

# Archbold

## Review

### Reform of evidence in sexual offences prosecutions: Law Commission consultation paper

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#### Introduction

This is the first in a series of three articles about the Law Commission's review of the law, guidance and practice relating to the trial process in prosecutions of sexual offences. The review has three broad objectives: increasing understanding of consent and sexual harm; improving the treatment of complainants; and protecting the defendant's fair trial rights. This article gives an overview of the project, consultation paper and next steps. The other articles discuss two topics of particular relevance to the legal community in further detail: use of counselling records and conduct of the trial.

The Commission published its consultation paper in May 2023, launching a consultation period that ended in September 2023. The Commission thanks all who submitted a written response, attended an event, or otherwise engaged with the consultation.

#### The prevalence of rape myths

Misconceptions about rape are, in simple terms, beliefs which, although genuinely and sincerely held, are factually incorrect and may be derived from stereotypes. For example, that rapes are always promptly reported,<sup>2</sup> or that real rape victims will be visibly distressed.<sup>3</sup>

A systematic review of the research using mock juries concluded that there is "clear evidence" that rape myths have an impact on juror decision-making.<sup>4</sup> The only study carried out with real jurors in England and Wales found that rape myths had far less influence than claimed.<sup>5</sup>

However, there are limits to the conclusions that can be drawn from it as it was unable to shed light on how juries deliberate.<sup>6</sup> In New Zealand—where it is permissible to ask about deliberations—researchers concluded that a recent study with real jurors "supports the view that at least some significant degree of illegitimate reasoning does occur" in jury decision-making in sexual violence trials.<sup>7</sup> As a result, the Commission proceeded on the basis that there are real risks that juries may unknowingly be influenced by rape myths and considered reform options to minimise this.

#### Protecting the defendant's fair trial rights

Throughout the consultation paper, the Commission examined the impact of all potential reforms on the defendant's fair trial rights.

The Commission concluded that the defendant's fair trial rights can be upheld through rigorous safeguards while avoiding any unnecessary trauma to the complainant or disproportionate invasion of their right to respect for their private life. The Commission considered both in relation to each measure discussed and in its view the measures proposed achieve this.

#### Myths and misconceptions introduced through evidence

Certain types of evidence are more likely to introduce rape myths into the trial process. This includes complainants' personal records, sexual behaviour evidence, character evidence, and compensation claims.

#### Personal records

Complainants' personal records including medical, counselling, school, and child and family services records are inherently private. The access, disclosure, and admissibility of such

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<sup>2</sup> N. Burrowes, *Responding to the challenge of rape myths in court. A guide for prosecutors* (March 2013).

<sup>3</sup> N. Burrowes, *Responding to the challenge of rape myths in court. A guide for prosecutors* (March 2013).

<sup>4</sup> S. Dinos et al, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *Int'l J Law, Crime and Justice* 36, 44, 47.

<sup>5</sup> C. Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Crim. L.R.* 987.

<sup>6</sup> J. Chalmers et al, "Why the jury is, and should still be, out on rape deliberation" [2021] *Crim. L.R.* 753, 755.

<sup>7</sup> Y. Tinsley et al, "I think she's learnt her lesson": Juror use of cultural misconceptions in sexual violence trials" (2021) 52 *Vic Univ of Wellington L Rev* 464, 470.

third-party material in sexual offences prosecutions has been the subject of contention.

Both the substance and application of the law and procedure have been criticised for failing defendants by failing to ensure the disclosure of relevant records. They have also been said to fail complainants due to broad and intrusive requests for personal information, leading complainants to withdraw or compromising therapy.

The Commission provisionally proposed that there should be a bespoke, unified regime governing access, disclosure and admissibility of personal records, involving greater judicial oversight. This includes an enhanced relevance threshold, rather than simple relevance, where it is first considered whether personal records are relevant, and, if so, of sufficient probative value to warrant production, disclosure, or admissibility. The Commission proposed the adoption of the Canadian model which involves judicial scrutiny at each stage and sets out factors that structure the exercise of judicial discretion, such as: whether the record is necessary for the defendant to make a full answer to the prosecution case; the complainant's right to privacy; and wider societal interests in encouraging the reporting of offences and complainants obtaining treatment. Proposals relating to counselling records are considered in greater detail in a separate article in this issue of *Archbold Review*.

