those who consider research with real jurors will provide the highest credibility in assessing the existence of rape myths.³² On the other hand there were those who considered that research with mock jurors was equally compelling revealing as it does hidden or even unconscious bias from time to time.³³
- 6.129 Other than to say that my experience with jurors over many years has convinced me that being a member of a jury brings out a real sense of civic responsibility to carry out the task with integrity and which may cast them in a somewhat different position from moot jurors who do not have such responsibility, I do not find it necessary to come down in favour of either theory.
- 6.130 The fact of the matter is that Professor Thomas' ten year research in England and Wales with real jurors and her preliminary research so far in Northern Ireland, whilst finding that very few jurors believe the obvious rape myths, nonetheless indicates a significant minority who are "not sure" about the truth of these myths. As Professor Thomas has recognised, this in itself provides an absolute foundation for the need to provide appropriate guidance to juries on the subject of rape myths.
- 6.131 In declining to prefer one form of research in this area against another, I make it clear that I am still convinced that a range of myths and stereotypes do exist amongst some members of the general public. I hold this view in light of the existing research into mock jurors, public research such as the YouGov Survey so recently commissioned by EAW, the universal acceptance of their presence by judges throughout the common law jurisdictions and, importantly, the first hand

32 Professor Cheryl Thomas; Research with real jurors was exhortated by the Bar Council, the Law Society, Rape Crisis Network Ireland, the main political parties and others.

33 Dr Dominic Wilmott, Department of Psychology, University of Huddersfield; Dr Olivia Smith, Anglia Ruskin University.

evidence with complainants themselves to the effect that even they embrace them.³⁴

- 6.132 The key issue is not whether these rape myths exist in society. They clearly do. Rather the element with which I have to deal is the effect these myths potentially have on juries and whether our present system is adequate to dispel them. This chapter deals with the steps that are available.

Public Awareness and School Education

- 6.133 There was overwhelming support from all respondents for a publicly funded campaign and improved school education programme to counter the existence of rape myths and stereotypes.³⁵ This support evinced strong agreement for a cultural shift in our society fuelled by a concerted, well-funded and consistent campaign to challenge them. Governments have shown that effective and consistent public information campaigns can change public attitudes.
- 6.134 There was also strong support from the same groups for an education programme in schools. Victim Support NI summed up the position as follows:
- “2007 minimum requirements for RSE education in school must be updated to include education on the issue of consent. All schools should include modules covering sexual violence, the impact it has on victims, where responsibilities lie, consent etc.”
- 6.135 The PPS indicated that it was conscious of the increasing number of files where the complainants were under 18 and that school education would provide “a real safeguarding opportunity”. Most of the other respondents considered that there should be mandatory RSE education in all schools on these topics.
- 6.136 In short, these campaigns are necessary to ensure that participating in jury service is not an individual’s first experience of learning about rape myths. Such campaigns can harness social media outlets to ensure the campaigns reach the widest audience.³⁶

Use of video pre-trial for jurors

- 6.137 This concept received wide support.³⁷ Properly in my view, there were those who felt that implementation should await the result of the research being carried out by Professor Thomas in Northern Ireland. Certain other riders were included:

34 The Rowan SARC response; Rape Centre Network Ireland; Women’s Aid Federation Northern Ireland and others.

35 The main political parties; Law Society; Bar Council; Barnardo’s; DRILL; NOTA; EVAW; The Rowan SARC; PSNI; Nexus NI; Women’s Aid Federation Northern Ireland; Women’s Regional Consortium; SBNI; Men’s Advisory Project; Belfast Feminist Network; Retired Association of Probation Officers; Victim Support NI; and numerous individual complainants.

36 Retired Association of Probation Officers makes the point that we are the only part of the United Kingdom that does not currently support a STOP IT NOW initiative which provides a helpline in the prevention campaign against child sexual abuse.

37 PPS; Law Society; Northern Ireland Bar; Women’s Regional Consortium (94% of women in a survey conducted agreed that work needed to be done with jurors to combat rape myths); Dr Wilmott; Belfast Feminist Network.

- It must be fair and balanced and not lean against the defendant.
- Practitioners need to be consulted and given an opportunity to approve the contents.
- Care must be taken to ensure jurors are not overloaded with instructions at the outset of the case.
- Input should be obtained from psychologists and specialist groups such as Women's Aid Federation Northern Ireland to advise on content.

Written Directions

- 6.138 Written directions by the Judiciary were another proposition that received much support.³⁸ I recommend that our Judiciary afford a higher priority to written directions on the subject of rape myths than has hitherto been the case.
- 6.139 An emphasis was placed by a number of respondents on the need to ensure that these directions, both oral and written, were couched in simple clear language that the average person could understand. Women's Aid Federation Northern Ireland, perfectly reasonably in my view, asserted that the current extract from the English Crown Court Compendium is difficult to understand in layman's terms and hence there may even be difficulty applying it. I agree. It should be redrafted for our purposes in Northern Ireland in much simpler and clearer terms.

Experts

- 6.140 This received a mixed reception. There were those, like me, who have felt that this could herald a resulting battle of experts making trials longer, more expensive, more complex, remove the focus from the parties and put more pressure on an already under resourced criminal justice system. In any event the current directions to dispel myths rely on the courts' experience.³⁹ There were others who were in favour of the use of experts which might be used to show how victims react to sexual coercion etc. The Attorney General has some concerns about the risk of unfairness in the use of videos if what amounted to officially sanctioned behavioural evidence was given to a jury without the opportunity for this to be challenged. He felt it would be preferable if expert evidence were called to disarm any rape myth likely to be current in any particular trial.
- 6.141 As I have made clear in the earlier part of the chapter only unchallengeable conclusions on rape myths could be included in the video (thus precluding any necessity for defence challenge) which would of course be raised at the Ground Rules Hearing. I remain of the view that expert evidence presents legal difficulties in attempting to adduce evidence which is outside the knowledge

38 PPS, Law Society, Women's Aid Federation Northern Ireland, Dr Wilmott, Dame Vera Baird QC and others.

39 Dame Vera Baird QC.

and experience of jurors. Its use will rarely be admissible save in exceptional circumstances.

Robust judicial intervention

6.142 A number of responses stressed the need for robust judicial intervention to control the use of rape myths by defence advocates particularly where it is being used for the sole purpose of suggesting that the complainant is more likely to have consented by, for example, the way they dressed. I agree entirely that robust judicial case management is necessary in dealing with rape myths and I am of the view that the topic needs to be specifically raised at each Ground Rules Hearing so as to anticipate the possibility of such myths emerging in the course of the trial or even in the course of closing speeches by counsel/ advocates.

Conclusion

6.143 The responses served to underline the views I have already expressed in this chapter. Accordingly I see no reason to alter the recommendations that I made in the Preliminary Report.

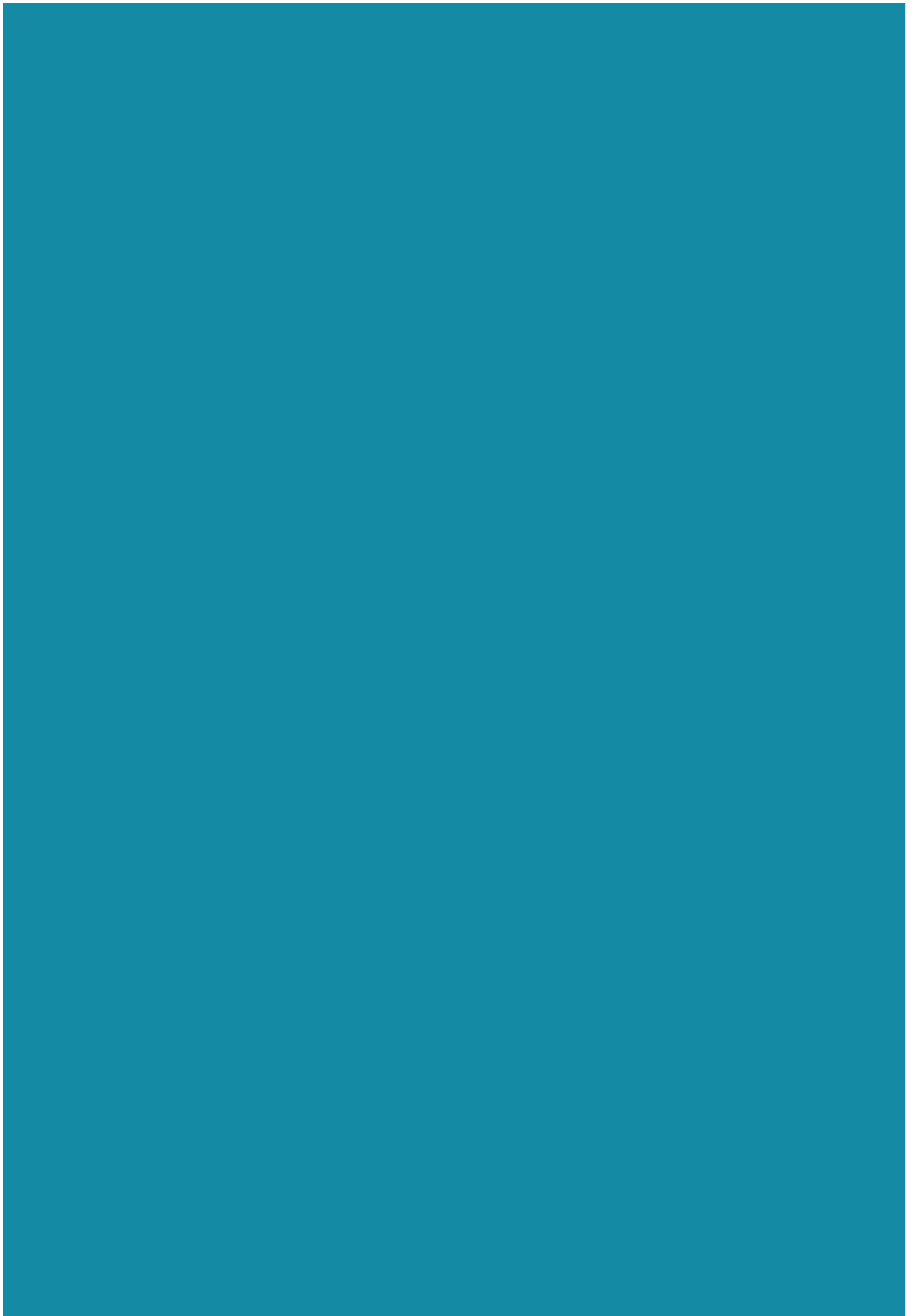
Recommendations

45. The NICTS in consultation with the LCJ's Office should give detailed and careful consideration to the research and recommendations of Professor Thomas into her experiences with real jurors as to:
 - the extent that jury myths influence jury verdicts here;
 - how widespread the problem is;
 - the understanding of judicial directions on the subject and the ability of jurors to apply them;
 - the desire for expert evidence on the subject;
 - the effect that current judicial direction has on the issue;
 - the effect that the playing of a video pre-trial would have on jurors;
 - the contents of such a video; and
 - the extent to which such myths can be removed.
46. A prescribed video film, similar or identical to that being currently piloted in England, provided the research results from Professor Thomas are favourable, should be introduced. The authoritative source in the video film should be the Lord Chief Justice and other members of the Judiciary and presented to the jury at the outset of the trial in all serious sexual offences.
47. The Judiciary should provide in addition appropriate written directions to the jury on the subject of rape myths at the outset of the trial.
48. The Judiciary should revisit the current directions that are given to jury members on rape myths to ensure they are clear, simple and not too complex with appropriate focus on comprehensibility avoiding standardised or "pattern" judicial instructions.
49. The Judiciary should, after discussion with counsel, encourage identification for the jury of the issues in the case by both prosecution and defence counsel before the evidence is called.
50. The Judiciary should give strong consideration to a greater emphasis on written directions to the jury at the end of the trial including the route to verdict, legal definitions and even directions to prevent false assumptions.
51. Parties should be encouraged to agree the content of any admissible expert evidence on this issue, and where possible admit it.
52. The Department of Justice and the Department of Education should speedily draw up plans for an awareness campaign through schools, television, radio, outdoor and internet advertising specifically on the myths surrounding serious sexual offences.

53. The Director of Public Prosecutions should record on an annual basis any case in which a person is said to have made a false complaint of rape and/or serious sexual offences and was being considered for prosecution.
54. Judges, after discussions with advocates, should carefully consider appropriate questions on a case by case basis for jurors to disclose signs of rape myths before they are empanelled.
55. Judges should robustly intervene when defence or prosecution advocates seek to invoke complainant myths in serious sexual offence cases.
56. There should be extensive training provided to the Judiciary and the professions by their respective bodies, calling on the assistance of expert outside bodies on the issue of rape mythology and false stereotypes.

Appendix A

	Claims highlighted by staff as relating to a sexual offence	Claimants under 18 at Date of Incident	Claimants awarded compensation	Claimants denied compensation	Claims with no decision
Application received between 01/04/10 - 31/03/11	294	193 (66%)	195	92	7
Application received between 01/04/11 - 31/03/12	344	236 (69%)	218	115	11
Application received between 01/04/12 - 31/03/13	331	222 (67%)	188	126	17
Application received between 01/04/13 - 31/03/14	333	229 (69%)	198	122	13
Application received between 01/04/14 - 31/03/15	325	218 (67%)	193	111	21
Application received between 01/04/15- 31/03/16	264	188 (71%)	147	95	22
Application received between 01/04/16 - 31/03/17	208	149 (72%)	94	72	42
Application received between 01/04/17 - 31/03/18	144	102 (71%)	50	30	64



Gillen Review

Report into the law and
procedures in serious
sexual offences in
Northern Ireland

Part 2

Sir John Gillen



Gillen Review

Report into the law
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Part 2

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Part 2

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Chapter 7

Social media

I do believe that if it is not addressed, the misuse of the internet represents a threat to the jury system, which depends, and rightly depends, on evidence provided in court which the defendant can hear and if necessary challenge.

Lord Judge, former Lord Chief Justice of England and Wales¹

Issues

- Is the use of social media having an adverse impact in trials for serious sexual offences to the extent that it is destroying the right to anonymity, nullifying the integrity of judicial orders, potentially rendering jury trials unfair for both complainants and accused and impairing the administration of justice overall?
- In 2005 the then Lord Chief Justice of England and Wales Lord Judge² summarised the issue as follows:

“If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and, in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial.”

What is social media?

- 7.1 Social media is an umbrella term that incorporates the use of or interaction with various devices, websites, applications and online tools by the user in order to generate and share content, either in words or pictures, with others or to participate in social networking. Material on the internet is in a continuous state of publication.
- 7.2 Social media platforms allow individuals to reach thousands of people via a single post, enabling them to access a potentially vast audience. Recently reported figures indicate that there are 2.32 billion Facebook users,³ 1.9 billion YouTube users,⁴ 1 billion Instagram users⁵ and 330 million Twitter users.⁶ Social

1 Judicial Studies Board lecture, Belfast, November 2010

2 Karakaya [2005] EWCA Crim 346, [2005] 2Cr App R S at [24]

3 EFE Newswire (2019) ‘Facebook celebrates 15th anniversary as controversy swirls around it’ *EFE Newswire* 4 February

4 Weiss, G.(2019) ‘You Tube Hits 2 Billion Monthly Users, As number of Channels with 1 million subscribers doubled last year’ *tubefilter* 5 February

5 Techcrunch (2018) ‘Instagram hits 1 billion monthly users every month, within spitting distance of Facebooks 2 billion’ *Business Insider (UK)* 4 May

6 Stout, D. (2019) ‘Social Media Statistics 2019: Top Networks By the Numbers’ *Dustn.tv*

media is characterised by its participatory culture, which is interactive. It can be either two-way (allowing conversations characterised by varying degrees of publicity, depending on the privacy settings selected) or one-way (publication without comment). Social media is also borderless. The ease of access to technology and the internet has made it simple for jurors to immediately access a range of information about the case with which they may be involved. There is no editorial filter to prevent instant communication.

The challenge of juror social media use

- 7.3 The traditional concept of a jury and its ability to remain completely closed off from extraneous sources and to remain impartial is being challenged by society's increased use of technology and access to information. Now juries and individual jurors have the ability to access and share information related to the case with a few taps on their smartphone screens.⁷
- 7.4 Our explorations have shown that there is a limited body of research examining jurors' internet use. Even fewer studies have focused specifically on social media.
- 7.5 Nonetheless, there is evidence that there are two broad categories of improper juror social media. Firstly, use of the internet to conduct research, and investigating facts or the law. Secondly, the use of social media to communicate with others or post/publish information.
- 7.6 It appears that increased access to information and use of social media in various jurisdictions have negatively impacted juries in some instances. It has resulted in a number of mistrials and overturned verdicts. The result of this is wasted costs associated with failed trials, delays, witnesses who may be unwilling or even unable to give evidence again, and the additional unwarranted stress imposed on the parties.
- 7.7 Hence courts and legislatures need to maintain the search for solutions so that the institutions of trial by jury can be preserved in a time of unprecedented communication and social change.
- 7.8 Research by Professor Cheryl Thomas, a distinguished academic who is a leading expert on juries, found that, whilst most people were aware of the dangers of social media and the internet for a criminal trial, a significant number either did not understand this danger or were confused as to the nature of the prohibition. Hence the recent leaflet now made available entitled 'Your Legal Responsibilities as a Juror' (see later in this chapter and appendix B) to all jurors in England and Wales, is couched in simple terms that members of juries can readily understand.

7 Cotter, J. and Volkens, L. (2015) "Jury Issues Arising From Use of Technology and Social Media" [online] Available at: https://www.nixonwenger.com/fileadmin/user_upload/Nixon_News_Images/Jury_Issues_Arising_From_Use_of_Technology_and_Social_Media__00436566xB91A7_.PDF Accessed: 11 April 2019

- 7.9 In short social media can have a negative impact on trials of serious sexual offences which include:
- removing the accused's right to a fair trial;
 - removing the complainants' right not to be named; and
 - making the trial process generally unfair.

Current law

- 7.10 Anyone posting a comment on a publicly available website that creates a substantial risk of causing serious prejudice in active proceedings faces the potential prospect of proceedings for contempt of court.
- 7.11 The current law aims to prevent trial by media. The Contempt of Court Act 1981 provides the framework for what can be published in order to ensure that legal proceedings are fair and that the rights of those involved in them are properly protected.
- 7.12 Sections 1 and 2 create the strict liability rule, which makes it a contempt of court to publish anything that creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice.
- 7.13 The strict liability rule applies to all publications. It is defined very widely as including "any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large."
- 7.14 Contempt is either civil or criminal, but the burden of proof for both is to the criminal standard.⁸ Contempt is a strict liability offence.
- 7.15 Civil contempt of court refers to behaviour that disobeys the authority of a court in a civil proceeding. Most often, civil contempt of court involves failure to satisfy a court order. Generally, sanctions for civil contempt end when the party in contempt complies with the court order, or the underlying case resolves. Civil contempt can result in punishment including a term of imprisonment and/or a fine.
- 7.16 Criminal contempt is a common-law offence punishable on indictment to an unlimited sentence, albeit more commonly considered as punishable following proceedings in the High Court. It is arguable that the proper punishment 'ceiling' ought not to be higher than under the 1981 Act.
- 7.17 Section 8 of the 1981 Act provides for the confidentiality of jury deliberations in Northern Ireland. It states:

8 Dean v Dean [1987] 1 FLR 517 CA

“it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.”

- 7.18 Judges verbally warn jurors throughout the trial of the need to rely purely on the evidence heard in the trial and not to consult the internet.
- 7.19 The Justice Act (Northern Ireland) 2015 did not make provision in relation to jurors conducting research in relation to a trial.
- 7.20 The Northern Ireland Department of Justice has no current plans to amend the legislation on contempt of court.
- 7.21 In jurisdictions compliant with the European Convention on Human Rights, (ECHR), the right to a fair trial is enshrined in Article 6. It requires that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
- 7.22 The independence and impartiality of the jury is required not just as a matter of fact, but as a matter of appearance.⁹ If there is a risk that the jury will see prejudicial media coverage (regardless of whether jurors have in fact seen it), this could give rise to the perception that the jury has or will become biased.
- 7.23 While Article 10 of the ECHR protects freedom of speech, it is not an unfettered right. Article 10(2) provides that the right may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society in respect of a number of interests, including the authority and impartiality of the Judiciary.
- 7.24 In November 2018 a man in Belfast pleaded guilty to publishing the name of a complainant on social media in contravention of the Sexual Offences (Amendment) Act 1992.¹⁰ The individual received a £300 fine,¹¹ plus a £15 offender levy.
- 7.25 The existing tools thus available to a court to manage the problems of social media can be summarised as follows:
- Requesting newspapers or social media users (if known) to remove posts from social media to prevent comments being posted beneath.
 - In the Crown Court, directing media organisations to remove articles from social media platforms.

9 Law Commission (2013) *Contempt of Court (1): Juror Misconduct and Internet Publications* (HC 860) London: The Stationery Office

10 This legislation restricts the release of any information which could lead members of the public to identify complainants in cases of rape and other offences of a sexual nature.

11 Erwin, A. (2018) ‘Man pleads guilty to publishing name of woman at centre of Belfast rape trial’ *The Irish Times* Wednesday 28 November

- Referring the matter to the Attorney General’s Office as a potential contempt.
- Dealing with the offending material as a contempt in the face of court.
- Referring the matter to local police forces for investigation into potential criminal offences.
- Issuing strong and clear judicial directions to the jury that they should disregard any comments that they see on social media.
- Issuing reporting restrictions under section 4(2) of the Contempt of Court Act 1981.
- In extreme cases, discharging the jury and ordering a retrial. However, this appears to be a last resort.
- Again, in extreme cases, referring the matter to the Criminal Cases Review Commission for further investigation into prejudicial material discovered after the end of a trial.

Background

- 7.26 Our former critical eye has been replaced by an even more terrifying observer: the relentless, ever-curious gaze of social media, which demands intimate knowledge of each user’s immediate environment. An active digital identity has become just as essential as paying your taxes. The distinctions between public and private space have evaporated.
- 7.27 Whilst the traditional mainstream media are well aware of the boundaries set out in the 1981 Act and the consequences of stepping outside them, social media presents new challenges to these fair trial protections. The challenge to the criminal justice system is how to keep pace with the information age.
- 7.28 There are a number of high-profile instances in all the jurisdictions in the UK that highlight the increasing problems faced by courts and law enforcement officers in upholding traditional strict contempt laws designed to ensure defendants and complainants receive a fair trial. The fact of the matter is that in high-profile cases a strong community reaction may be inevitable and actions to moderate or control content becomes all the more formidable.
- 7.29 In February 2016 the Court of Appeal in England heard an appeal in the case of *R v F and D*¹² concerning two teenage girls aged 13 and 14 charged with a murder that provoked outrage. As a result of a torrent of comments and abuses posted on Facebook and social media, the trial judge felt constrained to discharge the jury and order a retrial at a different venue several months later, creating considerable stress for the family of the victim, the witnesses, the defendants and their families and all those involved in the trial.

- 7.30 As a result the Attorney General for England and Wales decided to issue a Call for Evidence to gather information on the impact that social media has on the criminal justice system.
- 7.31 In our own jurisdiction during a recent high-profile trial of R v Jackson and Others, the intervention by social media was manifest, albeit insufficiently prejudicial to lead to a discharge of the jury. Not only was the complainant the subject of unlawful identification, but online abusive comments about both her and the accused proliferated throughout. At several points during the hearing, lawyers had drawn to the trial judge's attention online comments, the resolution of which was time-consuming and costly. A defence solicitor was quoted after the trial as saying that several days of the trial had been lost due to issues thrown up by online material, and he claimed that lawyers had been distracted by having to monitor online content.¹³ As indicated above a man who used social media to name the complainant has been convicted of an offence.
- 7.32 Trolling and negativity on social media, particularly towards children and young people, are commonplace before a trial according to Barnardo's NI. That charity has recommended that independent advice and guidelines should be provided to young people regarding who has access to their social media privacy settings and who can contact them through social media. This information could be in the form of a leaflet provided to young complainants and their families as well as young defendants and their families when dealing with a PSNI Liaison Officer.
- 7.33 However, we should be aware that social media is coming under strong challenge worldwide. Inauthentic accounts, violations of website terms, techniques for measuring the content on social media, misinformation usage and algorithm identifiers are but some of the issues being raised to challenge Facebook, Twitter, Snapchat and other social media platforms. The moment may now have arrived to impose more controls so long as we realise the extent and complexity of the problem.
- 7.34 The background to the issues in this chapter were well summed up by the House of Lords Communication Committee, a report on 'Social Media and Criminal Offences', suggested there are two ways to consider online acts: "either they are new acts, or they are acts already prohibited by the criminal law but committed in the new forum of social media,"¹⁴ The Committee also noted that, in response to the volume of offences, "society has four options: i) do nothing and accept the status quo; ii) add resources so that more allegations can be investigated and prosecuted; iii) change the law so that the behaviour is

13 Templeton,D.(2018) 'Northern Ireland man faces court over 'naming rugby rape trial woman on internet' *Belfast Telegraph* 1 August

14 House of Lords Communications Committee (2014) *First Report Social media and criminal offences* London: House of Lords

no longer criminal; iv) retain the law and approach to prosecutions, but seek to change behaviour through policy interventions.”¹⁵

Other jurisdictions

7.35 We have considered the law and practice in the various Australian jurisdictions, Canada, England and Wales, Scotland, New Zealand, Ireland and the US in relation to controlling jurors’ use of social media. Active steps are being taken in all of these jurisdictions to control the juror use of social media where they have jury trials. These are worthwhile examples for us in Northern Ireland to explore as a guide to what should happen here. Our researches revealed that in jurisdictions such as the Netherlands, Germany, Iceland, Sweden and South Africa, the problems are not nearly so acute because these offences are tried other than by a full jury system.

England and Wales

- 7.36 A 2010 study¹⁶ conducted for the Ministry of Justice (MoJ) by Professor Cheryl Thomas QC, examined how fair the jury decision-making process is by questioning actual jurors. The study took place in three different locations and included 62 cases and 668 jurors. The sample included both long, high profile cases and standard cases lasting less than two weeks with little media coverage. The study found that in high-profile cases almost three-quarters of jurors will be aware of media coverage of their case. In standard cases 13% said they saw information compared to 5% who said they searched for information on the internet. In high-profile cases those figures rose to 26% and 12% respectively. As Professor Thomas pointed out, jurors were admitting to doing something they should have been told not to do by the judge. This may explain why more jurors said they ‘saw’ reports on the internet rather than ‘looked’. These figures may be underestimates of those who admitted searching on the internet.
- 7.37 The study’s findings support the view that, in general, a ‘fade factor’ applies only to pre-trial publicity and does not affect the deliberations of the jury.
- 7.38 The study recommends that, to address both jury impropriety and juror use of the internet, the Judiciary and Her Majesty’s Courts and Tribunals Service (HMCTS) should consider issuing every sworn juror with written guidelines clearly outlining the requirements for serving on a trial. These guidelines should recognise the importance of the juror’s role and clearly explain what improper behaviour is, why it is wrong and what to do about it.
- 7.39 The study also suggests that the judge should review the requirements with jurors as soon as they are sworn. This should include a fuller jury direction about why jurors should not use the internet to look for information or discuss their

15 As above, para 78.

16 Thomas, C. (2010) *Are Juries Fair?* London: Ministry of Justice

case. It also recommends that jurors should be required to keep the guidelines with them throughout the trial.

- 7.40 In light of these recommendations, steps have already been implemented in England and Wales in order to address the crucial questions of whether jurors understand the rules on social media and internet use and whether breaches of the rules have been due to confusion or wilful disobedience.
- 7.41 Accordingly, an easy-to-read document entitled “*Your Legal Responsibilities as a Juror*” has been drawn up and is given only to sworn jurors at the start of each trial in accordance with Practice Direction 26 G (see appendix B).
- 7.42 Research tested the impact of the document with all juries at the Old Bailey in London over an eight-month period and found the new juror notice doubled juror understanding of in-trial and post-trial disclosure rules.
- 7.43 In England and Wales in December 2013, the Attorney General published advisory notes on the gov.uk website and Twitter to help to prevent social media users from committing a contempt of court. I pause here to observe that the Attorney General for Northern Ireland does not have an equivalent jurisdiction to issue guidance generally on disclosure as the superintendence of the Public Prosecution Service (PPS) has not formed part of his statutory duties.
- 7.44 The advisory notes, which had previously been issued only to print and broadcast media outlets on a ‘not for publication’ basis, were designed to ensure trials were fair, warn people that any comment on a particular case must comply with the 1981 Act, stop people inadvertently breaking the law, and ensure that trials were heard on the evidence and not what people had found online.
- 7.45 The Attorney General’s website also published infographics setting out what might be considered a contempt of court in the context of publishing comments on social media.
- 7.46 In March 2014 the Law Commission in England and Wales published its second report on *Contempt of Court*.¹⁷ That report recommended that a new online service be established to help journalists and publishers reporting criminal trials to discover whether reporting restrictions are in force and, if so, why.
- 7.47 The report recommended that all court postponement orders be posted on a single publicly accessible website. A further restricted service would be available where, for a charge, registered users could sign up for automated email alerts of new orders. This would reduce the risk of contempt proceedings for publishers from large media organisations to individual bloggers and enable them to comply with the court’s restrictions or report proceedings to the public with confidence.

17

Law Commission (2014) *Contempt of Court (2): Court Reporting (HC 1162)* London: The Stationery Office

- 7.48 The government was to consider how an online reporting restriction database could be taken forward as existing technology was replaced.
- 7.49 The Law Commission's recommendations are attached at appendix C.
- 7.50 The Criminal Justice and Courts Act 2015 (the 2015 Act) in England and Wales was introduced to implement the Law Commission's recommendations concerning juror misconduct. It brings with it a stringent regime and codification of jurors responsibilities. It is a codification of matters that could be considered to have been contempt of court and previously contrary to a judge's specific instruction.
- 7.51 However, they are extremely sweeping and probably are not covered by the standard judge's housekeeping instructions to the jury. Hence judges are advised to adapt the housekeeping directions to the jury to include the wide-ranging prohibitions and consequences.
- 7.52 Section 71 of the 2015 Act amends the Juries Act 1974 to create a specific offence of a juror who intentionally seeks information relating to the case they are trying.¹⁸ That information includes, but is not limited to, asking a question, searching online, visiting a place, inspecting an object, conducting an experiment or asking someone to do any of the above.
- 7.53 The 2015 Act provides that 'information in the case' includes the person in the case, the judge dealing with the case, any other person in the case (including lawyers or witnesses), and the law relating to the case, the law of evidence or court procedure.
- 7.54 This legislation also grants a discretionary power to a judge, if they are convinced it is in the full interests of justice, to confiscate a juror's electronic communication device and search a juror if it is believed it has not been surrendered.
- 7.55 The offences are indictable only and the maximum penalty is two years' imprisonment and/or a fine.
- 7.56 As earlier mentioned in this chapter, in the wake of comments by Sir Brian Leveson in the Court of Appeal in *R v F and D*, the Attorney General launched a public consultation exercise, *The Impact of Social Media on the Administration of Justice*.¹⁹ A call for evidence was completed and this report has been published in March 2019.²⁰

18 Section 20A Juries Act 1974

19 Attorney General's Office (2017) *The Impact of Social Media on the Administration of Justice: A Call for Evidence* London: Attorney General's Office

20 Attorney General's Office (2019) *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* London: Attorney General's Office

- 7.57 The following particular themes were drawn out in that publication:
- Social media posts which are prejudicial or which identify those subject to anonymity orders are not uncommon, and there is an added risk that this material could be seen by jurors.
 - Many social media users may be unaware of reporting restrictions and of what would constitute a breach of an anonymity order or contempt of court.
 - The Judiciary generally have the tools to mitigate the effects of adverse social media posts, however these tools can delay the trial process.
- 7.58 The responses to the issues raised included the following:
- The Attorney General's Office will promote the safe use of social media as part of a public legal education campaign, which will include a GOV.UK webpage.
 - Work is underway to develop clear, accessible, and comprehensive guidance on contempt led by the Judicial Office.
 - The Attorney General's Office has agreed points of contact with social media companies so that relevant material can be flagged and, if necessary, removed.
 - The Attorney General's Office will work with cross-government partners to improve the enforcement of the law on anonymity online.
- 7.59 At the time of writing this Review I understand the Ministry of Digital, Culture, Media and Sports is preparing an Online Harms White Paper.
- 7.60 Finally, in the context of England and Wales, I note that, at the time of writing, a Private Member's Bill has been introduced into parliament, apparently with considerable cross-party support, by Lucy Powell MP. The Online Forums Bill is to make administrators and moderators of certain online groups — and not just the giant distant companies that own them — responsible for their content.

Ireland

- 7.61 Ireland currently has no legislation to deal with contempt of court. While contempt of court is a common-law offence, there is a growing momentum for relevant legislation to deal with the changing nature of communications technology. In response to an increasing focus in the area, the Minister for Justice and Equality is engaged in an ongoing consideration of matters relating to the law on contempt.
- 7.62 A new Law Reform Commission report, with three modules, on the contempt of court issue is expected in the near future.
- 7.63 The first module report is expected to contain a considered analysis on a range of issues relating to contempt of court, including social media-related issues. It

had at the time of this Review's Preliminary Report published a paper, 'Privilege for Reports of Court Proceedings under the Defamation Act 2009', raising the questions outlined in the discussion below.

- 7.64 The former Chief Justice, Susan Denham, also initiated a consultation with the Presidents of the respective courts on the social media issue in light of recent experience and developments. Where recommendations emerge from this process, these will also link in directly with the priority work to be carried out on foot of the forthcoming Law Reform Commission report.
- 7.65 In October 2017 a Private Member's Bill was introduced to Dáil Éireann that would provide a court with general powers to place restrictions on publication of material where it appears to be necessary to avoid risk of prejudice to the administration of justice. It provides for:
- judicial powers to direct removal of material from websites and/or the disabling of public access to websites where it appears to be necessary to avoid risk of prejudice to the administration of justice; and
 - novel powers for the courts to order online hosts to internet providers to disable specified sections of websites for limited periods.
- 7.66 A number of specific defences to allegations of contempt of court are contemplated. They include defences for:
- innocent publication or distribution available to those who have taken reasonable care in publishing the material;
 - a discussion of public affairs with a risk of impediment or prejudice to particular legal proceedings as merely incidental to the discussion; and
 - reports of public legal proceedings, which are fair and accurate, published contemporaneously and in good faith.
- 7.67 We understand the Irish government is awaiting the Law Reform Commission report on the matter.

Scotland

- 7.68 The law in Scotland is also governed by the Contempt of Court Act 1981. In 2015 the then Lord Advocate, supported by the Law Society in Scotland, which had been piloting awareness sessions in schools on the consequences of posting on social network, urged reform of the legislation in response to changing social habits and attitudes and developments in modern communication.²¹ Amended guidelines were issued by the Lord Advocate to the police and media in January 2018 explaining in detail the effects of the Contempt of Court Act 1981.

21 Peterkin, T. (2015) 'Call for Contempt of Court review in internet age' *The Scotsman* 22 February

New Zealand

- 7.69 The Law Commission in New Zealand completed a review of the law of contempt in 2017 and recommended new legislation, which would provide:²²
- new court statutory powers to make temporary suppression orders postponing publication of information that poses a real risk of prejudice to an arrested person's fair trial;
 - new statutory offence to replace the common law contempt of publishing information where there is a real risk that the publication could prejudice a fair trial; and
 - a new statutory offence to replace common law contempt where a member of a jury who investigates or researches information, which he or she knows is relevant to the case.
- 7.70 The Government has responded to the Law Commission's review agreeing that the law requires modernisation and clarification. The Administration of Justice (Reform of Contempt of Court) Bill is going through the New Zealand Parliament. It is currently with the Justice Committee which is expected to report in Spring 2019.

Canada

- 7.71 In May 2018 it was reported that three recent trials in Ontario had been disrupted by juror misconduct connected to the internet, despite strict instructions from the judge.²³ The Government there is working with partners in identifying changes that can now be made to respond to problems of the internet.

Australia

- 7.72 Legislation in several Australian jurisdictions²⁴ prohibits a juror in a trial from making inquiries for the purpose of obtaining information about a party to the trial or any matter relevant to the trial except in the proper exercise of their function as a juror. In these jurisdictions there is growing use of Suppression Orders to prevent the publication of prejudicial material although some critics have argued they are proving ineffective.

Discussion

- 7.73 The advent of social media has developed beyond the contemplation of Parliament when the 1981 Contempt of Court legislation was enacted.

22 Law Commission (2017) *Reforming the Law of Contempt of Court: a modern statute* Wellington: Law Commission

23 Powell, B. (2018) 'How Google-happy jurors are derailing Ontario trials' *Toronto Star* 21 May

24 Queensland, New South Wales, Victoria and Western Australia.

- 7.74 I recognise that there is a paucity of empirical evidence to the actual effect of social media, if any, on jurors or jury verdicts here in Northern Ireland. Trusting the jury to take their oath responsibly is a cornerstone of our criminal justice system and therefore arguably we should be slow to accept that there is reason to believe that juries will embark on a search for further material contrary to jury directions in the absence of hard evidence.²⁵
- 7.75 Indeed our understanding from English colleagues is that it is somewhat rare for trials to be imperilled by its presence and that the case R v F and D was untypical.
- 7.76 On the other hand whilst we do have to trust jurors to honour their oath, we must also be realistic about the proclivities and natural curiosities of human behaviour and be alive to the dangers that lie in the wake of social media. It is this aspect of human behaviour that has clearly led other jurisdictions, to which I have earlier referred, to take active steps to control the use of social media. It is surely beyond plausible dispute that to protect the integrity of a trial there needs to be effective measures to control exposure to prejudicial material even if this is a rare occurrence in the criminal justice system. We have clear experience in Northern Ireland of a recent high profile trial of offences including rape, where social media was used to disclose the identity of the complainant and both complainant and accused were vilified online.
- 7.77 Moreover our faith in jurors does not address the problems thrown up by passive receipt of objectionable material with algorithms that often automatically produce online material, particularly in high profile trials.
- 7.78 A head in the sand attitude is no longer tolerable. We must act in a manner that is co-ordinated and consistent with our close neighbours so that it represents a joint cross-jurisdictional approach to what is widely recognised to be a genuine problem.
- 7.79 In essence, we are currently attempting to preserve a traditional mode of trial procedure in the face of a changing cultural landscape and developing communication information technologies.
- 7.80 I believe we need to follow the examples set in other jurisdictions. The current law needs to be augmented with new offences, new enforcement provisions and new processes similar to those surfacing elsewhere.
- 7.81 We should regard the changes in other jurisdictions as a virtue and borrow heavily from what they have done or are about to do because the problems are identical. We can use their head start to iron out any wrinkles that may have emerged about the scope and cross-jurisdictional reach of any such measures.

- 7.82 Joint exploration with the jurisdictions in the UK and Ireland as to legal methods of holding internet service providers and administrators to account for content hosted or distributed by their services is an imperative. We need to eschew piecemeal approaches and instead push forward a cohesive national framework to meet a problem, which is international in nature and, however rare the occurrence, that strikes at the heart of our criminal justice system.
- 7.83 I firmly believe the Department of Justice in liaison with the PPS should already be in contact with its opposite numbers in other jurisdictions in the UK and Ireland, recording our interest in what they are doing, offering any input they request us to make and carefully analysing any procedural or legislative changes they are making to ensure a coordinated joint approach is swiftly implemented. We in Northern Ireland should not be contemplating major changes in the overall law about social media without full consideration of the legislative changes being made in the rest of the UK and Ireland.
- 7.84 The issues are wide-ranging and complex, as the UK Government White Paper on the wider issue of Online Harms may show. Issues that need to be considered may well include:
- Should social media publishers be made liable for legally objectionable material contained on their platforms? Should we make the administrators and moderators of online groups responsible for their content?
 - Can social media reasonably argue that they are merely platforms and not publishers? Should social media not be designated in law as secondary publishers? Just as newspapers become liable for printing letters and comments, should social media outlets also not be liable for material on their platforms? As yet, no test case has emerged on this specific issue in the courts.
 - Should liability accrue once notification of the objectionable material has been given of a posting that breaches an injunction or risks prejudice to a trial and that material has not been taken down within, say, 24 hours?
 - Should not a legal onus be placed on social media publishers to identify and remove material potentially prejudicial to a trial long before it is drawn to the attention of the courts?
 - Algorithms are currently available and are deployed to identify and remove child sexual abuse images and terrorist material when it is posted. Why should further resources not be deployed to identify, block and remove this offending material in live trials and thus protect court proceedings?
 - It must, for example, be blindingly obvious that many forthcoming high-profile trials are likely to attract social media attention, and it is difficult to see why appropriate algorithms cannot be established by way of anticipatory action.

- Perhaps law enforcement agencies and the PPS have a role to play in notifying the main social media outlets of such forthcoming proceedings and drawing attention to the legal risks that social media face. That is not to say that, in the absence of court orders, these admonitions would bind the social media outlets, which would have to make their own decisions consistent with the principle of press freedom. It would, however, serve to put them on notice of potential legal problems that needed to be addressed timeously.
- Mainstream media need to be strongly encouraged to turn off and disable public comment facilities about a trial in the course of live proceedings. We understand this regularly happens with mainstream media in England and Wales and this should be adopted by local media in Northern Ireland.
- This, of course, does not address, for example, Twitter communications if such exchanges have been triggered by the broadcasted content on mainstream media. There is a strong argument for Twitter and other social media platforms to deploy technology tools to review particular users who have been abusive in the past and take steps to block their accounts.
- Should bloggers have the same defence of fair and accurate reports on court proceedings? Should someone have to prove malice who wishes to sue for defamation over a court report? Should such a plaintiff require the leave of the court before issuing proceedings? Should a new qualified privilege defence be introduced for court proceedings reports that do not meet the fair and accurate requirement, but are not the product of malice?
- With General Data Protection Regulation (GDPR) coming into force in 2018, data controllers, including at least some internet intermediaries, must erase content based on the 'right to be forgotten' (RTBF) requests, but are hosting platforms such as Facebook and Twitter controllers with RTBF erasure obligations? Do intermediary liability laws under the E-commerce Directive Articles 12–15 apply to RTBF erasure requests?²⁶
- Enforcement is a major problem with platforms outside our jurisdiction being difficult to capture within our system.

7.85 Whilst publication probably renders all further steps largely superfluous, nonetheless there are measures in Northern Ireland that we can be considering even now.

7.86 There should be specific legislation targeted at jurors' behaviour in relation to social media during trials as occurs in other jurisdictions. The 2015 Act in England and Wales is a sound precedent.

26 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

- 7.87 Of more immediate need, which requires no further delay, is to consider the introduction of written and or video warnings to jurors at the outset of the trial of the very serious consequences for both the trial process and them personally if they search the internet for information on the trial before them.
- 7.88 Appendix B contains a copy of the leaflet now given to juries in England and Wales to be retained by them throughout the trial, underlining the consequences. I consider this is a positive step that we should adopt. Arguably, jurors should sign a document confirming they have received this leaflet to remove room for doubt in the event of a later prosecution.
- 7.89 Jurors must be made to understand that failure to adhere to this warning endangers the trial process, can be extremely costly and stressful to all parties if a retrial is ordered, and will have grave personal consequences for those who offend.
- 7.90 Arguably, even earlier notification of these juror responsibilities could be provided. Therefore, when the notice calling for jury service is sent out it should be accompanied by a booklet about juror responsibilities, allowing time to digest the seriousness of the issue and to acclimatise to the concept of curbing their internet use etc.
- 7.91 Steps should be taken to make it easier for jurors to carry those responsibilities and to come forward when fellow jurors breach them. This can be done by providing a helpline or email address to enable them to make ready contact with court authorities in the event of an offence.
- 7.92 The Independent Press Standards Organisation Editor's Code of Practice is totally insufficient to meet the current social media problems. Accordingly, courts should have more powers to control the publication of website material during trials.
- 7.93 Already in Northern Ireland, pursuant to a Practice Note from the Lord Chief Justice in 2016,²⁷ members of the public are not permitted to take notes on electronic devices such as laptops or tablets and all mobile phones should be switched off in court. Moreover, members of the public are not permitted to use live text-based communication (LTBC) from court and all electronic devices should be switched off entering court. Thus live tweeting from the court must remain prohibited from the public. The press can only engage in tweeting if an application is made to the court for permission to do so. My understanding is that this is not a regular occurrence and is carefully scrutinised by judges.
- 7.94 Mainstream media must be encouraged to be responsible in its invocation and use of newspaper online pages and message boards/links with all the dangers attendant upon these links.

- 7.95 The Judiciary and the PPS should undergo training and refresher training encompassing information technology, awareness of social media platforms, trends, language etc. to enable them to seek and make informed orders and directions and to ensure they are future-proofed.
- 7.96 The Northern Ireland Courts and Tribunals Service (NICTS) should make earnest enquiries as to what steps can be taken to ensure administrative staff can monitor compliance with court orders in relation to social media and carry out surveillance to reduce the risk of significant breaches during the course of a trial. Moreover we should recognise that most of the risk of prejudicing a trial comes from top Google hits and widely used social networking sites. Consequently we should look at the possibility of a court official being tasked with searching for such prejudicial material pre-trial so that steps can be taken to have it taken down at least temporarily during the progress of the trial.
- 7.97 However, I realise that this obligation on the NICTS would require careful consultation to ascertain the extent of the burden. How time-consuming would this be? The officials are not lawyers. Would this require some legal knowledge as well as knowledge of the case itself to decide what material should be put before the judge? Is this a proper role for the NICTS or one that should be placed on representatives of the PPS and the defence? This does require further discussion and analysis.
- 7.98 Education about the responsibilities of jury service should start early. I consider this a responsibility resting on the Department of Education to take steps to strongly encourage secondary schools to include in their learning for life and work instruction on juries, jury responsibilities and contempt laws to encourage greater civic responsibilities amongst internet users.
- 7.99 One suggested remedy seems to me to be a non-starter and requires only brief mention. Reverting to sequestration, physical or electronic, of jurors (which is permitted, but very rarely invoked, in some US states) is not only financially unattainable and impractical but useless in any event to prevent their use of the internet. Secondly, a full voir dire of a jury as occurs in the US can take up many days in an already lengthy process.
- 7.100 I fervently believe that most jurors are thoroughly responsible citizens who at times simply want an accurate understanding of matters such as relevant evidence, legal standards and technical terms. I have come across a number of criticisms, virtually all from non-lawyers it has to be said, that judicial directions are often too complex, with insufficient focus on comprehensibility. Research from distinguished academics such as Professor Cheryl Thomas QC indicates that many jurors struggle to understand standardised or 'pattern' judicial instructions.

- 7.101 As such, any directions should aim to be comprehensible to non-lawyers. It is important that judges obviate the temptation on the part of the jurors to turn to legitimate channels on social media for these matters by explaining that these channels may not be accurate or reliable and how they can easily seek clarification and guidance during the trial by simply asking.
- 7.102 A new online service should be established to help journalists and publishers reporting criminal trials to discover whether reporting restrictions are in force and if so, why. All court postponement orders should be posted on a single publicly accessible website
- 7.103 Despite the restrictions on the jurisdiction of the Attorney General for Northern Ireland I welcome the generous gesture on his part to agree to publish:
- advisory notes on the government website and Twitter to help to prevent social media users from committing a contempt of court; and
 - infographics setting out what might be considered a contempt of court in the context of publishing comments on social media.
- 7.104 The Attorney General however makes it clear that he is content to comply with such recommendations only (and it is an important qualification) in the context of an overall improvement in contempt enforcement machinery.
- 7.105 I recognise that these are not perfect solutions. Even stiff custodial prison sentences for offenders may not be fool proof. The authors on social media may be difficult to trace and as long as internet service providers or internet content hosts are not treated as providing platforms, the process of ordering material to be taken down can be complex and at times impotent, especially if the provider lies outside the jurisdiction.
- 7.106 Nonetheless, the measures now under consideration are important steps in a cultural change that removes current ignorance about the consequences of law-breaking in this field. They would introduce a radical public rethinking about the nature of the internet and its connection with the protection that the rule of law affords to us all.
- 7.107 It should be clear, therefore, that the recommendations made below have to be regarded as preliminary or opening shots in a vitally important area of development.
- 7.108 Finally, this chapter is not intended to be seen as a jeremiad against social media. Rather it is hoped that it will be treated as a constructive critique cast in the knowledge that social media has the capacity to be of inestimable value if it chooses to do so. It could have a role to play, for example, in highlighting jury responsibilities, pointing out awareness of rape myths, discussing the issue of consent, and highlighting the nature of serious sexual offences with steps to improve online responsibility. I hope that in the months and years ahead, social media will take on that civic responsibility.

Responses

- 7.109 Without exception every respondent agreed that social media presents a significant challenge to the criminal justice system. Examples of the general approach in the responses include the following:
- The Bar of Northern Ireland – “the Bar recognises that a key challenge to the criminal justice system is how best to keep pace with the digital age.”
 - The PSNI – “the impact of social media carries a threat to the integrity of the judicial process and potentially influences complainant engagement.”
 - SDLP – “Recent high profile trials in Northern Ireland were subjected to widespread social media commentary and doubtless, had a devastating impact on both the complainant and the defendants therefore, it is imperative that the raft of measures recommended [be developed] as swiftly as possible.”
 - In this Review’s online public survey, of the 419 responses to this recommendation, 97.1% agreed that jurors need help to understand the risks associated with social media.
 - Typical of the general response was that of Victim Support NI who said “It is our view that the use of social media has now had an impact to decrease confidence in reporting sexual crime and taking cases forward. We therefore welcome recommendations aimed at addressing anonymity, guidance and legislation relating to the use of social media and consequences for breaching guidance, judicial powers to confiscate and measures to monitor compliance. In an ever-changing social media world, it is also important to ensure that those dealing with the issue are kept up to date and that they learn from work carried out in other jurisdictions.”
- 7.110 The only issues that arose were as to the best method of addressing the potential menace of social media.
- 7.111 The Bar Council was the sole respondent who considered that there is nothing to suggest that the directions already given by our highly experienced Judiciary are inadequate to address the risks posed by social media. However even this response recognised that there needed to be a fully co-ordinated cross-jurisdictional consultation and fresh approach to controlling the influence of social media and co-ordinating enforcement measures across the UK and Ireland. It felt that it would be important to fully consider the outcomes of any research (including that of Professor Thomas QC in Northern Ireland), and consultation exercises, including the Attorney General for England and Wales’ “Impact of Social Media on the Administration of Justice” call for evidence, before undertaking some of the more detailed actions outlined by me in this chapter.
- 7.112 However, the Bar were broadly supportive of more robust statutory powers being given to the judges such as those outlined in the recommendations in this Review.

7.113 Virtually all others who responded however, accepted much more broadly the raft of recommendations contained in the chapter recognising that further measures, including legislation to combat the risk of social media, are necessary.

7.114 I do not underestimate the difficulties of dealing with social media. A very helpful response from the PPS, whilst welcoming the proposals to control the adverse impact that social media may have in trials of serious sexual offences, properly highlighted a number of problems which will exist in so doing, which included the following:

- if liability is to accrue to social media outlets once notification of objectionable material has been given of a posting that breaches an injunction or risks prejudice to a trial, and material has not been taken down within 24 hours, who is to serve such notice, monitor compliance and investigate non-compliance particularly in cases where providers are based outside NI/UK?;
- PPS experience of seeking evidence from various common social media platforms by way of international mutual legal assistance is a process which can take “many months and sometimes years to obtain”. The majority of social media platforms are based outside our jurisdiction and it may be difficult to conduct effective enforcement against them;
- given the proliferation of social media content, how would the legal onus placed on social media to identify and remove material potentially prejudicial to a trial in advance of hearing be operated in practice?; and
- the recommendation that PPS take steps to notify the main social media outlets in advance of a trial when it is anticipated that adverse social media comments prejudicial to the fairness of the trial may arise would be difficult to put into practice by the PPS as it would be hard to foresee what types of cases would attract this type of adverse social media attention. Involvement by PPS will be time intensive, require a level of specialist knowledge and does not sit easily with the statutory functions of the PPS set out in the Justice (Northern Ireland) Act 2002. This is a subject that would require further discussion with the PPS mainly because high profile cases in NI are a rarity.

7.115 I consider that many of these apparent difficulties are overstated. In practice not only would the very presence of my recommendations if implemented be a deterrent to social media outlets, but with some degree of flexibility their difficulties could all be addressed successfully.

7.116 However, as I cautioned in the Preliminary Report, steps such as these should be discussed on a cross-jurisdictional basis and we should attempt to move en masse. It may be that the measures that I have raised, and the possible impediments raised by the PPS to some of the proposals, will be considered by the UK government’s forthcoming White Paper on “Online Harms”. It is a classic

example where a sharing of information and possible proposals might pay great dividend to all concerned.

- 7.117 The Attorney General for England and Wales' Response to the Call for Evidence published in March 2019 was obviously not a response to my Preliminary Report. Nonetheless, as I have indicated earlier in this chapter it contained a number of salient matters that have contributed to my final conclusions.
- 7.118 I note with particular interest that as a result of the issues raised in the Call for Evidence, the Attorney General's Office is working with Facebook, Google and Twitter to address contemptuous or otherwise unlawful social media posts. This includes working with the tools provided by those organisations to allow concerns to be raised regarding such posts. These tools will ensure that social media platforms are alerted to potentially unlawful or contemptuous posts and can review them quickly, thereby mitigating the risk to the administration of justice. This, however, may not remain the case if the issue is not addressed.
- 7.119 Whilst rare, in some situations the Google Autocomplete function has identified people who are subject to an anonymity order. For example, the name of a complainant of a sexual offence may appear when the offender's name is typed into the search bar. Whilst this is not a common occurrence, Google has made improvements to their autocomplete tool to help protect against inappropriate autocompletes. Work in this area includes an improved and prominent feedback tool which is used to implement further improvement, and a commitment to act quickly when notified of inappropriate autocompletes by the authorities.
- 7.120 It has subsequently been reported in the press that;
- "Social media and internet companies have agreed to a voluntary "take-down" procedure to combat rising incidents of online contempt of court." Facebook, Google and Twitter have struck a deal that allows officials for the solicitor-general to flag up online comments that are viewed as being in contempt and ask for them to be removed. However, the solicitor-general, acknowledged to *The Times* that the social media providers "would not be lawfully required to submit to a request from his office." Robert Buckland QC, said "the scheme would be kept under review to see if stricter measures were needed." The scheme facilitates special points of contact at each of the three technology companies to consider take-down requests on a case by case basis. Juries in the UK are required only to only consider evidence put forward in court. The solicitor-general stressed the integrity of the approach must be preserved.
- He said the government would resist moving towards a US approach in which contempt rules were less strict."²⁸
- 7.121 I recommend that the Attorney General for Northern Ireland and/or the Department of Justice should take steps to ensure that courts in Northern

Ireland are included within the new arrangements entered into by the Attorney General in England and Wales and that the voluntary “take-down” agreement applies also to Northern Ireland.

- 7.122 I observe also that a website designed to provide guidance to the public has been launched in England and Wales. Contempt of Court information has been published on the Gov.UK website by the Attorney General’s Office, “to promote the safe use of social media by clearly and accessibly explaining the risks and implications of using social media to undermine the administration of justice”.²⁹
- 7.123 I recommend that NICTS and/or the Department of Justice launch a similar website in Northern Ireland.
- 7.124 The Attorney General’s Response concluded that whilst there are new challenges with the use of social media, these challenges are not unmanageable and existing tools can be used to some extent to manage the problems that arise.
- 7.125 Nonetheless whether the government has sufficient power to enforce strict observance by social media companies of contempt of court rules is to be considered by the separate government White Paper on Online Harms to be jointly published soon by the Department for Digital, Culture, Media and Sport and the Home Office. My proposals will need to be revisited in light of that White Paper.

Conclusions

- 7.126 I believe there is evidence to suggest that steps need to be taken by way of further measures, possibly including legislation, to combat the risk of social media to criminal justice trials involving serious sexual offences. Many of the steps that I have recommended should be implemented as soon as a legislative window is available. For other measures, we should operate a cross-jurisdictional approach in order to maximise the legal impact on the social media menace. It is quite clear that the social media is coming under increasing scrutiny in a wide number of areas and it is important that consideration of the impact on the law and procedures in serious sexual offences should become part of the overall consideration of solutions.
- 7.127 Accordingly I see no reason to materially alter the recommendations that I had made earlier in the Preliminary Report in light of the responses that I have received save to make some additions in light of the Response to the Call for Evidence of the Attorney General for England and Wales in March 2019.

29 Ames, J. (2019) ‘Tech giants agree take-down scheme for online contempt’ *The Times* 5 March

Recommendations

57. There should be a fully coordinated cross-jurisdictional consultation and fresh approach to controlling the influence of social media in an attempt to co-ordinate enforcement measures in jury trials across the UK and Ireland.
- 58.* In the wake of such consultation, the following steps should be jointly considered:
- Social media publishers should be made liable for legally objectionable material contained on their platforms.
 - Liability should accrue to social media outlets once notification of the objectionable material has been given of a posting that breaches an injunction or risks prejudice to a trial and that material has not been taken down within, say, 24 hours.
 - A legal onus should be placed on social media to take reasonable steps to identify and remove material potentially prejudicial to a trial in advance of the trial hearing.
 - Law enforcement agencies and the PPS should take steps to notify the main social media outlets in advance of a trial when it is anticipated that adverse social media comments prejudicial to the fairness of a trial may arise.
 - Mainstream media should turn off and disable public comment facilities about a trial in the course of live proceedings.
 - Twitter and similar outlets should deploy technology tools to review and block the accounts of users with a history of abuse.
 - The administrators and moderators of online groups should be made responsible for their content.
 - Bloggers should not have the defence of 'fair and accurate' reports on court proceedings. A new qualified privilege defence should be introduced for court proceedings reports that do not meet the fair and accurate requirement, but are not the product of malice.
 - With the advent of the 2016 GDPR, data controllers, including internet intermediaries, must erase content based on right to be forgotten requests.
- 59.* Legislation should be introduced in Northern Ireland, similar to the Criminal Justice and Courts Act 2015, bringing with it a stringent regime and codification of jurors' responsibilities.
- 60.* A specific offence should be introduced of a juror who intentionally seeks information relating to a case before them in the course of the trial. That information should include, but not limited to, asking

a question, searching online, visiting a place, inspecting an object, conducting an experiment or asking someone to do anything of this nature.

- 61.* It should be ensured that information in the case “includes the person in the case, the judge dealing with the case, any other person in the case (including lawyers or witnesses), and the law relating to the case, the law of evidence or court procedure.”
- 62.* The new legislation shall grant a power to a judge, if they are convinced it is in the interests of justice, to temporarily confiscate a juror’s electronic devices and search a juror if it is believed they have not been surrendered.
- 63.* Judges should be empowered to order all mobiles and other communication devices be left outside the court if members of the public are to be admitted.
- 64.* A maximum penalty of two years’ imprisonment should be imposed for breach of the juror offences.
65. The Northern Ireland Court Service to consider what reasonable steps it could take to monitor compliance with court orders in relation to social media and carry out surveillance of social media to reduce the risk of significant breaches.
66. Provide jurors with a helpline telephone number or email address to enable them to discreetly complain of breaches of which they become aware.
- 67.* Increase the current penalties for breaching the anonymity of complainants.
68. Immediately introduce a written document, at least to all sworn jurors in serious sexual offence cases, identical to that in use in England and Wales, entitled *Your Legal Responsibilities as a Juror*.
69. The Judiciary should give clear directions at the start and end of each day reiterating to jurors that:
 - the problem is that the internet is participatory. Content is user-created and is often inaccurate and can be untruthful;
 - they must not conduct research about those participating in the trial or communicate with each other via social media or at all;
 - they must not publish information about the trial; and
 - decisions must be based solely on the evidence they hear during the trial.

- 70.* The Judiciary be granted general powers to place restrictions on publication of material where it appears to be necessary to avoid risk of prejudice to the administration of justice.
- 71.* Provide for judicial powers to direct removal of material from websites and/or the disabling of public access to websites where it appears to be necessary to avoid risk of prejudice to the administration of justice.
- 72.* Provide for judicial powers to order online hosts and internet providers to disable specified sections of websites for limited periods.
73. As part of the overall package of reforms, the Attorney General for Northern Ireland should publish advisory notes on the government website and Twitter to help to prevent social media users from committing a contempt of court.
74. As part of the overall package of reforms, the Attorney General for Northern Ireland's website should publish infographics setting out what might be considered a contempt of court in the context of publishing comments on social media.
75. In addition the NICTS and/or the Department of Justice should provide easy to read guidance to the public similar to the Contempt of Court information, already issued by the Attorney General's Office, on the nidirect website.
76. The Attorney General for Northern Ireland should follow the path taken by the Attorney General's Office in England to work with Facebook, Google and Twitter to address contemptuous or otherwise unlawful social media posts. These will include working with the tools developed by those organisations to allow concerns to be raised regarding such posts.
77. A new online service should be established to help journalists and publishers reporting criminal trials to discover whether reporting restrictions are in force and, if so, why.
78. All court postponement orders should be posted on a single publicly accessible website.
79. A further restricted service should be available where, for a charge, registered users could sign up for automated email alerts of new orders to reduce the risk of contempt proceedings for publishers from large media organisations to individual bloggers, and enable them to comply with the court's restrictions or report proceedings to the public with confidence.

80. The Government should consider how an online reporting restriction database could be taken forward as existing technology is replaced and updated.
81. That the findings of the cross-government Online Harms White Paper in England and Wales should be carefully monitored for further steps relevant to this jurisdiction.
82. That the current notice in jury rooms that reads 'Do not put anything on social media' should be radically revised and replaced with the written document given to each juror.
83. A notice similar to that handed to the jurors be prominently displayed in the public gallery of each courthouse, emphasising that it is unlawful to breach the anonymity of the complainant in any circumstances.
84. That the introductory jury video should make the same points.
85. Live tweeting from the trial should remain universally banned in criminal trials save where permission is granted to the press.
86. The Judiciary and the PPS should undergo mandatory training and refresher training encompassing information technology, awareness of social media platforms, trends, language etc.
87. The Department of Education should strongly encourage Boards of school governors to introduce awareness sessions to ensure students understand the consequences of posting on social media.
88. The Department of Education, in consultation with the NICTS, should take steps to strongly encourage secondary schools to include in their Learning for Life and Work curriculum instruction on juries, jury responsibilities and contempt laws in order to encourage greater civic responsibilities among internet users.

Appendix B



Your Legal Responsibilities as a Juror

By serving on this jury you are fulfilling a very important **PUBLIC SERVICE**. This means you have some important **LEGAL RESPONSIBILITIES**.

As a juror you have taken a **LEGAL OATH** or **AFFIRMATION** to try the defendant based **ONLY** on the evidence you hear in court.

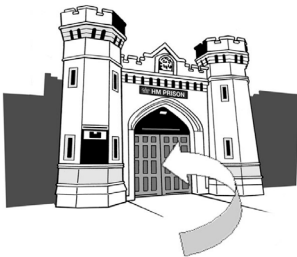
This means the **FAIRNESS** of the trial depends on you following a few very **IMPORTANT LEGAL RULES**. These rules are explained to you in this Notice.

You need to **READ** these rules, and make sure you **UNDERSTAND** and **FOLLOW** these rules at all times.

You should keep this Notice with your **SUMMONS** at all times while you are on Jury Service.



What Would Happen If You or Any Juror Did Not Follow These Rules?



If you do not follow the rules in this Notice, you may be in **CONTEMPT OF COURT** and committing a **CRIMINAL OFFENCE**. This is because these rules about what you can and cannot do as a juror are **ORDERS OF THE COURT** and also part of the **CRIMINAL LAW**. You can be prosecuted for breaking these rules, and if you are found guilty the maximum sentence is two years in **PRISON**, a **FINE** or both.

THE RULES

Looking for Information About Your Case



It is **ILLEGAL** for you to **LOOK** for any information at all about your case on the **INTERNET** or **ANYWHERE ELSE** during the trial.

This means you **CANNOT LOOK** for any information about:

- Any **PERSON** involved in the case. This means any **DEFENDANT, WITNESS** or anyone associated with the case including the **JUDGE** and **LEGAL TEAMS**.
- The **CRIME** or **CRIME SCENE**.
- The **LAW** and **LEGAL TERMS** used in the case.
- **COURT PROCEDURES**.

It is also **ILLEGAL** for you to ask **ANYONE** else to **LOOK FOR YOU**.

Appendix C

Contempt of Court (2): Court Reporting - Final Recommendations

- Adopt a publicly available online list of existing section 4(2) orders in force in England and Wales similar to that currently in place in Scotland.
- Orders would be communicated to an administrator on being made (as in our pilot scheme) and placed on the online list immediately. They would be removed from the online list on the date of their expiry (though the continued presence of an order on the list after its expiry would of course not itself extend contempt liability).
- An addition to the standard form to make clear that where a section 4(2) order includes a prohibition on reporting the existence of the order or its terms, this does not apply to the order's publication on the official online database.
- Those orders whose expiry is contingent upon another event, such as the conclusion of named legal proceedings, reasonably frequent checks are undertaken by the administrator of the list to ensure that expired orders are removed from the list promptly.
- Regarding concerns expressed about an online list compromising the very confidentiality that section 4(2) orders are designed to protect, our primary response is that this fails to take into account the limited purpose of a section 4(2) order, and has caused no problems in Scotland.
- Limit the information displayed on the publicly available online list to the name of the case in which the order has been made, and the date on which the order expires (or if the order expires on the conclusion of another case, rather than on a fixed date, then a record of this fact, and the name of the linked case).
- Access to the online list should be open to the general public, and therefore to all potential publishers of online and print material, including individual bloggers and other small-scale publishers in addition to the major media organisations.
- Where a potential publisher accessed the list and saw the name of a case about which they wished to publish, the webpage would direct them to telephone the court at which the case was being heard in order to discover further details about the terms of the order.
- To protect anonymity where appropriate, where there are reporting restrictions in place relating to the names of parties to the proceedings, the online list will identify cases by number, with a suitably anonymised case name.
- The online list should carry a warning to potential publishers to the effect that case numbers rather than names are the determinative identifier of a case, and that the mere absence of a case's name on the list should not be relied upon if the list

includes anonymised case numbers. In the event that there is an anonymised case listed at the court centre in which the potential publisher is interested, and if the potential publisher is uncertain whether this number refers to the case about which they wish to publish, then they should contact the court by telephone to check before publishing.

- Although the content of section 4(2) orders can be discovered by those sitting in the public gallery at court, by this information available to a potentially limitless audience via a public webpage may increase the chance of exactly the prejudice that such orders are designed to prevent.
- On further consultation, however, media representatives stated that proactive distribution of the terms of section 4(2) orders (as is the practice in Scotland, to a limited mailing list of media representatives) would assist them in establishing their legal obligations.
- The publicly accessible list of orders be supplemented by an additional restricted database which would contain the terms of section 4(2) orders themselves. We recommend that the cost of administering this more detailed database be borne by its users, and hence that there would be a subscription charge for access to the fuller list.
- The restricted nature of this additional database would guard against the slim chance of a juror stumbling upon the contents of an order when online.
- Charging for this extended service is justifiable, since those potential publishers who did not wish to pay would still have access to the basic list free of charge and would be able to enquire as to the details of any orders in which they were interested in the usual way, by contacting the relevant court.
- In addition to keeping costs to the public purse down, charging for access to the extended list would have the further advantage of ensuring that users of this extended service were traceable. Paying for access using a bank transfer, debit or credit card would enable users' identities to be verified and linked to a UK postal billing address (either an individual's home address, or a media organisation's business address). This would enable users of this restricted list to be traced.

Chapter 8

Cross-examination
on previous sexual history

In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.

Lord Slynn of Hadley, 2001¹

Issue

Is previous sexual history ever relevant to trials involving sexual offences, and does the current legislative regime in Northern Ireland strike an appropriate balance between an accused's right to a fair trial and the protection of complainants?

Current law and practice

- 8.1 Article 28 of The Criminal Evidence (Northern Ireland) Order 1999 ('the 1999 Order'), which mirrors section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA), provides restrictions on evidence or questions on the complainant's sexual history in proceedings for sexual offences. These provisions are undoubtedly complex and can bring about a troublesome overlap with bad character evidence under the Criminal Justice (Evidence) Northern Ireland Order 2004.
- 8.2 Courts may now grant leave to introduce evidence of sexual behaviour only if one of a number of criteria is met and the court is satisfied that if the previous evidence was not heard, an unsafe decision could be made. The evidence or questioning must relate to:
- An issue that must be proved other than the complainant's consent (a relevant issue would be honest but mistaken belief in consent).
 - The issue being argued is whether the complainant consented and the evidence or questioning relates to behaviour that took place as part of the alleged offence, or no more than 24 hours before or after the offence.
 - The issue is whether the complainant consented and the evidence or questioning relates to behaviour so similar to the defence's version of the complainant's behaviour at the time that it cannot reasonably be explained as a coincidence.
 - The evidence or questioning is intended to dispute or explain evidence introduced by the prosecution about the complainant's behaviour, whether alleged to have taken place at the time of the alleged offence or at a later date. Such evidence must go no further than to directly contradict or explain claims made by or on behalf of the complainant.

1

R v A (No 2) 2001 UKHL 25

- If the defence seek to introduce questioning or evidence by claiming that it relates to an issue that has to be proved, but the court considers that the real or main purpose is to undermine or diminish the complainant's credibility, the court will not allow it.
- Something of a gloss was put on this by the House of Lords in 2001.² In that case the defendant wished to introduce evidence of an alleged previous sexual relationship with the complainant prior to an alleged rape, which was not within the parameters of section 41 of the 1999 Act and was therefore not permissible. Lord Steyn stated:

“The effect of the decision today is that under section 41 (3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention. If this test is satisfied the evidence should not be excluded.”

- 8.3 In Northern Ireland an application under Article 28(2) of the 1999 Order for leave to adduce evidence of, or ask questions about, any sexual behaviour of a complainant must be made in writing within 28 days from the date of the committal of the defendant, or be accompanied by a full written explanation specifying the reasons why the application could not have been made within the specified period.
- 8.4 An application to permit the evidence shall contain a summary of the evidence it is proposed to adduce and of the questions it is proposed to put to any witness, and a full explanation of the reasons why it is considered that the evidence and questions fall within Article 28(3) or 28(5) of the 1999 Order.
- 8.5 However, experience of counsel to whom I have spoken is that often such applications are made on the day of trial or, indeed, during the trial, fuelled by the contents of late disclosure. The primary cause of this is often that the source of such cross-examination arises from third-party material. Such material is not sought, and the court does not commence a third-party disclosure exercise until long after the arraignment. The volume of material can be large in quantity and this contributes to the delays that arise. This stems from an undesirable backloading of this issue, which I have highlighted in chapter 10 'Disclosure'.

2 R v A (No 2) 2001 UKHL 25 at para. 46

Background

- 8.6 Academic criticism of the House of Lords judgment³ in paragraph 3 above has suggested that this judgment effectively rewrote section 41. It allowed the sexual history evidence between the accused and complainant if its omission could threaten the accused's right to a fair trial. It also brought elements of confusion and ambiguity into the scope of the law and has been interpreted to include third-party evidence.
- 8.7 A number of complainants and victims' groups with whom I have met assert that all too often there is inappropriate admission of previous sexual history either directly or indirectly. It is yet another fear embraced by complainants about the trial itself that contributes to disenchantment with the legal process and fears of what it may hold.
- 8.8 A recent report, led by Dame Vera Baird QC⁴ in England, relied on a study observing 30 rape trials between January 2015 and June 2016. It found that sexual history evidence was introduced in just over one third of the trials, often in circumvention of the procedural rules. Of the 11 cases where this evidence was introduced, six involved evidence or questioning relating to third parties.
- 8.9 This echoes findings by LimeCulture in September 2017 following a survey into Independent Sexual Violence Advisers (ISVAs) and court cases over the period April 2015 – April 2017.⁵ It was reported that out of a sample of 36 cases, only 25% of ISVAs recorded an absence of questioning about previous sexual history. Often the complainant was not informed before the start of the trial that this questioning was to take place.
- 8.10 On the other hand, the findings of a Crown Prosecution Service (CPS) audit in England commissioned by the Attorney General's Office and the Ministry of Justice in December 2017 analysing 309 rape cases, finalised in 2016, recorded that in 92% of cases, the judge did not permit an application to introduce sexual history evidence and such applications were made only in 13% of such cases.⁶
- 8.11 The conclusion was that the law is operating as Parliament intended. A flaw in this report, however, may be that it included cases where there had been pleas of guilty and obviously cross-examination of previous sexual history would be irrelevant in such cases.

3 McGlynn, C. (2017) "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" *The Journal of Criminal Law* Vol. 81, No. 5 pp. 367-392

4 Durham, R., Lawson, R., Lord, A. and Baird, V. (2017) *Seeing is believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16*. Newcastle: Vera Baird QC Northumbria Police and Crime Commissioner

5 LimeCulture (2017) *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: A Survey of Independent Sexual Violence Advisers (ISVAs)* Cheshire: LimeCulture

6 Attorney General's Office and Ministry of Justice (2017) *Limiting the use of complainants' sexual history in sex cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the law on the admissibility of sexual history evidence in practice (Cm 9547)* London: The Stationery Office

8.12 More recently, in November 2018 a large and detailed empirical study of the operation of section 41 of the Youth Justice and Criminal Evidence Act 1999 was carried out by the Criminal Bar Association in England and Wales under the aegis of Ms Laura Hoyano BL.⁷ The data was collected from 179 responses from barristers who prosecuted and defended in 377 sexual assault cases between November 2015 and November 2017.

8.13 Amongst the key findings of this survey were the following;

- Almost 60% of respondents considered that section 41 was working in the interests of justice. Only 27% considered that it was not working.
- Not a single respondent considered that section 41 should be reformed to make it *more* restrictive.
- Only one respondent thought the trial judges were being insufficiently rigorous in their application of section 41.
- A number of respondents argued that section 41 was too restrictive.
- The data showed the troublesome overlap between previous sexual behaviour evidence under section 41 and bad character evidence under the English equivalent of our Criminal Justice (Evidence) Northern Ireland Order 2004. Observers in the courtroom may well believe that section 41 has been flouted when it has not, because the evidence has been admitted for a different legal purpose.
- Many respondents expressed concern that a widespread lack of understanding of section 41 and how it is applied in trial courts could deter complainants from coming forward to report sexual assaults to the police.
- 18.6% of complainants in the sample were the subject of section 41 agreements or orders and this ratio was likely to be significantly overstated due to the cautious methodology employed.
- Significantly, section 41 was most frequently invoked in applications to admit previous sexual behaviour evidence on grounds which did not pertain to consent and which these laws are designed to intercept on the ground of impermissible stereotypes.
- In 35% of the applications the time limits were breached largely on account of piecemeal and delayed prosecution disclosure.

8.14 Dame Vera Baird QC, Northumbria Police and Crime Commissioner, contends that 31.6% of adult female complainants in the above mentioned survey were the subject of section 41 applications compared to 5.3% of adult male complainants, thus supporting the Northumbria findings.

8.15 There is an apparently accepted, though not yet actioned by the England and Wales authorities, need to monitor the use of section 41. It is believed that

⁷ Hoyano, L. (2018) The Operation of YCJEA 1999 section 41 in the Courts of England & Wales: views from the barristers' row. An independent empirical study commissioned by the Criminal Bar Association Oxford: University of Oxford

the Ministry of Justice HMCTS digital reform programme will facilitate this monitoring.

- 8.16 In light of the conflicting surveys that have appeared and the manifest belief on the part of complainants and representative bodies that there is an over use of cross-examination on previous sexual history in Northern Ireland I recommend that a similar monitoring of the use of Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 be instituted.
- 8.17 Although there has been no similar published research on the matter in Northern Ireland, a Court Observers' Panel Project has been established similar to the Northumbria Court Observers Panel Project in England during 2015-2016. This Northern Ireland panel was set up under the aegis of stakeholders such as Victim Support NI, Department of Justice, PPS, NICTS, Nexus NI, Women's Aid Federation Northern Ireland, Law Society and CJINI. Made up of 6 women and 2 men this group will attend as neutral observers and as unpaid volunteers at Crown Court trials of a sexual nature during the autumn of 2018 onwards. The members of the panel have undergone training. One of the matters to be observed will be the occasions when previous sexual history is invoked in these trials. This should help inform the monitoring exercise I have recommended the Department of Justice should carry out.
- 8.18 The use of third-party evidence in the context of serious sexual offences has been a source of concern. There have been continued calls for (further) legislative reform in this area.
- 8.19 Most recently, proposals were made in parliament to strengthen the law following the controversial English Court of Appeal judgment in *Chedwyn Evans v R*⁸ where it was held that sexual history evidence relating to persons other than the accused was admissible and potentially relevant. Following a retrial, where this evidence was introduced, the defendant was acquitted of rape.
- 8.20 Nonetheless, more common today are judicial pronouncements disavowing the relevance of third-party evidence to consent. For example in *R v A*,⁹ Lord Clyde clearly stated that while some evidence of previous sexual behaviour with the defendant may be relevant to an issue of consent, he did not 'consider that evidence of her behaviour with other men should now be accepted as relevant for that purpose.'

8 *Chedwyn Evans v R* [2016] EWCA Crim 452

9 'In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape' per Lord Slynn of Hadley. *R v A* (No 2) 2001 UKHL 25

Other jurisdictions

- 8.21 It emerged from our research into this subject in Australia, Canada, England and Wales, New Zealand, Norway, Ireland, Scotland, South Africa, Sweden and the US that, internationally, this issue has been very challenging. It has been grappled with in largely similar ways, all investing courts with a discretion to allow such evidence in various circumstances and with various safeguards.
- 8.22 Although varying in formulation and scope across jurisdictions, restrictions on sexual history evidence aim to repudiate inferences about women's sexuality and credibility. They particularly seek to address the 'twin myths' that sexually active women are more likely to consent and that they make less credible witnesses. There is greater agreement (but not consensus) that third-party evidence is not relevant.
- 8.23 What was troubling was that across the globe, the research indicated that the problem is not so much the statutory regime adopted, but the failure of the Judiciary in the exercise of their discretion to apply the provisions sufficiently robustly or correctly. Illustrations include:
- The examples in England and Wales from the Northumbria Observers' Panel (see paragraph 9 above).
 - A New Zealand study found that questioning about the complainant's prior sexual history (including with third parties) was introduced in 43% of recent cases.¹⁰
 - Recent Scottish statistics reveal that applications to admit sexual history evidence have been made in 72% of sexual offence trials (one fifth relating to third parties) and only 7% of the applications were refused. Worryingly, this demonstrated an *increase* in the use of sexual history evidence following new reforms aiming to restrict this material.¹¹
 - In Ireland, a study of rape trials during 2003–09 found sexual history evidence was admitted in two thirds of cases (with a 70% success rate for applications), most commonly related to previous sexual activity with the accused, previous alleged false allegations and based on 'promiscuity/ routinely displays suggestive behaviour.'¹²

10 Zydervelt, S. et al. (2017) 'Lawyers' Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s?' 57 *British Journal of Criminology* 551–9, at 565 in [McGlynn, C. (2017) *Rape trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*. *Journal of Criminal Law* 2017 Vol.81 (5) 367-392]

11 Burmen, M. (2009) 'Evidencing sexual assault: women in the witness box.' 56 *Probation Journal* 379-398 in McGlynn, C. (2017) *Rape trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*. *Journal of Criminal Law* 2017 Vol.81 (5) 367-392

12 Rape Crisis Network Ireland (2012) 'Previous Sexual History Evidence and Separate Legal Representation: RCNI Position Paper' Dublin: RCNI in McGlynn, C. (2017) *Rape trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*. *Journal of Criminal Law* 2017 Vol.81 (5) 367-392

- 8.24 Precisely the same criticisms, justified or not, that have surfaced during my Review have emerged in our international research, despite the universal insistence on a test of relevance. They include use of previous sexual history:
- To undermine the complainant’s credibility; this may be introduced subtly or through innuendo. Research indicates that admitting such evidence increases the chance of the factfinder blaming the complainant.
 - To support inferences of consent; this undermines the notion that consent is person and situation specific. The defence may also use sexual history evidence to liken the events under scrutiny to ‘normal’ sexual behaviour.
- 8.25 In an effort to prevent this, a number of jurisdictions have enacted legislation that excludes sexual history as a general principle but defines strict circumstances where such evidence may be admissible. Canada is a good example of this.
- 8.26 The Criminal Code in Canada has received some academic praise for the way that it deals with previous sexual history. It is thus worth exploring in some detail. That Code states that no evidence shall be adduced that the complainant has engaged in sexual activity other than that which forms the subject matter of the charge with the accused or any other person unless the judge determines that the evidence:
- is of specific instances of sexual activity;
 - is relevant to an issue at trial; and
 - has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
- 8.27 In determining whether to admit sexual history evidence, the legislation requires the judge to take into account a number of factors. These include the interests of justice; society’s interest in encouraging reporting; whether there is a reasonable prospect that the evidence will assist in arriving at a just determination; the risk that the evidence may unduly arouse jury sentiments of prejudice, sympathy or hostility; and the complainant’s dignity and privacy.
- 8.28 Canada also provides an exception permitting the introduction of sexual history evidence on the basis of similarity of behaviour, albeit this is not allowed to be used to demonstrate consent.¹³
- 8.29 A leading Supreme Court case in Canada¹⁴ provided illustrative examples of admissible evidence, which must be established on a voir dire by affidavit or

13 McGlynn, C. (2017) Rape trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence. *Journal of Criminal Law* Vol.81, No. 5 pp. 367-392

14 R v Seaboyer [1991] 2 SCR 577

the testimony of the accused or third parties, showing that the evidence is legitimate. These include the following:

- evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
- evidence of sexual conduct tending to prove bias or motive to fabricate;
- evidence of prior sexual conduct known to the accused at the time, tending to prove that the accused believed that the complainant was consenting;
- evidence of prior sexual conduct meeting the requirements for the reception of similar fact evidence; such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness; and
- evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.

8.30 Two leading academics have praised the Canadian approach and have suggested that:

- If England and Wales, and, therefore, Northern Ireland, enacted similar provisions to those in place in Canada it would enhance the law and 'restore the notion of consent as being person and situation specific'.¹⁵
- The Canadian approach has advantages over comparable legislation in England and Wales, and Ireland. In particular, it specifies that the purpose of the restriction is to exclude irrelevant evidence and it offers detailed guidance around admitting such evidence and the factors to be considered in this regard. An Irish academic¹⁶ states:

"The refinement of the restriction in Canada offers an excellent example to other common law countries. Firstly, the clarity of the provisions makes the law easier for complainant's to understand and secondly its precision upholds the fair trial rights of defendants with due regard to the complainant's right to privacy and respect."

8.31 Having said all that, research in 2016¹⁷ found that some trial judges in Canada misinterpret or incorrectly apply the Criminal Code provisions in relation to sexual history evidence. This is due to a number of factors, including a misunderstanding among some judges regarding what the legislation requires and the influence of third-party restrictions.

15 McGlynn, C. (2017) Rape trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence. *Journal of Criminal Law* Vol.81, No. 5 pp. 367-392

16 Murphy, G. (2006) "The Admissibility of Sexual Experience Evidence in Ireland" *Irish Criminal Law Journal* Vol. 15, No. 4

17 Craig, E (2016) "Section 276 Misconstrued: The failure to properly Interpret & Apply Canada's Rape Shield Provisions" *Canadian Bar Review* Vol. 94 No.1 pp.45-83

- 8.32 In New Zealand there are firm third-party restrictions and the judge may allow such evidence to be adduced only where satisfied that it would be contrary to the interests of justice to exclude it.
- 8.33 In the US there are varying laws across States but Michigan's law is among the strictest: judges may admit such history only if they find the complainant's past sexual conduct with the accused or activity explaining physical evidence is material to a fact at issue and that its inflammatory or prejudicial nature does not outweigh its probative value.

Discussion

The McGlynn Proposals

- 8.34 A number of suggestions for change in this area have arisen during the course of the Review. I can summarise the gravamen of these arguments by leaning heavily on an arresting analysis of the issues by Professor Clare McGlynn in a recent paper.¹⁸ The main arguments are as follows.
- 8.35 First, the Canadian system has many benefits. It contains a clear statement that sexual history evidence may not be admitted to support inferences supporting the 'twin myths' – namely, that by reason of that sexual activity, it is more likely that the complainant consented or is less worthy of belief. Arguably this should be introduced into English law to restore the notion of consent as being person and situation specific rather than capable of being inferred from previous conduct. Such a legislative reform, therefore, would exclude any sexual history evidence with third parties that was seeking to infer consent.
- 8.36 This would bring English law closer to some other jurisdictions, such as Michigan, where all third-party sexual history evidence is excluded other than evidence of specific instances to show the source or origin of semen, pregnancy or disease.
- 8.37 Any amended legislation could also state that, as a matter of principle, such evidence should only be admitted in exceptional cases, helping to counter current practice.
- 8.38 Secondly, again following the Canadian practice, decision-making could also be improved by specifying the issues to be considered when determining an application to admit previous sexual history.
- 8.39 This approach would provide clarity regarding the varied purposes of the legislation and aims to ensure as thorough an examination of the issues as possible. Such a provision would be coupled with a procedural requirement that

18 McGlynn, C. (2017) "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" *The Journal of Criminal Law* Vol. 81, No. 5 pp. 367-392

a written explanation is provided of the grounds adopted, not just a reference to the criteria or, even worse, a citation of the relevant section of the Act.

- 8.40 Thirdly legislation should raise the threshold of admission before potentially highly prejudicial and distorting material is admitted.
- 8.41 Section 41 of the YJCEA (which is identical to Northern Ireland legislation) currently requires that evidence is admissible only if the 'refusal of leave might have the result of rendering unsafe a conclusion of the jury' or court, on 'any relevant issue' (section 41(2)(b)).
- 8.42 It is argued that this is a low threshold given the highly prejudicial nature of sexual history evidence compared with alternatives in other jurisdictions, for example, Canada, which provides that evidence may be admitted only if it has 'significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice'.
- 8.43 This Canadian provision emphasises that the risk of admitting such evidence imperils the proper administration of justice, and not only the privacy, rights and dignity of the complainant. The inclusion of such a provision, properly recognised and utilised, might go some way towards enabling judges to take a more robust approach without fear of appeals.
- 8.44 Fourthly, the granting of legal representation to complainants would help judges to arrive at a correct decision.
- 8.45 Fifthly, the scope of any restrictions is dependent on the definitions used, specifically the meaning of 'sexual behaviour'. Currently defined as 'any sexual behaviour or other sexual experience' (section 42(1)(c) of the YJCEA), this provision is potentially too broad. Courts in the UK have:
- excluded evidence of the complainant talking to and exchanging phone numbers with a third party where the defence had sought to imply this was preliminary sexual behaviour;
 - permitted cross-examination regarding two relationships with third parties, on the basis that these were questions about the 'relationships' and not 'sexual behaviour'; and
 - permitted text messages showing a 12-year-old girl participating in 'risqué conversations'.
- 8.46 A definition, therefore, which at least included such implied sexual behaviour, may go some way towards strengthening the restrictions on these forms of evidence.
- 8.47 Sixthly, there is widespread concern that sexual history evidence is permitted to demonstrate reasonable belief in consent, even where excluded on the grounds of actual consent.

- 8.48 Finally, the legislation should remove the current similarity exception on the dual grounds of the irrelevance of this form of evidence and its prejudicial effects. If the evidence is sufficiently probative and germane to a relevant issue in the trial, it will come within one of the other exceptions such as rebuttal evidence.
- 8.49 The less satisfactory option, but still arguably better than the present position, is to strengthen the current exception, ensuring that only conduct indisputably unusual, and, therefore, highly unlikely to be coincidental, be admitted. Even in such cases, the approach in Canadian law should be taken, such that similarity evidence is not permissible to demonstrate consent (or belief in consent). What should be required is a demonstrable pattern of highly distinctive and unusual sexual behaviour. A pattern requires a significant number of incidents, more than one or two, to be sufficient to demonstrate consistent and characteristic behaviour. The behaviour must be highly distinctive and unusual, and, therefore, closely resembling the activities which form the subject matter of the charge.
- 8.50 For the pattern to have any relevance or significant probative value, it would need to have a close temporal connection to the incidents alleged. Such an approach would return to the original Parliamentary intention of the 1999 Act and should arguably avoid the Evans trap whereby the more ordinary the behaviour, the easier it is to satisfy the similarity condition.

Other Proposals

- 8.51 It is argued by some that while all of the above McGlynn recommendations would create a significantly fairer and better law than at present, the enforcement of stronger procedural rules may have an even greater impact.
- 8.52 Even just requiring the existing rules to be followed would improve considerably the impact and effectiveness of the current law. The current rules do require written applications in advance, together with justifications and specifics of the evidence to be adduced.
- 8.53 A hearing is required if the prosecution is to challenge an application, where the judge so demands or the application is made less than 14 days before the trial. If there is to be a hearing, it is to be in private. While this sounds sensible, it means excluding the public, and the complainant is also excluded.
- 8.54 However, there is no requirement that late applications, nor indeed the reasons for granting or refusing the application, need be in writing. Nor are there any sanctions laid down for late applications. Home Office research¹⁹ found that, contrary to the requirements of advance and written notice, the 'vast majority' of section 41 applications took place on the first day of the trial.

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

- 8.55 This failure to follow the procedures demonstrates a worrying disregard for rules designed to ensure appropriate and effective scrutiny of applications. It suggests that the risks to the administration of justice are not sufficiently recognised, nor is there sufficient respect for the complainant, who deserves advance notice of evidence being adduced about their sexual behaviour.
- 8.56 Suggested reforms, therefore, include a stronger more rigidly enforced obligation for applications to be made pre-trial and in writing, with the prosecution required to respond to each application. A hearing should be mandatory to ensure a careful scrutiny of applications, with the complainant permitted to attend. Such a hearing will help to ensure that the prosecution actively consider (and challenge) the use of sexual history evidence.
- 8.57 There must be stricter scrutiny of any late applications (which should still be in writing) with them being accepted only where the evidence was demonstrably not available at an earlier stage. Judges should be required to give reasons for their decision in writing.

Conclusions

- 8.58 In this context, it is not difficult to understand how research evidence and witness testimony over decades have raised concerns about the extent to which rape complainants are facing humiliating and traumatic trial processes. Phrases such as the 'second rape' have become common parlance due to the persistent evidence from complainants of their adverse treatment in court.
- 8.59 As I found in my interviews with complainants, concerns about the trial process are contributed to by fear of their sexual past being publicly explored. These concerns are factors in the under-reporting and high attrition rates.
- 8.60 Accordingly, restrictions on sexual history evidence, by limiting evidence and cross-examination to only highly probative material, are justified by the need to reduce the humiliating and distressing nature of cross-examination in trials of serious sexual offences as well as protecting a complainant's right to privacy.
- 8.61 Nonetheless, there is a general acceptance that there remains some relevance for sexual history evidence, particularly regarding a past relationship with the accused. Striking an appropriate balance between ensuring the defendant's right to a fair trial and protecting the complainant often proves difficult and contentious.
- 8.62 Moreover, I remain convinced that Judicial discretion in relation to sexual history evidence must be the key feature in determining how best to resolve these difficult issues in the absence of evidence based research that this is proving inadequate in Northern Ireland.

- 8.63 I have not been persuaded that further legislation along the lines of the jurisdictions we have considered has in practice trumped our own system provided a robust Judicial approach is adopted to ensure firm implementation.
- 8.64 Considering each of the concerns raised above, my views are as follows.
- 8.65 First, I do not agree that third party evidence is in all instances inadmissible. However stricter scrutiny should be applied for applications for such third party evidence and it should be considered admissible only in relatively few cases.
- 8.66 Secondly, Article 28 (2) of the 1999 Order requires an application to adduce such evidence of previous sexual behaviour of a complainant to be made in writing. Judges should ensure that such applications are in writing, and importantly, contain the reasons in some detail for it being made. cursory or perfunctory compliance with this requirement should be rejected. The prosecution should respond also in writing.
- 8.67 Thirdly, I am not persuaded that there is any need to raise the threshold for admissibility as in Canada. It may be necessary to revisit this conclusion in light of evidence that may emerge as to the frequency of cross-examination about previous sexual history arising for example out of the Court Observer Panel project and the Departmental exercise I have recommended. However, currently I am assured by both counsel and Crown Court judges that in practice such cross-examination is very rare. The advent of legal representation on behalf of the complainants should ensure that this remains the case or indeed even reduces its presence. This would also give assurance to complainants. That being so, I have no reason to doubt that the current legislation to the effect that such evidence is only admissible if the refusal might have the result of “rendering unsafe” the conclusion of the jury is adequate. I emphasise that changes in my Review can only be recommended provided that there is an evidential basis in Northern Ireland for doing so.
- 8.68 I agree entirely with the arguments raised in favour of granting legal representation to complainants when it emerges that cross-examination about previous sexual history is to be an issue. (See chapter 5 of this Review).
- 8.69 It also seems to me that the current definition of sexual behaviour as including “any sexual behaviour or other sexual experience” is not inappropriate given the wide vista of circumstances that may arise in sexual encounters. It affords a sensible measure of flexibility to all highly experienced Crown Court judges. However, that is not to say that, once again, if it emerges that research reveals a more widespread indication of cross-examination of previous sexual history than is currently apparent, or there is inconsistency in the application, we should not revisit this aspect in the future.
- 8.70 I can again envisage very rare circumstances where previous sexual experience might be a factor in an honest but mistaken belief in consent. So long as that

remains a rarity – and I have no evidence that would suggest that it is otherwise - I see no reason for legislative change.

- 8.71 It seems to me that there is a strong case to be made that in so far as the similarity exception is permitted, that should only occur where the conduct is indisputably *so similar* - and not merely similar - that it is highly unlikely to be coincidental. I consider that this is an area where, in an appropriate case the Court of Appeal in Northern Ireland can be depended on to set out a clear analysis of what circumstances amount to appropriate similarity. At the moment there is some measure of confusion arising out of the apparently conflicting cases in England. That can only be resolved by what I confidently believe will be a clear analysis in our own Court of Appeal once a suitable case comes before it. If that court, in light of experience considers legislative change is necessary, I have no doubt it will not hesitate to say so. Once again I have currently no evidence base to question its application in Northern Ireland.
- 8.72 I am confident that the procedural and evidential problems surrounding this area of law can be met by a series of robust procedural measures that do not yet require legislative change. These amount to the following.
- 8.73 First, the highly complex, technical and evolving nature of these issues must be grasped. There should be a recognition generally that trials of serious sexual offences require particular knowledge, skills and abilities on the part of both the legal profession and the Judiciary.
- 8.74 Secondly, intense training, seminars and workshops should be provided to the Judiciary on this issue.
- 8.75 I note with approval that the Judicial Studies Board for Northern Ireland (JSBNI) has prioritised this issue. I recommend it to provide regular and updated training on issues relating to sexual offence trials and to ensure that all judges presiding over such trials have attended the appropriate training courses and seminars.
- 8.76 Appropriate resources need to be made available to the JSBNI to ensure that all Crown Court judges attend, in England, the appropriate prescribed Serious Sexual Offence seminars and courses. These attendances should not be “one off” measures but should embrace refresher courses on a regular basis.
- 8.77 Thirdly, at the pre-trial case management hearing and as part of strong case management of such cases, the defence should be required to state in open court whether it is intended to make an application under Article 28 of The Criminal Evidence (Northern Ireland) Order 1999.
- 8.78 Fourthly, in the event of a late application under Article 28 of the 1999 Order, contrary to the time limits set out in rule 44H of The Crown Court Rules (Northern Ireland) 1979, judges should firmly take full account of the earlier opportunity, the requirements of the rules, the potential impact on the complainant of a late application, and on police resource availability at short

notice. I recognise that the reason for such late applications is often connected with delayed disclosure to the defence and this is yet another reason why the whole approach to disclosure needs to be reassessed and expedited.

- 8.79 If such an application is granted, judges should actively limit questions and evidence to the minimum required.
- 8.80 In the event that cross-examination on previous sexual history occurs without permission, the judge should immediately intervene and consider whether the impact on the complainant and or the prosecution case is such that a retrial should be ordered.
- 8.81 Fifthly, counsel for the prosecution and for the defence should be required to attend specialist training in all areas pertaining to sexual offence trials. Legal aid should not be granted to counsel or solicitors in such cases unless such specialist training has been certified.
- 8.82 The Bar Council and the Law Society should insist on attendance at a sufficient number of Continuing Professional Development (CPD) sessions in vital areas of law, practice and procedure before competence can be demonstrated in areas of serious sexual violence.
- 8.83 Sixthly, the Judiciary, in the wake of the fresh emphasis on training, must introduce firm case management from an early stage with a strong emphasis on:
- upholding the statutory time limits for such applications for cross-examination on previous sexual history in the absence of compelling reasons for extension, disregard of the statutory procedure should not be readily overlooked;
 - ascertaining from defence counsel at pre-trial hearings whether such an application is to be made;
 - all late applications need to be in writing, together with full and comprehensive reasons as to why the application should now be granted being carefully set out;
 - a hearing to determine if cross-examination on previous sexual history is to be permitted should be mandatory in order to ensure a careful scrutiny of applications, with the complainant notified and permitted to attend; and
 - wherever possible, judges should give their reasons in writing.
- 8.84 Whilst I do not believe a complete prohibition on evidence about a complainant's sexual behaviour with a third party should be introduced, the Judiciary should recognise that there are strong reasons for imposing a narrower prohibition on the complainant's sexual behaviour with third parties. Evidence or questions about sexual behaviour with third parties should be much more carefully scrutinised and more difficult to justify on grounds of relevancy than

evidence about sexual behaviour with the defendant.²⁰ Once again, if there is evidence based data that such third party evidence is being regularly admitted then consideration to stronger legislation should be given.

- 8.85 As outlined in chapter 5, separate legal representation should be permitted for complainants when the defence apply to cross-examine about previous sexual history.
- 8.86 Lastly, in accordance with the need for all advocates to agree any matter possible for efficient trial management, I recommend that advocates should jointly seek, and judges should strongly encourage them, to devise ways of providing the jury with evidence which is properly admissible on previous sexual history without the defence having to confront the complainant with it in cross-examination. This can often be achieved by prosecution leading the evidence or referring to it in opening the case or by an agreed statement of facts.

Responses

- 8.87 Of the 420 respondents who addressed the recommendation through the online survey that children and vulnerable complainants should have pre-recorded cross-examination on video before trial, 90.5% were in favour (94.5% of women and 82.8% of men).
- 8.88 The written responses revealed two clear schools of thought on this issue which had emerged during the course of the Preliminary Report.
- 8.89 On the one hand, there is the view held by the legal professionals namely the Bar Council of Northern Ireland, the Law Society and Ms Hoyano BL, as part of the report published by the Criminal Bar Association in England and Wales,²¹ which essentially concludes that:
- The admission of previous sexual behaviour evidence remains very exceptional.
 - That when it is admitted, it is for a specific evidential target deemed to be relevant by Parliament.
 - Successful applications are on narrow points which could be covered very briefly and did not authorise wide ranging cross-examination and sexual history.
 - That trial judges and prosecuting counsel are vigilant to ensure that every effort is made to avoid causing the complainant unnecessary distress whether through adducing the evidence by means other than cross-examination or through questioning confined to the specific point.

20 R v A (2001) UKHL 25

21 Hoyano, L. (2018). The Operation of YCJEA 1999 section 41 in the Courts of England & Wales: views from the barristers' row. An independent empirical study commissioned by the Criminal Bar Association Oxford: University of Oxford

- 8.90 The Bar Council in Northern Ireland emphasised that counsel are generally cautious in respect of applications of this nature and that judges are typically strict in limiting and defining what can be asked.
- 8.91 The Bar declare that whilst it is aware that concern has been expressed publicly by some “support organisations representing complainants in respect of cross-examination of previous sexual history. These organisations have typically not been present in pre-trial hearings when such matters are determined and it is likely that education and more informed communication with the Bar would be of some assistance.”
- 8.92 This echoes the view of the Criminal Bar Association in England who indicated that there may well be confusion between evidence admitted as bad character evidence under the quite separate provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 and evidence about previous sexual history. Observers in the courtroom might not appreciate the clear legal distinction.
- 8.93 The Law Society express the view that whilst robust case management is welcome, it is believed that the Judiciary are able to deal with cross-examination issues on previous sexual history should they arise.
- 8.94 The rival school of thought is that expressed by virtually all of the victim representative groups’ who of course have spoken widely to all those complainants who have been through the process.²² Moreover it also reflects the views of a large number of complainants to whom we spoke who indicated that fear of being cross-examined on previous sexual history was a major deterrent to involvement in the criminal justice system. The general points made were that:
- Despite all attempts to restrict the use of sexual history evidence, it continues to be admitted in a large number of cases leading to many complainants feeling that they are subjected to a second or Judicial rape following their treatment in court. The Women’s Regional Consortium carried out a small survey which revealed that 73% of women thought a victim’s previous sexual history should not be allowed at all.²³
 - Their previous sexual history was admitted in the wake of a lack of Judicial intervention.²⁴
 - Restrictions are being ignored in practice causing a devastating and humiliating experience.²⁵

22 For example Women’s Aid Federation Northern Ireland; Women’s Regional Consortium; Belfast Feminist Network; EVAW.

23 Women’s Regional Consortium.

24 Victim Support NI who were basing their view on a response to an online survey that they carried out.

25 Response of the Belfast Feminist Network.

- Admission is happening all too often and a fear of this is discouraging reporting or engaging in the trial process.²⁶

8.95 This also reflects the view of a number of the public representatives to whom we spoke, namely that more robust Judicial attitudes to restricting such cross-examination is required.²⁷

8.96 The concerns of these bodies found expression in the response of Dr Olivia Smith who strongly supported Professor McGlynn’s analysis as set out earlier in this chapter and expressed disappointment that I had not adopted the approach of that distinguished academic. She urged that I should revisit my proposals in light of the responses of the Observers Panel Pilot Scheme in Northern Ireland.

8.97 Dame Vera Baird QC, who as indicated earlier in this chapter had challenged the Criminal Bar Association conclusions, reiterated concern that the original intention of Parliament that the previous sexual history evidence should only rarely be admitted is neither being monitored nor in practice being effected. Whilst she agreed with all of the recommendations which I have made, she went further and said that the Canadian approach should be adopted, namely that:

- judges need to consider certain other factors before allowing an application;
- specifically, consideration should be given to society’s interest in encouraging reporting;
- consideration should be given to whether the evidence is seeking to elicit prejudice, sympathy or hostility from the jury; and
- the complainant’s dignity and privacy should be a factor.

8.98 The argument was made that the introduction of previous sexual history evidence, if not always introduced to attack a complainants credibility in the eyes of a jury, is still capable of having that effect by relying on “archaic but still commonly held perceptions about women and sexuality” and so its use must be carefully scrutinised.

8.99 To some extent this illustrated a very helpful academic response from Scotland²⁸ who contended that the prejudicial effects of previous sexual history can never be directly outweighed and probative value cannot be reasonably ascertained pre-trial because its effect is dependent upon all the evidence on that issue. In other words once evidence of previous sexual history is adduced, it is difficult if not impossible to assess, manage and control any associated prejudicial effect. He argues that the effect of the prejudice is likely to be an exaggeration of the probative value of the evidence.

26 Response of Women’s Aid Federation Northern Ireland.

27 Response of the SDLP & Belfast City Council.

28 David Lorimer BSc LLB LLM who is a PhD researcher at Aberdeen University where the subject of his thesis is “Protecting complainers in Sexual Offences: Next Steps for Scotland”.

- 8.100 Two other helpful responses were put before me. First, the current right to a prosecution appeal is limited to circumstances where the ruling is a terminating rule, i.e., the outcome being that the case can no longer proceed pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2004. That is a longstanding decision by Parliament which should not be subverted by this one issue of previous sexual history. I am no longer persuaded that there should be an additional right to appeal a decision to introduce previous sexual history. It would be a wholly new concept of appeal on this interlocutory matter for a complainant. I therefore am satisfied that decisions affecting the trial, including a decision to appeal any ruling, should remain those taken by the PPS in line with the provisions of Article 17 of the 2004 Order.²⁹
- 8.101 Second, the Attorney General considered that the recommendation that the Court of Appeal in Northern Ireland should avail itself of the earliest opportunity to address the issue of the circumstances in which similarity arises would be more constitutionally addressed by the legislature. I am not persuaded of this. There have been instances in the Court of Appeal in England where the matter has been addressed but perhaps not with the clarity for which practitioners had hoped. I am satisfied that the Court of Appeal in Northern Ireland, armed with the earlier experiences, would be in a position to provide that clarity. Obviously if this proved beyond its reach or if the court itself determined that legislation was necessary, that avenue could be then pursued.

Conclusion

- 8.102 I am very conscious of the two schools of thought that operate in the realm of cross-examination on previous sexual history. There is no doubt that there is a fairly widespread perception amongst complainants and members of the public that cross-examination on previous sexual history will frequently occur and present yet another daunting hurdle contributing to a reluctance to engage. The question arises however as to whether this perception is misplaced and potentially misunderstood. I consider that the recommendations I have made attempt to bridge the gap between the two views in a measured fashion. However I believe that this is an issue that needs to be resolved with some degree of empirical research as has occurred in England and Wales. Hence my first recommendation is that the Department of Justice should carry out an exercise to determine the extent of the admission of previous sexual experience in trials in Northern Ireland which, when taken alongside the reports from the current Court Observers Panel scrutiny, should provide a basis to consider if more serious legislative intervention is required.

Recommendations

89. The Department of Justice should carry out an exercise to determine the extent of admission of previous sexual experience in trials in Northern Ireland. Legislation concerning admission of previous sexual experience should be revisited in light of such an exercise.
90. There should be a greater emphasis on firm judicial case management in this area, with recognition of the statutory time limits for such applications under Article 28 of The Criminal Evidence (Northern Ireland) Order 1999.
91. There is a need to invite defence advocates to state in open court at a pre-trial hearing whether it is intended to make an application under this Article.
92. All late applications must be in writing, together with the proposed reasons why the court should grant or refuse the application.
93. There should be mandatory hearings for such applications, with the complainant notified and permitted to attend.
94. Wherever possible, the Judiciary should give reasons in writing when determining such applications.
95. In the event of a late application under Article 28 of The Criminal Evidence (Northern Ireland) Order 1999, contrary to the time limits set out in rule 44H of the Crown Court Rules, the Court should take full account of the earlier opportunity, the requirements of the rules, the potential impact on the complainant of a late application, and on police resource availability at short notice.
96. The Judiciary should actively limit questions and evidence on previous sexual history to the minimum required.
97. The Judiciary should recognise that there are strong reasons for imposing a narrower prohibition on the complainant's sexual behaviour with third parties than with the defendant.
98. Intense training, seminars and workshops should be provided to the Judiciary on this area of law.
99. Appropriate resources to be made available to the Judicial Studies Board for Northern Ireland (JSBNI) to ensure that all Crown Court judges attend in England the appropriate prescribed serious sexual offence seminars on a regular basis.
100. Advocates for the prosecution and for the defence should be required to attend specialist training in all areas pertaining to sexual offence trials. The Bar Council and the Law Society should insist on attendance

at a sufficient number of CPD sessions in vital areas of law, practice and procedure before competence can be demonstrated in areas of serious sexual violence.

- 101.* Legal aid should not be granted to counsel or solicitors in such cases unless such specialist training has been certified.
- 102.* Legal aid for legal representation should be extended to complainants in this area.
103. The Court of Appeal in Northern Ireland should avail itself of the earliest opportunity to address the following issues under the Criminal Evidence (Northern Ireland) Order 1999:
 - the circumstances in which “similarity” arises;
 - the appropriate definition of sexual behaviour; and
 - the circumstances in which sexual relations with a third party can be explored in cross-examination.
104. Trial judges and prosecuting counsel should make efforts to avoid causing complainants unnecessary distress wherever possible by adducing admissible evidence of previous sexual history by a means other than cross-examination or through brief questioning confined to the specific point.

Chapter 9

Delay

Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay “causes great harm to public confidence in the justice system” ... It “rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system.”

R v Jordan (2016)¹

Issue

Can the problem of increasing delay in processing serious sexual offences be solved?

Current law and practice

- 9.1 Delay in the criminal justice system in Northern Ireland, and in serious sexual offences in particular, has reached a tipping point where not only those inside the system but the general public and the mainstream press are demanding solutions. The injustice of current delay in the system is intolerable. It needs urgent reform and is a key component of this Review.²
- 9.2 Committal proceedings are the procedure used to determine whether there is sufficient evidence to justify putting a person on trial in the Crown Court. Committal reform featured in the Justice Act (Northern Ireland) 2015. The explanatory notes for the Act outlined the difficulties with the committal procedure in Northern Ireland as follows:
- “Proceedings can be in the form of oral evidence, where witnesses can be cross-examined, or as a paper exercise, carried out based on written statements and evidence. The practice of hearing oral evidence, particularly cross-examination, can have a significant impact on victims and witnesses, who may have to give (sometimes traumatic) evidence more than once. Oral evidence hearings can also be very lengthy, with hearings typically lasting 1-2 days, and problems are often experienced in organising witnesses to attend, which can lead to small adjournments and consequently increase delay in the magistrates’ court before the case can be sent to the Crown Court. They can also be costly to the legal aid fund.”³
- 9.3 Part 2 of the Justice Act (Northern Ireland) 2015 created measures to reform procedures around the taking of oral evidence and cross-examination of witnesses in committal proceedings, so that such evidence was only to be

1 R v Jordan [2016] 1 S.C.R. 631

2 Criminal Justice Inspection Northern Ireland (2018) Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland. Belfast: Criminal Justice Inspection Northern Ireland, records “This report concludes that the criminal justice processes in Northern Ireland for handling these cases take too long, are too expensive”.

3 Justice Act (Northern Ireland) 2015 c. 9: Explanatory Notes

given where, in the opinion of the court, it was required in the interests of justice. Powers were also introduced to allow direct transfer to the Crown Court of cases in which there is a guilty plea as well as direct transfer for certain indictable offences, beginning with murder and manslaughter cases, but including a provision where the Northern Ireland Department of Justice (DoJ) could amend the list of specified offences at a future date.

- 9.4 The Assembly's Committee for Justice in Northern Ireland in December 2016 considered that domestic and sexual violence cases should be high on the list for consideration for direct transfer.
- 9.5 The DoJ has prepared a further Bill to complete reform of committal proceedings, which would make provision for the abolition of Preliminary Investigations (PIs) and mixed committals. At present, written depositions of witnesses, and other evidence, are taken or given in the presence of the accused, and the accused is at liberty to cross-examine any witness for the prosecution before a district judge. Mixed committals are where not all the evidence is called.
- 9.6 In this jurisdiction, the Criminal Courts Judicial Committee had, as its primary focus, the efficient management of cases coming before the criminal courts for the benefit of all participants, thereby ensuring that cases were disposed of fairly, justly and expeditiously. Case management protocols for both the Magistrates' courts and Crown Courts were intended to be more than a vade mecum, but rather a minimum standard to which all practitioners would adhere.
- 9.7 The Indictable Cases Process (ICP) scheme,⁴ which currently does not include serious sexual offences, has been rolled out across Northern Ireland and is dealt with below.

International Standards

- 9.8 Article 6 of the European Convention on Human Rights (ECHR) — the right to a fair trial — provides the right to a fair hearing within a reasonable time:
- “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
- 9.9 The European Court of Human Rights (ECtHR) notes that the reasonableness of the duration of proceedings should be determined based on an overall assessment of each case. In cases where certain stages are conducted at an acceptable speed, the total length of proceedings may exceed a 'reasonable time'.

⁴ Originally called the Indictable Cases Pilot scheme when it was launched in the County Court Division of Ards. Since the end of the pilot it is now referred to as the Indictable Cases Process scheme.

- 9.10 The ECtHR further observes that a fair balance has to be struck between the various aspects of this requirement in terms of an expeditious trial and the proper administration of justice. In determining cases, the court has had regard to a range of factors, including the case's complexity (for example, where there are multiple defendants), the applicant's conduct (such as seeking to delay the investigation) and the conduct of the administrative and judicial authorities.

Background

Statistics

- 9.11 The statistics on delay are very troubling. Whilst direct comparisons between performances and outcome statistics in Northern Ireland and those in the Crown Prosecution Service in England can be difficult due to different processes and counting arrangements, nonetheless it is clear that the criminal justice system in Northern Ireland is slower than in England and Wales, with cases taking twice as long to complete. The overall time taken⁵ for sexual offence cases in the Crown Court in Northern Ireland, based on the principal offence, reveal that the overall average time for dealing with serious sexual offences has been increasing since 2014/15 (708 days) to 859 days in 2017/18 — a 21% increase.
- 9.12 The average time taken for rape cases⁶ dealt with in the Crown Court has increased by 14% between 2015/16 and 2017/18, from 827 days to 943 days, according to DoJ figures. The 943 days average in 2017/18 for rape cases is 69% longer than the overall Crown Court average (558 days). We have had numerous complainants emphasising the troubling nature of the delay. One complainant in a complex historical abuse case spanning two jurisdictions alleged to me that they are still awaiting a decision by the PPS 39 months after their initial report to the police. The average time taken for sexual offences excluding rape⁷ in the Crown Court has increased by 22% since 2015/16 from 687 days to 839 days in 2017/18.
- 9.13 The largest percentage increase between 2014/15 and 2017/18 at the interim stage for all sexual offence cases in the Crown Court was shown to occur at offence reported to charged/informed date, with average time increasing by 56% to 184 days.
- 9.14 In 2017/18 the longest average number of days at interim stage for all sexual offence cases in the Crown Court was 292 days from first court appearance to court disposal date.

5 From offence reported to case dealt with at court.

6 Based on the principal offence disposed and relate to substantive versions of the offence only.

7 Based on the principal offence.

9.15 The average⁸ time taken from offence reported to case dealt with at court, from 2014/15 to 2017/18, in terms of days in Crown Court cases was as follows:

Crown Court cases	2014/15	2015/16	2016/17	2017/18
All cases	476	515	584	558
All sexual offence cases	708	737	775	859
Sexual offences against children	598	708	730	986
Rape cases	862	827	921	943
Sexual offences excluding rape	686	687	744	839

9.16 For sexual offences involving children⁹ in the Crown Court (based on the principal offence), the overall average time has increased by 65% between 2014/15 (598 days) and 2017/18 (986 days).

9.17 For sexual offences involving children, the largest percentage increase between 2014/15 and 2017/18 at interim stage was shown at offence reported to charge/informed date, with average time increasing by 60% to 196 days.

9.18 For sexual offences involving children in 2017/18, the longest average number of days at interim stage was spent from first court appearance to court disposal date: 292 days.

9.19 The following additional statistics emerged from The Northern Ireland Audit Office Report¹⁰ published in March 2018:

- 12% — proportion of Crown Court cases that took over 1,000 days to complete between 2011/12 and 2015/16;
- 6.5 — average number of adjournments experienced by victims, defendants and witnesses in Crown Court cases; and
- 46% — proportion of victims and witnesses surveyed by the Department of Justice who felt the justice system was effective.

9.20 The Public Prosecution Service (PPS) informed the Review that during 2017/18 indictable prosecution decisions in respect of sexual offences were issued in an average of 285 calendar days. This compared with 229 days during 2016/17. This inordinate delay, where files can await allocation for 70 days, is primarily due to inadequate resources.

9.21 The PPS, in their response to the Preliminary Report, indicated that this delay arises from a number of pressures. These include a continual increase in sexual

8 Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.

9 Please note that these figures are based on the principal offence. The number of cases are therefore probably smaller than the overall number of cases of this type that go through the system each year. For those involving children information relates to where the offence description specifies involvement of a child.

10 Northern Ireland Audit Office (2018) *Speeding up justice: avoidable delay in the criminal justice system* Belfast: Northern Ireland Audit Office

offence file volumes (21% in 2017/18), the fact that prosecutors in the Serious Crime Unit adopt a “case building” approach, identifying opportunities to strengthen the available evidence in weaker cases, reviewing extensive third party material prior to decision in the majority of rape cases, dealing with the exponential rise in digital material, which has to be examined both for the purposes of identifying admissible evidence and to comply with disclosure obligations.

- 9.22 Various interim measures have been taken by the PPS to reduce avoidable delay, including the introduction of the Sexual Assault Clinic Model and the establishment of two Project Teams to reduce queues. However, a more permanent solution is required. The Unit’s operation was independently reviewed by Business Consultancy Services during autumn 2018. Recommendations regarding options for a future model will be presented to the PPS Management Board in early 2019.
- 9.23 We investigated the portion of time that was taken up by forensic examination (excluding the cybercrime unit) in relation to the forensic biology examination of rape and other sexual offences and their associated ‘priority’.
- 9.24 This data, for the last three financial years, shows that for all sexual offence cases the mean turnaround (in calendar days) stands at 77 days and the median at 72 days; 12% of cases had urgent examinations carried out and 5% of cases were priority cases.¹¹
- 9.25 These turnarounds are measured from the date of the first submission of items to Forensic Science Northern Ireland (FSNI) until the case is closed and takes no account of subsequent later submissions, which may delay the production of the final report and closure of the case.
- 9.26 Our visit to the cybercrime unit revealed that it has a system of prioritising cases that come in and serious sexual offences are high on the list. However, lengthy delays can occur depending on the number of enquiries that have to be made, and at times the fact that encrypted material has to be sent to specialised services in London.
- 9.27 Committal proceedings are often blamed for unnecessary delay. The number of committal proceedings in which a Preliminary Investigation (PI) or mixed committal is a feature is very low.
- 9.28 Northern Ireland Courts and Tribunals Service (NICTS) statisticians provided the following figures:
- in 2015, there were 171 committals for sexual offences; there was a mixed committal in two cases and a PI in three cases;

- in 2016, there were 171 committals for sexual offences; there was a mixed committal in four cases and a PI in six cases; and
- in 2017, there were 127 committals for sexual offences; there was a mixed committal in seven cases and a PI in three cases.

9.29 An additional feature of cases involving serious sexual offences which contributes to delay is that defendants are less likely than in other types of offences to plead guilty. Judicial statistics indicate that in 2016, 38% of all defendants made a plea of guilty on all charges whereas PPS statistics regarding Crown Court outcomes for defendants charged with sexual offences suggest that this figure was only 32% in 2016 and dropped to 21% in 2017. This inevitably means that the prosecutor is preparing the case in anticipation of a contest from the outset.¹²

Reports on delay

9.30 There have been a number of reports dealing with the delay within the system. Failure on the part of agencies has been regularly identified as a cause of delay by those reports.

9.31 Since 2006 there have been several independent reports, particularly by the Criminal Justice Inspection Northern Ireland (CJINI) on delay, which have been critical of overall performance and identified a number of issues. CJINI is an independent inspectorate with responsibility for inspecting all aspects of the criminal justice system in Northern Ireland apart from the Judiciary.

9.32 CJINI have published a number of inspection reports dating back over ten years, which have considered the topic of avoidable delay, including the quality and timeliness of police files. These have continued to raise concerns about avoidable delays in the criminal justice system. The Indictable Cases Pilot followed a CJINI report provided to the Lord Chief Justice in 2014.

9.33 The 2015 CJINI Inspection Report¹³ into police file quality called for greater collaboration between the PSNI and the PPS to address significant failings in the preparation of case files and the standards applied around disclosure. At that time the inspection found one third of case files were either of an unsatisfactory or poor standard. That report recommended, amongst other things, a need for the two bodies to establish a prosecution team which would work collaboratively to deliver a Joint Transformation Programme to deal with investigative standards, case management and disclosure.

12 Criminal Justice Inspection Northern Ireland (2018) Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland. Belfast: Criminal Justice Inspection Northern Ireland at paragraph 5.7

13 Criminal Justice Inspection Northern Ireland (2015) An inspection of the quality and timeliness of police files (incorporating disclosure) submitted to the Public Prosecution Service for Northern Ireland Belfast: Criminal Justice Inspection Northern Ireland

- 9.34 Troublingly however, the recent inspection of November 2018 found that the submission of files to the PPS was in accordance with PSNI time limits in only 41% of cases and the PSNI acknowledged that delay was a significant issue for the Public Protection Branch. In file samples from the PPS, just over a third of cases required a Decision Information Request to PSNI prior to the decision being taken by the prosecutor.
- 9.35 The review of prosecution case files considered the quality of the police file received by the PPS and the findings replicated the judgments of the 2015 inspection. Of 77 PPS files, 13% were assessed as good, 58% were fair and nearly a third were assessed to be poor albeit these files were not specific to sexual crime offences and the PPS Serious Crime Unit had not yet been introduced.
- 9.36 Since the 2015 report, only two new forms have been developed, agreed and rolled out to enable officers to provide the PPS prosecutor with an outline of the case in a pre-determined format more efficiently and effectively than had been done previously. Unfortunately, Inspectors were advised by PPS prosecutors that these forms were often not completed appropriately, with details missing or scant information provided, or that one or other, or in some cases both forms, were not completed at all.
- “Police officers did not appear to understand the purpose or need for these forms, or appreciate that they were intended to enable them to submit a file in a more effective manner, cutting down on requests for further information from the prosecutor.”
- 9.37 In short, the file reviews for the 2018 inspection suggested that between a quarter and a third of files were still in need of improvement. I agree entirely with the recommendation from the 2018 CJINI that PSNI and PPS must refocus on the “Working Together” project in order to assess the issues raised in the 2015 CJINI Inspection Report and fulfil the recommendation concerning the Joint Transformation Programme, particularly since the files mentioned in paragraph 35 above, had not yet been subject to that project.
- 9.38 In making this criticism of the PSNI, I recognise, as did the CJINI Report of November 2018, that officers in both the Rape Case Unit and the Child Abuse Unit continued to have large caseloads, compared to other forces, and as a result there is bound to be delay in progressing investigations largely due to a resource problem.
- 9.39 Lack of collaboration, the need for all agencies to work in partnership and a failure to complete cases within reasonable timescales were again themes of the Northern Ireland Audit Office Report, *Speeding up Justice: Avoidable Delay in the Criminal Justice System*, published in March 2018. This report focused on how effectively the four main justice organisations in Northern Ireland have worked together to deliver criminal justice: namely, the Police Service of

Northern Ireland, the Public Prosecution Service, the Northern Ireland Courts and Tribunals Service and the Department of Justice.

9.40 The main findings were as follows:

- First, key causes of delay are weaknesses in the early stages of investigations. The progress of cases through the system is punctuated by practices and processes that are not efficient and work against the timely delivery of justice. The inability of justice organisations to commit fully to a collaborative model of delivery underlies this situation, with no common performance framework.
- Secondly, in addition to the impact upon victims, defendants and witnesses, there is a significant financial cost of avoidable delay. However, justice organisations are not currently able to quantify the financial cost of delay. Attempts to improve performance are not supported by a detailed financial analysis to quantify the expected costs and benefits.
- Thirdly, in the last two years, there have been renewed efforts to tackle avoidable delay and improve performance. The Indictable Cases Pilot (see later in this chapter) delivered improvements in investigation and prosecution performance. Its principles are currently being tested on a wider scale.
- Fourthly, successful reform would contribute to:
 - faster end-to-end times for the completion of cases;
 - higher-quality investigation and prosecution files;
 - stronger arrangements governing working practices at key interfaces between organisations;
 - fewer adjourned hearings and trials at court; and
 - earlier guilty pleas by defendants.
- Fifthly, more work is needed to develop a fully functioning partnership throughout the justice system. This will require behavioural change, supported by effective collaboration within the Criminal Justice Board (CJB) and the Criminal Justice Programme Delivery Group (CJPDG). This includes establishing clear lines of accountability, quality information systems and a transparent reporting framework with continuous review occurring.
- Sixthly, the criminal justice system in Northern Ireland does not deliver value for money. The cost of criminal justice in Northern Ireland is significantly higher than in England and Wales, with no additional benefit arising. Cases take considerably longer to complete than in England and Wales.

9.41 Six specific recommendations, all of which I strongly recommend, were made:

- the Department, in consultation with the Lord Chief Justice, should ensure that adequate administrative support is provided to the Judiciary to facilitate

more effective management of cases and case progression in the Crown Court. This is a key recommendation and one that I strongly support;

- the Department should establish an effective system for monitoring the implementation of CJINI's recommendations to support improvement;
- the Department should establish an action plan and timetable for the eradication of the committal process;
- the CJB, working with the CJPDG, should focus on securing effective collaborative working to reduce avoidable delay in the management of cases;
- the CJB, working with the CJPDG, should take a lead in developing and implementing protocols around the sharing of performance and financial management information between justice organisations; and
- the CJB, working with the CJPDG, should establish processes that ensure that performance is analysed consistently and that lessons that can deliver performance improvements are learned and shared across the system.

9.42 Supervision of investigations has also been a problem. A recent report by HMICFRS published in 2018 regarding the effectiveness of the PSNI¹⁴ also raised an area for improvement stating:

“The PSNI should improve its supervision of crime investigations, particularly in those cases investigated by uniformed officers.”

9.43 The CJINI report of November 2018 emphasised precisely the same point stating at paragraph 3.70:

“Inspectors would emphasise again the need to address the recommendation [made by CJINI in 2015] that the PSNI should provide further support (including training and mentoring) to supervisors whose role it is to approve the forwarding of case files to the PPS.”

9.44 The evidence of this report records that there continues to be delays in submitting files to the PPS. In the police file review it emerged that there was effective supervision in 53% of the cases; there was limited, but appropriate, supervision in 16%; there was ineffective supervision in 29%; and no evidence of supervision in 2%. Such figures need to be addressed urgently.

Indictable Cases Pilot (ICP) scheme

9.45 The ICP scheme was designed at the behest of the Criminal Justice Programme Delivery Group in response to a report into delay in Crown Court cases commissioned by the Lord Chief Justice. The pilot was launched on 2 January 2015 and includes all indictable cases arising in the County Court Division of Ards.

14 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (2018) PEEL: Police efficiency 2017: An Inspection of the Police Service of Northern Ireland London: HMICFRS

9.46 Key elements of the ICP process included:

- improved investigative pathways with more structured and proportionate file preparation;
- early engagement between PPS and PSNI to agree proportionate file preparation and early engagement with defence to discuss early guilty pleas or agree times of defence matters in issue;
- clearer file standards and effective management and supervision of processes;
- a sentencing statement at police interview stage highlighting the benefits of entering a plea at the earliest opportunity;
- early PPS advice to the PSNI on charging;
- the provision of a case outline to facilitate earlier disclosure to the defence;
- narrowing of the issues in contest cases;
- robust judicial case management; and
- a more structured approach leading to clearer opportunities to enter a guilty plea.

9.47 I pause to observe at this stage that all the key elements of the ICP process would be of inestimable value in arresting continuing and unacceptable delay in serious sexual offence cases.

9.48 Critical success factors identified for the Pilot were: more proportionate case preparation; shorter investigations including earlier submission of forensic evidence; a greater number of earlier admissions of guilt/earlier guilty pleas; robust case management; fewer remand hearings; fewer withdrawals/reduction in the rate of cracked trials; shorter proceedings overall; and improved victim/witness satisfaction.

9.49 There was a general consensus that the Pilot principles should be continued in some form or other and specific ideas/areas were highlighted to explore, which could be added to or enhance the pilot's features, with the possibility of a 'special discount' for 'really early' pleas as a further possible element to reinforce the ongoing work.

9.50 The Indictable Cases Process notes that during the pilot stage, the ICP achieved:¹⁵

- 67% reduction in combined police investigation and file submission time;
- 89% reduction in PPS decision-making time; and
- 49% reduction from PPS decision to committal date.

9.51 The Pilot has now been converted into a complete roll-out across Northern Ireland since May 2017. However, serious sexual offences are not included in

15 Based on PPS data for the first 100 cases dealt with under the Pilot.

the scheme. The PPS assert that sexual offences were not selected for inclusion in the ICP for a number of reasons, which they attest are as follows:

- The Pilot revealed that serious sexual offences were usually contested thereby precluding engagement with the PSNI or defence to limit the investigative requirements or to narrow issues. I fail to understand this point. The whole purpose of engagement with the defence, particularly where matters are to be contested, is to narrow the issues, agree what evidence can be agreed and then proceed to have the case contested on the live issues if necessary.
- There was no evidence that in following the ICP process there was reduced avoidable delay in serious sexual offence cases. In my view if the recommendations I have made about the processing of these matters is followed, inevitably there would be a reduction in delay particularly where there is meaningful engagement with the defence at an early stage.
- The ICP was rolled out to those offence types in which the greatest reduction in delay had been achieved during the Pilot phase in order to maximise resources. It seems extraordinary to me that the ICP, with all the advantages which it has in order to reduce delay, should not be applied to the very area where delay is greatest.

- 9.52 As at the end of January 2019, 438 cases had been flagged up as meeting the criteria to process cases under the ICP scheme. As at December 2018, 75 ICP cases had concluded.¹⁶ I consider that the paucity of cases concluded in the course of a year, suggests that there is ample room for greater implementation of this ICP and I can conceive of no circumstances in which serious sexual cases would not benefit from the key elements of the process as set out in paragraph 46. This is a scheme with real potential to reduce delay and resources must be provided to ensure that it succeeds in the arena of serious sexual offences.
- 9.53 The PPS asserts that additional work is created through the implementation of pilot principles. This includes telephone and face-to-face consultations with the PSNI, court attendance, particularly at the committal stage, engagement with the defence, engagement with other agencies such as the Probation Board for Northern Ireland (PBNI) and drafting statements of facts. This is an area that may require closer examination in light of resource issues within the PPS.
- 9.54 Additional concerns were reported pertaining to the non-engagement of the defence at an early stage and delays whilst the defence awaited decisions on legal aid entitlements. Also, the lack of an agreement to obtain speedy access to medical information did create delays in one case. Such issues, whilst they clearly have the potential to impact on the development of a case, are precisely

the matters, which the recommendations that I make later in this chapter will address with active robust judicial case management invoked at an early stage.

- 9.55 The Judiciary expressed the view that early PPS involvement resulted in more accurate charging. This again would be a valuable development in serious sexual offence cases.
- 9.56 This in turn should help to avoid cracked trials during later stages of the process. It was also felt that more accurate charging would have a knock-on benefit of reducing PPS time in court.

Other jurisdictions

- 9.57 Internationally, many jurisdictions are implementing reforms in an effort to reduce inefficiencies and delays. Of all the researches into other jurisdictions on the issues set out in the other chapters in this Review, none found such a complete mirror image with Northern Ireland with identical problems of delay and failed solutions.
- 9.58 The research suggests that internationally there are few if any examples of system-wide reforms with measurable and sustainable outcomes in terms of completely solving the problem of delay. Some jurisdictions have highlighted the need to persuade stakeholders of the potential benefits of reform, and have considered introducing, or have introduced, formal measures or sanctions to encourage compliance with reforms.
- 9.59 This Review has looked at this problem of reducing delay in Australia, Canada, England and Wales, Germany, Iceland, Ireland, New Zealand, the Netherlands, Norway, Scotland and South Africa. Information was not found on effective approaches to reducing delay in France, Sweden or the US.
- 9.60 It may be a helpful guide to what we should do in Northern Ireland to list the common issues that have arisen in these disparate jurisdictions.

Causes of delay in other jurisdictions

- 9.61 At the investigation stage the causes of delay include the complexity of the case, the number of witnesses to be interviewed, examining CCTV, and forensic and scientific analysis.
- 9.62 Poor case management by the police, ineffective investigation techniques and poor information management are other common key factors. Research highlights the need for improving this stage of the process through timely and successful completion of police investigations and submission of accurate and complete reports to prosecutors.
- 9.63 Inadequate communication between police and prosecutors, and prosecutors and the defence, can also lead to delay. Better communication between police and prosecutors is considered essential, helping to ensure that the evidence

is gathered and available, that witnesses and missing evidence are identified and that charges are formulated appropriately. Clear lines of communication, protocols and training can limit misunderstandings and errors.

- 9.64 Inefficiencies occur due to the time taken to reach a decision by the prosecution.
- 9.65 Resource constraints are also an important factor, including limited prosecution or court capacity to deal with multiple cases.
- 9.66 When the matter reaches court, there are often further delays. Research conducted by the Attorney General of New South Wales in 2009¹⁷ bore a remarkable resemblance to issues raised with me in this Review. It identified a number of areas contributing to inefficiencies in criminal trials. These were:
- juries: including late applications by jurors seeking to be excused after empanelment and barriers to jury understanding of the evidence and legal arguments;
 - conduct of counsel: a perception that some counsel engage in overly lengthy and complex cross-examination while being inadequately prepared;
 - identification of the issues: inadequate efforts by counsel to narrow the issues for trial prior to jury empanelment, leading to the presentation of unimportant or uncontested evidence and difficulties for the jury in understanding the relevance of evidence;
 - presentation of evidence: prosecution calling repetitive evidence or non-contentious witnesses to 'over-prove' matters; and an absence of aids to support jury understanding of evidence (such as chronologies);
 - technology: issues such as inadequate staff training and incompatibility of varying formats; and
 - some defendants may wish for the process to take as long as possible, particularly if they believe that delays provide a greater chance of the case collapsing.
- 9.67 I adopt the view of the Chief Inspector of CJINI in November 2018 who said in the foreword of that report:
- “The criminal sanctions that can be imposed after a guilty verdict together with the licence conditions and/or restrictions, monitoring on release and the social stigma around sexual offending, create a high stakes situation for those accused. This may be reflected in the high numbers of adjournments at court and low levels of guilty pleas. This ultimately causes delay, prolongs the trauma on victims and potentially leads to their withdrawal from the case.”

17

Attorney General of New South Wales (2009) Report of the Trial Efficiency Working Group Sydney: NSW Attorney General's Department

Effects of delays

- 9.68 Key effects of delay in the system on complainants include the following:
- Impact on personal circumstances, particularly as much sexual violence occurs in a family or intimate relationship context (this can also have an impact on defendants). This impact is severe on those with particular needs such as age or disability. They are impacted by avoidable delays more than any others.
 - Impact on psychological recovery: retaining facts of the case in preparation for trial for longer periods can have greater effect on their long-term therapeutic recovery.
 - There is ample evidence that a long delay not only has an impact on the general perception about the unsuitability of the current criminal justice system, but in some instances contributes to the high attrition rate in terms of withdrawals.¹⁸
 - Particular difficulties for children, in light of their age and the proportion of their lives spent with criminal proceedings pending. This is especially problematic for cases involving younger children, who are more likely to forget information over time than older children and adults. Child witnesses are more likely to confuse memories from similar sources and are more willing to guess answers to questions when their memory has deteriorated. As such, their testimony is more likely to be undermined by difficult questioning following lengthy delays.
- 9.69 Delays can also have implications for the administration of justice. Article 6 of the European Convention on Human Rights provides the defendant with the right to a fair hearing within a reasonable time.
- 9.70 Both the complainant's and the accused's ability to recall the alleged offence at trial can be affected by delay. In turn this may influence perceptions of their credibility as a witness, which is particularly important in such cases where there are rarely any other witnesses. The complainant's testimony is likely to be more detailed and accurate closer in time to the alleged incident and, therefore, higher in quality.
- 9.71 In addition, the National Audit Office (NAO) notes that delays, along with collapsed trials, damage public confidence in the criminal justice system. It suggests that delays also create extra work and waste criminal justice resources.

18 Criminal Justice Inspection Northern Ireland (2018) Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland Belfast: CJINI. For example at the foreword, and at paragraph 6.15 of that report. The contents of this report echo precisely the views that have been expressed by complainants during the course of this Review.

Case management

- 9.72 In a number of jurisdictions, initiatives to reduce delay, including legislation, have included a focus on case management, with strong and proactive early engagement between all parties a crucial element.
- 9.73 The recent Canadian inquiry by the Standing Senate Committee on Legal and Constitutional Affairs suggested that a lack of robust case management may be the most significant factor in delay, leading to the introduction of legislation aiming to give judges more robust tools to enable effective case management.
- 9.74 In New Zealand, legislation enacted in 2011 encourages co-operation between all parties and requires counsel to agree which aspects of the case to focus on in court. This process includes a statutory obligation on defence counsel to file a document certifying that a meeting in terms of the management of the case has occurred between prosecutors and the defence.
- 9.75 The purpose is to discuss prospects of resolution or, alternatively, evidential issues in preparation for trial. Both parties are obliged to engage in these discussions and the document must be filed within five working days of the case review hearing. If defence counsel cannot obtain instructions, they are obliged to inform the court.
- 9.76 Further, defence counsel will not get paid by legal aid if the memorandum is not filed on time, and there is an ability for the court to impose costs directly on defence counsel if they do not comply with these procedural requirements.
- 9.77 In Tasmania, legislation aiming to limit delays provides the Supreme Court with increased case management powers.
- 9.78 In New South Wales, legislation also requires case conferencing between the prosecution and the defence, with a view to allowing for meaningful discussion about the case, reducing the issues to be dealt with at trial and maximising opportunities for early guilty pleas.
- 9.79 Research suggests that effective case management includes:
- identifying the real issues and needs of witnesses at an early stage;
 - achieving certainty in regard to what must be done, by whom and when;
 - monitoring the case's progress and compliance with directions;
 - ensuring evidence is presented clearly and concisely;
 - avoiding unnecessary hearings; and
 - making use of technology.
- 9.80 Most importantly, perhaps from our perspective in Northern Ireland, are the changes that have been made in England and Wales in the wake of Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings* and Lady Justice Macur's *Better Case Management (BCM) Handbook* (January 2018).

- 9.81 In essence, the theme is that there is mandatory early proactive communication and engagement between the parties (see Criminal Procedure Rule 3.3), with each party obliged to nominate a named person responsible for progressing the case.
- 9.82 The case is listed before the Crown Court judge (CCJ) within 28–35 days of being sent from the magistrate. There the issues to be determined are broadly explored. The Crown Court judge fixes target dates for pre-recorded cross-examination etc. and trial date at an early hearing.
- 9.83 Four stages will be robustly set out by the case managing Crown Court judge if the case is to be contested:
- Stage 1
Prosecution to serve the bulk of its material, including what disclosure it proposes to make, with the essential issues in the case within 50–70 days.
 - Stage 2
Defence to serve defence statement within 28 days thereafter. At this stage defence must state what disclosure it requires.
 - Stage 3
Prosecution must respond within 14–28 days.
 - Stage 4
Defence to provide final comments and applications regarding disclosure.
- 9.84 The case is referred back to the judge for explanation if any of these deadlines are broken.
- 9.85 Disclosure and, in particular, third-party disclosure, is a key ingredient (see paragraph 3.20 of Macur’s *BCM*).¹⁹ Early focus on disclosure is crucial. Thus, at stage 2, the defence must come off the fence and engage with the process, make any enquiries for disclosure, specifying the material sought and setting out how such material relates to the issues when providing a defence statement. Prosecution must respond to this at stage 3. If disclosure remains unresolved by stage 4, there must be a written application to the court under section 8 of the Criminal Procedure and Investigations Act 1996 (CPIA) by the defence. Third-party disclosure must also be gripped early on, with appropriate court orders if third parties are not assisting.
- 9.86 Sir Brian Leveson identified four overarching principles for improving efficiency. The principles were: getting it right first time; case ownership; duty of direct engagement; and consistent judicial case management. He outlined a series of other detailed recommendations, including:

19 The “Judicial Protocol on the Disclosure of Unused Material in Criminal Cases” published in December 2013 is worth reading.

- Enhancing the role of IT: including high-quality equipment for remote hearings and ensuring that digital evidence can be presented easily and without delay.
- Allocation: including ensuring appropriate training for those making charging decisions.
- Listing: Crown Court judges should have discretion to reduce the credit for a guilty plea at the first hearing if there has been a not guilty indication at the Magistrates' court. Steps should be taken to enable courts to move to a single/fixed listing and consideration should be given to increased use of thematic listing.
- Crown Court pre-trial: endorsing the National Early Guilty Plea scheme; providing case progression officers to ensure all participants have complied with their obligations; and holding the police, the CPS and defence practitioners accountable for repeated default.
- Crown Court trial: the law and provision of facilities should enable expert evidence by video link; there should be a review of training for court staff on video testimony; and consideration should be given to extending the court's power to prevent repetitious or unnecessary evidence and protracted, oppressive or irrelevant questions.
- Ground Rules arrangements should be extended to all vulnerable witnesses. Ground Rules Hearings (GRHs) lay down the ground rules for the trial's conduct. The judge and counsel discuss matters, including how victims and witnesses will be questioned — for example, agreeing who will lead questioning where there is more than one defendant and the length of time for cross-examination. Current CPS guidelines note that GRHs are good practice in cases with vulnerable witnesses or with witnesses who have a communication need, and essential in cases involving registered intermediaries.

9.87 In January 2018, the Judiciary of England and Wales published *The Better Case Management (BCM) Handbook*. It highlights proactive communication and engagement between all parties as key to the initiative's success. One of the most important aims is to ensure that the plea and trial preparation hearing is effective, either through a guilty plea or with the judge progressing the case in a way that will minimise the need for further hearings.

9.88 The handbook notes that the judge should actively and robustly manage every case, identifying guilty pleas or establishing the extant trial issues, and ensuring effective communication between the parties. In the case of guilty pleas, good case management is achieved where the judge sentences the defendant without unnecessary adjournment.

- 9.89 For not guilty pleas, there is strong case management where the judge:
- makes full enquiries about the case and sets appropriate, realistic and bespoke directions;
 - explores the issues so that uncontested evidence can be summarised and agreed; and
 - considers witness requirements to avoid unnecessary attendance of witnesses and reduce the trial's length.
- 9.90 The Better Case Management initiative introduced the Early Guilty Plea Scheme in June 2017 to assist in fulfilling its goals. The CPS has noted the 'huge advantages' of a plea at the earliest opportunity. The potential benefits include saving time and resources, reducing the impact of the crime upon victims, and preventing complainants from having to testify.
- 9.91 The scheme removed judicial discretion concerning reduction in sentences under previous legislation, which required the court to consider the stage in the proceedings where the offender indicated an intention to plead guilty. Instead, the scheme states:
- the maximum reduction in sentence of one third for a guilty plea is available only at the first hearing at which a plea or indication is sought;
 - after the first stage, the maximum reduction is one quarter; and
 - a sliding scale decreases the available reduction to one tenth on the first day of the trial.
- 9.92 There has been criticism that the timescales from arrest to attendance at a Magistrates' court may be a matter of hours, and that pre-trial disclosures by the CPS are often inadequate, suggesting that the scheme may pressurise defendants into making a guilty plea. Nonetheless, Sir Brian Leveson states that work carried out by the Transforming Summary Justice Group means that cases where a plea is anticipated are listed after charge in a 14-day list for guilty pleas and a 28-day list for not guilty pleas. Initial details of the prosecution case must be served before the 28-day first hearing, where a not guilty plea is anticipated, so that the defence has sufficient information to identify the issues.

Listing

- 9.93 A number of jurisdictions operate a special listing procedure for sexual offence cases.
- 9.94 In Victoria, special court lists are intensively managed prior to trial, and evaluation has shown that the lists had improved the efficiency of court proceedings.

- 9.95 However, the New Zealand Law Commission rejected special court lists for sexual offences, suggesting that they could place an excessive burden on the Judiciary.
- 9.96 Sir Brian Leveson identified current listing practices as having a negative impact on efficiency. He recommended that courts should be able to move to a single/ fixed listing, that Crown Court judges should have discretion to reduce the credit for a guilty plea where there has been a not guilty plea at the Magistrates' court, and that consideration should be given to greater use of thematic listing.
- 9.97 Research in England has identified a practice in some courts of:²⁰
- listing cases to begin at the end of the day so that no witnesses would be called until the following day, allowing for administrative business to be dealt with; and
 - piloting the use of pagers and mobiles to allow for witnesses to be released and contacted shortly prior to being called.

Specialist courts

- 9.98 Arguments in support of these courts in the literature include the potential to reduce delay; that judges, counsel and court staff are better equipped to recognise and address rape myths; and that there is an opportunity to develop targeted support services for complainants.
- 9.99 Arguments against these courts include the risk of burnout, cynicism or trauma for judges and counsel; a perceived loss of impartiality in relation to how the court deals with different types of criminality; and concerns among defendants that they would not receive a fair trial.
- 9.100 Specialist sexual violence courts exist in South Africa and on a pilot basis in New Zealand. While the New Zealand pilot is in its infancy, early indications suggest that it has reduced delay.
- 9.101 In South Africa, specialist sexual violence courts are linked to significant reductions in delays, particularly for cases involving child complainants.
- 9.102 In Victoria, where sexual offence cases are prioritised, the Magistrates' court, Children's Court and County Court each have a specialised list for sexual offence proceedings. The cases are intensively managed before trial, and a 2011 evaluation reported that the lists were speeding up preparation of cases and improving the efficiency of court proceedings.
- 9.103 However, pilot specialist sexual violence courts in New South Wales in 2005 were found to have had little impact upon delay or case management. Evaluators noted that there was little to differentiate the court from other courts, and that issues with the pilot included technological issues; late

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Payne, S. (2009) *Redefining justice: Addressing the individual needs of victims and witnesses* London: Petty France

appointment of prosecutors to some cases; a failure to develop practice directions; and inflexibility among some participants in the process regarding bringing in new measures.

Time limits

- 9.104 Statutory time limits are applied to cases in a number of jurisdictions. These vary in length: for example, in Victoria sexual offence cases must commence within three months of committal or after the indictment against the person is filed, although three-month extensions may be granted. However, research in Victoria shows that the time limits are rarely met and that extensions are common.
- 9.105 In Canada the Supreme Court provided that cases in the provincial court must be completed within 18 months, and within 30 months in the superior courts.
- 9.106 The New Zealand Law Commission recommended introducing a 12-month time limit from charge to setting the case down for hearing for sexual offence cases.
- 9.107 Scotland has implemented some form of time limits in the pre-trial process with a view to reducing the length of the criminal justice process. The Criminal Procedure (Scotland) Act 1995 provides that a preliminary hearing to set the trial date in the High Court of Justiciary must be held within 11 months of the full committal for a defendant on bail, and the trial must take place within 12 months of the full committal. The accused is discharged if these time limits are not met.
- 9.108 For a defendant held on remand, the time limits are 110 days for the preliminary hearing and 140 days for the trial. If these restrictions are not met, the accused is granted bail. The legislation provides that the time limits may be extended.
- 9.109 However, research suggests that these statutory time limits have had a limited influence on reducing delays or the length of the criminal justice process. Extensions are common, and the key reason often relates to the defence requiring additional preparation time.

Committal proceedings

- 9.110 Committal proceedings have been reformed or abolished in a number of the jurisdictions considered.
- 9.111 However, research from some jurisdictions shows that reforms to committal have not significantly reduced delays but rather shifted delays to the superior court.
- 9.112 In England and Wales, the Crime and Disorder Act 1998 abolished committal proceedings for indictable-only offences with cases instead sent automatically to the Crown Court. The rationale for this was that offences that are indictable-only are expensive and inefficient, and the matter would need to go to the Crown Court in any case. In May 2013, England and Wales also abolished

committal for triable either way or hybrid offences, with Magistrates' courts now allocating either way offences to be tried in the Magistrates' courts or the Crown Court.

- 9.113 The National Audit Office (NAO) found that, while abolishing committal hearings has reduced waste in the system by getting rid of a hearing that added little value, it has instead added to the pressure on Crown Courts and their backlogs as cases arrive more quickly. HMCTS and the CPS did not receive additional resources to deal with the increase in cases.
- 9.114 In Scotland there is no analogous procedure to our committal proceedings. In relation to High Court level sexual offences, where there is prima facie sufficiency of evidence, the Procurator Fiscal initiates proceedings by way of petition before the Sheriff Court. The case is then prepared and reported to the Crown Office for Crown Counsel's decision on whether there is sufficient evidence and further proceedings are in the public interest. An indictment is then prepared and served on the accused and calls in the High Court of Judiciary at a preliminary hearing. The accused will then enter a plea and the court will fix a trial date as appropriate.
- 9.115 In New Zealand in 2011 the committal procedure was formally abolished. The current process begins with initial disclosure, following which the court may require the defendant to enter a plea; a case review is held if the defendant pleads not guilty. The defence and prosecution must discuss whether the matter will proceed to trial prior to the case review and file a joint case management memorandum. This should deal with issues, including whether:
- the defendant intends to change their plea;
 - the prosecutor intends to seek leave to withdraw or change charges;
 - the defendant requests a sentence indication;
 - the disclosure obligations have been complied with; or
 - there are any issues that require judicial intervention.

Technology

- 9.116 Technology contributes to delays in criminal cases in many of the jurisdictions considered, including in relation to issues with live links and video playback.
- 9.117 The CJINI report of November 2018 reported that delays were common in examining digital devices, particularly laptops, by the PSNI's Digital E-Crime Support Units and Cyber Crime Branch. In 2017 CJINI published a report²¹ on an inspection of cyber-crime, which considered in depth the PSNI's approach to dealing with the examination of digital devices. That report questioned PSNI's ability to respond to the increasing demand for examination of digital devices

21 Criminal Justice Inspection Northern Ireland (2017) Cyber Crime: An inspection of the Criminal Justice System deals with Cyber Crime in Northern Ireland Belfast: CJINI

and called for it to reduce the backlog of digital forensic examinations to an acceptable level.

- 9.118 In addition there had been incompatibility between police digital records and systems used by the PPS and the courts. This had led to delay and inefficiency in case files being transferred to the PPS and when evidence was being heard at court. There were occasions when the quality of the ABE interview recording being played on the court screens was inadequate. For example, the sound was too quiet, there was sound interference from parent technological issues, background noises or even instances where the discs would not play at all in court systems. There appeared to be a lack of clarity as to whose responsibility it was to check the compatibility prior to the court commencing. The Crown Court Evidence Protocol, previously agreed between the PSNI, the PPS and the NICTS covering the roles and responsibilities of each organisation in respect of presenting evidence in court, appeared not to be understood or applied by those working in operational roles.
- 9.119 I agree entirely with the conclusion of CJINI that “it is concerning that in this age of digital technology, these issues are still arising causing delay, inefficiency and anxiety to police officers, prosecutors and victims.”²² That report recommended that the PSNI and the PPS should fully engage in the NICTS Digital Strategy to be published and to collaborate when developing and maintaining their own technology in order to ensure systems for the transfer of digital information across the justice system are fit for purpose.
- 9.120 Inefficient working practices in courts, such as paper based processes and procedures, are also causes of delay. The fact of the matter is that problems with technology can be cultural and include resistance to change among court users or a lack of willingness to support the use of existing technology in courts.
- 9.121 In England and Wales in 2018, the NAO²³ highlighted delays in the administration of the justice system caused by outdated systems and paper-based processes. Since 2016 the Ministry of Justice has been investing £700 million to modernise courts, particularly in reducing the costs of the estate and using technology to change how justice is administered, with a view to providing a better service at a lower cost.
- 9.122 The CPS and HMCTS are jointly leading a project to introduce a single online case management system from pre-charge to disposal, so that all parties (including complainants and witnesses) can access one digital case file. It also aims to introduce Wi-Fi to all courts, new equipment for presenting digital evidence in court and to roll out video link systems.

22 Criminal Justice Inspection Northern Ireland (2018) Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland Belfast: CJINI

23 National Audit Office (2018) Early progress in transforming courts and tribunals London: National Audit Office

- 9.123 The NAO notes that moving to a mainly digital way of working represents significant cultural change, with many areas of the criminal justice system mostly paper-based. In this regard it highlights the importance of persuading users of the benefits of this approach and notes a lack of effective sanctions, whole-system governance and oversight.
- 9.124 However, the 2018 NAO evaluation found that delivering the scale of technological and cultural change necessary to modernise the administration of justice is a 'daunting challenge' and that the HMCTS was already behind schedule.

Cultural change

- 9.125 Research suggests that, internationally, reforms aiming to reduce delay will not achieve their stated aim without accompanying reforms and resources, and cultural change is often required to improve long-established practices among advocates and others.
- 9.126 Some jurisdictions have highlighted the need to persuade stakeholders of the potential benefits of reform and have considered introducing, or have introduced, formal measures or sanctions to encourage compliance with reforms.

Discussion

- 9.127 I recognise immediately that there are features of serious sexual offence cases that contribute to delay because of the nature of the crimes. They are often complex and there is a considerable amount of evidence in some cases. Accessing that evidence and ensuring relevant and adequate disclosure in terms of medical, third party evidence and digital forensic evidence, all contribute to the delay. Moreover, as the statistics show, there is a reduced likelihood that defendants will plead guilty. Hence the time that it takes to resolve serious sexual offences should not be underestimated.
- 9.128 Nonetheless, delays and inefficiencies in the criminal justice system raise issues around complainants' access to justice, defendants' rights and the proper administration of justice. Indeed, delays can damage the credibility of the criminal justice system itself and undermine public confidence in it.
- 9.129 It is important to offenders as well, as early resolution of their case can help with their understanding of the implications of their actions.
- 9.130 Significantly, the reduction in time may lead to a safer community and increase confidence in the justice system, whereby offenders are prosecuted and held responsible for their crimes in the fastest time possible, commensurate with the principles of a fair and just process.

- 9.131 Changes aiming to reduce delay will not achieve their stated aim without accompanying reforms and resources, and often cultural change to improve long-established and prevalent practices.

Reports

- 9.132 No purpose will be served by me re-treading ground already covered in the reports adverted to above from CJINI and the Northern Ireland Audit Office. Suffice to say, I fully endorse all of their recommendations and urge that their recommendations be carefully analysed and implemented without further delay.

Indictable Cases Process (ICP) roll-out

- 9.133 The ICP scheme is working well. However, it is extremely difficult to justify the ICP scheme excluding all serious sexual offence cases. This is precisely the genre of case where delays are the greatest, where delay is causing potentially irreparable damage to complainants, and which is at least contributing to the under-reporting and the high attrition rate with complainants dropping out of the process. Every opportunity to reduce the delay has to be seized in this area of crime.
- 9.134 I appreciate that ICP may work most effectively where there are simple cases without disclosure problems, which can take up much time, and where pleas of guilty are more likely than in serious sexual offences.
- 9.135 Nonetheless, I regard this ICP exercise as brimming with potential for early engagement with serious sexual offences to meet the problem of delay. With the advent of Case Progression Officers from early 2019, the opportunity to process serious sexual offences in a timely and firm fashion, with an emphasis on deadlines for proportionate disclosure etc., should be grasped.
- 9.136 I note in the response from the PPS that a 12 month Case Progression Officer Pilot commenced in Belfast and Newry/Craigavon on 28th January 2019. Subject to a positive evaluation, the initiative will be rolled out to the remaining Crown Courts. This is currently funded by DoJ and new resources would be required should the initiative be rolled out.
- 9.137 It is imperative that the alleged problems with serious sexual offences involvement in the ICP scheme be addressed. There is no doubt that there has been a significant programme of awareness since initial roll out, including a conference style event in 2018 hosted by the Director of Criminal Justice, DoJ, the Director of Public Prosecutions, the Chief Constable and the Presiding District Judge. Roadshows have taken place in courthouses across Northern Ireland and workshops have been held in PPS. The project is governed by the Working Together Board chaired by the Deputy Director and an Assistant Chief Constable. The alleged impediments to the involvement of serious sexual offences in my view are simply not sustainable and can be addressed as follows:

- A recognition that all of the key elements of the ICP process set out above are highly relevant to offences of this type. These elements would all contribute to reduction of delay in these cases even if the fact of the matter currently is that they are more likely to be contested than other cases.
- Solutions to these issues may lie simply in more clarity regarding ICP principles and further engagement with key stakeholders particularly defence lawyers.
- Agreements may also need to be sought from the Health and Social Care Trust regarding medical information and I am aware that work has been on-going for years to try to secure agreement from Health Trusts to provide medical evidence more promptly in all cases. I understand that discussions are now at an advanced stage between PSNI and a representative of the Health Trusts to secure this. Such agreement would have a significant impact on avoidable delay where medical evidence is required and would remove yet another impediment to the introduction of serious sexual offences within the ICP process.
- Resources need to be made available to accommodate full PPS participation. If serious sexual offences are to be included in the ICP, there may also be considered the possibility of a “special discount” for “really early” pleas as a further encouragement to reverse the trend of such cases being contested.

9.138 For the rest of this chapter, I shall follow the list of issues identified in the research and which almost perfectly mirror our own problems of delay.

Investigation and prosecution stage

9.139 This is an area that contributes very substantially to delay.

9.140 The Northern Ireland Audit Office report of March 2018²⁴ identifies weaknesses in the early stages of investigations, when the PSNI compiles evidence and the PPS makes a decision on prosecution, as the most critical cause of delay in criminal justice.

9.141 Progress towards the 2006 objective for the PSNI to ‘get it right first time’ has been lethargic, and just over half of trials proceed on the date initially listed (57% in 2016), although this is an improvement on 43% in 2011.

9.142 As already indicated in this chapter, a topic of avoidable delay is the quality and timeliness of police files which continue to be a problem throughout the years as evidenced by the most up-to-date CJINI report of November 2018.

9.143 The quality of supervision and the file quality and disclosure in the PSNI must improve if delay in the investigative stage is to be tackled effectively.

24 Northern Ireland Audit Office (2018) Speeding up justice: avoidable delay in the criminal justice system Belfast: Northern Ireland Audit Office

- 9.144 A solution which I recommend, and which I note the PPS welcomes, is that a very experienced officer, who may not necessarily have attained senior rank status, should be deployed to oversee file quality in each case. Whilst I recognise the resourcing issue that arises from this and which has been raised by PSNI in its response, I agree with the PPS that this is an essential step in ensuring file quality and supporting those officers who may need additional guidance/training to fulfil their role effectively. The value of this role has already been recognised in the deployment of Police Decision Makers who are currently of inspector rank.
- 9.145 I also recommend that PPS officers should provide early engagement with prosecutorial advice to PSNI under the Justice (Northern Ireland) Act 2002. Whilst I appreciate that the PPS constitutionally should not have a role in supervising police investigations, which falls outside its statutory remit, as the CJINI Report of 2018 and earlier similar reports characterised it, there is a need to emphasise police officers and prosecutors working more closely together and developing a “prosecution team” approach.
- 9.146 It is the PPS assertion that police already seek prosecutorial advice in the most serious cases and this arrangement is working effectively. PPS operates a Serious Crime Unit Duty Prosecutor rota meaning that a prosecutor will always be available to provide this advice largely on demand. Nonetheless, I entirely share the view of the CJINI report of November 2018 which recorded that:
- “Overall Inspectors assessment at this stage is that there needs to be more progress made by the PPS and the PSNI towards adopting a case building approach whereby there is a focus on working together as a prosecution team to build a case from the outset (for example considering *res gestae*, first complaint, medical evidence, the actions of the defendant on CCTV etc.). As the CPS Rape Policy²⁵ states: ‘Prosecutors will look for evidence such as injury, struggle, or immediate distress to help them prove that the victim did not consent’.”
- 9.147 Accordingly, that report recommends that the PSNI and the PPS should produce an implementation plan to further develop the prosecution team approach for cases involving sexual offences within three months of that report. I strongly endorse this recommendation.
- 9.148 In making these criticisms I have taken into account a number of difficulties that police investigations face which include:
- complexity of issues where for example the allegations relate to longstanding non-recent abuse;
 - where there are multiple suspects;
 - where there is significant digital product to examine;

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CPS (2012) CPS Policy for Prosecuting Cases of Rape Available online at: <https://www.cps.gov.uk/publication/cps-policyprosecuting-cases-rape>

- the need to pursue all reasonable lines of inquiry whether these point towards or away from the suspect; and
- there are existing close relationships between the PPS and the PSNI.

- 9.149 In the wake of criticisms in the CJINI Report of 2015²⁶, the two bodies set up a “Working Together” project with the objective of improving quality of case files, improving effectiveness of decision-making and reducing delay. However, this project seems to have had limited impact to date and the impetus for it appears to have stalled with key individuals changed and less of a focus by Senior Officers on these issues as indicated above. The file reviews by the CJINI inspection suggests that between a quarter and a third of files are still in need of improvement²⁷;
- 9.150 That said I welcome two further steps which will help to address delay. First setting up of a Sexual Assault Advice Clinic in 2017 to enhance expeditious collaborative working relationships and practices between the two bodies in relation to investigations, which are likely to result in a no prosecution decision.
- 9.151 Secondly the PPS is currently engaging with senior PSNI to examine options for more proportionate handling of sexual offence complaints relying on the principle of early engagement between the two bodies whereby PSNI will seek prosecutorial advice from PPS in cases where PSNI assesses the cases unlikely to be capable of meeting the test for prosecution. Advice will be provided as to the prospect of that evidence meeting the test for prosecution. Any further relevant or potential lines of enquiry will be discussed and undertaken if relevant. This should act in tandem with the ICP.
- 9.152 We are in the digital era. The processes involving police and prosecution must become digitised. The PSNI and the PPS should engage in the NICTS digital strategy and collaborate when developing and maintaining their own technology in order to ensure systems for the transfer of digital information across the justice system that are fit for purpose.
- 9.153 I note with approval that the PSNI is currently represented at the Digital Criminal Justice Strategy meetings along with partners from the PPS, the NICTS and the Forensic Science Northern Ireland. This project is working towards a single vision for improved digital exchange of information and evidence across the Northern Ireland criminal justice sector. I hope that this is a harbinger of a new digital strategy.

26 CJINI (2015) *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland* Belfast: CJINI

27 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland* Belfast: CJINI paragraphs 3.63-3.68

- 9.154 To ensure all the parties have access to the progress of the case, we urgently need a single online case management system from pre-charge to disposal, from which all parties can assess the progress of their case.
- 9.155 The current delay in decision-making in the PPS has to change. Due to resource pressures, some files involving serious sexual offences are currently unallocated to a senior prosecutor for up to 70 days. Until recently this had been 150 days. This delay is completely unacceptable. The aim must be that upon submission of an investigation file by police to the PPS, it will be allocated to a prosecutor upon receipt. While there exists a flagging system to ensure that serious sexual offences, particularly those involving children and vulnerable adults, are fast-tracked for allocation, this inevitably means that cases which do not attract this level of prioritisation do not receive the prompt allocation they require.
- 9.156 The number of prosecutors in the Serious Crime Unit has risen from 10 full-time equivalent staff to 16.7 as at August 2018. I recognise that resources present a problem and this must be addressed by the Executive and the Northern Ireland Assembly under devolution; at present, this responsibility would fall to the Secretary of State for Northern Ireland.

Committal proceedings

- 9.157 I am in favour of the present steps already enshrined in statute to reform the committal system for complainants. The paucity of cases where any material benefit is achieved for the defendant is completely outweighed by the disproportionate cost of and stressful nature of such hearings. More importantly is the fact that precisely the same issues of liability can be dealt with by the Crown Court at an equally early stage²⁸. I can see no justification, therefore, for continuing with the present system, which is wasteful of time, costs and resources in circumstances where the vast majority of cases will be transferred anyway to the Crown Court.
- 9.158 I note that the Criminal Justice Inspection Report of November 2018 takes a similar view and concludes at paragraph 5.3:
- “... There are limited risks involved in abolishing the committal proceedings in these types of cases, as the vast majority will be transferred anyway. Direct committal would also reduce the anxiety for victims and should reduce delays in case progression.”
- 9.159 I am bewildered as to why serious sexual offences are not part of the committal reform and why it is currently confined to murder and manslaughter. I can think of no other area of crime, where the stress caused by adjournments when the case is ready for hearing and the prospect of, and the giving of, evidence

28 s14 of the Justice Act (Northern Ireland) 2015 permits a person who is committed for trial on any charge, at any time after that person is served with copies of the documents containing the evidence on which the charges are based and before that person is arraigned, can apply orally or in writing to the Crown Court sitting at the specified place of the trial for the charge in the case to be dismissed.

is more daunting than in crimes of this genre. Yet a step that could serve to reduce that stress is unaccountably not invoked for these crimes.

- 9.160 I am encouraged to observe that the Assembly's Committee for Justice shared my view that the current provisions should be extended to include serious sexual offences. In doing so, yet another step to reduce the overall fears that contribute to under-reporting and high rates of attrition could be taken.

Case management

- 9.161 Focus on case management, with strong and proactive early engagement between all parties, is one of the most important elements in reducing delay in the system. It is pivotal to dealing with these cases with the utmost dispatch.
- 9.162 A key component internationally is encouraging cooperation between all parties and requiring advocates to agree on which aspects of the case to focus in court.
- 9.163 I believe we should adopt the New Zealand approach and robustly impose in our Crown Court Rules an obligation on defence and prosecution to file a document within a specified time from the case having been returned to the Crown Court, certifying that a meeting in terms of the management of the case has occurred dealing with:
- prospects of resolution;
 - evidential issues in preparation for trial; and
 - disclosure, including third-party disclosure.
- 9.164 We should broadly adopt the approach to case management advocated in England by Sir Brian Leveson, who generously spent a great deal of time discussing it with me. His approach is set out in his *Review of Efficiency in Criminal Proceedings* (2015) and Lady Justice Macur's *Better Case Management (BCM) Handbook* (January 2018).
- 9.165 For ease of reference, I shall again outline the main tenets. At the first hearing before the Crown Court judge, steps should be taken by the judge toward:
- identifying the real issues and needs of witnesses at an early stage;
 - achieving certainty in regard to what must be done, by whom and when;
 - monitoring the case's progress and ensuring compliance with directions;
 - ensuring evidence is presented clearly and concisely;
 - avoiding unnecessary hearings; and
 - making use of technology.
- 9.166 For my part, I consider that the time limits set out for compliance within the Court Rules for England and Wales, whilst commendable, may not be achievable. In reality, if they are frequently broken or even regularly judicially extended, they become superfluous. Nonetheless, for the sake of consistency

across all Crown Courts, some time limits should be fixed and I urge that the Crown Court Rules Committee (CCRC) should consider realistic time frames for compliance.

9.167 To that end we should amend the Crown Court Rules for Northern Ireland to ensure:

- Mandatory early proactive communication and engagement between the parties.²⁹
- The case to be listed before the Crown Court judge within whatever time the CCRC deems appropriate after being sent from the District judge. That court will conduct a plea and trial preparation hearing with case management, either through a guilty plea or with the judge progressing the case in a way that will minimise the need for further hearings. There the issues to be determined are to be broadly explored. The judge will fix target dates for pre-recorded cross-examination etc. and the trial date, and ensure that the parties have engaged at this early hearing.

9.168 I make no apology for repeating the steps already adopted in England to which I have already adverted earlier in this chapter with appropriate time amendments for the Northern Ireland context. They should now be included in the Crown Court Rules. Four stages will be robustly followed by the case managing Crown Court judge if the case is to be contested:

- Stage 1
Prosecution to serve the bulk of its material including what disclosure it proposes to make together with the essential issues in the case within whatever period is determined by the CCRC as appropriate.
- Stage 2
Defence to serve its defence statement within whatever period is determined by the CCRC as appropriate thereafter. At this stage defence must state what disclosure it requires. The defence must cease to equivocate and engage with the process, make any enquiries for disclosure, specifying the material sought and setting out how such material relates to the issues when providing a defence statement. Defence practitioners in Northern Ireland accept that if the disclosure test is to be fairly applied by prosecutors, a properly drafted and particularised defence statement is a prerequisite.
- Stage 3
Prosecution respond within whatever period is determined by the CCRC as appropriate.

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See England and Wales Criminal Procedure Rules 3.3.

- Stage 4
Defence to provide final comments and applications regarding disclosure. If disclosure remains unresolved by stage 4, there must be a written application to the court under section 8 of the Criminal Procedure and Investigations Act 1996 by the defence. Third-party disclosure must also be gripped early on at this stage with appropriate court orders if third parties are not assisting.
- 9.169 The case is then referred back to the judge for explanation if, having been apprised of the matter by the Case Progression Officer, the judge is aware of any of these deadlines having been broken.
- 9.170 Disclosure and, in particular, third-party disclosure is a key ingredient in delay (see paragraph 3.20 of Macur's *BCM*). I have dealt, in chapter 10, 'Disclosure', with the problems of disclosure and, therefore, its impact on delay will await that chapter. Suffice to say, at this juncture, there must be a Judicial Protocol in Northern Ireland on the disclosure of unused material along the lines of that set out in England and Wales in criminal cases in December 2013.
- 9.171 Sir Brian Leveson also identified principles for improving efficiency with which I am also in complete agreement and which we should invoke as follows:
- enhancing the role of IT: including high-quality equipment for remote hearings and ensuring that digital evidence can be presented easily and without delay;
 - allocation: including ensuring appropriate training for those making charging decisions;
 - listing: Crown Court judges should have discretion to reduce the credit for a guilty plea at the first hearing if there has been a not guilty indication at the Magistrates' court; consideration should be given to increased use of thematic listing;
 - Crown Court pre-trial: providing one Case Progression Officer for each case to ensure all participants have complied with their obligations; and holding the police, the PPS and defence practitioners accountable for repeated default; and
 - Crown Court trial: the law together with provision of facilities should enable any expert evidence to be given by video link; there should be a review of training for court staff on video testimony; consideration should be given to extending the court's power to prevent repetitious or unnecessary evidence and protracted, oppressive or irrelevant questions.
- 9.172 GRH arrangements in Northern Ireland (which currently rarely occur unless there is a registered intermediary involved in the case) should be extended to all children and vulnerable witnesses. GRHs are crucial, at least for all cases

involving children and vulnerable adults, but they should eventually be extended to all cases involving serious sexual offences.

- 9.173 GRHs lay down the ground rules for the trial's conduct. The judge and counsel discuss matters including:
- how victims and witnesses will be questioned;
 - how uncontested evidence can be summarised and agreed;
 - unnecessary attendance of witnesses;
 - agreeing who will lead the questioning where there is more than one defendant; and
 - the estimated length of time for cross-examination of each witness.
- 9.174 Current CPS guidelines note that GRHs are good practice in cases with vulnerable witnesses or with witnesses who have a communication need, and essential in cases involving intermediaries.
- 9.175 *The Better Case Management (BCM) Handbook* is an excellent guide and Northern Ireland should have a similar handbook catering to our case management circumstances. Its very presence, given to all Crown Court judges, would crystallise the new approach and the need for consistent robust case management.
- 9.176 The English system sets out a fairly prescriptive approach to the discounting of sentencing at various stages thereafter. I do not favour this level of prescription. The principle that a sliding level of discount should apply from the earliest moment is sound and operates in Northern Ireland, but the stress of trial for complainants in serious sexual offence cases is so great that judges should maintain some flexibility for appropriate discount even in the event of a late plea, depending on the individual circumstances.
- 9.177 I believe there is an argument for thematic listing of serious sexual offence cases so that a number of serious sexual offences are listed on the same occasion to promote consistency of directions and to spread the word to all present in various similar cases in court that a new culture has arrived.
- 9.178 This is not to say that I favour special sexual offence courts. Experience internationally — for example, New South Wales — has not convinced me that these are a success and in any event the number of such cases in current Crown Court lists is such that it would not be very different from the situation that presently obtains. All our Crown Court judges are extremely well experienced in trying these cases because of their sheer volume.
- 9.179 There are too many trial adjournments in these cases, with an average of between six and seven in each case. This has a significant impact on criminal justice agencies. In 2012, PSNI officers were required to attend court in excess of 23,000 occasions, with an average attendance time of five hours. On 75%

of these occasions, equating to 11,000 front-line shifts, the officers were not required to give evidence.³⁰

- 9.180 The Judiciary has to be aware of this issue and adopt a very robust attitude to such applications. All applications for adjournments in serious sexual offence cases must be made in writing and, save in exceptional circumstances, should be served not less than 72 hours in advance of the hearing. I do not see why such applications cannot on occasions be dealt with administratively by judges.
- 9.181 One particular cause of aborted hearings and adjournments that surfaced with a complainant I met arose when, in her first trial, a juror belatedly asserted she knew the defendant and, in the second trial, a juror indicated at a very late stage that she had been subjected to a previous sexual assault and was not emotionally equipped to deal with the case.
- 9.182 This serves to emphasise the importance of ensuring that in cases of serious sexual offences the jury panel should be carefully questioned about their experience before commencing to sit in these very stressful trials.
- 9.183 I add three riders to my comments on case management. First, whilst a number of our international colleagues have statutory case management, I do not favour statutory case management simply because it lacks the flexibility of bespoke directions. Our judges have a great deal of experience now of case management and the straitjacket of statutory obligation is not to be welcomed. In a small jurisdiction, where judges regularly attend Crown Court meetings, there really is little room for inconsistency and in any event can be easily detected. The implementation of these recommendations will highlight the vital necessity of case management together with the precise steps that should be taken. I can see no reason why there is a need for statutory case management made in a vacuum and in the absence of the particular facts of each case.
- 9.184 Secondly, I see no benefit in statutory time limits for precisely the same reasons. The experience in Scotland and Victoria illustrates that they have little or no impact other than to show their impotence. They fail to recognise that serious sexual offences are in many respects unique and need bespoke directions in most cases.
- 9.185 Thirdly, what sanctions are available for noncompliance? The Judiciary is reluctant to impose legal aid sanctions and there is no current provision for a wasted costs order in the criminal justice system. In criminal trials the concept of 'strike out' against a defendant for non-compliance is a non-starter. Public condemnation by the Judiciary for non-compliance or, in the last analysis, referral to the professional bodies of the lawyers in face of defiant non-compliance perhaps are the only effective components of a compliance system.

30 Northern Ireland Audit Office (2018) *Speeding up justice: avoidable delay in the criminal justice system* Belfast: Northern Ireland Audit Office

Resources

- 9.186 I deal with resources in chapter 18 of this Review. Two comments fall for mention here. First, the Department of Justice should carry out a financial costing of delay. I am certain that such an exercise would provide yet a further incentive, if it was needed, to tackle this major impediment to justice in dealing with serious sexual offences.
- 9.187 Secondly, there can be little doubt that these proposals front-load the legal system in a manner that has not hitherto occurred. It requires a fresh mindset from both the lawyers and the Judiciary. Equally importantly, it needs a new structure of payment by the Department of Justice. These steps to remedy delay simply will not work unless they are reflected in this new bespoke method of payment in serious sexual offences. The fact of the matter is that the law and procedures in these offences present unique problems. It is because of this that my Review has been instituted. Unique problems require bespoke solutions and the Department of Justice must take this on board.

Responses

- 9.188 Some of the most trenchant criticisms of the legal procedures in this Review occurred in the course of responses about the delay in the system.
- 9.189 I can most easily capture the general feeling of shock at the revelation of the statistics on delay by citing a collection of the comments which emerged:
- “almost beyond belief”;
 - “shocking”;
 - “appalling”;
 - “it threatens the therapeutic recovery of people with learning disability”;
 - “it is too important to take half measures or be complacent about”;
 - “attempts to reduce delay have proved futile”;
 - “delay is often the most difficult aspect and has significant impact on (complainants recovery)”;
 - “this problem must be dealt with immediately”;
 - “delay in an investigation and court proceedings prevents young people from moving into recovery phase when dealing with trauma”;
 - “delay is a central and systemic problem in investigations and court process”;
 - “victims, with awesome regularity, report the process took a surprisingly long time. There are implications for them and their well-being”;
 - “a system riven with unnecessary and avoidable delay”;
 - “a new mind-set is required”;

- “given the length of the process and the distress experienced by victims it is hardly surprising that many are deterred from pursuing a case or dropping out”; and
- “it means victims then withdraw from the criminal justice process”.

9.190 The response from the PSNI summarised well the extent of the problem when it recorded:

“The PSNI recognise that minimising delay ... is critical and impacts on public confidence. Investigations of serious sexual crime are complex and often involve significant digital evidence. The PSNI are committed to making improvements, however this cannot be achieved in isolation. The PSNI would also highlight that while PPS and NICTS also have roles to play, so too, do defence representatives.”

9.191 Complainant after complainant, and indeed accused persons to whom we spoke, without exception, complain of the delay in the system and the impact it had upon them.

Resources

9.192 Lack of resources is clearly an important element in delay. I have a great deal of sympathy with the very first comment raised by the PPS in its response on delay when it stated:

“The increase in the time for PPS to take an indictable prosecution decision is primarily due to the resourcing issue. ... this arises from a number of pressures; a continual increase in file volumes, the fact that prosecutors in the Serious Crime Unit adopt a ‘case building’ approach, identifying opportunities to strengthen the available evidence in weaker cases, reviewing extensive third party material prior to decision in the majority of rape cases, dealing with the exponential rise in digital material which has to be examined both for the purpose of identifying admissible evidence and to comply with disclosure obligations.”

9.193 In many respects this echoes the same concern about resources emanating from the PSNI response.

9.194 The fact of the matter is that the public is truly shocked at the delay endemic in our system. The government has to recognise this and determine that unless appropriate resources are put into dealing with this problem gathering grave public concern will soon turn into public outrage.

Technology

9.195 It is clear from the responses that the main statutory agencies all recognise the vital role that development of technology can play in reducing delay. A response

from the Policing Board of Northern Ireland summarised the position well when it said:

“Of particular note are the recommendations in relation to PSNI’s under-developed technology systems that are considered not fit for purpose compared to the rest of the UK. This premise has emerged in a number of reports and poses significant procedural challenges for policing in NI generally and serious sexual offences in particular.”

Cost of delay

9.196 A theme running through a number of responses was that the Department of Justice should carry out a financial costing of delay. This will clearly highlight the problem and hopefully spur invocation of the principle of “invest to save”.

Effect of delay

9.197 The responses we have had from both complainants and accused persons who have been acquitted further attest to the profound effect, which delay in the system has had upon them. In terms of the process itself, those who have had first hand contact with complainants refer to the damage to the system itself in that it clearly means that there are complainants who withdraw from the system as a result³¹. Hence we found it extremely troubling that the PPS seem to think there was no evidence that delay contributed to withdrawal rates.

9.198 Responses from those on behalf of people with a disability emphasised, properly in my view, that delay has a particular effect on those who suffer from physical, sensory and learning disabilities or mental ill health .

Investigation stage

9.199 I accept entirely the thrust of the response from the PPS and PSNI to the effect that the PPS should not have a role in supervising police investigations which clearly fall outside its statutory remit. Prosecutors do need to remain separate from the investigator. Sensibly however both bodies agree that early engagement and provision of prosecutorial advice to PSNI under the Justice (Northern Ireland) Act 2002 in appropriate cases can make an important contribution to the effective and efficient conduct of sexual offence investigations and prosecutions.

9.200 These bodies consider it neither necessary nor proportionate to provide prosecutorial advice in every case involving a serious sexual offence. I have some doubts about this because I feel it fuels the ill-advised belief that in some instances, where it clearly is necessary, it does not require to be carried out. If there is a general principle that in serious sexual offences prosecutorial advice is received in every case –even if it is to inform the PPS that it is considered

31 Chief Superintendent Paula Hillman of the PSNI, the response of the PSNI, Women’s Aid Federation NI, Belfast Feminist Network, CJINI Report of November 2018, Women’s Regional Consortium.

unnecessary for brief reasons to be given - at an early stage that will ensure that no appropriate case falls through the net. Such advice can be very short and in appropriate cases take up very little time.

Case management

9.201 I welcome the helpful suggestions by the PPS in this section. They included:

- Agreeing with the recommendation that there should be mandatory early proactive communication and engagement between the parties in serious sexual offences which should be inserted into the Crown Court Rules, it added that it would be beneficial for the duties of all parties to be clearly set out. It suggests the approach to codifying the duties of all parties that has been adopted in England and Wales. Ensuring compliance with this process would fall to the Judiciary to monitor. I agree with this and recommend such a step be taken.
- The contact between prosecutor and defence should not be confined to the advocates. PPS contends that this could be conducted in the first instance between PPS Directing Officer and the defence solicitor which is currently at a significantly earlier stage than when counsel is instructed and reflects the Indictable Case Process arrangements. Once again I agree with this and recommend that such engagement should take place at a defined stage of the proceedings namely once the case has been sent to the Crown Court and before Stage 1 outlined in my recommendations.
- The period between committal and the first appearance before the Crown Court judge presents an opportunity for early formal engagements between the prosecution and the defence. This would involve the prosecution sharing initial details of its case for the defence to engage in identifying the disputes in issue.
- Early engagement may be challenging for all parties and that narrowing of the issues before the full evidence is served will require a new approach, but the initial details of the prosecution case along with any key evidence e.g. complainant's statement, the content of the suspect's interview should be sufficient for the defence to indicate a general position without undermining a defendant's rights.
- Unless there is some narrowing of issues in advance of Stage 1 of the judicial case management process, there is a danger that Stage 1 service of evidence by the prosecution becomes the equivalent of committal and files are "overbuilt" causing resources to be unnecessarily expended. Under section 14 of the Justice Act (Northern Ireland) 2015 the defence have a right to apply to dismiss and therefore, in the absence of issues being narrowed, the prosecution will have expended valuable time in covering every possible challenge that could be mounted unless those challenges have been identified through early defence engagement.

- The exchange of forms pre-trial under the Criminal Procedure Rules in England and Wales, which could be a model for such a regime in Northern Ireland.
- New arrangements to be introduced by PPS and PSNI for the management of disclosure will include a Disclosure Management Document.

9.202 These suggestions will greatly assist the judge's case management of the first hearing as it may, for example, identify that some forensic investigations are not required where sexual contact is admitted, or raise third party disclosure issues or legal challenges which are frequently only raised at a late stage under the current processes. This will allow the judge to set realistic target dates from an informed position and to engage in wider case management, which will ultimately lead to proportionate file building and a reduction in avoidable delay.

9.203 I am in full agreement with all of these points made by the PPS and my recommendations, by implication, embrace them all.

9.204 Both the Attorney General and the CJINI report of November 2018 favour placing obligations on the Judiciary by way of statutory case management so as to serve a speedy and fair trial. I still remain of the view that this will impose a statutory straitjacket upon experienced judges and is an unnecessary and inhibitive step.

Committal proceedings

9.205 Whilst most of those bodies who address the issue of committal proceedings are in favour of my recommendation that the Department of Justice should make provision for the direct transfer of serious sexual offences to the Crown Court bypassing the committal process³², the Law Society strongly disagrees with this recommendation making the following points:

- there is no evidence that the committal process is a cause of delay;
- the purpose of committal proceedings is to ensure that an accused is not put on trial on indictment unless the Crown can show it has sufficient legal evidence to justify doing so;
- removal would negatively impact on Article 6 rights to a fair trial;
- committal hearings weed out weak cases and charges can be amended or withdrawn as a result; and
- direct transfer to the Crown Court will have a resource implication and a significant impact on the public purse.

9.206 The Bar Council, whilst acknowledging that there are differing opinions amongst members as to the value of committal proceedings, feel that committal proceedings can represent an important procedural safeguard in a minority

32

CJINI November 2018, PPS, Crown Court Judges, the NI Assembly Committee for Justice etc.

of cases and practitioners typically advise as to when this right should be appropriately exercised.

- 9.207 I am unpersuaded by these arguments. The fact of the matter is that legislation has already been introduced to permit direct transfer and the procedure has been successfully operated in murder and manslaughter cases. There is no logic whatsoever in permitting murder and manslaughter cases to be processed in this way and to exclude serious sexual offences where there is an inescapable need to reduce elements of stress and pressure occasioned by a daunting court process.
- 9.208 I am anxious however that this chapter should not end on a note of despair about the inevitability of delay. Already there are encouraging signs that changes are occurring. These include:
- the PSNI recognise that there may be opportunities to expand ICP to some serious sexual crime cases. The PSNI has worked in collaboration with criminal justice partners through the implementation of the ICP, which has served to reduce avoidable delay within the criminal justice system in those cases to which it has been applied;
 - the PSNI is moving to further professionalisation with officers working in both the child and adult rape arenas through national accreditation in the Specialist Child Abuse Investigators Development Programme and the Specialist Sexual Assault Investigators Development Programme;
 - the PPS understands the continuing challenge of file quality. It records that much work is ongoing between PPS and PSNI to ensure consistent quality standards are met to reduce delay and other problems;
 - the PPS acknowledges the need for supervisory review of files dealing with serious sexual offences and will conduct regular case reviews at a suitable level of oversight and supervision;
 - the PSNI response accepts the value of early case consultation with the Serious Crime Unit of the PPS and indicates that there “is commitment to this from the Senior Leadership Teams” from both organisations;
 - the PSNI records that bids for additional resources have been submitted and supported by the Service Executive Team. The last uplift in resources, in Public Protection Branch, for example, resulted in the allocation of 37 additional officers and 4 police staff in February 2018;
 - the existing Service Level Agreement between the PPS and the PSNI Public Protection Branch which outlines in detail the roles and responsibilities of the respective organisations, has recently been the subject of review to ensure that joint working arrangements are clear and unambiguous;
 - there is to be an interim evaluation of the ICP process shortly. I believe this should be availed of to inform appropriate bodies of the need for further roll out of this process to serious sexual offences;

- there is universal agreement amongst the legal professions and the statutory bodies that early engagement between defence and prosecution is a vital step towards reducing delay and speeding up justice; and
- the responses which favour prioritising cases involving children and vulnerable adults received the welcome response from the PPS that “cases involving children and vulnerable witnesses are already prioritised for attention and allocated to a Senior Public Prosecutor according to a priority order. In order to effectively manage the increasing volume of cases received year on year by the Serious Crime Unit, an independent, external review of the Unit has been conducted and a draft report produced. This will be finalised and presented to the PPS’s Management Board for consideration in early 2019.”

9.209 Finally concern was raised about the recommendation that there should be a special discount for “really early” guilty pleas in serious sexual offences.³³ The number of cases where early pleas of guilty are entered are very few as the statistics reveal. If we are to counter the stress and pressure which the trial process imposes upon complainants, then a step such as this, which would encourage early pleas, has to be considered. Relieving most complainants of the burden of giving evidence and affording some measure of early closure is an aim not to be lightly dismissed.

Conclusion

9.210 I consider that the delay within the criminal justice system in processing serious sexual offences has now been fully recognised and is solidly within the public arena. Provided steps such as I have recommended are taken, this is a problem that can be ameliorated at least to a measureable degree. It is a fundamental step rendering the criminal justice system fairer and more sensitive to the needs of both complainants and accused.

33 For example, the Law Society, Belfast Feminist Network and others.

Recommendations

105. Recommendations by the Criminal Justice Inspection Northern Ireland and Northern Ireland Audit Office reports should be analysed, implemented and monitored by the Department of Justice as a matter of urgency.
106. Very experienced police officers should be deployed to oversee file quality in every case involving serious sexual offences before it is submitted to the PPS. Specific training should be given to these appointed officers.
107. The Indictable Cases Process (ICP) scheme should be extended to all serious sexual offence cases.
108. A special discount for 'really early' guilty pleas should be granted in serious sexual offences.
109. The PPS must be sufficiently resourced to speed up unacceptable delays in decision-making.
- 110.* The Department of Justice should make provision for the direct transfer of serious sexual offences to the Crown Court, bypassing the committal process pursuant to the affirmative resolution procedure under section 11(4) of the Justice Act (Northern Ireland) 2015.
- 111.* Mandatory early proactive communication and engagement between the parties in serious sexual offences. This should be inserted into the Crown Court Rules together with a codification of the duties of all parties.
- 112.* The first such engagement should be between the PPS Directing Officer and the defence solicitor, occurring between committal and the first appearance before the Crown Court judge, leading on to subsequent engagement between counsel/advocates.
- 113.* Counsel/advocates should certify such engagement has occurred before the first appearance before the Crown Court judge.
- 114.* The Department of Justice should institute a bespoke legal aid fee structure for serious sexual offences and in particular, provide for the role of counsel at the early engagement stage.
- 115.* Each serious sexual offence should be listed before the Crown Court judge within 28–35 days (or whatever time the Crown Court Rules Committee deems appropriate) from being sent from the District judge.
116. At the first hearing before the Crown Court judge, target dates for the processing of the case shall be fixed given the circumstances of the particular case.

117.* Thereafter, a four-stage process will follow if the case is to be contested:

- Stage 1
Prosecution to serve the bulk of its material (including what disclosure it proposes to make) with the essential issues in the case within whatever period is determined by the Crown Court Rules Committee as appropriate.
- Stage 2
Defence to serve defence statement within whatever period is determined by the Crown Court Rules Committee as appropriate thereafter. At this stage defence must state what disclosure it requires, setting out how such material relates to the issues when providing a defence statement.
- Stage 3
Prosecution respond within whatever period is determined by the Crown Court Rules Committee as appropriate.
- Stage 4
Defence to provide final comments and applications dealing with disclosure.

118. If disclosure remains unresolved by stage 4, there must be a written application to the court under section 8 of the Criminal Procedure and Investigations Act 1996 by the defence within a specified time.

119. Third-party disclosure shall be timetabled and appropriate orders granted against the third parties at this hearing.

120. The case should then be referred back to the judge for explanation if non-compliance has occurred.

121. Fast-tracking and priority listing to be afforded to serious sexual offences involving children and vulnerable adults.

122. Case Progression Officers to be appointed (as is intended from January 2019) to ensure all participants have complied with their obligations; and to enable the Court to hold police, the PPS and defence practitioners accountable for repeated default.

123. The PSNI and the PPS should take steps to engage in the NICTS digital strategy and collaborate when developing and maintaining their own technology in order to ensure systems for the transfer of digital information across the justice system that are fit for purpose.

124. The NICTS should urgently pursue the current steps being taken to ensure high-quality equipment for remote hearings and digital evidence can be presented easily and without delay.

125. Wi-Fi and equipment for presenting digital evidence should be available in all Crown Court hearings.
126. A properly qualified and experienced IT member of court staff must be readily available for every Crown Court hearing where remote hearings and digital evidence are being presented.
- 127.* Ground Rules Hearings should initially be held in every case involving a child or vulnerable witness, leading to a stage where a Ground Rules Hearing will be held in every case of a serious sexual offence.
128. A case management handbook for serious sexual offences should be commissioned by the Judicial Studies Board.
129. Applications for adjournment require special scrutiny. All applications for adjournments in serious sexual offence cases must be made in writing and, save in exceptional circumstances, should be served not less than 72 hours in advance of the hearing.
130. In serious sexual offence cases, issues of previous personal experience should be raised with potential jurors.

Chapter 10

Disclosure

An accused's right to a fair disclosure is an inseparable part of his right to a fair trial.

Lord Justice Steyn, 1994¹

Issue

Do the law and procedures dealing with disclosure require revision, and is disclosure within the criminal justice system in the context of serious sexual offences fit for purpose?

Current law

- 10.1 Disclosure is the process in criminal law by which someone charged with a crime is provided with copies of, or access to, material from the investigation that is capable of undermining the prosecution case against them and/or assisting their defence. Without this process taking place a trial would not be fair. Disclosure is governed by the Criminal Procedure and Investigations Act 1996 (CPIA).
- 10.2 The initial duty is supplemented by a duty under section 7A of a continuing disclosure. This duty arises irrespective of whether the defence has complied with its own duty under section 5(5) to give a defence statement to the court and the prosecutor.
- 10.3 Two implications should be noted. First, where the prosecution knows what the defence is likely to be — for example, from the police interview or a prepared statement — any unused material tending to support the defence is disclosable in advance of the defence statement, even if it does not undermine the prosecution case.
- 10.4 Secondly, any material that could reasonably be considered capable of undermining the prosecution case must be disclosed, even if the prosecutor thinks it does not. It will not matter at this stage that the defence case may be unknown or is not apparent from the prosecution papers.
- 10.5 There is an exception from the duty of disclosure for material that is not in the public interest to disclose. Section 8 of the CPIA allows the defendant to make an application for a specific disclosure of any material that there is reasonable cause to believe should have been disclosed under section 3.
- 10.6 There is underlying guidance (such as the Attorney General's Guidelines on Disclosure)² to assist practitioners with the application of the test setting out

1 R v Brown (Winston) [1994] 1 W.L.R. 1599

2 Attorney General's Office (2013) *Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* London: Attorney General's Office

the role of the investigator and the prosecutor in the overall process. There is also a significant amount of case law dealing with the test.

- 10.7 Third party disclosure e.g. medical evidence from the general practitioner, hospital, psychiatrist/counsellor etc. is governed in Northern Ireland by a “Protocol for Third Party Disclosure in Prosecutions of Sexual Offences or Serious Assaults”. Under this protocol, defendants’ legal representatives must address the issues of third party disclosure early and obtain the relevant information from the prosecution to enable them to draft applications to the court. The procedure and the protocol are designed to ensure that the necessary information is available at an early stage. The protocol also imposes an obligation on the relevant officer in charge of the case to explain to the complainant that the defendant’s legal advisors may make an application to the court to see their medical notes and any records from any counsellor they are attending as a result of the incident that is the subject of the charge.

Background

- 10.8 Prosecution disclosure has been problematic for many years. For far too long the system of disclosure has not operated effectively enough. Difficulties with disclosure have been at the core of a number of miscarriages of justice and criminal justice crises in England and Wales. There has been not only a collapse of a number of cases in England due to disclosure flaws, but the significant effort and investment wasted due to late disclosure has had substantial cost implications and will cause significant stress and anxiety to complainants, defendants and witnesses alike.
- 10.9 Whilst Northern Ireland has not encountered a problem to date of collapsed trials to anything like the same degree as has occurred in England and Wales, in response to the Preliminary Report of this Review, the Criminal Bar Association of Northern Ireland (“CBA”) recorded as follows:
- “Members inform the CBA that they regularly encounter examples of non-disclosure or very late disclosure, on the eve of trial or mid trial, of critically important and highly relevant material in criminal cases. Examples are stated of failures to timeously, universally and uniformly identify, harvest and retain potentially critically important and relevant information and material, which might well shed important light on material considerations and which opportunities have been irretrievably lost”.
- 10.10 There has been no shortage of reviews on the topic of dealing with disclosure. It has generated more official reviews than virtually any other issue in the law or criminal process. The same recurring themes surface throughout these reviews emphasising not only the deep seated nature of the problem but also the stubborn refusal to achieve change.

- 10.11 Lord Justice Gross's *Review of Disclosure in Criminal Proceedings* was published in 2011 (with a further review by himself and Lord Justice Treacy "Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure" in 2012). The review made the following points which still carry a resonance today:³
- it will be physically impossible or wholly impractical to read every document and every computer seized;
 - the CPIA regime requires that the process must be prosecution led;
 - a proportionality test is unsuitable since it would require improved confidence in the prosecution's performance of its disclosure obligations;
 - there is considerable scope for greater common sense in the scheduling of unused material, including greater use of provisions for "block listing";
 - proper training is an essential part of the professional development of a police investigator;
 - the defence's role in improving disclosure is reactive; it is unacceptable for the defence to refuse to engage and assist in identifying key issues at an early stage;
 - robust judicial case management with early guidance on the prosecution approach to disclosure and an insistence on responsible engagement from the defence with early identification of issues is crucial; and
 - full use to be made of sampling, key words or other search tools, explained clearly by the prosecution and with responsible cooperation between the parties.
- 10.12 The Judiciary of England and Wales published a *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* in 2013⁴. It stated that:
- larger and more complex cases demand a scrupulous approach by the parties and robust judicial case management;
 - early judicial guidance regarding the prosecution's approach to disclosure, ensuring early defence engagement is vital; and
 - where a judge believes that there are reasonable grounds to doubt the good faith of the investigation, the judge will insist on an independent and effective appraisal of the documents contained in the disclosure schedule.
- 10.13 In 2013 the former Attorney General for England and Wales published *Guidelines on Disclosure*,⁵ again emphasising the importance of prosecution-led disclosure and tailored thinking. In particular, the guidelines note that, in

3 Gross, P. (2011) *Review of Disclosure in Criminal Proceedings* London: Judiciary of England and Wales

4 Judiciary of England and Wales (2013) *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* London: Judiciary of England and Wales

5 Attorney General's Office (2013) *Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners*. London: Attorney General's Office

deciding whether material satisfies the disclosure test, consideration should be given, amongst other things, to:

- the use that might be made of it in cross-examination;
- its capacity to support submissions that could lead to the exclusion of evidence; a stay of proceedings; or a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the European Convention on Human Rights (ECHR);
- its capacity to suggest an explanation or partial explanation of the accused's actions;
- the capacity of the material to have a bearing on scientific or medical evidence in the case;
- the importance of the defence statement in identifying the issues in the case;
- a person accessing original data must be competent to do so and able to give the evidence, explaining the relevance and implications of their actions;
- investigators should ensure there is an audit trail or other record of process applied to computer-based electronic evidence, (which an independent third person should be able to examine);
- the person in charge of the investigation has overall responsibility for ensuring that the law and these principles are followed; and
- in cases with large quantities of data, the investigator may search by sample, key word or other tools and techniques; a strategy should set out how the material will be searched, and the defence should receive a copy of the search terms used, inviting them to suggest any further terms.

10.14 The Court of Appeal in England in 2015, in a leading case,⁶ lent essential approval to the approach advocated by Lord Justice Gross.

10.15 That case, in which there were 77 seized electronic devices and 600 million pages of data, provided the following guidelines:

- The prosecution must be in the driving seat at the stage of initial disclosure, acting within a disclosure strategy, identifying and isolating material subject to legal professional privilege and, if necessary, proposing search terms to be applied.
- Their approach must be explained, ideally through a disclosure management document.
- The defence must engage with the prosecution. Compliance with the test for initial disclosure calls for analysis of the likely cases of both prosecution and defence.

6 R v Richards and others [2015] EWCA Crim 1941 [45-60]

- Where vast volumes of electronic material are in play, common sense must be applied and the prosecution may use appropriate sampling and search terms. The law is prescriptive of the result, not the method.
 - The process of disclosure must be subject to robust case management, with the judge holding the prosecution to its duty of giving initial disclosure and insisting on defence engagement.
 - The judge must drive the case to the point where a defence statement is required, the issues can be clarified and disclosure questions dealt with on a reasoned and informed basis.
 - The judge must devise a tailored or bespoke approach eschewing a box-ticking exercise.
- 10.16 In July 2017, Richard Horwell QC published a report into a trial that had collapsed as a result of human errors by the police and the CPS, making 17 recommendations to improve the disclosure process.⁷ In that report Mr Horwell succinctly summarised the issue which persists to this day;
- 10.17 “Disclosure problems have blighted our criminal justice system for too long and although disclosure guidelines, manuals and policy documents are necessary, it is the mind-set and experience of those who do disclosure work that is paramount.”⁸
- 10.18 In January 2018 the CPS, the National Police Chief’s Council and the College of Policing published a National Disclosure Improvement Plan (NDIP) aiming to represent a shared commitment between the authors to change how the bodies fulfil their disclosure obligations.⁹
- 10.19 That plan highlights the duty of police to pursue all lines of inquiry and the necessity of disclosure to ensure a fair trial. Key elements of the plan include:
- extending Disclosure Management Documents (which were used to outline the prosecution approach to disclosure and ensure issues are dealt with early) to all complex Crown Court cases;
 - introducing the concept of Disclosure Champions to provide training and support in all Crown Court teams;
 - providing new police training, taking into account the ongoing and significant changes to disclosure practice;
 - introducing a new procedure for officers to identify reasonable lines of inquiry when submitting a charging decision request to the CPS; and
 - implementing a new protocol between the CPS and police on the use of third-party material.

7 Horwell, R. (2017) *Mouncher Investigation Report* (HC 292) London: House of Commons

8 As above, page 5.

9 Crown Prosecution Service, National Police Chiefs’ Council and College of Policing (2018) *National Disclosure Improvement Plan* London: Crown Prosecution Service

- 10.20 Already operational improvements are being driven by senior leaders from the police and CPS in executing this NDIP. Moreover, the Attorney General in England and Wales is holding a “Disclosure Summit” to discuss progress of the NDIP together with new Attorney General’s Guidelines on Disclosure. I pause to observe that the PPS and PSNI should become involved in this process.
- 10.21 The House of Commons Justice Committee (“the Justice Committee”) conducted an inquiry into the disclosure of unused material in criminal cases, which was published in July 2018.
- 10.22 The inquiry found that disclosure failures have been widely acknowledged for many years but have gone unresolved, in part due to insufficient focus and leadership by ministers and senior officials. It noted that while coverage of disclosure failures focused on serious sexual offences, all types of cases have experienced disclosure errors.¹⁰
- 10.23 The Committee stated that the government must consider whether funding is adequate to support a strong disclosure regime. It noted the strain delayed and collapsed trials place on already constrained criminal justice resources. It concluded that there needs to be:¹¹
- a shift in culture towards the viewing of disclosure as a core justice duty, rather than an administrative add on;
 - appropriate skills and technology to review large volumes of material; and
 - clear guidelines on handling sensitive material.
- 10.24 At the same time as the Preliminary Report in my Review was published, the Attorney General’s Office in England and Wales published a *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (the AG’s Review). The AG’s Review was carried out in part due to the new difficulties now presented by the sheer scale of digital material generated by police investigations and in the wake of a series of prosecutions in England being halted as a result of troubling disclosure failures in the context of allegations of serious sexual assault and rape.¹² The document aimed to be seen as a plan of practical actions to tackle those problems of disclosure from the point an allegation is considered by the investigator to the end of the case.
- 10.25 A recurring theme of the AG’s Review was that there must be a new emphasis on compliance with the duty of disclosure much earlier in the process than is currently the practice, supported by better training and methods, an appropriate use of technology, improved data collection and management information on the performance of the obligation and by strengthened oversight by the

10 House of Commons Justice Committee (2018) *Disclosure of evidence in criminal cases*. London: House of Commons

11 House of Commons Justice Committee (2018) *Disclosure of evidence in criminal cases*. London: House of Commons.

12 Attorney General’s Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (CM 9735) London: Attorney General’s Office.

Criminal Justice Board in England and Wales where ministers can hold the system to account.

10.26 Unsurprisingly the AG's Review, whilst recognising that important operational movements were currently being implemented through the NDIP, echoed almost precisely the problems that have surfaced in Northern Ireland. To emphasise this point it is worth citing the problems diagnosed in the course of the Review as follows:

- (a) Reasonable lines of inquiry not always being followed in line with the Criminal Procedure and Investigations Act Code¹³ duty to do so;
- (b) The duty and disclosure obligations are not being considered with sufficient attention from the outset of a criminal investigation;
- (c) Investigators not always identifying materials relevant for inclusion on the disclosure schedules they create as an audit trail for the unused material in a case with prosecutors not always asking the right questions to uncover the error;
- (d) Investigators and prosecutors not always applying the disclosure test correctly, which means that the material that should be disclosed is not disclosed;
- (e) Disclosing the right material too late;
- (f) Failure to ensure the engagement of the defence and the Judiciary with disclosure issues where they have a role in the process;
- (g) Not having the necessary technological tools;
- (h) Not collecting or measuring disclosure performance data adequately; and
- (i) In the past, insufficient prioritisation of disclosure improvement at a senior level in policing and prosecuting.

10.27 Equally unsurprising is the fact that the practical proposals to tackle the root causes of these issues in the AG's Review echo the same headings that need to be recognised in Northern Ireland and which I strongly endorse in this Northern Ireland Review. These were:

1. Primary legislation (the CPIA) continues to provide an appropriate disclosure regime, but in practice the system is not working as effectively or efficiently as it should.
2. Practical reinforcement of the duty to make reasonable lines of inquiry and apply the disclosure test correctly.
3. Pursuing a fair investigation and considering disclosure obligations from the outset, rather than as an afterthought.

13 Ministry of Justice (2015) Criminal Procedure and Investigations Act 1996 (section 23 (1)) Code of Practice: Revised in accordance with section 25 (4) of the Criminal Procedure and Investigations Act 1996. London: Ministry of Justice.

4. Proportionate “frontloading” of disclosure preparation and performance.
 5. Early and meaningful engagement with disclosure issues by the defence and the Judiciary.
 6. Harnessing technology.
 7. Data management.
 8. Sustained oversight and improvement.
- 10.28 The Criminal Justice Inspection Northern Ireland (“CJINI”) report of November 2018¹⁴ is one of a series of excellent reports over the past years. The issue of disclosure had been closely scrutinized in CJINI’s 2015 inspection on file quality.¹⁵ It found that disclosure was dealt with satisfactorily in only four of the 17 Crown Court cases (23.5%) inspected. The file review for the 2018 inspection found that disclosure was not handled well in the 31 cases in the sample. The quality was rated as fair in only 9.7% of cases (three) and poor in 90.3% (28) of the cases inspected. Third party material was dealt with appropriately in only two of the 11 relevant cases examined (18%), with seven where it was not (64%).
- 10.29 In the 2018 report, these persisting issues about disclosure were borne out by discussions with prosecutors who outlined the challenges of meeting their disclosure obligations, and the lack of progress to address the problems raised in the 2015 CJINI report. Deficiencies continued to include instances where the police did not properly discharge their responsibilities in relation to revelation and relevance, a lack of challenge and support by the PPS about these matters and a lack of adequate record keeping by prosecutors in relation to the discharge of their own disclosure duties.
- 10.30 The File Quality Report in 2015 had recommended that:
- “The PPS will provide the PSNI with guidance on Disclosure. The PSNI will scope and deliver a new central Disclosure Unit and enhance the skills of operational Police Officers on the subject of disclosure. A timetable on the delivery of the central Disclosure Unit should be provided to CJJ within one month of report publication.”¹⁶
- 10.31 Troublingly the CJINI Report of 2018 indicates that inspectors were advised that this had not been implemented to date due to resourcing issues. The PSNI advised that they had not yet made a final decision on the best way to deliver

14 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland

15 Criminal Justice Inspection Northern Ireland (2015) *An inspection of the quality and timeliness of police files (incorporating disclosure) submitted to the Public Prosecution Service for Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

16 Criminal Justice Inspection Northern Ireland (2015) *An inspection of the quality and timeliness of police files (incorporating disclosure) submitted to the Public Prosecution Service for Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

progress against this issue. The report concluded that there was still a pressing need for the PPS and the PSNI to develop a more robust method to deal with disclosure, particularly where large volumes of evidence were involved. I welcome the fact however, that a Disclosure Improvement Plan for Northern Ireland (DIPNI) has now been implemented by the Chief Constable and the Director of the PPS and this should better inform practice in the future.

Other Jurisdictions

- 10.32 We have considered approaches to dealing with disclosure challenges in Australia, Canada, England and Wales, France, Germany, Ireland, the Netherlands, New Zealand, Scotland, South Africa and the United States.
- 10.33 The inquisitorial systems proved of little assistance principally because disclosure is not a key feature of the pre-trial stage of these systems with no statutory provisions regulating the disclosure of information e.g. France and Germany. Moreover, in the US, there is no duty on the prosecution to search for possibly exculpatory materials and disclosure of unused material is not part of US terminology. South Africa affords the prosecution an opportunity to refuse disclosure access if it convinces the trial judge that access is not justified for the purpose of a fair trial which of course is a different test to that which we apply.
- 10.34 However, it is noteworthy that in the US, the federal system does have a seamless integration. Investigators and prosecutors work together, with the former working under the guidance and direction of the latter, who have overall case ownership and deal with cases from investigation through to and including the trials conduct.¹⁷ There is also an emphasis on outsourcing.
- 10.35 In some jurisdictions, which are akin to our own, our research reveals a remarkable similarity in the problems and attempted solutions with those that arise in our jurisdiction. I find some measure of reassurance in these countries that the complexity of the problems are such that we in Northern Ireland are not alone in having difficulty solving the problems. Disconcertingly the experience in these jurisdictions illustrated how elusive systemic solutions can be. The problems and solutions which are common to both Northern Ireland and these jurisdictions find expression as follows:

Resourcing

- 10.36 Research across the jurisdiction shows that resourcing issues are highly problematic in cases involving large amounts of electronic evidence. This relates to ensuring that there is an adequate number of staff to carry out disclosure and that such staff are suitably qualified to perform effectively. In truth resourcing presents one of the key disclosure challenges in every jurisdiction that we explored.

17 Gross, P. (2011) *Review of Disclosure in Criminal Proceedings* London: Judiciary of England and Wales

- 10.37 Challenges relating to digital disclosure begin at the very start of an investigation for serious sexual offences. Digital devices must be forensically imaged prior to inspection so that the reviewing officer does not alter any data. A lack of resources to carry out this function can lead to delays. Suspects in England and Wales, and, indeed, in Northern Ireland, are often told that images from their seized device will be available for the investigator to view between a few weeks' time or in more than six months' time.
- 10.38 In order to avoid this, police in England and Wales do not always retain phones and other electronic devices belonging to suspects and complainants. As such, this may disregard potentially exculpatory evidence.¹⁸
- 10.39 Where devices are obtained, there are challenges around meaningful disclosure. Resourcing issues mean that much relevant material may be left undisclosed or remain hidden in unused materials. Where unused materials are later provided to the defence, they often lack the requisite time or resources to search for a particular piece of evidence.
- 10.40 As set out earlier in this chapter, the House of Commons Justice Committee has recently asserted that the government must consider whether current funding is adequate to support a strong disclosure regime, noting the cost implications of delayed and collapsed trials.

Training and Cultural Change

- 10.41 Evidence from England and Wales points to a policing culture of pursuing a conviction against the suspect rather than an approach of pursuing all reasonable lines of inquiry.
- 10.42 There is no doubt that the recent chaos in England and Wales caused by the collapse of trials arising out of late disclosure was contributed to by an inappropriate mind-set on the part of police investigators. The potential problem arises with evidence emerging that may help the defence. Undoubtedly, where it eliminates the suspect altogether, we can safely assume that the police will abandon that line of inquiry. Absent malpractice, it is in no one's interest to pursue a person known to be innocent.
- 10.43 The problem arises when the evidence does not go that far and then there is a danger that it may be "ignored or repressed or marginalised if it does not fit the police case or tends to undermine it."¹⁹
- 10.44 An additional problem may well be that police officers are not evidence lawyers and may not be aware of the complexity of the legal rules governing cross-examination of witnesses and, therefore, be unaware of the potential serious nature of some discoverable documents. The task, therefore, simply cannot be

18 Parker, J. (2018) "Sex, texts and disclosure" *Criminal Law and Justice Weekly* Vol.182 No.5

19 Dennis, I. (2018) "Prosecution disclosure: are the problems insoluble?" *Criminal Law Review* pp.829-842

delegated to police officers with little or no legal training. Hence, the crucial importance of designated disclosure officers dealing with these serious crimes and the need for schedules of unused material being supplied with the case file to the PPS at an early stage.

- 10.45 The literature suggests that across many countries the police mind-set needs to be changed. It has to be predicated on the need to organise evidence with disclosure in mind from the outset. It highlights the crucial importance of training for police officers in disclosure. Disclosure is only as good as the person doing it.
- 10.46 A 2017 report by HM Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) – presciently stated:²⁰
- “The inspection found that police scheduling...is routinely poor, while revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence case is rare. Prosecutors fail to challenge poor quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and prosecutors are failing to manage ongoing disclosure. To compound matters, the auditing process surrounding disclosure decision making falls far below any acceptable standard of performance. The failure to grip disclosure issues early often leads to chaotic scenes later outside the courtroom, where last minute and often unauthorised disclosure between counsel, unnecessary adjournments and – ultimately – discontinued cases, are common occurrences. This is likely to reflect badly on the criminal justice system in the eyes of victims and witnesses.”
- 10.47 With regard to perceived pro-prosecution bias on the part of the police, the NDIP in England and Wales will introduce a new procedure for officers to identify reasonable lines of inquiry when submitting a charging decision request to the CPS.
- 10.48 In 2011, the Canadian Steering Committee on Justice Efficiencies and Access to Justice strongly recommended that police and prosecution should jointly develop and implement a standard checklist for Crown brief and disclosure packages.²¹ It emphasised the crucial importance of training for those involved in such tasks.
- 10.49 This change in mind-set applies not only to the police but across criminal justice stakeholders. In England the NDIP proposed establishing a jointly led police and prosecution-led national disclosure forum with representation from all agencies,

20 HM Crown Prosecution Service Inspectorate and HMIC (2017) *Making it fair: a joint inspection of the disclosure of unused material in volume Crown Court cases* London: HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary

21 Department of Justice (2011) *Report on Disclosure in Criminal Cases from the Steering Committee on Justice Efficiencies and Access to Justice*. Ottawa: Government of Canada

including the Judiciary and defence community, to focus on practical action that can and should be taken to improve performance and disclosure and guard against disclosure failures.²² These meetings include a representative from the Law Society, the Bar Council and Criminal Bar Association, defence solicitors and the Judiciary and have successfully facilitated open discussions on these issues.

Early Engagement

- 10.50 Ensuring early and effective communication between, first, police and prosecutors and, secondly, the defence and prosecution is essential. While the defence's role in disclosure is largely reactive, it must engage and insist on identifying key issues at an early stage.
- 10.51 The Canadian government steering committee suggested that professional participants in the criminal justice system must recognise that they are interdependent and need to work collaboratively in relation to disclosure, and that such a culture change needs to take place, which will enhance the administration of justice.
- 10.52 The NDIP in England and Wales introduces Disclosure Champions to provide training and support in all Crown Court teams. These champions support Chief Crown Prosecutors to complete disclosure assurance, lead training in their areas and drive forward the cultural change in the organisations. In addition to the CPS champions, the police have established a complementary network of champions. They are led at chief officer level in each force and work is coordinated by superintendents/chief superintendents. The Policing College hosted a series of Regional Disclosure events enabling each force to nominate champions to receive updated information about the disclosure improvement initiatives and how to support their colleagues in dealing with disclosure issues in their investigations.
- 10.53 In British Columbia and Ontario, prosecutors are co-located at police stations or with specific police units so that they can provide timely advice in a variety of cases.
- 10.54 Alberta has established disclosure centres, where police and prosecutors work together to ensure initial disclosure packages are quickly and efficiently prepared between police and prosecutors.
- 10.55 It is absolutely clear, therefore, that in most jurisdictions a key element of disclosure management includes ensuring that the police organise evidence with disclosure in mind from the outset. It cannot be regarded as simply an administrative add-on at the end of the investigation.

Technology

- 10.56 All the jurisdictions reviewed are seeking to find appropriate technology to keep up with the evolving pace of digital media. Police technology needs to be developed throughout the world involving a strategy with prosecution in mind.
- 10.57 Lord Justice Gross and the Court of Appeal in England and Wales have highlighted the importance of making full use of sampling, key words and other search tools.
- 10.58 The report by the Canadian government steering committee stated that disclosure issues may be understood as failures of the criminal justice system to effectively use modern information management technology and procedures.
- 10.59 Disclosure centres in Alberta, Canada, provide most of the disclosure electronically, which has significantly improved the process and led to cost savings. Disclosure provided electronically is searchable and may be linked to the trial brief.
- 10.60 In the US there is an emphasis on using technology to support disclosure in order to reduce cost and improve efficiency. Outsourcing is often employed to support this.
- 10.61 In England and Wales, the Government is playing a role in ensuring the digital challenges to disclosure are being tackled by the police and providing support where necessary. The Home Office is currently supporting the police to solve these problems in two main ways:
- Working with policing and wider partners through participation in the NDIP Technology Group. The group, chaired by the CPS and reporting to the National Disclosure Delivery Board, is co-ordinating work across the criminal justice system to develop technology solutions to aid effective disclosures and to ensure there is co-ordinated action in this area.
 - Funding long term police led work through the Police Transformation Fund which will aid the development of capabilities which support effective disclosure, in particular:
 - (i) Mapping forces' current Digital Investigation and Intelligence (DII) capabilities and making recommendations for improvement, covering capabilities all forces require in the extraction, analysis, storage and sharing of digital data which supports effective disclosure.
 - (ii) The development and piloting of a police Digital Evidential Transfer System (DETS) which will enable policing to ease the shared digital material with cross-criminal justice system partners. Once the pilots are completed in April 2019, the national service would be available from June 2019.

(iii) Engaging experts in the technology sector to propose technical solutions to aid disclosure, both existing and for development, at each stage of the investigative process. This work aims to be completed by early Autumn 2019 with a focus on solutions which can be implemented quickly.

10.62 The Justice Select Committee inquiry into disclosure identified a need for a comprehensive strategy to ensure that all police forces are equipped to handle the increasing volume and complexity of digital evidence.²³

10.63 The Home Office is presently supporting a “Landscape Review” which was due to conclude in late 2018. The results of that review will be assessed at the Attorney General for England and Wales’ Tech Summit in mid 2019, co-chaired by the Policing Minister and Solicitor General. This will identify a way forward with police leaders, private tech specialists and companies and other stakeholders in the criminal justice system.²⁴

Feasibility

10.64 Lord Justice Gross noted in his 2011 *Review of Disclosure in Criminal Proceedings*, the importance of recognising that in some cases it is simply not possible or practicable to read every document gathered.

10.65 However, he specifically did not recommend a proportionality test, stating that such a legislative change would require increased confidence in the prosecution’s performance of its disclosure obligations.

10.66 The Canadian government steering committee notes that in unusually larger, complex investigations where the conventional approach to disclosure is not feasible, the prosecution may discharge its duties by providing the defence with a description or index of the material and an opportunity to inspect it.

10.67 Canada, England and Wales, Australia and New Zealand invoke a staged approach to disclosure, as time and effort in preparing and disclosing information of no interest to the defence waste resources. The Canadian government steering committee also notes the importance of using practical procedural tools for the early resolution of disclosure dispute for materials outside the investigative file. Thus at the beginning, the defence requires sufficient evidence in order to provide comprehensive advice to the accused on the ability of the prosecution to prove its case and the consequences of entering a guilty plea. If the case goes to trial, the prosecution can provide additional disclosure.

23 House of Commons Justice Committee (2018) *Disclosure of Evidence in Criminal Cases*. London: House of Commons

24 Attorney General’s Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (CM 9735) London: Attorney General’s Office

Judicial Case Management

- 10.68 Research across the jurisdictions highlights the importance of effective case management in disclosure - for example, setting time limits to shape expectations and allow for measurement and evaluation of progress.
- 10.69 Recommendations from other jurisdictions include ensuring that judges provide early guidance on the prosecution's approach and insist on early defence engagement, providing them both with early binding rulings and directions.

Outsourcing

- 10.70 The question of outsourcing this disclosure exercise has been raised by one prominent academic in the UK,²⁵ and outsourcing is used elsewhere. An example of a jurisdiction where there is emphasis on outsourcing is the US.

Developments in Northern Ireland and the Disclosure Improvement Plan for Northern Ireland (DIPNI)

- 10.71 I have no doubt, and the public can be reassured, that both the PPS and the PSNI share a genuine commitment to meet the challenges of disclosure and that real efforts are being made by both bodies to bring about sustainable change.
- 10.72 I am encouraged to note that both bodies welcome the review of the Attorney General of England and Wales in the context of existing Codes of Practice, protocols, guidelines and legislation on disclosure.
- 10.73 Importantly, in December 2018 the PSNI and PPS agreed a Disclosure Improvement Plan for Northern Ireland (DIPNI). This plan seeks to build on the recommendations of the CJINI inspections of 2015 and 2018 and on joint working groups established by both the PSNI and the PPS.
- 10.74 The DIPNI sets out the work deemed necessary to address the identified weaknesses within the disclosure process in the criminal justice system in Northern Ireland as well as to identify and prepare for future challenges and risks under five headings namely, capacity, capability, leadership, governance and partnership.

Capacity

- 10.75 Under the theme of Capacity the plan undertakes that the two bodies will do the following:
- Develop a joint protocol for the examination of digital media to include appropriate engagement as required between the Disclosure Officer and the prosecutor as to the reasonable lines of enquiry proportionate to each investigation.

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Dennis, I. (2018) "Prosecution Disclosure: Are the Problems Insoluble?" *Criminal of Law Review* at pp.829-842

- Update the existing Service Level Agreement between PSNI and PPS entitled *Service Level Agreement for the Investigation Prosecution and Management of Cases of Rape and Serious Sexual Assault* to:
 - include a requirement for police to investigate the relevant lines of inquiry which involve social media;
 - include a requirement that the Disclosure Officer will examine and report upon such material;
 - include a requirement that police will provide advice to complainants, suspects and third parties including witnesses requesting them to refrain from discussing the complaint via any social media platforms;
- Review and disseminate within the PPS best practice in relation to the recording of disclosure decisions.
- PSNI will develop knowledge and expertise in disclosure via an appropriately resourced and sustainable disclosure model.
- Participate in the National Technology Working Group to explore the use of a range of digital tools to assist in the review of digital material.
- Develop a business case for funding and start design activities through the Causeway Users Group for a police Digital Evidential Transfer System (DETS) to PPS.

Capability

10.76 The plan recognises that there is a lack of understanding concerning disclosure responsibilities within the Police Service and that, in some Crown Court cases, prosecutors sometimes fail to challenge poor quality schedules and inadequate defence statements and in turn provide little or no input to the police. Importantly it emphasises that disclosure issues need to be considered as an integral part of all investigations rather than an additional responsibility added on at the end when preparing a prosecution file. It recognises that the current training delivered is not successfully providing the appropriate learning outcomes for large sections of the Police Service. It also crucially indicates that the process by which disclosure is managed in the PPS will be reviewed to ensure that prosecutors engage with officers regarding issues relating to unused material at the earliest opportunity in relevant cases.

10.77 Under the heading of capability, the plan undertakes to:

- update the PSNI/PPS Disclosure Manual and supporting documents by April 2019;
- develop an Action Plan to include consideration of disclosure training requirements and delivery if any disclosure policy changes;
- initiate development of a suite of standard forms covering third party material examination, retention and disclosure; and

- capture disclosure issues as part of the charge screening process.

Leadership

- 10.78 Under the theme of Leadership the plan concedes that matters relating to disclosure have not always been given the profile or importance that they merit on levels of case work. Accordingly, there has been established the PSNI/PPS Joint Disclosure Forum co-chaired by ACC Criminal Justice & Legacy and the Deputy Director of the PPS.
- 10.79 It is recorded that the following steps have already been taken namely that:
- Attendance has been made at the UK National Disclosure Forum.
 - Establishment of a joint PSNI/PPS Joint Disclosure Forum.
 - Engagement with a disclosure training event hosted by the Bar Council.
 - The introduction, as part of new PPS Case Management Procedures, a system whereby prosecutors, investigators and counsel attend Case Strategy Meetings in complex cases in which disclosure issues are managed and resolved through a consistent and strategic approach. These meetings are to ensure that risks to a successful outcome in difficult and complex cases are identified at an early stage.
- 10.80 The plan undertakes that the following steps will be taken:
- appointment of a single PSNI and PPS expert Disclosure Lead;
 - appointment of PPS Disclosure Champions across different business areas; and
 - appointment of PSNI Disclosure Champions across all departments.

Partnership

- 10.81 It is recognised that action must be taken by the PSNI and PPS and partners throughout the criminal justice system, in particular the defence community and Judiciary, to ensure the effective implementation of proposed measures designed to tackle the current challenges surrounding disclosure. Significantly, it indicates that to assist in the management of the large amount of data that has now been covered in all levels of investigations, assistance and technical expertise may be sought by PSNI from external providers as well as colleagues with the relevant technical knowledge.
- 10.82 It is indicated that the following steps have already been taken:
- Establishment of the Working Together Project which aims to provide file quality and reduce avoidable delay in cases deemed suitable for summary prosecution.

- The relaunching of the Indictable Cases Process scheme to reduce delay (*but significantly this does not include provision for rape and other serious sexual offences*).
- Development of further joint practice improvements including the establishment of evidential standards to improve the quality of the files submitted to the PPS. These standards provide guidance to police officers as to the constituent elements of commonly-encountered offences and also sets out the requirements of the PPS in terms of the evidence needed to prove those constituent elements.
- Establishment of a joint PSNI/PPS Joint Disclosure Forum.

10.83 The plan undertakes the following steps:

- to host a disclosure seminar bringing together senior figures from across the criminal justice system;
- to work with Judiciary and the defence community to focus on practical action to improve performance on disclosure and guard against disclosure failures;
- to identify appropriate cases where significant disclosure issues arise which will be subject to a joint PSNI/PPS Case Conference;
- to identify opportunities to share and receive training in expertise from the CPS;
- to host an annual bilateral disclosure event to review best practice and operational experience, to enhance continuous improvement and to build and maintain effective relationships; and
- PSNI will identify opportunities to share best practice.

Governance

10.84 Under the heading of Governance it is recognised that a mechanism needs to be implemented to review and monitor performance and to enable the sharing of learning throughout the police and PPS. It recognises that performance, compliance and quality must be monitored in order to identify both good practice and areas for improvement across the full range of case work.

10.85 The plan undertakes to:

- include disclosure monitoring as part of the PSNI performance framework;
- ensure that all prosecutors have a performance objective relating to disclosure;
- review and amend the PPS disclosure assurance reporting arrangements to enable more rigorous assessment of performance in PPS;

- conduct a thematic review within the PPS of disclosure compliance and recording by PPS prosecutors across a range of business areas and offence types;
- conduct a thematic review within the PPS of disclosure compliance and recording by independent counsel at court;
- introduce the revised disclosure assurance process in PPS. Compliance with the process will be assessed through the existing performance arrangements and reviews;
- ensure that delivery against the commitments and the plan will be reported to the Management Boards of the respective organisations;
- engage with CJINI regarding future inspections relating to disclosure. Both PSNI and PPS will engage as required with follow up inspections and will jointly monitor progress; and
- brief the Criminal Justice Board as required to keep it informed as to the plan's progress.

10.86 A number of other developments have taken place which include the following:

- (1) Schedules of unused material are prepared by the PSNI and submitted with the file to the PPS. However, this exercise is not employed by the PSNI consistently. It is essential that such a schedule contains a description of the unused material that is sufficiently useful and informative to enable critical initial judgments to be made by both prosecution and defence as to its relevance and potential importance to the case. The PPS indicate that even in cases where a prosecution is recommended, that schedule is often not included. This produces a real gap in the process and needs to be corrected. It has to be recognised that it is central to decision-making. The PSNI expressed the view that the process of submitting a schedule of unused material in Northern Ireland does not exist and the material is listed on either the sensitive or non-sensitive schedules. Where even the PPS and the PSNI cannot agree on the nomenclature of this process, my concerns are increased.
- (2) Third party material is guided by the Third Party Practice Direction on Disclosure which has been handed down by the Lord Chief Justice. However, the PPS asserts that there is inconsistent application of it judicially. An example given is that when the defence makes application for material under section 8 of the CPIA, too lax an approach is adopted with the extra material invariably being granted which in turn causes substantial extra work for the PPS.

10.87 The concept of a Disclosure Management Document that records all materials to be disclosed, and note of the decision taken and affording easy access to everything in the one place concerning disclosure has not been invoked in

Northern Ireland despite the fact that these Disclosure Management Documents have been regularly used by the CPS in England in all rape and serious sexual offences.

10.88 Technology is sadly lacking in Northern Ireland in the criminal justice system. We are very far off developments in the rest of the UK, with inadequate resources and infrastructure.

Discussion

10.89 All those handling a case – investigators, prosecutors and defence lawyers – have an important part to play in the disclosure process, all underpinned by oversight from the Judiciary. Prosecutions must not be brought based on insufficient evidence and both the accused and complainants may be caused suspense and uncertainty, not to mention injustice, unless disclosure is properly effected.

10.90 Recent events in England have highlighted yet again how much damage to public confidence in the criminal justice system is caused when the disclosure in individual cases is mishandled.

10.91 The Disclosure Improvement Plan for Northern Ireland (DIPNI) has excellent aspirations and if followed through will do much to address the issues that challenge both the police and PPS. However, it is disappointing to note from the recent CJINI report of November 2018 that the process of disclosure was still riven with flaws including examples where the police did not properly discharge their responsibilities in relation to revelation and relevance, a lack of challenge and support by the PPS about these issues and a lack of adequate record keeping by prosecutors in relation to the discharge of their own disclosure duties. Moreover, the recommendation of 2015 that the PSNI would scope and deliver a new Central Disclosure Unit has still not been developed. Happily, the PSNI have now advised me that through the DIPNI, a disclosure unit is in the process of development.

10.92 I agree with virtually all commentators²⁶ on the existing system in Northern Ireland, and England and Wales, who say that, although the CPIA regime predates the enormous expansion in electronic communication in social media, it is still fit for purpose. It would be a distraction to reinvent the wheel and there is no need to do so. The test is clear and sensible. It is the application of the law that is inadequate and unsatisfactory.

10.93 The test for disclosure under the current legislation is that of relevance. This test dictates the parameters of unused material seized during an investigation which

26 See also similar view expressed in the Attorney General's Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (CM 9735) London: Attorney General's Office and in the House of Commons Justice Committee (2018) *Disclosure of evidence in criminal cases*. London: House of Commons

the investigator is obliged to schedule. It is the items on the schedule that the investigators review and to which the disclosure test is applied.

- 10.94 I observe from the AG's Review of 2018 that some stakeholders had suggested there should be no relevance test and the investigator should schedule everything they come into possession of during an investigation as otherwise there is a risk of items being missed off the schedule. I agree with the conclusion of the AG's Review that provided a broad and flexible approach is taken to the concept of relevance:

"it would create a disproportionate and illogical burden on the investigator to require them to schedule all obviously irrelevant material. It would cause further delay for victims, witnesses and suspects while scheduling and reviewing took place and there is no evidence that it would improve outcomes."²⁷

- 10.95 Other stakeholders in the AG's Review suggested that the relevance test was far too wide and needed an overt reference to proportionality. Their view was that too much time was already spent scheduling and reviewing items that meet the relevance test but are in fact of no real help to the issue in dispute between the prosecution and the defence. Once again I agree with the AG's Review which adverted to the recognition by Lord Justice Gross in his 2011 Review that on paper there is merit in the argument for proportionality but Lord Justice Gross did not recommend this due to strong representations from stakeholders that it would lead to miscarriages of justice. It seems to me that remains a valid argument and I do not recommend a narrowing of the relevance test.

Resources

- 10.96 Frankly, unless appropriate resources are put into ensuring there are sufficiently suitably qualified personnel, adequate technology and improved data collection, available to assist digital disclosure delays, the risk of injustice will continue. The fact of the matter is that resourcing issues may mean that the dangers of relevant material being left undisclosed or remaining hidden in unused materials that have emerged in England could well surface in Northern Ireland. The DoJ has to appreciate that the colossal waste of public money involved in the current delayed system, and the dangers of trials being aborted at a late stage, outweigh the cost of putting additional resources into the system.

Training

- 10.97 Disclosure must be seen as integral to the criminal justice process and not a tiresome add-on. This is a message that I do not believe the PSNI has yet fully implemented, and it needs to change. Training should emphasise that the Service must address issues of disclosure from the very outset and recognise that

27 Attorney General's Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (CM 9735) London: Attorney General's Office

disclosure is central not only to decision-making in serious sexual offences but a vital ingredient of the whole process from beginning to end.

- 10.98 Effective disclosure practices must become the norm throughout the system. Thus, I consider that the often repeated failure to submit a Schedule of Unused Material to the PPS is indicative of how some PSNI officers have relegated the importance of disclosure as a key ingredient at operational level.
- 10.99 Similarly, it is crucial that the PSNI and the PPS commence to use a Disclosure Management Document (DMD). The DMD is the essential means by which the critical requirement that there be a clearly defined and focused strategy between an investigator, forensic scientist and prosecutor and thereafter between the prosecution advocate, the defence team and where appropriate, the judge can be assured, especially with respect to digital material. At present, the parties in the proceedings are making decisions, preparing their case and making case management decisions before fully understanding the nature of the investigation and the lines of enquiry that were, or were not, pursued and why. This can lead to misunderstandings and delay, when issues or remedial action could have been resolved much earlier if the digital forensic strategy and overall disclosure management was understood and, to the extent possible, agreed by those involved.²⁸
- 10.100 Similarly, PSNI officers must be trained to the effect that third-party disclosure must be addressed from a very early stage. There is no reason why an experienced PSNI investigator should not recognise at an early stage the need for third-party disclosure and to set in motion that process.
- 10.101 Encouragingly the Disclosure Plan invokes the principle of Disclosure Champions who would be responsible not only for oversight of disclosure in the PPS but the supervision of trends in disclosure within the PSNI. It seems to me that in every serious sexual offence investigation, the Designated Disclosure Officer should be a specialist having had specialised training in the art of disclosure rather than relying, as I understand the current position to be, on the officer in charge who plays such a role and who may not have such expertise. It is not enough to persist with the current practice of merely appointing whoever is the chief investigating officer to head up disclosure.
- 10.102 The PSNI should also be trained to provide an audit trail of all work done by its officers in this regard during the course of serious sexual investigations so that transparency is obvious not only to the defence but to the court.

28 Attorney General's Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (CM9735) London: Attorney General's Office

10.103 In that context it is worthy of note to observe the 2017 joint inspection by HM Crown Prosecution Service Inspectorate and HMICFS, that:

“identified a basic lack of knowledge by police of the disclosure and scheduling process, with officers failing to understand why they needed to provide good descriptions of material. There was also confusion amongst officers as to what constituted relevant unused material.”²⁹ Furthermore, the inspectors found existing training to be inadequate.

10.104 I strongly suspect that this also applies to the PSNI and hence the importance of the training adverted to in the Disclosure Improvement Plan for Northern Ireland.

10.105 In short, resolving problems with disclosure will necessitate a shift in culture, driven by clear leadership. This echoes the findings of the *Mouncher* Investigation Report by Richard Horwell QC which concluded:

“Disclosure errors were not designed to pervert the course of justice; they were the consequence of inexperience, poor decision making and inadequate training, leadership and governance.”³⁰

10.106 In making these criticisms of the current training with the PPS and PSNI, I make it clear that I do not underestimate the scale of digital material now generated by police investigations, but unless a radical change is made in our approach to these fresh difficulties in the disclosure process, injustices will inevitably follow.

Early Engagement

10.107 Early engagement is the key to reducing delay and bringing about timely and efficient disclosure. This includes early engagement between police and prosecutors and, equally and perhaps even more importantly, between defence and prosecution. The defence must engage and assist in identifying key issues at an early stage. Collaborative working is the only solution to the current unconscionable delay in the system in relation to disclosure.

10.108 As indicated in the AG’s Review of November 2018, early discussions between the prosecution and the defence ensure better quality defence statements, identifying actual issues for the trial and helping the prosecutor to better perform the disclosure exercise. In the current system, both prosecution and defence frequently fail to engage with this process until very close to the trial date and often during the trial itself.

10.109 I do not favour the Canadian and US system of seamless integration of investigators and prosecutors. Our own model of institutional separation has strengths that cannot be ignored. Nonetheless, that should not preclude

29 HM Crown Prosecution Service Inspectorate and HMIC (2017) *Making it fair: a joint inspection of the disclosure of unused material in volume Crown Court cases* London: HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary

30 Horwell, R. (2017) *Mouncher Investigation Report* (HC 292) London: House of Commons

extensive prosecutorial guidance by the PPS on disclosure issues to properly trained designated disclosure officers within the PSNI at the commencement of serious sexual offence investigations.

- 10.110 As indicated in chapter 9, 'Delay', the stages of the case management now being directed by Crown Court judges must include early involvement of the defence making a positive contribution to the disclosure system.
- 10.111 Early engagement of the PSNI must involve early preparation of schedules of unused material, which need to be given a much higher priority than they are at the moment, and the PSNI should at the earliest possible stage commence the process of third-party disclosure.
- 10.112 The CPS in England and Wales has provided specimen letters to me — for example, dealing with early approaches for third-party material — for guidance for the PSNI to use. These can be readily made available to the PSNI by this Review if such templates are not in their possession.

Technology

- 10.113 There is much to be said for the view expressed by the Canadian government steering committee which recently asserted that disclosure issues may be understood as failures of the criminal justice system to effectively use modern information, management technology and procedures.
- 10.114 The full potential of new technology is not currently being exploited in Northern Ireland. We must learn to make use of sampling, keywords, artificial intelligence, computer learning, word searches, algorithms etc. and feedback in order to make accurate decisions in the future.
- 10.115 It is encouraging to note that in England and Wales work is progressing on a joint National Police Chiefs' Council and Home Office programme, 'Transforming Forensics' to take advantage of leading edge technology and innovation to respond to present and future demands.
- 10.116 I share entirely the view expressed in the AG's Review of November 2018 that we must reach the stage where before commissioning resources on digital forensic work, the investigator, in conjunction with the prosecutor where appropriate, should agree a clear strategy as to what is required and why. There may be multiple digital exhibits and it will be important to decide on what the priorities are, perhaps submitting requests in appropriate phases so as not to overwhelm resources. With each piece of work, it is important to target the right data on the device. For example, where there is an allegation of rape involving two people who have known each other for six weeks, there may be no need to examine data on a smart phone preceding that period. In short the primary objective of all concerned in the investigation and the consequent proceedings must be to achieve a clearly defined and focused strategy between

the investigator, forensic scientist and prosecutor and thereafter between the prosecution advocate, the defence team and where appropriate, the judge.

- 10.117 The proliferation of smart phones and tablets, the manner in which people now live their lives through electronic communications and the way that traces of that can be forensically recovered from the senders and recipients devices, on-line, from third parties or stored in the cloud, means that these issues are now encountered more regularly in everyday Crown Court cases. Technology is therefore a major part of the problem but it must be made into part of the solution as well.
- 10.118 The digital strategy group in Northern Ireland needs to invest its time and experience in the criminal justice system to bring about technological advances. At the moment Northern Ireland is far behind advances currently being introduced in England and Wales.

The Privacy Rights of Complainants

- 10.119 Whatever the extent of the information that has to be processed, disclosure should not involve an open-ended trawl of unused material. There are reports in England of unfettered access to highly personal records and data being sought by the police from complainants under threat of the case being dropped. There is no need for a trawl through everything in the life of the complainant. As Dame Vera Baird QC said recently:

“A criminal case is about what happened not whether the complainant qualifies for sainthood.”³¹

- 10.120 The fact of the matter is that complainants must not be subjected to unwarranted intrusion into their privacy. This is one of the factors that contributes to complainants not reporting serious sexual offences and withdrawing once involved. It is worthy of note that this issue was raised before the Justice Select Committee Inquiry into the Disclosure of Evidence.³² The evidence before this Committee was submitted by victims’ representatives such as Rape Crisis, Police and Crime Commissioners, forensic specialists, prosecutors and defence lawyers. The Attorney General’s Guidelines in England and Wales are to be revised to assist the prosecution in ensuring that privacy and data protection considerations are properly embedded in disclosure practices and procedures.
- 10.121 This is one of the reasons why I have recommended that legal representation be made available to complainants. There is a clear necessity to ensure that informed and qualified agreement is given by the complainant as a data subject,

31 Barr, C. and Topping, A. (2018) ‘Police demands for potential rape victims’ data spark privacy fears’ *The Guardian* 25 September

32 House of Commons Justice Committee (2018) *Disclosure of Evidence in Criminal Cases* (HC859) London: House of Commons, para.120-127

firstly to the examination of the data, and, if necessary, to the disclosure of material. Systems need to be implemented to record agreement at each stage. The PPS will need to be satisfied that informed agreement to disclosure has been given and that, importantly, complainants and witnesses are aware that disclosure is not to be made before this happens. I see no reason why there should not be a system of redaction of digital material and this is an area where technical and practical capabilities of the police needs to be prioritised.

Case Management

- 10.122 The role of effective case management in disclosure cannot be overestimated. As already indicated in chapter 9, 'Delay', the Judiciary must grip this concept of disclosure at the earliest possible moment, setting time limits to shape expectations and allow for measurement and evaluation of progress.
- 10.123 Judges must be proactive in insisting on early defence engagement and making binding rulings in terms of disclosure at early stages.

Outsourcing

- 10.124 I conclude by saying that I recognise that the disclosure exercise is not performed in timeless academia. It is performed often in police stations under significant pressures of time, resources and the weight of work.
- 10.125 It is this that has led in some circles to a suggestion that the police might be able to call on the services of an experienced lawyer independent of both prosecution and defence — for example, a retired county court judge with the seniority and requisite skills to deliver an authoritative opinion on the application of a disclosure test. An independent and partial reviewer of unused material would not be subject to the risk of confirmation bias. Whilst there would a cost involved, the time of such reviewers would amount to a savings against the risk of trials collapsing.
- 10.126 I note in the Disclosure Improvement Plan for Northern Ireland that outside help for the PSNI is contemplated when necessary.
- 10.127 For my part, until the recommendations I have made have been implemented and given an opportunity to correct the present situation, the need for an outside independent source does not seem to me to be merited at this stage. However, I do not dismiss the possibility of it if delay in the process and continuing flaws in the system persist.

Responses

- 10.128 The responses of the Criminal Bar Association and the Law Society have been broadly supportive of the proposals put forward. Both are in agreement that

the current process is flawed and requires urgent change. Common themes emerging from their responses were as follows:

- (1) Early judicial control with early disclosure hearings will facilitate early identification, gathering and retention of potentially relevant material.
- (2) The Criminal Procedure and Investigations Act 1996 is fit for purpose and the existing legislative disclosure test and applicable procedures are adequate.
- (3) There is clearly a need for more co-operation between prosecution and defence which in the past has become unnecessarily and unhelpfully combative. The Criminal Bar Association suggests a Joint Steering Committee to recalibrate the disclosure system. This fits in precisely with the co-operative approach already outlined in the Disclosure Improvement Plan put forward by the PPS and PSNI.
- (4) The Criminal Bar Association advocate “some form of retrospective audit trail which clearly and objectively fixes individual responsibility for disclosure and any failings.” It also suggests that “similar standard form checklists” would benefit practitioners within the PPS by making clear what had been done and what needed to be actioned. Once again this coincides precisely with the proposals outlined in the Disclosure Improvement Plan, which I strongly encourage.
- (5) Understandably the Law Society have exhorted the need for adequate public funding to be available for all sides to comply with their responsibility and this coincides with chapter 18 where I have put forward views on “Resources”.

10.129 The Attorney General’s Review in England and Wales was obviously not a response to my Preliminary Report albeit it was published about the time of or shortly after my report. However, it has dealt with a number of issues common to those raised by me in this chapter on disclosure.

10.130 I have already touched on a number of the proposals contained in that Review in the course of this chapter. However, it contained a number of additional matters which can be usefully added to those proposals I have already put forward. These include:

- (1) Whilst agreeing with all commentators that the primary legislation is adequate, it does recognise that difficulties with interpretation in some instances have arisen. It records that this can manifest itself through investigators and prosecutors interpreting the disclosure test too narrowly or placing too much focus on what the defence asserts to be its case, disregarding other matters unknown to the defence that would be part of the defence case if only they were made aware of them, or other possible defences which the facts might support.

- (2) In the Mouncher Investigation Report of July 2017, Richard Horwell QC expressed disapproval of the phrase “strict interpretation of the disclosure test”. His recommendation was that whilst disclosure must be carried out according to law, “if in doubt disclose” is an important steer to ensure everything that might assist the defence is in fact disclosed to them.
- (3) The Attorney General thus concludes:

“The government is satisfied that the legislative scheme is sound, provided the statutory test is interpreted by investigators and prosecutors who are sensitive to the risks that an overly inflexible approach could cause.”³³
- (4) It is important to observe that whether material is relevant, or whether it satisfies the disclosure test, can be cumulative. In isolation, a document or piece of information may seem irrelevant, but when taken together with several other items it might be significant. Furthermore, even material that may appear to have a negative impact on a defence, or a fact relied on by the defence, can assist in establishing the boundaries within which it can practically be advanced or the weight that can be placed on it at trial.
- (5) I fully endorse that approach and it is my recommendation that the PSNI and PPS should be sensitive to the risks presented by an overly inflexible approach to the relevance test.
- (6) Recognising that there are regular failings in the quality of disclosure performance in “volume crime” cases, the AG’s Review assessed that there were certain items of material that almost always assisted the defence and therefore meet the test for disclosure. However, they are frequently not disclosed until there has been significant correspondence and challenge from the defence which is wasteful of time and resources. Accordingly, the Review recommended that a rebuttable presumption should be created through the CPIA 1996 Code of Practice that certain types or categories of unused material meet the disclosure test. Whilst a full consultation will be conducted on this proposal in the future, the following were suggested:
 - crime reports;
 - computer aided despatch records of emergency calls to the police;
 - existing investigators’ notes;
 - any record of the complaint made by the complainant;
 - any previous account of a witness, including draft witness statements;
 - CCTV footage, or other imagery, of the crime in action;
 - previous convictions or cautions of witnesses;
 - basis of pleas of co-accused; and
 - defence statements of the co-accused.

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London: Attorney General’s Office

- 10.131 If there is a rebuttable presumption, the focus for the investigator and prosecutor shifts to whether there is good reason that those items do not satisfy the disclosure test. This constitutes only a presumption and therefore nothing is automatic about the disclosure and irrelevant sensitive personal information contained in those documents must be redacted. I consider this to be a useful approach and accordingly I recommend that it be implemented.
- 10.132 Within any system accountability is necessary to ensure standards are met. The AG's Review concluded that there was a wide consensus that the imposition of financial penalties in criminal litigation where the majority of parties are publicly funded does not assist with ensuring compliance.
- 10.133 However, it did recommend that the Criminal Justice Board gathers examples of national good practice and, working with the Judiciary, the CPS and the defence, considers how to enforce the application of such good practice. Sanctions are always a major problem to ensure compliance within the criminal justice system. If sanctions, which I believe should exist, are to be meaningful, they will require input from the Judiciary, the PPS and representatives of defendants.
- 10.134 The Northern Ireland Criminal Justice Board is not as widely representative as the Criminal Justice Board in England. However, the Criminal Justice Board in Northern Ireland is supported by the Criminal Justice Programme Delivery Group, which comprises the senior leaders of all criminal justice organisations in Northern Ireland. Taken together, the two Boards appear broadly to cover the role discharged by the English Criminal Justice Board. I see no reason therefore why the two bodies cannot combine to consider the examples of national good practice that operate in England and Wales and to resolve to apply the best of that practice to Northern Ireland. I accordingly recommend that this be done.
- 10.135 Early engagement between prosecution and defence has been strongly exhorted in my Preliminary Report. Discussion on this aspect of disclosure has largely centred around the stage after the defendant has been charged. However, the AG's Review points out that nothing in common law prevents the prosecution and defence having a discussion at any stage of an investigation:
- "On the contrary, defence engagement at the pre-charge stage could identify reasonable lines of inquiry pointing away from the suspect to be taken into account when considering a charging decision. This would allow for the identification of undermining material at the outset of the investigation, meaning weak cases could be finalised at an early stage."³⁴

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- 10.136 The AG's Review has identified areas of good practice which were of benefit to disclosure and management at the pre-charge investigation stage namely:
- investigators asking complainant and suspect whether they are aware of, or can provide access to, digital material that has a bearing on the allegations;
 - investigators and defence representatives agreeing a summary of lines of inquiry that have arisen from an interview under caution;
 - standard questions for interviewers to identify common disclosure issues and barriers like encryption keys;
 - defence representatives setting out clear representations on potential lines of inquiry in a prepared statement at the beginning of the interview;
- 10.137 There is usually only very limited information or 'pre-interview disclosure' provided in advance of an interview under caution. There is nothing wrong with that as the investigators will wish to get a frank account of what took place from the suspect. However, evidence provided to the AG's Review revealed a gap pre-charge where:
- (i) if the defence knew more about the prosecution case they might volunteer more information; and
 - (ii) if the investigator and prosecutor knew about that information it would help them identify new lines of inquiry, particularly in relation to where exculpatory material might be on a digital device or social media.
- 10.138 The AG's Review was provided with some examples by some parties that suggested pre-charge engagement between prosecutor and defence might have avoided a case being charged that was stopped later in proceedings when the issue was raised post-charge.³⁵
- 10.139 The National Disclosure Improvement Plan in England is setting up a working group to consider guidance to fill that gap in the rare cases that might benefit from prosecutor and defence lawyer engagement pre-charge. The revised Attorney General's Guidelines on Disclosure will also include guidance and pre-charge engagement. I strongly recommend that the Disclosure Improvement Plan for Northern Ireland should also envisage setting up a similar working group to consider appropriate guidance on this matter.
- 10.140 In passing I observe that in a number of instances where I met accused who had been acquitted of serious sexual offences, a claim was made that the charges should never have been brought and that earlier disclosure would have obviated any charges being preferred. In the AG's Review it is recorded that:
- "The government considered evidence which suggested that, in some cases stopped due to disclosure difficulties, there were questions which could and should have been addressed pre-charge."

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As above.

- 10.141 Accordingly, the AG's Review recommends that the documents which influence an investigator's or a prosecutor's decision to charge a case should make explicit the requirement for adequate assurance on disclosure issues before a case is charged. Strong evidence was given to the AG's Review that, in some cases, it is only if the investigators have prepared draft disclosure schedules pre-charge that the prosecutor is able to identify possible defects in disclosure that ought to be remedied before charges are brought or that might reveal that the case ought not to be prosecuted at all. I have made similar recommendations.
- 10.142 The AG's Review recorded that the evidence to the Justice Select Committee inquiry had demonstrated a clear need for more sophisticated data collection by the CPS in order to provide an appropriate basis for measuring, managing and tracking performance on disclosure. Without reliable data, performance improvement cannot be consistently assessed. Work is already taking place, under the National Disclosure Improvement Plan, to enhance performance. For example, improvements have been made to how Individual Quality Assessments in the CPS are undertaken, with legal managers completing the assessments on a sample of cases each month to draw out learning and good practice. I strongly recommend that the PPS move to put in place methods of recording data about disclosure and on a monthly basis senior officials to complete assessments on a sample of cases that draw out learning and good practice about disclosure.
- 10.143 The AG's Review recommended that the Criminal Justice Board in England and Wales should become the forum through which improvements are overseen. It was recommended that that should include the next phase of the National Disclosure Improvement Plan programme reporting to the Criminal Justice Board so that the systemic nature of the problems, the lessons learned and the practices improved would occur at a deep cultural level, sustainably and for the long term.
- 10.144 I strongly recommend that the Northern Ireland Criminal Justice Board in liaison with the Criminal Justice Programme Delivery Group should become the forum through which improvements in disclosure and for that matter delay are overseen and I suggest these two topics be put on the agenda at each CJB meeting for the foreseeable future.
- 10.145 One online blog,³⁶ whilst taking no exception to much of what was contained in the disclosure proposals in the Preliminary Report, did challenge the assertion therein that everything that the investigator comes into possession of during an investigation should be disclosed. I have already dealt with this in the course of this chapter. In terms it amounts to a suggestion that there should be no relevance test. Provided, as I have recommended, that a broad and flexible approach is taken to the concept of relevance, I repeat that it would create a

disproportionate and illogical burden on the investigator to require them to schedule all obviously irrelevant material. This would cause further delay for victims, witnesses and suspects whilst scheduling and reviewing took place. Provided that there are robust audit trails and rigorous checking and challenging by prosecutors at all levels when reviewing and performing their disclosure obligations, I am satisfied that the present procedure is the appropriate one.

Recommendations

131. A recognition that disclosure is a specialism by the PSNI. Minimum standards and accreditation are necessary in the appointment process of Designated Disclosure Officers in the PSNI.
132. The PSNI should scope and deliver a new Central Disclosure Unit as a matter of urgency.
133. In all training delivered to the PSNI and the PPS, the potential significance of failures in disclosure should be underscored by using appropriate examples from actual cases.
134. Disclosure training should emphasise the continuing obligation on Designated Disclosure Officers throughout an investigation to seek to ensure that all relevant information has been identified, is recorded and submitted to the PPS. The PSNI should provide an audit trail of work done by the police in the course of the disclosure exercise.
135. The PPS and PSNI should be particularly flexible in the approach to the relevance test.
136. The PSNI must afford a higher priority to schedules of unused material to be, without exception, submitted with the police file to the PPS.
137. The duty of the Designated Disclosure police officer must include flagging up what is relevant when submitting unused material and third-party material to the PPS.
138. The PSNI should address potential third-party disclosure issues at the outset of the investigation.
139. In training, the investigative mind-set necessary for the PSNI must be highlighted, indicating the need to identify evidence that would be helpful not only to the prosecution but potentially to the defence.
140. The police must be trained to see disclosure as a core justice duty rather than an administrative add-on.
141. The PPS should introduce forthwith a Disclosure Management Document.
142. The PPS should reintroduce Disclosure Champions throughout the system.
143. Robust judicial case management must be introduced at an early stage, highlighting the importance of a defence statement identifying the key issues in the case and setting time limits to shape expectations.
144. Resources must be invested in technology. The Digital Strategy Group in Northern Ireland should lead the process of technological advance in serious sexual offences.

145. In all serious sexual offences where disclosure has been substantial, the PPS should forward to the relevant Disclosure Champion in the PSNI, at the termination of the case, a brief report on how disclosure was handled in the case, highlighting any defects and suggested improvements.
146. Guidelines should be revised to assist the prosecution in ensuring that privacy and data protection considerations are properly embedded in disclosure practices and procedures.
147. Such guidance should emphasise the importance of police making arrangements to ensure that prosecutors are satisfied that informed agreement to disclosure has been given by complainants and that complainants and witnesses are aware that disclosure is to be made before this happens.
148. There should be a rebuttable presumption in favour of disclosure for categories of key documents/materials that usually assist the defence.
149. The Northern Ireland Criminal Justice Board and the Criminal Justice Programme Delivery Group should consider and draw up sanctions in order to hold PSNI, PPS and defence practitioners accountable for repeated default in relation to disclosure duties.
150. The Disclosure Improvement Plan for Northern Ireland should be carried out as a matter of urgency.
151. The Disclosure Improvement Plan for Northern Ireland should establish a working group to consider guidance on pre-charge engagement of prosecution and defence practitioners.
152. Before a defendant is charged, the PPS should demand adequate assurance from the PSNI investigators on disclosure issues and, wherever possible, insist on the preparation of draft Disclosure Schedules pre-charge.
153. The Criminal Justice Board supported by the Criminal Justice Programme Delivery Group should become the forum through which improvements to disclosure and delay are overseen.
154. The Criminal Bar Association, the Law Society, the PPS and the PSNI should set up a joint steering group to consider methods of improving the disclosure process.

Chapter 11

Consent

Consent is a philosophical, psychological, and legal quagmire.

Aya Gruber
'Consent Confusion'¹

Issues

- Is the current definition of legal consent inadequate?
- Is our understanding of what evidence constitutes reasonable belief on the part of an accused person confused and unclear?
- Should Northern Ireland introduce the concept of gross negligent rape?

Current law

- 11.1 The current law on sexual offences in Northern Ireland is governed by The Sexual Offences (Northern Ireland) Order 2008 (the 2008 Order). The 2008 Order sought to consolidate the law on sexual offences in Northern Ireland into one statute and to modernise, strengthen and harmonise the body of offences and penalties in line with England and Wales. The provisions in the 2008 Order place the law on sexual offences in Northern Ireland on a par with Part 1 of the Sexual Offences Act 2003 which governs the law in England and Wales.
- 11.2 The 2008 Order provides a general definition of consent in Article 3 as follows:
 'A person consents if he agrees by choice, and has the freedom and capacity to make that choice.'
- 11.3 The definition is relevant to a number of offences in the Order that require that the complainant (C) must consent to sexual activity. In the case of rape this applies to any penetration of the vagina, anus or mouth of C.
- 11.4 In proving the absence of consent, the Order sets out limited circumstances that would amount to a conclusive (irrebuttable) presumption of absence of consent (Article 10) and other circumstances that would amount to a rebuttable presumption of the absence of consent (Article 9). Where the facts do not fall squarely within any of these irrebuttable or rebuttable presumptions, the prosecution must prove the absence of consent in accordance with the general definition - that is, that the complainant did not agree by choice, or lacked the freedom or capacity to make that choice.
- 11.5 Article 9 provides that there will be an evidential presumption against consent where the victim has, for example, been subject to violence (may be rebutted by the defence).

¹ Gruber, A. (2016) "Consent confusion" *Cardozo Law Review* Vol. 38:415 pp. 415-458

- 11.6 Article 10 provides for a conclusive presumption (cannot be rebutted) where, for example, it is established that the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act.
- 11.7 As well as proving an absence of consent to, in the case of rape, intentional penetration, the prosecution must also prove an absence of reasonable belief in consent on the part of the defendant (D).
- 11.8 Article 5(2) of the 2008 Order provides that whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps D has taken to ascertain whether C consents.
- 11.9 This formula is repeated in the 2008 Order for other sexual offences where C must consent to sexual activity (see Articles 6(2), 7(2) and 8(2)). An honest but mistaken belief in consent may not be reasonable.
- 11.10 The irrebuttable and rebuttable presumptions apply equally to the issue of absence of reasonable belief: where the relevant circumstances and the defendant's knowledge of those facts are established by the prosecution, it is presumed that the complainant did not consent and the defendant did not reasonably believe that she (or he) was consenting.
- 11.11 There is, therefore, a threefold test in cases of rape:
- Did the complainant consent?
 - Did the accused believe the complainant consented?
 - If the accused believed that the complainant consented was that belief reasonable?

Background

- 11.12 The present legislation was designed to centre sexual offence law upon respect for individual sexual autonomy and freedom of choice. The new definition was meant to offer more clarity than the previous law's rudimentary distinction between consent, however reluctant, and mere 'submission' falling short of consent.
- 11.13 The 2008 Order for Northern Ireland follows the approach in England and Wales by replacing the previous requirement of knowledge or reckless knowledge of the absence of consent with a need to prove that the defendant does not reasonably believe that C consents.
- 11.14 This was hailed as an important step forward in respecting the principle of sexual autonomy as it put the onus on D to be clear that C does consent.
- 11.15 The difficulty is that the definition of consent is vague, with the result that juries and, for that matter, defence counsel may bring sexual stereotypes into play in determining whether there was consent. If we permit criminal justice actors to

draw on rape myths, this may attach a sense of legitimacy to them and lead to their reinforcement in the minds of jurors.

- 11.16 Therefore, there has been criticism that the test as to whether a belief is reasonable, requiring regard to be had to all the circumstances, does not clearly delineate what should and should not be considered reasonable, leaving the door open for stereotypes to determine assessments of reasonableness. Moreover, what circumstances are to be considered? Those surrounding the immediate interaction or broader background circumstances?
- 11.17 The judicial directions in the England and Wales *Crown Court Compendium* stress that the test is whether an ordinary, reasonable person, in the same circumstances as D, would have believed C was consenting, not whether D thought it was reasonable. But it has been suggested that it is not difficult for D to establish that his belief in consent was reasonable based on the complainant's behaviour, such as flirting or failing to actively demonstrate a lack of consent through protest. Additionally, does this include certain characteristics of the defendant and thus be more subjective than objective?
- 11.18 There are various ways in which steps could be taken to shift the focus of attention away from C's behaviour toward D's conduct in deciding whether D has a reasonable belief in consent. The present Order does factor into consideration 'any steps D has taken to ascertain whether C consents'. This appears to draw the jury's attention to the importance of examining D's conduct and not just C's behaviour, but the present Crown Court directions in England and Wales state that there is no obligation on D to have taken any specific steps to ascertain consent.
- 11.19 The review of sexual offences in England and Wales, which preceded the legislation that introduced the new definition in the Sexual Offences Act 2003, also recommended that there should be a standard direction that, depending on the circumstances of the case, juries should be told not to assume that the complainant did freely agree just because they did not say or do anything, protest or resist, or was not physically injured. In the event this recommendation was not acted upon in England and Wales and no such standard direction is regularly given. It was not included in the review and consultation on the law in Northern Ireland.

Other jurisdictions

- 11.20 We are not alone in Northern Ireland in struggling with the concept of consent in these cases. It has presented lawmakers internationally with significant challenges. This is particularly marked in the sphere of sexual relations, where communication is often characterised by subtle suggestion and tacit understanding. As consent can be understood and interpreted in different ways, providing appropriate criteria in relation to consent is a key challenge.

11.21 Internationally, a wide range of approaches are in place to define rape, which may or may not include defining consent. There are five approaches to this concept across the international jurisdictions.

11.22 (i) Rape defined by force or resistance

- This derives from historical ideas about female chastity. Force and resistance remain highly significant evidentially in criminal justice, even in jurisdictions that have moved to consent-based models e.g. in France, the Netherlands, Norway and some states in the US. Perfectly correctly the UK has moved away from that old model.

11.23 (ii) Veto model: “no” means “no”

In this model the complainant must actively express rejection of an act in order for it to become criminal conduct. An example of this applies in Germany. Once again, perfectly correctly, we have moved away from this model.

11.24 (iii) Consent-based models

11.25 There are various descriptions of consent in place, including wanted or agreed to sex. Approaches to defining consent are broadly similar in a number of jurisdictions where the actus reus of rape requires proof that the complainant did not consent. Consent is defined slightly differently across the jurisdictions, as follows:

- in England and Wales, consent is defined as where a person ‘agrees by choice, and has the freedom and capacity to make that choice’. Northern Ireland uses this definition;
- Australian territories often refer to ‘free and voluntary agreement’;
- the Canadian Criminal Code defines consent as ‘voluntary agreement’, and notes that it is not a defence if the accused failed to take reasonable steps to ascertain consent;
- New Zealand legislation notes that ‘a person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity’;
- Ireland defined consent in 2017 as where a person ‘freely and voluntarily agrees to engage in that act’, and notes that any failure to offer resistance does not of itself constitute consent;
- Scotland defines consent as ‘free agreement’;
- South Africa defines consent as ‘voluntary or un-coerced agreement’; and
- Sweden notes that a person commits rape if they have sex with ‘a person who is not participating freely’. I pause to observe that this is an interesting description and has its attractions. It moves from a sole focus on the context

within which consent is given to a conception of consent as something that requires participation.

- 11.26 In regard to the mens rea of rape in the following jurisdictions, in varying degrees the prosecution must prove that the defendant knew that the complainant was not, or might not be, consenting, and/or that the defendant did not consider whether the complainant was consenting or was reckless in this regard:
- in Australia, honest but mistaken belief in consent is a defence to rape: in most territories this belief must be held on 'reasonable grounds', although some place the onus on the defendant to prove that they took 'reasonable steps' to ascertain consent;
 - in Canada, the Criminal Code places an onus on the defendant to introduce evidence as to what reasonable steps they took to ascertain consent;
 - in England and Wales, the defendant's belief must have been 'reasonable';
 - in New Zealand, the accused's belief in consent must be held 'on reasonable grounds';
 - in Scotland, rape is committed 'without any reasonable belief that B consents', and notes that regard must be had to whether the person took steps to ascertain consent;
 - In Ireland, the defendant's belief must simply have been honest and currently there is no test to the effect that the defendant's plea must have been reasonable; and
 - Ireland is currently examining the 'honest belief' element of rape. Potential advantages include that it is unfair to convict someone where they could not foresee the risk of harm. Disadvantages include that it allows defendants to rely on unreasonable beliefs as a defence and that it may reinforce rape myths and stereotypes.
- 11.27 Criticisms of the consent-based model include the argument that there is a failure to take into account concepts of freedom, capacity and choice in light of societal norms and stereotypes; and may allow silent acquiescence through fear to be construed as consent.
- 11.28 Moreover, in a number of these jurisdictions there are further concerns that the "reasonable belief" test is in practice too subjective to allow the defendant's belief to be tested against the standard of a reasonable man by those jurors and other criminal justice actors who scrutinise the complainant's behaviour and sexual history. They may apply inappropriate questions about reasonable steps to ascertain consent.
- 11.29 Moreover, these jurisdictions often provide a list of circumstances in which consent is not present (such as where the complainant is asleep). This may be exhaustive (as in Northern Ireland, England and Wales) or non-exhaustive (such

as Ireland). There have been criticisms of the exhaustive approach taken in England and Wales and Northern Ireland, with suggestions that it omits certain circumstances and leaves no scope for further situations to be added through the common law.

- 11.30 (iv) Affirmative consent: only “yes” means “yes”.
- 11.31 Under this model broadly speaking a person should demonstrate free and positive consent through conduct and/or words. However, there are differing interpretations of this.
- 11.32 Thus an affirmative consent model is in place in the US states of Wisconsin and Minnesota, which note that consent requires words or overt acts indicating informed and freely given agreement. A small number of US states have enacted affirmative consent laws and policies for colleges and universities, requiring them to set an affirmative consent standard meaning ‘affirmative, conscious, and voluntary agreement to engage in sexual activity’.
- 11.33 In California consent is defined as a:
‘positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.’
- 11.34 In 2004, Tasmania introduced an affirmative consent model, which was perceived as one of the most progressive in the world. A person does not freely agree (consent) to an act if they do not say or do anything to communicate consent. Following an acquittal in a high-profile rape case in New South Wales, the government there is reviewing the law on consent, including considering an affirmative consent model.
- 11.35 A pivotal Canadian Supreme Court judgment² described an affirmative standard for consent approaching ‘only yes means yes’.
- 11.36 In 2017, Canada introduced a Bill reflecting Supreme Court decisions and stating that it is not a defence where there is no evidence that the complainant’s agreement was ‘affirmatively expressed by words, or actively expressed by conduct’. There are concerns that this will shift the burden of proof to the defence.
- 11.37 The Irish Supreme Court recently defined consent as active communication through words or physical gestures.³ The Law Reform Commission of Ireland has considered that these definitions arguably imply that consent in sexual circumstances is no longer purely about an internal mental attitude and more about performance and signals that the person has the requisite willing mental state.

2 *R v Ewanchuk* [1999] 1 SCR 330

3 *Director of Public Prosecutions v C O’R* [2016] IESC 2012 CA 297

- 11.38 Sweden has recently changed its law, and it would seem that under the new law whether there was, in fact, agreement is to be viewed objectively and not subjectively. Factfinders should consider the complainant's acts, their words and not their 'internal attitude'. Likewise in Iceland, under the new law, consent is present when it is 'voluntarily expressed'. The new Spanish government is reported to be intending a law on consent aimed at removing ambiguity by requiring that consent will have to be explicit.
- 11.39 The New South Wales Minister for the Prevention of Domestic Violence and Sexual Assault and (Minister for Family and the Community Services) is reported to favour a requirement for audible consent by which, if you want to have sex, you have to ask for it, and if you want that sex, you have to say yes. I pause to note my concerns about such an exclusionary concept since it does not seem to consider the experience and reality of those who cannot express themselves verbally.
- 11.40 Criticisms of this model include that the standard is too rigorous in light of the spontaneous nature of sexual relations. It may be better suited to first time sexual encounters but not so well suited to longer term relationships. Moreover, it has been argued that, due to gender inequalities within society, even "yes" may not reliably mean "yes".
- 11.41 (v) A conceptual approach
- 11.42 International criminal law introduced a new approach based on the aggressive and coercive nature of rape rather than on body parts (undermined somewhat by later case law).
- 11.43 Some suggest that this approach is uniquely suited to sexual violence under international law, while others argue that it provides a model between the use of force and consent-based models that could be used in domestic law.
- 11.44 In this context I am indebted to Dr Eithne Dowds of Queen's University Belfast, who expanded on this conceptual approach. She pointed out that there is also literature that seeks to explore how the conceptual or 'coercive circumstances' approach under international criminal law might supplement rather than supplant domestic consent approaches.⁴ This introduces the notion of moving beyond what could be perceived as the 'real rape' stereotype and incorporating some notion of coercion/coercive circumstances into our definition of rape. All of this could be viewed in the context of and aligned with legislation on domestic and coercive control that may be developed in Northern Ireland particularly in the realm of domestic violence and abuse.

4 Dowds, E. (2018) "Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective" *International Feminist Journal of Politics* Vol.20, Iss. 4, pp.624-643

Discussion

- 11.45 I commence by recognising there is a strong current of opinion in Northern Ireland to the effect that the current law works well and that there are those that say there has been no real movement demanding change in the law.
- 11.46 On the other hand I also recognise immediately the attractions of a 'yes means yes' approach in a changing era where the emphasis on sexual autonomy has hopefully never been higher.
- 11.47 To require a person who wants to engage in sexual activity with another person, to take the opportunity to be clear that that person truly consents and to require express consent, is in line with the shift in the present legislation towards stressing the importance of sexual autonomy and, as illustrated above, by the direction of travel in a number of countries.
- 11.48 A further step in line with the shift taking place in certain jurisdictions towards requiring express consent before any sexual activity takes place would be to require D to obtain express consent before it could be said that he had a reasonable belief in consent.
- 11.49 An interesting variation on such a requirement is that put forward by Dr Dowds, who favours an emphasis on the Swedish concept of participation in sexual relations (as opposed to communication) so that, if someone is not actively participating, it is questionable whether they are consenting. This would be true of sexual relations beyond the first encounter and may constitute a welcome protection for those within longer term relationships.
- 11.50 Hence the possibility of requiring an affirmative consent standard is worthy of careful exploration. It would stipulate that unless C's voluntary agreement is affirmatively expressed, C does not consent and there can be no reasonable belief that C consents.
- 11.51 Arguably, it would herald a societal change in the attitude adopted to sexual relations.
- 11.52 However, I am not currently persuaded of its validity. In particular, it may be said that requiring express consent (only yes means yes) for every sexual encounter is too far removed from the way in which sexual relationships develop and sets an unrealistic threshold that would be difficult to apply in practice.
- 11.53 Moreover, the requirement that consent be expressed suggests that the presence or absence of consent must be determined objectively with the result that the protection offered to the complainant may be less generous than under the present law where consent is subjectively determined: it is a state of mind.
- 11.54 A further question is whether an affirmative consent standard should apply only to rape offences or to all sexual offences that require the absence of consent to sexual activity, including sexual assault.

- 11.55 If it is to apply only to rape offences, then D is being required to establish that C consents to different sexual acts within the same sexual encounter in different ways. If it is to apply to all sexual acts requiring consent, D will have to establish C's affirmative consent to each sexual act within the same sexual encounter.
- 11.56 Professor Dave Archard of Queen's University Belfast summed up the position extremely well when he recently wrote:⁵
- "As in our relationships with the state or with government, much remains tacit and too much may be taken for granted. Words often disappear in the act of sex. People respond or fail to respond to physical cues. The fact of the matter is that women know when their will is being over borne but too often men fail to recognise they are abusing their power.
- It may be of course that that the legal system is ill constructed for the stuff of such intimate interactions and the courts are poor places for a resolution that satisfies the warring sides. People want their voices to be heard and women are saying it more clearly than ever before. The challenge is to find a practical way to translate this into reality."
- 11.57 The difficulty thus lies in finding a formula that would be workable and effective and which would reflect the way in which sexual relations operate. Once qualifications are admitted, it is difficult to draw the line as to when affirmative communicative consent is to be required and when not.
- 11.58 I can also see the superficial attractions of moving the law to a place where there is a requirement that D takes reasonable steps to ascertain consent and places an onus on the defendant to prove that he had reasonable belief.
- 11.59 However, I consider that the obstacles in the way of such an approach are insuperable. First, defendants could raise issues under the European Convention on Human Rights that such a law is unreasonably placing a burden of proof on the defendant.
- 11.60 Moreover, it would be too difficult and onerous on a defendant to prove agreement where communication in sexual encounters is often implicit. As the Law Reform Commission of Ireland recently stated, "A standard that requires reasonable steps may be too easily, too commonly and too innocently contravened in ordinary relationships."⁶
- 11.61 A further objection is that placing an onus on D to take reasonable steps to ascertain consent means that those who failed to do so, despite having an honest and reasonable belief that there was consent, are subject to the same potential life sentence as those who commit intentional or reckless rape.

5 Professor Dave Archard in email correspondence.

6 Law Reform Commission (2018) *Knowledge or Belief Concerning Consent in Rape Law* Dublin: Law Reform Commission

My proposals

- 11.62 The key component of the current law is that, rightly, it focuses on consent as agreement by choice as the fundamental principle that must be safeguarded in sexual offence law.
- 11.63 I consider further legislative steps could be taken to underpin this key principle. I am particularly attracted by the proposals submitted to the advisory panel by Professor John Jackson from Nottingham University. They are set out in the following paragraphs.
- 11.64 First, in order to restrict the wide discretion that jurors have to determine whether there was agreement by choice, there should be inserted in the legislation an express clause that states that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent. This is already contained in legislation in section 128A of the Crimes Act 1961 in New Zealand. In Ireland, the Criminal Law (Sexual Offences) Act 2017 amended the Criminal Law (Rape) (Amendment) Act, 1990, provides the following definition of consent: “A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act”. It specifies: “Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.”
- 11.65 I favour this development because it shifts the focus away from resistance as a means to prove absence of consent and on to some affirmative expression of consent.
- 11.66 However, it can be effective only if the Judiciary robustly prevents such evidence being brought in in practice by addressing the issue at both pre-trial preliminary hearings and during the course of the trial.
- 11.67 Secondly, we could follow the approach adopted in Scotland and Ireland, and expand on the list of situations where it may be said that C did not consent.
- 11.68 At present, the 2008 Order for Northern Ireland lists a number of circumstances that give rise to a rebuttable presumption of a lack of consent — for example, where C was asleep or otherwise unconscious or fears the use of immediate violence.
- 11.69 Scotland and Ireland have gone further and asserted that in these circumstances the presumption is irrebuttable that C does not consent and has also expanded on the circumstances mentioned in the 2008 Order to include: the threat of any violence (not necessarily immediate); where C is incapable of consent because of the effect of alcohol or some other drug; and where the only expression or indication of consent or agreement comes from a third party.

- 11.70 The list of circumstances as to when there is an absence of consent could be expanded in Northern Ireland to include, for example:
- Where C submits to the act because of a threat or fear of violence or other serious detriment such as intimidation or coercive conduct or psychological oppression to C or to others. Thus, for example, high levels of psychological coercion in the context of the encounter would fall outside the definition of consent. This is an important addition as it would challenge on a statutory level limited understanding of rape that relies on “real rape” stereotypes.
 - Where the only expression of consent or agreement to the act comes from a third party.
 - Where C is overcome, voluntarily or not, by the effect of alcohol or drugs.
 - Moreover, courts must not allow it to follow that, merely because a person may be behaving irresponsibly or exposing themselves to a high-risk situation, there is necessarily a genuine consent to sexual activity.
- 11.71 Rather than imposing any burden of proof on D to prove consent or a reasonable belief in consent, which could raise European Convention on Human Rights issues, where any of these circumstances exist, it could simply be stipulated that C does not consent to any sexual act and that if D was aware of these circumstances, D did not reasonably believe that C was consenting.
- 11.72 I am particularly interested in the reference to alcohol because all too often we seem to think that it is only when someone is incapacitated by alcohol that we recognise rape whereas that in-between stage of total sobriety and complete drunken incapacity needs to be addressed.
- 11.73 Thirdly, there are various ways in which steps could be taken to shift the focus of attention away from C’s behaviour toward D’s conduct in deciding whether D has a reasonable belief in consent. The 2008 Order does factor into consideration any steps D has taken to ascertain whether C consents. This appears to draw the jury’s attention to the importance of examining D’s conduct and not just C’s behaviour, but the present Crown Court compendium in England and Wales states that there is no obligation on D to have taken any specific steps to ascertain consent.
- 11.74 The current definition as to what constitutes a reasonable belief in consent could either be qualified by adding that there can be no reasonable belief in consent unless the defendant has taken reasonable steps to ascertain whether the complainant consents or be amended by adding that, in determining whether there was a reasonable belief in consent, the jury should take account of all the circumstances, including a failure to take any steps to ascertain whether the complainant consented.
- 11.75 The latter would take the legislation beyond its present remit, which simply refers to whether a belief is reasonable is to be determined having regard to

all the circumstances, including any steps D has taken to ascertain whether C consents. My proposal is that specific reference be made to the failure to take any steps to ascertain if the complainant consented.

- 11.76 The attraction of the latter is that it shifts the focus on to the defendant and what actions were or were not taken to ascertain consent, and thus may change the narrative in a positive way. It may also serve to reduce the impact of rape myths, thus allowing a clearer picture of the events in question to develop.
- 11.77 The potential weakness in my proposal may be that it does not tell the jurors what weight they should place on this aspect but I believe that, if we are to retain a jury system, we have to instil confidence in jurors to apply their own common sense and logic to the evidence as it emerges on a case-by-case basis. As I trust I have emphasised throughout this Review proposals must be viewed collectively and not individually. Hence the steps taken to address jury myths and educate the public shall be seen as part of the proposals in the chapter.

Gross negligence rape

- 11.78 A wholly discrete issue that demands our attention is the development in Sweden and Iceland, and now being considered in the current review being carried out in Ireland, introducing the concept of gross negligence rape.
- 11.79 Both Sweden and Iceland in 2018 have introduced a separate offence, with a lower sentence, of negligent rape. The Swedish legislation describes the test for negligent rape as whether the person could and did do all the things necessary to determine whether consent was actually received.
- 11.80 The Law Reform Commission of Ireland has put out for consultation the proposal that there be a new offence of gross negligence rape, carrying lower penalties than for rape, to address circumstances where D honestly but mistakenly believed there was consent. The law could also state that a belief will not be reasonable if no reasonable steps were taken and could also exclude grounds for consideration of what is reasonable.
- 11.81 The difference between rape and gross negligence rape is described as akin to the difference between murder and manslaughter, in that they share the same actus reus but the accused's mens rea differs. The maximum sentence for the second offence is four years imprisonment in Sweden.

Discussion

- 11.82 The main advantage in creating a separate offence of this kind is that it criminalises non-consensual sex where the accused's belief in consent was unreasonable but also recognises that there is a lower degree of moral culpability in these cases than with intentional or reckless rape. It may lead to greater consistency in sentencing.

- 11.83 There are those who say that this proposal has much to commend it given the reluctance of juries to convict a man who may have had honest but unreasonable belief in consent – if the sentence for rape is to remain as severe as it currently is.
- 11.84 Recent figures from the Crown Prosecution Service (CPS) in England and Wales illustrate the reluctance of juries to convict young men of rape at the start of their adult life. According to the figures, the conviction rate in 2017/18 in rape-only trials involving 18–24 year old men was 31.6%. The number of successful prosecutions against men aged 25–59 in 2017/18 was much higher at 45.6%.
- 11.85 In the past five years, the conviction rate for 18–24 year old men who stood trial in rape-only cases has not risen above a third. Of the 1,343 rape-only cases the CPS has taken against young men, only 404 were convicted — an average of 30.1%. However the average conviction rate in rape -only cases for men aged 25-59 in the past five years was higher at 43.2%.⁷
- 11.86 Accordingly, the invocation of a lesser charge where sentences imposed are likely to be much lighter than those currently imposed for rape could well lead to more just and fair convictions and reverse the figures currently presented.
- 11.87 The argument is made is that such a new offence would still effectively publicly communicate that the man is a rapist (someone who is prepared to have non-consensual sex) if the woman did not consent. Adducing a somewhat lesser offence with a commensurately lesser sentence might recognise the realities of jury trials for these offences and bring about more convictions based on the lesser charge in cases where there was a genuine belief, albeit mistaken, that consent had been given.
- 11.88 I am entirely opposed to the concept of “gross negligence rape”. My abiding concern remains that convicting for negligent rape (on the lesser sentence that follows) does not fully acknowledge the egregious harm done to the victim who is raped even if negligently. These offences are so heinous and the consequences for the victim so dire that any such charge risks undermining the true seriousness of rape and the destruction of the sexual autonomy that is the cornerstone of our legislation. There should be no hierarchy of rape or serious sexual offence.
- 11.89 A further question, if a lesser offence of negligent rape were enacted, is whether a similar lesser offence would have to be enacted for other sexual offences where non-consent is an element.
- 11.90 I believe there is much to be said for the concerns raised in the report of the Law Reform Commission of Ireland that this offence could make prosecutions for the offence of rape more difficult. Prosecutors may choose the lesser charge where there is insufficient proof of knowledge and through concerns that the

7 CPS Release FOI 18 (21/9/18) Number of contests for rape flagged cases – additional data to Disclosure 17 - Attachment

jury would not accept a rape charge. In addition, jurors might opt for the lesser offence as a compromise where they cannot agree whether there was sexual intercourse or consent, where the correct verdict would actually be rape or an acquittal.

- 11.91 This could result in a situation where only the 'clearest' rape cases are thus prosecuted, while those in which there is little evidence of non-consent would be prosecuted as gross negligence rape. The Law Reform Commission of Ireland notes that such a situation could signal a return to older definitions of consent requiring force and resistance, rather than recognising it in terms of the right to bodily autonomy.
- 11.92 We must be careful not to allow perceived low conviction rates for serious sexual offences to distort our thinking. As I have indicated earlier in this Review, it is perhaps unsurprising that the conviction rate is somewhat low given the high burden of proof in circumstances where, in most cases, it is a question of credibility of one word against another, with an absence of independent forensic evidence or signs of violence and where both parties often have previously unblemished reputations.
- 11.93 There are concerns about low conviction rates of young men for these offences. Two matters require consideration. First, we need better public and jury education about jury myths and the grave consequences of serious sexual offences. Secondly, gradations of the culpability of offenders should be taken into account at the sentencing stage and maximum flexibility should be afforded to judges at that part of the process.
- 11.94 I therefore do not recommend the introduction of this lesser offence at this time.

Responses

- 11.95 The respondents to this chapter of the Review virtually all recognise that this is an extremely complex area of law which merits close inspection and exploration.⁸
- 11.96 Respondents also refer to the lack of understanding of the concept amongst the general public particularly as to how a person can give and receive consent.⁹
- 11.97 Accordingly there was general support for better public education and in particular for education in schools. I have already dealt with the response of the Department of Education to this Review in the course of chapters 6 and 7 and

8 Response of the Northern Ireland Law Society; Barnardo's; Women's Aid Federation NI and Women's Resource and Development Agency (on NVTV 14 January 2018). Perhaps surprisingly the Criminal Bar Association (CBA) was the one voice that felt the law was clear on consent since the 2008 Order indicating that it was not the law that needed to be changed but rather public awareness of the law and consent which needs to be better informed. The CBA felt that reforming the definition in a different form of words would be unnecessary and unhelpful.

9 Barnardo's, Claire Sugden MLA (former Minister of Justice).

I pause to note that the Council for Curriculum, Examination and Assessment (CCEA) has been specifically asked to develop guidance and curriculum resources to support the delivery of priority areas in the context of teaching sexual issues including sexual consent.

- 11.98 Of those respondents who directly addressed the specific recommendations to amend the 2008 legislation, there was broad agreement that they were appropriate and reflected a movement away from an approach that simply looks for narrow and stereotypical indication of refusal.¹⁰ We did not have a single respondent who objected to the suggested reforms at paragraph 111 other than is mentioned in this footnote.
- 11.99 However, there was a school of thought emerging that suggested I had not gone far enough in the reforms I had suggested.
- 11.100 First,¹¹ my attention was drawn to a provision in section 9(3) of the Criminal Law (Rape) (Amendment) Act 1990 as inserted by section 48 of the Criminal Law (Sexual Offences) Act 2017 in Ireland which reads as follows:
- “This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.”
- 11.101 In other words the list of circumstances in which there is no consent should not be circumscribed and should be left open depending upon the particular facts of the case. I agree entirely with this suggestion and I have accordingly added this to the recommendations that I have made.
- 11.102 Secondly, it was recommended that consideration be given to including the provision similar to that in section 9(4) of the Criminal Law (Rape) (Amendment) Act 1990 as inserted by section 48 of the Criminal Law (Sexual Offences) Act 2017 in Ireland which reads as follows:
- “Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.”
- 11.103 This clarifies that consent once given may be withdrawn at any time before or during the sexual activity in question. Once again I am attracted by this proposition and accordingly I have included this as an additional recommendation.

10 For example, Rape Crisis Network Ireland; Barnardo's; Queen's University Belfast Human Rights Centre and Gender Network. The Attorney General “agrees strongly” with the first three recommendations although he was concerned about the suggestion that a jury should take account of all the circumstances “including a failure to take any steps to ascertain whether C consented” on the grounds that this may introduce a dangerous artificiality into the jury assessment.

11 Rape Crisis Network Ireland.

- 11.104 Thirdly, Dr Eithne Dowds¹² made the following proposals.
- 11.105 First, affirming the trend towards affirmative consent standards which examine not whether the woman said “no” but whether she said “yes”, there is merit in thinking through different concepts of affirmative consent. In particular encouragement was given to developing more participatory models that do not rest on enthusiasm or verbal expression but on mutuality and engagement. It was argued that such an approach is significant not only due to its potential to add more specificity to the concept of consent, but due to its symbolic potential and the message it sends in relation to appropriate and inappropriate sexual conduct. It would provide a formal declaration of a norm that defines what kind of conduct citizens are entitled to expect from each other.
- 11.106 It was proposed that instead of defining consent as “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”, it could be framed more along the lines of “a person consents if they are participating in the act as a result of exercising free choice and having the capacity to make that choice”.¹³ Jurisdictions such as Sweden and California deploy similar wording. In California, the law stipulates that evidence that the complainant requested that the defendant use a condom or other birth control device is not enough by itself to constitute consent. Under a participatory approach to consent, such a request could be misinterpreted by the finders of fact as evidence of participation, when the request may actually have been made as a result of the inevitability of the attack and an attempt by a complainant to reduce the possibility of Sexually Transmitted Infections (STIs) or pregnancy.
- 11.107 This suggestion of a participatory approach could apply across all sexual offences where consent is an issue.
- 11.108 Whilst I find the proposition has many attractions, I remain unconvinced that the legislation should be amended in this fashion. Already the impression of consent is extremely complex and my fear is that by introducing yet a further concept of “participation”, it would simply provide more room for confusion, uncertainty and dispute amongst members of the jury as to what amounts to “participation”. My job should be to simplify the law rather than increase its complexity. I can envisage far too much room for dispute amongst the jury as to what amounted to “participation”.
- 11.109 Secondly, on the issue of expanding the list of circumstances when there is an absence of consent, our proposal was broadly welcomed because it would add more specificity to the law and the addition of a circumstance dealing directly with voluntary intoxication was important due to the existing law dealing with that capacity in a limited way.

12 Lecturer: School of Law, Queen’s University Belfast.

13 This approach was also strongly supported by Dr Olivia Smith, Anglia Ruskin University.

- 11.110 However, a further proposal was made that the list should include the following “C submits to the act because of a threat or fear of violence or other serious detriment to C or others”. It was recognised that this would challenge, on a statutory level, limited understandings of rape that rely on the “real rape” stereotype. It also recognised that rape can manifest itself in many different ways and there may be instances where no explicit violence (in the traditional sense of physical force) is required and the complainant does not resist but submits to the act.
- 11.111 However, in order to expressly recognise this new approach which might arise in the context of severe poverty, familial or intimate abuse, economic oppression or other forms of abuse of circumstances, where a complainant might give what has been described as “apparent” consent, it was proposed that the wording of my recommendation be adapted to more explicitly account for such situations.
- 11.112 This would be achieved by amending my proposal to read “where C submits to the act because of a threat or fear of violence or other serious detriment, such as intimidating or coercive conduct or psychological oppression to C or to others”. Although the original wording of my proposal may be interpreted as including such instances, there was value in making them explicit so as to increase awareness and prevent the word “detriment” from being narrowly interpreted in practice.
- 11.113 I am persuaded by this argument and accordingly I have amended my proposed recommendation to embrace the suggestion made by Dr Dowds in this respect.
- 11.114 Turning to the proposed recommendation I made that the jury now should take account of all the circumstances, “including a failure to take any steps to ascertain whether C consented” two responses are of significance. First, the Attorney General is sceptical about the reference to the “jury should take account of all the circumstances, including a failure to take any steps to ascertain whether C consented”. He is concerned that this specification may introduce a dangerous artificiality into the jury assessment.
- 11.115 However, Dr Dowds, recorded that the dissonance between legal standards on consent and societal acceptance of rape myths and stereotypes about what constitutes consent is detrimental to the assessment of “reasonableness”. Hence she considered that the jury being exhorted to include in their considerations a failure to take any steps to ascertain whether C consented, was “an important intervention”. She felt such an approach was in keeping with the participatory approach which she has advocated and the potential to mark an important shift in focus. However it was recognised that the jury would need to be informed that this was not simply a question of rendering a belief “unreasonable” automatically if the defendant failed to take such steps but simply a matter for them to take into consideration. What amounts to “a step” would of course be a matter that would be dealt with on a case by case basis.

- 11.116 I am inclined to the view of Dr Dowds that this is an appropriate recommendation and I have therefore left it unamended.
- 11.117 Given the widespread international debate about how consent should be defined and in light of the continuing academic concerns about its meaning, it was somewhat surprising to find that the Bar of Northern Ireland was of the view that:
- “Criminal cases where consent is the issue may be complex to prosecute and difficult to prove but that does not mean that the basic concept of consent itself is difficult ... The definition of consent and the framework provided by the Sexual Offences (NI) Order 2008 already bring sufficient clarity to the law ... any issues around the meaning of consent cannot be met by a change in our law and the solution should therefore lie in a more informed public at large.”
- 11.118 I fear this fails to recognise the real complexity in the definition of consent which both international and local scholars and academics are now confronting. I therefore continue to share the concerns expressed by the other respondents and hence I am convinced that the recommendations I have made in terms of amending the 2008 legislation are absolutely necessary.
- 11.119 With one exception, all of those who responded on the issue of the new offence of gross negligence rape opposed its introduction for the same reasons that I have indicated in the chapter.¹⁴

14 A submission to the Review noted that “a hierarchy of rape would not be a bad thing if it gets changes in societal behaviour in favour of a deeper understanding of consent. It would also give the police a more robust line of questioning to follow with defendants than they do currently”.

Recommendations

- 155.* The Sexual Offences (Northern Ireland) Order 2008 should be amended to provide:
- that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
 - for the expansion of the list of circumstances as to when there is an absence of consent to include, for example (i) where C submits to the act because of a threat or fear of violence or other serious detriment such as intimidation or coercive conduct or psychological oppression to C or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where C is overcome, voluntarily or not, by the effect of alcohol or drugs;
 - that where any of these circumstances exist, the complainant does not consent to any sexual act, and if the defendant was aware of these circumstances, the defendant did not reasonably believe that C was consenting;
 - this section does not limit the circumstances in which it may be established that a person did not consent to a sexual act;
 - that the definition as to what constitutes a reasonable belief in consent should add that, in determining whether there was a reasonable belief in consent, the jury should take account of all the circumstances, including a failure to take any steps to ascertain whether C consented; and
 - consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.
156. The offence of gross negligence rape be not introduced.

Chapter 12

Voice of the accused

Whether or not there is a reasonable expectation of privacy in a police investigation is a fact-sensitive question and is not capable of a universal answer one way or the other.

Mr Justice Mann in Sir Cliff Richard OBE v the British Broadcasting Corporation (BBC) and Chief Constable of South Yorkshire Police [2018] EWHC1837 (Ch)

Issue

In the context of serious sexual offences, should the law permit publication of a person's identity:

- pre-charge whilst that person is suspected or being investigated by police;
- post charge but pre conviction;
- who is a witness, other than the complainant, in the trial?

Current law

- 12.1 The principle of open justice provides that, unless there is compelling reason, nothing should be done to prevent the publication of reports of court proceedings. This means that all proceedings and written judgments of the court are to be held in open court and be freely reported unless the judge otherwise determines.
- 12.2 The exceptions to this general rule include the Sexual Offences (Amendment) Act 1992, which provides that where there is an allegation that a sexual offence has been committed against a person, that person's name or image shall not be published if it is likely to identify them.
- 12.3 Where a defendant is related to the complainant or there is a link between them that could lead to identification of the complainant, it is the duty of the media to ensure that nothing is reported that would lead to such identification. In effect this means that many defendants are in practice accorded anonymity even after conviction. As indicated later in this chapter, 59% of those convicted in Ireland are not named on the basis that to do so would identify the complainant.
- 12.4 In Northern Ireland in the three years 2016, 2017 and 2018¹ the number of defendants facing at least one sexual offence charge that had a reporting restriction made in their case was 40, 45 and 31 respectively in the Magistrates' court and 28, 27 and 15 in the Crown Court.
- 12.5 A court does not, however, have the power to prohibit the media from identifying a defendant in a sexual offence case, save that the defence may make

¹ Data for 2018 are currently provisional and may be subject to change.

representations seeking anonymity for a defendant in a sexual offence case if it is established that the defendant's human rights are substantially at risk.

12.6 Those human rights, which are potentially engaged when a defendant's name is published, may include where publication:

- would create a real risk to the person's life;
- would create a risk of the person being subjected to inhuman or degrading treatment; or
- would *disproportionately* infringe upon the person's private or family life.

12.7 The right to privacy and thus anonymity pre-charge surfaced recently in the case of *Sir Cliff Richard v The British Broadcasting Corporation (BBC) and The Chief Constable of South Yorkshire Police*.² The plaintiff in this case succeeded against the BBC over its coverage of a police search on his home which was part of an investigation into an historical child sex allegation. The plaintiff had never been arrested or charged.

12.8 The court determined at first instance that the plaintiff in these circumstances had a legitimate expectation of privacy under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)³ albeit this might not invariably be the position. The Corporation's reporting had infringed Sir Cliff Richard's rights in a serious and sensationalist manner. No appeal was entered against this finding.

12.9 It is worth recording, however, that there are numerous other examples where anonymity for individuals accused of sexual offences is granted in particular circumstances. Illustrations include:

- The Education Act 2011, Part 3, section 13, which applies in England and Wales, but not in Northern Ireland, prohibits the publication of matters leading to the discovery of the identity of school teachers accused of sexually assaulting a child at their school pre-charge. Teachers are deemed especially vulnerable to false allegations. These restrictions cease to apply once proceedings for the offence have been instituted.
- In Northern Ireland the Department of Education's Circular 2015/13 provides guidance to principals and Boards of Governors for dealing with allegations of abuse against a member of staff. It states that while the restrictions set out in Part 3 of the Education Act 2011 do not apply in Northern Ireland, they should be treated as best practice. These restrictions should remain in place unless or until the Secretary of State publishes information about an investigation or decision in a disciplinary case arising from the allegation, or proceedings for the offence have been instituted.

2 [2018] EWHC 1837 (Ch).

3 The Right to respect for private and family life, home and correspondence

- Paragraphs 49 and 50 in Schedule 1 of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 provide for the omission from the register of the name of anyone alleged to be guilty of sexual misconduct and includes the power to order reporting restrictions in any case that involves allegations of sexual misconduct. Similar legislation applies in England and Wales.
- Article 170(2) of The Children (Northern Ireland) Order 1995 ensures privacy for children involved in proceedings under the Order by prohibiting publication of any material that is “intended, or likely, to identify any child as being involved in any proceedings in which any power under this Order may be exercised by the court with respect to that or any other child, or an address or school as being that of a child involved in any such proceedings.”

12.10 The concept of the anonymity of individuals and defendants has been considered in the context of open justice in a number of significant cases in both the House of Lords and the Supreme Court in differing circumstances.

12.11 The trend in these cases has been for Article 8 rights of privacy under the ECHR to be trumped by the Article 10 right to freedom of expression and the right to defend press freedom, save in those cases where there is clear evidence that publication would infringe an individual’s Article 2 right to life or Article 3 rights under the ECHR prohibiting torture or inhuman or degrading treatment or punishment.⁴

12.12 Examples of where anonymity has been refused to a defendant in favour of the right to freedom of expression and the concept of open justice include:

- Where the surviving child of a mother on trial for murdering her son sought to protect his identity.⁵ Lord Steyn in that case referred specifically to the issue of the anonymity of defendants and said that a requirement to report trials without revealing the identity of defendants would be a ‘very much disembodied trial and that, if reporting restrictions continue to increase; [i]nformed debate about criminal justice will suffer’.
- Where the identity of children who were indirectly involved in child pornography offences by their father would be revealed if he was named,⁶ Sir Igor Judge said:

4 For example the Supreme Court decision in *Secretary of State for the Home Department v AP* [2010] UKSC 24 & 26, where if the defendant’s identity was revealed, “he would be at real risk not only of racist and other extremist abuse, but of physical violence” and in light of the risk of infringement of his Article 3 rights. Also, with regard to the potential impact on the defendant’s private life, in *Venables v News Groups Papers Ltd* [2010] EWHC B18 (QB) which concerned the anonymity of the child murderer of Jamie Bulger following his conviction for child pornography, the court maintained the order on the basis of the threat to Venables’ life if his new identity were to be revealed.

5 *re S (FC)(A child)*[2004]UKHL47

6 *R. (On the application of Trinity Mirror Plc) v Croydon Crown Court* [2008] EWCA Crim 50 .*R v Croydon Crown Court 3A& B ex parte Trinity Mirror plc & Ors* [2008] EWCA Crim 50

“In our judgment it is impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country.”

- In a further case the Supreme Court⁷ refused anonymity orders to individuals subject to asset-freezing orders on the basis that the HM Treasury had reasonable grounds to suspect their involvement in terrorism. The court rejected the argument that in cases involving suspected terrorism (not dissimilar in impact to the public displeasure about serious sexual offences), an acquittal will not undo the damage to an individual’s reputation and that there will be a public assumption that there is no smoke without fire, thus justifying anonymity. Lord Rodger commented that such an argument is tantamount to saying that the ‘press must be prevented from printing what is true as a matter of fact, for fear that some of those reading the reports may misinterpret them and act inappropriately’. He added that members of the public ‘are more than capable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt’, and the rationale behind the public naming of defendants is that ‘most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law’. Lord Rodger explained:⁸ “Stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature.

A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”

- The most recent Supreme Court ruling relating to the balance to be struck between Article 10 and Article 8⁹ concerned a prominent figure who had been arrested, bailed and subsequently rearrested in relation to offences alleging organised grooming and prostitution of teenage girls. Nine men, but not the appellant, eventually faced trial and seven were convicted. The appellant, arguing that his identification in the course of the trial was unjustified, unsuccessfully applied to the High Court for an interim injunction to protect his privacy and reputation.
- The majority of the Supreme Court¹⁰ held that, while the presumption of innocence served as a starting point, and experience suggested that the public understood the ‘difference between allegation and proof’, it was wrong to

7 Guardian News and Media, [2010] UKSC 1.

8 at para 63.

9 *Khuja v Times Newspapers Ltd* [2017] UKSC 49 [2017] All ER (D) 114 (Jul).

10 *Lord Sumption, Lord Neuberger, Lord Clarke, Lord Reed and Lady Hale.*

treat Lord Rodger's observation (above) as a legal presumption 'let alone a conclusive one'. In delivering the leading judgment, Lord Sumption said:

"The conclusions that the public may draw from evidence and submissions at a criminal trial in open court will differ from case to case, depending on, among other things, the gravity of the allegations, the character of the evidence and the extent of the publicity surrounding the trial. It would be foolish for any court to ignore the extreme sensitivity of public opinion in current circumstances to allegations of the sexual abuse of children".

Nonetheless, Lord Sumption added:

"It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public, which would be absolutely entitled to attend, but for purely practical reasons cannot do so.

For this reason, restrictions on the reporting of what has happened in open court give rise to additional considerations over and above those which arise when it is sought to receive material in private or to conceal it behind initials or pseudonyms in the course of an open trial."

Interestingly, he went on to say that, while he questioned whether the public interest 'extended to include the applicant's identity', he concluded that it did in this instance because the identity was neither a peripheral or irrelevant feature and increased the story's interest "by giving it a human face", which is a "legitimate consideration".

Current practice in Northern Ireland pre-charge

- 12.13 The Police Service of Northern Ireland (PSNI) asserts that, it does not follow the 2013 guidance from the College of Policing (whereby most UK police forces name individuals upon charge). Rather the PSNI's media policy is unique. The Service will not name individuals arrested or suspected of a crime unless in exceptional circumstances, where there is a legitimate policing purpose for doing so.
- 12.14 This, they assert, is in accordance with the recommendations and findings of the Leveson inquiry, the Information Commissioner and the Home Affairs Committee.
- 12.15 Exceptional circumstances may be where there is a threat to life, prevention or detection of crime or where police are making a public warning about a wanted individual.

- 12.16 The PSNI do, however, release some details about the person, such as their gender, age, area they live, date of arrest, if they are in custody or on bail, or how they were disposed of following custody.
- 12.17 If the decision is made to release a name, it must be rationalised and authorised by a chief officer and logged by the corporate communications department.
- 12.18 The PSNI assert that other UK forces are interested in it's approach. This was discussed at a recent UK police press officers' course. This interest was fuelled by a number of high-profile cases in England, where the name of the suspect was released.
- 12.19 One matter of note, is the law on pre-charge naming of children and young people involved in criminal investigations. Current legislation in Northern Ireland (and in England and Wales) means that juveniles cannot be named post charge when appearing in the Youth Court, but there is no legislative provision in force covering children and young people pre-charge.
- 12.20 Section 44 of the Youth Justice and Criminal Evidence Act 1999 does protect this pre-charge anonymity for children and young people but it has not been brought into force since the Government appear satisfied with the self-regulation of the press in this area. This matter is currently before the Court of Appeal in Northern Ireland. I make no recommendation or comment on this matter pending the outcome of this appeal.¹¹

International Standards

- 12.21 The European Court has held that the right to private and family life and the freedom of expression deserve equal respect. It has emphasised the broad margin of appreciation afforded to States.¹²
- 12.22 While the European Court has not specifically ruled on the issue of anonymity of an accused person, the Committee of Ministers Recommendation at Principle 15 (support for media reporting) provides that:

“Announcements of scheduled hearings, indictments or charges and other information of relevance to legal reporting should be made available to journalists upon simple request by the competent authorities in due time, unless impracticable. Journalists should be allowed, on a non-discriminatory basis, to make or receive copies of publicly pronounced judgments. They should have the possibility to disseminate or communicate these judgments to the public.”

11 Re JKL to be heard later in 2019.

12 Axel Springer AG v Germany (Application no 39954/08) ECHR 7 February 2012

Background

- 12.23 In the course of this Review I have read and heard personally extremely troubling accounts from a number of accused persons, who had been subsequently acquitted of serious sexual offences including rape. I also heard from family members of such persons. I was left in no doubt of what they have all suffered on mainstream media, social media and elsewhere before they were charged, post charge, during their trial and long after their acquittal.
- 12.24 These consequences included:
- loss of employment and difficulty thereafter obtaining fresh employment;
 - the perceived need to leave Northern Ireland;
 - verbal abuse in public;
 - vile, unsavoury and untruthful attacks on social media, including Twitter and Facebook;
 - time-consuming and largely unsuccessful attempts to have the offending material taken down from social media;
 - inaccurate and distorted mainstream media reporting, with members of the family of the accused being regularly photographed outside the court arena;
 - photographs of acquitted person appearing in newspapers long after the trial is over whenever the trial is being referenced;
 - severe psychological distress and suicide attempts;
 - elderly relatives and close relations suffering ill health as a result;
 - members of the wider family circle suffering grievously in the wake of the rumours circulating;
 - children at school, who are relatives, being taunted in the wake of graphic reporting of trials on news bulletins and newspapers; and
 - irreparable damage to defendants of their hard-won reputation and standing in the community in circumstances where the presumption of innocence seems to have been cast aside.
- 12.25 I also heard from and about witnesses, other than the complainants, who had been named in high-profile cases and who have been subjected to not dissimilar personal intrusion, vile abuse and wounding accusations on social media. These have been long-lasting and have profoundly affected such witnesses. In their case, the assertion made was that inadequate steps had been taken to protect their identity.
- 12.26 The issue of anonymity for accused persons has long been on the legal menu. It was first introduced in the case of complainants by the Heilbron report in 1975.¹³

13

Home Office (1975) *Report of the Advisory Group on the Law of Rape* (Cmnd 6352) London: Home Office

- 12.27 The report accepted that there should be lifetime anonymity for complainants but not for defendants, on the basis that publicity may be ‘extremely distressing and even positively harmful’ and result in an unwillingness on the part of complainants to access justice. The report concluded that those arguments did not apply to defendants.
- 12.28 Nevertheless, the Sexual Offences (Amendment) Act 1976 introduced anonymity for defendants in England and Wales, following a concessionary amendment during the passage of the Bill. Anonymity related only to offences of rape, and the complainant was expressly referred to as a woman. In Northern Ireland, Article 8 of The Sexual Offences (Northern Ireland) Order 1978 introduced a similar provision.
- 12.29 In 1988 the law was reversed in England and Wales following a Criminal Law Revision Committee report,¹⁴ which concluded that there was no justification for the principle of equality between a complainant and a defendant and, in particular, there was no reason to differentiate defendants in sexual offence cases from other criminal cases.
- 12.30 The 1978 Northern Ireland legislation granting such anonymity to defendants was repealed by The Criminal Justice (Northern Ireland) Order 1994 on the basis that it was a discouragement to victims from coming forward.
- 12.31 The Home Affairs Committee Fifth Report 2002–03 (the Home Affairs Report) identified four arguments against the introduction of anonymity for the accused:¹⁵
1. The open justice principle, “with free and full reporting of what happens in our criminal courts;”
 2. The reasoning behind the acceptance of strong public policy reasons for granting anonymity to complainants in sexual offence cases did not extend to the accused;
 3. There was no reason to treat those accused of sexual offences differently from those accused of other serious crimes; and
 4. Anonymity would undermine the ability of the police to investigate crimes.
- 12.32 Four arguments in favour of extending anonymity to the accused were also identified in that report:
1. The equality of treatment of complainants and accused person’s argument;
 2. The prejudicial nature of sex offences: publicity can be ‘ruinous to the individual, even though he may be acquitted of the charges’. The committee noted the Metropolitan Police position that publicity is particularly damaging

14 Criminal Law Revision Committee (1984) *Sexual Offences* (Cmnd 9213) London: HM Stationery Office

15 House of Commons Home Affairs Committee (2003) *Sexual Offences Bill: Fifth Report of Session 2002-03* London: The Stationery Office, at para. 72-80

- in sex cases involving children and their claim that between 5% and 7% of those arrested for such crimes commit suicide;
3. Publicity can inflame public outrage and disorder, which sometimes leads to threats or attacks; and
 4. Anonymity for the complainant increases the risk of false allegations.
- 12.33 Committee members were in favour of granting anonymity to the accused for a limited period between allegation and charge.
- 12.34 This was rejected by the Government in 2003 when the Sexual Offences Act was introduced. It was not accepted that those accused of sexual offences should be treated any differently than those accused of other serious crimes: 'Is it really more shameful to be accused of committing a sexual offence than to be accused of murder?'
- 12.35 During the passage of the Sexual Offences Act 2003, the House of Lords moved a motion to extend limited anonymity to defendants. This was in line with the Home Affairs Committee report which proposed anonymity for defendants up until charged to protect 'potentially innocent suspects from damaging publicity', while ensuring that "the public interest in full and free reporting of criminal proceedings, was safeguarded."
- 12.36 In 2010, the coalition government announced in its programme for government its intention to extend anonymity in rape cases to defendants.
- 12.37 The subsequent Ministry of Justice (MoJ) report of November 2010¹⁶ concluded:
- "Overall, this review found insufficient reliable empirical evidence on which to base an informed decision on the value of strengthening anonymity for rape defendants. Evidence is lacking in a number of key areas and this report highlighted a range of issues on which clarity and/or more robust evidence is needed."
- 12.38 Accordingly, the government concluded in 2010 that there was insufficient evidence to justify a change in the law.
- 12.39 In 2015, a Home Affairs Committee report on police bail¹⁷ made a similar proposal to that of the Home Affairs Committee Fifth Report 2002–03, but no further change in the law has been made since the right to anonymity was removed in 1988.
- 12.40 Hence the question of anonymity at least for defendants accused of rape has been repeatedly raised in parliamentary debates over several decades and has also received frequent attention in newspapers and, to a lesser extent, in

16 Ministry of Justice (2010) *Providing Anonymity to those Accused of Rape: An Assessment of Evidence* London: Ministry of Justice

17 House of Commons Home Affairs Committee (2015) *Police Bail: Seventeenth Report of Session 2014–15* (HC 962) London: The Stationery Office

academic and professional literature. The debate includes an array of factual claims and arguments that rest on weak empirical foundations.

- 12.41 A much more effective case has been made in a series of reports about the appropriateness of pre-charge anonymity and an investigation being treated as something that would attract privacy rights under Article 8 of the ECHR.
- 12.42 First, Sir Brian Leveson presciently foresaw the issues arising in the Cliff Richard case in his *Report into the Culture, Practices and Ethics of the Press*.¹⁸ He concluded at paragraph 2.39;

“I would endorse the general views of Commissioner Hogan-Howe and Mr Trotter on this issue. Police forces must weigh very carefully the public interest considerations of taking the media on police operations against Article 8 and Article 6 rights of the individuals who are the subject of such an operation. Forces must also have directly in mind any potential consequential impact on the victims in such cases. More generally, I think that the current guidance in this area needs to be strengthened. For example, I think that it should be made abundantly clear that, save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.”

- 12.43 Lord Justice Treacy and Mr Justice Tugendhat, responding to the Law Commission’s *Contempt of Court: A Consultation Paper*¹⁹, agreed with and adopted the words of Sir Brian Leveson.
- 12.44 Thirdly, the College of Policing’s *Guidance on Relationships with the Media* (May 2013), paragraph 3.5.2, states:

“Save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of a crime should not be released by police forces to the press or the public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence. This approach aims to support consistency and avoid undesirable variance which can confuse press and public.”

- 12.45 Fourthly, there is Sir Richard Henriques’s *Independent Review of the Metropolitan Police Service’s handling of non-recent sexual offence investigations alleged against persons of public prominence*.²⁰ This report was not intended to deal with privacy rights and reporting as such, but it does contain valuable material that goes to show the dire consequences that often occur when accusations are made against a prominent person, notwithstanding

18 Leveson, B. (2012) *An Inquiry into the Culture, Practices and Ethics of the Press* London: The Stationery Office

19 Law Commission (2013) *Contempt of Court: A Consultation Paper* London: Law Commission

20 Henriques, R. (2016) *An Independent Review of the Metropolitan Police Service’s handling of non-recent sexual offence investigations alleged against persons of public prominence*

that they turn out to be false and not pursued by the police (but after investigation).

Other jurisdictions

- 12.46 Apart from Ireland, we are unaware from our researches of any jurisdiction where the accused is given blanket automatic anonymity in rape and incest cases. All common-law countries seem to adopt the same approach as that currently followed in the UK, where the general principle of publication of the accused's name, at least after charge, is adopted, albeit with some exceptions.
- 12.47 There are countries which therefore provide a measure of defendant anonymity. New Zealand does not specifically provide defendant anonymity for rape cases although defendants can apply for a Name Suppression Order. Section 200 of the Criminal Procedure Act 2011 provides that a court may make an order forbidding publication of the name, address or occupation of a person who is charged with or convicted of or acquitted of an offence provided it meets the following criteria:
- cause extreme hardship to the person charged with or convicted of or acquitted of the offence or any person connected with that person;
 - cast suspicion on another person that may cause undue hardship;
 - cause undue hardship to any victim of the offence;
 - endanger the safety of any person;
 - lead to the identification of another person whose name is suppressed by order or law;
 - prejudice the maintenance of the law, including the prevention, investigation and detection of offences; or
 - prejudice the security or defence of New Zealand.
- 12.48 Cases involving incest receive automatic name suppression. In 2017/2018 22% of those charged with rape were granted final name suppression orders, and for sexual assault the percentage was 25%.
- 12.49 In Australia, the New South Wales Court Suppression and Non-Publication Orders Act 2010 grants the power to make suppression or non-publication orders on specific grounds, including if it is necessary to avoid causing undue stress or embarrassment to a party or to a witness in criminal proceedings involving an offence of a sexual nature. Between 2013-2017 there was an increase of around 41% in the number of cases where the defendants' identity was suppressed.
- 12.50 Finally, in this context, mention has been made in the responses to our review to the Netherlands in terms of granting defendant anonymity. In fact our research reveals that there is no legislative right to anonymity for the accused

in Dutch law and parties in criminal proceedings have very limited rights to remain anonymised. It is common practice in Dutch journalism to anonymise suspected or convicted persons by only mentioning the first letter of their last name. However, this is not an enforceable standard and is simply a journalistic convention.

Ireland

- 12.51 Ireland is therefore the country to which most proponents of a change in our law about anonymisation turn.
- 12.52 In Ireland, the name of the defendant is anonymised (unless convicted) in rape and incest cases.
- 12.53 The Office of the Director of Public Prosecutions in Dublin, who have been extremely helpful to this Review, were unaware of any analysis of what might be termed the negative effects of the anonymity rule — that is, whether it had impeded other victims coming forward. This is one of the issues that may be considered in the current on-going review in Ireland.
- 12.54 It is important to appreciate that the rule does not apply to all serious sexual offences. Thus an accused charged with sexual assault can be named unless the naming of the accused might identify the victim. Arguably this different treatment of various sexual offences is anomalous but it does reflect the previous UK and Northern Ireland approach which had anonymised only those accused of rape.
- 12.55 Data in Ireland shows that even after a conviction, the majority of those convicted of rape are never publicly named, due to strict rules in Ireland protecting complainants' identities. An analysis of data from 2011 to 2014 showed that 59% of those convicted of sex crimes in the Central Criminal Court are not named in the media after conviction, because the offender was a relative or could be easily linked to the victim in the mind of the public.²¹
- 12.56 It has been argued that pre-conviction anonymity of accused persons is vital in Ireland because the country is so small and many rape cases come from small rural communities. "It can be difficult enough for the complainant who finally plucks up enough courage to go to the Guards. It's a nightmare, and it's just not going to help if their rapist is named and shamed in the local or national press even before conviction".²²
- 12.57 The written Constitution may also be a factor. The right to a citizen's good name means that stripping anonymity pre-conviction is unacceptable.

21 Gallagher, C. (2014) 'Untangling the vexed question of anonymity in sex cases' *Irish Times* 3 March

22 Gallagher, C. (2014) 'Untangling the vexed question of anonymity in sex cases' *Irish Times* 3 March

Discussion

Anonymity pre-charge

- 12.58 I am convinced that there is an extremely strong case to be made for the introduction of legislation amending the Criminal Justice (Northern Ireland) Order 1994 to extend a degree of statutory anonymity to persons being investigated until the time that a charge is brought.
- 12.59 As my interviews with those who have been accused and acquitted, together with family members, have established, there is an extraordinary stigma attached to sexual crimes. The experience of public figures, both in Northern Ireland and elsewhere, attests to the devastation of private life caused by media, and particularly social media scrutiny. Sadly, as I discovered in the course of further meetings with family members of such persons in the course of my Review, this applies even to those on the periphery of such matters facing somewhat less serious charges.
- 12.60 Public scrutiny pre-charge threatens to undermine the right to be thought of as innocent until proven guilty.
- 12.61 To advertise the identity and details of a suspect in a serious sexual offence before the level of evidence required to establish a charge is effectively to engage in a fishing expedition.
- 12.62 The argument, which I feel has great force post charge, that publishing the identity of defendants on the grounds that it encourages others to come forward has much less weight pre-charge where for the sake of the merest suspicion details of individuals' lives are held up and subjected to public scrutiny.
- 12.63 The dangers of public shaming of innocent people pre-charge are manifest. For example, Sir Cliff Richard, who was named during an investigation into alleged sexual offences, which never resulted in him being arrested much less charged with any such offence despite huge public scrutiny, was vindicated only years later. The case of Christopher Jefferies, a school teacher allegedly involved in the murder of a young woman and which was featured as a case study in the Leveson Inquiry, also illustrates the public opprobrium visited on totally innocent people investigated but not charged with even non-sexual crimes. More recently media reports named the innocent Sussex couple arrested but not charged in relation to the reported flying of drones near London Gatwick airport.
- 12.64 These are but some of the cases that illustrate, in my view, the need for a new law to make it a criminal offence to breach anonymity until charges are brought unless in exceptional circumstances in the public interest.
- 12.65 Pre-charge anonymity accords with current police practice in a system which usually appears to function relatively well despite the rare high profile cases where social media intrudes.

- 12.66 It also reflects the gathering momentum of Parliamentary pressure to support legislation, already laid in the House of Lords, in 2019 to effect this reform. Lord Paddick, the Liberal Democrats' spokesperson in the House of Lords, has a Private Members Bill, Anonymity (Arrested Persons) Bill 2017-2019, that has just had a second reading which would make it illegal to identify suspects before charge without the authority of a Crown Court Judge.
- 12.67 I observe also a trend in court proceedings for judges to comment on the growing public concern that "the identity of those arrested and suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances."²³
- 12.68 As already mentioned earlier in this chapter, publication of matters leading to the discovery of the identity of school teachers accused of sexually assaulting a child at their school is an offence under the Education Act 2011 section 13 pre-charge.
- 12.69 I see no logic in schoolteachers in Northern Ireland being denied the statutory protection of anonymity given to those in England and Wales pre-charge when pupils make allegations of a sexual nature against them. Schoolteachers are uniquely vulnerable to such allegations and therefore merit statutory protection. It is right to say that the Department of Education in Northern Ireland has issued a circular addressing the issue²⁴ to the effect that 'legal advice is that the restrictions outlined in [the English legislation] should be applied as best practice in Northern Ireland.' That does not deflect me from recommending that this protection be placed on a statutory footing.
- 12.70 I recognise that following the case of Sir Cliff Richard to which I have adverted above, journalists may now be disabused of the notion that there was no reason why they should not report a police investigation or the search of a house etc.
- 12.71 The judge in that case, having balanced the rights of the individual to privacy against the rights of press and media freedom of expression, determined that this person under investigation by the police had a reasonable expectation of privacy.
- 12.72 It is thus a question of balance. The press must show that the public interest in the broadcast or the report the journalist is imparting contains information that outweighs the right to privacy of the suspect.
- 12.73 This will also apply to individuals using their smartphone or other web-enabled communication device, who then puts the material onto social media, even if they have correctly identified that person and got it right, because that person has a right to respect for privacy.
- 12.74 The problem is that some members of the public may not have the resources, which makes seeking compensation worthwhile. Bloggers may not be worth

23 PNM v Time Newspapers Limited and Ors [2014] EWCA Civ 1132 [2014] at [37] per Sharp LJ

24 Department of Education (2013) Circular 2015/13 *Dealing with Allegations of Abuse against a Member of Staff*

suing, so they may act illegally with impunity. The danger is that there may be reporting on Twitter and Facebook that mainstream media then reports.

12.75 Arguably, therefore, strong consideration should be given to introducing more robust protection by way of statutory regulation to offer reassurance to the public that, until such times as there are sufficient grounds upon which to charge, their identity will not be published.

12.76 The Bar Council in England and Wales²⁵ has suggested an amendment to the Sexual Offences (Amendment) Act 1992 to extend a degree of statutory anonymity to defendants. It was suggested that it should take the following form by inserting after section 1(2) a new subsection 1(3):

“(3)-(1) Where a person is accused of an offence to which this Act applies, neither the name nor address, and no still or moving picture, of that person shall –

(a) be published in England and Wales in a written publication available to the public; or

(b) be included in a relevant programme for reception in England and Wales,

if it is likely to lead members of the public to identify that person as the person against whom the accusation of committing the offence has been made.

-(2) Subsection 3(1) shall apply only up until the time that a charge is brought upon the person identified in subsection 3(1) for the offence that is the subject of the allegation identified in subsection 3(1).”

12.77 I therefore recommend such a step be taken in Northern Ireland. As the Bar Council in England and Wales indicated, this will help alleviate the intense stigma associated with accusations of sexual offences, will protect private lives at the time it will be most newsworthy, and will relieve individuals of lingering public disapprobation in the absence of any charge.

12.78 Comprehensive investigation protocols/procedures and the early involvement of prosecutors could also ameliorate the risk that a false allegation proceeds to charge and act as a further safeguard/contributor to increased public confidence.

12.79 I conclude my observations on the question of anonymity pre-charge by observing that there may be rare circumstances where anonymity pre-charge should be removed in the interests of justice. Such exceptional circumstances might arise where there was a threat to life, prevention or detection of a crime where the police are making a public warning about a dangerously at large individual.

25 Daly, H. (2015) “Innocent until proven guilty? Sexual Offences and the anonymity of defendants” *Bar Council* [online] Available at https://barcouncil.org.uk/media/406497/_15__hannah_daly_-_essay.pdf Accessed: 11 April 2019

Anonymity of accused post charge

- 12.80 This matter generated more controversy and division of opinion than any other issue in this Review. The arguments on each side are extremely strong and persuasive. Without doubt I found this the most difficult judgment call that I have made throughout the entirety of this Review.
- 12.81 I have concluded however that the arguments in favour of the status quo which permits the identification of accused once a charge has been preferred in serious sexual offences are compelling and the current law should remain in place.
- 12.82 Before coming to this conclusion I have weighed heavily the unarguable fact that those accused of rape and serious sexual offences, even when acquitted, incur a long term stain – something perhaps uniquely present in serious sexual offences – because of the nature of these offences. There is an intense stigma associated with allegations of sexual offences and I am well aware that the private lives of those who have been so accused will remain indelibly marked notwithstanding their acquittal. The lingering public disapprobation with all the attendant consequences will indelibly mark many of those in this category.
- 12.83 For some complainants, including some to whom we spoke, anonymity for the accused may generate greater confidence in the process not only in high profile cases where anonymity may diminish the media attention, but in other cases in small local towns, anonymity for the accused may generate confidence in the process where there is less likelihood of their identity becoming public through jigsaw identification.
- 12.84 Exceptions could be made in the public interest where the prosecution could satisfy the court that, for example, there were reasonable grounds for suspecting the accused was a serial rapist or was fleeing justice.
- 12.85 Acquittal may well offer little prospect of public vindication. Damage to reputation may stalk an acquitted person for many years thereafter.
- 12.86 Conscious as I am of these burdens, which have been so eloquently outlined to me by both accused persons and their families, I have come down in favour of the status quo for the following reasons.
- 12.87 A key argument for withholding anonymity after charge is that it is difficult to justify anonymity in serious sexual offences and yet not extend this to accused in other heinous offences such as murder, extreme but non-sexual child abuse, drug dealing, domestic abuse, blackmail and violent offences against older people etc. These offences also inevitably mark the accused with indelible stains notwithstanding acquittal.
- 12.88 In short, many other very serious charges of a non-sexual nature carry an opprobrium for an accused person that may lead not only to social media vilification, isolation and physical/mental challenges for the accused and his

family but also real risks to their safety at the hands of self-styled vigilantes and organised crime gangs. I have to ask myself why should those charged with serious sexual offences be singled out for special treatment and those charged with other heinous offences be denied such anonymity. The risk of a two tier system is very real.

- 12.89 There is the danger that, whilst a prohibition of publication of the accused's name would be effective against the main media, with an attendant dampening on press freedom and on the public's right to know, it would not affect social media, especially in high-profile cases.
- 12.90 The argument that the parties in a rape trial should be on an equal footing - the complainant is not identified so the defendant should have the benefit of anonymity - is flawed. The Criminal Law Revision Committee rejected this argument despite its superficial attractiveness, saying:
- “The equality argument perhaps stems from a failure to appreciate that the complainant is a witness in the trial — although often rape trials rest upon the evidence of one person against the other, that does not equate their role in the process.”
- 12.91 The comparator should be those accused of other crimes, not the complainant. As the Heilbron committee stated:
- “The reason why we are recommending anonymity for the complainant is not only to protect victims from hurtful publicity for their sake alone, but in order to encourage them to report crimes of rape so as to ensure that rapists do not escape prosecution. Such reasoning cannot apply to the accused. The only reason for giving him anonymity is the argument that he should be treated on an equal basis. We think it erroneous to suppose that the equality should be with her — it should be with other accused persons and an acquittal will give him public vindication.”²⁶
- 12.92 There are strong public interest reasons to support anonymity for the complainant, not least because it is a necessary measure to promote the complainant's participation in the process. No such argument applies to the accused. However, the identity of the accused is neither peripheral nor irrelevant and increases the press interest by giving it a human face.
- 12.93 Importantly, naming defendants can enable other potential victims and witnesses to come forward to report offences where these are of a serial nature, as has been evidenced in England in the high-profile instances of Savile, Worboys, Clifford and Harris. Serious sexual offences very often present as a one against one credibility test where the high burden of proof often results in acquittal. If, however, other persons have come forward to give evidence of similar behaviour, the prosecution will undoubtedly have a stronger case.

- 12.94 Numerous prosecution and law enforcement agencies, both in the UK and in the other jurisdictions that we have researched, personally cited cases where the naming of an accused post charge had brought forward other witnesses who describe similar behaviour.
- 12.95 In Northern Ireland, I have received a personal assurance from both a senior official in the PPS and from a senior officer in the PSNI that they are personally aware of a number of cases processed by these bodies where the publication of the name of the accused after charge in a serious sexual offence investigation had triggered another witness or other witnesses to come forward with similar allegations against the same accused. I was furnished with the details of a number of such cases which satisfied me that there was strength in the suggestions being made. Most of these are pending cases and therefore I am not free to publicise them. As appears in chapter 2, a large number of serious sexual crimes may go unreported and therefore any step which brings such men and women forward into the criminal justice system needs to be encouraged.
- 12.96 This has been most commonly seen in cases where the accused has a high public standing or holds a position of trust in the community, such as a sports coach or a member of the clergy. In such cases, victims may feel (and are often told so by an abuser) that no one will believe them or people will 'turn on them' if they report. This changes when others have the courage to stand up and come forward.
- 12.97 Given the very nature of this type of crime, it is particularly important that the prosecution is aware of all potentially corroborating evidence when reviewing the case.
- 12.98 Research conducted by the Ministry of Justice in 2010²⁷ noted that evidence that establishes a link between one rape and another can increase the likelihood of a conviction, albeit at that stage no systemic evidence could be found that established the extent to which further evidence had been found when identities of suspects have been released. That situation has now changed and there clearly is evidence of this phenomenon, including instances in Northern Ireland.
- 12.99 In my view once sufficient evidence has been produced by the State justifying a charge, that serves to place such a person into a wholly different category from someone who is merely a subject of investigation but not charged.
- 12.100 Victims' groups to whom I have spoken express the view that granting anonymity only to those accused of serious sexual offences is liable to perpetuate the patently erroneous myth that a large proportion of rape allegations are false and all complainants are therefore to be treated with suspicion.²⁸ There appears to be no empirical evidence or conclusive research

27 Ministry of Justice (2010) *Providing anonymity to those accused of rape: An assessment of evidence* London: Ministry of Justice

28 See also Lord Falconer, HL Deb (Sexual Offences Bill) 2 June 2003 Col. 1091

findings to justify that myth. Nothing should be done to encourage it. I pause to note however that I did not find any evidence to support the argument that granting the defendant anonymity might give the impression that there exists a presumption of doubt about the credibility of the complainant and insofar as I have striven to make this an evidenced based Review this argument by itself would not have carried sufficient weight to reverse the status quo.

- 12.101 The admonitions of the Supreme Court to which I have referred to earlier in this chapter and the rarity with which the Supreme Court has permitted anonymity for the reasons set out by the judges therein must carry weight in looking at the overall approach to this issue in Northern Ireland. As I have indicated in chapter 3 the principle of open justice is not without limits. Departure should only occur when there is compelling evidence. It is a legitimate consideration that, without either the identity of the complainant or the accused being disclosed, the case becomes so anodyne in factual content that it loses interest for the press. The presence of the press retains public accountability as it provides for public access through contemporaneous reporting and dissemination of information, preventing encroachment on the principle of open justice. That becomes even more important, if, as I have recommended in chapter 3, the public is to have restricted access.
- 12.102 The question of the anonymity of an accused person is not quite as stark or as challenging as it might seem on first glance. The fact of the matter is that a number of accused benefit from anonymity in our jurisdiction in order to prevent identification of the complainant. I have already adverted in this chapter to the large number of persons in Ireland who avail of anonymity even after conviction because of this very principle.
- 12.103 Finally, I find little weight in the argument that it is sufficient to say that other complainants will come forward after a conviction has occurred and the name of the accused is then publicised. This will have no effect on those who have been acquitted and who might well have been properly convicted had their name been published post charge leading to other witnesses coming forward.

Anonymity of witnesses

- 12.104 In the context of witnesses other than complainants, who are liable to be vilified on social media, especially in high-profile trials, judges should be clear that the principle of open justice has never been absolute, and they have power to permit evidence to be given in a way that does not identify witnesses, or other matters in the interests of justice, and to make ancillary orders under the Contempt of Court Act 1981. Otherwise, we will create a position where witnesses, like complainants, will be increasingly unwilling to come forward.

Responses

Pre-charge anonymity

- 12.105 We did not have a single response challenging the need for anonymity pre-charge. I am satisfied therefore that there is universal support for this step.
- 12.106 In the course of our research we came across the argument that pre-charge anonymity raises the spectre of police investigations and searches of people's homes going unreported. Does it make it more difficult to scrutinise the conduct of the police, put decision-making more in the hands of the police and challenge the wider principle of the public's right to know? I am satisfied that the injustice visited on those who have neither been arrested nor charged far outweighs these arguments.

Anonymity post charge

- 12.107 The response to anonymity post charge reflected the same complete division of opinion that I had encountered in the course of my enquiries prior to the publication of the Preliminary Report. The Bar Council's response noted, 'the Bar recognises that there are strong arguments on both sides of the anonymity debate' accurately reflects my own experience in this aspect.
- 12.108 An analysis of the Review's online survey recorded 57.2% of respondents agreed that the status quo under which the accused are named post charge should continue. 35.9% disagreed and advocated anonymity. 5.9% were neutral. That survey revealed that males were more likely to disagree with the status quo with 58.6% males favouring change, whereas only 28.6% of females favoured change.
- 12.109 In the responses we came across concrete examples being given of instances where the complainants had dropped out of the process, but where it was earnestly believed that if other witnesses came forward against the same alleged perpetrator, the matter would proceed.
- 12.110 Equally, there were some complainants who indicated that they were in favour of granting anonymity because it served to further protect their own identity. Thus for example Rape Crisis Network Ireland, whilst expressing an understanding of the argument that publicising the identity of accused persons could help encourage others to come forward, asserted their experiences that complainants are generally glad to be reassured that the accused's identity as well as their own is not made public before conviction.²⁹
- 12.111 There were other respondent groups who urged the need for change to grant anonymity. The Law Society recorded that its representatives were almost in unanimous agreement for anonymity to the point of conviction making the

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RCN I submission on the Gillen Report and also the view expressed by Dr Berna Grist BL, the Bar of Ireland.

valid point that an accused is vulnerable, especially if they have a high profile. The Society felt that the naming of an accused would not automatically deliver more complainants, because if someone is going to make a complaint they will do so on hearing the name of the accused no matter what stage their identity is publicly known. Thus after a conviction they will come forward.

- 12.112 Similarly, all of the accused persons who have been acquitted together with their relatives who have made contact with the Review underline the dire consequences that lie in the wake of publicity notwithstanding acquittal. Recent meetings with families of such persons have highlighted the fact that in high profile cases, photographs of the accused regularly surface in the press whenever the particular trial is mentioned i.e. long after the acquittal has occurred. Objection was taken by other respondents to this media practice indicating that it was unfair on these persons in the wake of their acquittal. Moreover, the presence of Google references to these high profile trials long after the trial is over is a constant reminder to the public and may have adverse consequences on their ability to obtain employment. Criticism was also made of the exaggerated and inaccurate references made in some of the mass media about the nature of the charges that in fact were preferred against accused persons.
- 12.113 Groups such as FACT³⁰ provided a detailed analysis of men who had been subjected to false accusations suggesting that the scale of false allegations was far greater than that which had appeared in the Preliminary Report. It was submitted that the principle that an acquittal will give public vindication no longer applies bearing in mind the advent of social media. The research papers referred to in the Preliminary Report are described as having been prepared prior to the arrival of social media.
- 12.114 These groups sought to distinguish those accused of serious sexual offences from other serious offences on the grounds that serious sexual offences have a much more inflammatory nature and publication of the names of the accused pre-conviction can lead to a form of vigilante mob rule. The fact that only one jurisdiction, namely Ireland, has a complete automatic ban on publication of the name of the accused prior to conviction did not carry weight because some jurisdiction has to take the lead in moving away from its unfairness.³¹
- 12.115 On the other hand I received a number of strong responses favouring maintenance of the status quo. This included a number of important public bodies³² all of whom adhered to the arguments that potentially more complainants will come forward as already evidenced in numerous instances cited in the Preliminary Report and that it is very difficult to justify protecting

30 FACT (Falsely Accused Carers Teachers and other professionals); in its submission to the Review of 2019.

31 Dr Berna Grist BL, The Bar of Ireland.

32 The five main political parties in Northern Ireland; Belfast City Council; the former Minister of Justice, Claire Sugden MLA; End Violence Against Women; and Dr Olivia Smith in submissions received by this Review.

accused persons in serious sexual offences and not in other very heinous offences. In short there is insufficient evidence to justify a change in the status quo in the face of these incontrovertible new facts.

- 12.116 We also heard from relatives of complainants who indicated that their family members had withdrawn from the process after initially reporting but that if others came forward to name the alleged perpetrator the situation would be different and such individuals would feel empowered to carry on.
- 12.117 It was argued that a fair balance is struck if anonymity is given pre-charge and removed post charge.³³ Another group, whilst agreeing in principle with the post charge publication, states that there might be some instances where identities could be anonymised in the future.³⁴
- 12.118 Finally, the argument was again raised that if anonymity was to be granted to those who were accused post charge, it would lend itself to a belief in the eyes of the jury that this reflected the fact that a large number of false allegations were made by female complainants and this would serve to fuel further misconceptions about the evidence of complainants.³⁵
- 12.119 In the course of one of our outreach meetings, an issue was raised as to why there is a disparity between counselling services made available to complainants, but not to accused persons who had been acquitted and may well be suffering the wake of an experience and the aftermath. I consider this to be a valid point and I recommend that counselling services be made available in the voluntary sector for those who have been acquitted and who are suffering as a result.
- 12.120 One response however did chime with me. Complainants have regularly made the case that in some instances the revelation of the accused's name does lead to their own identification. The press or those who publish the accused's name should be well aware that publishing such material which leads to the identification of the complainant can amount to a criminal offence. It is clear to me that this is a factor that is not being given sufficient attention by the PSNI or PPS at the time of charging and before the first appearance in court. The complainant should be contacted and this matter should be raised with them so that, if necessary, an application can be made at the first hearing before the District Judge who can inform the attending press, provided there are grounds for so doing, that this may well be a case where a revelation of the name of the accused could lead to the identification of the complainant. The District Judge of course would have to be convinced before making such a statement that there is a link between the complainant and the accused such that this could lead to the identification of the complainant and thereafter the duty is imposed on the media to ensure that nothing is reported that would lead to such

33 Women's Aid Federation Northern Ireland.

34 Retired Associates of the Probation Board

35 Women's Resource & Development Agency response to the Gillen Review,

identification. This should not be a particularly difficult operation given that in Ireland 59% of those convicted are not named on this basis.

- 12.121 Once again the Information Commissioner's Office (ICO) has made a helpful response to this chapter. It records that insofar as the current PSNI policy is not to name those arrested or suspected of a crime unless in exceptional circumstances, nonetheless they do release some details about the person such as gender, age, area they live in or arrest date. The Information Commissioner asserts that the PSNI will need to consider the likelihood of this information being potentially attributable to an identifiable individual on a case-by-case basis and document their decision-making in order to demonstrate compliance.
- 12.122 Insofar as I have recommended legislation to protect the identity of school teachers accused of sexually assaulting a child at their school pre-charge, the ICO indicates that this is likely to require consultation with the ICO as it would require a legislative change concerning the processing of personal data pursuant to the EU General Data Protection Regulation 2016 (GDPR).
- 12.123 Finally, in this context, I have recommended statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged. ICO considers that this falls within the obligation under the GDPR to consult with the ICO and the Data Protection Impact Assessment and developing policy proposals relating to the processing of personal data pursuant to the provisions of the GDPR legislation.

Conclusions

- 12.124 I reiterate that there are compelling arguments on either side of this issue. The response process has clearly underlined a division of opinion that persists in this matter.
- 12.125 I have the extremely difficult task of weighing up on the one hand the manifestly dire consequences that lie in the wake of persons accused of these offences who are subsequently acquitted against on the other hand the undoubted evidence that it does encourage other victims of the same person to come forward and the unfairness to those accused of non-sexual offences who are subject to publication of their identity.
- 12.126 The fact of the matter is that the identity of the complainant will be protected by such persons being anonymised if to publicise their identity would reveal the identity of the complainant. This is a defence mechanism for complainants that should be robustly asserted on their behalf by the prosecution at the earliest possible stage and should be addressed with the complainant before anyone is accused of an offence against them.
- 12.127 It has to be remembered that there has never been anonymity for people accused of all serious sexual offences and what anonymity there has been has

only been in existence for rape and incest charges. I therefore consider that the argument that complainants fear that their identity might be made public by the accused identity being publicised is not sustainable.

- 12.128 Secondly, on balance I consider that the public interest in encouraging other complainants to come forward is a greater imperative for the rule of law than the need to protect those who have been acquitted. There is manifest evidence of other complainants coming forward in the light of the publication of an accused's identity in jurisdictions across the world as well as in Northern Ireland. It is this factor that has tipped the balance in virtually every country except Ireland and I can see good reason for this. To blandly assert that this somehow encourages more false allegations or sets out "rape bait" is to ignore the factual findings that a plethora of genuine complainants have come forward in these circumstances. I have found no one in the responses who has adequately answered this issue. Accordingly, I am of the view that the naming of a person charged with an offence may be considered an important measure in the State realising its duty to prosecute the perpetrators of sexual crimes.
- 12.129 I also find it fundamentally unfair that those accused of serious sexual offences – but not rape or incest – as well as other heinous offences such as child abuse, blackmail or murder, should for some reason not have the protection that those accused of rape and incest would have. I consider such a state of affairs would be fundamentally unbalanced and unfair. Again, I have come across no respondent who has adequately answered this issue. The stain of a rape acquittal is no greater in my view than the potential stain of a child abuse/serious domestic violence/murder acquittal.
- 12.130 I therefore confirm my recommendation that the status quo in relation to those accused of serious sexual offences post charge should remain unaltered.
- 12.131 I consider that anonymity pre-charge is an equally unanswerable proposition. Such persons are in a different category from those whom the State has determined to have crossed the barrier for prosecution.

Recommendations

157. There should be no change in the current practice of naming accused persons after they have been charged.
- 158.* Legislation should be introduced to protect the identity of schoolteachers accused of sexually assaulting a child at their school pre-charge.
- 159.* There should be statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged.
160. The Judiciary should more readily exercise their discretion to prohibit publication of the identity of witnesses other than complainants in cases of serious sexual assault.
161. Counselling services in the voluntary sector should be made available to accused persons who have been acquitted of serious sexual offences.
162. Greater weight should be given to the assertions of complainants that publication of the name of the accused will lead to their identity.

Chapter 13

The voice of
marginalised communities

Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.

Mogoeng Mogoeng
Chief Justice of South Africa¹

Issue

What can victims and accused persons in marginalised communities reasonably expect from the law and procedures set up by the State in dealing with serious sexual offences?

Current law and practice

- 13.1 It is a matter of procedural fairness that witnesses and parties may participate effectively in the justice system. There is an onus on all those who work within the justice system to take steps to remove barriers that create disadvantage and discrimination.
- 13.2 In 2016² the Court of Appeal in Northern Ireland noted:
- “For many years now the courts in Northern Ireland have recognised the particular need to ensure fairness in hearings where one or more parties suffers from a disability.”
- 13.3 Who is ‘vulnerable’? Article 4 of The Criminal Evidence (Northern Ireland) Order 1999 sets out which vulnerable witnesses are ‘eligible for assistance on the grounds of age or incapacity’.
- 13.4 These vulnerable witnesses must, at the time of the hearing, be either under 18 or suffering “from mental disorder within the meaning of The Mental Health (Northern Ireland) Order 1986” or have a “significant impairment of intelligence and social functioning” or have a “physical disability or is suffering from a physical disorder” that is likely to diminish the quality of their evidence.
- 13.5 Article 5 sets out those ‘intimidated’ witnesses who are eligible “for assistance on grounds of fear or distress about testifying”.
- 13.6 ‘Special measures’ is the assistance that the Order speaks of and can be summarised as the legal rules allowing witnesses to give evidence in a criminal court in a manner that is different to the more traditional giving of evidence from a witness stand in the courtroom. The principal provisions are contained in the 1999 Order.

1 Oriani Ambrosini, MP v Sisulu, MP Speaker of the National Assembly [2012] ZACC27

2 Galo v Bombardier Aerospace UK (2016) NICA25)

- 13.7 Research into special measures in Northern Ireland concluded that:
- “The identification of vulnerable witnesses, especially vulnerable adults, remains problematic with conservative estimates indicating that the police identify only one quarter of witnesses who are potentially vulnerable or intimidated. Findings from a number of research studies highlight a ‘hierarchy of identification’ with children and victims of sexual crime being more likely to be identified as vulnerable or intimidated compared to vulnerable adults with mental, learning and physical disorders or disabilities.”³
- 13.8 In fact, there is a general lack of information and data in relation to the number of vulnerable or intimidated witnesses who are in contact with criminal justice systems in the UK.
- 13.9 In 2010 a further report noted:
- “In the majority of cases vulnerabilities [of witnesses and suspects who are interviewed at police stations] are not identified, and even if identified, this information is not always acted upon in terms of service provisions.”⁴
- 13.10 In the wake of this, Professor Penny Cooper created a toolkit on the Advocate’s Gateway in England that would set out guidance on identifying vulnerability.⁵

International Standards

- 13.11 The 2012 EU Directive on the rights of victims provides that victims and witnesses of certain categories of crime, such as gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities, require specific treatment.⁶ The Committee of Ministers’ Recommendation on assistance to crime victims identifies “domestic or sexual violence, terrorism, crimes motivated by racial, religious or other prejudice” as special categories of crime requiring specific recognition.⁷
- 13.12 The Committee of Ministers’ Recommendation on Intimidation of Witnesses highlights the particularly difficult situation faced by “witnesses giving evidence against family members in criminal cases” and “elderly persons subjected to ill-treatment by their family”.⁸ The Committee noted that, “when a vulnerable witness first reports allegations to the police, there should be immediate access

3 Bunting, L., Hayes, D. and Clifford, G. (2013) *Special Measures for Vulnerable Witnesses in Northern Ireland* Belfast: Department of Justice

4 Gudjonsson, G. (2010) “Psychological vulnerabilities during police interviews. Why are they important?” *Legal and Criminological Psychology* Vol. 15, pp. 161–175

5 Cooper, P. (2017) *Toolkit 10: Identifying vulnerability in witnesses and parties and making adjustments*. 2nd ed. London: The Advocate’s Gateway

6 Article 22, EU Directive 2012/29/EU

7 Council of Europe Committee of Ministers’ Recommendation on Assistance to Crime Victims, Rec (2006) 8, para. 12.3

8 Council of Europe Committee of Ministers’ Recommendation on Intimidation of Witnesses and the rights of the defence R(97)13, paras 17 and 21

to professional help” and that “the examination of the witness should be conducted by suitably trained staff.”⁹

- 13.13 The UN Declaration on the Elimination of Violence against Women identifies, “women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict as being especially vulnerable to violence.”¹⁰ Pursuant to that Declaration, States should “adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence”.¹¹
- 13.14 Migrant women are particularly vulnerable to domestic and sexual violence,¹² with the Special Rapporteur on violence against women noting, following her visit to the UK, that “the justice system is not effectively equipped, or responsive, to address the specific needs of women and girl survivors of violence.”¹³
- 13.15 The Parliamentary Assembly of the Council of Europe notes, “migrant women in Europe face twofold discrimination based both on their gender and their origin. In addition, in communities marked by a strong patriarchal culture, they may be exposed to an aggravated risk from domestic violence. Confronted with the language barrier and family pressure, they often end up isolated and unable to express their views and have only limited access to any facilities that exist to protect the victims of domestic violence. Migrant women may also have faced violence in their home country or in transit or in the host country. Irregular migrant women face a further problem in that they risk being sent back to their home country if they manifest themselves to the authorities.”¹⁴
- 13.16 Similarly, the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) Committee has also noted the vulnerable position of migrant women.¹⁵ In the context of women migrant workers the CEDAW

9 Council of Europe Committee of Ministers’ Recommendation on Intimidation of Witnesses and the rights of the defence R(97)13, para 24

10 Preamble, UN Declaration on the Elimination of Violence against Women. A/RES/48/104

11 Article 4(i), UN Declaration on the Elimination of Violence against Women. A/RES/48/104

12 UN Human Rights Council Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo A/HRC/17/26, 2 May 2011, para 14. See also, All-Party Parliamentary Group on Domestic and Sexual Violence/Women’s Aid (2014) Women’s Access to Justice: from reporting to sentencing paras 24-27

13 UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences. Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland, Rashida Manjoo, A/HRC/29/27/Add.2 (19 May 2015) para 95

14 Council of Europe, Parliamentary Assembly Resolution 1697 (2009) Migrant Women: at particular risk from domestic violence, para 1

15 In *Jallow v. Bulgaria*, the Committee recognised the vulnerable position of the complainant due to being an “illiterate migrant woman without command of Bulgarian or relatives in the State party, and dependent on her husband”, and concluded that Bulgaria had failed to comply with its obligations under the Convention.

Committee has highlighted, “women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate. Domestic workers are particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers... Women migrant workers who migrate as spouses of male migrant workers or along with family members face an added risk of domestic violence from their spouses or relatives if they come from a culture that values the submissive role of the women in the family.”¹⁶

- 13.17 The Council of Europe Parliamentary Resolution 1697(2009) on Migrant Women invites member states to “adopt dedicated action plans addressing the specific needs of migrant women who are victims of violence, including domestic violence and trafficking.”¹⁷
- 13.18 In relation to older women, the CEDAW Committee has stated that “States parties should give due consideration to the situation of older women when addressing sexual violence...”¹⁸
- 13.19 The World Health Organisation (WHO) has recognised “people with disabilities are at greater risk of violence than those without disabilities... The prevalence of sexual abuse against people with disabilities has been shown to be higher, especially for institutionalized men and women with intellectual disabilities, intimate partners, and adolescents.”¹⁹
- 13.20 The UN Committee on the Rights of the Child has noted that “Children with disabilities are more vulnerable to all forms of abuse be it mental, physical or sexual in all settings, including the family, schools, private and public institutions, inter alia alternative care, work environment and community at large. It is often quoted that children with disabilities are five times more likely to be victims of abuse.”²⁰ Similarly, States Parties to the UNCRPD (UN Convention on the Rights on Persons with Disabilities) recognise “that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”²¹
- 13.21 I note that the UNCRPD requires State Parties to “take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia,

16 CEDAW Committee General Recommendation 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008), para 20

17 Council of Europe, Parliamentary Assembly Resolution 1697 (2009) Migrant Women: at particular risk from domestic violence, para 4.2. See also, CEDAW Committee, General Recommendation 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008) para 26.

18 CEDAW Committee, General Recommendation 27 on older women and protection of their human rights, CEDAW/C/GC/27 (16 December 2010) para 38

19 World Health Organisation (WHO) (2011), World Report on Disability p.59

20 CRC Committee (2006) General Comment 9 on the rights of children with disabilities, CRC/C/GC/9 (27 February 2007) para 42

21 UN Convention on the Rights on Persons with Disabilities, Para 17, Preamble

appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers ... States Parties shall ensure that protection services are age, gender and disability sensitive.”²²

- 13.22 In accordance with the UNCRPD the State is obligated to “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”²³
- 13.23 The Yogyakarta Principles call on States to “take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the judicial process... and to ensure that no one’s credibility or character as a party, witness, advocate or decision-maker is impugned by reason of their sexual orientation or gender identity”.²⁴
- 13.24 The Committee of Ministers’ recommends that research should include criminal victimisation and its impact on victims; the prevalence and risk of victimisation and factors affecting risk; the effectiveness of legislative and other measures for supporting and protecting victims of crime; and the effectiveness of interventions by criminal justice agencies and victim services.²⁵
- 13.25 The CEDAW Committee has stated, “States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence.”²⁶ Similarly the UN Declaration on the Elimination of Violence against Women requires States to, “promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public.”²⁷

22 UN Convention on the Rights on Persons with Disabilities, Article 16.2

23 UN Convention on the Rights on Persons with Disabilities Article 13

24 Yogyakarta Principles, Principle 8

25 Council of Europe, Committee of Ministers’ Recommendation on assistance to crime victims, para. 17.2

26 CEDAW Committee, General Recommendation 19 on violence against women (1993) para 24(c). See also, CEDAW Committee, General Recommendation 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008) para 23 (c)

27 UN General Assembly Declaration on the Elimination of Violence against Women, A/Res/48/104, 1993, Article 4(k)

13.26 With specific reference to violence against women, the Council of Europe Committee of Ministers has recommended that research and data collection should be developed in respect of:

- a. the preparation of statistics sorted by gender, integrated statistics and common indicators in order to better evaluate the scale of violence against women;
- b. the medium- and long-term consequences of assaults on victims;
- c. the consequence of violence on those who are witness to it, inter alia, within the family;
- d. the health, social and economic costs of violence against women;
- e. the assessment of the efficiency of the judiciary and legal systems in combating violence against women;
- f. the causes of violence against women, i.e. the reasons which cause men to be violent and the reasons why society condones such violence;
- g. the elaboration of criteria for benchmarking in the field of violence.²⁸

13.27 Despite these commitments the European Union Agency for Fundamental Rights (EUFRA) noted in 2014 that “one area where there is agreement – embracing the UN, the Council of Europe, the European Commission, the European Parliament and civil society – is with respect to the continued lack of comprehensive, comparable data on the phenomenon of violence against women.”²⁹ The UN Special Rapporteur on Violence against Women has also noted, “Coherence and sustainability in data collection is essential for the effective development and implementation of laws, policies and programmes. It is also essential to include both quantitative data, to measure prevalence and forms, and qualitative data, to assess the efficacy of measures.”³⁰

13.28 Recent research by the Economist Intelligence Unit on the response to child sexual abuse and exploitation conducted a bench marking exercise with 40 countries across Europe. It highlights the UK as having one of the better environments for children. However, it also identifies the lack of data on the extent of child sexual exploitation in the UK.³¹

28 Council of Europe, Committee of Ministers, Recommendation No. R(2002)5 on the Protection of Women against Violence, Appendix, para 5. See also, Council of Europe, Parliamentary Assembly Resolution 1697 (2009): Migrant Women: at particular risk from domestic violence, para 4.1.2; Article 11.1, COE, Convention on Preventing and Combating Violence against women and domestic violence (Istanbul Convention)

29 EUFRA, Violence against women: an EU-wide survey Main Results (March 2014,) p. 12

30 UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo A/HRC/23/49 (14 May 2013) para 61

31 The Economist Intelligence Unit, ‘Out of the shadows: Shining light on the response to child sexual abuse and exploitation: UK country profile’ (EIU, 2018)

Background

Level of sexual offences against those with a disability

- 13.29 The level of reported sexual offences is at its highest in Northern Ireland since recording started. National and international studies reveal that people with disabilities are more likely to be victims of crime than any other groups in the general population.³²
- 13.30 A growing body of evidence also finds that crime towards people with disabilities starts early. The experience of crime is particularly acute for women with disabilities and people with cognitive impairments.
- 13.31 All genders with differing disabilities may face different challenges and have very different needs. Some disabilities may put people at a higher risk for crimes such as sexual assault or abuse. For example:
- Someone who needs regular assistance may rely on a person who is abusing them for care. The perpetrator may use this power to threaten, coerce or force someone into non-consensual sex or sexual activities.
 - An abuser may take away access to the tools a person with a disability uses to communicate, such as a computer or phone.
 - People with disabilities may be less likely to be taken seriously when they make a report of sexual assault or abuse. With learning disabilities or dementia, they may not be believed.
 - They may also face challenges in accessing services to make a report in the first place. For example, someone who is deaf or deaf-blind may face challenges accessing communication tools such as a phone to report the crime or get help.
 - Many people with disabilities may not understand or lack information about healthy sexuality and the types of touching that are appropriate or inappropriate. This can be especially challenging if a person's disability requires other people to touch them to provide care.
 - Consent is crucial when any person engages in sexual activity, but it plays an even bigger, and potentially more complicated, role when someone has a disability. Some disabilities may make it difficult to communicate consent to participate in sexual activity, and perpetrators may take advantage of this.
 - People with disabilities may also not be given the same education about sexuality and consent that people without disabilities receive. In addition, someone who has a developmental or intellectual disability may not have the ability to consent to sexual activity.

32 For example US Department of Justice National Crime Against Persons with Disabilities, 2009-2015 – Statistical Tables, NCJ250632, July 2017.

- An underlying need to be accepted and a perceived powerless position in society.
- Perpetrators may be more confident that their crime will remain hidden.

13.32 *The Rowan Sexual Assault Referral Centre Annual Report 2015-2016* stated that 48% of people referred during the year had complex and additional needs. This included chronic illness, mental health problems, physical disabilities and learning disabilities.

Level of recognition

13.33 Police Service of Northern Ireland (PSNI) figures on victims of sexual offences with a disability for 2017/18 simply do not reflect the level of sexual abuse set out above and this points to under-reporting in our community. The figures reveal as follows:

- Of the 3,317 available PSNI records for victims of sexual offences in 2017/18, there were 300 where there was at least one disability input and 59 of these records had more than one disability input. The table below shows the number of times each type of disability has been input and therefore adds to more than the 300 records.
- 9.0% of sexual offence victims in 2017/18 had a disability.

Victim disability	2017/18
Learning	74
Long-term illness	38
Mental health	192
Physical	58
Sensory	11
Total	373

13.34 However, criminal justice professionals in general may lack the ability to recognise and respond appropriately if the victim has a learning disability. Research points to a lack of expertise among police officers, doctors, psychologists and psychiatrists equipped to talk to children with a mild learning disability.

13.35 An example is professionals asking a child repeated, focused questions, which may lead to inaccurate responses, rather than open-ended invitations or open directive questions.

13.36 In addition, the person receiving the disclosure may have personal views on the complainant's mental ill health capacity or base their actions upon stereotypes or myths.

13.37 Other issues include the overprotection of victims; a belief that evidence has been contaminated by a third party (for example, due to manipulation);

assumptions about the ability to take the case to court; perceptions about a lack of support for complainants; and resource constraints.

- 13.38 The Criminal Justice Inspectorate Report on November 2018, dealing with delay, records that victims with particular needs, due to, “for example age or disability, were especially impacted by avoidable delay.”³³

How this problem is being addressed

- 13.39 Many authors have identified a need for further research into sexual offences against people with disabilities, noting that reliable estimates of the extent of the problem are essential for developing preventative programmes.
- 13.40 Areas identified for further research include:
- the types of disability associated with particular sexual offences;
 - types of perpetrators (for example, intimate partners, acquaintances and caregivers);
 - other characteristics of victimisation; and
 - for older complainants, particularly those with a cognitive impairment, there may be difficulties in obtaining an accurate and reliable victim report and in explaining and obtaining consent for a medical examination, as well as challenges in conducting the examination.
- 13.41 The PSNI has informed the Review that steps are being taken to address those with a disability in the following manner:
- In respect of victims, witnesses, suspects or defendants who have a communication difficulty, Registered Intermediaries (RIs) are used. A communication difficulty could arise for example due to a learning disability, a child who is very young, on the autistic spectrum, or someone with a physical disability that creates a difficulty with communication. This list is not exhaustive.
 - RIs are communication specialists such as speech therapists and are assigned dependent on the person’s needs. The criminal justice system uses RIs for children under the age of 18 and, over that age, it is dependent on any other communication needs they may have.
 - The RI carries out an assessment with the person and then provides guidance — for example, to the police officer interviewing them — as to how that interview should be structured.
 - Such advice could include the length of time they can be spoken to; for young children, that they need to sit at a small table instead of the

33 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland

armchairs in the Achieving Best Evidence (ABE) suite; not to ask tag questions—for example, 'I am wearing a red dress today, isn't that correct?'

- RIs also can provide information on whether a person can tell the time, focus on dates, would understand a week ago or a year ago, or how long something went on for. They may also suggest the best time of day for the person to be interviewed.
- For all witnesses and victims, the police officer is present during this assessment. For suspects, their solicitor is present and the police officer is not. The RI would often be present during the interview but not always.
- The RI would then also provide a report to the court for any needs the person may have and would be present with the individual during cross-examination;
- The use of RIs is a special measure for which the Public Prosecution Service (PPS) and defence practitioners would apply to the court.
- In relation to attending court, RIs would liaise with the Victim and Witness Care Unit (VWCU) in relation to any needs that the person may have.

13.42 The VWCU can arrange for interpreters for language, sign language and use of the loop system for people who have hearing aids. If a person is blind, the VWCU can assist them in court and if required provide anything they need to read in Braille. This is all explained to victims, witnesses and suspects at the outset of the investigation.

13.43 Formerly, the PSNI conducted a one-day disability awareness course available and a one-day LGBT+ awareness day open to all response officers. This course is no longer available within PSNI.

13.44 We spoke to Positive Futures, a charitable body working with people with a learning disability, acquired brain injury or an autistic spectrum condition. They argued that general Learning Disability (LD) training is needed for all professionals working in the justice system. This should include trainers who have learning disabilities and, where appropriate, can speak directly about their experiences of encountering professionals or justice-related issues. They recommended procedures in the criminal justice system which:

- provide guidelines for criminal justice professionals on identifying people with a LD;
- identify victims with a LD as early as possible;
- take time to get to know them and their support needs;
- use written and oral communication that are easy to understand;
- make relevant adjustments during trial preparation;
- improve interviewing techniques—for example, designating specialist interviewers for people with a LD;

- provide knowledge in assessing capacity, credibility and biases of witnesses and jurors;
- ensure partnership by working with agencies and individuals with particular expertise in supporting people with a LD in accessing justice; and
- identify appropriate court environments for witnesses with autism — free, wherever possible, from distracting noises.

13.45 Positive Futures is working on a project in collaboration with Queen’s University Belfast, the PPS, the PSNI and Nexus NI. The project is:

- increasing the knowledge of people with a learning disability about their rights in relation to the justice system process and how to access appropriate support by developing an accessible guide;
- empowering people with a learning disability to influence current support arrangements provided by statutory and voluntary organisations by co-producing a counselling/therapeutic programme for victims of sexual violence; and
- increasing the skills and confidence of the PSNI Rape Crime Unit and PPS staff to support people with a learning disability by the co-production of training and implementation for those who provide services to victims of sexual violence.

Under-reporting of serious sexual offences by those with a disability

13.46 There is no doubt that the under-reporting of serious sexual offences by those with a disability is high. The Equality Commission provided us with a helpful analysis of the reasons for this as a result of its inquiries, and these included:

- emotional toll of making a report;
- fear of retaliation or retribution, particularly if the perpetrator was a family member or support worker;
- fear of the consequences of reporting a crime and fear that this might expose them to further problems;
- issues of credibility and not being believed due to stigma felt by those with mental ill health issues;
- past negative impacts of dealing with the PSNI and the justice system;
- unclear of their rights and what is involved in taking a case forward;
- barriers to communication;
- shame and embarrassment of crime;
- may need much more support from the public sector and other agencies, which is not currently available; and
- those with mental ill health issues are more vulnerable to abuse.

- 13.47 VicHealth in Australia estimates that 90% of Australian women with an intellectual disability have been subjected to sexual abuse, more than two thirds (68%) of them before turning 18 years of age.³⁴
- 13.48 Nexus NI carried out a DRILL (Disability Research on Independent Living and Learning) project with children with learning disabilities in special schools. They receive no sex education as society perceives that they will not have sexual feelings. This is not the case. They need boundaries and sex education too.
- 13.49 None of the statutory agencies involved in the justice system adequately monitors the number of victims with a learning disability.

Visually impaired (VI) people

- 13.50 In one of the few studies addressing the prevalence and associated factors of sexual assaults, by including a probability sample of adults with VI, a recent Norwegian study showed a higher prevalence of people in the VI population being exposed to sexual assaults such as being raped and forced into sexual acts compared with that in the general population, reaching statistical significance for women only. No similar study has been carried out in Northern Ireland but logic dictates that our local Northern Ireland community must be similarly exposed.³⁵
- 13.51 In the population of people with VI, the risk of sexual assaults was particularly high among individuals having other impairments in addition to their vision loss.
- 13.52 Individuals with VI may be at risk of sexual assaults for many reasons, being either specific to VI itself or related to having an impairment in general.
- 13.53 First, many people with VI are known to have lower socio-economic status and to be more prone to social isolation and dependency. This makes it easier for a perpetrator to assert power and control over the victim.
- 13.54 Secondly, being dependent on other people in care or service situations, which may be the case especially for some of those having additional impairments, may provide for closeness and intimacy. Often, the perpetrator has a close relationship to the victim. It has been found in research in Norway that nine in 10 victims with VI were abused either by an acquaintance or a close relative.³⁶
- 13.55 Thirdly, important issues related to sexual violence are differences in power and control. Negative social views towards people with impairments, like stigmatisation and discrimination, may be internalised by the individual, leading to low self-esteem and feelings of self-blame.

34 Vic Health (2017) *Violence against women in Australia: An overview of research and approaches to primary prevention* Melbourne: Victorian Health Promotion Foundation

35 Brunes A and Heir T. (2018) "Sexual assaults in individuals with visual impairment: a cross-sectional study of a Norwegian sample" *BMJ Open* Vol. 9

36 As above.

- 13.56 Dependency, fear of being left alone and feelings of unworthiness can make people stay in a relationship that is potentially abusive.
- 13.57 Fourthly, people with congenital blindness are likely to process anatomy information and experience attraction and sexual excitement quite differently from sighted people as they have no visual representation of body image. The lack of visual cues around sexual rapport can present a real problem.

Deaf People

- 13.58 We have been in contact with the British Deaf Association (BDA) concerning serious sexual assaults on deaf people. That association has registered concern that in England at least:
- juries do not receive sufficient training in how interpreters are used in cases where the victims are deaf;
 - jurors do not receive any information concerning deaf children's attainments, which would enable them to appreciate the impact that a lack of language has;
 - it also appears that juries are not provided with any insight into the differences between British Sign Language and Irish Sign Language;
 - police interviewers need to appreciate the difference between an interpreter of British Sign Language and an interpreter of Irish Sign Language. This creates yet another difficulty in reporting;
 - there are doubts as to whether the suggestions made in the *Equal Treatment Bench Book* are adequately conveyed by the court officials to juries; and
 - there is a need to increase the numbers of deaf RIs and, in doing so, improve the choices available for deaf witnesses. I pause to observe however that there are already a number of RIs who have specialisms relating to those who have hearing impairments, mutism etc. Such a requirement comprises only 1% of cases arising. To date with four recruitment exercises for RIs, there have been no applicants from these communities.
- 13.59 The evidence is clear from government statistics in England that at key stage 2 (the stage at which children leave primary school for secondary school) the percentage of deaf children achieving the expected standards in reading, writing and mathematics was 39% as opposed to 70% with no identified special educational needs (SEN).³⁷ In 2017, the proportion of deaf children achieving the required key stage 2 in reading skills alone was 48% against the 80% achieved by children with no identified SEN.

37 Department for Education (2017) *National Curriculum assessments at key stage 2 in England, 2017* (revised) London: Department for Education

- 13.60 Without language, deaf children do not develop the ability to read. The impact of this is not only on language levels but also on knowledge levels.
- 13.61 Much of our society requires the ability to read newspapers, basic documents, leaflets, posters, websites, social media and subtitles on television. When this is allied to the lack of hearing, such as being able to hear conversations, the television, the radio and other forms of sounds, the impact becomes even greater.
- 13.62 The British Deaf Association has an advocacy project in the East Midlands whereby it has an advocate who works with deaf clients in deciphering documents such as those related to housing, welfare benefits, health appointments and other more complicated issues such as divorce proceedings. 100 per cent of deaf clients attending the BDA require a translation of the documentation that they bring to the service.
- 13.63 The double lack of language and knowledge leads to a number of issues, one being the difficulty in understanding concepts or systems. Many of the association's clients do not know how organisations work and how to manage these to achieve what they need. It therefore follows that many are unprepared for what might happen in court.
- 13.64 Deaf and visually impaired people face the added difficulty that if they are not eligible for legal aid, they have to pay for their own interpreter when they seek legal advice.
- 13.65 It has been reported to us that some deaf people are taking out bank loans to make this happen. This acts as a clear impediment to justice.³⁸
- 13.66 Sexual crimes against deaf people often occur within the close community in which they live and this creates not only issues of confidentiality but can be off putting in terms of coming forward.
- 13.67 There needs to be legislation recognising both the British Sign Language and Irish Sign Language to enable the hearing impaired to have their preferred language interpreter.
- 13.68 Sex education for deaf children in schools on issues such as consent is crucial and should be introduced.

Black, Asian and minority ethnic (BAME) groups

- 13.69 Once again I am satisfied that the level of recognition of the degree of serious sexual offences against this group is disturbingly low. The PSNI figures on race are set out below. If the information we have received, the literature we have read and the interviews we have conducted are anywhere near accurate, these

are a gross underestimate of the crimes committed against the communities listed in the following table:

Victim ethnicity	2017/18	%
White	2,572	77.5
Irish Traveller community	13	0.4
Black ethnicity (including Black Caribbean, Black African, Black other)	18	0.5
Indian/Pakistani/other Asian/Chinese	14	0.4
Other ethnic groups	9	0.3
Mixed	12	0.4
Missing/unknown	679	20.5
Total	3,317	

- 13.70 Research on reported sex offences indicates that most victims self-identify as white, with very few victims or perpetrators from black or minority ethnic groups. This may point to barriers to reporting for minority ethnic groups.
- 13.71 There is a real dearth of research on the degree of under-reporting in the black, Asian and ethnic minority communities in Northern Ireland, as evidenced by the discussion I had with two members of that community in Northern Ireland who advised me that information regarding victims from their communities is not collected.
- 13.72 However, we did have the invaluable benefit of a joint submission from the Northern Ireland Council for Racial Equality, the Black and Minority Ethnic Women's Network and the Migrant Centre NI, who confirmed the lack of research on under-reporting.
- 13.73 The previous Northern Ireland Council for Ethnic Minorities (NICEM) had conducted two pieces of evidence-based research.³⁹ The first report was conducted by Professor Monica McWilliams and Priyamvada Yarnell. The second report was conducted by the former deputy director of the Runnymede Trust, the race think tank in the UK, in June 2013 as part of the submission to the Committee on the Elimination of Discrimination against Women (CEDAW).
- 13.74 From all of this the following points emerged:
- There are broad issues of violence affecting BAME women in NI, including and interlinked to issues of trafficking, sexual violence, forced marriage and harmful cultural practices. Such issues are under-researched in the Northern Ireland context and many statutory agencies are unaware of their existence.

39 McWilliams, M. and Yarnell, P. (2013) *The Protection and Rights of Black and Minority Ethnic Women Experiencing Domestic Violence in Northern Ireland: Prepared for Submission to CEDAW Belfast*: NICEM and Isal, S. (2013) *The Experience of Ethnic Minority Women in Northern Ireland: Prepared for Submission to CEDAW Belfast*: NICEM

- BAME victims of domestic violence are particularly vulnerable and as such require special protection to enable them to come forward to disclose details of their abusive partners in a safe environment.
- For that reason, data needs to be collected on BAME victims engaging with, or providing evidence to, the criminal justice system so that the various agencies know the extent to which they need to direct their resources towards those who are particularly vulnerable.
- Increasing victim confidence in the criminal justice system generally, and more specifically in the Public Prosecution Service, remains a challenge for service providers everywhere. This may be accentuated in the context of Northern Ireland, given the legacy of the conflict and the reluctance of some communities to seek help from 'outsiders'. For this reason, systematic and consistent data collection for equality monitoring and for other purposes needs to be in place.
- There is a very robust monitoring system across the criminal justice system for hate crime but, extraordinarily, we do not have one on domestic, sexual or other violence against women. Why does the equality monitoring not apply to domestic and sexual violence in the criminal justice system as well as related service providers?
- Unfortunately, neither the PPS nor the PSNI publish adequate or truly useful information on the characteristics of those who have reported sexual offences. Consequently, it is difficult to determine what the attrition rate is for crimes reported by BAME individuals specifically. But this is not the case in hate crime, which has a full data set.

13.75 According to census data,⁴⁰ around 1.72% of the usually resident Northern Ireland population is of a BAME background. This includes the 1.10% of the population born outside the British Isles and a further 0.62% of the population who were born within the British Isles and who identified themselves as having a minority ethnic background in the 2011 census. That ethnic minority population is increasing in Northern Ireland so it is all the more important to record data on the occurrence of serious sexual offences in these communities.

13.76 The reasons for under-reporting of serious sexual offences in these communities have been put forward by the Equality Commission's inquiries. They bear a striking resemblance to the research on BAME women's experience of domestic violence in Northern Ireland and the reasons why they do not report. In truth, barriers to justice can seem even steeper for people of this group. The reasons were as follows:

- language barriers for those whose first language is not English;

40 Northern Ireland Statistics and Research Agency and Northern Ireland Neighbourhood Information Service, Census 2011, Table DC2201NI: Country of Birth by Ethnic Group.

- lack of knowledge/understanding of the legal system;
- previous experience of the judicial systems in their own country;
- community/family pressures and fear of children being taken into care;
- reluctance to seek help from public authorities or outside support agencies due to a perceived lack of cultural sensitivity;
- financial dependency on the perpetrator;
- religious and cultural beliefs;
- fear of retaliation or retribution;
- immigration status/ fear of deportation;
- financial dependence on partner and no recourse to public funds;
- stigma and shame attached to crime;
- previous negative experiences dealing with the police. At times a feeling that the police will not take them seriously;
- people from BAME communities and members of the Traveller community may have experienced racism or prejudice and fear that they will not be believed or they will not be treated properly. As a result, they may be reluctant to report offences or support a prosecution; and
- cultural and religious beliefs may also prevent some people from reporting offences or supporting a prosecution.

Traveller community

- 13.77 At a Queen's University Belfast seminar in 2018 that dealt, inter alia, with the topic of under-reporting of serious sexual offences, it was noted that reporting by people from the Traveller community is minuscule and this has a ripple effect in their community.
- 13.78 This reflects the view expressed by a member of the Traveller community to whom I spoke in the course of this Review. She was a founder member of Tóme Anoshá, the only entirely Traveller led organisation in Northern Ireland and which has unprecedented access to that community which could be of enormous help in research and presenting training etc. The following points were made at that meeting relevant to our enquiries:
- perhaps 80% of serious sexual crimes go unreported to the police;
 - many of these allegations are dealt with internally by the community;
 - rape myths abound;
 - there is a strong patriarchal culture;
 - there exists a fear of social services taking children away if reports are made;
 - financial dependency on the perpetrator;
 - measure of familial pressure to withdraw allegations; and

- the PSNI needs to improve its cultural awareness of the Traveller community; they only meet such members in a criminal law setting.
- 13.79 An Munia Tober is a Traveller support organisation dedicated to the reduction of inequalities that affect the Traveller population in greater Belfast through improvements in health, housing, economic, young people's outcomes and integration activities.
- 13.80 Since An Munia Tober became part of the Bryson Charitable Group in April 2012, the charity has developed and implemented a range of programmes for Travellers that respond to the identified needs of this indigenous ethnically marginalised group as identified in The Race Relations (Northern Ireland) Order 1997. The Belfast Health and Social Care Trust provides the funding for this project.
- 13.81 To date, little has been done on sexual abuse as there is a reluctance by the Traveller community to come forward and report these kinds of crimes. The Trusts attempted to address this issue in the past, but it is claimed there was no interest.
- 13.82 The Trusts are attempting to raise awareness of the issue by incorporating it into one-to-one meetings and as part of other group sessions, signposting the women to Nexus NI and Women's Aid organisations should they ever need to avail themselves of that type of support.
- 13.83 That said, it has been noticed that Traveller women are asking more and more about this subject at Traveller reference group meetings, possibly because of the recent high-profile rape case in Belfast.
- 13.84 A strong gender culture is seemingly inherent within the Traveller community, with patriarchal dominance apparent. Men are viewed as responsible for the family, while women are expected to be loyal to their father and obey men within the family, avoiding shame at all costs.
- 13.85 There is a lack of information about Travellers' sexual health and sex education needs. In addition, the community is reticent to discuss such matters, with much individual knowledge gained through word of mouth or their GP. In many cases, sex and sexuality remain taboo subjects.
- 13.86 Prevalence figures for violence against minority ethnic groups, including Irish Travellers, vary. Research notes a perception that Irish Travellers are among the groups more likely to experience domestic violence, although evidence for this is lacking.⁴¹
- 13.87 Other research with Travellers in Ireland has identified concern among Traveller parents about the level of acceptance in relation to violence within marriage.

41 Allen, M. (2012) "Domestic Violence within the Irish Travelling Community: The Challenge for Social Work" *The British Journal of Social Work* Vol. 42, Iss.5, pp. 870-886

Professionals interviewed as part of a recent study also raised concerns about rape and incest within Traveller communities.⁴²

- 13.88 In addition to factors that may discourage reporting of serious sexual offences among the majority population, Traveller victims face additional challenges in disclosing and reporting abuse. Young women tend to live within and in close proximity to their husband's extended family.
- 13.89 Research suggests that, in cases of abuse within these close-knit family structures, the emphasis tends to be on the victim's duty to the family system as a whole, and they may come under pressure to remain married due to cultural and religious norms. Outside the community, Traveller women may face discrimination from police officers, with reports of police refusing to respond to call-outs to halting sites.⁴³
- 13.90 Poorer education outcomes for Travellers may mean that the victim is unable to complete the necessary forms for a barring or protection order. A further challenge is a fear of social workers due to an emphasis on child protection.
- 13.91 Indeed, Bryson Intercultural in Northern Ireland, which aims to work with and empower minority ethnic families and their communities in Northern Ireland, including Irish Travellers through An Munia Tober, notes that a key factor preventing Traveller women from coming forward is a fear of losing their children if they report a sexual offence.
- 13.92 A 2010 University College Dublin study by Dr Mary Allen and Pauline Forster posits that the issue of domestic violence within Traveller communities is unlikely to be resolved without taking account of cultural norms that begin in childhood, where boys and girls experience different rules and levels of supervision. Traveller participants in the research noted this part of Traveller culture as important in conserving the reputation of girls.⁴⁴
- 13.93 Nonetheless, research has suggested that an interventionist approach, teaching men how to control anger and improve relationships through expressing feelings and removing frustrations and anger, could help to reduce gender-based violence within these (and other) communities.
- 13.94 Effective relationships and sexuality education can play an important role in sex that is free from coercion or violence. Research highlights a need to ensure mainstream sex education classes are culturally appropriate for Travellers. It also suggests that in order to tackle domestic violence, Travellers and Traveller

42 McGaughey, F. (2011) *Travellers' Attitudes to Sexual Relationships and Sex Education* Dublin: Pavee Pont Travellers Centre

43 Allen, M. (2012) "Domestic Violence within the Irish Travelling Community: The Challenge for Social Work" *The British Journal of Social Work* Vol. 42, Iss.5, pp. 870-886

44 McGaughey, F. (2011) *Travellers' Attitudes to Sexual Relationships and Sex Education* Dublin: Pavee Pont Travellers Centre

organisations need to discuss aspects of Traveller culture that may disempower women.

Older People

13.95 PSNI figures for the age of victims of sexual offences in 2017/18 were as follows:⁴⁵

Victim age	2017/18	2017/18 %	2016/17	2016/17 %
<18	1,936	58.4%	1,868	60.1%
18–19	174	5.2%	141	4.5%
20–24	251	7.6%	245	7.9%
25–29	215	6.5%	183	5.9%
30–34	166	5.0%	136	4.4%
35–39	157	4.7%	123	4.0%
40–44	99	3.0%	104	3.3%
45–49	105	3.2%	110	3.5%
50–54	69	2.1%	73	2.3%
55–59	47	1.4%	43	1.4%
60–64	34	1.0%	15	0.5%
65+	59	1.8%	62	2.0%
Age unknown	5	0.2%	6	0.2%
Total	3,317		3,109	

- 13.96 The sexual abuse of older people is a subject that is rarely discussed but is nevertheless a reality.
- 13.97 In a small number of cases, it is the result of opportunism — for example, a care worker seeing a chance to assault a dependent person — but more often it is planned by someone known to the older person. Sometimes it is the continuation of domestic violence into old age, in some cases it is about exercising power and control, and in some cases it is associated with an incestuous relationship. Some studies suggest adult children or grandchildren to be common perpetrators.⁴⁶
- 13.98 The most common location is in the family home, and the second most common location of the sexual assault is care homes.
- 13.99 There are, therefore, particular issues for older people that do not exist in other groups.

⁴⁵ Police Service of Northern Ireland (2018) *Trends in Police Recorded Crime in Northern Ireland 1998/99 to 2017/18: Annual Bulletin published 31 October 2018* Belfast: PSNI

⁴⁶ Lundy, M and Grossman, S. (2004) "Elder Abuse: Spouse/Intimate Partner Abuse and Family Violence Among Elders" *Journal of Elder Abuse & Neglect* Vol.16, Iss.1, pp, 85-102; Naughton, C., Drennan, J., Lyons, I., Lafferty, A., Treacy, M., Phelan, A., O'Loughlin, A. and Delaney, L. (2012) "Elder abuse and neglect in Ireland: results from a national prevalence survey" *Age and Ageing* Vol. 41, Iss. 1, pp.98-103

- 13.100 Perpetrators of abuse or neglect are often people who are trusted and relied on by an older person, such as family members or care staff.
- 13.101 There are also reported cases of older women from minority communities being targeted because of their ethnic origins.
- 13.102 One of the challenges of elder sexual abuse, therefore, is the perpetuation of the myth that it is predominantly perpetrated by strangers and is often a secondary crime — for example, a man who is burgling a property takes the opportunity to sexually assault or rape an older woman. This myth is sustained by a societal attitude that does not accept the concept of sexuality in older age and, therefore, the idea that an older woman can be targeted because she is a woman.
- 13.103 Another challenge of elder sexual abuse is that, because it is often denied, the opportunity to protect forensic evidence can be lost by the kindness or embarrassment of others who desire to make the older person comfortable instead of calling the police.
- 13.104 There is a paucity of research that has been conducted into sexual violence against older women, with the result that our knowledge and understanding of the prevalence, characteristics and impacts is extremely limited.
- 13.105 The existing academic literature suffers from conceptual, operational and methodological weaknesses that have been recognised by a number of researchers.⁴⁷ Sexuality in old age continues to be a taboo subject in society, and the existing academic literature has predominantly focused on sexual health and physiological issues in older age.⁴⁸
- 13.106 The ‘typical’ rape victim is still positioned as a young attractive female who is attacked by a stranger, motivated by sexual desire (Lea et al. 2011). Some scholars in this area have gone so far as arguing that this exclusion of older women equates to a form of rape denial.⁴⁹ Society tends to view older people as asexual, largely based on ageist attitudes that view old age as a process of decay, decline and deterioration.⁵⁰
- 13.107 The Director of Action on Elder Abuse to whom I spoke made a crucial point. The media and, for that matter, the Judiciary fuel this myth by referring to

47 Ball, H.N. (2005) “Sexual Offending on elderly women: A review” *The Journal of Forensic Psychiatry & Psychology*, Vol. 16, Iss. 1, pp.127-138; Jeary, K. (2005) “Sexual abuse and sexual offending against elderly people: A focus on perpetrators and victims” *The Journal of Forensic Psychiatry & Psychology* Vol. 16 Iss.2, pp.328-343; Jones, H. and Powell, J. (2006) “Old age, vulnerability and sexual violence: implications for knowledge and practice” *International Nursing Review* Vol.53, Iss.3, pp.211-216; Lea, S. J., Hunt, L. and Shaw, S. (2011) “Sexual Assault of Older Women by Strangers.” *Journal of Interpersonal Violence* Vol. 26, Iss.11, pp. 2303-2320

48 Kleinplatz, P. J. (2008) “Sexuality and older people” *British Medical Journal* Vol. 337

49 Jones, H. and Powell, J. (2006) “Old age, vulnerability and sexual violence: implications for knowledge and practice” *International Nursing Review* Vol.53, Iss.3, pp.211-216

50 Jones, H. and Powell, J.L. (2006) Old age, vulnerability and sexual violence: implications for knowledge and practice *International Nursing Review* 53, 211–216

perpetrators in this type of crime against older people as being particularly 'sick' and 'depraved', attacking people 'at the end of their lives'.

- 13.108 Law enforcement agencies have to appreciate that the ageing society is a primarily female society, and sexual violence is an overwhelmingly female experience. An analysis of sexual violence against older women must, therefore, take into account the social structural position of older women in society and consider a range of factors, including age and gender, when exploring sexual violence against older people.
- 13.109 Our research and contact with the Director of Action on Elder Abuse Northern Ireland revealed older people as yet another troubling aspect of massive under-reporting of such crimes with the following reasons being the source of the problem:
- vulnerability because of their current circumstances — for example, age-related illness or fluctuating mental health capacity;
 - fear of consequences of reporting a crime and of public exposure;
 - victims may think they are deemed to be unreliable witnesses and that they will not be taken seriously;
 - victimisation because of their connection to the perpetrator;
 - fear that they could lose their independence;
 - fear of the judicial system and having to give evidence in court;
 - lack of knowledge of the judicial system;
 - may require support from others that is not readily available;
 - fear, power and loyalty can also prevent cases being reported; and
 - an inability to recognise sexual abuse is happening.
- 13.110 The degree of sexual abuse actually surfacing was chillingly illustrated by the Director when she indicated to me that, between 2012 and 2016, 730 cases of alleged sexual abuse of older people were reported to the Southern Health and Social Care Trust. The number of calls made to her organisation's helpline fully illustrated the vast under-reporting to the police.
- 13.111 It was also the experience of the Director that all too often, on the few occasions when these crimes are drawn to the attention of the PSNI, those officers take too paternalistic an approach, viewing it as a social worker's issue. Victims are actively discouraged from entering the criminal justice system by suggestions that the legal process is too long, they will be publicly identified, their grandchildren will be impacted etc.
- 13.112 Interestingly in the Criminal Justice Inspection Report of November 2018 it is recorded as follows;
- "In practice however, decisions to stop the prosecution were sometimes taken on the basis that the prosecutor decided that the experience of giving

evidence would be too traumatic or damaging to the victim’s mental health, without sufficient consideration of how the victim could be supported to give evidence in terms of special measures or support.....”⁵¹

- 13.113 There is obviously a training gap in the PSNI and for that matter in the PPS approach and it needs to be corrected, calling on the services of such groups as Action on Elder Abuse Northern Ireland or the Commissioner for Older People for Northern Ireland to effect such training.
- 13.114 There is a real need to fully recognise sexual attacks on older people as crimes that need to be addressed within the criminal justice system and not merely social problems. Older people are sexually attacked not only because they are vulnerable but because it is part of gender violence. The PSNI and PPS must grasp this without further delay.
- 13.115 There is a complete lack of appropriate research locally on the issue and this needs to be addressed in order to define the true extent of the problem. The Department of Justice must take the lead on this.
- 13.116 There needs to be a public awareness campaign to highlight these issues.
- 13.117 The PPS and the PSNI need to develop systems that keep a record of prosecutions arising out of serious sexual offences against older people.
- 13.118 The Judiciary and the legal profession will also benefit from training from organisations such as Action on Elder Abuse Northern Ireland.

LGBT+ Community

- 13.119 The only PSNI figures for sexual offences against this community for 2017/18 were as follows:

Sexual orientation	2017/18	%
Bisexual/gay/lesbian	4	0.1
Heterosexual	10	0.3
Missing/unknown	3,303	99.6
Total	3,317	

- 13.120 Routinely, police do not ask people what their sexual orientation is unless it is of relevance to what they are reporting: that is, a hate crime due to someone’s sexuality. This makes analysis of the degree of crimes against this community hopeless as the PPS does not collect any data either.
- 13.121 The literature makes it clear that LGBT+ people’s sexuality is often used to control and manipulate them.

51 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland at paragraph 4.29

13.122 We had very helpful contact with HERE NI (previously known as LASI, Lesbian Advocacy Services Initiatives), a Belfast-based charity — the only Northern Ireland organisation of its type — that works with lesbian and bisexual (LB) women and their families to help to alleviate the inequalities caused by discrimination and homophobia in our society.⁵²

13.123 This organisation noted:

- Homosexuality was decriminalised in Northern Ireland only in 1982, and for many older LB women, this legacy still lives on.
- The impact of this invisibility often presents itself through fear. Older LB women often fear that a service provider may hold prejudiced views against them or that they do not have the knowledge or skills to address their specific needs.
- The result of this is a barrier created for that person when trying to access a facility or service or that the person feels they are unable to disclose their minority sexual orientation.
- Visibility remains of paramount importance. This impacts both directly and indirectly on this group and helps to sustain the homophobic and heterosexist undertones that exist within society (this may include all aspects of society ranging from a local community to large-scale statutory agencies). This invisibility is presented in many forms such as poorer levels of mental ill health and well-being and high levels of social isolation.

13.124 These issues contribute to differing serious sexual offences not being reported. Many of this group of women are unsure of the process of how to report an offence, some feel they may not be believed due to their sexual orientation, and many do not have the confidence to speak out.

13.125 Another issue may also be the potential disclosure of their sexual orientation. Many such women are not 'out' and they fear their sexual orientation may be made public if they are engaged with a series of agencies.

13.126 Yet again, it emerged that there was a real lack of research carried out around LGBT+ reporting crimes in general, never mind serious sexual offences. This singular lack of data about serious sexual offences against the LGBT+ community is an area that needs to be explored in great detail before the criminal justice system can devise appropriate remedies.

52 Much of their remit involves supporting women in their own area to set up peer groups so that they might have access to their own community, facilitating a range of one off events and one to one support and advice sessions and facilitating a range of social activities to help those that are isolated and working with Government agencies to help formulate policies that are reflective of the needs of LB women and their families. Their biggest project currently is a same sex family support project which is the first funded project of its kind in Northern Ireland. This project engages same sex families and also provides one to one support in the home.

- 13.127 We have spoken to members of the Rainbow Project (RP)⁵³ and we have also researched the matter broadly. The findings are in line with findings for the other marginalised groups discussed in this Preliminary Report.
- 13.128 There is a lack of research evidence on gendered violence and the prevalence of lesbian, gay male and transgender experiences of serious sexual violence; that which exists is mainly from the US. The limited nature of empirical evidence of the prevalence and effects of sexual violence on men is particularly acute in relation to men who have sex with other men or male sexual offence victims. The RP report that there is a failure on the part of government and other agencies such as the PSNI and the PPS to monitor sexual orientation and gender in serious sexual offences. They were dismissive of the excuse that such information was a private matter. RP regarded such data as extremely important.
- 13.129 Research from the UK suggests that gay men are at significantly greater risk of sexual violence, while lesbians are significantly more likely to face emotional and sexual violence.
- 13.130 Under-reporting of serious sexual offences is again a real problem. Our first-hand evidence from RP and our research suggests that LGBT+ individuals may worry that police and service providers may respond in a homophobic manner, or be concerned that violence within same-sex relationships will not be taken seriously. Concerns about outing, particularly for young people, who often do not have the support of a family who are aware of their sexual identity, can also contribute to reluctance to report, and perpetrators may deliberately target this vulnerability. Concerns may include:
- A myth that sexual violence does not occur in same-sex relationships — for example, due to a view that women are nurturing and never violent and that men are always willing to have sex.
 - A desire not to draw negative attention to LGBT+ communities for fear of fuelling homophobic beliefs.
 - A perceived lesser sense of legitimacy accorded to same-sex relationships, meaning that it is difficult to obtain recognition of abuse within same-sex relationships.
 - Concerns around not being believed or taken seriously. The experience of RP is that on occasions the PSNI discourages the preferment of charges on the basis that, for example, the PPS is unlikely to prosecute or that some form of discussion with the perpetrator may solve the problem rather than prosecution. It is felt that this is a radically different attitude from that which would be adopted in cases of a heterosexual complainant.

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Northern Ireland's largest support organisation for lesbian, gay, bisexual and transgender people.

- Previous discrimination and historically poor relationships between the police and LGBT+ people may result in a fear or mistrust of the police.
- Internalised homophobia or guilt among some LGBT+ individuals. Young victims may not even realise they have been sexually abused until they are so informed, which may contribute to rape myths and act as a barrier to reporting.
- Losing the financial or domestic support of the perpetrator if unwelcome sexual advances are rejected. This is not true consent but in terms amounts to sexual coercion.
- Lack of PSNI knowledge at the earliest stages of complaint of the need for a complainant to obtain HIV treatment.
- Exclusion of transgender people from services due to their gender history (for example, being excluded from female-only services due to being assigned male at birth).
- In prison, where there is anecdotal evidence of a high degree of sexual violence, there is no helpline or adequate support available.

13.131 The literature highlights challenges for all male victims, who may be less likely to report for fear of being disbelieved, blamed and exposed to other forms of negative treatment. There is evidence in the UK that gay male victims may experience less sensitive treatment from police officials.

13.132 Indeed, research shows that some specialist police officers in England believed that male survivors received poor treatment. The RP argue that the training of the PSNI in LGBT+ issues is too little (often only in early training), too short and too disparate. There is a lack of an organisational approach, including police officers across the service. For example, in the past there existed LGBT+ liaison officers but these have now disappeared. These should be reinstated.

13.133 There is also a postcode lottery of services for male victims of sexual violence in the UK, with men often placed on waiting lists for services from third-sector organisations. There is a severe lack of adequate support in the criminal justice system for men.

13.134 The RP asserted that the PPS has no adequate training of its personnel on LGBT+ issues. For example, the RP has not been invited to participate in or contribute to such training. A similar criticism is made of the Judicial Studies Board for Northern Ireland. It is a legitimate argument to make that informed prosecution decisions cannot be made and adequate directions given to juries unless the complexities and the culture of this community are fully understood. An example of this is that whilst members of the gay male community may have had many sexual partners that in itself should have absolutely no bearing on a decision to prosecute or the possibility of a guilty verdict.

- 13.135 Potential practices for reducing barriers to support for LGBT+ complainants must include a genuine emphasis on awareness raising, namely:
- awareness raising within LGBT+ communities about serious sexual offences;
 - ensuring materials provided to complainants do not assume heterosexuality and clearly stating that agencies serve trans people;
 - awareness raising among the Judiciary and statutory services, including the PSNI and the PPS;
 - specialist services for LGBT+ complainants to encourage those who may not report to mainstream services;
 - professionals sensitively enquiring about sexual orientation and gender identity;
 - increased education in schools concerning LGBT+ issues, including the concept of consent within that community; and
 - the establishment of a helpline in prisons.

Sex Workers

- 13.136 In general, there is a lack of evidence on sexual violence against sex workers, with limited evidence on the prevalence and incidence of such violence globally. The illegal nature of sex work in many jurisdictions leaves sex workers particularly vulnerable through a lack of legal protections and monitoring.
- 13.137 However there is international research that finds that sex workers face particularly high levels of sexual and physical violence, with estimates ranging from 45% to 75% of sex workers having experienced sexual violence.⁵⁴ Under-reporting is high.⁵⁵
- 13.138 Literature from the Australian Institute of Criminology in 2006 found that there is a bias against convicting someone accused of a serious sexual offence against a sex worker.
- 13.139 There are a number of rape myths specifically referable to sex workers, e.g. that sex workers cannot be raped, that sex workers have no limits in terms of the sexual services they may provide and that once money is paid they have agreed to anything being done to them including extreme violence.⁵⁶
- 13.140 The lack of anonymity for sex worker witnesses (other than the complainant) deters such women coming forward to support sex worker complainants. They fear naming and shaming of prostitutes in the press.

54 Deering, K.N., Amin, A., Shoveller, J. Nesbitt, A., Garcia-Moreno, C., Duff, P., Argento, E. and Shannon, K. (2014) "A Systematic Review of the Correlates of Violence against Sex Workers" *American Journal of Public Health* Vol. 104, No. 5, pp. 42-54

55 UglyMugs response notes that of 111 reports to UglyMugs of assaults against sex workers between 2009-2019, only four were reported to PSNI. 36 of these assaults occurred in 2018 suggesting an increase in attacks.

56 Response of UglyMugs, an online sex worker safety scheme.

- 13.141 Sexual violence against this group is generally accorded a low priority by researchers, policymakers and international bodies.
- 13.142 Research reveals barriers in some jurisdictions to reporting include mistreatment from the police. However, evidence suggests that police engagement with sex workers has been successful in a number of jurisdictions at changing the environment for sex workers, increasing capacity for them to safely participate in sex work and report violence to the authorities. A classic example is here in Northern Ireland. There is a PSNI project in relation to sex workers and the introduction of sex worker liaison officers to build confidence in reporting where sex workers have been victims of crime. This may well be an important step in addressing this problem.
- 13.143 The existing literature also highlights a need for increased research and interventions in relation to violence against sex workers. Such work should be carried out in conjunction with sex work communities. There is clearly, yet again, a shortage of research in Northern Ireland on this community in terms of serious sexual offences and steps need to be taken to repair this gap and address what procedures can be adopted to obviate what appears to be serious under-reporting of sexual crimes against them.⁵⁷
- 13.144 I welcome the fact that the DOJ has commissioned QUB to conduct further academic research, as required by statute, into the operation of Article 64A of the Sexual Offences Order (NI) 2008. This research will assess the impact of the offence of purchasing sexual services on the safety and wellbeing of sex workers and the report is due later in 2019.⁵⁸
- 13.145 I make specific mention of victims of human trafficking as a marginalised group within this context. They are especially vulnerable in terms of the extreme difficulty in reporting offences until such time as they escape from their exploitation. For trafficking victims, sexual exploitation may not however always involve third parties or the transactional or commercial element traditionally associated with prostitution. It may simply involve the exploitation of the victim by the person holding them in exploitation simply for their own gratification.
- 13.146 Victims of human trafficking exploited primarily for forced labour or domestic servitude may nonetheless also be victims of serious sexual assault. To this extent they represent a separate specific group within the context of marginalised communities.

57 Research was carried out by Queen's University Belfast in 2014 looking at incidences of violence against sex workers (chapter 6) and problems associated with reporting crime (chapter 8).

58 CARE (Christian Action in Research and Education) which is a member of the Department of Justice NGO Engagement Group on Human Trafficking, whilst welcoming research, expressed concerns about the Department of Justice overseeing such research projects in light of criticisms they made over research commissioned by the DOJ into prostitution. In 2014 it was criticised for its allegedly flawed methodology and the alleged known bias of the researchers. In light of this CARE recorded "we have little confidence in the DOJ's ability to produce quality independent research into the experience of sexual violence of people involved in prostitution and victims of human trafficking".

Males

- 13.147 This Review has already dealt with serious sexual offences against men in a number of the chapters — for example, chapter 2, ‘The voice of complainants’, and chapter 6, ‘Myths surrounding serious sexual offences’. However, we revisit them again in this context to emphasise that their plight often leaves them marginalised in similar ways to other groups in the community.
- 13.148 Yet one more time, we have to record a paucity of research locally on this aspect of our Review. However, a study of the literature worldwide (which, it is fair to say, records that there is limited empirical evidence of the prevalence and effects of sexual violence on men, particularly those who have sex with other men) has asserted the following propositions with regard to male complainants:
- most men who reported non-consensual experiences with other men defined themselves as primarily heterosexual;
 - however, men who had sex with other men were six times more likely to have non-consensual sex as an adult;
 - gay and bisexual men tend to have more sexual partners than heterosexual men, and this may increase the risk of non-consensual sex;
 - women were often involved in non-consensual sexual experiences with adult men, but few women were involved in the sexual abuse of boys (this may depend on the male’s viewpoint);
 - non-consensual sexual experiences were associated with psychological and alcohol problems and self-harm;
 - gross under-reporting of sexual offences generally, but particularly against men;
 - men may be less likely to report for fear of being disbelieved, blamed and exposed to other forms of negative treatment. A 2018 report⁵⁹ on UK university students records that around 10% of reported rapes in the UK and 9% of those in the US were carried out on males. It also draws attention to under-reporting, with an estimated 4% of male victims likely to report rape due to the social stigma around male rape;
 - rape myths are rooted in traditional views of masculinity and correlate with traditional gender stereotypes and homophobia;
 - victims’ internalised homophobia, guilt and self-blame can be compounded by the homophobic reactions of others;
 - there is a need for implementation of appropriate support for male survivors;
 - the destructive effects of sexual violence, with suicidality rates particularly high among men who reported non-consensual sexual experiences; and

59 Spruin, E. and Reilly, L. (2018) “An exploration into the acceptance of male rape myths within the UK” *Journal of Forensic Sciences and Criminal Investigation* Vol. 9, No. 3

- exposure to adult non-consensual sex was associated with the greatest number of psychological consequences, and childhood sexual abuse associated with the least. This may be due to the immediacy of the exposure, or it could relate to the greater availability of support services for victims of childhood abuse in comparison with the services available to adults.

13.149 One report in 2017⁶⁰ from England noted that gay male survivors may experience less sensitive treatment from police officials and highlights research showing that some specialist police officers believed that male survivors received poor treatment. The article also refers to a postcode lottery of services for male victims of sexual violence in the UK, with men often placed on waiting lists for services from third-sector organisations.

13.150 In line with rape myths applying to women, it is argued that those applying to men are often deeply rooted in traditional gender norms and stem from the same patriarchal structure. These gender norms hold that men possess traits such as independence, toughness, power, aggressiveness, control and dominance, while victims of rape are often portrayed as weak, defenceless and feminine.

13.151 One of the most commonly cited rape myths is that ‘real’ or ‘strong’ men cannot be raped. Research also suggests that men are blamed more when others believe they did not sufficiently resist or fight back. The article identifies a number of rape myths that apply to men, particularly:⁶¹

- ‘real’ men would not put themselves into a position where they could be raped;
- men cannot be forced to have sex against their will;
- sexual assault of men by women is improbable, as women are sexually passive and men sexually dominant and assertive and that female sexually perpetrated abuse is rare or non-existent. Accordingly, rape should be redefined to replace any gender-specific terms — most notably, reference to a penis — with gender-neutral terminology;
- a view that men welcome all sex;
- a notion that ‘real’ men can protect themselves;
- an idea that gay male victims likely ‘asked for it’;
- perceptions that male victims experience less harm;
- male victims sometimes experience physical sexual arousal during non-consensual sex, which may add to the misapprehension that the activity was welcome;

60 Lowe, M. and Rogers, P. (2017) “The scope of male rape: A selective review of research, policy and practice” *Aggression and Violent Behavior* Vol. 35, pp. 38-43

61 Spruin, E. and Reilly, L. (2018) “An exploration into the acceptance of male rape myths within the UK” *Journal of Forensic Sciences and Criminal Investigation* Vol. 9, No. 3

- only gay men can be raped, or rape other men (media coverage of allegations against Kevin Spacey and their conflation with homosexuality may have contributed to this myth);
- men are less affected by sexual assault than women; and
- male victims show lower levels of masculinity.

Other jurisdictions

- 13.152 Once again, we considered experiences with similar marginalised communities in worldwide literature.
- 13.153 It was remarkable to discover that precisely the same problems we encounter in Northern Ireland are echoed elsewhere.
- 13.154 Thus, for example, there is in most cases a paucity of research on serious sex offences in relation to these groups and, in many cases, limitations to the existing literature. Whilst this absence is particularly noticeable in Northern Ireland, it also applies internationally. A lack of consistent and effective recording and monitoring of sex offences against these groups impedes robust analysis.
- 13.155 As a consequence of the limitations to the literature and monitoring of sex offences against these groups, estimates of the prevalence of sex offences vary widely. Nonetheless, the evidence indicates that they are at a significantly higher risk of experiencing sexual abuse.
- 13.156 Three factors emerged in the international literature. First, research suggests that specialist sexual violence services for minority groups may help to encourage complainants to engage.
- 13.157 Such services require a clear understanding of the cultural context and specific needs of the minority group(s) it serves.
- 13.158 Strengthening engagement and partnership work with local grass-roots organisations and ensuring that services are designed with input from the minority groups can be beneficial in this regard. Training for criminal justice professionals and others is crucial.
- 13.159 A good example of such services is the Abused Deaf Women's Advocacy Services (ADWAS), which has helped set up satellite agencies in the US by providing training and proposing a strategy to make available accessible services to deaf and deaf-blind women and children who are victims of sexual assault and domestic violence. A key element of this is that deaf individuals develop the programmes, expanding services that meet the needs of members of their community.

- 13.160 Secondly, effective sex education can promote safe sexual health that is free from coercion and violence, and the research highlights its importance for minority groups who are at an increased risk of sexual violence.
- 13.161 For example, the evidence suggests that appropriate sex education for young people with learning disabilities can reduce their vulnerability but that many such individuals do not receive relationship and sexuality education.
- 13.162 The increased vulnerability of BAME people to sexual violence is linked to many factors, including a lack of appropriate sex education and non-attendance at relationships and sexuality education classes.
- 13.163 Sex education curricula should be designed in a culturally sensitive manner. For example, typical elements of teaching may conflict with Islamic teaching, suggesting that community consultation is of importance in the development of teaching and learning materials.
- 13.164 Thirdly, the literature on minorities clearly highlights a need for more well-designed research studies on serious sexual offences against minority groups. Reliable estimates of the scale and nature of the issues are required in order to develop effective preventative programmes and, I add, in order to inform the criminal justice actors of the appropriate procedures to be adopted in the criminal process including the education of juries.

Discussion

- 13.165 If the law and procedures in serious sexual offences are to be fairly applied to all our citizens, it must include those in marginalised communities. It is not enough to say that these communities, for a variety of reasons, cannot or do not choose to come within the criminal justice system.
- 13.166 The State has duties and obligations to them all and cannot ignore serious sexual offences against them. We as a society and as a criminal justice system collectively need to respond to the needs of all complainants despite the fact that they may not come forward. We need to reflect on our duty of care towards citizens and on what the State owes them. It must be patently obvious that the only way we can even begin to bring these marginalised communities more fully within the law and procedures of our criminal justice system is to reach out to them and provide education as to what our justice system can offer to end the misery and shame that these victims unjustifiably bear.
- 13.167 The differing elements of the interests of victims within these groups require, in the first place, empirical research commissioned by the State. If we are to address the fact that many of these groups are not engaging with the criminal justice system in Northern Ireland, we need first to understand why they remain outside. This requires an evidence-gathering exercise on their experience with, and knowledge of, the current system together with a consideration of what

mechanisms, alone or in combination with conventional law and procedures in the legal system, may establish a construct of victim justice for them.

- 13.168 The Department of Justice should take steps to reach out to these communities and commission individual research projects to gather knowledge in Northern Ireland of the prevalence, extent, nature and experiences of serious sexual offences among minority ethnic, immigrant, LGBT+ and Traveller communities, those with physical, sensory, learning disabilities or mental ill health, the elderly and men.
- 13.169 That Department must provide specialist sexual violence services, harnessing the assistance of local grass-roots organisations for marginalised communities to encourage engagement with the criminal justice system. It is crucial that individuals in the marginalised communities — for example, deaf people — help to develop the programmes.
- 13.170 The task of research into these marginalised groups should rest not only with the Department of Justice but also with the wider Northern Ireland Executive, the Equality Commission, the Human Rights Commission, the Northern Ireland Commissioner for Children and Young People, and the Commissioner for Older People, who need to play a role in this task, which should have been performed many years ago.
- 13.171 These studies could then be drawn on when training professionals, specifically the Judiciary, the legal professions, the PSNI and the PPS, so as to strengthen their knowledge of serious sexual violence among these groups, its effects and the most suitable ways of proceeding in such cases.
- 13.172 The recommendations in this Review place a premium on well-trained professional's case managing and discussing serious sexual offences at the earliest possible moment. They will invest the process with expedition, skill and sensitivity to the justice needs of both complainant and accused so as to ensure fair treatment and effective participation. Part of this task, which is specifically aimed at marginalised communities, can only be done on an informed basis if the problems surrounding the parties are known so that the process can take account of them wherever possible.
- 13.173 It is crucial that contact between these marginalised communities and the police should be empowering, supportive and proactive. This will not only deliver a better service to them but improve the chances of police gathering the evidence they need to secure a conviction.
- 13.174 Police decision-making about whether to pursue an investigation, where these marginalised communities are concerned, must not be affected by factors such as lack of understanding about older people, those with a disability, the cultural backgrounds of marginalised communities, a lack of awareness about what supports are available or required, and assumptions about whether or

not prosecutions will be successful. Police need to and, I am sure, want to build their ability to understand different forms of disability and cultures and to make reasonable adjustments. These groups require a specialist response and training is the vital ingredient.

Responses

- 13.175 175. Without exception everyone who responded to this chapter welcomed the proposal to gather knowledge and data in Northern Ireland on the prevalence, nature and experience of serious sexual offences in the marginalised communities mentioned.⁶²
- 13.176 176. The Rowan SARC is attempting to gather data on co-morbidities of the victims. It already has presented plenary results from this on victims under 18 years which show a higher incident of sexual abuse within those with learning disability and autism. It has formed links with the Public Health Agency (PHA) and Nurse Consultant (Mental Health and Learning Disability) highlighting these issues and formed a Regional Learning Disability Healthcare Steering Group at which this is being focussed.⁶³ It is helpful to note that the Rowan in its response not only indicated that the commissioning of such research was crucial, but volunteered that it could be helpful in assisting the data for such research.
- 13.177 177. It is encouraging to note that both the Bar Council and the Law Society welcomed the recommendations advocating co-operation between them to create a tool kit that would set out guidance in identifying vulnerability and the need for them to provide training courses to help members determine what special adjustments and training tools might be needed for those with communication needs and to better understand the LGBT+ community. Both bodies also welcomed proposals to arrange training for solicitors and barristers in physical disability, hearing and visual awareness problems, and that a list of barristers and solicitors who have undergone such training should be made publicly available.
- 13.178 178. I was further encouraged to note that the Law Society reminded me that they already have appointed a Disability Officer and the Bar has already developed a Vulnerable Witness CPD Resources Package, which highlights best practice and training resources on handling vulnerable witnesses including many of the marginalised communities outlined in this chapter. The Bar notes that the research advocated in this chapter could be incorporated into any future programme with training to be developed with practitioners.

62 For example the Bar Council, the Law Society, Barnardo's, Care Northern Ireland, the Retired Associates of Probation, The Rowan SARC, and Dr. Olivia Smith of the School of Humanities and Social Sciences at Anglia Ruskin University.

63 Dr. Alison Livingstone, Consultant Paediatrician and Clinical Lead Paediatrics at the Rowan SARC.

- 13.179 179. We had a number of distinguished respondents on behalf of the deaf and hard of hearing.⁶⁴ They criticised, in my view rightly, the omission in the Preliminary Report to highlight the need to create a system which is sensitive and responsive to the opportunities for deaf people to give their narrative and address their communication needs. We need to address more fully the nature of appropriate access to qualified interpreters when such people need legal support and advice. It has to be recognised that this communication issue bridges both those who are deaf and those who are in receipt of their account so as to ensure that misleading information does not emerge. A crucial issue arises as to who is to pay for this? I consider that the current “green form” system with Legal Aid should be fully fleshed out to ensure that deaf persons attending solicitors, either as complainants or as persons accused of serious sexual offences, should be catered for so that interpreters appropriately trained in the relevant sign language, whether it be British Sign Language or Irish Sign Language, can communicate appropriately. Moreover deaf complainants need support and access to counselling with the benefit of suitably qualified interpreters if those counsellors are unable to sign themselves. It has to be recognised that the level of sign language of deaf persons may be less than fluent and deaf relay interpreters may be needed.⁶⁵
- 13.180 180. A quite superb document from DRILL condensing the Preliminary Report into the key facts in easy to read manner for those with a learning disability⁶⁶ is fully illustrative of the steps that can be taken to ensure that those with a learning disability fully understand documents in easily digestible form. It is something that the Department of Justice should be aware of when publishing materials surrounding serious sexual offences and indicative of the approach that the PSNI and PPS should be adopting when communicating with those with a learning disability.
- 13.181 181. The Commissioner for Older People for Northern Ireland (COPNI), whose primary aim is to safeguard and promote the interests of older people and to be an authoritative champion for them, helpfully drew attention to the report of June 2018 “Home Truths”⁶⁷ making a number of recommendations regarding the safeguarding of older people and the protection of their human rights. That report should be carefully considered by the PSNI/PPS/DoJ in the context of older people and serious sexual offences. One critical finding of the investigation was that there was, “no clear evidence of an appropriate or effective response by

64 Dr. Feu, consultant psychiatrist in mental health and deafness; Professor Michael Schwartz, Law Professor at Syracuse University College of Law who is deaf; Brian Symington, long-time advocate on behalf of the deaf.

65 Feu, M., and Chovaz, C. (2014)(eds) *Mental Health and Deafness* Oxford: Oxford University Press

66 Prepared by the DRILL Project led by Positive-Futures.

67 Commissioner for Older People in Northern Ireland (2018) *Home Truths: A Report on the Commissioner's Investigation into Dunmurry Manor Care Home* Belfast: COPNI (Following the statutory investigation into Dunmurry Manor Care Home, an investigation lasting 16 months uncovering evidence of sexual assaults on female residences of Dunmurry Manor Care Home.)

the relevant authorities nor a robust process to protect female residents from sexual and physical abuse by ambulant males”.

- 13.182 The Commissioner makes reference to some research which will be published in May 2019 examining older people as victims of crime in Northern Ireland⁶⁸ and the response of the criminal justice agencies. It is anticipated that the report will make a number of recommendations for improving the way in which criminal justice agencies including the PSNI, the PPS and the NICTS, engage with older people who have been victims of crime. This report has the potential to be an important document in dealing with this marginalised community and all these statutory bodies should pay close attention to it when published.
- 13.183 The Commissioner for Older People drew my attention to his previous calls for adult safeguarding legislation in Northern Ireland to provide adequate protection for older people at risk of abuse or harm, bringing Northern Ireland into line with the rest of the UK.⁶⁹ It would provide clarity in terms of definitions, duties and powers for all those working to safeguard people. I endorse entirely the request made by the Office of the Commissioner in this regard.
- 13.184 A report in June 2014 was published entitled *Protecting Our Older People: A Call for Adult Safeguarding Legislation*.⁷⁰ This report called for the introduction of specific legislation to protect adults who may be at risk of abuse. The call for an Adult Safeguarding Bill was also reiterated in the Commissioner’s *Home Truths* report (June 2018) into Dunmurry Manor Care Home.⁷¹ Legislation would strengthen the existing policy-based approach in Northern Ireland which is applied or operationalised differently across the different HSC Trusts. However, as the *Home Truths* report (p.30) noted, “It remains arguable that a policy based approach may not be Human Rights compatible as it does not guarantee an appropriate level of protection. This was the point made by the reports on the statutory guidance in England and in Wales prior to new legislation coming into force.”
- 13.185 It is worth rehearsing the recommendations in the report of June 2014 which should be taken forward, namely;

“The definitions used currently in adult safeguarding in Northern Ireland are unclear.

68 In 2016 Queen’s University Belfast was commissioned by COPNI to undertake a research study examining older people who as victims of crime in Northern Ireland and the response of the Criminal Justice Agencies.

69 In England there is the Care Act 2014; in Scotland, the Adult Support and Protection (Scotland) Act 2007 and in Wales, the Social Services and Well-being (Wales) Act 2014.

70 Commissioner for Older People in Northern Ireland (2014) *Protecting Our Older People: A Call for Adult Safeguarding Legislation* Belfast: COPNI

71 Commissioner for Older People in Northern Ireland (2018) *Home Truths: A Report on the Commissioner’s Investigation into Dunmurry Manor Care Home* Belfast: COPNI (Following the statutory investigation into Dunmurry Manor Care Home, an investigation lasting 16 months uncovering evidence of sexual assaults on female residences of Dunmurry Manor Care Home).

A clear definition is required in terms of:

(1) A “person who is at risk”; Creating a single, clear and easy to understand definition of a person ‘at risk of harm or abuse’ in statute is a critical first step. A clear definition will help practitioners in their role by assisting them in the exercise of their professional judgment in complex circumstances. Robust and detailed guidance alongside a clear definition will also be required and should be underpinned by statute.

(2) The “abuse or harm” – i.e.; what they are at risk of; A clear definition of ‘harm or abuse’ as well as supporting guidance is essential.

(3) What constitutes “financial abuse”; A clear and unambiguous definition of ‘financial abuse’ is required. Reports of alleged financial abuse are rising in relation to older people. A specific legislative reference to financial abuse in new legislation will help support better recognition and identification of instances when financial abuse is occurring.”

13.186 The report goes on to recommend;

“(23) An adult safeguarding board empowered by statute should be created to act as an oversight body to protect older people at risk of harm or abuse. It would be a matter for this board to hold the relevant membership organisations to account. It is expected that “relevant organisations” would include all statutory, community and voluntary organisations working with older people.

(24) Placing specific statutory duties on people who work with older people who are at risk of harm or abuse is required. These duties should apply to all relevant organisations working with older people, including the police, health and social care practitioners and care workers across all statutory, community and voluntary organisations.

(i) A duty to report any suspected cases of abuse or harm should be placed on all identified relevant organisations.

(ii) A duty for the ‘most appropriate organisation to make enquiries or conduct investigations when a referral is received.’ The most appropriate organisation to make the enquiry or conduct the investigation should be determined on a case by case basis. There should also be a requirement to fulfil this designated duty in a timely fashion and to complete specific stages of enquiry or investigation, which should be outlined by accompanying guidance.

(iii) All relevant organisations working with older people at risk of harm or abuse should also be bound by a duty to provide appropriate services. ‘Appropriate services’ here would include services such as advocacy.

(iv) Throughout the safeguarding process, all relevant organisations should be bound by a legislative duty to cooperate with each other in order to best protect an older person at risk of harm or abuse.”

- 13.187 Legislation by itself will not comprehensively protect older people from sexual abuse. Detailed guidance, training and resources, as well as a public awareness campaign with the commitment of the public and relevant organisations to work together will ensure improved protection for older people from harm or abuse.
- 13.188 By way of response on the issue of training, the PSNI made a number of points. There are a significant number of training packages and events relating to marginalised communities that are available to the PSNI for example, Hate & Signal Crime Lesson; Mental Health and Adults at Risk lessons; Dementia Awareness Training; Suicide Awareness training; Cultural Diversity training and sessions delivered by Transgender NI. These training packages and / or events are not a one-size fits all – they are delivered and tailored to specific officers and teams based on their operational role and community area they serve.
- 13.189 For those officers working in the specialist arenas, such as in Public Protection Branch, there is an ongoing assessment of need and opportunities for training through Continued Professional Development training sessions for example, FGM, Forced Marriage and Honour Based Violence Awareness events.
- 13.190 New training has recently been developed and will be delivered by the Police College. This training will include; exploring misconceptions around migration, an in-depth explanation of the Advocacy Scheme, understanding Hate Crime and the true impact on the victim, and the training will be enhanced by attendance and input from 4 x Hate Crime Advocates (supporting victims from the LGBT, Chinese, Muslim and those victims with a Disability). The PSNI has 6 categories of Hate Crime motivation; Racism, Sexual orientation, Religious/Faith, Disability, Transphobic and Sectarian. An Information Evening and an Awareness Evening attended by the Student Officers allows them to engage with representatives from minority groups/ minority communities. Representatives from the following groupings are regularly in attendance; Rainbow Project (LGBT), Mindwise, Migrant Centre, NICEM, and the Ethnic Minority Police Association. Amongst other things, this face-to-face engagement increases Officer's awareness of; advocacy, cultural sensitivities, and racism awareness, in the context of Hate Crime and Hate Crime investigations.
- 13.191 Whilst officers are trained in technical skills, there is also a focus on behaviours and values that ensure officers take cognisance of vulnerabilities and social context and treat individuals as such. There is involvement of advocates and experts to bring specific issues into perspective during training. The approach to Joint Protocol training for adults at risk and children involves representatives from HSCT and this enhances the learning opportunities for all involved.
- 13.192 On the issue of the need for a complainant to obtain HIV treatment the PSNI assert that first responders to incidents of penetrative offences are trained to provide a 'Your Wellbeing' document. This document outlines the need for

treatment specifically relating to HIV. Where this form has not been provided by first responders, Rape Crime officers will address this with the complainant. Furthermore, The Rowan, Sexual Assault Referral Centre, assesses risk based on the individual circumstances should the complainant choose to engage with Rowan services. The 'Your Wellbeing' document is provided regardless of whether the complainant chooses not to make a formal complaint or attend The Rowan.

- 13.193 Finally, CARE (Christian Action and Research and Education) charity objected to the use of the terminology "sex worker" throughout the Preliminary Report on the grounds that this nomenclature unhelpfully implies that prostitution is a form of work which contradicts the understanding of prostitution as a form of exploitation. It was argued that the term has been strongly rejected by many survivors of prostitution who now campaign for the abolition of prostitution and groups who work with victims of human trafficking for sexual exploitation.
- 13.194 However the phrase is regularly used worldwide when referring to prostitution and indeed finds its way into many pieces of legislation and the literature.⁷² Moreover, as the helpful response from CARE points out, it should be clarified that provision of sexual services for payment is not in fact illegal in Northern Ireland and in particular in 2015 the offence of loitering or soliciting for purposes of prostitution was repealed. I am therefore not persuaded that use of this phrase has the consequences outlined by this response.
- 13.195 CARE welcomes the other recommendations made in the Preliminary Report about training and resourcing of professionals within the criminal justice system to enable them to recognise vulnerability and respond appropriately to people from marginalised groups, the importance of good information to inform understanding of levels of offending against marginalised groups and the engagement of grassroots groups for marginalised communities with close engagement with such groups who provide support to victims of human trafficking. Sexual violence services are vital to help people recover from the trauma, both physical and mental, that these offences can cause. The response helpfully draws my attention to the statutory requirement for a cross departmental strategy regarding provision of services to assist people to leave prostitution and recommends there should be integration between the services proposed by the Review and this strategy.
- 13.196 Justifiably in my view the response from CARE registers concern that no specific mention is made in the Preliminary Report of victims of human trafficking as a marginalised and especially vulnerable group despite their situation making it very difficult for them to report such offences until such a time as they escape

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For example the Sex Work Act 1992 in Australia and a recent book "Sex Workers and the Law Booklet 2017 edited by Release"

from their exploitation. I have corrected that within the main body of the chapter.

Conclusions

- 13.197 In the main therefore universal approval has been given to the contents of this chapter in the Preliminary Report and I am encouraged to note the care and attention that has been invested in the plight of such groups.
- 13.198 My recommendations therefore remain unchanged save that I have in addition added references to the need for adult safeguarding legislation and further steps that need to be taken to protect those who are deaf and hard of hearing.

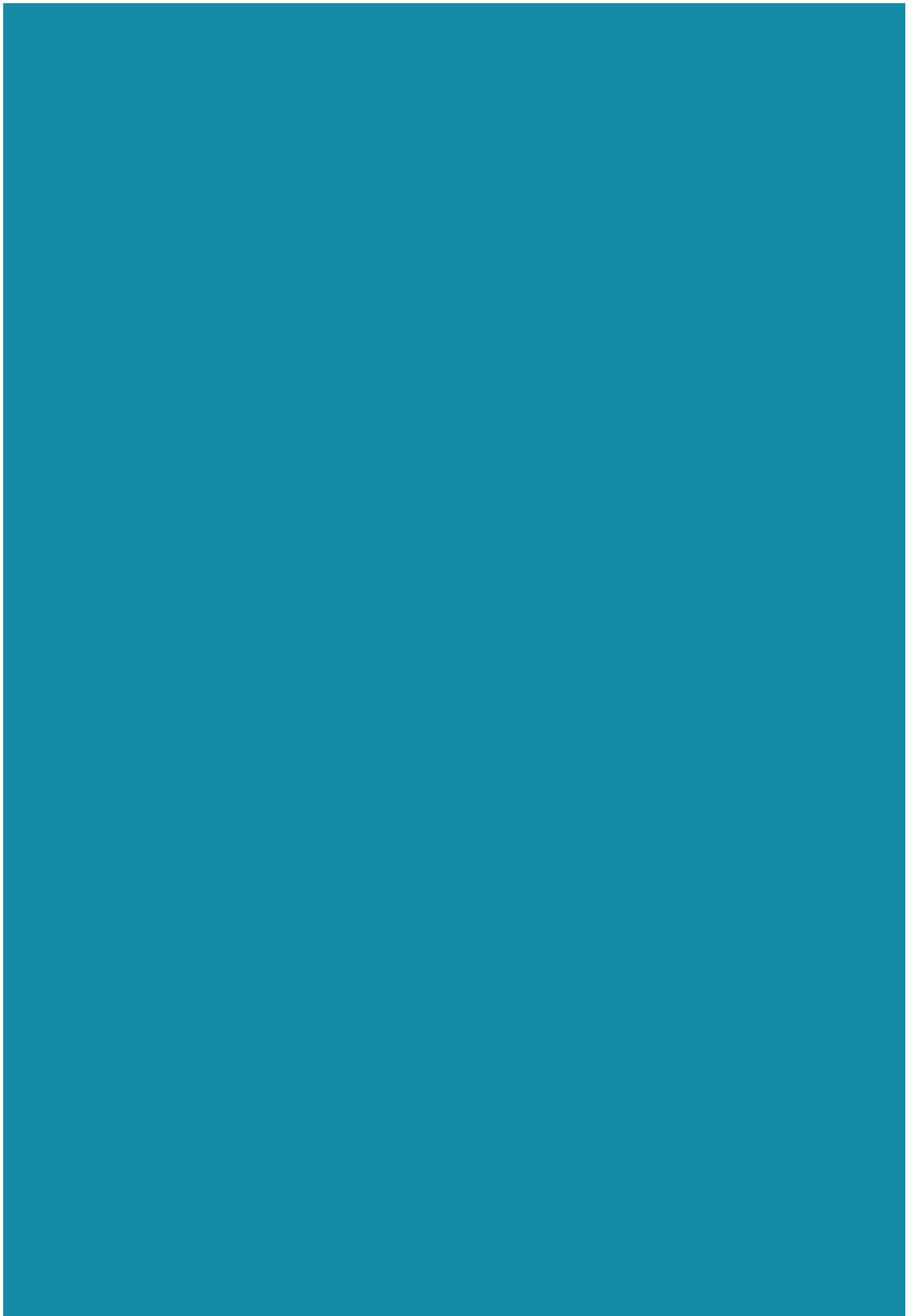
Recommendations

163. The Bar Council and the Law Society should cooperate to create a toolkit that would set out guidance on identifying vulnerability in these marginalised groups, with the assistance of groups in the voluntary sector specialising in these fields.
164. The Judiciary, the Bar Council and the Law Society should provide training courses:
 - to help members determine what special adjustments and screening tools may be needed for those with communication needs, with the assistance of groups in the voluntary sector specialising in these fields; and
 - to better understand the LGBT+ community, with all its complexities and particular culture, relevant to serious sexual offences.
165. Both prosecutors and defence representatives should take great care to assess vulnerability, and if practitioners suspect vulnerability in complainants, witnesses or accused persons, they should request the services of registered intermediaries.
166. Recruitment exercises for Registered Intermediaries should encourage members of the deaf and visually impaired communities to apply.
167. The Department of Justice should develop systems and commission individual research projects, where not already (for example two research projects into sex workers have been commissioned) to gather knowledge and data in Northern Ireland of the prevalence, extent, nature and experiences of serious sexual offences among BAME groups, immigrants, LGBT+, Traveller communities, sex workers, older people and disabled people, including those with physical, sensory and learning disabilities or mental ill health.
168. The Department of Justice, the Executive, the Equality Commission, the Human Rights Commission, and the Northern Ireland Commissioner for Children and Young People should take steps to provide specialist sexual violence services, harnessing the assistance of local grass-roots organisations for marginalised communities to encourage engagement with the criminal justice system.
169. The NICTS should:
 - upgrade its website to include links to various disability support organisations;
 - expedite implementation of The Criminal Evidence (Northern Ireland) Order 1999;and

- ensure the recommendations of the Criminal Justice Inspection report of November 2018 be implemented where relevant.
170. The PSNI and the PPS should monitor and collect accessible individual data of all allegations of serious sexual offences against persons who are members of BAME groups, immigrant, LGBT+ and Traveller communities, sex workers, older people and disabled people, including those with physical, sensory, learning disabilities or mental ill health.
 171. The PSNI should reach out and mount an educational programme amongst marginalised communities to increase knowledge of the criminal justice law and procedures in serious sexual offences.
 172. PSNI officers in the Public Protection Unit should undergo obligatory further training in dealing with all marginalised communities, building upon their foundation training, with the assistance of groups in the voluntary sector specialising in these fields.
 173. The PSNI should reintroduce LGBT+ liaison officers.
 174. PPS prosecutors in the Serious Crime Unit should undergo obligatory training in dealing with marginalised groups, with the assistance of experts in the voluntary sector specialising in these fields.
 175. Specific attention should be given by the DoJ and the statutory agencies to the need to ensure that both deaf complainants and accused persons have access to publicly funded qualified interpreters in both British Sign Language and Irish Sign Language throughout the criminal justice process and to counsellors thereafter who will have the services of qualified interpreters.
 176. At the commencement of trials involving the deaf as either a complainant or an accused, the trial judge should highlight to the jury the problems of deafness.
 177. Advocates for deaf people should be trained and made available to explain documentation to a deaf complainant or accused person.
 178. The Law Society should arrange training for solicitors, and the Bar Council should arrange training for barristers, in physical, sensory, learning disabilities or mental ill health, hearing and visual awareness problems and that a list of solicitors and barristers who have undergone such training should be made publicly available so that those who are physically, or visually impaired or those who are deaf or hard of hearing can make an informed choice regarding legal representation.
 179. The NICTS should liaise with professional technical officers in the Royal National Institute of Blind People (RNIB) and the Sense and Action on Hearing Loss when considering technology requirements to

support visually impaired and deaf persons to participate fully in court proceedings.

- 180.* Adult Safeguarding Legislation should be introduced to provide protection for older people at risk of abuse or harm in line with similar legislation in the rest of the United Kingdom.
181. The Department of Education should address the need to include in the school curriculum for disabled children, children with sensory disability and those who are members of marginalised communities' sex education designed in a culturally sensitive manner on matters such as consent, personal space, boundaries, appropriate behaviour, relationships, fears of homophobia and transphobia, gender identity and sexuality.
182. There must always be a Ground Rules Hearing when a witness is vulnerable, save in very exceptional circumstances.
183. Obviating delay in a case of vulnerable witnesses including the aged or those suffering from a disability should be a key component in case management from the outset of the process and if necessary, such cases should be fast tracked.
- 184.* The need for legal representation for complainants to obtain advice on the law and procedures in serious sexual offences for those in marginalised communities is particularly pressing.



Gillen Review

Report into the law and
procedures in serious
sexual offences in
Northern Ireland

Part 3

Sir John Gillen



Gillen Review

Report into the law
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Part 3

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Chapter 14

Voice of the child

Children have suffered adult violence unseen and unheard for centuries. Now that the scale and impact of all forms of violence against children is becoming better known, children must be provided with the effective prevention and protection to which they have an unqualified right.

**Report of the Independent Expert for
the United Nations Study on Violence against Children, 2006, para 6**

Issues

- Are the law and procedures in Northern Ireland, that are currently in place in the criminal justice system dealing with serious sexual offences, sufficient to realise the rights of children to be supported through the existing adversarial legal process and to be helped in their recovery from abuse?
- The issues raised in this chapter in the context of children also largely apply to all vulnerable adults.
- Should the Icelandic model of the Barnahus system or an appropriate variation be introduced in Northern Ireland for the benefit of children?

Current law and practice

- 14.1 Increasing recognition of the potentially negative impact of criminal proceedings and the stresses experienced by child witnesses in the court environment have led many Western countries to develop legislative and policy initiatives aimed at better protecting child witnesses.
- 14.2 Child protection and justice processes in Northern Ireland are still based on the adversarial procedure for cases concerning serious sexual offences against children. However, over the past two decades in Northern Ireland there have been legislative and policy initiatives aimed at ensuring that child witnesses are able to give their best evidence and receive the support they need. It reflects an increasing awareness of the flawed approach of the past in respect of the treatment of children and vulnerable adults in court.¹ This has brought about improvements for child victims and witnesses, who are now able to access support through the Young Witness Service (YWS) and avail themselves of special measures that protect them from giving evidence in open court.
- 14.3 Encouragingly, children with communication difficulties due to young age, a learning difficulty etc. are provided with an assessment by a Registered Intermediary (RI) (see chapter 1, 'Background').
- 14.4 In these instances, the assessment and subsequent Ground Rules Hearing (GRH) are largely effective at turning the court's attention to the needs of the child giving evidence in most cases.

¹ R v Christopher Killick [2011] EWCA Crim 1608; Galo (Patrick) v Bombardier Aerospace UK [2016] NICA 25

- 14.5 RIs can work to encourage the court to step outside its normal mode of function and to adapt practice to meet the individual needs of the child in the court. I strongly commend this approach.
- 14.6 Developments in Northern Ireland have often mirrored those in England and Wales, key amongst them being the introduction of The Children’s Evidence (Northern Ireland) Order 1995, which allowed for witness evidence by children to be given via video link and barred defendants from cross-examining child witnesses personally.
- 14.7 In addition, The Criminal Evidence (Northern Ireland) Order 1999 made provisions for special measures to reduce the stress of children giving evidence at trial.
- 14.8 These special measures include:
- screens in the courtroom (Article 11): screens are physically placed around the witness box to prevent the witness from seeing the defendant;
 - evidence by live link (Article 12): the witness will give evidence from a separate room located outside of the courtroom where proceedings are taking place;
 - evidence given in private (Article 13): the judge/district judge has power to clear the courtroom of those who do not need to be in the courtroom when the witness is giving their evidence. Only legal representatives connected with the case and one nominated press member will be allowed to remain. This measure applies to sexual offence and intimidation cases only;
 - removal of wigs and gowns (Article 14);
 - digitally recorded evidence-in-chief (Article 15): the police interview will be visually recorded and played at the trial as the witness’s main evidence-in-chief;
 - digitally recorded cross-examination or re-examination (Article 16): where any further evidence is recorded in advance of the trial and played on the day of trial. This measure has not yet been implemented;
 - Intermediaries (Article 17): people who act as communication specialists to improve the communication and understanding of the witness to comprehend questions put to them and to respond to those questions; and
 - aids to communication (Article 18): devices used by the witness to assist them in understanding questions and communicating their answers.

Other good practices for children include:

- 14.9 There is a practice of children being familiarised with courts before the hearing in Northern Ireland.
- 14.10 In 1999 the Northern Ireland Vulnerable or Intimidated Witnesses working group was set up to consider the recommendations in “*Speaking up for*

Justice."² Now known as the Victim and Witness Steering Group, this subgroup of the Criminal Justice Board has a central role in managing cross-agency issues impacting on victims and witnesses across the criminal justice system and, through a network of subgroups, is responsible for coordinating key areas of service development and delivery.

- 14.11 In terms of service development, the *Review of the Criminal Justice System in Northern Ireland* in 2000, also recommended that publicly funded witness support schemes should be made available at all Crown Court and Magistrates' courts venues.³ This recommendation formed the basis for the roll-out of the National Society for the Prevention of Cruelty to Children (NSPCC) Young Witness Service (YWS), which currently operates in all Crown Courts across Northern Ireland (as well as in all Magistrates' and Youth courts including criminal appeals in the County court and Court of Appeal).
- 14.12 Since the millennium, there have been further developments in policy and guidance with a number of criminal justice inspections in Northern Ireland⁴ identifying a range of problems in relation to delays within the criminal justice system, attrition in the prosecution of sexual offences, and general lack of confidence in the system and its processes.
- 14.13 The Independent Inquiry into Child Sexual Exploitation (CSE) in Northern Ireland 2014 was commissioned by the Minister for Health, Social Services and Public Safety and the Minister of Justice. The Minister for Education agreed that the Education and Training Inspectorate would join the inquiry in relation to schools and the effectiveness of the statutory curriculum with respect to CSE. The Inquiry published its report in November 2014.⁵ Ministers made a commitment to develop action plans in order to implement its recommendations, which included a number of recommendations specific to strengthening criminal justice arrangements. The Departments have produced progress reports following this. CJINI are currently conducting a thematic inspection into child

2 Home Office (1998) *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of the Vulnerable or Intimidated Witnesses in the Criminal Justice System* London: Home Office

3 Criminal Justice Review Group (2000) *Review of the Criminal Justice System in Northern Ireland* Belfast: Her Majesty's Stationery Office

4 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland; Criminal Justice Inspection Northern Ireland (2010) *Sexual Violence and Abuse: A thematic inspection of the handling of sexual violence and abuse cases by the Criminal Justice System in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland; Criminal Justice Inspection Northern Ireland (2006) *Avoidable delay: a Thematic Inspection of Delay in the Processing of Criminal Cases in Northern Ireland* Belfast: Belfast: Criminal Justice Inspection Northern Ireland ; Criminal Justice Inspection Northern Ireland (2006) *The Management of Sex Offenders in light of the murder of Mrs Attracta Harron: Interim Report* Belfast: Criminal Justice Inspection Northern Ireland

5 Marshall, K. (2014) *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry* Belfast: Criminal Justice Inspection Northern Ireland, the Regulation and Quality Improvement Authority and the Education and Training Inspectorate

sexual exploitation. Work is ongoing and it is likely this report will be published within the 2019/20 financial year.

- 14.14 The Justice Act (Northern Ireland) 2015 (the 2015 Act) has provided, although not yet fully introduced, a number of measures relevant to children.
- 14.15 The aim was to:
- improve services for victims and witnesses by the creation of new statutory Victim and Witness Charters, the introduction of Victim Personal Statements,⁶ information disclosure provisions between criminal justice system service providers,⁷ and the expansion of video link powers between courts and a number of new locations; and
 - speed up the system. Judges are given new case management powers and responsibilities at section 92 of the 2015 Act. The details of this have not yet been completed.
- 14.16 The 2015 Act thus introduces a statutory framework for the management of cases. Through regulation, the Department of Justice (DoJ) will be able to impose duties on the prosecution, the defence and the court, which set out what must be completed prior to commencement of court stages. There is also a general duty on the court, the prosecution and the defence to reach a just outcome as swiftly as possible.
- 14.17 Currently, a bespoke option for case management, rather than a statutory case management, operates for serious cases such as murder and terrorist offences by the High Court judge responsible for those trials. It is triggered once the accused is returned for trial, albeit only for a limited number of cases. It works extremely well, not least because the returns are quality controlled by a court administrator. It is the long-term intention of the Lord Chief Justice to introduce this into all Crown Court cases once there has been made available the administrative staff to support it.
- 14.18 The *Equal Treatment Bench Book* (2018) is compiled by the Judicial College for judges in England and Wales.⁸ It has been adopted by the Judiciary in Northern Ireland and is exhibited on the Internet. It recognises the key principles set out in the United Nations Convention on the Rights of the Child, including the application of Article 3 that the best interests of the child must be a top priority in all decisions and actions that affect children. Chapter 2 specifically deals with children, young people and vulnerable adults.
- 14.19 Whilst there is a statutory umbrella over all measures available for children and other vulnerable or intimidated witnesses, the only statutory special measures

6 Sections 28-33 of the Justice Act (Northern Ireland) 2015

7 Schedule 3 of the Justice Act (Northern Ireland) 2015

8 Judicial College (2018) *Equal Treatment Bench Book 2018*. Available at: <https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/> Accessed: 11 April 2019

available for child defendants are use of live link in limited circumstances, and intermediaries during the course of their evidence, the latter not yet being in force, obliging courts to rely on the common law.

- 14.20 In relation to child defendants, live links are available in Northern Ireland under Article 21A of The Criminal Evidence (Northern Ireland) Order 1999, as inserted by the Justice Act (Northern Ireland) 2011. The conditions for under-18s are that the person's ability to communicate effectively in proceedings as a witness giving oral evidence is compromised by their level of intellectual ability or social functioning, and that the use of a live link would enable them to participate more effectively in the proceedings as a witness (whether by improving the quality of their evidence or otherwise). This is exactly the same as the English legislation in section 47 of the Police and Justice Act 2006 (which amended the Youth Justice and Criminal Evidence Act 1999).
- 14.21 In relation to intermediaries for child defendants in Northern Ireland, the relevant legislation is Article 21BA of The Criminal Evidence (Northern Ireland) Order 1999 (as inserted by the Justice Act (Northern Ireland) 2011). For children, the condition for application is that the accused's ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused's level of intellectual ability or social functioning. The English equivalent, section 104 of the Coroners and Justice Act 2009, has not been commenced.
- 14.22 In England, and hopefully soon in Northern Ireland, there has emerged a redefinition of the conventional rules for cross-examining vulnerable people in criminal trials and delivery of a strong direction to advocates to change and improve their practice.⁹

International Standards

- 14.23 The United Nations Convention on the Rights of the Child (UNCRC) sets out minimum standards for children's rights across all areas of their lives, such as civil and personal protection, health, education and welfare. The four guiding principles that flow through the Convention are: children's right to non-discrimination; the right to survival and development to the highest level; their best interests being a primary consideration; and their voice being heard in all matters affecting them.¹⁰
- 14.24 The Convention also highlights that, as rights holders, children have special rights to protection from abuse, exploitation and trafficking, and to be supported in their recovery from abuse. The State has an obligation to ensure that appropriate measures and procedures, including court and judicial

9 R v Barker [2010] EWCA Crim 4; R v Edwards [2011] EWCA Crim 3028; R v Wills [2011] EWCA Crim 1938

10 United Nation Convention on the Rights of the Child, Articles 2 (non-discrimination), 3 (best interests of the child), 6 (survival and development) and 12 (respect for the views of the child)

processes, are in place to realise these rights. The Convention affords particular rights to any child in contact with the criminal justice system, including child defendants. The rights of the Convention are interdependent and indivisible. Children’s lives cannot be compartmentalised.

- 14.25 The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) requires that the State takes over “the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses”.¹¹ Furthermore, that “a child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.”¹²
- 14.26 The Lanzarote Convention¹³ requires that each State shall “ensure that training on children’s rights and sexual exploitation and sexual abuse of children is available for the benefit of all persons involved in the proceedings, in particular judges, prosecutors and lawyers.”¹⁴
- 14.27 In 2016, following examination of the UK and devolved governments, the UN Committee on the Rights of the Child stated that, in Northern Ireland, the recommendations of the *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry* in 2014 must be implemented. It advocated that, across the UK, exploitation cases required a strengthening of effective remedies for victims.
- 14.28 That Committee has stressed that “a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.”¹⁵
- 14.29 The Committee also recommended that video-recorded interviews with child victims and witnesses be used in court as evidence rather than children attending in person and being subject to cross-examination.

11 The Council of Europe Convention on preventing and combating violence against women and domestic violence at Article 26(1)

12 As above at Article 56(2)

13 The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse which was ratified by the UK in 2018, requires States to adopt specific legislation and take measures to prevent sexual exploitation and sexual abuse, to protect child victims and to prosecute perpetrators.

14 Article 36(1) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)

15 Committee on the Rights of the Child, General Comment No.12 (2009) *The right of the child to be heard* CRC/C/GC/12 at paragraph 34

- 14.30 The Victims of Crime Directive (Directive 2012/29/EU) also requires, although not specifically for child victims, that measures to avoid contact with offenders and to ensure that the victim can be heard without being present, using communication technology where appropriate are available.¹⁶

Background

Increase in offences in against children

- 14.31 There has been a great increase in recorded offences of abuse of children. In Northern Ireland in 2011/12, there were 985 sexual offences recorded in relation to children. In 2017/18, this had risen to 1,936. In Appendix D at the end of this chapter there is full statistical analysis of offences relating to children.
- 14.32 Children make up the majority of victims of sexual crime (58% in 2017/18) reported to the Police Service of Northern Ireland. Over the years, the NSPCC has worked constructively through such measures as the Victims and Witnesses Strategy to encourage children and young people to speak out and to help them in the journey through court processes, and this may have contributed to the increased reporting.
- 14.33 This increase in recorded offences of abuse of children is echoed in similar offences recorded by police in England and Wales, which more than doubled over three years to hit a record 49,330 in 2015/16, some 2,800 of them against children under five. This is not just because of the tide of historical offences reported in the wake of the Jimmy Savile scandal. The number of under-fives working with RIs has also soared, from 124 in England and Wales in 2012 to 584 in 2017, according to the National Crime Agency (NCA). Similarly to England and Wales, in this jurisdiction requests have increased for RIs to work with children under-five from 28 in 2013/14 to 62 in 2018/19. However, because the RIs scheme was phased, it was not until 2017 that RIs were introduced to all courts.

Under Reporting and Attrition

- 14.34 However, the under-reporting and attrition rate of sexual crime against children and young people are very concerning. In examining the prevalence of child abuse in the UK, the NSPCC has estimated that, for every child on a child protection plan or register, another eight were experiencing maltreatment or abuse. In assessing the extent of sexual abuse against children within family settings the Children's Commissioner for England found that only one in eight children who are sexually abused were identified by professionals.¹⁷

16 Articles 23(3)(a)-(b), EU Directive 2012/29/EU

17 Children's Commissioner (2015) *Protecting Children from Harm: A critical assessment of child sexual abuse in the family network in England and priorities for action* London: Children's Commissioner for England

- 14.35 In earlier research, the NSPCC found that only 19% of reported sexual offences against children had been detected or 'cleared up'.¹⁸ We note that PSNI figures show that the charge or summons rate for rape offences (where the victim was either a child or adult) for 2017/18 was 5.5%.¹⁹
- 14.36 The Northern Ireland Commissioner for Children and Young People (NICCY), in an extremely informative submission to this Review, has also recorded the importance of recognising that the number of cases that are known to statutory agencies are likely to represent only a partial picture of child sexual abuse cases.
- 14.37 The Child Care Centre is a multi-disciplinary unit which specialises in the investigation of child sexual abuse and provision of therapy in Belfast. It recorded that less than 5% of its cases where they believed children had been sexually abused had been subject to charges by the PPS.
- 14.38 A range of factors can act as barriers to identification and reporting, including the power relationship endemic to abuse, the emotional impact of abuse, which can induce fear, shame and guilt on the part of the victim, and the nature of our child protection and justice systems, which largely rely on the capacity and ability of a child or young person to disclose that they have been abused.

Delay

- 14.39 Delay in the hearing of cases and, in particular, cases involving children has been a continuing problem and is a matter of profound concern. A Northern Ireland Audit Office (NIAO) report in March 2018 identifies weakness in the early stages of investigations — namely, when the PSNI compiles evidence and the PPS makes a decision on prosecution as the most critical cause of delay in criminal justice.²⁰ Progress towards the 2006 objective for the PSNI to 'get it right first time' (which applies in all types of cases and refers to investigations) has been unsatisfactory, and just over half of trials proceed on the date initially listed (57% in 2016), although this is an improvement on 43% in 2011.
- 14.40 YWS practitioners report that in cases involving children, especially where the child is a victim of a sexual offence, the progress of the case through the courts is too slow. We have also been advised by the Northern Ireland Statistics and Research Agency (NISRA) for the Department of Justice that the time is increasing rather than decreasing for sexual abuse cases involving children. The subject of delay is dealt with separately in chapter 9 of this Review, but it is a matter of major concern with children.

18 Bunting, L. (2011) *Child Victims in Contact with the Criminal System in Northern Ireland* Belfast: NSPCC

19 Relates to the number of crimes detected in 2017/18 as a percentage of the number of crimes recorded in 2017/18.

20 Northern Ireland Audit Office (2018) *Speeding up Justice: avoidable delay in the criminal justice system* Belfast: Northern Ireland Audit Office

- 14.41 The Child Care Centre record the occurrence of frequent delays stating, “very often children attend court only to find that the case will not be heard and relisted for another day.”

The Youth Witness Service submissions

- 14.42 The NSPCC’s Young Witness Service (YWS) produced a concerning submission for this Review. It was informed by its specialist YWS staff and volunteers, who laid out their practical experience of child victims involved in criminal cases in Northern Ireland. It set this against key areas of best practice identified in chapter 2, ‘Children, Young People and Vulnerable Adults’, of the *Equal Treatment Bench Book*.²¹
- 14.43 What lends weight to the deep concerns expressed by YWS practitioners is that it virtually mirrors the experiences in England, voiced in highly authoritative reports by Joyce Plotnikoff and Richard Woolfson dealing with young witness policy and practice.²² In their recently published report,²³ Plotnikoff and Woolfson record that despite the improvement of the policy and practice framework for young witnesses in England and Wales since 2009, provision of support is inconsistent. Furthermore, there is a lack of leadership, ownership and accountability for this policy and practice. This means some children are still at risk of having negative experiences and being retraumatised. The report highlights that child sexual abuse cases take longer to get to court than other types of crime, and the time between the initial report and the trial is getting longer.²⁴ This is further complicated by the absence of official statistics about the number of children giving evidence in court, and unofficial statistics are difficult to compare and understand. Reflecting on this report, I can say that nothing in the YWS report surprises me. On the contrary, it serves to convince me there is merit in the criticisms.²⁵
- 14.44 It is the YWS case that the current procedures do not consistently consider and prioritise the needs of the children with whom they are engaged. Moreover, contrary to UNCRC’s Article 12, which asserts that every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously, the YWS found that there is little evidence of consultation with children to hear their views about issues such as special measures or the court environment in any systematic and meaningful way.

21 Judicial College (2018) *Equal Treatment Bench Book 2018*. Available at: <https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/> Accessed: 11 April 2019

22 Plotnikoff, J. and Woolfson, R. (2009) *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* London: NSPCC

23 Plotnikoff, J. and Woolfson, R. (2019) *Falling short? A snapshot of young witness policy and practice* London: NSPCC

24 As above, section 2.2

25 In its response to this Review, the Child Care Centre fully endorsed these concerns.

- 14.45 The detailed concerns expressed in the YWS submission included the following:
- i. Prosecutors may at times arrive to court with limited awareness of case detail and little or no previous engagement with the child or family. I pause to add that, despite the Public Prosecution Service (PPS) policy that all prosecutors should meet complainants in the two weeks prior to trial, failure to comply with this was a complaint that resonated throughout many of my meetings with adult complainants and is obviously all the more damaging when applied to children;
 - ii. The full range of special measures is not available and applied to children even when it might be in the child's best interest for them to be applied;
 - iii. Digitally recorded cross-examination is not as yet available;
 - iv. Closed courts are applied in only a small number of cases. The Criminal Evidence (Northern Ireland) Order 1999 is available to have evidence heard in private for children, but it is rarely applied for. This has been an area of concern reported by YWS staff and my view is that, in cases where there is a child victim of a sexual crime, the default position should be that evidence is heard in private;
 - v. Combined measures, including video link with screens, are rarely used;
 - vi. The perception is that there may be a lack of awareness of the range of special measures available, a reluctance to apply for special measures and/or an unwillingness to grant less common special measures;
 - vii. The criminal justice system and court processes are often perplexing and traumatising for children and their families. There is a general lack of awareness of how traumatic an experience court can be for a child with little evidence of systemic trauma-informed practice. Training is obviously needed for all involved in the criminal justice system, including court staff, legal professionals and the Judiciary;
 - viii. Courts often request that children are in attendance from the start of the day even when experience and practice reveals that the child's case will not start until the afternoon. Lengthy waiting times and delays can be distressing for a child;
 - ix. There is no evidence in practice of the advice set out in the *Equal Treatment Bench Book* that there should be systematic scheduling of witness start times for children.²⁶ Currently, the witness is required to be at court and available when the court is ready for them, with often no indication of when this will be. The needs of child witnesses are very rarely (with some

26

Judicial College (2018) *Equal Treatment Bench Book 2018* Available at: <https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/> Accessed: 11 April 2019 at chapter 2, paragraph 56

exceptions) factored in to planning. The impact of a long wait before giving evidence may affect schoolchildren most;

- x. Current PPS statistics do not differentiate between adult victims/witness and children in terms of timescales;
- xi. There are multiple examples of children being asked to attend courts where the court premises and layout are not fit for purpose with:
 - no safe waiting room space for the child;
 - children having to share a waiting room with other vulnerable witnesses including adults, where there is the potential breach of anonymity;
 - children having to walk through the main waiting room past defendants and the public to use restroom facilities; and
 - no requests that a trial be moved when the court is known to be unsuitable for a child.
 - i. There is no consultation with the YWS when it comes to setting dates, meaning that at times cases must be transferred from the original key worker, who has established relationships with the witness and families, to new workers. This can increase anxiety for the witness and may impact on their ability to give evidence on the day;
 - ii. Cases should be referred to the YWS at the time of arraignment and Achieving Best Evidence (ABE) interview guidelines should be followed. This is not happening in practice. The YWS is tasked by the Department of Justice to work with young witnesses and their families to meet the Department's requirements under the Victim Charter. The time available between referral and trial can be too short to allow for meaningful support to be provided. During 2017/18, 19.2% of referrals to the YWS were with two weeks' notice or less (7.8% with one week's notice or less);²⁷
 - iii. Scheduling a 'clean start to witness testimony': practitioners do not see evidence of the courts in Northern Ireland using a clean start when a vulnerable witness is required to give evidence. This would be immensely beneficial to children and their families if it were routine practice;
 - iv. Children are at times cross-examined for longer than optimal times, without the principle of regular breaks being consistently applied. There are experiences of cross-examination routinely exceeding

- that which should be expected of a vulnerable child, with cross-examination at times exceeding two hours without regular breaks;²⁸
- v. Whilst live link is used in most cases involving children, almost all the live link facilities are in court facilities. The expansion of live links into other non-court facilities would greatly improve the experience for children and vulnerable witnesses in general. Options could include locating facilities in NSPCC premises or investment in mobile live link equipment;
 - vi. The best interests of the child are not consistently considered when planning a time to allow a child to review an ABE interview. A child may be expected to review the interview on the day of court when it may be the child's preference to do so beforehand. At times, investigating officers have not been aware that they have a role in the ABE interview refresh and have had to be prompted by YWS staff. In fairness, the PSNI have explained in the response to this Review that the importance of good planning to allow a child appropriate time to review their interview is placed to the fore in PSNI thinking;
 - vii. It is a regular occurrence that the required equipment is not available to allow the witness to be refreshed on their ABE interview on the day. These issues often cause unnecessary delay and increase the anxiety and distress of witnesses;
 - viii. There are also regular problems with ABE interview playback in court where the equipment does not work on the day;
 - ix. Children are often expected to watch their ABE interview with the judge and jury, with the child being visible to the court during this time. There appears to be a preference for simultaneous viewing of the ABE by the courts and the child;
 - x. Chapter 2, paragraph 98 of the Equal Treatment Bench Book references the young witness protocol and advises that "all young witnesses should ideally have an intermediary assessment as, no matter how advanced they appear, their language comprehension is likely to be less than that of an adult witness."²⁹ YWS practitioners report that this is not the current practice and that the use of RIs is relatively rare, inconsistent and at times resisted even when significant vulnerability and need has been identified by qualified social workers within the YWS staff group. This is despite the fact

28 The Child Care Centre advises that the adversarial nature of the criminal court diminishes the opportunity for young children to give their best evidence, taking little cognisance of the child's development level, and how they perceive situations and report events.

29 Judicial College (2018) *Equal Treatment Bench Book 2018* Available at: <https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/> Accessed: 11 April 2019

that I am assured by the DoJ that, unlike in England, the supply of RIs in Northern Ireland is plentiful, upon request by the end users (PSNI or PPS). I have specifically referred to the DoJ response to this issue in paragraph 219 of this chapter;

- xi. There is little evidence of an effective initial needs assessment being undertaken by PSNI on the Victim and Witness Care Unit with respect to witnesses and, when they are undertaken, these are not communicated to YWS practitioners. We also find that issues such as ADHD/ASD go unreported prior to the YWS assessment;
- xii. Chapter 2, paragraph 120 of the Equal Treatment Bench Book advises that best practice is to hold a Ground Rules Hearing where there is a young witness.³⁰ YWS practitioners report that this is not routinely practised except when an RI is involved;
- xiii. Too often the decision as to whether an RI is involved, is taken by the judge, on the day of the hearing itself. This is challenging for the child and family as they will not know when arriving to court if the child will have the support of an RI while giving evidence. This can be anxiety-provoking albeit in the vast majority of cases use of a Registered Intermediary is agreed by the Judiciary;
- xiv. YWS practitioners report that the tone and manner of questioning can be experienced as authoritarian and frightening to children. It is noteworthy that NISRA statisticians working for the Department of Justice found that 56% of witnesses during 2016/17 felt that the defence was discourteous in its engagement with them.³¹ This figure has been consistently high over the five years covered in the research report;
- xv. Children are asked about third-party material without any previous context being provided to the witness;
- xvi. Except for cases where an RI has been used, and thus the courts are notably more tuned in to the child, YWS staff and volunteers report that courts often do not adapt their language and style to meet the needs of the child with whom they are communicating;
- xvii. YWS practitioners report that children are often asked the same questions repeatedly when giving evidence. This has a destabilising and anxiety-provoking impact on children and can lead to inaccurate responses from children with learning disabilities; and

30 As above.

31 Department of Justice (2017) *Victim and Witness Experience of the Northern Ireland Criminal Justice System: 2008/09 - 2016/17* Belfast: Department of Justice

- xviii. There is no current working mechanism for supporters of victims and witnesses to routinely provide feedback to individual trial judges on the child's experience of their court and the effectiveness of the local systems to support them.

Northern Ireland Commissioner for Children and Young People (NICCY)

Criticisms of the System

- 14.46 The criticisms of the law and procedures do not end with the NSPCC. NICCY has also made some trenchant criticism of the procedures as follows.
- 14.47 In particular, NICCY has closely monitored the implementation process of the recommendations of the *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry* in 2014 (the Marshall Inquiry). NICCY continue to have significant concerns about the lack of evidence to demonstrate that implementation has been effective and is improving outcomes for children. NICCY notes that many of the Marshall Inquiry recommendations have direct relevance to the Review's terms of reference. These concerns and the Commissioner's recommendations have been set out in a number of NICCY papers.
- 14.48 The Marshall Inquiry recommendations commented on by NICCY include:
- 14.49 Key recommendation 9: The DoJ should establish an inter-agency forum, drawn across the criminal justice sector and third-sector stakeholders, to examine how changes to the criminal justice system can achieve more successful prosecutions of the perpetrators of CSE. This must be informed by the experiences and needs of child victims.³²
- 14.50 The Department informs me that there have been two reports arising from this, together with a workshop in March 2016. However, whilst there has been a draft action plan, no implementation has occurred, despite the passage of time, due to resource issues.
- 14.51 Key recommendation 14: The DoJ should lead on a project to examine legislative issues highlighted in this report and bring forward proposals for change. These include:
- a) Ensuring compliance with international standards by extending protection to children up to the age of 18, specifically, the Child Abduction (Northern Ireland) Order 1985 and the Sexual Offences (Northern Ireland) Order 2008.
 - b) Providing for a recovery order under the Child Abduction (Northern Ireland) Order 1985, on the model of that in section 69 of the Children (Northern Ireland) Order 1995.

32 Marshall, K. (2014) *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry* Belfast: Criminal Justice Inspection Northern Ireland, the Regulation and Quality Improvement Authority and the Education and Training Inspectorate

- c) Replacing all references to child ‘prostitution’ with ‘child sexual exploitation’.
 - d) Extending the offence of ‘grooming’ to include ‘enticing’.
 - e) Reversing the rebuttable presumption in the Sexual Offences (Northern Ireland) Order 2008 in relation to ‘reasonable belief’ as regards the age of a child.³³
- 14.52 The Department recognises the strength of many of these points. It recently launched a public consultation reviewing the law on child sexual exploitation to seek views on these proposals set out in Key recommendation 14.³⁴ Steps have been taken in some areas to align the 18 age limit, and it is expected this will be completed. Similarly, it is recognised that the changes in nomenclature to ‘child sexual exploitation’ and ‘enticing’ have much to recommend them in line with the aim to modernise the use of language. Consideration is to be given to the rebuttable presumption as regards the age of children.
- 14.53 I record my particular sympathy with the need to excise the references to ‘child prostitution’. A child cannot be a prostitute as this implies choice and is victim blaming. It is misleading regarding the child’s experience. Articles 38/39/40 of the Sexual Offences (Northern Ireland) Order 2008 should be reworded. It is significant to note that section 68 of the Serious Crime Act 2015 in England and Wales, which came into force on 3 May 2015, replaced legislative references to child prostitution and pornography with references to ‘child sexual exploitation’. It also amended section 1 of the Street Offences Act 1959 so that the offence of loitering or soliciting for the purposes of prostitution applies only to persons aged 18 and over.³⁵ I therefore have recommended that legislative action be taken to change this situation as soon as possible.
- 14.54 The Department asserts that, in the absence of the Executive and Assembly, some of these areas of consideration have been slower than otherwise would have been the case.
- 14.55 Supporting recommendation 43: PSNI and criminal justice partners in the Prosecution Service and Court Service should continue to develop their approach to responding to victims of CSE in a way that treats them fairly and sensitively and avoids blaming them for offending behaviour associated with their abuse. This involves attitude, not just policy or process.³⁶
- 14.56 The Department asserts that this process is ongoing and various steps have been taken — for example, training arranged for all CSE officers in the PSNI.

33 As above.

34 The consultation, “Review of the law on child sexual exploitation” was open between 19 February 2019 and 16 April 2019.

35 This legislative reform occurred in the wake of Ann Coffey MP raising this matter vigorously in Parliament.

36 Marshall, K. (2014) *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry* Belfast: Criminal Justice Inspection Northern Ireland, the Regulation and Quality Improvement Authority and the Education and Training Inspectorate

- 14.57 Supporting recommendation 44: The Department of Justice should continue to seek to develop and improve the experiences of young witnesses, taking into account research and learning from other countries. This should include consultation with stakeholder groups and young witnesses.³⁷
- 14.58 The Department confines its learning to other jurisdictions within the UK. There are traditionally no researchers retained by the DoJ and little research is done into developments outside the UK.
- 14.59 Supporting recommendation 45: PPS should ensure that prosecutors dealing with sexual offences against children continue to receive training at regular intervals on the dynamics of child abuse, including CSE.³⁸
- 14.60 Supporting recommendation 46: Awareness-raising about the dynamics of child abuse and CSE in particular should be available for all legal personnel and be mandatory for all legal professionals dealing with child abuse cases. This should be made the responsibility of the PPS for its own legal staff, the Northern Ireland Bar for its staff [and the Law Society for their members], and the Judicial Studies Board [JSB] for judges.³⁹
- 14.61 Northern Ireland does not have mandatory training relating to children for the Bar or the Law Society. In 2015, the authorities in England and Wales stated that it had made it a requirement for publicly funded advocates in serious sexual offence cases to have undertaken approved specialist training. The Advocacy and the Vulnerable Training was developed in conjunction with the Bar to help solicitor advocates and barristers strike the balance between advancing their client's case effectively in court whilst ensuring vulnerable witnesses are not subjected to undue stress. The Ministry of Justice has not yet made this training compulsory for all publicly-funded advocates acting in serious sexual offences cases. The Ministry's inaction has been met with dismay by some of the course's lead facilitators. No steps have been taken to address this in Northern Ireland.
- 14.62 I found it surprising to learn that there has been a paucity of lectures to date specifically on the needs of children within the criminal justice system from the Northern Ireland JSB. I understand that when each new judge meets the JSB to discuss training reference is made to the presence of the *Equal Treatment Bench Book* prepared by the Judicial College. This is arguably proving inadequate.
- 14.63 Referencing the Marshall Inquiry's Supporting recommendation 47, NICCY argues that the Department of Justice should ensure that both statutory case management and statutory time limits be introduced in Northern Ireland. Both have already been the subject of clear recommendations by the Criminal Justice Inspection Northern Ireland.

37 As above.

38 As above.

39 As above.

- 14.64 The Department is still consulting on these proposals.
- 14.65 NICCY has proposed a number of other reforms relevant to children as follows:
- First, expert input for the benefit of all legal personnel and jury members should be provided at the beginning of each trial to address key issues such as the power dynamics of sexual abuse and grooming and to include ‘myth busting’. These matters are addressed in chapter 6 of this Review.
 - Secondly, child victims and complainants should have access to a legal representative or advocate whose role is to protect the rights and best interests of the child and who has an authoritative position in proceedings (see chapter 5).

Other concerns

- 14.66 A further separate issue is that of pre-recorded cross-examination, which is dealt with as a separate topic in chapter 4 of this Review.
- 14.67 My discussions with Crown Court judges have highlighted court technology as a significant problem with cases involving young witnesses, with difficulties at times having a clear view of the witness’s facial expressions over the live link and hearing the witness clearly. Moreover, a frequent complaint is that the position of the camera is hopelessly misaligned and the voice is difficult to hear. Virtually without exception, Crown Court judges have had the experience of the technology not working at all on many occasions, occasioning lengthy delays and adjourned hearings.
- 14.68 The quality of the ABE is crucial to its evidential importance as the young witness’s evidence-in-chief. The experience of both judges and legal professionals is that there are many occasions when it has been poorly conducted by PSNI officers, with rambling, repetitive questions, which are often irrelevant and confusing for the complainant and for the jury.
- 14.69 In fairness to the PSNI, it provided the Review with details of the process it utilises and has afforded the Review team the opportunity to view and engage with ABE training. I have met and discussed with the PSNI the methods of training it currently employs.
- 14.70 In respect of victims, witnesses or suspects who have a communication difficulty, the PSNI use RIs. A communication difficulty could be a learning disability, a child who is very young, someone who is on the autism spectrum or someone with a physical disability that creates a difficulty with communication. This list is not exhaustive. RIs are usually speech and language therapists and are assigned depending on the person’s needs.
- 14.71 Police use RIs for all children under the age of seven, must consider their use for all children aged eight to eleven, and over that age, use is in response to any other communication need the person may have. The RI carries out an

assessment with the person and then provides guidance to the police officer interviewing them as to how best to communicate with the person and how the interview should be structured. Such advice could include the length of time they can be spoken to; young children need to sit at a small table instead of the armchairs in the ABE suite; and interviewers should not ask tag questions — for example, ‘I am wearing a red dress today, is that not correct?’

- 14.72 They can also provide information as to whether a person can tell the time, focus on dates, if they would understand a week ago, a year ago, or how long something went on for. They may also suggest the best time of day for the person to be interviewed. For all witnesses and victims, the police officer is present during this assessment. For suspects, the solicitor is present and the police officer is not. The RI would often be present during the interview.

Barnahus system

- 14.73 A wholly separate issue arises from NICCY’s submission that this Review should consider a change in the law and procedures to introduce a less adversarial process for children concerning sexual offences, which is less likely to re-traumatise the child while ensuring that the interests of justice are properly served.
- 14.74 This would reflect a child-centred approach, which secures child victims’ and witnesses’ best evidence, minimises the need for multiple interviews and examinations, and respects due process.
- 14.75 NICCY drew particular attention to the development and adaption of the Barnahus or ‘Child House’ model, which is promoted by the Council of Europe. The model was developed in Iceland and is now operating in a number of countries, including a small pool of Home Office-funded pilot projects that have been established in England. The Scottish Courts and Tribunals Service has also recommended that the model be developed in Scotland.
- 14.76 The Barnahus model seeks to embed in the justice process child protection disclosure procedures and, by ensuring legal, social care and medical professionals working collectively, aims to provide a comprehensive service for children in a single setting.
- 14.77 The model involves professionals trained in forensic interviewing. There are two types of interview, namely exploratory and investigative. During an initial exploratory interview if a child discloses abuse, any alleged perpetrator can be taken into custody. This is followed by an investigative interview with a range of professionals including defence advocates, police, child protection services, the child’s legal representative and a judge observing via video link and communicating with the interviewer to ask any questions.
- 14.78 Since the Barnahus model was established in Iceland, the number of child victims of sexual exploitation coming forward for help has more than doubled

per year, indictments have more than tripled and convictions have more than doubled. The Barnahus model has since been exported to Norway, Greenland and Denmark, with pilots planned in Finland and Lithuania.

- 14.79 The recorded interview provides the child's testimony in court. The process aims to ensure a minimal time lapse between exploratory and investigative interviews and between investigative interview and trial. The model also allows children to access therapeutic support more quickly.
- 14.80 NICCY notes that the development of a similar model in this jurisdiction would need to take account of a range of factors, including the requirement that evidential and public interest tests are meant to inform prosecutorial and charging decisions, and that this may necessitate a further interview stage with the child, as occurs in some other countries that have adapted the model.
- 14.81 NICCY also highlight that European Barnahus quality standards have now been developed. Such a substantive change to current adversarial arrangements would address not only a number of recommendations of the Marshall Inquiry (such as key recommendation 9 and supporting recommendations 43 and 44), but a range of other relevant issues including the disclosure of evidence, support for complainants, victims and witnesses, and the use of pre-recorded cross-examination.

Other jurisdictions

Iceland

- 14.82 In Iceland, the Barnahus model has been in place since 1998, using a child-friendly response to child sexual abuse that is multi-agency, interdisciplinary and all under one roof.
- 14.83 The Icelandic Government Agency for Child Protection recognised that multiple agencies were holding cases of suspected sexual abuse, but information sharing and coordination were poor.⁴⁰ Young complainants were required to give multiple interviews to professionals from each agency, diminishing the quality of their evidence and being further traumatised by having to give testimony in court.
- 14.84 The model recognises the vulnerability of the child victim and the harm caused to the child by multiple interviews.
- 14.85 The Barnahus in Iceland provides one place in which the child can have forensic interviews and make court statements, have a medical examination and access therapeutic services, which are also available for the victim's family.

40 Children's Commissioner (2016) *Barnahus: Improving the response to child sexual abuse in England* London: Children's Commissioner for England

- 14.86 There is no specific Barnahus law, and Barnahus is not explicitly referred to in any legal provision. There are, however, regulations in both the Child Protection Act, No. 80/2002 and the Law on Criminal Procedure, No. 88/2008 that provide the legal basis for the Barnahus operation.
- 14.87 The Child Protection Act, No.80/2002 requires the Government Agency for Child Protection in Iceland to run special service centres, with the objective of promoting interdisciplinary collaboration and strengthening the coordination of agencies in handling cases of child protection.
- 14.88 In 2015, a legal change was made in the Law on Criminal Procedure, No. 88/2008, providing that investigative interviews of child victims up to 15 years of age should be supervised by a judge in a specially designed facility and with the support of a specially trained person.
- 14.89 The exploratory interview is a formal process that provides a safe space in which children are supported to disclose abuse in a non-leading manner. Where a child makes a disclosure, the interview is stopped so that the alleged perpetrator can be taken into custody. An investigative interview is held as soon as possible.
- 14.90 Investigative interviews are watched via video link by a range of professionals, including the police, Government Agency for Child Protection, the prosecutor, the defence attorney, the judge and the child's state-appointed legal representative. Professionals communicate with the interviewer via an earpiece, and they relay questions in a child-friendly manner consistent with the principles of forensic interviewing.
- 14.91 The criminal justice process is embedded within the Barnahus. The investigative interview serves as testimony for the court. The court case is usually held six months after the interview. Given that the investigative interview is used as testimony, there is no need for further questioning.
- 14.92 It is to be noted that Iceland has a small population (around 300,000 people). It is thus able to provide child psychologists for all interviews of children who have been sexually abused under the age of 14.

Norway

- 14.93 The Norwegian approach is based on the Barnahus. It was introduced following widespread criticism of low prosecution and conviction rates in relation to child abuse.
- 14.94 Criminal Procedure Regulations of 2 October 1998 No. 925 provide for the taking of evidence in a judicial hearing prior to trial for witnesses under 16 years of age or who have a mental health problem in cases where the witness is the alleged victim of a sexual offence.

- 14.95 The regulations provide that such a hearing should happen as soon as possible after an incident is reported and no more than two weeks later, albeit there is much slippage in practice.
- 14.96 There are now 11 Barnahus centres across Norway, which provide customised facilities for the hearings, including dedicated interview rooms featuring high-quality audio and video links to a conference/viewing room for all those entitled to observe the proceedings.
- 14.97 Formal exploratory interviews are not used in the Norwegian model. This phase is conducted by social workers, who then refer cases for investigative interviews to the Barnahus.
- 14.98 The investigative interview is conducted in two stages:
- An initial detailed interview, which determines whether there is evidence to charge an alleged perpetrator.
 - A supplementary interview, undertaken following an interview with the alleged perpetrator and in which the interviewer does not repeat the same questions but instead focuses on discrepancies in the account and enables elaboration to improve the quality of the evidence. Cross-examination in this model is significantly removed from traditional cross-examination.
- 14.99 The interview consists only of a structured approach in which the police interviewer, who is a specialist in forensic interviewing, is the only person who questions the witness directly during the evidential hearing. They can take suggestions from the defence lawyer as to lines of questioning. That is deemed sufficient to meet Article 6 of the European Convention on Human Rights (ECHR) requirement allowing the examination of the witness on behalf of the accused.
- 14.100 The judge is in control of this hearing, which may also be attended by: the interviewer; counsel for the complainant; substitute guardian for the child; defence lawyer; prosecuting lawyer; police investigator; adviser from the Barnahus; and representatives from child welfare services (if necessary).
- 14.101 There will also be a technician to operate the audio/video viewing and recording. The accused is not usually present, although it is the norm that they are informed that the session will be taking place.
- 14.102 Given that this hearing takes place as soon as possible after the alleged incident is reported, there may not even be an identified defendant who has been charged. In this case, a lawyer is appointed to represent the defence's interests in anticipation of a future trial.

England and Wales

The Barnahus Model

- 14.103 Only one in four children and young people reporting sexual abuse is currently referred to local services for medical support.⁴¹ Like children in Northern Ireland, those who do report abuse face multiple interviews with social workers, the police and medical professionals in different settings, and a long wait to go to trial.
- 14.104 Many cases do not have sufficient evidence to reach the prosecution stage and families are often left to navigate the complex health system by themselves in order to seek support from their GP, mental health services or local charities.
- 14.105 Children who have been victims of sexual abuse or exploitation will, for the first time in the UK, be able to access a complete range of support services from dedicated experts under one roof in a pioneering project launched in London.
- 14.106 The Children and Young Persons' Havens Service (Haven) in London opened in 2016, providing forensic medical examination and emotional support to children reporting recent sexual abuse.
- 14.107 In 2018, it began piloting video-recorded ABE interviews conducted by a clinical psychologist on one day a week. The protocol between the Metropolitan Police and the Haven for ABE interviews included criteria for requesting RI assistance.
- 14.108 Open since April 2018, it offers a calm environment for medical examinations, counselling and therapy, with soft coloured chairs and brightly coloured rugs that provide a soothing alternative to plastic clinical furniture, artwork and a 3D technology system providing distraction. Funded by NHS England (London), it expands the services offered to adult sexual victims.
- 14.109 The 'Lighthouse' pilot is the UK's first Child House.⁴² This service is available for children and young people from five boroughs in North Central London who have experienced any form of sexual abuse including exploitation more than seven days before referral.
- 14.110 It opened at the end of 2018 and will soon be fully operational. Medical, advocacy, social care, police and therapeutic support will be delivered from one place, providing a co-ordinated approach to support children and young people. There will be approximately 30 multi-disciplinary staff made up of a doctor, paediatric nurses, Independent Sexual Violence Advocates (ISVAs), social workers and police. The service is commissioned to treat 550 children per year and over 100 have been referred in the first three months. The aim is to

41 Mayor of London (2016) *UK's first Child Houses to launch for young victims of sexual abuse* [Press Release] 13 September

42 The Home Office has funded a national proof of concept of the Child House in London based on the international 'Barnahus' model. See also NHS England (2018) *London Child Sexual Abuse Services Learning Report* London: NHS England.

make sure that children overcome the trauma that sexual abuse can cause by focussing the right help at the right time.

- 14.111 The whole service is needed to respond to sexual abuse under one roof and the ISVA will guide the child or young person and their family through their journey of recovery helping them access medical care, police and social worker assistance and mental health support more easily and quickly. The ISVA will also support children and young people through the court process.
- 14.112 Importantly, in the Lighthouse, the ABE interview will often be conducted by a child psychologist (supported by a police officer) helping to reduce the re-traumatisation and to gather the best evidence by putting the child or young person's emotional needs first.
- 14.113 There is an initial planning meeting between the police and the child psychologist when some basic but brief background information is given to the latter before the interview starts. The police officer listens in. The police officer can make further suggestions regarding the interview to the child psychologist during necessary breaks for the child. Currently a child psychologist can only be made available one day per week. A pragmatic approach is adopted in the selection of children for interview with the psychologist.
- 14.114 Durham Police are currently piloting another version of the Child House in which the police conduct the ABE interview after the child has been assessed by a child psychologist.
- 14.115 Pre-recorded cross-examination of the child has not yet commenced although when it does occur, it will be performed by defence counsel and not the psychologist in the wake of concerns raised by the Judiciary and Bar in England. They may be further traumatised by the court experience.
- 14.116 Most of the interviews with children are therefore still carried out by trained police officers due to the limited availability of child psychologists. The child psychologists are trained by the Metropolitan Police to be aware of investigative issues and legal matters such as obligations under the Police and Criminal Evidence legislation etc.
- 14.117 An extremely important element of the whole process is that every third interview is carefully supervised and discussed with experienced experts to create a learning cycle.
- 14.118 Equally important for children in this model is the creation of a child friendly environment with appropriately designed furniture and toys. A key feature of the Lighthouse facility's design is a separate waiting room for the ABE interview. This is only used for interviewing, and once the child has completed this stage, they will not be in this room again.⁴³

43 This information about the Lighthouse project was generously provided by Emma Harewood, Development and Service Manager at the Lighthouse.

14.119 The response from the Child Care Centre in Belfast has criticised the expectation that children must recount their experiences without the aid of any toys or mediums which can help them with the process. It has noted a reluctance on the part of ABE interviewers to use any such “props”. Lack of access to suitable materials hinders a child’s ability to communicate. RIs are helping to change this.

Other developments in England

14.120 Case management in England involving vulnerable adults and children is based on a Ground Rules Hearing (GRH) which occurs in all but the most exceptional cases pre-trial. The Criminal Procedure Rules provide a lengthy list of what must be discussed in order, for example, to identify the scope and length of cross-examination, following which the judge can manage a timetable that is fair to all parties. Advocates are expected to produce a list of cross-examination questions to the judge for approval at the GRH and these will be shared with the intermediary, but not of course with the child.

14.121 In terms of training the Bar in England has been proactive. In 2016, the Advocacy Training Council working group on vulnerable witness handling produced a document, *Raising the Bar: Handling of Vulnerable Witnesses, Victims and Defendants in Court*.

14.122 The toolkits available on the Advocate’s Gateway are compulsory reading for any advocate who is to question a vulnerable witness.

14.123 The Advocacy and the Vulnerable Training Programme was launched by the Inns of Court College of Advocacy in 2016 and by all accounts achieved high professional attendance and was well received.

14.124 The Bar Standards Board has recently introduced a new provision for youth court advocacy, consisting of registration for this specialism plus self-certification of competence.

14.125 Lord Judge, the former Lord Chief Justice of England and Wales, has recommended to the Government that rules of professional conduct be made consistent for the purpose of sexual offence cases. Currently, advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a vulnerable person.

14.126 To obtain a ‘ticket’ to try serious sexual offences, judges must attend a two-day induction seminar on serious sexual offences. High Court judges are not required to attend training. Bespoke training on managing vulnerable witness cases was delivered in 2013–14.

14.127 Interestingly, one example of training that is now translated into the Criminal Procedure Rules is that which outlaws requests that a child demonstrate intimate touching on their body or mimic sexual actions. If it is necessary to

ask the witness to demonstrate how or where they were touched, the witness should be provided with a gender-neutral diagram or doll.

- 14.128 Intermediaries in England act flexibly depending on the child's needs or circumstances, employing an arsenal of toys that children can play with to keep calm and focused. Once the intermediaries know what works, they bring them to trial, where children give evidence via live video link, either from a room elsewhere in the court building or a remote site.
- 14.129 There may even be larger items that get transferred — special measures that have to be agreed at a GRH before trial. One child is described as giving her evidence from a rocking horse and another with a pet hamster on her lap.
- 14.130 One RI was described in a recent *Guardian* article as having persuaded two judges that a makeshift den should be constructed from chairs and a blanket, for a child to retreat into.⁴⁴ At another assessment it was discovered that one boy seemed to be calmed by tidying up, so he took a full-sized and handheld vacuum cleaner to trial. Before he was interviewed, staff would tear paper into hundreds of bits and scatter them on the floor.⁴⁵

Scotland

- 14.131 The children and gender-based violence lead in the Violence against Women and Girls and Barnahus Justice Unit in the criminal justice division of the Scottish government, kindly sent us a full account of and information about the development of the Barnahus concept in Scotland. The following points were made:
- In 2018, the Barnahus project has been included in the programme for government. The current plan is to develop some Scottish-specific standards or principles for Barnahus, which will provide a road map for developing the model in Scotland in the next few months.
 - Some early steps in Scotland that have driven action included a visit to the original Barnahus in Iceland in 2017 and a round-table event where representatives from the Icelandic model came to tell stakeholders in Scotland how to implement the model.
 - In addition, there are a number of pieces of work under way to develop a Scottish model. First, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill which seeks to support the use of pre-recording evidence and avoiding the requirement for children to have to give evidence during trials.
 - Secondly, work to improve the quality of joint investigative interviews;

44 Williams, R. (2018) 'Helping child witnesses: 'One girl gave evidence with a hamster on her lap' *The Guardian* 17 February

45 As above.

- Thirdly, the Chief Medical Officer's Taskforce to Improve Services for Victims of Rape and Sexual Assault who have experienced rape and sexual assault has agreed standards for examinations and appropriate criminal pathways for children and young people.
- Finally, the National Trauma Training Framework has been invoked.

Discussion

- 14.132 This chapter focusses on the need to adapt criminal proceedings in serious sexual offences to accommodate children. Courts have safeguarding responsibilities in respect of children and the exercise of judicial discretion often has a safeguarding dimension. It needs to be recognised that children under stress can function at a lower level making it more difficult for them to remember accurately and think clearly. Accordingly the law and procedures must at times be adapted flexibly to ensure that children are not disadvantaged by conventional law and procedures.
- 14.133 In my view, one has only to read the criticisms mentioned earlier in this chapter to see the need for urgent procedural change in many respects if the interests of children are to be adequately safeguarded. A fresh culture of advocacy for children and vulnerable adults needs to be invoked, which will challenge the traditional style of advocacy.
- 14.134 Rethinking the approach to the need for the presence in court of a child and the nature of the cross-examination does no more than elicit a civilised way to treat vulnerable children and produce an environment where the truth is more likely to emerge and still respects due process.
- 14.135 Crucial matters for children involve the challenges of jury myths, lengthy delays in the process, disclosure, pre-trial cross-examination and questions approved in advance by the judge, separate legal representation, possible repeal of section 5 of the Criminal Law Act as it applies to children, and the adversarial system, as opposed to the inquisitorial system. These are the subject of separate chapters in this Review and as such are not replicated in this chapter.
- 14.136 The weaknesses procedurally in the system with reference to children and, for that matter, vulnerable adults are not only self-evident but in most instances can be altered without a change of law by implementing more robustly the law and procedures that are already in existence. Alongside this, there needs to be adjustment to the Crown Court Rules necessary to implement the new departure from the traditional style of advocacy with children and vulnerable witnesses.
- 14.137 We need to redefine conventional understanding of the rules for cross-examining children and vulnerable people in criminal trials, coupled with the delivery of a strong direction to advocates to change their current practice.

There has to be a real recognition that questions that ignore the principles designed to obtain accurate information from a witness and exploit their developmental limitations are inconsistent with a fair trial and contravene professional codes of conduct.

- 14.138 I believe it is becoming apparent for all to see that existing special measures designed to help children and vulnerable adults are not matched by appropriate advances in advocacy skills.
- 14.139 In addition to developing a better understanding of under-reporting and the attrition rate of reported offences, those participating in the justice system in Northern Ireland, including the Judiciary, legal professionals, the PPS and the PSNI, should seek to better understand the experiences of children and young people. They all need to recognise the extent of the confidence gap in the system in order to support and protect them and to deliver justice.
- 14.140 Accordingly, more mandatory training on such issues needs to be introduced by the Judicial Studies Board, the Law Society, the Bar Council, the PPS and the PSNI, invoking the assistance of the NSPCC's YWS and NICCY and child psychologists.
- 14.141 The Barnahus project, promoted by the Council of Europe, and its offshoot, the Child Houses in London, are arguably well worthy of consideration. Scotland is also pursuing the concept with some enthusiasm. We must not let our children be left behind. This concept requires our close attention if we are to take seriously the need to protect children from the risk of being traumatised a second time by a harrowing procedural process, whilst still protecting the rights of the accused to raise questions, but in a non-traditional setting.

Judiciary

- 14.142 Case management steps must become better informed, more robust and more consistently applied in the case of children and vulnerable adults, permitting the new culture of advocacy to take root. Contrary to the present system that confines bespoke case management hearings to those few cases involving murder and terrorism, all cases involving child complainants or other vulnerable witnesses in serious sexual offences (and indeed eventually extended to all complainants in serious sexual offences) should be afforded such hearings. A recognition by the Judiciary of the trauma that such cases can occasion children must inexorably lend weight to that step being taken as a matter of urgency, with appropriate administrative staff being applied to such cases to ensure timely and comprehensive compliance with GRH directions.

14.143 GRHs should define the issues for trial, such as:⁴⁶

- It is eminently reasonable that proposed questions to be asked in cross-examination of children require written notice in advance to the judge and the intermediary for their perusal and approval.
- An emphasis on the need to avoid tag questions, to use short and simple sentences and easy-to-understand language, and to avoid the use of tone of voice to imply an answer.
- Time limits on cross-examination.
- If limitation is to be put on cross-examination, how the jury will be directed.
- The presence of an intermediary and YWS in the course of the proceedings.
- An emphasis on agreed statement of facts wherever possible in advance to shorten the trial.
- Any legal aid complications arising.
- Disclosure and particularly third-party disclosure, with a firm involvement of the defence and prosecution in presenting a cards-up approach from an early stage as to what disclosure is relevant to the defined issues.
- Venue: live link from a remote location is in many instances the preferred model for all vulnerable witnesses, especially children. This can reduce the trauma of the courtroom and the attendant danger of meeting the accused. It is also likely to provide more attractive facilities, which are lacking in many of our present courtrooms.

14.144 Special measures should also be given a high priority at these early hearings.

14.145 Timings etc. for the child, including scheduled breaks with a target time of two hours' maximum waiting time should be considered at the GRH.

14.146 There is a clear requirement for an interventionist approach by the Judiciary to ensure these matters are rigorously policed. In short, there must be a much more interventionist approach by the Judiciary to ensure that questioning is designed to obtain accurate information without exploiting developmental limitations, unwittingly or otherwise.

14.147 Those directions given at the GRH by the judge should be committed to written form so there is no room for confusion, and compliance should be monitored by a court progression officer.

14.148 This new approach by the Judiciary will require training. I am encouraged to note that the Northern Ireland JSB has already embarked on this process with a recent workshop for Crown Court judges in October 2018. This workshop addressed these precise issues in the presence of an experienced English judge and senior counsel who were all well versed in similar developments already occurring in England.

46

Rook, P and Ward, R. (2016) *Sexual Offences: Law & Practice*. 5th ed. London: Sweet & Maxwell

- 14.149 The JSB should meet the needs of the child who is giving evidence. The dynamics of the trauma of child sexual abuse should be prioritised in its training programme. Such an approach seems to be currently lacking. It should invoke the assistance of child psychologists and other outside agencies with expertise in this field. It is not enough to rely on this somehow emerging during the courses currently attended by our judges in England, albeit having attended such a course myself, I can say that it is extremely useful.
- 14.150 I understand that each new judge meets the JSB to discuss training, and reference is made to the presence of the *Equal Treatment Bench Book* on the Internet. This is clearly proving inadequate and specific training through lectures needs to be given to address the very weaknesses in the system contained in this chapter.
- 14.151 The first step may be to furnish each judge with a physical as well as an online copy of the *Equal Treatment Bench Book*. It should be present on every judicial desk in some format during a hearing involving a child. Judges need to be encouraged to take its guidance fully into account wherever possible.
- 14.152 Familiarity with that book, better training and an increased understanding of the needs of children would represent the most effective way of ensuring that not only are the issues we have outlined addressed at the GRHs but also ensure a number of other vital steps are taken which would include:
- Wherever possible hearing dates should be suitable for members of the YWS and intermediaries who are familiar to the child.
 - Robustly enquiring into reasons for adjournments, which should be granted only exceptionally.
 - Insisting technology is tested in advance of the hearing before the child arrives and, if necessary, insisting on the presence of an expert to effect this.
 - Where courthouses are unsuitable for children, either considering a change of venue or making such directions as to arrival times of the parties as to ensure the child can arrive at court without meeting the accused or their family/friends. In addition, specifically addressing what can be done with the facilities available at a GRH to reduce the possibility of confrontation.
 - Taking steps to ensure that where appropriate an interim assessment of each child by the intermediary has been carried out and the intermediary has discussed with the YWS the needs of the child.
 - Ensuring there will be familiarisation of the child with the court, the judge and counsel prior to the hearing commencing.
 - Discussion with the relevant intermediary as to the needs of the child before the day of hearing.
 - Ensuring the child sees the ABE interview to refresh their memory at the optimum time for that child and not necessarily on the day of the hearing.

- Careful use of and insistence on simple language that children can comprehend.

Institute of Professional Legal Studies and the legal professions

- 14.153 The Institute of Professional Legal Studies (IPLS), the Bar Council and the Law Society must consider bespoke training and the publication of a manual on advocacy and the handling of child and other vulnerable witnesses in court.
- 14.154 The starting point in trials dealing with children and all vulnerable witnesses should be the assumption that the advocate has undergone specific training about dealing with vulnerable witnesses and children and is able to ask questions in a way that effectively makes it unnecessary to have judicial or intermediary intervention.
- 14.155 Advocates should not undertake such cases unless they have performed such training. It must be recognised that, where an advocate does not have this professional competence, they are in serious dereliction of the duty to the court and in breach of their professional conduct rules.
- 14.156 Lord Thomas, former Lord Chief Justice of England and Wales, said recently:
- “Such competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences are grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer.”⁴⁷
- 14.157 We can usefully borrow from England the Advocacy and the Vulnerable Training Programme developed and implemented by the Inns of Court College of Advocacy in late 2016 to ensure that all advocates understand the key principles behind the approach to, and questioning of, vulnerable people and children in the criminal justice system. A working party should be established to carry out this work.
- 14.158 All advocates who undertake serious sexual offence cases involving vulnerable witnesses and children in the Crown Court or Youth Court are expected to participate. It should be a pan-profession approach involving both defence and prosecution counsel. The objective is to ensure common ground in the principles underpinning best practice.
- 14.159 The course embraces:
- pre-course online training (including lectures from experts such as legal academics and child psychologists covering child development);
 - pre-reading of legal/practical materials;
 - watching GRHs;

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R v Rashid [2017] EWCA Crim 2

- interactive advocacy training; and
- each delegate has the opportunity to participate.

14.160 The materials for the course include an Advocate's Gateway toolkit. These toolkits offer a wide range of good practice guidance for interviewing vulnerable witnesses and defendants in an array of circumstances. In addition, there is an advocacy training video.

Department of Justice

- 14.161 There has been unacceptable delay in taking steps to implement those provisions of the 2014 Marshall Inquiry.
- 14.162 These are highly important provisions for the welfare of children and cannot be overlooked. While the absence of a Minister is an impediment, steps should be taken to have the implementation ready for action once a legislature is restored. To commence virtually afresh at that stage is far too late.
- 14.163 Moreover, the Department of Justice must become more creative and broad-based in its thinking about how the plight of children can be improved in this area. I am surprised that there appears to be no relevant research assistance provided to look beyond the confines of Northern Ireland and, indeed, the rest of the UK for developments in child welfare in serious sexual offences.
- 14.164 Hence it seems to me that sufficient consideration has not yet been given to the Barnahus scheme, which has been introduced in various countries in Europe, is under serious consideration in Scotland and is being piloted now in England. This is a scheme that demands attention in the interests of the welfare of children in Northern Ireland. It has on the face of it many attributes that would merit a pilot scheme in Northern Ireland, along the lines of the Child Houses in London. At the very least it demands anxious scrutiny and analysis of how it is progressing there. I understand that, although the DoJ is aware of the Barnahus model, there is no action within the current Domestic and Sexual Violence and Abuse Action Plan, or the Victim and Witness Action Plan in relation to this model. I note, however, that the DoJ plans to undertake some exploratory work in the near future to gather more information about this model and its effectiveness in other jurisdictions.
- 14.165 I also consider that the Department of Justice should flex its muscle and go one step further than England by actually making it a requirement for publicly funded advocates in serious sexual offence cases to have undertaken approved specialist training. That training should be drawn up and approved by the Department of Justice and Criminal Justice Board in liaison with the Bar Council and the Law Society.
- 14.166 I observe that Lord Judge, a former Lord Chief Justice in England and Wales, has recommended to the Government that rules of professional conduct be made

consistent for the purpose of sexual offence cases. The perception is, however erroneous it may be, that advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a child or other vulnerable person. This perception needs to be dealt with by both the Bar Council and the Law Society.

- 14.167 This would oblige the Bar Council and the Law Society to set up special continuing professional development (CPD) training for those wishing to engage in cases of serious sexual offences involving children. It would further spur the steps that those bodies are taking to introduce mandatory training for its members.
- 14.168 I recognise the commitment of the Department to statutory case management (section 92 of the Justice Act (Northern Ireland) 2015) and to statutory time limits (the Criminal Justice Order (Northern Ireland) 2003). Although not yet introduced, they are genuine statutory attempts to eradicate delay and introduce consistency into necessary case management.
- 14.169 I am bound to caution, however, that statutory straitjackets placed on the discretion of highly experienced Crown Court judges with years of experience in the legal profession and in presiding over such trials can be counterproductive and impede the best interests of children in these harrowing cases.
- 14.170 Each of these cases is unique and is burdened with its own facts. A one size to fit all circumstances will serve only to restrict the vital flexibility that judges require if they are to do justice. These cases are far too complex and facts specific to be squeezed into envelopes that are often all too remote from the realities of the case at hearing. In truth, only those who have served at the coalface with years of proactive experience are in a position to assess what each case requires.
- 14.171 I therefore recommend that these statutory provisions be not implemented. If they are to be implemented, this should not be done without the strongest of judicial and professional guidance with the maximum of flexibility accorded to the Judiciary.
- 14.172 The Department of Justice has published a consultation paper on a revision of the law which protects children from sexual exploitation and abuse.⁴⁸ The consultation looks at existing criminal law relating to areas which include grooming and online exploitation; indecent images of children; child sex dolls and sexual offences involving abuse of trust.
- 14.173 As earlier referred to in this chapter, the Department is seeking views on the current laws and additional measures which will allow proposals to be developed for consideration by a future Justice Minister.

48 The consultation, "Review of the law on child sexual exploitation" was open between 19 February 2019 and 16 April 2019.

14.174 Key amendments relevant to the Review include:

- amending the references to child prostitution and child pornography in Articles 38-40 of the Sexual Offences (Northern Ireland) Order 2008 and replacing them with “sexual exploitation of children”; and,
- reversing the burden of proof in the reasonable belief defence in relation to sexual offences against children as set out in the 2008 Order.⁴⁹

Police Service of Northern Ireland

14.175 The PSNI, despite the lack of resources, needs to appoint, within the Public Protection Branch (PPB), officers who are specially trained by outside agencies and who specialise in serious sexual abuse of children. Children, both complainants and accused, need to be handled sensitively, as do their parents and grandparents. The welfare of a child or grandchild of an accused should never be raised without the most solid foundations. Moreover, children’s needs require special attention. For example it has to be recognised that taking away a child’s diary or mobile phone for months on end may not only be disproportionate but may have a profound effect on the child as I found out from the NSPCC in Craigavon during a visit in January 2019.

14.176 Similarly, wherever possible, interviews should not take place at a police station. The prospect of visiting a police station can inhibit young people from coming forward to the police and can be terrifying for children.

14.177 It has to be recognised that seeing several different detectives dealing with the offence, can be extremely disconcerting for children.⁵⁰

14.178 ABE interviews need to be revisited. The optimal position would be that such interviews should be conducted by specially trained child psychologists wherever possible. However the reality is that there is a paucity of child psychologists in Northern Ireland and in any event they would need to be highly trained as to the provisions of the Police and Criminal Evidence legislation so as to be able to conduct such interviews in an admissible fashion. Recognising this, I consider that a pragmatic solution is to have such interviews conducted by a small specialised, highly trained and carefully selected cadre of PSNI officers. The role of child psychologists in the training of such officers would be vital. I also strongly encourage the practice of critical analysis of such interviews through video recordings of actual interviews on a periodic basis.

14.179 The Child Care Centre has recorded that, at present, it is their experience that the PSNI underuse social workers who have considerable experience in communicating with children. Experts should be available to ensure the

49 Articles 6-22, 23-26, 32-33 and 37-40 of the Sexual Offences (Northern Ireland) Order 2008

50 Visit to the NSPCC in Craigavon, January 2019. Officers also have to recognise that failing to take steps to advise the child that the perpetrator has now been released, and the area in which he is living etc. can cause enormous concern to a child if this information is discovered without warning.

equipment is working properly. I make it clear of course that the fact that interviews would be conducted by child psychologists does not preclude input from the police during the interview through for example, an earpiece or during breaks.

- 14.180 If police officers are to continue to perform this ABE task, police officer training on ABE interviewing in general requires outside guidance rather than a reliance on internal training. In England, for example, some judges give of their free time to assist in some training sessions. Only carefully selected officers who have exhibited the ability to establish a rapport with children should be permitted to participate in such interviews. Furthermore, the services of the Bar, the Law Society and child psychologists should be invoked.

Public Prosecution Service

- 14.181 Similarly, the PPS needs to appoint within its ranks prosecutors specially trained in such child matters, who will have a general oversight of cases of serious sexual abuse involving children from the outset.
- 14.182 Such a specialist prosecutor should be offering prosecutorial guidance to the PSNI from the time the crime involving child sexual abuse is reported.
- 14.183 The PPS also needs to prioritise dealing with cases involving children (see chapter 9) in order to reduce delay.
- 14.184 Victim Support NI indicates that PPS prosecutors often postpone meeting children and vulnerable witnesses until the day of trial, notwithstanding the existing practice advocating early meetings. The PPS should consider the use of live link to enable early meetings with counsel to take place outside the court setting.
- 14.185 I note with interest that the Criminal Justice Inspection Northern Ireland Report of November 2018 records;

“Whilst the PPS have made improvements... to its approach to dealing with victims and witnesses, the evidence from this inspection shows there is still significant work to be done to fully meet the needs of victims, particularly where they are vulnerable or have been subject to serious offences.”⁵¹

51 Criminal Justice Inspection Northern Ireland (2018) Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland. Belfast: Criminal Justice Inspection Northern Ireland at paragraph 4.39

- 14.186 There is a need to ensure that consultations with child and vulnerable victims are undertaken in an environment and manner which is in keeping with the principles of Achieving Best Evidence in criminal proceedings.⁵²
- 14.187 Prosecuting counsel need to be more interventionist during the process to ensure judges are properly managing cases involving vulnerable witnesses. Judges should be invited, for example, to consider whether there should be a GRH. Prosecutors should also be encouraged to bring to a judge's attention that counsel has departed from appropriate standards in respect of the proper treatment of vulnerable witnesses.

Northern Ireland Courts and Tribunals Service

14.188 The Northern Ireland Courts and Tribunals Service should:

- carry out an audit of facilities suitable for child witnesses in all Crown Courts and draw up a plan to meet deficiencies. In this context I draw particular attention to the human rights standards that I have set out earlier in this chapter;
- provide appropriate child furniture and toys in all link rooms from where children are likely to be giving evidence;
- take steps to ensure adjustable camera angles are available in live link rooms;
- draw up a list of non-court venues and make provision for non-court remote live link, such as NSPCC premises, the Rowan Centre or investment in mobile live link equipment; and
- take urgent steps to update and modernise the technology available in courts.

14.189 I understand steps are being taken, namely:

- From 5 March 2018, the NICTS has agreed a new contract for the support and development of NICTS courtroom technology. Under this contract, all NICTS technology currently used in courts will be refreshed and standardised over the lifetime of the contract (five years). This will improve and modernise current court facilities (including that in witness rooms) and will provide a foundation for criminal justice organisations to make it easier to present digital evidence in court.
- In recent months, the NICTS has been working with the supplier to agree the technical architecture of the new solution. It is important to take the

52 Department of Justice and Criminal Justice System Northern Ireland (2012) *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy* Belfast: Department of Justice and Criminal Justice System Northern Ireland as cited by Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland at paragraph 4.39

time to get this right, otherwise we may not get a solution that is fit for purpose. The first two proof of concept courtrooms will be installed before the end of March 2019. NICTS intend to establish a formal project to take forward rollout in 2019.

- Meanwhile, the NICTS has established the Electronic Evidence Working Group, with representatives across Criminal Justice Organisations (CJOs) and the DoJ. The group meets three times a year and is mainly a communication forum where issues/problems can be discussed. The purpose is to ensure that all CJOs are aware of each other's future plans. A situation must not arise where one CJO takes forward a project without considering the impact on other organisations, which led to the recent difficulties in presenting ABE evidence in court.
- One outcome so far from this working group is that, following the problems displaying body cam evidence, the PSNI has now agreed to provide laptops in designated courtrooms so that this evidence can be displayed.

14.190 Finally, there should be a duty for a Registered Intermediary, as a communication specialist, to assess a child defendant before the trial to enable that defendant to prepare effectively communicate with the court and understand all aspects of the trial process. I also do not understand why live link should not be available to a child defendant who is suffering fear or distress.

Responses

14.191 Virtually without exception the responses to this chapter were all very positive and supportive of the recommendations made. The following topics surfaced as the main issues arising in the responses.

The Barnahus Project

14.192 All of the responses on this project were extremely positive about the possibilities of a similar system being invoked for children in Northern Ireland.⁵³ The Children's Commissioner described the project as "as close to an ideal system as we have seen". There was a general desire expressed to assist the Department of Justice to explore the implications of this model.

14.193 194. The Barnahus model chimed with those respondents who were anxious to encourage a less adversarial style of trial process for children and vulnerable adults.⁵⁴

53 NICCY; the Rowan SARC; NSSPC Northern Ireland; SBNI; the Retired Association of Probation Officers; Women's Aid Federation Northern Ireland; Rape Crisis Network Ireland; Dr Alison Livingstone, Consultant Paediatrician and Clinical Lead for Paediatrics at the Rowan SARC; Dr Olivia Smith, Senior Lecturer, Criminology at Anglia Ruskin University; Caroline Holloway, Service Centre Manager at NSPCC Craigavon; Dr McMonagle, Consultant Clinical Psychologist working in mental health.

54 Womens Aid Federation Northern Ireland.

14.194 I strongly welcome the decision by the Department of Justice to lead a delegation of informed stakeholders to visit the Lighthouse facilities in London. Equal enthusiasm to visit that project and to be part of such a delegation has been expressed by the PSNI, NICCY and PPS.

Articles 38/39/40 of the Sexual Offences (Northern Ireland) Order 2008 'Child Prostitution'

14.195 Those who responded to this issue universally supported removal of the reference to "child prostitution" in this legislation and any related or future legislation or guidance.⁵⁵ The essential argument is that a child cannot be a prostitute as this implies choice and is victim blaming. NSPCC suggest that it would be more appropriate to refer to "children who have been subjected to child sexual exploitation". Other suggestions include reference to a "child abused through prostitution".

14.196 CARE Northern Ireland suggested that the reason behind the change is not that the term 'prostitution "implies any notion of a voluntary choice on the part of the individual", but rather "prostitution (of persons of any age) is a form of commercial sexual exploitation and a form of violence against women and girls."

14.197 This may on the face of it appear to be a small legislative matter but I believe it carries huge symbolic significance as to how we view children in the context of serious sexual offences.

Training

14.198 All respondents welcomed the emphasis that the Preliminary Report placed on training.⁵⁶ There was a general push for child trauma based awareness within the Judiciary, legal advocates and PSNI. The Safeguarding Board for Northern Ireland (SBNI) are currently involved in an Early Intervention Transformation Project, the aim of which is to increase awareness across all member agencies of the impact of trauma and adverse childhood experiences upon a child. The PSNI are one of the agencies engaged with this project.

14.199 The Law Society and the Bar Council clearly welcome training proposals to complement the work they are already doing. The Law Society undertook to consider the recommendations made about further training. The Bar Council embraced the proposals for training of new barristers about the basic principles of questioning children and vulnerable adults, together with the suggestion

55 NSPCC Northern Ireland; CARE Northern Ireland; NICCY; Ms Simons, a senior manager with the South Eastern Trust Safeguarding Division.

56 SBNI (this is the key statutory mechanism for agreeing how the relevant organisations in Northern Ireland will co-operate to safeguard and promote the welfare of children and young people. The membership includes all the key statutory bodies responsible for the protection of children); PSNI; Law Society NI; The Bar of Northern Ireland; Ms Connolly; NHIRC; Dr Livingstone; NSPCC NI; The Rowan SARC; CARE NI.

that the two bodies set up special CPD training and bespoke manuals for those engaging in these types of cases.

- 14.200 The Bar has undertaken to increase the number of CPD training opportunities for members around child sexual exploitation, vulnerable witnesses and child protection, which is now accredited as an example of the mandatory advocacy training that all practicing barristers are now required to undertake in every CPD year. It has also provided this training in a range of formats as a support for practitioners. Barristers can access CPD resources such as “Raising the Bar: the handling of vulnerable witnesses, victims and defendants in court” from the Advocacy Training Council to which I have referred to in the report.
- 14.201 It has also indicated that it is fully committed to continuing to expand on the catalogue of such specialist CPD content to ensure practitioners have an enhanced awareness of issues around children’s rights, child protection, developmentally appropriate questioning and the dynamics of child sexual abuse. It has developed a vulnerable witness CPD resource pack that highlights best practice training on handling vulnerable witnesses.
- 14.202 Both the Bar Council and the Law Society, in looking at the recommendation that it be a matter of specific professional misconduct to inappropriately question a child or vulnerable witness, firmly assert that such inappropriate questioning is already a matter of professional misconduct and both commit themselves to promote the highest standards of practice to safeguard clients and the public interest.
- 14.203 Whilst acknowledging the emphasis on training, the NIHRC recommended that such training be extended to all personnel in contact with child victims in the criminal justice system.
- 14.204 The NSPCC felt that there was little evidence that the Judiciary were taking the Equal Treatment Bench Book into account. They urged that judges be encouraged to take its guidance fully into account whenever possible.
- 14.205 In this context a number of respondents made a strong plea for the need for education at every level of societal life about the harm that child abuse does and the impact it has on the lifelong trajectory of an individual.⁵⁷
- 14.206 The PSNI mounted a stout defence of the criticisms implicit in this chapter which included the following points:
- PSNI have a bespoke Child Abuse Investigation Unit incorporating child sexual exploitation officers who are provided with training on the Specialist Child Abuse Investigators Development Programme.

- Outside input on the training courses from child psychologists in terms of child development, the PPS and Social Services in terms of disabilities already exist.
- However, they recognise that input from the Judiciary in training would also be beneficial.
- There is also a PSNI Policy Lead for child abuse including sexual exploitation as well as a Child Safeguarding Officer attached to the Public Protection Branch.
- There is no capacity to have a bespoke unit to deal with all cases involving children regardless of crime type.

Facilities

14.207 The Review's criticisms of the lack of adequate facilities for children was highlighted by a number of respondents. Moreover criticism was made that the Justice Act (Northern Ireland) 2015 had not yet been fully implemented in a number of areas.⁵⁸ The NIHRC not only endorsed the review of facilities required for children set out in the chapter, together with the proposed plan to remedy these deficiencies, but they recommended that this be carried out expeditiously with reference to the relevant human rights standards and the need for appropriate resources to be allocated.

ABE Interviews

14.208 The ongoing nature of the problems facing ABE interviews continue to be a source of complaint in the responses. The Bar Council recorded; "[M]embers have suggested that there is a compelling need to ensure that the recording of the complainant's ABE interview is conducted by independent qualified lawyers. Concern has been expressed regarding these interviews being conducted with substantial breaks and no warnings being given about discussions on evidence." These comments about the manner in which these ABE interviews are conducted coincided with criticism also emanating from the Judiciary to whom I have spoken. Whilst I have now changed my mind about the advisability of lawyers carrying out the interviews, I share the general note of despair about the current standard of many ABEs.

14.209 The PSNI again mounted a strong defence of the manner in which they conduct ABE interviews. It is contended that the training and conduct of interviews is in line with nationally approved guidance set out in "Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing victims and witnesses, the use of special measures and the provision of pre-trial therapy"⁵⁹ Understandably

58 SBNI; NSPCC NI; NIHRC.

59 Department of Justice and Criminal Justice System Northern Ireland (2012) Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy Belfast: Department of Justice and Criminal Justice System Northern Ireland

they assert that ABE interviews can be complex and information is interwoven, often requiring several interviews to extract all information. It should be borne in mind that complainants have suffered significant trauma or are vulnerable, for example, by reason of age at the time of interview and therefore not all information will flow in a time ordered sequence.

- 14.210 In a welcome development a PSNI ABE Working Group has recently been established. PSNI contest the proposal that interviews should be conducted by a child psychologist and members of the Bar on the basis that this raises a question around expertise of collating and assessing evidence. The role of barristers is one of advocacy, not investigation and the two different roles should not be conflated. It is contended that the recommendations in the Review risk the carefully balanced role and responsibilities in the Northern Ireland criminal justice system where there is operational independence of the police, and thus the PPS or independent Barristers acting as interviewers do not have the capacity to direct police operational action. In short, the PSNI contended the report unjustifiably reflects on the skills of police officers as being subservient in terms of capability by comparison to legal figures. I urge the PSNI to look carefully at how these ABEs are carried out in the Lighthouse project in London with child psychologists and/or highly trained police officers.
- 14.211 Finally, in this context the PSNI indicate that they would welcome outside input from the Judiciary and would like it known that they do have outside input in their training courses from child psychologists in terms of child development, and input from social services in terms of disabilities. All ABE interviews are conducted by fully trained and accredited PSNI officers.

Special Measures for Children

- 14.212 I was very concerned to note the assertion by the Young Witness Service of the NSPCC that the full range of special measures is not available and applied to children even when it might be in the child's best interest for them to be applied. If this assertion is correct it is a damning indictment of how we are treating the interests of children in serious sexual offence cases.
- 14.213 Accordingly the Review made contact with the Deputy Principal Statistician in the Policy and Information Unit of the PPS. We were informed that the following special measures applications were made in the last two financial years:
- in 2016/17 there were 252 special measure applications across 163 sexual offences cases; and
 - in 2017/18 there were 209 special measure applications in 133 sexual offence cases.
- 14.214 Unfortunately however, the PPS were unable to provide a breakdown for the number of such special measures which were sought in the case of children.

The breakdown between adult/children information is not held on the PPS case management information system in such a way that the PPS can link each special measures application to the specific witness or victim on the case. This is very unfortunate and is another example of where the lack of appropriate data inhibits an informed appreciation as to whether or not the procedures in serious sexual offences dealing with children are being effectively implemented. I recommend that the PPS takes steps in the future to amend their case management information system in a manner that permits the number of special measure applications in the case of children to be calculated on a yearly basis.

Paying for Sexual Services of Children

14.215 CARE NI in its response raised the concern that perpetrators who exploit children by paying for sexual services of the child are not being properly prosecuted.

14.216 There are two statutory offences in relation to the act of paying for sexual services:

- Article 37 of the Sexual Offences (Northern Ireland) Order 2008 – paying for sexual services of a child, which carries a sentence of up to life imprisonment for victims under 13.
- 14 years imprisonment where the victim is aged 13-17. This offence carries a defence of reasonable belief that the child is 18 or over if the child is aged between 13 and 17.
- Article 64A of the 2008 Order in relation to paying for sexual services of a person, which was enacted 1 June 2015 by way of an amendment to the Order, carries a sentence of imprisonment of up to one year. The age of the “person” is not defined making it an available offence in all cases whether a child or adult is concerned.

14.217 CARE NI cited two recent possible cases where the latter offence was preferred even though allegations of the purchase or attempted purchase of sex was from a child. The fear was therefore that, if convicted, such perpetrators would receive a much lighter sentence than was intended by the law as set out in Article 37 with reference to children.

14.218 The PPS have responded to the effect that offences of this type involving children should in principle be prosecuted as an Article 37 offence not least because of the much higher available sentence. It was stressed that there is no policy decision practice to prosecute for the Article 64A offence on the basis that it is easier to prove. The PPS assert that they will select the offence that best fits the evidence in the particular case and which enable it to prosecute the case at its height. I welcome the careful observation that CARE NI is keeping on

this important aspect of sexual crime against children and it should continue to monitor developments in the future.

Miscellaneous Matters

- 14.219 A number of the issues raised in responses on this chapter are dealt with in other chapters. These include the advisability of reform to the Criminal Law Act section 5 in the context of children, the need for education of children from primary school age upwards on matters relevant to the abuse of children, the role of pornography in influencing attitudes towards children, and the suggestion of the need for an advocate for victims of child abuse to be available in these cases.
- 14.220 The NICCY response properly drew attention to the recommendations concerning extension of RIs and other special measures to those children who are defendants. This is an area that must not be overlooked. I have already expressed my profound concern about the suggestions that special measures are not being fully developed in the case of children.
- 14.221 The suggestion that all young witnesses should have an intermediary assessment is not a position with which the Department of Justice agrees. This is not least due to the fact that should such a condition be applied in a Northern Ireland context, it would cripple the scheme locally and recreate the problems experienced in England and Wales in terms of significant time delays and a reluctance for police to request a Registered Intermediary due to the delay that it causes. Rather, and more importantly, the Department considers that the use of, and access to a Registered Intermediary, should continue to be determined on a prioritised basis of need.
- 14.222 The position locally is that the PSNI use Registered Intermediaries for all children aged seven and under and it must consider the use of an intermediary for children aged eight to 11. Over that age the use of a Registered Intermediary is dependent on whether or not communication issues are identified. The Department sees no need to provide Registered Intermediaries for older children with no communication difficulties then potentially preventing an individual with significant communication difficulties having access to the service.
- 14.223 I conclude the review of the responses by drawing the attention of the relevant statutory bodies to the helpful response from the Information Commissioner's Office in this context. In so far as the recommendations make provision for non-court remote live links such as NSPCC premises or investment in mobile live equipment, this is likely to require a Data Protection Impact Assessment for such a new piece of technology involving the processing of special category data of vulnerable data subjects on a large scale.
- 14.224 Moreover, extending the availability of live link measures to a child defendant on the basis of fear or distress, which is currently the position, is likely to

require consultation with the Information Commissioners Office as it would be a legislative change concerning the processing of personal data. Finally, in this context, extending the provision for RIs to a child defendant pre-trial (beyond the police interview stage) is likely to require consultation with the Information Commissioner's Office as it would be a legislative change concerning the processing of personal data.

Conclusions

- 14.225 I was greatly encouraged by the positive response to the concept of Barnahus and I have no hesitation in strongly encouraging the Department of Justice to investigate this concept as soon as possible. It will be noted that the Scottish Government has concluded that there is no need for primary legislation to invoke such measures and hence there is no need for delay in considering a concept that is potentially crucial to the law and procedures governing how we deal with children as complainants.
- 14.226 I have no hesitation in strongly urging a fresh recommendation to the effect that we follow the example in England and Wales of replacing legislative references to child prostitution and pornography with reference to "child sexual exploitation".
- 14.227 I welcome the enthusiasm with which all the statutory bodies and the legal agencies have embraced the need for training. I regard training, particularly in the field of children, that invokes the outside agencies and experts such as a child psychologist etc. as being fundamental to any change in the culture that we are seeking to introduce as to how we deal with children.
- 14.228 It is clear that a number of stakeholders consider that we urgently need to review the facilities in our courthouses for children, and the alacrity with which respondents have embraced this need is encouraging.
- 14.229 The need to embrace fully all the recommendations contained in the Equal Treatment Bench Book, as set out in my recommendations, is compelling and pressing. I share the view expressed by the NSPCC NI that regularly adopting the main thrusts of the Equal Treatment Bench Book "would mark a fundamental departure from the way access to justice is delivered to the majority of children".
- 14.230 ABEs are clearly vexed and complex matters. It was certainly never the intention of this Review to suggest that the officers who carry out these interviews currently on behalf of the PSNI are 'subservient' to the legal profession. The fact of the matter is that they have different skill sets, which have to be applied in the cases of children in a different context. The Barnahus concept is predicated on the principle that interviewing children needs highly specialised skill sets, which are probably only found in child psychologists, who of course, if they

eventually conduct cross-examination, will be guided in the questioning by input from the PSNI, defence counsel, prosecuting counsel and judge.

- 14.231 However, if the purity of this approach cannot be obtained in every case, then the skill levels of police in conducting these interviews has to be raised from its present level. The universal criticisms visited on many of the ABEs by most lawyers and judges simply cannot be ignored. It is not enough to assert that current training is adequate when manifestly the results are not acceptable. There needs to be more planning of interviews, more training by child psychologists and more careful selection of officers who have an obvious flair for this type of work. Perhaps most important of all, there needs to be regular monitoring and critical analysis on an ongoing basis of individual interviews by those with expertise in the field.
- 14.232 In short I believe that this chapter reflects the weaknesses that exist procedurally in the system and illustrates the gap between the vision of policy on one hand and the reality of experience on the other. It reveals the flawed implementation of the law, which has existed now for several years. This Review hopefully places an emphasis on solutions which are radical and which in some cases are 'out of court' as key components of securing justice for children within the current law and procedures.

Recommendations

Training

185. Regular mandatory training should be carried out on the issues of children's rights, child protection, developmentally appropriate questioning, and the dynamics of child sexual abuse in serious sexual offences in the court process (with specific reference to UNCRC and the Lanzarote Convention) by the Judicial Studies Board, the Law Society, the Bar Council, the PPS, the PSNI and other major stakeholders in the criminal justice system dealing with children.
186. * Publicly funded advocates in serious sexual offence cases must have undertaken approved specialist training in serious sexual offences involving children.
187. Each Crown Court judge, to be given a physical copy of the Equal Treatment Bench Book.

Judiciary

188. In every Crown Court case involving sexual offences against a child either as complainant or as accused, Crown Court judges should, well in advance of the date of trial and in accordance with the Equal Treatment Bench Book consider:
 - the use of closed courts and combined measures for the child;
 - the possibility of alternative court venues or non-court facilities such as non-court remote live link if court facilities are unsuitable for the child;
 - prioritising the attendance of children at a fixed time early in the day, with a target maximum waiting time from arrival of two hours;
 - making provision at the outset for adequate breaks during the hearing;
 - adopting a flexible attitude and seeking the advice of the intermediary as to the manner in which the child gives evidence and where that evidence should be given;
 - ensuring, wherever possible, hearing dates are suitable for members of the YWS and intermediaries who are familiar to the child;
 - robustly enquiring into reasons for adjournments, which should be granted only exceptionally;
 - insisting technology is tested in advance of the hearing before the child arrives and that a suitable expert is available;
 - ensuring there is an interim assessment of each child by an intermediary where appropriate in light of their communication

difficulties and ascertaining if the intermediary has discussed the needs of the child with the YWS;

- discussion with the relevant intermediary as to the needs of the child before the day of hearing;
- ensuring that there will be familiarisation of the child with the court, the judge and counsel prior to the hearing commencing;
- careful use of and insistence on simple language and control of aggressive cross-examination;
- ensuring that child witnesses are not cross-examined in an authoritarian or frightening manner; and
- ensuring that stereotypical mythology about the behaviour of children is not permitted and is addressed at early hearings.

189. All cases involving child complainants or other vulnerable witnesses in serious sexual offences should be afforded an obligatory case management hearing, with appropriate administrative staff to ensure timely and comprehensive compliance with directions.

190. GRHs should be introduced in all hearings involving child complainants/vulnerable adults or a child/vulnerable adult accused addressing such matters as:⁶⁰

- defining the issues for trial;
- proposed questions to be asked in cross-examination, with written notice in advance to the judge and the intermediary of their content for his/her approval;
- emphasis on the need to avoid tag questions, to use short and simple sentences and easy-to-understand language, and to avoid a tone of voice that implies an answer;
- time limits on cross-examination;
- if limitation is to be put on cross-examination, how the jury will be directed;
- the presence of an intermediary and YWS;
- an emphasis on agreed evidence to shorten the trial;
- any legal aid complications arising;
- disclosure in general and third-party disclosure in particular, with firm involvement of the defence and prosecution;
- venue including live links;
- special measures;
- timings; and

- the need for a more interventionist judicial approach.

191. Directions given at the Ground Rules Hearing to be committed to written form.

Department of Justice

192. Implement without further delay, and to the extent deemed appropriate, the provisions of the 2014 Independent Inquiry into Child Sexual Exploitation.
193. Implement fully the recommendations of the Northern Ireland Audit Office report of March 2018.
194. Engage research assistance to keep abreast of developments in child sexual abuse and draw on research and innovative practice overseas.
195. Give urgent consideration to the advantages of the Barnahus scheme and Child House pilots now operating in England and to consider the viability of a similar pilot in Northern Ireland.
196. Given the unique circumstances that often arise with child complainants and defendants in serious sexual offences, approach with caution the implementation of statutory case management and time limits, which do not carry the imprimatur of the Judiciary.
197. Provide legal representation for child complainants until the trial commences.

Institute of Professional Legal Studies and the Legal professions

198. The Bar Council and the Law Society to set up special CPD training and bespoke manuals for those wishing to engage in cases of serious sexual offences involving children.
199. New barristers should receive training and guidance both whilst at the Institute of Professional Legal Studies and at the Bar about the basic principles of questioning children and vulnerable adults.
200. It should be a matter of specific professional misconduct to inappropriately question a child or vulnerable person.

Public Prosecution Service

201. The PPS to take further steps to ensure pre-trial engagement with the child or family well in advance of trial and that prosecuting counsel must arrive in court with a detailed awareness of the case.
202. The PPS to appoint prosecutors with a special expertise in the dynamics of child sexual offences, who should have exclusive oversight of all such cases from the time of reporting to the PSNI until disposal at trial.

203. The PPS should make it a condition of the retainer for serious sexual offences involving children that counsel have attended a specified awareness course.
204. The current case management should be amended to record special measure applications in the case of children.

Police Service of Northern Ireland

205. The PSNI should revisit its training and selection of officers for ABE interviews, invoking the assistance of the Judiciary, the legal professions and other outside bodies, including child psychologists.
206. The PSNI should take steps to ensure adjustable camera angles, with the presence of a camera operator, and adequate sound quality are available in rooms where ABEs are occurring.
207. The PSNI should appoint from within the PPB or Child Abuse Investigation Unit (CAIU), a specialised child unit that will deal exclusively with child witnesses.
208. Provide appropriate child-sized furniture and toys in all ABE rooms from where children are likely to be giving evidence.

Northern Ireland Courts and Tribunals Service

209. Carry out an audit of facilities suitable for child witnesses in all Crown Courts and draw up a plan to meet deficiencies.
210. Provide appropriate child-sized furniture and toys in all link rooms from where children are likely to be giving evidence.
211. Take steps to ensure adjustable camera angles are available in live link rooms.
212. Draw up a list of non-court venues and make provision for non-court remote live link such as NSPCC premises or investment in mobile live link equipment.
213. Introduce a system that records waiting times at court for child witnesses, commencing from time of arrival.
214. Set up a system of feedback of the experience of children after the case is completed to better inform future changes.
215. Ensure adequate equipment is available to encourage a child to act naturally and in a relaxed manner during the ABE experience.
216. Ensure the availability of an RI at all stages for all child complainants and accused children, where that is deemed appropriate in light of the child's communication difficulties.

217. Ensure that an initial needs assessment is carried out on all child complainants and accused children, where it is deemed appropriate in light of any communication difficulties.
- 218.* Article 21A of The Criminal Evidence (Northern Ireland) Order 1999 should be amended to extend the availability of live link measures to a child defendant on the basis of fear or distress.
- 219.* The phrase 'child prostitute' should be removed from existing legislation and not included in future legislation. It should be replaced with the phrase 'child sexual exploitation'.

Appendix D

Statistics from the PSNI

1. Sexual offences recorded crime has been increasing year on year with 3,443 crimes recorded in 2017/18. 1,936 of these related to children. Since 2011/12 the number of child victims of sexual offences recorded crime has almost doubled from 985 to 1,936 in 2017/18, an increase of 96.5%.
2. Over the same period there has been a 72.4% increase in sexual offences recorded crime for victims excluding children.
3. The percentage change in terms of increases, year on year for child victims of sexual offences recorded crime, has been declining. There was a high change of 26.7% between 2012/13 and 2013/14 but this has dropped to a 3.6% increase between 2015/16 and 2016/17 and also between 2016/17 and 2017/18. The percentage change in terms of increase between 2016/17 and 2017/18 for victims of sexual offences recorded crime excluding children was 11.3%.
4. Children make up the largest proportion of victims of sexual offences recorded crime. In 2013/14, 61.5% of victims of sexual offences recorded crimes were children. This has dropped slightly to 58.4% in 2017/18.
5. Of those under 18, the largest proportion are in the 11-15 age category (51.8% in 2017/18). Those aged 11-15 relate to three-tenths (30.2%) of all victims of sexual offence recorded crimes in 2017/18.
6. In 2017/18, for child victims of sexual offences recorded crime, sexual assault on a female was the highest proportion of offences (29.6%) followed by sexual activity offences (28.7%). Rape (including attempts) makes up 1 in 5 (20.4%) sexual offences recorded crimes for children in 2017/18.
7. For offences of sexual assault on a female with a child victim, 43.6% relate to children 10 years and under while 42.8% are for 11 – 15 year olds in 2017/18. The number of child victims of sexual assault on a female have increased by 84.2% from 2011/12 (311) to 2017/18 (573).
8. In 2017/18 for offences of sexual assault on a male with a child victim, 65.0% relate to children 10 years and under. Figures for child victims of sexual assault on a male have more than doubled between 2011/12 and 2017/18 from 124 to 257.
9. Rape (including attempts) for child victims have increased by 47.9% between 2011/12 and 2017/18. In 2017/18 around a third (33.1%) of child victims of

rape (including attempts) were 10 years and under and 42.3% relate to 11-15 year olds.

10. Child victims of sexual activity offences have increased from 207 in 2011/12 to more than two and a half times this in 2017/18 (556). The majority of child victims in 2017/18 of sexual activity offences were in the 11-15 year age bracket (77%). This legislation relates to children under 16.

PPS Sexual Offences Relating to Children⁶¹ (Excluding Indecent Images) 2012/13 to 2017/18

11. The number of files with sexual offences against children received by the PPS has varied across the last six years with a high of 492 cases in 2012/13. A total of 452 cases with sexual offences against children were received in 2017/18, an increase of 24.2% on 2016/17 which had the lowest number of cases across the six years (364).
12. The number of decisions issued by the PPS for suspects with sexual offences against children varied between 2012/13 and 2017/18 with a high of 627 in 2012/13 and a low of 266 in 2016/17.
13. The majority of decisions issued by PPS for sexual offences against children are for no prosecution. 2016/17 saw the highest proportion of suspects for these offences prosecuted on indictment (30.5%). This dropped to 15.9% in 2017/18.
14. The overall conviction rate for defendants dealt with in the Crown Court for sexual offences against children has varied between 2012/13 and 2017/18. The conviction rate reached a high of 79.0% in 2015/16 but this has fallen to 60.0% in 2017/18.
15. 10.6% of defendants dealt with in the Crown Court for sexual offences against children pled guilty to all offences in 2017/18, down from 19.5% in 2016/17.

61 Relates to sexual offences that specified the victim was a child in the offence description.

Chapter 15

Training

*There are many paths that lead us as we muddle through the throng.
There are many roads to follow to avoid the one that's wrong.*

**'A Journey's Wish'
Leslie Owen Wilson**

Issue

Is sufficient training given to the main participants in the criminal justice system on serious sexual offence issues so as to ensure the law is properly interpreted and procedures are appropriately followed?

Current practices

- 15.1 There are excellent guides to both current practices and opportunities to improve training, and on which I have drawn heavily in this chapter.¹
- 15.2 As already indicated in chapter 14, The Marshall report of 2014 included the following recommendations relevant to training:
 - “Supporting Recommendation 45: Public Prosecution Service (PPS) should ensure that prosecutors dealing with sexual offences against children continue to receive training at regular intervals on the dynamics of child abuse, including child sexual exploitation (CSE).
 - Supporting Recommendation 46: Awareness raising about the dynamics of child abuse and CSE in particular should be available for all legal personnel and should be mandatory for all legal professionals dealing with child abuse cases. This should be made the responsibility of the PPS for its own legal staff, the Northern Ireland Bar for its staff, and the Judicial Studies Board for Judges.”
- 15.3 I have also sought and received extremely helpful information on training from the Judicial Studies Board (JSB), the Northern Ireland Bar Council, the Law Society of Northern Ireland, the PSNI, the PPS, and the Institute of Professional Studies as to the current training practices by these bodies.

¹ *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry*, initiated by Ministers in 2014 ('the Marshall report'); the current strategy, *Stopping Domestic and Sexual Violence and Abuse in Northern Ireland* (Department of Justice, 2015); the Department of Justice commissioned 'Northern Ireland Victim and Witness Survey (NIVWS)' in 2016, and the response thereto; and a research report commissioned by the Department of Justice, *Addressing Domestic and Sexual Violence and Abuse: Identifying Best Practice* Professor Monica McWilliams and Dr Jessica Doyle, Transitional Justice Institute, Ulster University, October 2017 ('the McWilliams Report').

International standards

- 15.4 The EU Victims' Rights Directive 2012/29/EU requires that:
- “Officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.”
- 15.5 That Directive specifically details that the Judiciary and lawyers should also have access to both general and specialist training to increase awareness of the needs of victims² in line with the nature, level and contact with victims. The “training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.”³
- 15.6 The Committee of Ministers' Recommendation on Assistance to Crime Victims further specifies, “specialised training should be provided to all personnel working with child victims and victims of special categories of crime, for example, domestic or sexual violence ...”.⁴
- 15.7 The content of such training should have regard to the relevant human rights standards.⁵ The Istanbul Convention further requires that training should include how to prevent secondary victimisation⁶ and a co-ordinated multi-agency approach.
- 15.8 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has highlighted, “Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.”⁷
- 15.9 Despite the persisting frailties in the law and procedures on serious sexual offences, I am satisfied that the public at large and the complainants and accused persons in particular can be reassured that the training of many stakeholders in the criminal justice system on issues surrounding serious sexual crime, whilst still in need of reassessment, has been taken seriously particularly in recent years. To underline this I consider it worthwhile to highlight that training in some detail.

2 Article 25(2) and (3) of the EU Directive 2012/29/EU

3 Article 25(5) of the EU Directive 2012/29/EU

4 Committee of Ministers' Recommendation on Assistance to Crime Victims at paragraph 12.3

5 Committee of Ministers' Recommendation on Assistance to Crime Victims at paragraph 12.5

6 Article 15(1) The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

7 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19 Violence against women* (1992) paragraph 24(b)

The Judiciary

- 15.10 Members of the Judiciary are provided with up-to-date developments either through JSB seminars in Northern Ireland or through attendance at the Judicial College, or events elsewhere in the UK. Recent examples include the October 2018 Crown Court workshop on pre-recorded evidence-in-chief and cross-examination of witnesses in serious sexual offence cases and a workshop on jury directions in February 2019 which included discussions around jury myths and stereotypes together with some of the recommendations about the use of videos etc. in this Review.
- 15.11 Crown Court Judiciary are sent to the Judicial College's training course in England and Wales on serious sexual offences which is, therefore, essentially responsible for the detailed content of the training.
- 15.12 Hence, up-to-date training is given a high priority. As an example of a swift response to training needs, upon receipt of the Marshall report in March 2015, the matter was placed before the subsequent meeting of the Judicial Studies Board on 21 April of that year. The Board agreed that, in compliance with recommendation 46, the full report (recommending mandatory awareness training about CSE) would be distributed to all courts Judiciary under cover of an email specifically advertng to that recommendation and the requirement to raise awareness of the matters contained within the report. Accordingly, a circular was issued to judges and deputies on 5 May 2015.
- 15.13 The JSB and the Office of the Lord Chief Justice (OLCJ) were subsequently represented at a conference, "Protecting Children from Sexual Exploitation in Northern Ireland: Learning the Lessons", organised by the Northern Ireland Commissioner for Children and Young People, on 17 September 2015, at which Kathleen Marshall, the report's author, was the main speaker.

The Bar Council of Northern Ireland

- 15.14 The Bar Council takes very seriously the matter of professional training and offers lectures, seminars and conference attendances on matters of serious sexual offences.
- 15.15 Thus, for example, in response to the Marshall report in November 2014, the Bar confirmed it would continue to deliver specialist training to publicly funded barristers. The training programme included child abuse and child sexual exploitation, vulnerable witnesses, violence against women and representation of those with communication needs. The Bar offered this training through Continuing Professional Development (CPD) sessions for practitioners.
- 15.16 A focal point of the programme was the Bar's participation in the European training project initiated by the Council of Bars and Law Societies of Europe (CCBE), which focused on the training of lawyers on the law regarding violence against women. The training was delivered by a multidisciplinary panel of

presenters including specialists from the Bar and Judiciary of Northern Ireland in family and criminal law.

- 15.17 The Bar has undertaken to increase the number of CPD training opportunities for members around child sexual exploitation, vulnerable witnesses and child protection, which is now accredited as an example of the mandatory advocacy training that all practising barristers are required to undertake in every CPD year.
- 15.18 This training has been provided in a range of formats as a support for practitioners. In addition to events, barristers can access resources such as *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court*, which enables practitioners to engage in dedicated CPD on demand. The Bar is committed to expanding the catalogue of such specialist CPD content to ensure those practising in the family and criminal courts have an enhanced awareness of child abuse, child sexual exploitation and domestic violence.
- 15.19 The Bar of Northern Ireland has created a Vulnerable Witness CPD Resource Pack that highlights best practice training resources on handling vulnerable witnesses, including papers, presentations and podcasts, which practitioners can use to refine their witness-handling skills.
- 15.20 The resources to which barristers are signposted include the self-learning materials that practitioners in England and Wales, who are seeking specialist accreditation to be briefed in criminal cases involving vulnerable witnesses, must undertake to be admitted to the accreditation process.
- 15.21 The resource was shared with members in March 2018 as part of a series of emails around mandatory CPD advocacy.
- 15.22 A cross-jurisdictional seminar on the topic of advocacy in sexual offence cases was delivered in Northern Ireland in April 2019, by leading prosecution and defence barristers from the Bar of Northern Ireland and includes contributions from senior colleagues on the Bar of Ireland's Advanced Advocacy Committee. The Bar of Ireland also plans to include the vulnerable witness handling resource guide, referred to above, on its practitioner hub, which is currently in development.

The Law Society of Northern Ireland

- 15.23 The Law Society (LS) similarly is closely wedded to the concept of training and organises a large number of training sessions and seminars for its members on domestic violence and sexual violence.
- 15.24 Characteristically, when this Review broached with the LS the necessity of raising the profile on issues of rape mythology and stereotypical opinions, it promptly replied that it was in the process of planning its programme for next year and was open to producing a CPD event on such matters.

- 15.25 Whilst these specific subject areas (including rape mythology) have not appeared in recent years on the programme, the LS has been in discussions with groups such as Women’s Aid around the issue of domestic (including sexual) violence. Partnership and collaboration with other agencies is something the LS has done and will continue to explore in updating and refreshing its CPD programme in the future.

The Police Service of Northern Ireland

- 15.26 The Police Service of Northern Ireland (PSNI) has emphasised to this Review that it is conscientious in making training available to its officers. The assistance that has been given to this Review to understand the training employed has been time consuming and exemplary.
- 15.27 My team attended two training courses at Garnerville Police Training College. They observed a specialist detective training course on an Adult Safeguarding Programme, which is an element of a Specialist Sexual Assault Investigator’s Development Programme. In this course qualified police officer trainers (detectives) with experience of performing duties in a Rape Crime Unit (RCU) deliver training to ranks up to that of inspector. The RCU officers who investigate serious sexual assaults, are responsible for evaluating and quality assuring the initial response to the rape or serious sexual offence before advancing the investigations.
- 15.28 This programme addresses the arena of adults at risk of harm and in need of protection. Additionally there is a module on developing a deeper understanding of sex offenders. Training is regularly reviewed and renewed. Practitioners attend regular and bespoke CPD events.
- 15.29 I was encouraged to note that the course included a helpful presentation by Nexus NI. There was a second training foundation course which we attended focusing on the role of a police officer when responding to reports of rape and other serious sexual offences, which included a presentation by Nexus NI highlighting myths about rape. It dealt with:
- how personal attitudes and values may impact on an investigation;
 - what is meant by rape trauma and how it may affect how a victim presents;
 - what actions should be taken by a first responder to a report of sexual assault;
 - relevant legislation;
 - the concept of consent;
 - The Rowan centre; and
 - gathering evidence and crime log keeping.
- 15.30 A significant element of training within the student officer training programme (carried throughout foundation training, leadership training and development)

is to educate and develop officers and staff in respect of diversity, focusing on human rights, policing with the community, communication skills, values and ethics. A number of community, charity, voluntary and partner organisations are invited to attend the police college and engage with new students.

- 15.31 As indicated in chapter 1 'Background', since 2010 the PSNI has introduced a significant programme of change on how services would be delivered to victims, witnesses and callers. The need for officers to be empathetic and understanding in all incidents is emphasised, particularly in response to the introduction of the Victim Charter of November 2015. The RCU is developing a "First Responder" Digital package to train First Response Officers on the expectations of a first responder to a rape victim.
- 15.32 The PSNI is now trained on their obligation to provide victims of a crime with a Victim Pack, a written acknowledgement, including a crime reference number, the name and contact details of the investigating officer and the location of their police station. The duty officers are trained to assist or pass a message on to the appropriate officer. Victims are entitled to receive an update from the police within 10 days on what they are doing to investigate the crime. Further updates are to be provided as appropriate, including information on what to expect from the criminal justice system in terms of help and support available (including information on specialist support organisations) and decisions not to proceed with or end an investigation.
- 15.33 In relation to the conduct of investigations, a checklist of what is needed (in terms of evidence provision) is now included in the Service Level Agreement, revised in 2015, between the PSNI and the PPS.
- 15.34 Training is also provided on special measures and witness classification alongside other courses such as the initial crime investigators' development programme, investigative supervisors' development programme, managers of serious and complex investigative programmes and other specialist interview courses.
- 15.35 The PSNI assert that it operates within and in line with National Guidelines in the way Achieving Best Evidence (ABE) interviews are approached and recorded with complainants.
- 15.36 The length of ABE interviews is very much dictated by the individual case circumstances and needs of the victim. It is the PSNI's case that the complainant is continually assessed and, where necessary, ABE interviews will be staged over a number of hours or days to allow the complainant adequate breaks to ensure best evidence is achieved.
- 15.37 The PSNI has also been active in training or educating the public at large, and young people in particular, on issues such as consent and aspects of sexual assault. The most recent example was the launch of "No Grey Zone," a new multi-agency campaign with a 'no means no' message. It was headed by the

PSNI and backed by many support agencies, including The Rowan centre and the students' unions from Ulster University and Queen's University Belfast. In addition, the Police College hosts a community engagement evening during week 5 of the Student Officer Training Programme, when different partner agencies and advocacy services engage with Student Officers. Such groups include the Men's Advisory Project (MAP) and the Rainbow Project.

15.38 However, I note with deep concern the following extract from the CJINI Report of November 2018⁸ which records that:

“Victims’ organisations however raised concerns at the reduction of their input into police training over recent years. Whilst Nexus had an input into Foundation Training in respect of the lesson on sexual offences and Women’s Aid had an input into the lesson on domestic offences, Inspectors were advised that the length of these sessions had been reduced due to time constraints in the programme. In addition, there was insufficient time to incorporate specific sessions from other groups such as Men’s Advisory Project and The Rainbow Project. Victim support organisations all noted the lack of funding available for organisations to support these training activities but felt that the need to help improve the police response outweighed these concerns.”

15.39 I trust that one of the constant themes of this Review is the enduring need for a continuous multi-disciplinary approach to training and the reduction in input from outside agencies is the antithesis of such an approach. Without this input standards are liable to slip.

The Public Prosecution Service

15.40 The PPS works hard and determinedly on training. It published an updated victim and witness policy in summer 2017. The policy includes details of the Service’s approach to meeting the needs of vulnerable and intimidated witnesses and the identification of special measures, including registered intermediaries.

15.41 All prosecutors and panel counsel attend mandatory training on the Victim Charter. Panel Counsel attended a masterclass seminar on prosecuting sexual offences delivered by leading UK experts in May 2017. Guidance and training materials are regularly distributed electronically to them. PPS panel counsel must comply with the code of ethics in the PPS Code for Prosecutors.

15.42 Training about communicating with young people is being delivered by the National Society for the Prevention of Cruelty to Children (NSPCC) and the Voice of Young People in Care (VOYPIC) regarding the needs of children in care.

8 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland, at paragraph 6.2

- 15.43 The PPS communications team undertook service user research with Fathom (a website designer) between November 2016 and March 2017. The resulting report identified a number of priority audiences, which included victims and witnesses, and set out a series of recommendations to improve delivery using digital channels.
- 15.44 Policy and operational leads have received training on topics including modern slavery, LGBT+ awareness and equality issues, violence against women and girls, and judicial review.
- 15.45 Training is pending on the topic of recovered memory, particularly relevant to cases of non-recent sexual violence.
- 15.46 I am encouraged to note the CJINI Report of November 2018 records that victim support organisations reported a greater willingness by the PPS (than the PSNI) to engage with them since the establishment of the Serious Crime Unit. The establishment of the Serious Crime Unit provides an excellent opportunity for the PPS to develop more effective relationships with victim support organisations and enhance the transparency and understanding of their work.
- 15.47 However that report records that:
- “Victims felt less connected with the directing prosecutor in the PPS. Although letters were sent from the Victim and Witness Care Unit to advise victims that the PPS had received their file and who the directing prosecutor was, victims still often reverted back to the PSNI Investigating Officer for information about the case progression. The delays in the system inevitably compounded this issue.”⁹
- 15.48 That report referred to victims feeling that they wanted to see justice being done and to seek closure on the trauma they had suffered. Even if the case resulted in a conviction, the victim could feel let down if they were not sufficiently or meaningfully consulted on or informed about the process that led to that conviction. Similar to the information that emerged in the CJINI report, my interviews with some complainants revealed that they did not understand the sentence that the defendant received or what difference him being on the Sex Offenders Register would make. There was also a breakdown in communication with the complainant, either by the PSNI or PPS, as to informing a complainant that the convicted defendant was to be released, and the general area where he was living so that the complainant could be on their guard in case they came across him etc. Further training on these human aspects are vital if the processes are to improve.

9 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland, at paragraph 6.6

The Institute of Professional Legal Studies

- 15.49 The Institute of Professional Legal Studies (IPLS) provides training to our future barristers and solicitors on:
- law and procedure, Bar advocacy, evidence, special measures, ethics and etiquette; and
 - in criminal litigation, there is an evidence section, which is taught to both Bar and solicitor trainees.
- 15.50 Rape mythology, impact of trauma on a victim especially children and the vulnerable, under-reporting and attrition rates are not dealt with (that is, by way of formal teaching session), but reference is made to dealing with witnesses/clients, including vulnerable witnesses and clients in advocacy and consultation training. Trainees are referred to websites of organisations such as Rape Crisis. A short chapter on preconceptions is included as part of effective communication in the Bar advocacy file.

The Department of Justice

- 15.51 It is imperative that the DoJ ensures that all personnel dealing with serious sexual offences have training on the very issues that have surfaced in this Review. Informed legislation and procedural adjustments can only emanate from a service that is adequately trained in the kind of issues that permeate this Review. Hence it is important that the DoJ invokes the assistance of the multiple outside agencies available in training their staff.

Discussion

- 15.52 Training on the nature and consequences of serious sexual offences, how to prevent secondary victimisation, working with children and vulnerable witnesses and gender sensitive training for those involved in the criminal justice system is crucial. I believe that there is ample justification for Independent Sexual Violence Advocates (ISVAs) reporting that complainants perceive there to be a continuing lack of understanding throughout the process about the impact that trauma can have on complainants and how they respond to the trauma. I deal with this in chapter 2 of the Review.
- 15.53 I note, for example, in England and Wales, solicitor advocate members sit with barristers on a judicially led committee working to develop specific training aimed at advocates who appear in trials involving such witnesses. In England and Wales, there are proposals, still not perfected, that oblige all publicly funded advocates to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences.
- 15.54 Recognising the modern digital era in which we live, online training on victim and witness awareness issues could be further explored, highlighting the

commitments under the EU Victims' Rights Directive, the Victim Charter and the Witness Charter.

- 15.55 As I have learned in this Review, current international best practice is a crucial ingredient in exploring how we should progress in Northern Ireland. I consider that our agencies pay insufficient attention to such practices alongside their own practice and training. This does not require expensive travel or attracting foreign experts. It can be based on a comprehensive desk-based review of global literature and European National Action Plans (NAPs), as occurred in the McWilliams research.
- 15.56 Three further key components relevant to training in this area can be derived from the research carried out by Professor McWilliams.¹⁰ First, that issues surrounding appropriate procedures do not operate in isolation but rather interact with and compound one another. Interpersonal risk factors act in tandem with community and/or societal factors, and it is this concurrence that is crucial in risk assessment and needs to be to the fore in training exercises.
- 15.57 Secondly, successful measures of training generally engage multiple stakeholders simultaneously, including not only key service providers but also community leaders, Non-Governmental Organisations (NGOs), and peer groups amongst others. Training programmes should place a great emphasis on the concept of multiple stakeholder engagement rather than the odd engagement of an outside source from time to time.
- 15.58 Thirdly, training of participants in the criminal justice system surrounding serious sexual offences requires a coordinated approach in which common practice threads are included by each different discipline. I doubt whether the various bodies named in this chapter have much idea of what training the others are currently giving. The Department of Justice should take the lead in coordinating such a training strategy.
- 15.59 In order for training procedures to be effectively informed, reformed and implemented, it is important that everyone realises what are the root causes of high levels of under-reporting and withdrawal from the process. Such root causes require to be explored in the course of inadequate or absent economic empowerment programmes (with gender training), empowerment training for women and girls, community mobilisation programmes, school/group, training/education-based interventions, public education on rape myths and stereotypes, and programmes aimed at improving service level responses to sexual violence. These would all serve to provide a more informed understanding of necessary changes and reforms set out in this Review.

10 *McWilliams, M. and Doyle, J. (2017) Violent conflict, political settlement and intimate partner violence: lessons from Northern Ireland Edinburgh: Political Settlements Research Programme*

- 15.60 Training on the prevalence and changing character of serious sexual offences should be undertaken on a frequent basis, regularly refreshed and include an assessment of those identified as most vulnerable — for example, those with disabilities, older people, ethnic minorities and those with insecure immigration status.
- 15.61 This Review has strongly recommended the adoption of a fresh approach to, and radical departure from, the traditional style of advocacy at least when questioning children and vulnerable witnesses. The development of interactive courses for all advocates who participate in such trials is crucial. Advocates need to acquire specialist skills in managing children and vulnerable witnesses as part of their basic training, which is set out in chapter 14.

The Judiciary

- 15.62 I consider that, as part of the need to educate the public on the dangers of rape mythology, misleading stereotypical characterisation, the problems of under-reporting and dropout, and the devastating traumatic consequences of sexual offending, the Judiciary should become more open to multiple stakeholder engagement in training and to the potential offered from training by outside agencies such as Women’s Aid Federation NI, Nexus NI, Victim Support NI, the Men’s Advisory Project (MAP), various groups representative of the marginalised communities referred to in chapter 13 in this Report and from expert psychologists in this area.
- 15.63 If judicial training is to be effective, training has to be regularly given, refreshed and coordinated across all stakeholders in the criminal justice system involving serious sexual offences. Online training should be part of this development.
- 15.64 I found that in London, some Old Bailey judges voluntarily assisted police training in such matters as Achieving Best Evidence (ABE) interviews. The Judiciary in Northern Ireland should be open to offering, on a voluntary basis, similar services.

The Bar Council of Northern Ireland

- 15.65 Notwithstanding the care taken by the Bar Council in training, I consider that much more focus needs to be given to the issues arising in this Review in the sphere of serious sexual offences.
- 15.66 Only barristers who have undergone approved specialist training in such offences should be publicly funded and be permitted to participate in trials of serious sexual offences.
- 15.67 Greater use of multiple stakeholder engagement and outside agencies should be invoked in drawing up such a specialised training programme.

- 15.68 The specialised training set out in chapter 14 of this Review with reference to questioning of children and vulnerable witnesses needs to be instituted as soon as possible.

The Law Society for Northern Ireland

- 15.69 Much of what I have said about the training of barristers applies to solicitors. The Law Society needs to raise the profile of training with the help of outside agencies and multiple stakeholder engagement on issues set out in this Review.

The Police Service of Northern Ireland

- 15.70 The PSNI are the first and probably the longest line of contact with complainants and accused persons. Officers need more focused and intensive renewed training and refresher courses to more fully appreciate that sensitive handling of complainants and those who are accused together with their families, will almost inevitably assist in the effective building of the case.
- 15.71 In passing, and on foot of interviews I have had with some family members of accused persons, I observe that officers investigating serious sexual offences who are interviewing suspects need to be sensitive to the impact that their inquiries about other family members including children have unless it is absolutely necessary.
- 15.72 Gathering more complete information about complainants' experiences, thoughts and feelings may aid in countering the rape myths that exist by making their actions more understandable and their story more believable. Addressing these matters at an early stage may allow the ABE to play an important role effectively in combating such myths.¹¹ I welcome the fact that there is to be a roll out by the PSNI of the "First Responder" package.
- 15.73 Despite the training that the PSNI gives to their officers, I still encountered too many instances with complainants where adequate preparation for the ABE at the initial stages was overlooked.
- 15.74 Police officers need more training from outside agencies in how to sensitively interview complainants, especially children and the vulnerable. They need to recognise the value of establishing rapport, actively listening, asking open questions that allow the complainant to speak freely, avoiding language that suggests judgement and signposting legal advice should that become available. Not every officer will have the necessary flair to conduct these interviews successfully or establish rapport with witnesses who may be very brittle and vulnerable. Hence more careful selection is important. I fear that careful selection is lacking at the moment and the criteria mentioned above are not receiving sufficient emphasis.

11 Westera, N. J., Kebbell, M. R. and Milne, B. (2016) "Want a Better Criminal Justice Response to Rape? Improve Police Interviews with Complainants and Suspects" *Violence Against Women* Vol. 22, Iss. 14, pp. 1748–1769

- 15.75 I strongly encourage the practice adopted in the Lighthouse project in London where there is regularly a constructive but critical analysis of interviews by experts that have been carried out in order to review its quality and assist better future performance.
- 15.76 I also encourage training to provide a more consistent approach to ABEs. It should be remembered that the ABE interview will probably create for the jury a vital first impression of the complainant. Hence, wherever possible, there should be an attempt to make the ABE shorter, more succinct and more chronologically sequenced than is now happening.
- 15.77 In saying this I recognise that the ABE interview can become complex with several interviews at times being required to extract the information. However, there is a real danger that if such an ABE interview is carried out too soon after the alleged incident, a complainant will be too traumatised to provide an accurate and meaningful interview. Thought should be given to such interviews occurring after the complainant has had an opportunity to make some measure of recovery in the short term. Nonetheless, I recognise that for operational reasons this may not be possible in some instances.
- 15.78 Not only complainants but members of the legal profession and Judiciary record that some ABEs are rambling, discursive and contain too many irrelevancies.
- 15.79 Complainants assert they can be unduly lengthy, with the complainant detained for several hours before completion.
- 15.80 Importantly, they fail to address key issues that would perhaps serve at the outset to impede rape myths that might arise at the trial.
- 15.81 Moreover, as outlined in chapter 2 of this Review, I was told by complainants of:
- meeting different police officers in a genre of crime where consistency is vital and training should emphasise the enormous benefits of personnel consistency wherever possible;
 - being informed, particularly in historical abuse cases, of the “unlikelyhood of a conviction”, the lack of manpower to cover all areas and “to put it behind me and get on with my life”;
 - being given inadequate or vague information as to the progress of the case during investigations and not properly kept up to date despite the training that is currently given. Contact with a complainant must not be seen as a mere box ticking exercise. It has to be meaningful and informative;
 - not being adequately informed as to what had happened after court hearings. It is simply not enough to be told the case is adjourned. A full explanation needs to be given, accompanied by a full account of what has

happened at each interlocutory hearing by the officer or PPS representative who was present and not by an officer or PPS representative who is relaying what someone else told them; and

- being dealt with at the outset with less than appropriate empathy or understanding. The complainant should be told at the outset the method of making complaints about police treatment or attitude.

15.82 Undoubtedly there are pockets of excellence in carrying out the ABEs. However far too many ABEs appear to be unsatisfactory. If ABEs are to be conducted by police officers, it should be by a cadre of highly skilled and intensively trained police officers. The current system is simply not working effectively.

15.83 In addition, training needs to emphasise that at the earlier stages locations in police stations should be found to ensure they have quiet, distraction-free, comfortable rooms where reporting by or interview of a complainant can be carried out before they are eventually taken to a centre such as The Rowan in Antrim. Again I was told of initial meetings in cold, comfortless waiting rooms that did little to settle already emotionally disturbed complainants. It is right to say however that the PSNI calculate that only 13% of victims attend a police station to report.

15.84 Accused persons reporting to police stations recorded being kept waiting in public areas for lengthy periods before being dealt with. Training must include the fact that it is acutely embarrassing and indeed humiliating to be exposed to public gaze in this manner. Accused persons are entitled to be dealt with in a dignified and prompt manner wherever possible on an appointment basis.

15.85 The McWilliams report echoed my own experience with some complainants that not all police officers were familiar with the special measures that may be applicable to vulnerable complainants despite the training that has been given by the PSNI.

15.86 I note that in the CJINI Report of November 2018 it is recorded at page 10:

“The application of policy regarding victims and witnesses was complied with in just over half the cases in the prosecution sample and there is more to do to ensure all victims can access special measures, as is their entitlement.”

15.87 This suggests the current training is insufficiently comprehensive and the need for increased training for all front-line responders on relevant special measures that are available to assist the complainants and to support witnesses in providing evidence at court.

15.88 Finally, complainants need informed general advice at the outset as to how the legal process is likely to unfold. The absence of this was a regular complaint against the PSNI. Hence the need for some measure of independent legal representation.

The Public Prosecution Service

- 15.89 Once again the contents of the Professor McWilliams report echo precisely my own experience in meeting complainants.
- 15.90 While, on the one hand, some participants spoke positively about the pre-court contact they had with the PPS, others appeared to have had expectations that there would have been a greater level of contact and were accordingly disappointed to find this did not happen.
- 15.91 Feedback regarding engagement with PPS legal representation was also mixed (DoJ 2016¹²). Some expressed disappointment with the brevity of the meetings with the PPS legal team. They noted the lack of opportunity to build a rapport with their legal representatives before going into court and the lack of information provided about what would happen in court. The CJINI Report of November 2018 at page 10 records:
- “Victims however felt more disconnected from the directing officer in the PPS and did not appear to understand their role or how they made decisions.”
- 15.92 Participants alluded to communication difficulties with some barristers, referring to them as stand-offish, cold and clinical, whilst others noted the lack of updates from the PPS on the progress of their respective cases and inadequate explanations about what had occurred at the end of the case.
- 15.93 Some of the concerns raised by complainants related to the time available to discuss the case, and the level of detail and explanation as to what would happen. Concerns were also expressed that the language used by prosecutors, both in written correspondence and at court, was difficult to understand.
- 15.94 I had contemplated the need for a specialist section of the Serious Crime Unit in the PPS to deal exclusively with serious sexual offences. However, I have been informed that this unit deals with approximately 1,250 cases per annum. Over 1,200 of these cases deal with all serious sexual offences and thus form the vast body of their work. Policy and training functions for sexual offences are managed within the Unit. The experience of PPS officers is that dealing with sexual offences all day long is a gruelling task and the prosecutors welcome dealing with other offence types from time to time as this gives them a break from the sexual offence files. I therefore do not consider that there is a necessity for a specialist section dealing with serious sexual offences in these circumstances.

12 Department of Justice (2016) *Initial findings of research with victims of sexual abuse and violence* Belfast: Department of Justice

The Institute of Professional Legal Studies

15.95 Appropriate training at this early stage of legal careers is crucial. Issues arising in this Review should be included in the curriculum. In particular, I strongly recommend the IPLS take urgent steps to liaise with voluntary agencies — for example, Nexus NI, Women’s Aid Federation NI and the PSNI — to avail itself of their services to construct appropriate curriculum courses to address these issues. The contents of chapter 14 dealing with the questioning of children and vulnerable witnesses require urgent inclusion in the curriculum.

Technology

15.96 I conclude this chapter with comments on the need for training in developing technology across the board. The proliferation of smartphones and tablets, the way people now live their lives through electronic communications, and the way that traces of that can be forensically recovered from the senders and recipients devices, online, from third parties and which are stored in the cloud, mean that these issues are now encountered more regularly in everyday, non-specialist, Crown Court cases.

15.97 In particular the recent high profile disclosure failures in rape cases in England and the Rape and Serious Sexual Offence Review carried out by the CPS¹³ have highlighted the particular impact of this in rape cases, where the complainant and the accused are acquainted with each other. Messages on mobile phones or social media can be highly relevant in understanding what has occurred in these cases.¹⁴

15.98 One of the major problems however is that digital forensic work takes too long. This means that critical evidence such as smartphones or computer analysis may not be reviewed, served or disclosed until close to the trial. This in itself can be a major cause of delay.

15.99 As outlined in chapter 10 the Attorney General’s Review of November 2018 in England and Wales revealed a number of examples where delay was caused by inappropriate requests by police for “full downloads”. It was suggested to that review by some stakeholders that system wide comprehension and familiarisation needs to be improved so that lawyers and investigators understand what they are asking for and legal applications and directions are made in the right context.

15.100 Training needs to make it clear that before commissioning resources on digital forensic work, the investigator, in conjunction with the prosecutor where appropriate, should agree a clear strategy as to what is required and why. There

13 Crown Prosecution Service (2018) *Rape and serious sexual offence prosecutions: Assessment of disclosure of unused material ahead of trial* London: Crown Prosecution Service

14 Attorney General’s Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (CM 9735) London: Attorney General’s Office

may be multiple digital exhibits and it will be important to decide on what the priorities are, perhaps submitting requests in appropriate phases so as not to overwhelm resources. With each piece of work, it is important to target the right data on the device. For example, where there is an allegation of rape involving two people who have known each other for six weeks, there may be no need to examine data on a smartphone preceding that period.

- 15.101 The primary objective of all concerned in the investigation and the consequent proceedings must be to achieve a clearly defined and focused strategy between the investigator, forensic scientist and prosecutor, and thereafter between the prosecution advocate, the defence team and, where appropriate, the judge.
- 15.102 At present, many of the parties in the proceedings are making decisions, preparing their case and making case management decisions before fully understanding the nature of the investigation and the lines of enquiry that were, or were not, pursued and why. This leads to misunderstandings and great delay, when issues or remedial action could have been resolved much earlier if the digital forensic strategy and overall disclosure management was understood and, to the extent possible, agreed by those involved.
- 15.103 As I have set out in chapter 10 at paragraphs 60-62, the Home Office in England is currently supporting the police in England and Wales to solve these problems. It is important that the Department of Justice in Northern Ireland and the Chief Constable, coordinate their strategy with the Home Office to involve themselves in the work that is currently being done in England.
- 15.104 If problems with disclosure and delay are to be challenged, training in and development of technology has to be invoked as a solution rather than as a problem. As the amount of digital evidence continues to increase, the demand for police officers to have both the tools and skills to use them will become a critical matter of the future of policing and the removal of delay in the criminal justice system.
- 15.105 In the local context it was informative to note that in the CJINI report of November 2018 issues were raised about the use of digital technology in investigations and subsequent transfer through the justice system as the case progressed. The report noted firstly that delays were common in examining digital devices, particularly laptops, by the PSNI's Digital E-Crime Support Units and Cyber Crime Branch.
- 15.106 In chapter 9 on 'Delay' I refer to the fact that in 2017 CJINI published a report on an inspection of cybercrime¹⁵ which considered in depth the PSNI's approach to dealing with the examination of digital devices. That report raised concerns about the PSNI's ability to respond to the increasing demand for examination of

15 Criminal Justice Inspection Northern Ireland (2017) *Cyber Crime: An inspection of how the Criminal Justice System deals with Cyber Crime in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland

digital devices and made a number of recommendations relevant to the chapter on delay.

- 15.107 I endorse the recommendation made by the 2018 CJINI report to the effect that, “The PSNI and the PPS should fully engage in the NICTS digital strategy and collaborate when developing and maintaining their own technology in order to ensure systems for the transfer of digital information across the justice system which are fit for purpose”.

Responses

- 15.108 My grave concerns about the need for further training have been echoed throughout the responses received to the Preliminary Report.¹⁶
- 15.109 There was enthusiastic support from a number of bodies for the idea of a committee judicially led to develop specific training, which would co-ordinate subjects and involve multiple stakeholders.¹⁷
- 15.110 It was particularly welcome that both the Bar Council and the Law Society indicated they were very willing to work in collaboration with outside agencies in order to improve their training. This theme of interdisciplinary work coursed through the responses and I hope will be harnessed throughout the criminal justice system given the enthusiasm evinced by virtually all of the voluntary sector bodies to participate in such training.
- 15.111 A particularly helpful and informed response came from Dr Kevin Smith, a former police officer with 30 years’ service, who is presently employed as the National Vulnerable Witness Adviser for Major Crime Investigative Support in the National Crime Agency.¹⁸ Dr Smith made a number of valuable comments on the recommendations that I had made on training in the Preliminary Report. These included the following:
- A lack of planning, often preceded by the absence of an adequate witness assessment to feed into the planning process, has been a problem for some time in England and Wales. Indeed an HMIC inspection that took place four years ago concluded that “the absence of effective planning was the root of many failings observed”. HMIC viewed the shortcomings in the interview process that they identified, including in planning and preparation, as a

16 For example the Northern Ireland Policing Board, SDLP, EVAW, Women’s Aid Federation NI, Barnardo’s, Safeguarding Board for Northern Ireland, Victim Support NI, the Members of the Retired Association for Probation Officers, the Probation Board for Northern Ireland, Dr Alison Livingstone from The Rowan Centre.

17 Public Prosecution Service, Bar Council, EVAW, Women’s Aid Federation NI, Rape Crisis Network Ireland, Dr Alison Livingstone from The Rowan Centre, Barnardo’s, the Retired Associates of Probation and the Law Society.

18 Dr Smith is also a nationally approved interview adviser and regularly deploys to major crime investigations throughout the UK to design and develop operational interview strategies for vulnerable, intimidated and significant witnesses in complex cases. He is also one of the authors of the revised edition of the National Interview Guidance for England and Wales that is set out in “Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Guidance on Using Special Measures” (Minister of Justice 2011).

failure of implementation rather than of guidance and recommended the development of planning booklets and greater supervision as a result. Once again adequate training is the key.

- More training for the PSNI in terms of rapport, active listening and sensitive questions is likely to be beneficial. This is particularly true when one considers developing research on the role of rapport in managing trauma.¹⁹ Moreover it is essential that any additional training that is proposed must be supported by effective supervision in the workplace.
- A great deal can be done to improve matters during the interviews to address rape myths and common misconceptions about the impact of trauma on behaviour and recall.²⁰ Dr Smith has written extensively on taking steps to mitigate the damage to a complainant's testimony that can occur as a result of a lack of understanding about trauma.²¹

15.112 Finally it is encouraging to note that the PSNI welcome input by the Bar, the Judiciary and by child psychologists into their training. The involvement of judges, counsel and psychologists is certainly a feature of many interviewing conferences in England and Wales.

Conclusion

15.113 The universal support for further training that has emerged in the responses has persuaded me that there is no need for me to change the recommendations that I have made in the Preliminary Report to any material degree.

19 Risan, P., Binder, P-E and Milne, B (2017) "Establishing and maintaining rapport in investigative interviews of traumatized victims: a qualitative study", *Policing* Vol.12, Iss.4 pp. 372-387

20 Hohl, K. and Stanko, E. (2015) 'Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales' *European Journal of Criminology* Vol. 12, Iss.3, pp. 324-341

21 Hanson, E. and Smith, K. (in preparation) *Managing Trauma in Criminal Investigations* Abingdon: Routledge

Recommendations

220. The Northern Ireland Criminal Justice Board should set up a committee to coordinate subjects for training and multiple stakeholder engagement in the various training programs suggested in this chapter.
221. Such training should highlight the importance of human rights and appropriate international standards. In particular those specific to the issue of victims' rights and sexual crime, must be incorporated into any training programme for all relevant personnel. The incorporation of human rights standards should not be a discretionary part of any training programme.

Judiciary/Law Society of Northern Ireland/Bar Council of Northern Ireland

222. The Judicial Studies Board, the Bar Council and the Law Society should afford a higher priority to training and awareness from outside agencies on such matters as the trauma suffered by victims, rape mythology, jury misconceptions, jury guidance, the reasons for under-reporting of, and withdrawal from, the process of sexual offences, questioning and cross-examining children and vulnerable witnesses, the problems of marginalised communities, international human rights standards and how these may be best addressed.
223. The Judicial Studies Board, the Bar Council and the Law Society should afford a higher training priority to developments and research in jurisdictions outside Northern Ireland in dealing with serious sexual offences.
224. The training mentioned above may profitably include an online element highlighting, for example, the commitments under the EU Victims' Rights Directive, the Victim Charter and the Witness Charter.
225. The Law Society and the Bar Council should produce joint CPD events, with the assistance of relevant outside agencies, specifically dealing with such matters as are set out above.
- 226.* The Judicial Studies Board, the Bar Council and the Law Society should consider offering their services to the PSNI in assisting to train officers involved in serious sexual offences.
227. A judicially led committee should be set up, working to develop specific training aimed at advocates who appear in trials involving serious sexual offences.

The Police Service of Northern Ireland

228. Training and, importantly, regular refresher training should emphasise the following:

- relevant human rights standards;
- a greater emphasis on specially selected skilled and trained officers to conduct ABEs, including how to sensitively interview complainants. There should be provision of planning booklets to officers carrying out ABEs;
- a recognition of the potential of assistance from the Bar Council, the Law Society and the Judiciary in training officers for ABE interviews;
- a recognition that in ABE interviews occurring in the immediate aftermath of a sexual attack, consideration should be given to postponing the interview for a matter of days, depending on the physical and mental state of the complainant, albeit it has to be recognised that investigative imperatives may demand an earlier interview;
- a greater priority to be given to complainants being provided with comprehensive explanations as to the progress or lack of progress in the case and specifically what has happened at each individual court hearing;
- the need, at the earliest stages of reporting, to find quiet, distraction-free, comfortable rooms where a complainant can be spoken to before transfer to a centre such as The Rowan in Antrim;
- the need to positively explain to the complainant what the legal process may involve, including, for example, a full explanation of special measures;
- the need to deal with visits by the accused to police stations in a private and dignified manner and, wherever possible, on an appointment basis;
- the need to ensure that when a case is completed, a full explanation is given to the complainant about the outcomes; and that the complainant is informed of a perpetrator's release from prison; and
- the problems facing marginalised communities in addressing serious sexual offences.

The Public Prosecution Service

229. In training, a greater emphasis on:

- the need to invoke the assistance of outside agencies in training sessions;
- relevant human rights standards;

- the need to ensure all victims can access special measures;
- interpersonal interaction with complainants;
- the need to meet with complainants well in advance of trial save in the most exceptional of circumstances;
- the need to be fully knowledgeable of the facts of the case no matter how late counsel has come into the case;
- the need to discuss with the complainant the issues that are likely to arise in the trial, including a detailed analysis of special measures that may be available;
- the need to vigorously oppose the introduction of previous sexual experience of the complainant at trial, when permission to do so has not been granted;
- marginalised communities and the problems of serious sexual offences;
- the need for directing officers in the PPS to explain fully and adequately their role and how they make and have made decisions; and
- the need to ensure that when a case is completed, a full explanation has been given to the complainant about the outcome.

230. Regular refresher training should take place on:

- rape mythology and stereotypical responses in the criminal justice system;
- sensitive examination of children and vulnerable witnesses in serious sexual offences; and
- the traumatic effects of serious sexual offences.

The Institute of Professional Legal Studies

231. The IPLS should invoke the services of outside agencies to address such issues as:

- rape mythology and stereotypical responses in the criminal justice system;
- sensitive cross-examination of children and vulnerable witnesses in serious sexual offence cases;
- the impact of trauma on witnesses; and
- the under-reporting and high attrition rate of serious sexual offences.

The Department of Justice

232. The DoJ should invoke the services of outside agencies and multiple stakeholder engagement in training their officials.

Technology

233. Frontline investigators in the PSNI and prosecutors in the PPS must benefit from simple, clear and practical training and assistance in performing their duty relating to digital material, including the legitimacy of appropriate use of technological solutions.
234. Accordingly, outlines and protocols should be drawn up to provide such clarity. The PSNI should immediately take steps to assess what products already exist on the market or ought to be developed to assist the roll out of greater technology.
235. The PSNI and the PPS should take steps to attend the Attorney General of England and Wales' 'Tech Summit (co-chaired by the Solicitor General in England and Policing Minister)' to be held in 2019 to assess the results of the Home Office supported Landscape Review and to identify a way forward with police leaders, private tech specialists and companies.
236. Greater emphasis should be given to the development and delivery of digital investigative training to ensure that all officers in the PSNI have a base level of training and understanding of digital principles.

Chapter 16

The jury system

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.

Lord Devlin Trial by Jury¹

Issues

- Should serious sexual offences be tried without a jury?
- Should defendants in serious sexual offences have the right to opt for trial without a jury?
- Should there be a third possible verdict — namely not proven — in serious sexual offences?
- Should juries have a gender quota?
- Should there be a move towards an inquisitorial system in dealing with serious sexual offences?

Current law

- 16.1 Today in Northern Ireland, there is a strong presumption for jury trials in all Crown Court cases, with less than 2% of all Crown Court cases dealt with each year under the Justice and Security (Northern Ireland) Act 2007 (“the 2007 Act”) which makes provision for trial without a jury. However, the severe threat from Northern Ireland-related terrorism and the presence of violent proscribed organisations continue to pose risks to the criminal justice system, which can necessitate non-jury trials in a small number of cases where such a threat arises.
- 16.2 Provisions under the 2007 Act are separate from those contained in section 44 of the Criminal Justice Act 2003, which enables trials to be conducted in England and Wales and Northern Ireland without a jury, where there is evidence of a real and present danger that jury tampering would take place.

Background

- 16.3 Courts in the UK have maintained a healthy realism about the integrity of jurors, their ability to focus on the evidence and to follow judicial directions.
- 16.4 In 2006, the Court of Appeal in England said:
- “There is a feature of our trial system which is sometimes overlooked or taken for granted ... juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright ... We cannot too strongly

¹ Devlin, P. (1956) *Trial by Jury* London: Stevens & Sons

emphasise that the jury will follow them [the judge's directions], not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair."²

- 16.5 This is the theory that juries react well to being given a noble purpose.
- 16.6 Today, therefore, this system is a cornerstone of our justice system, enshrined in our unwritten constitution and imbued with such unassailable legitimacy that serving on a jury is established as one of the key duties of the citizen. It is for many the only point of contact with the courts and the justice system, even if, paradoxically, it remains shrouded in myth and mystery.
- 16.7 The jury system in criminal trials is based on the principle that the determination of guilt or innocence of an accused should be undertaken by members of the community in order to guarantee a fair trial.
- 16.8 It was only in the most pressing of circumstances that the UK government removed juries in Northern Ireland under the Diplock system for those charged with scheduled offences — mainly offences associated with members of proscribed organisations — and such cases are now but a fraction of our criminal trials as our society moves towards normality.
- 16.9 However, as social media platforms and online news have become ubiquitous, concerns about the impact of prolific and adverse publicity have been accompanied by difficulties in numerous common-law jurisdictions with tweeting jurors, Instagramming jurors, jurors unable to curb their detective impulses and even befriending the accused on Facebook.
- 16.10 This growing concern is further fuelled by increased awareness of the allegedly widely held perception in our society of the existence of misconceptions, myths and stereotypes about rape and other sexual offences (see chapter 6).

Other jurisdictions

- 16.11 We have examined non-jury/judge-alone trials in the UK, Ireland, Denmark, France, Germany, Iceland, the Netherlands, Sweden, Australia, Canada, New Zealand, South Africa and the US focusing on indictable cases not limited to rape and serious sexual assault cases.
- 16.12 In most of the common-law jurisdictions examined, there is some limited scope to have judge-alone trials whereas those countries with inquisitorial systems generally have judges plus assessors or multi-judge panels.
- 16.13 Where there is an option to have a non-jury trial, the defendant may have the right to elect the mode of trial or it may be the judge who decides if it is in the

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R v B [2006] EWCA Crim 2692

interests of justice for the case to be heard by judge-alone. This differs from country to country and even from state to state in Australia.

- 16.14 There are several different models of non-jury trials, including the single professional judge model, multi-judge panels and other models, including using lay assessors. The different jurisdictions can be broken down as seen in the table below:

Judge/s plus lay assessors	Multi-judge panel	Non-jury trial on application (defendants right to elect)	Non-jury trial on application (judge who decides if it is in the interest of justice)	Jury trials only
Denmark (three judges + six-person jury of lay judges)	Iceland (three judges)	Australia (South Australia, Australian Capital Territory [except rape])	UK (only where there is a danger of jury tampering [NI terrorism])	Australia (Victoria, Tasmania, Northern Territory)
France (three judges and nine-person jury in the cour d'assises)	Netherlands (three judges)	US	Australia (Western Australia, New South Wales, Queensland)	
Germany (judge and two lay assessors)			New Zealand (only if long and complex or intimidation of jurors [excludes rape])	
South Africa (judge + two lay assessors)			Ireland (terrorist or organised crime offences)	
Sweden (judge + two lay assessors)			Canada [excluding murder]	

- 16.15 The role of lay assessors or assessors varies from country to country. They can be constituted from varied backgrounds as advocates or retired magistrates as in South Africa, or nominated by social organisations, usually political parties of which they are members, as in Sweden.
- 16.16 In judge-alone trials the judge takes over the role of factfinder from the jury. If more than one judge or assessor is involved, consideration must be given as to who will act as the factfinder and who will act as the decision-maker or if a majority verdict will be sufficient.
- 16.17 Judge-alone trials are held in cases of terrorism and state security in Northern Ireland and Ireland. In the rest of the UK they are available only where there is a danger of jury tampering, and in New Zealand there is provision for judge-alone trials only in long and complex cases or in cases in danger of jury tampering.
- 16.18 Rape and serious sexual offence cases are generally heard by a jury, where jury trials are available. In New Zealand and the Australian Capital Territory serious cases, except rape and serious sexual assault, can be heard by a judge-alone.

Common-law jurisdictions

England and Wales

- 16.19 In criminal courts the most serious offences are tried on indictment and are heard in front of a judge and jury. When someone is on trial for a serious crime they have the right to be tried by a jury of peers and they determine whether defendants are guilty of the offences with which they have been charged beyond reasonable doubt or, in other words, where the jury is sure of the defendant's guilt.
- 16.20 There are specific situations in England and Wales and in Northern Ireland where a judge-alone trial can take place as set out in paragraphs 1 and 2 above.
- 16.21 The original section 43 of the Criminal Justice Act 2003 would have extended judge-alone trials for fraud cases where the complexity or length of the trial would make the trial so burdensome to members of the jury that, in the interests of justice, serious consideration should be given to conducting the trial without a jury. This power however was repealed in 2012.
- 16.22 Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*³ noted that suggestions had been made to the Review that trial by jury should remain the primary form of trial for more serious offences triable on indictment subject to two exceptions: defendants in the Crown Court should be entitled with the court's consent to opt for trial by judge-alone; and in serious and complex frauds the nominated trial judge should have the power to direct trial by judge-alone. Sir Brian also noted the former is a widespread feature of other common-law jurisdictions. He made no final recommendations in relation to judge-alone trials, as this was outside the scope of his review, but he concluded:

"If this proposal is worth pursuing, it would be more appropriate to allow the Judge to decide on a case by case basis whether to accede to the defendant's request for trial without jury, rather than imposing a general statutory limit on offences to which the option could apply. The Judge should decide the matter further to hearing representations from both sides. Further, the Judge should be entitled to override the defendant's wish for trial by Judge alone if he (the Judge) considers that the public interest requires a jury, for example, in case of certain offences against the State or public order."

Ireland

- 16.23 In Ireland judge-alone trials are only available for specified terrorist and organised crime offences.
- 16.24 Part V of the Offences Against the State Act, 1939 provides for the arrangement of the Special Criminal Court to hear indictable cases for scheduled offences — in essence offences concerning the effective administration of justice

3 Leveson, B. (2015) *Review of Efficiency in Criminal Proceedings* London: Judiciary of England and Wales

and the preservation of public peace and order and, since 2009, organised crime — without a jury when ordinary courts are inadequate to secure the effective administration of justice. In the Special Criminal Court three judges are appointed to hear the case without a jury and are empowered to deliver majority verdicts.

- 16.25 Indictable offences that must be tried before a judge and jury, as listed in the Criminal Procedure Act, 1967 and the Criminal Law (Rape) (Amendment) Act, 1990, include rape and aggravated sexual assault.

Australia

- 16.26 Australian jurisdictions have increasingly moved to facilitate trial by judge-alone in cases that are the subject of significant prejudicial publicity.
- 16.27 The right to a judge-alone trial is available to defendants in South Australia and to some degree, not including rape, in Australian Capital Territory.
- 16.28 While the defendant can apply for a judge-alone trial in Western Australia and Queensland, granting this matter is in the discretion of the judge if it is considered in the interests of justice and not the uncontested right of the accused. In New South Wales, where the defence and the prosecution agree that there should be a judge-alone trial, the judge is obliged to grant this.
- 16.29 These moves have been predicated upon the assumption that the ordering of a trial by judge-alone is an effective means of reducing the risk of prejudice in serious sexual offences.
- 16.30 Judge-alone trials are not available to defendants in Victoria, Tasmania and the Northern Territory.

Canada

- 16.31 Trial by jury is a right available to any person accused of committing an indictable offence that is punishable by five years or more in prison. Indictable offences in Canada are generally more serious offences.
- 16.32 However, trial by jury is not imposed upon an accused person. Rather, a person accused of certain offences may *choose* to be tried by a jury but is not required to do so.
- 16.33 Most accused in Canada select trial by judge-alone. There is a perception that justice may be speedier, cheaper and more lenient in the lower criminal courts, which may try virtually all serious offences.

New Zealand

- 16.34 New Zealand could be the first common-law country to rid sexual crime cases of jurors if one key proposal from a recently published report by its Law Commission is implemented.

- 16.35 In 2015 the New Zealand Law Commission published a report, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*.⁴ The report examined alternatives to juries in sexual offence cases, specifically trial by judge-alone and trial by judge sitting with assessors. The commissioners have suggested that there is a case for having sexual offence trials decided by a judge, either alone or with two expert lay assessors.
- 16.36 Section 24(e) of the New Zealand Bill of Rights Act 1990 provides that a person has the right to a trial by jury if the penalty for the offence is or includes imprisonment for two years or more.
- 16.37 Section 102 of the Criminal Procedure Act 2011 provides that a judge may order a judge-alone trial if a case is likely to be long and complex or there may be intimidation of jurors, but only where the defendant is charged with an offence for which the maximum penalty is imprisonment for life or imprisonment for 14 years or less. This excludes sexual violation (which includes rape and unlawful sexual connection with another person) as it has a maximum sentence of 20 years.
- 16.38 The Law Commission noted the cost and resource savings in favour of judges sitting alone and the fact that judges could be trained continually rather than training new jurors for each case. Against this, the Commission noted the removal of juries means the loss of the expression of democratic involvement; the safeguard against arbitrary or oppressive government; and the promotion of public confidence in the system.
- 16.39 In relation to trial by judge sitting with assessors who have some prior knowledge and understanding of sexual violence, the Commission noted the situation in Germany. The Commissioners concluded that the inclusion of assessors would depend on whether they were there to merely advise or would have a greater role — i.e. voting — and noted that the training and experience of lay assessors would mean they could set aside common misconceptions (rape myths) and the element of collective decision-making model would be retained. They also noted the possibility of using justices of the peace for this purpose.
- 16.40 The Law Commission noted that there is a case for conferring the decision-making function in sexual offence cases on some entity other than the jury but stopped short of making a recommendation as any alternative would need to be carefully considered and would need to be justified as a reasonable limit on the right to jury trial in the New Zealand Bill of Rights Act 1990.
- 16.41 The Commission made no recommendations to change the fact-finder in sexual violence cases but simply recommended that the issue should be looked at again as part of the evaluation of a new specialist court grounded in reliable data as to the levels of accuracy achieved in decision-making by different

4 Law Commission (2015) *The Justice Response to Victims of Sexual Violence* Wellington: Law Commission

kinds of fact-finding bodies. Sexual violence courts are now being piloted and research into the success of the pilot is just beginning so no conclusion has been reached. The Commission's other conclusions were that an alternative system outside the present criminal justice system is required, the aim of which would not be to displace the criminal justice system, and that better support systems are required for victims (see chapter 17 of this Review).

South Africa

- 16.42 In South Africa jury trials were abolished by the Abolition of Juries Act, 1969. The South African Law Reform Commission noted that even before the abolition of the system, it had, to a large extent, fallen into disuse due to the fact that members of the public were extremely reluctant to serve on the jury, citing various excuses for not serving on a jury.
- 16.43 Cases are now heard by a judge and up to two lay assessors at the judge's discretion.
- 16.44 For serious cases such as rape or indecent assault a judge must be assisted by two lay assessors. The assessors must have experience in the administration of justice or a special skill in any matter that may call for consideration during the trial. They assist the judge in assessing the facts of the case while the judge is responsible for the determination and application of the law. The judge will confer with the assessors in determining the guilt or otherwise of the defendant.

United States

- 16.45 The Sixth Amendment to the US Constitution guarantees the rights of criminal defendants, including the right to a public trial, without unnecessary delay by an impartial jury of the state and district wherein the crime shall have been committed.
- 16.46 Rule 23 of the Federal Rules of Criminal Procedure allows a defendant to waive the right to a jury, but only if the prosecution consents and the court approves.

Inquisitorial systems where judges and lay assessors consider cases

Denmark

- 16.47 Sexual offending will be tried in the district court with three judges and a 'jury' of six lay members nominated by social organisations, usually political parties of which they are members.

France

- 16.48 Sexual offence cases are tried either in the tribunal correctionnel, which is a criminal court dealing with less serious felonies and misdemeanours (before a

panel of three professional judges), or in the higher cour d'assises (consisting of three professional judges and a jury (nine citizens chosen by drawing lots), which deals with the more serious cases such as rape and murder.

Germany

16.49 The Landgericht (District Court) hears serious sexual violence cases in front of a judge and two lay assessors, who all have the same voting power. Lay assessors are drawn from people who self-nominate.

Iceland

16.50 There are no jury trials in Iceland. Most cases are heard by one judge. If the accused denies and the question of guilt depends mostly on the testimony of the accused and witnesses, three judges will hear the case. In complex civil and criminal cases there are three judges, two of whom can be specialists — for example, plumbers, engineers or medical doctors. These expert judges are not lawyers.

Netherlands

16.51 Cases are heard by a panel of three professional judges. The full-bench panel (three members) deals with more complex cases and all cases in which the prosecution demands a sentence of more than one year's imprisonment.

Sweden

16.52 Sexual offence cases are tried before a tribunal comprising one professional judge and two lay assessors. The lay assessors are nominated by social organisations, usually political parties of which they are members.

Comparison of the inquisitorial and adversarial systems

16.53 Throughout this whole Review process, both before the publication of the Preliminary Report and since then in the response stage, a number of well informed and sensible people have raised with me the very radical possibility of adopting an inquisitorial approach (similar to that operated in European jurisdictions) to serious sexual offences rather than our traditional adversarial process.

16.54 In deference to those arguments I have looked closely at the academic literature on this topic. There is no simple or exact definition pertaining to 'adversarial' and 'inquisitorial' legal systems, with different models providing varying approaches across jurisdictions.

- 16.55 Broadly however, in the adversarial system responsibility for the investigation, selection and presentation of evidence lies with the parties to the proceedings.⁵
- 16.56 The inquisitorial system places greater emphasis on the pre-trial phase with responsibility for investigation lying with a neutral figure, usually a judge.
- 16.57 Key features of the adversarial system are:⁶
- Parties define the issues to be determined and identify and present the relevant evidence to the court.
 - Based on mistrust in the reliability of the prosecution evidence there is an assumption that mistaken guilty verdicts are best avoided by allowing the defence to test and counter the evidence at trial.
 - Judge acts as a neutral arbiter ensuring that the process works fairly.
 - Judge decides on the verdict, or directs the jury on how to do so, on the basis of the evidence presented by each party and tested under cross-examination by the opposing party.
 - Strict rules to prevent the admission of evidence that may prejudice or mislead the fact-finder.
 - Role of the complainant is as a witness with no recognised status.
- 16.58 Key features of the inquisitorial system are:⁷
- Judge plays the dominant role at trial.
 - Judge may interview witnesses before trial, direct further lines of investigation, decide which witnesses should be called, and conducts most of the questioning;
 - Pre-trial processes are viewed as indispensable in determining reliable and unreliable evidence, identifying flaws in the prosecution case and identifying evidence favourable to the defence (a greater presumption of guilt exists by the time of trial).
 - Cross-examination is rarely used during the trial, although the parties and counsel may ask questions.
 - Significantly fewer rules of evidence and more information are available to the court at the outset (e.g. the defendant's criminal history may be read to the court at the start of the trial).
 - Lay jurors are appointed for a fixed period of time, receive some training, and are expected to sit on a certain number of cases annually.

5 Hodgson, J.S. (2010) "The Future of Adversarial Justice in 21st Century Britain" *North Carolina Journal of International Law and Commercial Regulation* Vol. 35, No. 2, pp. 319-362

6 Law Commission (2012) *Alternative Pre-trial and Trial Processes: Possible Reforms* Wellington: Law Commission

7 Law Commission (2012) *Alternative Pre-trial and Trial Processes: Possible Reforms* Wellington: Law Commission

- Judges rely mostly on dossiers of evidence to form legal conclusions in their chambers. Courtroom proceedings tend to work as a formality, rather than as an opportunity for the judge to investigate the accusations.⁸

- 16.59 The two concepts have moved towards each other in recent years. Thus a more recognised role for complainants in recent years in many adversarial systems has incorporated elements of the inquisitorial approach, while inquisitorial systems have adopted elements of the adversarial model.
- 16.60 There may no longer exist any purely inquisitorial systems, as a result of international covenants protecting defendants' rights. Changes to European inquisitorial systems have emphasised greater impartiality for the trial judge, the defendant's right to call witnesses and the ability to cross-examine witnesses.⁹
- 16.61 The literature includes many comparative law reviews, but limited empirical studies comparing the two systems.
- 16.62 Both systems have led to miscarriages of justice.¹⁰ In both systems, inadequate defence, incorrect interpretations of testimony or evidence, media pressure, 'overambitious' police or prosecutors or investigations limiting lines of enquiry and false confessions can contribute to incorrect verdicts.¹¹

Suggested weaknesses in the adversarial system

- 16.63 Within the adversarial system the decision-maker does not collect evidence: rather, they rely on the reports of interested parties, and there have been criticisms around the tendency for litigants to report only favourable evidence.¹²
- 16.64 The adversarial system makes an assumption that evidence in criminal trials will be presented to laypersons who may be less equipped than judges to identify prejudice and take it into account when addressing evidence as a whole. In adversarial systems there is a level of distrust that the jury will be able to effectively distinguish probative value from prejudicial effect.
- 16.65 Rules of evidence mean that the jury as fact-finder often must decide on the outcome of the case without knowing all of the available information. This can have the effect of leading to public dissatisfaction in the criminal justice system, and undermining confidence in it.

8 Kim, M.C. and Penrod, S.D. (2010) "Legal decision making among Korean and American legal professionals and lay people" *International Journal of Law, Crime and Justice* Vol. 38, Iss. 4, pp. 175-197

9 Finn, J. (2009) "Inquisitorial trials for sexual offences and 'fair trial' rights" *Canterbury Law Review* Vol. 15, pp. 317-348

10 Hodgson, J.S. (2010) "The Future of Adversarial Justice in 21st Century Britain" *North Carolina Journal of International Law and Commercial Regulation* Vol. 35, No. 2, pp. 319-362

11 Brants, C. (2013) "Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands" *University of Cincinnati Law Review* Vol. 80, Issue 4, Article 2

12 Froeb, L.M. and Kobayashi, B.H. (2001) "Evidence Production in Adversarial vs. Inquisitorial Regimes" *Economics Letters* Vol. 70, No.2, pp. 267-272

- 16.66 Hence there are those that argue that a possible solution to this issue is to dispense with juries, allowing many rules of evidence to be removed. For example, the defendant's criminal history could be admitted, with the fact-finder determining its weight. In such a scenario the New Zealand Law Commission¹³ states that fundamental evidential rules would need to be retained, including those relating to relevance, repetition and sexual history.
- 16.67 One study¹⁴ highlights the almost unlimited right to call and cross-examine witnesses within the adversarial system as an important strength, but highlights the potential risk that expert witnesses will identify with the party they are testifying for, rather than present a completely objective account. Nonetheless, adversarial systems often establish safeguards to mitigate these risks, such as practice directions.
- 16.68 Within the inquisitorial system the court appoints experts, often from state laboratories or forensic institutions, which may prevent them from feeling that their testimony should be favourable to a particular party. However, there is a risk that the inquisitorial court relies too much on their testimony as it is expected to be impartial.¹⁵
- 16.69 The main argument that proponents of the inquisitorial system propound is that there is evidence, as earlier chapters in this Review suggest, that juries bring with them preconceived ideas and prejudices about sexual offending i.e. rape myths.
- 16.70 Other criticisms of juries include:
- jurors may not understand or assimilate complex, technical or scientific evidence, or evidence that is presented over a long period of time;
 - they sometimes deliver verdicts that are not supported by the evidence;
 - an elaborate set of rules exists to keep juries from relevant evidence that may be wrongly interpreted or given undue weight, as it is believed they may not be capable of weighing evidence appropriately and setting aside prejudicial effects;
 - the deliberation process is difficult to appeal;
 - any prejudicial attitudes held by judges can be addressed by ongoing information and training, which would not be practical for jurors;
 - jury deliberations are not transparent or open to scrutiny, leaving room for speculation about the reasons for their decision and undermining public confidence in the outcome; and

13 Law Commission (2012) *Alternative Pre-trial and Trial Processes: Possible Reforms* Wellington: Law Commission

14 Brants, C. (2013) "Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands" *University of Cincinnati Law Review* Vol. 80, Vol.4, Article 2

15 As above.

- removal of juries would mean that complex evidential rules would not be required.

- 16.71 The adversarial approach has also received criticism for encouraging aggressive and adversarial behaviour, which may damage the interests of justice. For example, there are concerns that the treatment of witnesses may cause trauma and influence the quality of their testimony.¹⁶
- 16.72 The report by the Law Commission of New Zealand suggests that challenges associated with the adversarial approach are particularly pertinent in sexual offence cases, and that the high rates of attrition for such cases are evidence of this.
- 16.73 However, there is no evidence of a lower attrition rate for sexual offence cases within the inquisitorial system.
- 16.74 A further challenge with the adversarial system is the degree of faith placed on the parties to present their case effectively and persuasively. In practice this is often determined by the availability of resources, the effort put into a case, and the ability and competence of barristers.
- 16.75 There are further concerns that questioning within the adversarial system can be designed to confuse the fact-finder, rather than to clarify matters.
- 16.76 Internationally there is evidence that taking part in an adversarial trial can cause stress and trauma to complainants of violent crimes and sexual offences, and that adversarial questioning can increase self-blame. This in turn may discourage other victims from coming forward. One author¹⁷ suggests that judges who seek to reduce such harm to complainants risk reversal by appellate courts.
- 16.77 A criticism of cross-examination is that some defence counsel aim to confuse an honest witness or affect the quality of their testimony by exerting pressure, rather than using it to identify or deter inaccurate testimony.
- 16.78 Cross-examination may also present challenges in relation to witnesses who are children or who have an intellectual disability: indeed the literature notes that it can cause such witnesses to give inconsistent and inaccurate evidence, and may cause trauma to them. While evidence shows that children and people with an intellectual disability are capable of giving accurate testimony, under cross-examination they may:¹⁸
- have difficulties remembering what happened a long time after the event;
 - not realise when they have misunderstood a question;

16 Law Commission (2012) *Alternative Pre-trial and Trial Processes: Possible Reforms* Wellington: Law Commission

17 Fan, M. (2014) "Adversarial Justice's Casualties: Defending Victim-Witness Protection" *Boston College Law Review* Vol. 55, Iss. 3, pp. 775-820

18 Bowden, P., Henning, T. and Plater, D. (2014) "Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An impossible triangulation?" *Melbourne University Law Review* Vol. 37, No. 2, pp. 539-584

- may not ask for confusing, complex or ambiguous questions to be clarified; or
- may be prone to anxiety.

16.79 Issues around cross-examination for such witnesses may arise due to counsel's approach, the language and phrasing of questions, and lengthy delays between the initial complaint and the trial. The adversarial system's traditional preference for live oral testimony may not result in such witnesses providing their best evidence.

16.80 Evidence from Australia suggests that counsel often seek to discredit child witnesses on the basis of their development, confidence or intellect, rather than in relation to the reliability of their testimony.¹⁹

Suggested strengths of the adversarial system

16.81 The defendant's right to prepare and present their own case in the adversarial system may be preferable in relation to self-determination and may foster feelings of empowerment.²⁰

16.82 The presentation and testing of two versions of events may be superior to the judge verifying the prosecution case.

16.83 There is evidence that in general jurors are very conscientious, and that prejudices may be mitigated by the collective deliberation process.

16.84 Judges may also be influenced by rape myths and stereotypes.

16.85 The Law Commission of New Zealand also draws attention to other functions of juries, including community participation in criminal justice, which may support public confidence in the system and ensure it is sensitive to prevailing values, and acting as a protection against oppressive State conduct.²¹

16.86 A further study found that legal professionals and jurors weigh and evaluate evidence differently. Legal professionals appeared more sensitive to variations in confession evidence in comparison to lay people, suggesting that they make legal decisions more systematically than lay participants. Nonetheless, they conclude that the performance of lay people is comparable to the performance of legal professionals.

16.87 According to research,²² both lay participants and legal professionals were more likely to reach a guilty verdict in inquisitorial trials (for murder and rape),

19 As above.

20 Brants, C. (2013) "Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands" *University of Cincinnati Law Review* Vol. 80, Vol.4, Article 2

21 Law Commission (2012) *Alternative Pre-trial and Trial Processes: Possible Reforms* Wellington: Law Commission

22 Kim, M.C. and Penrod, S.D. (2010) "Legal decision making among Korean and American legal professionals and lay people" *International Journal of Law, Crime and Justice* Vol. 38, Iss. 4, pp. 175-197

suggesting that they may have ‘benefitted’ from cross-examination within the adversarial system.

Criticisms of the inquisitorial system

- 16.88 Criticisms of the inquisitorial system include that it is inefficient, bureaucratic and places insufficient emphasis on the presumption of innocence. There are also concerns about the extent to which the police and prosecution perspective dominates cases.
- 16.89 The inquisitorial system may also lack the participatory and democratic benefits of the adversarial approach.
- 16.90 The classical inquisitorial procedure does not provide the suspect with the presumption of innocence or the right to avoid self-incrimination.
- 16.91 However, experience in Europe following the introduction of the European Convention on Human Rights demonstrates that the inquisitorial process can accommodate both of these provisions.

Conclusions

- 16.92 I believe that the inquisitorial system is less suited to our system of justice and presents challenges to our concept of a fair trial for four main reasons.²³
- 16.93 First, the right to a fair and public hearing by an independent court is crucial. In the classic inquisitorial process the same judge conducts investigatory processes, decides whether there is sufficient evidence for a trial, and presides over the trial, allowing questions to arise around potential bias.
- 16.94 Admittedly there have been changes to some European systems to mitigate this; for example, in France the judge who decides that an accused should be detained prior to trial may not conduct the trial.
- 16.95 Nonetheless, the European Court of Human Rights (ECtHR) has held that a judge should not be regarded as biased simply on the basis that they have been involved in the preliminary investigation. Yet there is evidence that judges who have seen the prosecution dossier are more likely to convict, perhaps due to the influence of criminal history evidence. Presumably perceptions around a lack of impartiality within the inquisitorial approach can be mitigated by changing judicial personnel for the trial or ensuring that the fact-finder at trial has independence from the judge. A parallel is that in Northern Ireland’s adversarial system the judge determining bail or disclosure issues would not act as the Crown Court trial judge.
- 16.96 Secondly in a purely inquisitorial system there is an assumption that the judge will seek to discover the truth, allowing a limited role for defence lawyers. The

23 Finn, J. (2009) “Inquisitorial trials for sexual offences and ‘fair trial’ rights” *Canterbury Law Review* Vol. 15, pp. 317-348

ECtHR has emphasised the crucial importance of the right to a lawyer in order to ensure a fair trial. Nonetheless, in practice, defendants in most European inquisitorial systems do not always receive significant assistance from their lawyer. I do not believe this is in keeping with our traditional sense of justice and fair play

- 16.97 Thirdly the defence in adversarial systems has significant scope (limited by evidential rules and the privilege against self-incrimination) to call witnesses. In strict inquisitorial theory the judge could determine the matter without asking the defendant for any evidence, or could require self-incriminating evidence. However, the ECtHR has recognised significant changes in this regard as a result of the Convention. Nonetheless, the importance afforded to the neutral judge as investigator may limit the defence's opportunity to call witnesses to challenge the prosecution case.
- 16.98 Fourthly cross examination within the inquisitorial system may take place in private, and the judge is likely to limit the defence's opportunity to cross-examine witnesses in detail. Witnesses may face cross-examination by the investigating authority on a number of occasions, but witnesses rarely have to give evidence during the trial or be cross-examined by defence counsel.
- 16.99 I believe this Review and the foregoing chapters have recommended proposals to address and meet many, if not all of the challenges of the adversarial system and which strengthen the case to resist changing to a purely inquisitorial system. Several at least introduce aspects of the inquisitorial process to moderate the unacceptable aspects of the pure adversarial system.

Arguments in favour of the status quo retaining jury trials rather than a judge alone or a judge with two assessors

- 16.100 The arguments in favour include:
- Jury trial can more accurately reflect the views of the community and society as the jury is taken from a sample of members of the public.
 - Most people never become involved in the criminal justice system save on the very rare occasions when they are an accused, a victim or a witness. Jury service affords an opportunity for every citizen to be positively involved in the criminal justice system, a particularly important factor in a fractured society such as Northern Ireland.
 - It contributes to openness and transparency of criminal proceedings, especially if we are to restrict public attendance in serious sexual offence cases. It guards against secrecy and censorship of criminal proceedings.
 - The criminal justice system relies on trusting jurors to be true to their oath and adhere to judicial directions. Removal of that concept, even in limited circumstances of serious sexual offences, risks undermining that faith and loss of public confidence in the system overall.

- Current flaws in the jury concept, if they exist, can be resolved by better education together with earlier, clearer written and oral judicial guidance.
- There is a paucity of local empirical evidence that juries cannot be trusted to follow judicial directions in these trials.
- A jury means that the decision-making is being carried out by a group of people fresh to the task and not just in one person's hands who could become battle hardened hearing numerous cases over the years, out of touch with social mores, and whose bias or prejudice could affect the verdict.
- If the Diplock precedent of non-jury trials was followed, a judge alone hearing a trial of serious sexual offences would provide an automatic right of appeal, which could conceivably lead to greater stress on the complainant and increased delay.

Are there compelling arguments in favour of removing or altering the nature of jury trial?

16.101 The arguments in favour of a judge sitting alone or a judge sitting with two lay assessors include:

- Judges have legal training and expertise to analyse evidence whereas it can be difficult for a jury to understand the complexities of challenging criminal matters and complex serious sexual offences.
- A judge could pre-read the details of the case and direct parties to the central issues.
- Judges are trained to be more objective than juries. It is difficult to know whether juries have left their prejudices and stereotypical mythology aside or ignored social media content as no reasoning is required for their verdict, especially where adverse publicity has been available during the course of the trial.
- When giving a verdict a judge would have to give reasons, making the process more transparent and making it easier for a defendant to appeal. It would also provide reassurance to both complainants and accused that the verdict reflected a determination based on logic and law.
- A reduction in the cost of long trials and improved case management by the judge if appointed at an early stage.
- While recognising the ability of jurors to follow directions and robustly resist the impact of prejudicial information, a distinction is clearly maintained between the respective abilities of judges and jurors to disregard prejudicial publicity.
- Trials would likely be shorter.

- It would reduce the impact of previous sexual history being introduced unwittingly or otherwise.
- A judge sitting alone with a lay panel of two would mirror youth justice hearings and would still involve the public to some extent in the trial process. It has to be remembered that the vast majority of criminal cases are heard by a District judge sitting alone albeit involving less serious offences.

Discussion

- 16.102 Our research has illustrated that worldwide, even in the common-law countries, the purity of trial by jury is conceptually no longer sacrosanct in the modern era.
- 16.103 For my own part I confess I started out on the journey through this Review with a commitment to the jury system in all serious criminal offences.
- 16.104 I fear that unflinching commitment may have been partly borne out of a less than full appreciation on my part at that stage of the serious dangers that lie in the wake of the current jury led system in serious sexual offences.
- 16.105 The emerging evidence during this Review of the potential presence of jury myths and stereotypes, the menacing potential of social media, and the benefits of providing a reasoned, transparent judicial judgment to explain to complainants and accused alike why a verdict that may have a permanent and devastating effect on their lives has been determined, are all matters that have given me ample reason to pause and reflect.
- 16.106 Moreover, it has become clear to me in the course of my discussions that a growing number of credible voices, including a minority of judges, barristers, solicitors, police officers, other stakeholders in the criminal justice system and, most importantly, many thinking members of the public especially from the younger generation — share the same profound concerns about the suitability of jury trials as opposed to a judge sitting with two assessors in serious sexual offences. They question the appetite amongst lawyers such as me for the delicate inquiry and reform that our jury system arguably demands if the criminal justice system as a whole is to retain public confidence.
- 16.107 On the other hand I remain concerned about the dangers of undermining our criminal justice system based, as it is, on faith and trust in the jury system.
- 16.108 Would the removal of trial by jury from the criminal justice system in Northern Ireland in these cases, not only eliminate an historic element of the legal system but deny the community here the right to participate in the administration of criminal justice, with an attendant lack of community confidence in their legal system? Would removal of juries in serious sexual offences be the thin end of the wedge, leading to campaigns for its removal overall? We have to be wary of a strategy of Leninist clarity that demands we do whatever it takes to rid us of the flaws of the jury system even if that means getting rid of the jury system itself.

- 16.109 It cannot pass without comment that, having interviewed representatives from all the political parties represented in the Assembly, with one firm exception, they all strongly supported the retention of juries in these cases, albeit most recognised the attendant dangers of social media and jury myths. I believe a proposal for the removal of jury trial would be a legislative non-starter in this part of the world.
- 16.110 I recognise that our extensive research has shown that the trend in some jurisdictions in common-law countries is to increasingly open the door to non-jury trials particularly if the defendant opts for it. However, I cannot overlook the unique circumstances that pertain in Northern Ireland where confidence in the administration of justice and the participation of citizens in the criminal justice system carries a particularly important resonance.
- 16.111 Are serious sexual offence cases, where often the issue is essentially one word against another, not quintessentially more suited for twelve people fresh to the case to determine rather than individual judges who may have become battle hardened with the passage of time and the regularity of the cases?
- 16.112 Is not the research into actual juries in Northern Ireland justifying their removal too incipient at best, and inadequate at worst, to form an appropriate basis for any particular course of action? We must not base reform on assumption rather than on empirical evidence. Only a slim body of research has examined jurors' internet use and even fewer studies have focused specifically on social media. The suggestion to abolish, or fundamentally reform, the jury system in the absence of local empirical evidence that fair juries are no longer possible in the digital age is arguably too far reaching at this stage in Northern Ireland.
- 16.113 The argument for removal may be particularly hard to sustain where this Review is recommending a number of reforms to confront the flaws attendant on jury presence, including steps to address social media exposure and rape mythology and provide more comprehensible judicial directions and explanations. At the very least would it not be necessary to suspend such precipitative action pending the outcomes of these reforms and perhaps return to the issue once those changes have bedded in and we have observed their effect?
- 16.114 Whilst, therefore, at the moment I still lean towards maintaining juries even in cases of serious sexual offences, it is perhaps the area where I entertain most misgivings about the current law.
- 16.115 That said, I have no difficulty even at this moment, conceiving of those circumstances where a court might even now be persuaded by an accused that a fair trial was no longer possible with a jury.
- 16.116 A classic example occurred in England in 2016,²⁴ when the court had to consider the relationship between the right to a fair trial and openly abusive

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R (on the application of the BBC) v. F and D [2016] EWCA Crim 12

and potentially highly prejudicial communications on social media in a case concerning two teenage girls aged 13 and 14 charged with an horrific murder. As a result of a torrent of comments and abuse posted on Facebook and social media, the trial judge, confronted by a joint application by both prosecution and defence, felt constrained to discharge the jury and order a retrial at a different venue, creating considerable stress for the family of the victim, the witnesses, the defendants and their families and all those involved in the process.

- 16.117 Such instances are very rare but if such an extreme set of circumstances with widespread publicity were to occur in a small jurisdiction such as Northern Ireland, it simply might not be possible to address the mischief by a change of venue if the reporting had been province wide.
- 16.118 In such circumstances I believe there is much to be said for the Australian experience (echoed to a lesser or greater degree in the other jurisdictions we have cited) that where the defence has made such an application and the judge decides it is in the interests of justice to do so, the trial should continue with a judge-alone. Such an application could be made and determined at any stage of the process.
- 16.119 I emphasise, however, that this would only occur where the accused had consented in the first place. For a judge to take away the right of an accused to a jury trial in the interests of justice on an application by the prosecution, which is not consented to by the accused would represent a significant departure from the position in common law jurisdictions, which have not abolished the jury altogether.
- 16.120 As mentioned earlier in this Review, there are of course specific conditions which, if satisfied, lead to deprivation of the right to a jury but my suggested amendment involves the much broader ground of the 'interests of justice' or the 'effective administration of justice'. In those wider circumstances the consent of the accused should be required.
- 16.121 In the context of jury trial I turn now to two matters that surfaced during my extensive interviews in the course of this Review and which I can address in relatively short order.

Should there be a gender quota in juries?

Background

- 16.122 In recent years, some campaign groups have called for gender quotas in rape cases, on the assumption that a woman's perspective on rape and other serious sexual offences is drowned out by the man's perspective, resulting in unjust acquittals.

Discussion

- 16.123 The argument is that men and women, as two distinct groups in society, bring different perspectives to the jury room, and the legal system should account for this fact in its construction of rules about criminal and civil juries. A jury drawn from a fairly representative panel of jurors, however, cannot be truly a jury of one's peers if the perspective of women is absent or silenced.
- 16.124 How the profile of a jury can influence the verdict is far from clear-cut. If that were true, one would expect that female-dominated juries would convict more readily than male-dominated ones.
- 16.125 Attempting to test that hypothesis in 2009, academics Conor Hanly, Deirdre Healy and Stacey Scriver in Ireland analysed the verdicts and gender breakdowns of 108 juries: 64% had more men than women, 17% had more women than men, and 19% were split evenly.²⁵
- 16.126 The analysis, published by the Rape Crisis Network Ireland, found female-dominated juries did not convict of rape in any case, and the male-dominated ones had a higher conviction rate than evenly split juries. The numbers were too small to be definitive, but the researchers concluded there was no evidence that increasing the number of female jurors would lead to more convictions, which is consistent with research in other countries.
- 16.127 Professor Thomas, who is mentioned in earlier chapters and is currently researching jurors in Northern Ireland, informed me that in the course of the many years spent researching real jurors in England and Wales, she has found no evidence that a gender quota would make any difference to jury outcomes.
- 16.128 As I have stated throughout this Review, I cannot recommend reform on anything other than evidence-based research. I reiterate that the concept of juries following judicial directions to put prejudice out of their minds and acting responsibly in compliance with their oath is a principle upon which our criminal justice system is founded. I conclude there is no compelling evidence that women or men react differently or less responsibly in light of those directions.
- 16.129 I therefore find no evidential base for gender quotas in juries in serious sexual offence cases.

Not proven

Current law

- 16.130 Only two verdicts are open to a jury in Northern Ireland: guilty or not guilty.

25 Hanly, C., Healy, D. and Scriver, S. (2009) *Rape and Justice in Ireland: a National Study of Survivor, Prosecutor and Court Responses to Rape* Dublin: Liffey Press

Background

- 16.131 Scotland has a unique system within the English-speaking common-law world. It is the only country that has 15 jurors, three verdicts — guilty, not guilty and not proven — and where a simple majority of eight out of 15 is sufficient for a guilty verdict.
- 16.132 The legal implications of a not proven verdict are the same as with a not guilty verdict: the accused is acquitted and is innocent in the eyes of the law.
- 16.133 Scottish juries were historically able to return only proven or not proven verdicts. A third verdict of not guilty was introduced in the 1700s and became more commonly used than not proven.
- 16.134 In more recent years, it has been said that the general perception has been that a not proven verdict suggests a sheriff or jury believes the accused is guilty, but does not have sufficient evidence to convict.
- 16.135 In 2016, Holyrood’s Justice Committee concluded that Scotland’s not proven verdict was on borrowed time and may not serve any useful purpose. In the 2016/17 programme for government,²⁶ the Scottish government said it wanted to commission ‘independent jury research to consider the dynamics of decision-making by juries, including the current jury majority and three verdict system, helping to inform future proposals for the reform of the criminal justice system.’
- 16.136 Consequently, a ground breaking study into how juries come to decisions, including their use of the not proven verdict, is to be carried out in Scotland. The research has been described as the first of its kind in Scotland and will take place over the next two years. It will be led by three academic professors and a market research company.
- 16.137 The study will involve members of the public sitting on mock juries and will examine the size of juries and their decision-making processes. It will also consider Scottish law’s unusual three-verdict system.
- 16.138 Responding to the plans, Douglas Thomson of the Law Society of Scotland’s Criminal Law Committee told BBC Scotland that the not proven verdict was the logical one to keep in criminal cases and there was an argument for dropping not guilty. He said that if the Crown failed to prove a case, the logical verdict was not proven rather than not guilty.
- 16.139 The prospect of introducing this third verdict into the Northern Ireland system has been raised with me in the course of this Review by a disparate collection of individuals including some complainants and politicians.
- 16.140 The primary argument made for its introduction has been that it is believed that there exists a public perception that if a not guilty verdict is brought in by

26 Scottish Government (2016) *A Plan for Scotland: The Government’s Programme for Scotland 2016-17* Edinburgh: Scottish Government

the jury, this means that the complainant was lying and the allegations were fabricated. A not proven verdict would clarify the issue and make it clear that far from asserting the complainant was lying and that the accused had not committed the offence, the jury had merely concluded that there was not enough evidence to convict the accused.

16.141 The statistics for all three verdicts in Scotland are as follows.

People proceeded against in court by outcome of court proceedings, 2011/12 to 2015/16

Outcome	2011/12	2012/13	2013/14	2014/15	2015/16
PNGA ¹ ² or deserted ³	10,910	9,975	9,687	9,323	9,044
Acquitted not guilty	4,517	4,719	5,322	6,275	6,633
Acquitted not proven	991	972	1,119	1,149	1,173
Charge proved*	108,424	101,018	105,656	106,622	99,950
All	124,842	116,684	121,784	123,369	116,800

1 Plea of not guilty accepted.

2 Includes cases where proceedings are dropped after a person has been called to court - for example, if witnesses cannot be traced.

3 Deserted simpliciter: that is, trial is permanently abandoned by the Procurator Fiscal.

* Excludes people against whom proceedings are started but which are dropped before they reach court.

Source: Scottish Government Criminal Proceedings Database

Arguments for introducing the not proven verdict

16.142 As indicated above, it would more closely reflect the realities from the complainant's point of view whilst not stating that the accused was guilty. This would make the failure to convict an accused easier for a complainant to accept and accommodate themselves to the finding, thus aiding ultimate recovery from their experience.

16.143 It gives the jury a real choice to reflect their findings without creating misleading impressions for the complainant.

Arguments for maintaining the status quo with simply two verdicts

16.144 The verdict is confusing for juries and the public and fails to provide closure for victims. A not proven verdict risks leaving victims confused and disappointed, or an impression with the public that defendants have escaped punishment.

16.145 It can stigmatise an accused person and undermines the principle of innocent until proven guilty by leaving a stain on an accused where a jury is not persuaded to convict.

- 16.146 It is fine for the Scottish justice system to be different from other countries if we are satisfied those differences are worthwhile. Where is the evidence it is better than our system?²⁷
- 16.147 Why would we introduce a wholly new system when we are awaiting the outcome of the Scottish study, which may conceivably result in Scotland abandoning the concept?
- 16.148 Whilst Scotland has had this system over the centuries, it is entirely foreign to our jurisdiction and there is no empirical evidence or research to justify its introduction.

Discussion

- 16.149 Any reform I recommend must be evidence-based. I find no evidence or research suggesting that this concept, which may even be on the cusp of abandonment by its one proponent, could justifiably be introduced in Northern Ireland.
- 16.150 For centuries our criminal justice system has been founded on the basis that the accused is either guilty or not guilty. To introduce a concept other than this is potentially confusing to the public and unfair to accused persons without offering any real closure to the frustrations of a complainant.

Responses

- 16.151 The general thrust of the detailed responses that I received on the issue of jury trials mirrored almost precisely the situation that I discerned prior to the consultation exercise. The fact of the matter is that whilst most stakeholders and members of the public favoured juries, there is a gathering momentum, albeit still a minority view, behind the argument to remove juries from serious sexual offences.
- 16.152 419 people replied to the online survey on this issue. 68.0% agreed with the recommendation that serious sexual offences remain heard by a jury save in exceptional circumstances, 16.2% responded that they were neutral/don't know. 78.2% of men were in favour of the recommendation and 66.1% of women. Interestingly 25-34 year old respondents showed least agreement with the recommendations, the figure in favour being 59.1%, with 22.6% of respondents in this age group answering neutral/don't know.
- 16.153 Most of the respondents who sent in submissions to the Review, including all of the 5 main political parties, were in favour of retaining juries.²⁸

27 Peterkin, T. (2017) 'Study to Evaluate 15 member jury and not proven' *The Scotsman* 24 September

28 For example the Bar Council of Northern Ireland, the Law Society, Northern Ireland Human Rights Commission, the Retired Associates of Probation Officers, Dame Vera Baird QC, End Violence Against Women, Nexus NI, Dr Olivia Smith and others.

- 16.154 A number of individual complainants who had been through the system, victims' representative bodies and some academics were opposed to the continuation of juries hearing these cases.²⁹ It should be noted that many of the opponents to the jury system felt that a judge should sit with perhaps 2 lay assessors.
- 16.155 Women's Resource and Development Agency, whilst not opposed to the idea that juries may be the best system for prosecuting sexual crimes, felt that not enough consideration had been given by me to exploring alternatives, including further exploration of the evidence around developing sexual violence panels, smaller than a traditional jury and with some expertise in the issues, or at least having built up experience of examining crimes of this nature.
- 16.156 The response from Sinn Fein really encapsulated the thrust of all of the responses that favoured juries:
- "The jury is an essential part of our legal system. The use of a jury is viewed as making the legal system more open and transparent which is important particularly if public attendance at serious sexual offence cases is restricted.
- The jury system gives the public a chance to participate in the administration of justice. Justice is seen to be done as members of the public are involved in a key role.
- There is general public acceptance of the way the jury system works. With the public having confidence in the jury system, it is very difficult to alter the system. The lack of public involvement in the delivery of justice might call into question its impartiality and destroy people's faith in it."
- 16.157 Given the universal support that juries have amongst all 5 political parties, I reiterate that in any event it would be a legislative non-starter to suggest changing the system.
- 16.158 That said, the strength of the case against juries should not be underestimated.
- 16.159 In a compelling response drafted by Victim Support NI, it referred to an online survey which that organisation had carried out between 3 December 2018 to 7 January 2019 with 72 respondents, 54.6% of whom had reported the sexual crime to the police and 45.1% who had not. Of those respondents whose case had gone to trial only 26.1% favoured a jury trial and 73.9% favoured a judge led panel with 2 expert assessors.
- 16.160 Regarding those respondents whose cases had not gone to trial, only 11.8% favoured a jury trial and 84.3% favoured a judge led panel with 2 expert assessors.

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Victim Support NI, Women's Aid Federation Northern Ireland, Belfast Feminist Network, Ms Drinan, David Lorimer BSc LLB LLM, PhD Researcher at Aberdeen University

16.161 Victims Support NI concluded:

“[it] strongly supports the belief that a judge-led panel is the best way forward. In making this judgment we have drawn on the broad experience of staff and volunteers, particularly of our ISVA’s and those who work within the courts and understand how victims experience the criminal justice system. Additionally, we have taken the views of victims, as expressed on our online survey, into account. We have also drawn on the experience of our partner organisations in other countries and debated this matter to Board level. Contemporary research and the ongoing experience of our Court Observers, who provide feedback on juries from the 9 trials they have observed, adds to the body of evidence.

This one recommendation could dramatically change the court experience for the better, encouraging victims to come forward to report crime and increase confidence in our criminal justice system.”

16.162 Amongst the many reasons which were set forward for such a change – most of which I have already set out in the earlier part of this chapter – the essential argument was that the influence of rape myths and stereotypes, the role of unconscious bias, and the particular nature of sexual crime is such that the recommendations I have made to address the flaws in the system ‘are not adequate to respond to the challenge of how those rape myths and stereotypes play in the court process and their impact on the ‘fairness’ of the trial’.

16.163 The response of Dr Willmott, a lead researcher in a large 3 year research project, examining the role of juror characteristics including rape myth acceptance, made some telling points arising out of his research which included:

“Psychological research tells us that much like racist attitudes, attitudes towards rape (rape myth acceptance) are not always overt and often held below conscious awareness. Rape myth acceptance often functions implicitly with the individual, in this case juror, unable to recognise that they endorse such myths or adopt stereotypical thinking/information processing..... It is my opinion, that whilst enhanced juror training from trial videos and expert witnesses will be beneficial in as far as increased juror awareness/recognition of rape myths may result in a small number of jurors being able to dispel the influence of these myths when presiding over a case, overall this enhanced training will have little effect in reducing rape myth bias in juror decision making.”

16.164 Separate from this issue, three other matters relevant to juries arose in the responses.

16.165 Firstly, it was a theme running through the responses of the political parties, and indeed other respondents, that the moment has now arrived to consider reviewing the exemptions from jury service that presently exist in our system. Under the Criminal Justice Act 2003, all registered electors in England and Wales aged between 18 and 70, except people with a mental illness and those

convicted of a criminal offence, must now serve on a jury if summoned. This means that judges, lawyers, politicians, ministers of religion, doctors etc. are all eligible to sit on a jury. Exemptions in Northern Ireland are much wider under the Criminal Justice (Northern Ireland) Order 2008 and the Juries (Northern Ireland) Order 1996. Thus those who have at any time held any judicial or other office belonging to any Court of Justice in Northern Ireland, barristers/solicitors, probation officers, etc. are all disqualified in Northern Ireland.

- 16.166 Changes to this system of ineligibility could increase significantly the number of people who can do jury service and would serve to better reflect the entire communities from which jurors are drawn. This could also improve public confidence in the criminal justice system and send a clear message that serving the community as a juror is the responsibility of everyone. In saying this I am only too aware that in terms of numerical and geographical distribution the small size of Northern Ireland renders a *complete* read across of the English provisions probably implausible. For example, Civil Servants may have been involved in matters relevant to the jury system across all of Northern Ireland.
- 16.167 Secondly, the recommendation that the court should have the power, if it is in the interest of justice, to grant an application by a defendant for a judge only hearing collected some measure of criticism for the following reasons:
- it was felt that the complainant should have a say in whether this right would be granted; and
 - a classic case could be an alleged paedophile who might get a less unsympathetic hearing from a judge than from a member of the public and it might be difficult to convince those in the community that the accused had been able to opt for a form of trial that might favour the community less, because it would take less account of public awareness of the seriousness of such offences.
- 16.168 There is a fear that this proposal could be the thin end of wedge and that we are moving to a stage where jury trial will only become available at the discretion of a judge.
- 16.169 The Law Society sounded a note of caution in wishing to have rather more guidance on when such circumstances for a judge only trial could be heard.
- 16.170 It might introduce an element of unfairness in that the more heinous the crime, the greater the option to choose a judge alone would be open to a defendant.
- 16.171 I conclude by saying that I still consider that there will only be rare circumstances – such as that that arose in the case of *R v F and D* [2016] EWCA Crim 12 – where, in the interest of justice, a judge would accede to an application for trial by judge alone. The presumption shall still be that jury trial is the norm and the exception would only arise if on the request of the defendant, the judge was satisfied that a fair trial was simply not possible before a jury.

16.172 Finally, it has come to my attention that following a rape acquittal in England and Wales, prosecution advocates complete Adverse Outcome Reports (AORs). The advocate is expected to use an AOR to highlight potential reasons for the acquittal and any lessons arising for the Prosecution Service. Given the perception amongst the public of a low conviction rate in Northern Ireland arising from such jury trials, I believe that the introduction of such a measure in Northern Ireland by the PPS would be instructive in terms of further debates about the advisability of jury trials as well as providing useful feedback to the PPS about how such prosecutions might be more effectively mounted in the future. I therefore recommend that this step should be taken.

Conclusion

16.173 Other than to add recommendations that there should be a broader spectrum of eligibility of jurors and the use of AORs, I consider that the recommendations that I had earlier made should remain. I still favour jury trials for all the reasons I have earlier set out despite the responses that have emerged. I am also still persuaded that in rare cases a defendant should be able to apply for a judge alone trial.

Recommendations

237. All serious sexual offences should continue to be tried in the Crown Court by a judge and jury in the adversarial system.
- 238.* Legislation should be introduced to the effect that where, in a serious sexual offence trial, the defence has made an application that the trial should continue with a judge alone in the interests of justice, and the judge agrees, the trial should be heard by a judge alone.
239. A verdict of not proven should not be introduced in Northern Ireland.
240. There should be no gender quotas in juries in Northern Ireland.
- 241.* The current exemptions from jury service in Northern Ireland should be reviewed significantly so that the legislation in Northern Ireland operates in parallel with the Criminal Justice Act 2003 in England.
242. Following acquittals in serious sexual offences, prosecution advocates should complete Adverse Outcome Reports.

Chapter 17

Measures complementing
the criminal justice system

It's time for a drastic overhaul of our justice system's response to sexual assault. The adversarial system, combined with a reactive political approach, has failed victims of sexual assault on far too many occasions. We need innovative and alternative responses which better address the needs of victims, while also acknowledging the importance of offender rehabilitation.

Rob Hulls, Former Victorian Attorney General and Deputy Premier and Director, Centre for Innovative Justice, RMIT University¹

Issues

- Should Northern Ireland introduce the concept of alternative resolution or restorative justice to complement the law and procedures surrounding serious sexual offences in Northern Ireland?
- Should section 5 of the Criminal Law Act (Northern Ireland) 1967 which requires an individual with knowledge of a relevant offence to report it to the police in the absence of a reasonable excuse be repealed?

Current law and practice

17.1 In Northern Ireland, there is no statutory basis for alternative resolution of or restorative justice for serious sexual offences outside the criminal justice system other than for children and young people. The Justice (Northern Ireland) Act 2002 allows juveniles responsible for sexual harm to participate in Youth Conferences with victims and their parents or carers.

International standards

17.2 The EU Victims' Rights Directive recognises restorative justice programmes, requiring the State to ensure that there are adequate safeguards to protect the victim from secondary and repeat victimisation, intimidation and retaliation.² However, the Directive covers all criminal offences and does not specify if the nature of the offence is relevant to the provision of restorative justice. It does establish some safeguards for the exercise of a safe and competent system, which include that the service be in the best interest of the victim, with their free and informed consent and that any agreement may be considered in future criminal proceedings.³

1 Hulls, R. (2013) 'Justice reform: a better way to deal with sexual assault' *The Conversation* 22 November [online] available at <https://theconversation.com/justice-reform-a-better-way-to-deal-with-sexual-assault-19692> Accessed: 11 April 2019

2 Council of the Europe, Directive 2012/29/EU of the standards on their rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14 November 2012

3 As above, Article 12(1)(a)-(d)

- 17.3 However, it must be recognised that the State is under an obligation to conduct an effective, official investigation in respect of allegations that fall under the scope of torture, inhuman and degrading treatment. In particular, there is an onus on the State to conduct an investigation of their own motion, once aware of the allegation, and not at the request of the victim.⁴ The serious sexual offences that fall within this Review have been considered under this heading by international treaty bodies and the European Court of Human Rights (ECtHR).
- 17.4 For example, the ECtHR has confirmed the State obligation to take action, even in circumstances where a victim of domestic violence does not make or withdraws a complaint. The Court has reiterated, “once the situation has been brought to their attention, the national authorities cannot rely on the victim’s attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim.”⁵ The ECtHR has also found it was the duty of police, when aware of allegations, to, “investigate of their own motion the need for action in order to prevent domestic violence, considering how vulnerable victims of domestic abuse usually are.”⁶
- 17.5 The ECtHR has further “underline[d] that in domestic violence cases perpetrators’ rights cannot supersede victims’ human rights to life and to physical and mental integrity.”⁷
- 17.6 Both the Istanbul and Lanzarote Conventions require that confidentiality rules should not constitute an obstacle to the reporting of serious acts of violence.⁸ In respect of children, the Lanzarote Convention requires State Parties to, “take the necessary legislative or other measures to ensure that the confidentiality rules imposed by internal law on certain professionals called upon to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse.”⁹

4 Hugh Jordan v the United Kingdom [2001] ECHR 327, para 105

5 Opuz v Turkey, (Application no. 33401/02) 9 June 2009. ECHR 2009 para 153

6 T.M. and C. M. v. The Republic of Moldova, Application no. 26608/11, 28 January 2014, para 46

7 Opuz v Turkey, Application no.33401/02, 9 June 2009, para 147, citing CEDAW Committee jurisprudence, Yildirim v. Austria (decision of 1 October 2007) and A.T. v. Hungary (decision of 26 January 2005)

8 The Council of Europe *Convention on the protection of children against sexual exploitation and sexual abuse*, 12 July 2007, Article 12(1) (Lanzarote Convention) and the Council of Europe *Convention on preventing and combating violence against women and domestic violence* November 20014 (Istanbul Convention)

9 Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, Article 28 (Istanbul Convention) and *The Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse*, 12 July 2007 (Lanzarote Convention)

Section 5, Criminal Law Act (Northern Ireland) 1967

- 17.7 The provisions of section 5 of the Criminal Law Act (Northern Ireland) 1967 (provisions that do not apply in England and Wales), require an individual with knowledge of a relevant offence (which would include rape or a serious sexual offence) to report it to the police in the absence of a reasonable excuse.
- 17.8 The figures for prosecutions and convictions for such offences under the Criminal Law Act (Northern Ireland) 1967 in Northern Ireland are extremely low. A total of 15 defendants have been dealt with in the Crown Court between 2013/14 and 2017/18, of which seven have been convicted for offences under section 5. During 2016/17, 18 defendants were convicted for offences under section 5 in the Magistrates' court, rising to 26 in 2017/18. This may be because the legislation is very effective or, more likely, because it is not enforced in practice.
- 17.9 I am led to believe that the Police Service of Northern Ireland (PSNI) adopt a safeguarding approach to such prosecutions and report such matters only if there is a risk to others by not so reporting. In the present system not all detected crimes will result in a file being sent by PSNI to the PPS for decision for a variety of reasons. For example, in specific cases such as sexual activity between two young persons or sexting these may be dealt with by social services under the Joint Protocol agreement. This is to avoid unnecessarily criminalising young persons and is also to avoid a negative impact on families. It is deemed to be in the best interests of the victim in these cases not to prosecute. Safeguarding is paramount when arriving at such a decision.
- 17.10 The Attorney General for Northern Ireland properly obviated the difficulty of the provisions when he published guidance, providing reassurance that it is highly unlikely that it will be in the public interest to prosecute a person for failure to report information received about a rape to the police where that disclosure of rape is made in the context of the operation of social security and tax credit legislation.
- 17.11 Interestingly that guidance¹⁰ contained two helpful paragraphs as follows:
- “This guidance emphasises that, in the vast majority of cases in which disclosures are not drawn to the attention of police, no offence will have been committed. Even when the section 5 offence can be said to have been committed, the primary public interest in bringing perpetrators of rape to justice and protecting the public means that any penalisation of victims (and those to whom they make disclosures) for failing to come forward with information is likely to create future barriers to victim support, to undermine

10 Attorney General for NI (2018) Guidance by the Attorney General for Northern Ireland pursuant to Section 8 of the Justice (Northern Ireland) Act 2004 Human Rights Guidance for the Public Prosecution Service – the application of section 5 of the Criminal Law Act (Northern Ireland) 1967) to rape victims and those to whom they make disclosures in connection with a claim for social security, child tax credit or anonymous registration on the electoral roll.

confidence in the criminal justice system and to damage the willingness of victims and witnesses to cooperate with the criminal justice system.

In summary, even where information about rape is not passed on to the police by a victim or a person to whom she [they] make[s] disclosure, the existence of a reasonable excuse will mean that the section 5 offence has not been committed. Even where no reasonable excuse exists, the public interest points away from prosecuting the victims of rape or those to whom victims make disclosures of rape.”

- 17.12 Understandably, that guidance carried a rider that the situation may be different where the victim of the rape is a child or vulnerable adult, or where failure to report the offence to police is likely to put others at serious risk of harm.

Universities

Queen’s University Belfast

- 17.13 Queen’s University Belfast (QUB) follows a similar path to other universities in England and Wales when allegations of serious sexual offences on campus are drawn to their attention by complainants. The vital difference from the rest of the UK is the application of the Criminal Law Act (Northern Ireland) 1967, carrying the obligations referred to in paragraph 17.7 above. This obliges QUB to report to the police serious sexual offences. The University has a Student Sexual Misconduct Policy,¹¹ which applies to all members of the University. The salient points of the policy are as follows:

- Within the policy, sexual misconduct is defined as any unwelcome behaviour of a sexual nature that is committed without consent or by force, intimidation or coercion. Such behaviour will usually also constitute a criminal offence.
- It operates a zero tolerance policy with regard to sexual misconduct.
- If a member of the University has been the victim of sexual misconduct, the University will take all reasonable steps to ensure their physical safety and facilitate their access to appropriate specialist support, while respecting their feelings and decisions.
- If a student is the victim of sexual misconduct, they are advised to consider reporting it to the police and/or the University. The University further advises that the information will be treated in a sensitive, confidential and non-judgemental manner. A range of options can then be explored both inside and outside the University.

11 Queen’s University, Belfast, *Student Sexual Misconduct Policy* [online] Available at <http://www.qub.ac.uk/directorates/AcademicStudentAffairs/AcademicAffairs/GeneralRegulations/Policies/StudentSexualMisconductPolicy/> Accessed: 11 April 2019

- If complainants choose not to report to the police, they can still seek support services within the University as well as counselling offered by Inspire through the student well-being service.
- The University will cooperate fully with any police investigation and any subsequent legal proceedings.
- The University will at no time undertake any investigations or actions that could compromise a police investigation or criminal proceedings. Where a police investigation is ongoing, the University will normally hold any internal investigation in abeyance, pending the outcome of any such police investigation or criminal proceedings.
- Penalties for the disciplinary offence of sexual misconduct will vary according to the seriousness and circumstances of the offence but include suspension and expulsion from the University.
- The University reserves the right to take disciplinary action against a student or member of staff accused of sexual misconduct of its own volition, even if the reporting student does not wish to make a formal complaint.
- If a student is under investigation for an alleged criminal offence, they have a duty to notify the University.
- The University also has access to specific “Safe and Healthy Relationships” wellbeing advisers who can support students who are reporting or responding to allegations of misconduct by listening to them as well as providing guidance and support around their options.
- Additionally, students have access to advocates for safe and healthy relationships, who are specially trained staff members from across the University, equipped to deal with any problems a student may encounter, including emotional and specialist support (the latter through signposting to specialised external agencies).
- If a student is accused of misconduct (by another student, the University or the police), they are advised to share the circumstances with someone they can trust such as a friend, a family member or a member of staff.

Ulster University

- 17.14 The Ulster University has no specific policy on sexual misconduct but there is an overall disciplinary policy. Any allegations of sexual misconduct would be investigated under that policy.
- 17.15 The University is conscious that it needs to do more in terms of dealing with alleged sexual offences, in relation to both staff and students. To that end, senior management met in the autumn of 2018 with Nexus NI to obtain advice and explore possible ways forward, particularly over the issue of consent. This will lead to a new policy on sexual misconduct and something more substantive built into the existing disciplinary policy.

Further Education Colleges

17.16 This Review also made contact with Further Education Colleges. From their responses, it is understood that whilst they do not have specific sexual misconduct policy, they do have disciplinary and safeguarding policies. They invariably report serious sexual offences to the statutory agencies, including the police and social services.

Communities

17.17 Outside universities, there is a number of accredited community restorative justice organisations. An example is Northern Ireland Alternatives, which has five offices throughout Belfast. These tend to work most closely with vulnerable victims within communities to provide support as opposed to direct contact with the offender.

Restorative justice

17.18 Restorative justice is a somewhat different concept. It gives victims the chance to meet or communicate with their offender to explain the real impact of the crime. It empowers victims by giving them a voice.

17.19 It often involves a meeting called a conference, where the victims meet their offender face-to-face. Both parties can bring supporters, for example family, friends or professionals such as counsellors or victim support workers.

17.20 Sometimes when a face-to-face meeting is not the best way forward, the victim and offender will communicate through letters, recorded interviews, video or via a facilitator.

17.21 The benefits of restorative justice are that it can help victims to get answers to their questions and to directly tell the person who harmed them how they have been impacted.

17.22 It holds offenders to account and can give them an opportunity to make amends.

17.23 Restorative justice can be used for any type of crime and at any stage of the criminal justice system, including alongside a prison sentence. It does not matter how long ago the crime took place — there is no time limit.

17.24 It is only possible if the offender has admitted to the crime, it is essential that both victim and offender are willing to participate. It is an entirely voluntary process. It may be used as part of a court sentence, both a custodial sentence or community-based service, if the victim and perpetrator choose to participate.

17.25 The restorative justice process is led by a facilitator or an accredited practitioner, who supports and prepares the participants and makes sure that the process is safe. The victim can drop out at any time, including on the day of a conference

or even while it is taking place. It is the victim's process and it will be tailored to meet their needs.

- 17.26 Taking part in a restorative justice conference can proceed with the victim alone or with a friend or family member there to support them.
- 17.27 The principles of restorative justice have been successfully placed at the heart of the youth justice system in Northern Ireland as it has evolved since 2002.
- 17.28 The system of restorative justice that has been established involves the use of youth conferences at which the offender, victim (or victim representative), professionals and others are brought together to discuss the offence and its repercussions and to agree on an action plan for the offender.
- 17.29 Youth conferences are fully integrated within the criminal justice process. A young person can be referred for a youth conference at one of two stages of the criminal justice process:
- Prior to conviction if, having been charged by the PSNI, the young person admits the offence; in such cases, the referral is undertaken by the PPS, and the conference is known as a diversionary youth conference.
 - Following conviction, in which case the conference is known as a court-ordered conference. With certain exceptions, there is a statutory requirement for the court to order a conference for a convicted young person who agrees to participate.
- 17.30 Youth conferences are organised and facilitated by youth conference coordinators, who are specialist, trained officers of the Youth Justice Agency (YJA).
- 17.31 At a youth conference, the young person is invited to give an account of the offence, and the victim, if present, is encouraged to ask the young person questions about what has been said and how they have been affected by the crime.
- 17.32 Others in attendance are also invited to give their views on the crime and its effects. A critical element of the conference is the collaborative development of a youth conference plan, which sets out actions to be taken by the young person to make amends for the offence and reduce the likelihood of further offending.
- 17.33 Where a youth conference plan is agreed at the conference, the details of the plan are submitted to the PPS (in cases of diversionary conferences) or court (if it was a court-ordered conference).
- 17.34 If the plan is accepted by the PPS or court, its implementation is thereafter monitored by the youth conference coordinator or another member of YJA staff. If the PPS rejects a plan, the case may proceed to prosecution; if the court rejects a plan, it can pass a different sentence in its place.

- 17.35 Following consultation with the Department of Justice, the PSNI and the PPS, it was agreed that the Probation Board for Northern Ireland (PBNI) would pilot an intensive community sentence as an option for judges in the Ards, and Armagh and South Down court divisions in low-tariff crime. Termed the 'Enhanced Combination Order' (ECO), it was based on existing legislation and offered judges an existing community option in a more intensive format.
- 17.36 ECOs focused on rehabilitation, victim issues, restorative practice and desistance. They also included a focus on mental health, parenting/family issues and an assessment by PBNI psychologists. The requirements on offenders subject to such orders were to:
- complete unpaid work within local communities at an accelerated pace;
 - participate in victim-focused work and, if possible, a restorative intervention;
 - undergo assessment and, if appropriate, mental health interventions with PBNI psychology staff, and participate in parenting/family support work if applicable;
 - complete an accredited programme, if appropriate, such as Thinking Skills and Personal Capabilities; and
 - undertake intensive offending-focused work with their probation officer.
- 17.37 The DoJ is currently working on an adult restorative justice strategy.¹² The Reducing Offending Directorate (ROD) is committed to have this document ready for public consultation by mid 2019. I understand that this Directorate will be looking at the proposals in this Review, perhaps in the context of a proposed Centre of Restorative Excellence, in line with the recommendation by the Fresh Start Panel Report on the Disbandment of Paramilitary Groups in Northern Ireland.¹³

Background

- 17.38 As I have set out in chapter 2, 'The voice of complainants', there is substantial under-reporting of serious sexual offences on a scale few of us fully appreciate. Individuals, males and females alike, do not report the incident. More specifically, it has been estimated the year ending March 2017 that only around 17% of women reported offences of a serious sexual nature to police.¹⁴ Men were even less likely to report rape.¹⁵ There is, therefore, a multitude of women

12 Department of Justice (unpublished) Draft Adult Restorative Justice Strategy for Northern Ireland 2016-2019

13 Alderdice, J., McBurney, J. and McWilliams, M., (2016) *The Fresh Start Panel Report on the Disbandment of Paramilitary Groups in Northern Ireland*. Belfast: Northern Ireland Executive

14 Office for National Statistics (2018) *Sexual offences in England and Wales: year ending March 2017* London: Office for National Statistics

15 Spruin, E. and Reilly, L. (2018) "An exploration into the acceptance of male rape myths within the UK" *Journal of Forensic Sciences and Criminal Investigation* Vol. 9, No. 3

and men who bear these crimes in silent shame and misery. For these people the legal system is ill constructed for resolution of their experiences.

- 17.39 Whilst there is no agreed definition of restorative justice processes, the concept is internationally both a way of thinking about crime and a process for responding to crime. It provides an alternative framework for thinking about wrongdoing. The European Forum for Restorative Justice has used the following definition of restorative justice:

“Restorative justice is an inclusive approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired, relationships maintained and justice achieved.”

Other jurisdictions

England and Wales

- 17.40 The Restorative Justice Council (RJC) promotes quality restorative practice for everyone. The RJC is the independent third sector membership body for the field of restorative practice. It provides quality assurance and a national voice advocating the widespread use of all forms of restorative practice, including restorative justice. The RJC’s vision is of a society where high-quality restorative practice is available to all.
- 17.41 There is evidence from the Ministry of Justice in England¹⁶ that “85% of victims who go through restorative justice conferences find it helpful ... there is a 14% reduction in reoffending rates”.
- 17.42 A further report in 2007 recorded that victims of crime who engage in restorative justice do better on average than victims who do not, across a wide range of outcomes including reduced levels of post-traumatic stress.¹⁷
- 17.43 An evaluation of the Ministry of Justice (formerly the responsibility of the Home Office) restorative justice schemes in 2008 established that restorative justice provided value for money, with an overall cost to savings ratio of 1:9.¹⁸
- 17.44 English universities operate a similar alternative resolution approach to that in QUB. For example, Cambridge University offers both formal and informal reporting options for all students who come forward with experiences of sexual misconduct, whether or not they choose to report to the police. The University

16 Ministry of Justice (2012) *Restorative Justice Action Plan for the Criminal Justice System* London: Ministry of Justice

17 Strang, H. and Sherman, L. W. (2007) *Restorative justice: the evidence* London: The Smith Institute

18 Restorative Justice Council (2011) *What does the Ministry of Justice research into restorative justice tell us?* London: Restorative Justice Council extrapolated from Shapland, J., Atkinson, A., Atkinson, H., Dignan, J., Edwards, L., Hibbert, J., Howes, M., Johnstone, J., Robinson, G. and Sorsby, A. (2008) *Does Restorative Justice affect reconviction? The fourth report from the evaluation of three schemes* London: Ministry of Justice

will support a student to go to the police if they choose to do so but will not put any pressure on them to report to the police.

- 17.45 The only time the University will report to the police without the explicit consent of the student (although it will inform the student that it is doing so) is if the University considers the student or someone else to be in immediate danger.
- 17.46 The University reporting options are available for students, regardless of the type of sexual misconduct they have experienced. This could include an accusation of sexual intercourse without consent. The University considers that it would be unfair to give students who have (allegedly) experienced more serious sexual misconduct fewer reporting options. That being said, the University is transparent with students about the limited investigative powers and resources available to the University compared with those of the police.

United States

- 17.47 The tension between a university's responsibility to respond to internal complaints of sexual misconduct and the criminal justice system's response to the same complaints has been a topic of lively discussion in the US higher education arena for some time.
- 17.48 Under federal civil rights law, universities and schools must proactively prevent and respond to claims of sexual harassment, sexual violence and other forms of gender-based violence, retaliation, discrimination, and must have an impartial and prompt process for investigating and adjudicating reported cases.
- 17.49 An informal process, such as mediation, may be appropriate for some cases of sexual harassment, but in cases involving allegations of sexual assault, mediation is not appropriate, even on a voluntary basis.
- 17.50 Colleges, universities and school districts are required by law to provide complainants with a prompt, adequate and impartial investigation should they choose to make a report. The following is to be noted:
- in cases involving criminal conduct, school personnel must determine whether appropriate law enforcement or other authorities — for example, child protection authorities — should be notified;
 - at a university such as Tufts in Massachusetts, the university will honour a complainant/victim decision either to pursue a law enforcement remedy or to decline to pursue that avenue of remedy; and
 - Tufts found that very few students choose to go through the criminal process (for all the daunting reasons set out in this Review about the criminal justice system) and they may prefer the internal university process; they may perceive the internal university process as less adversarial and providing immediate resources and support.

- 17.51 In 2014, the White House published a report¹⁹ noting that while:
- “some survivors of [sexual assault] turn to the criminal justice system, others look to their schools for help or recourse... These two systems serve different (though often overlapping) goals. The principle aim of the criminal system is to adjudicate a defendant’s guilt and serve justice. A school’s responsibility is broader: it is charged with providing a safe learning environment for all its students - and to give survivors the help they need to reclaim their educations.”

Ireland

- 17.52 To obtain the Irish perspective on the concept, the Review spoke to Dr Marie Keenan²⁰ an acknowledged expert on the subject.
- 17.53 Dr Keenan does not believe restorative justice should be an alternative to the criminal justice system. Rather it should be promoted and operated by the State as an additional justice mechanism and a supplementary accountability tool for offenders.
- 17.54 She asserts that justice outcomes and best procedures have to make it very clear that the context of the sexual violence matters. Responses should be influenced by the context and the victim’s justice interests.
- 17.55 Dr Keenan’s Irish study,²¹ which considered the experiences of 23 offenders and 30 victims, found that the majority of victims wanted restorative justice. There were two cohorts who preferred the idea of restorative justice: interfamilial contexts and situations with very young offenders.
- 17.56 While, therefore, restorative justice should be provided as an additional avenue, it is understood that for some this will become the primary form of justice.
- 17.57 It was Dr Keenan’s view that victims may want a voice and participation. The perpetrator may have faced the criminal justice system and been punished accordingly, but the victim, who has simply been a witness in the criminal trial, often remains a passive bystander.
- 17.58 Restorative justice aims to put the victim at the heart of the justice process. Victims desire a voice which can help them to move on; validation, vindication or offender accountability. Some of these may be more important than others to individual victims.
- 17.59 A victim’s voice may not be heard much in the criminal justice process but restorative justice can give them a voice. Participation in the criminal justice process may be limited, although if the victim secures a conviction, they may

19 White House Task Force to Protect Students from Sexual Assault (2014) *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault* Washington: The White House

20 Associate Professor at the School of Social Policy, Social Work and Social Justice, University College Dublin.

21 Keenan, M. (2014) ‘Sexual trauma and abuse: Restorative and Transformative Possibilities’ *Exploring the Potential of Restorative Justice for Sexual Violence* Leuven, Belgium

feel validated. Moreover, for some complainants — for example, where the case does not progress beyond the PPS — restorative justice may become an alternative.

- 17.60 With restorative justice sometimes a defendant's accountability can be seen to be fulfilled by them turning up and relating their story. This is insufficient in serious sexual offences. They must agree to sexual offender treatment etc.
- 17.61 It is more than this however. It involves listening to the victim's account of the harm and the consequent suffering expressing remorse (if they feel it) and agreeing to take actions designed to repair the harm and to reduce the risk of further harm. In the case of serious sexual harm the actions and the accountability should be more rigorous and relevant to the specifics that emerge from the exercise.
- 17.62 In terms of cost-effectiveness, in Ireland, a recent evaluation and social return on investment analysis of restorative justice highlighted a potential 300% return on investment.²²
- 17.63 Some jurisdictions — Belgium, Denmark and Norway — have legislated for both systems of criminal justice and restorative justice.

Belgium

- 17.64 In Belgium, there is a firewall between the two systems of criminal justice and restorative justice, which run in parallel. Generally, it is only in cases reported to the police where the complainant will be offered restorative justice.
- 17.65 Once a report is made, the police will contact the complainant to inform them of the restorative justice (mediation) service.
- 17.66 It is at the judge's discretion if the restorative justice report is used in sentencing the defendant.
- 17.67 Complainants can access this service at any stage of the criminal justice system.
- 17.68 This is a State service where, in theory facilitators are not able to take self-referrals (where the person has not reported the crime). In Dr Keenan's experience, it sometimes happens, where a case is taken under the radar.

New Zealand

- 17.69 There is legislation for restorative justice in New Zealand. Section 24A of the Sentencing Act 2002 came into force on 6 December 2014. The provision means a court must adjourn proceedings to enable enquiries to be made by a suitable person as to whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victim.

22 Quigley, M. Martynowicz, A. and Gardner, C. (2015) "Building Bridges: An Independent Evaluation of Le Chéile's Restorative Justice Project. Research Findings" *Irish Probation Journal* Vol.12

- 17.70 It applies if an offender has pleaded guilty or has been found guilty, if there are one or more victims of the offence and if no restorative justice process has previously happened in relation to the offending. If, thereafter, the offender wishes to take part in restorative justice their lawyer can ask the judge to consider it.
- 17.71 Restorative justice services are run by State-funded community-based groups — for example, Project Restore, which is contracted by the Ministry of Justice.
- 17.72 Restorative justice providers are approved by the Ministry to ensure they have experience and training to guarantee the restorative justice process is safe and supportive for everyone. The Ministry of Justice has also published restorative justice guidelines.
- 17.73 If the judge decides that restorative justice should be explored, a trained facilitator will have a pre-conference meeting to see whether restorative justice is appropriate for the victim.
- 17.74 The facilitator can decide not to go ahead with a conference if they think safety is a concern or that restorative justice will not help. They will inform the court accordingly and, in which event, sentence is passed in the normal way.
- 17.75 The restorative justice conference takes place before the accused is sentenced. The facilitator's report is furnished to the judge, who decides whether to include any agreements made at the restorative justice conference as part of the sentence.
- 17.76 It is recognised in New Zealand that the use of restorative justice processes in family violence and sexual violence cases will not always be appropriate. The particular dynamics of family violence and sexual violence, including the power imbalances inherent in this type of offending, can pose significant risks to the physical and emotional safety of the victim.
- 17.77 Family violence offending, in particular, is often cyclical and reflects deeply entrenched attitudes and beliefs. Offenders may be more manipulative and have offended seriously and repeatedly. A one-off intervention may, therefore, not be effective or safe.
- 17.78 Where a restorative justice process does take place, providers must ensure that facilitators possess the specialised skills and experience required to facilitate these cases and that additional safety and support measures are in place. Advice from those knowledgeable in responding to family violence and sexual violence should always be sought.
- 17.79 The age and maturity of a child or young person will often determine the appropriateness of a restorative justice process in a particular case and the extent of their participation — for example, very young victims may not attend the conference. Parents/caregivers should be fully involved in the process,

including giving their consent to the process taking place and participating with, or on behalf of the child.

- 17.80 There will be inevitable power imbalances arising from an adult offender and young victim. Therefore, if a restorative justice process does take place, restorative justice providers and facilitators must take particular care to ensure that the child or young person is safe and supported and understands what is taking place.
- 17.81 Project Restore helps people affected by sexual harm to restore their lives and relationships by meeting their justice needs and interests through restorative justice processes.
- 17.82 The New Zealand Law Commission²³ examined how this could work safely in a process operating outside the court system. Eligible victims could choose to access an accredited programme provider, who would work with the victim to meet their 'justice goals', which may or may not involve meeting with the perpetrator.
- 17.83 Eligible perpetrators who participated would need to take responsibility for their actions and make a redress agreement. The agreement would be monitored by the provider, who would verify completion to an external body. If the process was successfully completed, a statutory bar would prevent the perpetrator being prosecuted for the same incident of sexual violence.
- 17.84 The theory is that it is better if the offender is participating in a sexual offender treatment programme than doing nothing.

Arguments against alternative mechanisms

- 17.85 There are arguments against such alternatives to the criminal justice system. There are those who assert that restorative justice reflects a misunderstanding of what victims of serious sexual crime go through. It not only risks re-traumatisation but provides a very dangerous 'out' for sex offenders that leaves others in enormous danger of repeat offending.
- 17.86 In many of these offences, there is a complete imbalance of power and control and this process may present yet another opportunity for somebody who has the pathology of resorting to a sex crime to exert power and control.
- 17.87 Given that the majority of offenders know their victims beforehand, victims might be vulnerable to emotional manipulation and feel forced to forgive.
- 17.88 Restorative justice is too focused on private interests at the expense of the public interest. These offences are so heinous and the risk of reoffending so great that only the criminal justice system can meet the public interest need

23 Law Commission (2015) *The justice response to victims of sexual violence: criminal trials and alternative processes* Wellington: Law Commission

for punishment, retribution and deterrence. A public wrong requires a public response.

- 17.89 How would a self-referral voluntary justice mechanism, involving a restorative justice element, with built-in confidentiality, accord with Access NI checks/ vetting and barring? Would the perpetrator and their crime be entered on a criminal record? Would such a person be identified via an enhanced disclosure check when applying to work with children or vulnerable adults?

Arguments in favour

- 17.90 There are strong arguments also in favour of a restorative justice concept. The criminal justice system is currently dealing with only a small percentage of these crimes and, of those that are reported, over 40% withdraw.²⁴ These figures may be an underestimate in certain marginalised communities (see chapter 13). The system is proving inadequate to meet the needs of many complainants.
- 17.91 Alternatives to the criminal justice system in Northern Ireland have already been deployed in youth justice and creative solutions are being introduced in low-tariff crime. We cannot go on ignoring the possibilities for dealing with serious sexual offences with alternative mechanisms when already the universities have recognised the problem and across the world countries are offering alternatives that people regularly avail themselves of.
- 17.92 If we do not provide victim-focused solutions to those who entirely voluntarily wish to embrace them, those who are committing at least some of these heinous offences will emerge unscathed and perhaps continue to endanger others.

Discussion

- 17.93 I believe we have to recognise that the criminal justice system has a specific set of functions that may limit its ability to meet the justice needs of some victims of serious sexual assault. The justice needs of one victim will differ from the justice needs of another. For some victims the negative experiences of the court process and the prescribed rigid consequences for the offender may be reasons for not entering the criminal justice system. For others — for example, in familial contexts or wherever very young offenders are concerned — the complainants may find the embarrassment of public disclosure all too great and will never report the matter to police.
- 17.94 In short, victims' needs are complex, individualised and are not necessarily met in all instances within that system. This failure to provide additional mechanisms of redress in itself can arguably be said to contribute to inadvertent trauma,

24 PPS review of cases in which there was a no prosecution decision. Includes victim withdrawal and those where a report had been made by a third party to police but the victim did not wish the matter to be investigated. Similar findings by PSNI of 41% from research completed for rape incidents reported during January to July 2017.

distress and secondary victimisation. Might more victims be prepared to come forward and participate in legal proceedings if a suite of complementary potential remedies might make the ordeal worthwhile?

- 17.95 In articulating such complementary measures, I am particularly anxious not to displace the function of the criminal justice system, which rightly prioritises fair trial protections for accused persons whose liberty is at stake.
- 17.96 Moreover, there are certain types of sexual offence and offenders for which there is a public interest in dealing with them exclusively in the criminal justice system with condign custodial punishment visited on the offender.
- 17.97 However, because that system is in many ways offender-focused, it perhaps fails to give effect to the diverse needs of victims and, for that matter, the best manner of dealing with offenders. That is one reason why in Northern Ireland we increasingly invoke innovative means to deal with youth justice and low-tariff offenders outside the conventional court system.
- 17.98 Accordingly, I consider that as a society we need to be innovative in looking at mechanisms outside the criminal justice system to complement its method of dealing with serious sexual offences so long as fair trial rights are not sacrificed.
- 17.99 I am not alone in this thinking in Northern Ireland. I note with approval that in the Criminal Justice Inspection Northern Ireland Report of November 2018,²⁵ the Chief Inspector declares in the foreword, “We need a more creative approach incorporating restorative justice practice and, in appropriate cases, educational programmes for un-adjudicated perpetrators.”
- 17.100 However, one crucial difference from conventional restorative justice practices has to be made crystal clear in the context of serious sexual offences. Any new process must be victim-focused and based on the needs of the victim. It must put victims at the heart of the justice process, empowering and helping them to move on. It can be triggered only if the victim genuinely wishes to do it. It must never be allowed to become yet another instance of re-traumatising the victim.
- 17.101 They must not be forced or pressurised to go down this avenue and, if resolution for complainants means putting the perpetrator in prison for a long time, then so be it. Many victims of sexual violence or abuse undoubtedly may not want to take part in restorative justice, and many offenders may never admit their guilt let alone show remorse to facilitate such a process.
- 17.102 But where they do, and where the restorative justice process can be delivered safely, it is at least possible that it can make a difference, helping victims to put the crime behind them and rehabilitating offenders.

25 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland

- 17.103 Restorative justice should only happen when there is a facilitator or accredited practitioner with the right skills and experience available who has completed suitable training and has specific expertise in sexual harm. They will decide whether the process is appropriate and, if it goes ahead, the safety and well-being in the process of the complainant is paramount.
- 17.104 Moreover, there will undoubtedly be some circumstances where, as in the New Zealand system, restorative justice will be wholly unsuitable, and these cases will need to be weeded out from any new process as occurs in that jurisdiction. These would include, for example, where the use of extreme physical violence had been used, (although some such cases have been successfully processed²⁶), multiple perpetrators, use of a weapon, where there was obvious evidence of abuse of power and manipulation during the process, and child sexual abuse.
- 17.105 However, sadly, the unassailable fact is that the vast majority of complainants currently remain outside the criminal justice system, and that in itself presents a public interest danger, with potentially large numbers of offenders remaining unscathed. That circumstance cannot be in the public interest and demands to be addressed.
- 17.106 I do not see why solutions that are open to students in our universities here and elsewhere, where they voluntarily opt to invoke them, should be denied to the majority of complainants who are not at these institutions.
- 17.107 I am attracted by the proposals made by the New Zealand Law Commission and the system that is evolving in that jurisdiction. I strongly recommend the Department of Justice to consider the contents of the report of the New Zealand Law Commission of December 2015, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, to map out the details of some of the proposals I have set out.
- 17.108 In the first place, restorative justice should be invoked as a possibility where the offender has pleaded guilty and the victim has indicated a desire to avail of restorative justice, and the offender agrees also. I emphasise again however that this process must be victim initiated.
- 17.109 This can be profitably invoked whilst the perpetrator is serving their sentence. It can possibly be invoked before sentencing with the judge taking any agreement arrived at during the subsequent conference into account. My concern here is that the judge would need to be careful to avoid establishing a hierarchy of rape with the remorseful rapist somehow receiving a much reduced sentence for what is a heinous offence. I repeat, however, it can only arise if the victim leads the process and the offender acknowledges their wrongdoing.

26

Byrne, J. (2018) 'The Meeting is a remarkable and very moving film' *RTE* [online] Available at: <https://www.rte.ie/entertainment/movie-reviews/2018/0927/998260-the-meeting-is-a-remarkable-and-very-moving-film/> Accessed: 11 April 2019

- 17.110 The onus is on the Department of Justice to provide State-funded, properly qualified facilitators to operate such a scheme. There already exists in Northern Ireland organisations with restorative justice trained staff, such as the YJA, the Northern Ireland Prison Service, PBNI as well as community-based restorative justice organisations.
- 17.111 However, I believe the Department in time should also give careful consideration to similar facilitators available in an alternative process to resolve certain serious sexual offences outside the criminal justice system, where the complainant does not wish to report the matter to the police and the alleged offender agrees to participate.
- 17.112 The suitability of the case would be determined by those specialist facilitators using a comprehensive risk assessment mechanism, excluding cases set out above. It would include an assessment of risk to the community in consultation with the police or other agencies where appropriate.
- 17.113 Nothing said by the perpetrator in the course of this alternative process could be used in criminal proceedings, save that, if the information related to other offending, this could trigger further police investigation and could be used in criminal proceedings.
- 17.114 I immediately recognise the dangers of such confidentiality. Someone who had admitted serious sexual offences in the process would not therefore have an entry on their criminal record or an appearance on an enhanced disclosure check. However, given the huge amount of under-reporting, many perpetrators are already escaping such protective measures. At least in this process, they may agree to undergo treatment and reverse their deviant behaviour in the future. Presumably, this would include undertakings not to work with children or vulnerable adults. A breach would vitiate the agreement.
- 17.115 The process would permit the complainant at any time to withdraw and report the alleged offences to the police. However in that event the perpetrator would retain the benefit of privilege for any admissions he had made in the restorative justice process and these could not be used in future criminal proceedings.
- 17.116 In making this suggestion, I am acutely aware of the conceptual difficulty in the State lending its approval to, and facilitating, a process where, for example, a rapist who will have admitted their guilt is not being processed through the criminal justice system. The distinction from low tariff crime or youth offending, where restorative justice works conventionally, could, arguably, not be stronger. On the other hand, some radical remedy has to be considered for that proportion of cases where the victim is adamant that the police must not be involved and yet desperately needs to help alleviate their plight and which they feel can best be addressed in this novel manner.

- 17.117 I add two riders to my views. First, if these recommendations are to be taken up, I consider legislation is required to ensure sustainability. In the United States, New Zealand and European jurisdictions, legislation exists and thus creates a better chance of the process succeeding.
- 17.118 Secondly, whilst legislation is required, it is not enough. If there is reluctance on the part of members of the public in general, or on the part of facilitators, to embrace this concept the process will fail. There must be public education on the desirability of such mechanisms.

Section 5, Criminal Law Act (Northern Ireland) 1967 in practice

- 17.119 A further impediment to reporting these crimes to those who are in a position to provide help and assistance can also, arguably, be the provisions of section 5 of the Criminal Law Act (Northern Ireland) 1967 which require an individual with knowledge of a relevant offence (which would include rape or other serious sexual offences) to report it to the police in the absence of a reasonable excuse.
- 17.120 This in itself can prevent complainants coming forward when they feel they cannot provide full and frank details to, for example, social workers, doctors, counsellors, nurses etc. if they wish the crime to remain unreported.
- 17.121 Such impediments cannot be in the public interest if their effect is to prevent effective support being given to victims and impedes eventual prosecution of offenders.
- 17.122 The figures for prosecutions and convictions for such breaches of the Criminal Law Act in Northern Ireland are extremely low. The PSNI adopts a safeguarding approach to such prosecutions and only report such matters if there is a risk to others by not so reporting. The Attorney General obviated a similar problem about reporting a rape in exemplary fashion as earlier set out in this chapter.
- 17.123 Already in most cases there may well be reasonable excuse for such matters not being reported by third parties where it would hinder the support and therapy being given to the complainant. The situation would be different where the victim of the serious sexual offence is a child or vulnerable adult, or where failure to report the offence to police is likely to put others at serious risk of harm.
- 17.124 Whilst it is unlikely that prosecutions would ensue where information was given in confidence or to family members, the perception amongst non-lawyer professionals is that prosecution could well flow from non-disclosure. I believe that counselling or medical services such as those provided at the Rowan Sexual Assault Referral Centre or under the aegis of the various support agencies should have a clear dispensation in all serious sexual offences, either by an amendment to the 1967 Act or by a further guidance statement from the Attorney General. In each instance it would carry the same rider where the victim of the serious

sexual offence is a child or vulnerable adult, or where failure to report the offence to police is likely to put others at serious risk. The current legislation would therefore require repeal/amendment.

17.125 The Information Commissioner has helpfully drawn my attention to the fact that the proposed change in legislation would trigger an obligation for the Department to consult with their office to carry out a Data Protection Impact Assessment (DPIA) when developing a policy proposal relating to the processing of personal data.

Responses to Restorative Justice

17.126 There was a substantial division of opinion on the advisability of establishing a restorative justice scheme whether within the criminal justice system or outside the criminal justice system.

17.127 The online survey conducted by the Review had responses from 420 people. In the context of a victim led restorative practice within the criminal justice system. Overall 53.1% agreed with the recommendation, 12.6% disagreed, and just over a third (34.3%) of the respondents were either neutral or did not know. A thread running through the specific comments that we received emphasised that this must be entirely the choice of the victim.

17.128 The online survey received 418 responses to dealing with victim led restorative practice outside the criminal justice system. Results showed 37.6% agreeing with the recommendation, 30.4% disagreed and just under a third (32.1%) of respondents were either neutral or did not know. Of those who provided specific comments, some were unsure how the system would work whilst others mentioned that issues with the criminal justice process needed to be addressed so that people can engage with that process rather than turn to restorative justice.

17.129 This survey reflected the same division of opinion that emerged in the written responses to the Review.

17.130 Of those supporting the proposals, Victim Support NI captured the general mood in stating:

“Victim Support NI is fully supportive of the dynamic, human and relational response restorative justice provides and of restorative practice mechanisms within the justice system.

We are mindful of the range of debate related to the use of restorative practice when it comes to sexual crime, for example where there is coercive behaviour restorative practices, if not understood and managed well, could be extremely damaging to victims.

It is our experience that different victims wish to take different approaches to achieving justice. For some it is important to pursue a case through the

courts. Others are concerned that reporting will damage family relationships forever and that it is not a risk they want to take. We are, therefore, supportive of recommendation 15: Alternative Mechanisms, including an entirely victim led concept of restorative practice, should be considered both inside the criminal justice system and parallel to it. This consideration should be far reaching and engage victims themselves as well as organisations that support victims of sexual crime.”

17.131 Nexus NI provided a similar theme in stating:

“Though the evidence in relation to restorative practice is limited, there are individual examples that demonstrate for some victims of sexual crime, restorative practice is effective.

Nexus NI would emphasise that restorative practice will not be right for every survivor. Practitioners will require extensive training, experience and support. Participants must be entirely comfortable with the process and receive the right support before, during and after the conference. The process needs to be continually risk assessed to ensure it’s safe for everyone involved.”

17.132 Support came from other disparate areas.²⁷ However even amongst those who were favourably disposed to the concept within the criminal justice system, there were those who opposed the concept outside the criminal justice system. The PPS considered that the use of a self-referral voluntary justice mechanism, whilst it might appear to benefit a victim, would not protect the wider public, as there was no suggestion that any public protection arrangements could be implemented or monitored in instances where the perpetrator had admitted guilt e.g. there was nothing noted on the sexual offenders register, the Barring List or that the perpetrator would be subject to for example the Sexual Offences Prevention Orders. They also voiced concerns about disclosure emanating from the restorative process if the victim changes their mind and supported a prosecution.

17.133 Similarly Dame Vera Baird QC disagreed with restorative practice outside the criminal justice system albeit she felt that greater clarification may help to understand the matter “since the principle looked positive”.

27 Submission from Barnardo’s NI (who encouraged research into restorative justice where both the victim and accused are children rather than removing children from the scheme) (NI); the National Organisation for Treatment of Abuse (“there may be scope for restorative practice to complement the criminal justice process in order to support victims of crime”); Dame Vera Baird QC PCC (believe the form of restorative justice could be extremely beneficial for some victims who want answers/explanation/acknowledgment from their perpetrators particularly if (as is usually the case) the perpetrator is known to them- provided the complainant agreed, the defendant admitted guilt, the defendant was genuinely in remorse, practitioners were appropriately qualified and experienced); PPS (whilst neutral on the point, noted the benefits of restorative justice arrangements in even very serious cases in the context of youth justice. It may provide a model which would meet the needs of some complainants more effectively than the formal criminal justice arrangements); PSNI (recognised the empowerment that restorative justice brings to victims, the swiftness of justice and how it can help with the healing process. However they did feel that further detail would be required on the proposals I made), J; Men’s Advisory Project (for adults only)

- 17.134 The public representatives/politicians from the five main parties to whom we spoke, whilst all agreeing that the concepts were worthy of further consideration, did raise a number of concerns which included:
- The continued influence of paramilitaries in communities is a factor to be considered.
 - It in effect could lead to offenders not having any conviction or monitoring.
 - Two local councils who responded²⁸ cautioned against the adoption of a restorative justice measure for fear it would add to intra-process pressure on the victim and would be open to abuse particularly in light of the length of time it takes for cases of this nature to make it to court.
 - A key focus of statutory bodies should be to stop under-reporting of serious crimes and not to provide an alternative justice system.
 - It could operate as an “easy fix” which if implemented in place of a clear complete transformation of the criminal justice process, will not provide victims with the justice they deserve.
 - Although on the face of it, the exercise would be entirely a voluntary one by the victim, experience shows that voluntary practices such as this can be thrust onto victims who feel it is the only option being offered to them.
 - It may be the case that victims feel that they would want to use these practices simply because the existing legal system does not work. These restorative practices should not be seen as an alternative to a criminal justice system that is not fit for purpose.
 - It may unintentionally reinforce a hierarchy of rape and sexual violence.
 - Public awareness of the option of restorative justice would not reinforce deterrence to sexual crimes and could become an abuser’s tool in dissuading victim from reporting.²⁹

17.135 In terms of the legal profession, the Law Society saw it as an interesting concept but felt that they would need to explore some more of the details. The Bar Council took the view that the concept was unsuitable for sexual offences with a risk that it could displace the function of the criminal justice system in prioritising fair trial rights for the accused individual whose liberty is often at stake. They raised the query as to whether an offender who admits their guilt inside this system could receive some form of criminal record or further treatment for their behaviour given the serious nature of the offence. The Bar believed that there is undoubtedly a compelling public interest argument that

28 Belfast City Council and Lisburn and Castlereagh City Council.

29 This was a view expressed by Women’s Resource and Development Agency (WRDA) who added to this point however that in cases where there is an option post sentencing, a truly victim led option with robust safeguards and facilitated by experts in the field of sexual violence, it could prove to be a very empowering experience for survivors and could aid in their recovery.

serious sexual offences should be dealt with exclusively by the criminal justice system.

- 17.136 In short there were a number of disparate bodies who doubted the validity of the concept of restorative justice.³⁰ However a clear thread running through a number of responses was to the effect that the concepts are worthy of further consideration and perhaps there is a need for a public consultation to determine the views of a wider constituency than may have responded to this report.³¹ Further detail would be required in terms of financial cost, resource and perhaps even investigative impact that this might have.³²
- 17.137 A recent conference in Belfast on the topic³³ raised a number of common concerns about restorative justice emphasising the need for a focus on voluntary participation, preparation and risk assessment putting physical and emotional safeguards in place, building in time-outs for the participants, adequately training facilitators and considering indirect rather than direct meetings. These are the sort of key requirements which require further research around this issue together with a public education programme which is a vital pre-requisite to the concept being generally accepted.

Conclusion

- 17.138 I am satisfied that the concept of restorative justice, both within the criminal justice system and without, is well worth further consideration. There clearly are potential pit falls but the fact of matter is that with such large under-reporting, a very substantial number of perpetrators are already at large without any control or treatment. Moreover, particularly within familial and young person contexts, there are at least a number of complainants who could potentially benefit enormously from this kind of exercise which is currently unaddressed in society at large in the context of serious sexual offences. I therefore recommend that the Department of Justice give in depth consideration to this concept.

Responses to the proposal to repeal section 5 of the Criminal Law Act

- 17.139 The proposal to repeal the Criminal Law Act in so far as that deals with serious sexual offences gathered a great deal of support from the written responses.³⁴

30 Women's Aid Federation NI; WRDA; EVAW; Belfast Feminist Network; Belfast City Council; Lisburn and Castlereagh City Council; Northern Ireland Bar; PPS (in terms of a self-referral model); Dame Vera Baird QC, (in terms of a self-referral model)

31 PPS response.

32 PSNI response.

33 "Sexual Violence and Trial: Local and Comparative Perspectives" *Queens University Human Rights and Gender Network*, 11-12 September 2018

34 Victim Support NI; The Rowan SARC NI; The Attorney General for NI; Men's Advisory Project; Dr Alison Livingstone, Consultant Paediatrician; Dame Vera Baird QC,.

17.140 The arguments in favour of this that emerged can really be summarised as follows:

- If a victim of a sexual offence thinks that anybody to whom they speak about their experience has to report to the police, victims will not speak out, thereby not receiving the practical, emotional or psychological help that they need to recover.
- The true extent of sexual abuse will be concealed.
- The threat of prosecution for those who do not report sexual offences can be used by perpetrators to silence victims.
- It removes agency from the complainant.
- Mandatory reporting risks the identification of the victim.

17.141 Of the 420 responses that we received on the online survey, 49.3% agreed with the recommendation, 27.9% disagreed and the remaining 22.9% were neutral or did not know.

17.142 The main substantive voice dissenting from my recommendation was the PPS who, whilst adopting a neutral position, feared that the repeal of section 5 as recommended would result in it being repealed for all offences and therefore would not apply to other offences of the type it was primarily introduced to deal with, for example, terrorist offences. This reveals a misunderstanding of the recommendation which, as now amended, makes clear that which has always been the case, namely that it would apply only to serious sexual offences because of the unique context of these cases.

17.143 The PPS also argue that since the number of prosecutions is extremely low and the PSNI adopts a safeguarding approach to such prosecutions, only reporting such matters if there is a risk to others by not reporting, the repeal of this legislation is not necessary. Guidance by the Attorney General could be further promoted. I fear that this approach fails to appreciate that this current legislation has potentially a grave inhibiting effect on complainants failing to report serious sexual offences to doctors, counsellors, social workers etc. It is this chill factor that needs to be addressed. The paucity of prosecutions does not address the fears and the perceptions that exist about reporting.

17.144 An interesting debate surfaced during the responses as to the advisability of mandatory reporting of child protection concerns. The Royal College of Paediatrics and Child Health (RCPCH) has undertaken a skeletal review of the current international academic literature in relation to mandatory reporting, synthesising the available evidence, empirical data and critiquing existing commentary to inform its policy. On foot of the research, the RCPCH does not support mandatory reporting of child protection concerns and urges the UK not to legislate on this issue. Its conclusion is that there is no credible or conclusive evidence that it better protects children at risk of harm and its introduction

would undermine the cultural approach of risk and responsibility sharing that has been developed in the current system. Mandatory reporting still raises more questions than it provides answers and, according to the RCPCH, is a blunt instrument which is a simplistic and ineffective answer to a far more complex set of problems. This also seems to reflect the current Home Office thinking.

- 17.145 On the other hand it has to be recognised that child sexual abuse is an under-reported crime where there is a high rate of re-offending.³⁵ This is why responding and reporting of this crime is so important. There may be a number of therapeutic options that may need to come first but reporting is important.
- 17.146 Obviously this is a matter that needs further exploration, but for my own part I still recommend that there be an obligation to report crimes for serious sexual violence involving children.

Conclusion

- 17.147 I have found no reason to alter the recommendations which I had proposed in the Preliminary Report, save that I have made it clear that the repeal of section 5 of the Criminal Law Act (Northern Ireland) 1967 should apply to serious sexual offences only in this context.

35

Dr Liz McMonagle, Lead Consultant, Clinical Psychologist in Adult Mental Health and lead author in British Psychological Society's response to the Home Office on Mandatory Reporting. Joint author of British Psychological Society guidance "Safeguarding children and young people: Every Psychologist's Responsibility (1 June 2018).

Recommendations

- 243.* The Department of Justice should give serious consideration to providing State funding for a scheme of accredited practitioners to operate a system of restorative justice at any stage in the criminal justice process dealing with serious sexual offences where the offender has admitted their guilt, the victim has requested the scheme be invoked and the perpetrator has agreed to be involved. The scheme must be victim led.
- 244.* The Department of Justice should, in time, give consideration to making available to complainants, a self-referral voluntary justice mechanism involving a restorative practice element as an alternative to participation in the criminal justice system in order to resolve certain serious sexual offences, provided it is victim led.
- 245.* Section 5 of the Criminal Law Act (Northern Ireland) 1967 should be repealed at least in relation to all serious sexual offences save that in cases where an individual had knowledge of a relevant offence (which would include rape or other serious sexual offence) concerning a child or vulnerable adult (as currently defined in law) or where failure to report the offence is likely to put others at serious risk that individual would be obliged to report it to the police in the absence of a reasonable excuse.
246. In the absence of repeal of section 5 of the Criminal Law Act (Northern Ireland) 1967 in relation to serious sexual offences, the Attorney General for Northern Ireland should consider giving additional guidance to the same effect as recommendation 150 above for serious sexual offences.

Chapter 18

Resources

An ounce of prevention is worth a pound of cure.

Benjamin Franklin

Issue

Is the criminal justice system properly resourced if the proposed changes to the law and procedures in serious sexual offences are to be efficiently implemented?

Current position

- 18.1 In terms of financial impact, the estimated cost of health and social services support in Northern Ireland as a result of domestic violence and abuse¹ was approximately £50.2 million for 2011/12, with the total estimated economic costs of domestic violence in Northern Ireland for the same year standing at around £674 million.
- 18.2 The same report calculated that the costs for sexual violence occurring outside the partner setting for Northern Ireland were estimated at £257 million for 2011/12. This cost estimate excludes costs for child victims of rape and sexual assault, which it has not been possible to calculate. In this respect the cost estimate is considered to be an underestimate. It's also worthy of note that the criminal justice services recorded do not include defence costs. The criminal justice figures are made up of police, prosecution services, courts, probation and prison costs.

(All Figures in £m)

	Females		Males		Total	
	2010/11	2011/12	2010/11	2011/12	2010/11	2011/12
Health and social care services	4.3	4.0	0.7	0.7	5.0	4.7
Criminal justice services	26.2	27.1	4.6	4.8	30.8	31.9
Local economic output	31.2	28.4	5.5	5.0	36.7	33.4
Intangible human costs	173.2	159.2	30.6	28.1	203.8	187.3
Total economic costs	234.9	218.7	41.4	38.6	276.3	257.3

- 18.3 These figures are unsurprising in light of a report from the Home Office for England and Wales in July 2018, *Economic and Social Costs of Crime*.² This document recorded the estimated annual cost of rape in 2015/16 prices was

1 Department of Health, Social Services and Public Safety and Department of Justice (2016) *Stopping Domestic and Sexual Violence and Abuse in Northern Ireland: A Seven Year Strategy* Belfast: Department of Health, Social Services and Public Safety

2 Heeks, M. Reed, S. Tafsiri, M. and Prince, S. (2018) *The Economic and Social Costs of Crime*. 2nd ed. London: Home Office

£4.8 billion (for an estimated 121,750 rapes) and for other sexual offences (an estimated 1,137,320 crimes) £7.4 billion.

- 18.4 These figures are absolutely shocking and they constitute an indelible stain on the fabric of our daily living. We cannot lay claim to be part of a civilised democracy if we permit the law and procedures in serious sexual offences to be so under resourced that it contributes materially to this exercise in unmitigated human misery.
- 18.5 The question to be asked is not “Can we afford to repair the system?” The question must be ‘Can we afford not to repair the system?’ In short, we have to ask ourselves what kind of society do we want to live in? Are we prepared to stand aside and wring our hands in impotent frustration as we watch complainants and some accused who are acquitted in serious sexual offences disintegrate physically and mentally in the wake of a legal system, once the envy of the world, which is so under-resourced that in some respects in dealing with serious sexual offences it is becoming an instrument of a denial of access to justice? What I find most perplexing of all however, is the failure to recognise that the imperfections I have identified in the Review in terms of delay, defects in the disclosure process, lack of skills and training, and lack of front-loading the process etc. all contribute to a massive waste of public money and resources. Government speaks of ‘investment to save’ but I fear that principle has yet to be applied to the law and procedures in serious sexual offences.
- 18.6 I recognise that we are in a challenging financial period when many disparate and wide-ranging demands are being made on government. Limited funds are available in every conceivable area of public concern. Difficult choices have to be made.
- 18.7 However, policymakers have to decide how two fundamental obligations of the State are to be met in the context of serious sexual offences. First, to those who have suffered unspeakable sexual crimes that strike at their human dignity and bodily integrity, with life-changing consequences in many cases. Secondly, to those who are accused of these offences so as to ensure a fair trial and the innocent are not convicted. How are these obligations to be met if appropriate resources are not provided? Are we to abandon these people to their fate merely because we do not have the appetite to pay for all our good intentions?
- 18.8 In this Review, I have made a series of recommendations, both strategic and operational. All of these seek to deliver both short-term and long-term improvements to our current arrangements for delivering justice in serious sexual offence cases, many with potentially far-reaching benefits.
- 18.9 It has become crystal clear to me during this Review that the issue of resourcing is a key component of our system’s ability to deliver justice and provide these improvements. The problems do not spring from a lack of desire on the part of the various stakeholders and statutory bodies who are working at the coalface.

Rather it is a complete failure to provide them with the resources to do that which they realise should be done.

- 18.10 It is not a case of ‘doing more with less’ or simply ‘working smarter’, but of properly identifying where additional resource is required to deliver my recommendations and ensuring that it is in place as soon as possible. Without this investment, a number of the recommendations cannot be successfully implemented, and if efforts are made to do so in the absence of adequate resourcing, they are liable to fail in their aspiration.
- 18.11 My views apply equally to statutory and voluntary agencies, the Judiciary tasked to conduct these cases, the legal profession and even the Department of Justice, which will be responsible for overseeing the delivery of my recommendations.
- 18.12 The draft Programme for Government³ adopted an outcomes-based approach and considers what the outcomes for the citizens in Northern Ireland should be and what kind of place we want to live in.
- 18.13 Of particular note, Outcome 7 of the Programme for Government — “We have a safe community where we respect the law, and each other” — includes as indicator 38 of delivery to “increase the effectiveness of the justice system.” A lead measure for this indicator is “access to justice and speedy resolution for victims.” While a fleet of measures is being developed to advance this aim, there remains scope to do more, arising from my recommendations.
- 18.14 Before seeking to implement any of the recommendations, I request that the Department of Justice conduct a comprehensive resource impact assessment, with the assistance of affected stakeholders, into my recommendations, individually and cumulatively. This should include both the direct costs arising — for example, from deployment of additional Police Service of Northern Ireland (PSNI) and Public Prosecution Service (PPS) resources; and indirect/consequential costs — for example, revisions required to the legal aid regime to support any enhanced services from counsel and solicitors at court.
- 18.15 Failure to properly conduct a resource impact assessment will undermine the fulfilment of my recommendations, risks contributing to increased delay and disclosure deficiencies as a result of spreading limited resources even more thinly in an attempt to meet the changes, and loss of confidence of stakeholders, including the victims we serve, and the wider public.

International Standards

- 18.16 The Istanbul Convention requires that State Parties “allocate appropriate financial and human resources for the adequate implementation of integrated

3 Northern Ireland Executive (2016) *Draft programme for government framework 2016-21*. Belfast: Northern Ireland Executive

policies, measures and programmes to prevent and combat all forms of violence.”⁴

18.17 The UN declaration on the Elimination of Violence against Women States that there should “include in Government budgets adequate resources for their activities related to the elimination of violence against women”.⁵

18.18 Following her 2014 visit to the UK, the UN Special Rapporteur on Violence against Women recommended that the State should establish necessary safeguards to ensure that “authorities operate within a human rights framework, and in compliance with the international obligations of the United Kingdom, when addressing the issue of violence against women and girls, particularly when making commissioning decisions.”⁶

18.19 I turn now to consider the resources needed for specific stakeholders in this process.

Legal profession

18.20 Throughout this Review, significant emphasis has been placed on the inherent difference in these types of offences over all other offences in the criminal code. The recommendations that are being contemplated are, in some circumstances, potentially ground breaking within this jurisdiction. This Review recognises that those involved in these types of trials require particular knowledge, skills and abilities. Indeed, my recommendation is that only those who have demonstrated this should be permitted to be involved in such trials.

The current legal aid position

18.21 The parent legislation that underpins free legal aid in the Crown Court is the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (the 1981 Order). Article 29 provides that any person returned for trial for an indictable offence shall be entitled to free legal aid in the preparation and conduct of his defence. Therefore any assistance to the complainant cannot be provided under current criminal legal aid legislation.

18.22 Article 37 of the 1981 Order, as amended, provides:

“The Minister of Justice in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard, among the matters which are relevant, to:

4 *The Council of Europe Convention on preventing and combating violence against women and domestic violence* (November 2014) Article 8

5 UN General Assembly *Declaration on the Elimination of Violence Against Women*, 20 December 1993, A/RES/48/104

6 UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*, 19 May 2015, A/HRC/29/27Add.2

- (a) the time and skill which work of the description to which the rules relate requires;
 - (b) the number and general level of competence of persons undertaking work of that description;
 - (c) the costs to public funds of any provision made by the rules; and
 - (d) the need to secure value for money,
- but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part.”

- 18.23 In setting the legal aid rates and irrespective of the legislative framework, there has always been a focus in particular on the time and skill of the professional, the public expenditure involved and value for money for the taxpayer.
- 18.24 In 2005 there was a policy shift to introduce a standard fee format for legal aid in the Crown Court. The aim was to improve the control and predictability of expenditure, deliver value for money and ensure more timely assessment and payment of fees. Such standard fees were to operate on a swings-and-roundabouts basis, an idiom that characterises the rationale for setting the rates for fees in almost all legally criminal aided cases.⁷
- 18.25 There are detailed provisions for the fee applicable to solicitor, QC, leading/led/sole junior counsel depending on whether the case is a plea from arraignment, a plea before the trial commences or a trial fee with varying fees depending on the length of trial.
- 18.26 There is an all-inclusive fee for a case that is characterised by a guilty plea at first arraignment. PPS fees are somewhat different.
- 18.27 A trial preparation fee applies to any case that is characterised by a not guilty plea at arraignment but a guilty plea prior to trial. There are varying fees depending on the volume of evidence served on the court and enhanced fees to take account of high Pages of Prosecution Evidence (PPE) counts in bands of up to 3,000 pages. Above 3,000 pages solicitors are paid £1 per page.
- 18.28 What is significant in relation to these fees is the definition of the page count or ‘PPE range’ as defined in the 2011 rules.⁸ The page count is confined to the number of pages of prosecution evidence served on the court. It includes witness statements/depositions, exhibits and interview transcripts. It does not

7 The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 has provided the basic structure of the various remuneration schemes since. Presently, The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2016 and The Legal Aid for Crown Court Proceedings (Costs) (Amendment No. 2) Rules (Northern Ireland) 2016 prescribe for the determination of costs payable to solicitors and barristers in respect of work done under a criminal aid certificate for all cases tried on indictment since 15 April 2016. In respect of serious sexual offences (and also offences against children) these are contained within a table of offences in Schedule 3 to The Legal Aid for Crown Court Proceedings (Cost) Rules (Northern Ireland) 2005 as amended. Serious sexual offences are class D offences for the purposes of the rules (there are nine classes of offences from A to I).

8 The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011

include disclosure material or third-party disclosure as directed by the court albeit an application for “exceptional preparation” payment can be made as per guidance issued by the DoJ. In fact, there has never been provision for any form of payment for consideration of disclosure material since the introduction of the standard fee regime for Crown Court cases. Once again PPS fees are different in this regard.

- 18.29 The third type of composite fee is the basic trial fee, which applies to a case that proceeds as a trial. Any disclosure material that falls outside the 700-page count is not specifically remunerated.
- 18.30 A series of fixed fees are payable for attendance at arraignment, reviews/ mentions, sentencing hearings and refresher fees for cases that continue after the first day of trial. This does not apply to a case that is characterised with a guilty plea at arraignment.
- 18.31 Arguably, these ancillary fees may not properly remunerate practitioners for the detailed and focused case management hearings, Ground Rules Hearings and/ or the pre-recorded cross-examination of witnesses that is envisaged by this Review.
- 18.32 The Legal Aid for Crown Court Proceedings (Costs) (Amendment No. 2) Rules (Northern Ireland) 2016 does make provision for the payment of additional remuneration in exceptional cases. They provide for an application for a certificate of exceptionality in an individual case, where a representative is required to undertake additional preparation work because the case involves a point of law or factual issue that is very unusual or novel. The rules prescribe hourly rates of payment for the additional work authorised by the Department of Justice.

Future developments with the Legal profession

- 18.33 Legal aid funding for these types of cases must also adapt to the cultural changes that are being considered for the presentation of these cases in court.
- 18.34 For example, preparation for cross-examination of the complainant outside the course of the main trial will require a different approach by the Legal Services Agency to the way the fee structure in these types of cases are currently calculated and calibrated. In this context it must be appreciated that the Legal Services Agency has no role in setting fees. That is a policy function and the responsibility of the Department of Justice.
- 18.35 Likewise, the importance of pre-trial issues and Ground Rules Hearings will be underpinned only if they are defined and remunerated in a way that distinguishes them from other routine court mentions/reviews.

- 18.36 Delay in the system is the worst in the UK and is deteriorating each year to a point where rape cases⁹ are taking, on average,¹⁰ 943 days from report to conclusion and amounts to a clear denial of access to justice.
- 18.37 A key ingredient to arresting and reversing this unacceptable trend is earlier active engagement of the defence in the process, including detailed judicial case management, disclosure, crystallising the defence case etc. This is simply not going to be effected and the proposals will founder unless fees are adjusted to pay adequately for this work.
- 18.38 There is a sense that the defence statement has become perfunctory. In this Review, it is envisaged to become a critical document that should act as a signpost for the defence case and alert the court and the prosecution to significant milestones on the pathway. If so, it needs to be identified as important by the Department of Justice, with appropriate remuneration for those who draft it, in much the same way as pleadings are remunerated in civil justice.
- 18.39 How we currently handle disclosure is one of the major blights on our criminal justice system. It has been identified by virtually everyone in this Review as a major issue in the criminal process, and if poorly handled from the outset, is a contributing factor to a corrosive delay and replete with the potential for injustice within the system for all those involved. There is no adequate provision at present to remunerate practitioners for dealing with this crucial aspect of the whole process.
- 18.40 The PPE range, as described already, recognises the complexity of the case, and the fee relevant to that complexity, by means of a banded page count on the basis of the evidence 'served on the court'. There should be some form of additional fee for consideration of disclosure material and in particular third-party material.
- 18.41 A defence statement properly pleaded must identify disclosure material that satisfies the disclosure test. This is yet another area where a properly drafted defence statement is a crucial part of the new reforms.
- 18.42 Third-party disclosure has already been judicially considered to be both relevant and in the interests of justice to disclose, and if the consideration of such material is properly remunerated, it will behove everyone to address the issue in a timely and comprehensive manner, reduce delay and ensure that the interests of justice are served for all.
- 18.43 It is also apparent that a fundamental theme throughout the Review is the imperative for engagement from the outset. Any new judicial protocol and/

9 Information provided by DoJ. Based on the principal offence disposed and relate to substantive versions of the offence only.

10 Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.

or practice direction to marshal how defence practitioners prepare and defend those charged with serious sexual offences will add to the workload of those engaged in criminal defence work. Whilst practitioners will doubtless rise to meet the challenge that reform will bring, it must be adequately and properly remunerated. This may not necessarily always mean an additionality of fees where for example it involves allocation of remuneration to the different stages of the case. Hence fees may be restructured in order to address the new processes.

- 18.44 It is timely to revisit the provisions of Articles 37(a) and 37(b) of the 1981 Order and to recognise that those who undertake this type of work must exercise significant skill and competence to ensure that the improvements to the system can achieve the intended results.
- 18.45 The Review is also recommending that complainants ought to have the funded resource of access to an experienced lawyer to explain the procedures, the law, the trial process and some of the specific areas of concern for complainants — for example, third-party disclosure, health records, cross-examination about previous sexual history etc.
- 18.46 Criminal solicitors are well placed to provide this advice, subject to suitable funding. This should enable complainants to receive focused but time-limited advice on the actual issues that will arise in the trial from an experienced lawyer who can represent the complainant's interests exclusively during the period of the retainer/referral/instructions. The lawyers need to be appropriately recompensed if this is to work.
- 18.47 Criminal defence practitioners are often much maligned for their insistence on an ever-increasing slice of the ever-diminishing cake that is the legal aid budget. However, in this area, the importance of highly skilled lawyers, fully briefed and properly prepared to act on behalf of those accused of serious sexual offences, cannot be overstated.
- 18.48 I make no apology for repeating what I have said in chapter 9, 'Delay'. The key to reducing delay, solving the seemingly immutable issue of late and inefficient disclosure, demanding early defence and prosecution engagement, introducing early Ground Rules Hearings, pre-recorded cross-examinations and early, firm case management is to introduce a new culture of front-loading the process, in stark contrast to the current system. This will not work and the problems besetting serious sexual offences will remain unless the Department of Justice creates a bespoke system of payment, fixed or otherwise, for these early steps. The setting-up of this Review is proof positive that serious sexual offences present unique problems in the criminal justice system and they require bespoke solutions if we are really serious about solving them. In many instances however the same work as at present will be done but delivered at an earlier more timely stage.

- 18.49 I make it clear that these proposals are not an attempt to create a hierarchy of defence advocates which elevates their fees above all others in the criminal justice system. However, if new methods of dealing with all the problems endemic in serious sexual offence cases are to be introduced, a bespoke fee structure to meet those changes is crucial.

Public Prosecution Service

- 18.50 The resourcing of decisions as to prosecution is labour-intensive: 60% to 65% of the current running costs of the PPS are in respect of staff costs, and it is widely recognised that, in general, cases involving sexual offences are more time-consuming to process than other so-called volume crime.
- 18.51 The reasons are multifactorial, due in part to the fact that there has been a 21% increase in the number of incoming cases involving sexual offences to the PPS over the 2017/18 financial year¹¹ (a trend that seems set to continue), most allegations are denied by suspects, with the majority of cases contested to trial stage, increased volume of digital and third-party documentation requiring consideration by prosecutors, and the increased level of engagement with victims throughout.
- 18.52 To increase the demands upon prosecutors will bring contingent costs: in effect, time is money, and intensifying the requirement for new duties has to be matched with equivalent resource.
- 18.53 This casework also requires specialist prosecution staff who are in limited supply, and building the capacity of the PPS to meet increased demands may have a lead time of up to six months for recruitment and training.
- 18.54 The PPS also engages independent counsel to prosecute cases in the Crown Courts and higher courts. Additional duties falling to them, derived from a number of my recommendations, may result in additional payments becoming due. Payments to counsel in respect of this work are currently determined in line with costs payable to the defence and may require considered assessment and funding where relevant.

Police Service of Northern Ireland

- 18.55 The absence of adequate resourcing to provide properly trained officers specialising in investigating serious sexual offences will continue to delay justice inordinately for both complainants and accused and potentially cause miscarriages of justice, with the risk of innocent people being imprisoned.
- 18.56 Specially trained and qualified investigators and interviewers (especially Achieving Best Evidence (ABE) interviews of children and vulnerable witnesses) in serious sexual offences — officers who are also up to the task of organising

11 Public Prosecution Service for Northern Ireland (2018) *Statistical Bulletin: Cases Involving Sexual Offences 2017/18* Belfast: PPSNI

early third-party disclosure, unused material disclosure, drafting accurate and informed disclosure schedules etc. — require a substantial degree of time-consuming specialised training. It is only with such steps that we in Northern Ireland can cut down the current unconscionable delay and avoid the injustices that have occurred in England. Resources to meet these imperatives have to be found if we are to address the continuing problems.

18.57 It is not without significance that the Criminal Justice Inspection Northern Ireland Report of November 2018 at paragraph 3.16 records:

“Given the recent increases in referrals and reports to police and continuing challenge to manage the caseloads arising from this, it is imperative that the PSNI maintain a focus on balancing the demand and workload. The Public Protection Branch Business Plan incorporated this area and it was monitored via the overview system. CJI believe there should be a continuing focus from Senior Management of Public Protection Branch on:

- ensuring caseloads of both investigating officers and their supervisors are manageable and enable investigations to be carried out in an effective and timely manner;
- a focus on succession planning to develop replacements for officers who chose to leave the Public Protection Branch; and
- further consideration as to how resources can be better shared to meet demand peaks across the various branches of Crime Department.”¹²

18.58 That report recommended that resourcing levels in the Public Protection Branch should be reviewed and reassessed within a year of the publication of that report. I share that recommendation.

18.59 My own experience in this Review echoes the conclusion of the House of Commons Justice Committee, who conducted an inquiry into the disclosure of unused material in criminal cases,¹³ published in July 2018, and concluded that government must consider whether funding is adequate to support a strong disclosure.

Judiciary

18.60 Resources must be made available to the Northern Ireland Judicial Studies Board (JSB) to train all judges adequately, with multiple stakeholder involvements.

12 Criminal Justice Inspection Northern Ireland (2018) *Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in Northern Ireland*. Belfast: Criminal Justice Inspection Northern Ireland

13 House of Commons Justice Committee (2018) *Disclosure of evidence in criminal cases* London: House of Commons

The measures I have proposed to address the mischiefs within the system need detailed, planned and timely training steps if they are to have any real impact. Perfunctory 'one off' sessions will not work and are a waste of money. Provision must be made for all Crown Court judges to promptly attend conferences in England on serious sexual crime, both on initial appointment and thereafter for refresher courses on a more regular basis than currently occurs. This is a complex and rapidly developing area of law. Delay in judges from Northern Ireland attending these courses due to a lack of resources is totally counterproductive in ensuring a just system.

- 18.61 In addition, appropriate administrative assistance must be made available to the Judiciary to effectively operate the fresh impetus to be given to case management. Without such staff the necessary compliance with court orders, a vital prerequisite of the new proposal, in a timely and efficient manner will be lost. Experience reveals that unless court orders are closely monitored and sanctions imposed, inevitable drift accompanied by delay and wasted expenses will occur.

Complainants

- 18.62 The effects of serious sexual offence crimes on victims are devastating in terms of human misery and bring about enormous cost to the National Health Service and the nation at large (see earlier in this chapter).
- 18.63 Counselling services and support to the voluntary sector are crucial to help victims through the court process, recover and get on with their lives. It is short-term economic illiteracy to fail to invest adequately in these early interventionist services.
- 18.64 There must also be investment in the court process for complainants to ease the harrowing nature of the court procedures and to take vigorous steps to encourage participation in the process.
- 18.65 Thus, for example, separate legal representation, early pre-recorded cross-examination, more acceptable court facilities, more training of the professions and the Judiciary are but some of the early remedies that have to be paid for and provided.
- 18.66 If the plight of victims is to be fully comprehended and various societal myths dispelled, there has to be a recognition across government departments that the public in general, and schools in particular, need education programmes. Early and relevant investment in such programmes will hasten the long-term dividends.
- 18.67 To have a criminal justice system which deals with serious sexual offences in such a manner that the majority of victims refuse to enter into it is not only a damning indictment of the system, but also a huge waste of resources whereby an existing very costly system is simply not used.

18.68 None of this is to suggest that I am advocating a hierarchy of victims. It is rather a simple recognition that complainants have particular and in some instances unique requirements which cannot be dealt with on a one size fits all approach across the criminal justice system.

Children

18.69 Perhaps my greatest criticism of the manner in which the criminal justice system deals with serious sexual offences is reserved for the way it deals with children. I simply do not accept that we are currently complying with the international standards set out in chapter 14 of this Review in the area of the criminal law, which deals with serious sexual offences where children are concerned.

18.70 Children need to be carefully considered and analysed if we are to arrest the development of overwhelming personal, social and mental ill health problems into adulthood, with huge costs to our Health Service.

18.71 Only appropriate investment can arrest this. Thus we must alter our approach to how we deal with the evidence of children, how we manage their attendances at court or at other remote centres, and the Department of Justice must take steps to explore such internationally recognised models as the Barnahus. It is unconscionable that our children should be deprived of what may conceivably prove to be life-changing opportunities in this distressing area of serious sexual crime merely because we are not prepared to invest in appropriate obvious remedies to our current system, and appropriate research and analysis as a first step.

Marginalised communities

18.72 The paucity of research that we in Northern Ireland — and I include in this concern not only the Department of Justice but the various voluntary and statutory bodies representing these communities — have carried out into the prevalence and extent of serious sexual offences in these communities is a troubling testament to our current indifference to their plight. It is completely unacceptable if we are to characterise ourselves as a caring and just society.

18.73 Investment has to be made in research as to the extent and nature of this problem locally before we can even begin to provide criminal justice solutions in the law and procedures governing these offences within these communities.

Technology

18.74 If those accused of these crimes are to receive a fair trial and if complainants are to receive justice in timely fashion, more investment has to be made in due process and the technology that makes the criminal justice system work efficiently. This Review is littered with instances where technology would contribute to resolving such matters as disclosure and delay etc. Without such

investment, we will fall far behind other jurisdictions and these problems that I have identified will continue unabated.

Conclusions

- 18.75 As a society, we have to decide whether we are serious about addressing the problems that exist in our criminal justice system in dealing with serious sexual crime. Many of the proposals I have made will require some short-term investment, and others long-term financial consideration, but all of these investments have the potential to make massive savings long term if only we have the imagination and determination to pursue them.
- 18.76 The resources required for these recommendations are all manifest in the foregoing chapters. Hence the specific recommendations that I make are limited in number but are by no means a comprehensive list of what I have already set out in earlier chapters.

Responses

- 18.77 There has been almost universal recognition in the responses that implementation of the recommendations proposed in this Review will require significant financial commitment, adequate resourcing and careful planning across criminal justice stakeholders.
- 18.78 It has also been recognised that in the absence of such additional resourcing, these recommendations are liable to fail. In short, as one respondent pithily characterised it, “this will involve deciding whether we are serious about addressing the problems that have been shown to exist and investing in both short- and long-term solutions”.¹⁴
- 18.79 I agree with the respondent who recorded that political will, if it can be located and brought to bear on policy and procedures, as well as resource provisions, may prove to be the most important element in the exercise. I pause at this stage to observe that I have interviewed representatives of the five main political parties in Northern Ireland in the wake of the Preliminary Report and, without exception, they have all expressed a very welcome enthusiasm to ensure that resources are made available for these recommendations.
- 18.80 The consequences of failing to act are well recognised in the responses that I have received. The SDLP succinctly summarised the matter in saying:
- “Quite correctly the report’s author sets out the high human and societal cost of sexual violence. The argument for increased financial investment across the criminal justice system is well-made with far reaching benefits.”
- The party poses the question ‘can we afford not to do them?’

18.81 I could not sum up the theme coursing through these responses better than that set out by Women’s Regional Consortium. It characterised the issue thus:

“It must never be forgotten that behind every statistic on rape and sexual assault lies a real person who has suffered a significant trauma. It is likely that the impact of this will be felt not only by the victim themselves but by their wider family and friends. The trauma of their experience could last throughout their life and have devastating impacts on their families and relationships if it is not acknowledged and properly dealt with.

It is therefore vital that we have adequate and properly resourced support services for victims as well as a robust and efficient judicial process which meets the needs of victims.”

18.82 I simply add to this that in addition the human and economic cost to those who are acquitted can also be costly and life changing. They should not be overlooked in this scenario of the necessity to find the resources to deal with these problems.

18.83 Again and again in the responses, the recommendation that there be a comprehensive resource impact assessment by the Department of Justice is welcomed and fully approved.¹⁵

18.84 Encouragingly, responses emerge to the effect that:

“nothing short of full adoption of the report’s recommendations as a whole will truly lead to substantial change.”

“Cherry-picking those recommendations that are easy and cost-effective to deliver will not deliver justice” .¹⁶

18.85 A relevant point identified that these reforms should happen in a structured fashion with, for example, the recommendations about disclosure being largely completed before pre-recorded cross-examination is introduced.¹⁷

18.86 Albeit not a response to this Review, it is interesting to note that the recent Attorney General’s *‘Review of the efficiency and effectiveness of disclosure in the criminal justice system’* (November 2018) in England and Wales also identified the need to review legal aid payments to deal with cases involving disclosure.

18.87 It recommended that the Criminal Justice Board in England and Wales commission a working group to lead the examination of this aspect of its conclusions and feed this into the Ministry of Justice’s Review of the Advocates’ Graduated Fee Scheme. This should include consideration of whether changing some of the structure and timing of legal aid payments would facilitate earlier

15 Public Prosecution Service, Sinn Fein, Probation Board Northern Ireland, Women’s Aid Federation NI, Victim Support NI and Belfast Feminist Network.

16 Women’s Aid Federation NI.

17 Victim Support NI; Barnardo’s NI.

and more effective defence engagement. The recommendation was that this should also apply to a pre-charge engagement model. Such a structure should also embrace a Fee Scheme for early preparation and engagement between the defence and prosecution lawyers. I commend this approach to the Department of Justice.

- 18.88 Two discrete matters: first, the PSNI drew my attention to the fact that the Public Protection Branch has been identified as one of the four strategic growth areas within the PSNI. Their work includes tackling sexual violence and abuse; child sexual abuse and exploitation; safeguarding children; and safeguarding adults at risk. Since its establishment, further business cases have been brought before the Service Executive Team for additional resourcing and these have been provided. This remains under constant review and in considering this report and any recommendations, resources in the form of people and finance will always play a role in their implementation.
- 18.89 Secondly, the Men’s Advisory Project made a special plea on behalf of men who they assert, correctly in my view, are overlooked in sexual assault and rape conversations just as they are in many conversations about acts of abuse perpetrated against them.
- “For men who are victims, the constant spotlight on men as perpetrators whilst no focus, work or funding is provided to men as victims is doubly shaming.”
- 18.90 A compelling argument is made that “services to male victims are chronically underfunded and to a large extent ignored. [The Review] must use the platform of this consultation to highlight this discrimination.”¹⁸ I enthusiastically take the opportunity to highlight this and strongly recommend that those responsible for providing resources to implement the recommendations in this Review take steps to ensure that services to male victims receive a fair share of the finance available.

Conclusion

- 18.91 I have been strongly encouraged by the responses to this chapter. There was almost universal recognition that it is absolutely imperative that resources be invested in the implementation of these recommendations if we are to address the fundamental weaknesses in the criminal justice system that contribute to the very high human and societal costs, alongside the manifest lack of public confidence, in how the law and procedures currently deal with serious sexual offences.

Recommendations

247. There needs to be early liaison with the Department of Justice to consider aligning fee schemes.
- 248.* The Department of Justice, in liaison with the professional bodies needs to review and restructure the Fee Schemes to take into account the recommendations of this report, in particular the need to support early engagement between prosecution and defence teams.
- 249.* A fee should be set to include all work, including early engagement, preparation for cross-examination of the complainant outside the course of the main trial and Ground Rules Hearings.
- 250.* Appropriate remuneration should be structured for dealing with significant disclosure third party issues on a case by case basis.
- 251.* Advocates should be remunerated by concentrating on the complexities of the case rather than the page count, particularly taking into account the considerable reliance on electronic evidence.
252. Those responsible for allocating resources must ensure male victims receive a fair share of the finance available.
253. There must be a comprehensive resource impact assessment by the Department of Justice of the recommendations in this Review.

Chapter 19

Recommendations requiring
legislation for implementation

Some of the recommendations (which have been asterisked) in each chapter may require primary/secondary/Crown Court Rules implementation.¹ For ease of reference I have summarised these in this chapter as follows:

Chapter 3 - Restricting Access of the Public Recommendations

- 19 That the public at large be excluded in all serious sexual offence hearings in the Crown Court save for officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant or, a parent or relative of the accused together with such other persons (if any) as the judge, or the court, as the case may be, may in their or its discretion permit to remain. The public will be admitted for the verdict and sentencing in the event of conviction.
- 20 A cipher be applied to the complainant's identity in all court hearings, including the initial charge sheet and the bill of indictment (albeit the identity must be revealed to the accused and their representatives) and their image shall not be publicly displayed during any hearing save to the accused and their representatives.
- 21 Anonymity of complainants shall be made permanent so that it applies even after death.

Chapter 4 - Pre-recorded Cross Examination Recommendations

- 38 The Department of Justice in Northern Ireland should make provision for separate fees for pre-recorded cross-examination.
- 39 Hearings of pre-recorded cross-examinations should be treated as the first day of the trial and the legal aid rules should reflect this.

Chapter 5 - Separate Legal Representation Recommendations

- 40 Publicly funded legal representation should be granted to all complainants in all serious sexual offence cases in the following circumstances:
- to afford relevant information and general legal advice on a time limited basis throughout the process up to the commencement of the trial with the option of bringing such matters to the attention of the court prior to trial;
 - where complainants wish to exercise the right to appear in court to object to disclosure of private material to the accused's defence team or to ensure it is restricted to the minimum necessary; and
 - where complainants wish to appear in court to object to the introduction of their previous sexual history.
- 41 That consideration be given to and a cost analysis made of extending legal representation during examination-in-chief and cross-examination at the trial itself after the recommendations above at number one have been piloted and analysed.

Chapter 7 - Social Media Recommendations

- 58 In the wake of such consultation, the following steps should be jointly considered:
- Social media publishers should be made liable for legally objectionable material contained on their platforms.
 - Liability should accrue to social media outlets once notification of the objectionable material has been given of a posting that breaches an injunction or risks prejudice to a trial and that material has not been taken down within, say, 24 hours.
 - A legal onus should be placed on social media to take reasonable steps to identify and remove material potentially prejudicial to a trial in advance of the trial hearing.
 - The administrators and moderators of online groups should be made responsible for their content.
 - Bloggers should not have the defence of ‘fair and accurate’ reports on court proceedings. A new qualified privilege defence should be introduced for court proceedings reports that do not meet the fair and accurate requirement, but are not the product of malice.
 - With the advent of the 2016 GDPR, data controllers, including internet intermediaries, must erase content based on right to be forgotten requests.
- 59 Legislation should be introduced in Northern Ireland, similar to The Criminal Justice and Courts Act 2015, bringing with it a stringent regime and codification of jurors’ responsibilities.
- 60 A specific offence should be introduced of a juror who intentionally seeks information relating to a case before them in the course of the trial. That information should include, but not limited to, asking a question, searching online, visiting a place, inspecting an object, conducting an experiment or asking someone to do anything of this nature.
- 61 It should be ensured that information in the case “includes the person in the case, the judge dealing with the case, any other person in the case (including lawyers or witnesses), and the law relating to the case, the law of evidence or court procedure”.
- 62 The new legislation shall grant a power to a judge, if they are convinced it is in the interests of justice, to temporarily confiscate a juror’s electronic devices and search a juror if it is believed they have not been surrendered.
- 63 Judges should be empowered to order all mobiles and other communication devices be left outside the court if members of the public are to be admitted.

- 64 A maximum penalty of two years' imprisonment should be imposed for breach of the juror offences.
- 67 Increase the current penalties for breaching the anonymity of complainants.
- 70 The Judiciary be granted general powers to place restrictions on publication of material where it appears to be necessary to avoid risk of prejudice to the administration of justice.
- 71 Provide for judicial powers to direct removal of material from websites and/or the disabling of public access to websites where it appears to be necessary to avoid risk of prejudice to the administration of justice.
- 72 Provide for judicial powers to order online hosts and internet providers to disable specified sections of websites for limited periods.

Chapter 8 - Cross-examination on previous sexual history Recommendations

- 101 Legal aid should not be granted to counsel or solicitors in such cases unless such specialist training has been certified.
- 102 Legal aid for legal representation should be extended to complainants in this area.

Chapter 9 - Delay Recommendations

- 110 The Department of Justice should make provision for the direct transfer of serious sexual offences to the Crown Court, bypassing the committal process pursuant to the affirmative resolution procedure under section 11(4) of the Justice Act (Northern Ireland) 2015.
- 111 Mandatory early proactive communication and engagement between the parties in serious sexual offences. This should be inserted into the Crown Court Rules together with a codification of the duties of all parties.
- 112 The first such engagement should be between the PPS Directing Officer and the defence solicitor, occurring between committal and the first appearance before the Crown Court judge, leading on to subsequent engagement between counsel/advocates.
- 113 Counsel/advocates should certify such engagement has occurred before the first appearance before the Crown Court judge.
- 114 The Department of Justice should institute a bespoke legal aid fee structure for serious sexual offences and in particular, provide for the role of counsel at the early engagement stage.
- 115 Each serious sexual offence should be listed before the Crown Court judge within 28–35 days (or whatever time the Crown Court Rules Committee deems appropriate) from being sent from the District judge.

- 117 Thereafter, a four-stage process will follow if the case is to be contested:
- Stage 1
Prosecution to serve the bulk of its material (including what disclosure it proposes to make) with the essential issues in the case within whatever period is determined by the Crown Court Rules Committee as appropriate.
 - Stage 2
Defence to serve defence statement within whatever period is determined by the Crown Court Rules Committee as appropriate thereafter. At this stage defence must state what disclosure it requires, setting out how such material relates to the issues when providing a defence statement.
 - Stage 3
Prosecution respond within whatever period is determined by the Crown Court Rules Committee as appropriate.
 - Stage 4
Defence to provide final comments and applications dealing with disclosure.
- 127 Ground Rules Hearings should initially be held in every case involving a child or vulnerable witness, leading to a stage where a Ground Rules Hearing will be held in every case of a serious sexual offence.

Chapter 11 - Consent Recommendations

- 155 The Sexual Offences (Northern Ireland) Order 2008 should be amended to provide:
- that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
 - for the expansion of the list of circumstances as to when there is an absence of consent to include, for example (i) where C submits to the act because of a threat or fear of violence or other serious detriment such as intimidation or coercive conduct or psychological oppression to C or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where C is overcome, voluntarily or not, by the effect of alcohol or drugs;
 - that where any of these circumstances exist, the complainant does not consent to any sexual act, and if the defendant was aware of these circumstances, the defendant did not reasonably believe that C was consenting;
 - this section does not limit the circumstances in which it may be established that a person did not consent to a sexual act;
 - that the definition as to what constitutes a reasonable belief in consent should add that, in determining whether there was a reasonable belief in

consent, the jury should take account of all the circumstances, including a failure to take any steps to ascertain whether C consented; and

- consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.

Chapter 12 - Voice of the Accused Recommendations

- 158 Legislation should be introduced to protect the identity of schoolteachers accused of sexually assaulting a child at their school pre-charge.
- 159 There should be statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged.

Chapter 13 - Voice of Marginalised Communities Recommendations

- 180 Adult Safeguarding Legislation should be introduced to provide protection for older people at risk of abuse or harm in line with similar legislation in the rest of the United Kingdom.
- 184 The need for legal representation for complainants to obtain advice on the law and procedures in serious sexual offences for those in marginalised communities is particularly pressing.

Chapter 14 - Voice of the Child Recommendations

- 186 Publicly funded advocates in serious sexual offence cases must have undertaken approved specialist training in serious sexual offences involving children.
- 218 Article 21A of The Criminal Evidence (Northern Ireland) Order 1999 should be amended to extend the availability of live link measures to a child defendant on the basis of fear or distress.
- 219 The phrase 'child prostitute' should be removed from existing legislation and not included in future legislation. It should be replaced with the phrase 'child sexual exploitation'.

Chapter 16 - The Jury System Recommendations

- 238 Legislation should be introduced to the effect that where, in a serious sexual offence trial, the defence has made an application that the trial should continue with a judge alone in the interests of justice, and the judge agrees, the trial should be heard by a judge alone.
- 241 The current exemptions from jury service in Northern Ireland should be reviewed significantly so that the legislation in Northern Ireland operates in parallel with the Criminal Justice Act 2003 in England.

Chapter 17 - Measures Complementing the Criminal Justice System Recommendations

- 243 The Department of Justice should give serious consideration to providing State funding for a scheme of accredited practitioners to operate a system of restorative justice at any stage in the criminal justice process dealing with serious sexual offences where the offender has admitted their guilt, the victim has requested the scheme be invoked and the perpetrator has agreed to be involved. The scheme must be victim led.
- 244 The Department of Justice should, in time, give consideration to making available to complainants, a self-referral voluntary justice mechanism involving a restorative practice element as an alternative to participation in the criminal justice system in order to resolve certain serious sexual offences, provided it is victim led.
- 245 Section 5 of the Criminal Law Act (Northern Ireland) 1967 should be repealed at least in relation to all serious sexual offences save that in cases where an individual had knowledge of a relevant offence (which would include rape or other serious sexual offence) concerning a child or vulnerable adult (as currently defined in law) or where failure to report the offence is likely to put others at serious risk that individual would be obliged to report it to the police in the absence of a reasonable excuse.

Chapter 18 - Resources Recommendations

- 248 The Department of Justice, in liaison with the professional bodies needs to review and restructure the Fee Schemes to take into account the recommendations of this report, in particular the need to support early engagement between prosecution and defence teams.
- 249 A fee should be set to include all work, including early engagement, preparation for cross-examination of the complainant outside the course of the main trial and Ground Rules Hearings.
- 250 Appropriate remuneration should be structured for dealing with significant disclosure third party issues on a case by case basis.
- 251 Advocates should be remunerated by concentrating on the complexities of the case rather than the page count, particularly taking into account the considerable reliance on electronic evidence.

(Endnotes)

- I. Section 52 of the Judicature (Northern Ireland) Act 1978 (“the 1978 Act”) provides that Crown Court rules may be made in accordance with section 53A.
- II. Section 53A provides that after making Crown Court rules the Committee must submit them to the relevant authority, which means in relation to Crown Court rules which deal (or would deal) with an excepted matter, the Lord Chancellor; and otherwise, the Department of Justice in Northern Ireland. The relevant authority must allow or disallow Crown Court rules submitted to it.
- III. Article 4(3) the Departments (Northern Ireland) Order 1999 (“the 1999 Order”) provides that any functions of the Department may be exercised by – (a) the Minister; or (b) a senior officer of the Department. Article 2 provides that a senior officer of the Department refers to a member of the Northern Ireland senior civil service. Article 5 establishes each Department as a body corporate.
- IV. Since the decision of the NICA in the Buick case ([2018] NICA 26) the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (‘the Act’) came into operation 1 November 2018. Section 3(1) of the Act effectively reverses the High Court’s decision in Buick by clarifying that the absence of Ministers does not prevent a senior officer from exercising the functions of a Department during the period for Executive formation, if the officer is satisfied that it is in the public interest to do so during that period.
- V. Making of Statutory Rules by negative resolution is subject to the above requirement to take account of the public interest even though Departments may lawfully make Statutory Rules through the negative resolution procedure, as an exercise of a function. Essentially it will be those ‘minor’ and ‘non-policy’ decisions which can be taken without considering Public interest or decisions that would ordinarily not have been presented to a Minister to decide or agree. Paragraphs 9 to 12 inclusive of the Guidance issued by the Secretary of State are relevant to the determination of the “public interest”. In the absence of the relevant Rules being “technical or procedural” and not involving new major public expenditure commitments, or a major change of any pre-existing policy, programme or scheme approved by Ministers previously then the Public Interest assessment for the Department is guided more on whether there is a public interest in taking a decision rather than deferring a decision until there is an Executive.
- VI. Crown Court rules are made by the Rules Committee and ‘allowed’ by the Minister (or Permanent Secretary). So if the public interest requires it the Rules can be signed off by the Permanent Secretary.
- VII. Crown Court Rules are subject to the negative resolution process under section 119(3) of the Judicature (Northern Ireland) Act 1978. The negative resolution process was applied to all court rules by S.I. 2010/976 and Schedule 1 to the Northern Ireland (Miscellaneous Provisions) Act 2014 (c. 13).
- VIII. As there is no sitting Assembly under the current arrangements, potential Statutory Rules are usually submitted to the DOJ Legislative Programme Board who consider the public interest assessment, in advance of submission to the Permanent Secretary.
- IX. Once approved by the Permanent Secretary the Statutory Rule may proceed as usual. It should be laid at the Assembly Business Office under 41(3) of the Interpretation Act (Northern Ireland) 1954. Under 41(2) of the 1954 Act the statutory period would still apply to Statutory Rules laid under 41(6) (negative resolution). It will be published in the Belfast Gazette.

Glossary

Name	Description
ABE	- Achieving Best Evidence
ADHD/ASD	- Attention Deficit Hyperactivity Disorder/Autism Spectrum Disorder
BBC	- British Broadcasting Corporation
BAME	- Black, Asian and Minority Ethnic
CBA	- Criminal Bar Association
CCBE	- Council of Bars and Law Societies of Europe
CCrt	- County Court
CCJ	- Crown Court Judge
CCRC	- Crown Court Rules Committee
Charge	- When a suspect is formally accused of committing a crime
CJB	- Criminal Justice Board
CJINI	- Criminal Justice Inspection Northern Ireland
CJPDG	- Criminal Justice Programme Delivery Group
CJS	- Criminal Justice System
Counselling	- Giving help and advice on personal, social or psychological problems
CPD	- Continuing Professional Development
CPS	- Crown Prosecution Service
Cracked trial	One that's dropped because a witness doesn't turn up or withdraws their evidence
Cross-examination	- Challenging the evidence given by a witness in court
Crown Court or CC	- A court where criminal cases are dealt with by a judge and jury of 12 members of the public. The Crown Court also deals with appeals for cases dealt with by the magistrates' and youth courts
CSA	- Child Sexual Abuse
CSE	- Child Sexual Exploitation
DESU	- District Electronic Support Unit

Name	Description
DHSSPS	- Department of Health, Social Services and Public Safety (Former NI Department, now DOH)
Disclosure	- The evidence that the Crown and Police have collected to prosecute a case a the filling of documents in statements required by law
DE	- Department of Education
DOH	- Department of Health
DOJ	- Department of Justice
DPP	- Director of Public Prosecutions
ECHR	- European Convention on Human Rights which is an international treaty to protect human rights and political freedoms in Europe
ECtHR	- European Court of Human Rights
ECO	- Enhanced Combination Order
EU	- European Union
Examination in chief	- The part of the trial when witnesses tell the court what happened. In many cases involving child prosecution witnesses this is done using a video made at the start of the case by the police.
FSNI	- Forensic Science Northern Ireland
GP	- General Practitioner
GRH	- Ground Rules Hearing
HMCTS	- HM Courts and Tribunals Service
HO	- Home Office
ICP	- Indictable Cases Process (or Pilot)
Intermediary	- An intermediary is a person specially trained to help children and vulnerable adults understand and answer questions.
Intimidated Witnesses	- This definition includes those subjected to sexual offences, domestic abuse, human trafficking and stalking
IP	- Injured Party
IPSL	- Institute for Professional Legal Studies

Name	Description
Istanbul Convention	- A Council of Europe Convention on preventing and combatting violence against women and domestic violence open for signature on the 11th May 2011 in Istanbul
ISVA	- Independent Sexual Violence Advocate
JSB(NI)	- Judicial Studies Board Northern Ireland
Jury	- Twelve members of the public who listen to evidence and decide whether the defendant is guilty in Crown Court cases.
Justice Committee	- The Committee for Justice was established in Northern Ireland to advise and assist the Minister of Justice on matters within their responsibility as a Minister
LCJ (OLCJ)	- Lord Chief Justice (Office of the Lord Chief Justice)
LD	- Learning Disability
LGBT+	- Lesbian Gay Bisexual Transgender + Others
Live Link	- A closed circuit television or video link that enables witnesses to give evidence from somewhere away from the court room, but still allows them to be seen and heard and to see and hear what happens in court
LS	- Law Society
MAP	- Men's Advisory Project (which provides confidential support and counselling services for men experiencing domestic abuse)
MOPAC	- Mayors Office for Policing and Crime
MOJ	- Ministry of Justice
NAO	- National Audit Office
NCCA	- National Council for Curriculum and Assessment
Nexus NI	- Nexus NI offer services and support to people who have been affected by sexual violence in any form, and our services are delivered across Northern Ireland. Services provided include: counselling; training; education and support.
NI	- Northern Ireland
NIAO	- Northern Ireland Audit Office
NICCY	- Northern Ireland Commissioner for Children and Young People

Name	Description
NICTS	- Northern Ireland Courts and Tribunals Service
NIHRC	- Northern Ireland Human Rights Commission
NIPS	- Northern Ireland Prison Service
NGO	- Non-Governmental Organisation
NSPCC	- National Society for the Prevention of Cruelty to Children
NSW	- New South Wales
PBNI	- Probation Board Northern Ireland
PCC (OPCC)	- Police and Crime Commissioner (Office of the Police and Crime Commissioner)
PE	- Preliminary Inquiry
PFR	- Proportionate Forensic Reporting
PPS	- Public Prosecution Service
PPSSCU	- Public Prosecution Service Serious Crime Unit implemented in 2016
PSNI	- Police Service Northern Ireland
QC	- Queen’s Counsel
QUB	- Queen’s University Belfast
RASSO	- Rape and Serious Sexual Offences
RCC	- Rape Crisis Centre
RCNI	- Rape Crisis Network Ireland
RCU	- Rape Crime Unit
Restorative Justice	- Restorative Justice gives the victims to meet or communicate with their offender to explain the real impact of the crime. It often involves a meeting called a conference where a victim meets the offender face-to-face.
RI	- Registered Intermediary
Rowan Centre	- The Rowan is the regional Sexual Assault Referral Centre (SARC) for Northern Ireland opened in 2013 and jointly funded by the Department of Health Social Services and Public Safety and the Police Service for Northern Ireland
RTE	- Irish National Television
RP	- The Rainbow Project (Northern Ireland’s largest support organisation for lesbian, gay, bisexual and transgender people)

Name	Description
SBNI	- The Safeguarding Board for Northern Ireland
SCM	- Statutory Case Management
Social Media	- These are interactive computer-mediated technologies that facilitate the creation and sharing of information and other forms of expression by a virtual communities and networks
Special Measures (SMD)	- The help for witnesses that a court can offer so that they can give their best evidence in court. They include live video links, video-recorded statements, screens around the witness box and assistance with communication. (Special Measures Direction)
SSO	- Serious Sexual Offences
The Review	- The Gillen Review into the Law and Procedure of Serious Sexual Offences
TRAVAW	- Training of Lawyers on the law regarding violence against women
UK	- United Kingdom
United Nations Convention on the Rights of the Child	Universally agreed basic standards that should be respected by governments. The Convention sets out the basic human rights that children everywhere have. Available from UNICEF at www.unicef.org
USA (US)	- United States of America (United States)
VI	- Visually Impaired
Victim Support NI	- Victim Support NI is an independent charity supporting people affected by crime. We offer a free and confidential service, whether or not a crime has been reported and regardless of how long ago the event took place.
Video link	- Another way of describing the live link
VPS	- Victim Personal Statements
Vulnerable Witness	- This definition includes children and adults with learning disabilities and mental health problems
VWCU	- Victims and Witness Care Unit

Name	Description
Women's Aid	<ul style="list-style-type: none"> - Women's Aid is the lead voluntary organisation in Northern Ireland addressing domestic and sexual violence and providing services for women and children. <p>The Women's Aid movement in Northern Ireland began in 1975 and is made up of nine local Women's Aid groups and Women's Aid Federation Northern Ireland.</p> <p>Each Women's Aid group offers a range of specialist services to women, children and young people who have experienced domestic violence. They are all members of Women's Aid Federation Northern Ireland.</p>
Women's Regional Consortium	<ul style="list-style-type: none"> - The Women's Regional Consortium consists of seven established women's sector organisations that are committed to working in partnership with each other, government, statutory organisations and women's organisations, centres and groups in disadvantaged and rural areas, to ensure that organisations working for women are given the best possible support in the work they do in tackling disadvantage and social exclusion. The seven groups are as follows: <p>Training for Women Network (TWN) – Project lead</p> <p>Women's Resource and Development Agency (WRDA)</p> <p>Women's Support Network (WSN)</p> <p>Northern Ireland's Rural Women's Network (NIRWN)</p> <p>Women's TEC</p> <p>Women's Centre Derry</p> <p>Foyle Women's Information Network (FWIN)</p>
Witness Charter	<ul style="list-style-type: none"> - This document sets out the standards of service for all prosecution and defence witnesses
YJA	<ul style="list-style-type: none"> - Youth Justice Agency
YWS	<ul style="list-style-type: none"> - Young Witness Service

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- Ms JaneAnn Duffy, Department of Justice and Equality (DoJE)
- Dr Marie Keenan, Lecturer, School of Social Policy, Social Work and Social Justice, University College Dublin
- Hon. Mr Justice Peter Kelly, President of the High Court
- Law Reform Commission
- Maeve Lewis, Executive Director, One in Four Ireland
- Susan McKay, Journalist
- Jim O'Callaghan, Spokesperson on Justice and Equality, Fianna Fáil
- Aidan O'Driscoll, Secretary-General, DoJE
- The Probation Service
- Office of the Director of Public Prosecutions
- Professor Thomas O'Malley
- Rape Crisis Network Ireland
- RTE
- Brendan Ryan, CEO The Courts Service
- Mr Justice Garrett Sheehan, Retired Court of Appeal Judge
- Séamus Wolfe SC, Attorney General of Ireland

New Zealand

- The Honourable Justice Rebecca Ellis, High Court, Wellington
- Dr Emily Henderson, Senior Solicitor, Henderson Reeves Connell Rishworth
- Law Commission
- His Honour Judge Geoffrey A Rea, Napier District Court
- The Honourable Sir Douglas White, President, Law Commission

Norway

- Line Tveter, Legislation Department, Ministry of Justice and Public Security

Scotland

- Karen Auchincloss, Team Leader, Criminal Justice Reform, Justice Directorate, Scottish Government
- The Right Honourable Lord Bonomy
- Lord Carloway, Lord President of the Court of Session; Lord Justice General
- Lady Dorrian, Lord Justice Clerk
- Alison Di Rollo, QC Solicitor General
- Patrick Down, Head of Criminal Law and Sentencing Team, Justice Directorate, Scottish Government
- Susan Duff, Advocate
- Gordon Jackson QC, Dean of Faculty of Advocates
- David Lorimer, University of Aberdeen
- Sarah M. Livingstone, Faculty of Advocates
- Laura McDavitt, Policy Officer, Criminal Justice Reform, Justice Directorate, Scottish Government
- Beth McMaster, Criminal Justice Division, Scottish Government
- Anthony McGeehan, Crown Office and Procurator Fiscal Service (COPFS)
- Mr Kevin Philpott, Senior Policy Adviser the Scottish Government
- Rape Crisis Scotland
- Neil Rennick, Director of Justice, Justice Directorate, Scottish Government
- The Honourable Lady Stacey, Judge of the Supreme Court
- Lord Turnbull
- James Wolffe QC, Lord Advocate

South Africa

- Associate Professor Lillian Artz, Director, Gender, Health and Justice Research Unit, University of Cape Town
- Henk Du Preez, State Law Adviser, Department of Justice and Constitutional Development

- Dr Aisling Heath, Development Specialist and Research Consultant, Gender, Health and Justice Research Unit, University of Cape Town
- Kamogelo Lekubu-Wilderson, Director, Victim Support and Specialised Services, Department of Justice and Constitutional Development
- Bronwyn Pithey, Attorney (Gender-based Violence), Women's Legal Centre
- Jackie Wessels, Regional Court President, Limpopo

The Netherlands

- Andre Dingemanse, Policy Adviser, Ministry of Justice and Security

United States

- Boston Bar Association
- Brooklyn Defender Services
- Martha Coakley, former Attorney General of Massachusetts
- Council of the Boston Bar Association
- David Deakin, Assistant District Attorney/Chief, Family Protection and Sexual Assault Bureau
- The Honorable Judith Fabricant, Chief Justice, Massachusetts Superior Court
- Rachel Ferrari, Chief of Bronx County Child Abuse/Sex Crimes Bureau, Office of the District Attorney
- Karen Friedman Agnifilo, Chief Assistant District Attorney, New York County District Attorney's Office
- Maureen Gallagher, Policy Director, Jane Doe Inc., Boston
- The Honorable Linda E Giles, Associate Justice, Massachusetts Superior Court
- Mary Haviland, Executive Director, New York City Alliance Against Sexual Assault
- The Honorable Judge Melissa Jackson, Associate Judge, New York City Criminal Court
- Amy Litwin, Counsel to the Special Victims Division, Bronx County District Attorney's Office
- Liam Lowney, Executive Director, Massachusetts Office for Victim Assistance (MOVA)
- New York City Bar Association
- Professor Michael W Martin, Clinical Professor of Law and Director of Clinical Programs, Fordham University, New York
- Lili Palacios-Baldwin, Associate General Counsel for Labor and Employment, Tufts University, Medford, Massachusetts
- The Honorable Christine M Roach, Massachusetts Superior Court
- The Honorable Janet L Sanders, Massachusetts Superior Court
- Professor Michael Schwartz, Associate Professor of Law, Syracuse University

- Jill Zellmer, Executive Director, Office of Equal Opportunity, Tufts University, Medford, Massachusetts

Barbados

- The Honourable Chief Justice and President Sir Marston Gibson
- The Honourable Madam Justice Jacqueline Cornelius