#### *Sexual behaviour evidence*

In sexual offences prosecutions, evidence of a complainant's sexual behaviour evidence (SBE) can be relevant and necessary to fairly determine the issues. However, such evidence poses a high risk of introducing rape myths into the trial and lead to unnecessarily intrusive questioning of the complainant, contrary to the interests of justice. Therefore, restricting the use of SBE is widely considered necessary.

SBE is restricted under s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999. This prohibits the use of SBE on behalf of the defendant, unless, on application to the court, the evidence is deemed admissible under one of four "gateways" and the court is satisfied that, without the evidence, the jury's conclusion on a relevant issue might be unsafe. The four gateways are that the evidence: goes to an issue not of consent; is evidence of "similar" sexual behaviour; is evidence of "contemporaneous" sexual behaviour; or is rebuttal evidence.

The current regime has been the subject of significant scrutiny. Views range from it being too broad, and too restrictive, to views that it is working well. One consistent criticism is that it is too complex.

Identifying a need for reform, the Commission provisionally proposed that a structured discretion model, similar to Canada and Scotland, would better address the inherent difficulties of SBE.

Under the proposals, SBE would be prohibited unless the evidence has substantial probative value, and its admission would not significantly prejudice the proper administration of justice. The judge would consider these factors: protection of the complainant's dignity, respect for the complainant's private life and legal rights; the interests of justice including the defendant's fair trial rights; benefits of encouraging victims to report or engage with prosecutions; and the risk of introducing or perpetuating myths or misconceptions. The

Commission also asked whether the restrictions should apply to evidence adduced by the prosecution.

A structured discretion model should lead to clear, more consistent decision making and robust analysis. To enhance this, the Commission provisionally proposed that judges be required to provide written reasons.

#### *Character evidence*

The Criminal Justice Act (CJA) 2003 allows for character evidence to be adduced in trials in respect of defendants and non-defendants, including witnesses such as complainants in sexual offences prosecutions.

The Commission heard from stakeholders that although the violent or controlling or coercive nature of a relationship is an important consideration in sexual offences cases, such non-conviction bad character evidence is rarely used. It concluded that non-conviction evidence that a defendant has engaged in controlling or coercive behaviour, other forms of domestic abuse, or violence is admissible if it meets the threshold under either s.101(c) or (d) of the CJA 2003. These provisions allow important explanatory evidence and evidence relevant to an important matter in issue between the defendant and the prosecution to be admitted. In the Commission's provisional view, the bad character provisions do not require amendment, but it asked whether guidance is needed to assist prosecutors and judges.

The Commission considered criticisms of the different approach to evidence of good character for defendants and complainants. While evidence of a defendant's good character is used in trials where relevant, evidence of the complainant's good character is admissible only in limited circumstances. It provisionally concluded that this discrepancy does not justify an expansion of the current law, as elucidated in *Mader*,<sup>8</sup> as it would risk watering down the defendant's fair trial rights. However, it provisionally proposed that where fairness demands it, the judge should direct the jury explaining the lack of evidence of the complainant's good character and that no adverse inference must be drawn from its absence.

#### *Compensation claims*

Sexual offences victims are entitled to claim compensation from the Criminal Injuries Compensation Authority for the physical or psychological injury sustained which is "directly attributable" to the offence.<sup>9</sup>

The Commission heard the existence of compensation claims is often the subject of defence disclosure requests and is adduced at trial to undermine the witness' credibility and to suggest that their allegation is false and for the purpose of financial gain.<sup>10</sup> Its use may allow rape myths to permeate the trial. Jurors may overestimate the frequency of false complaints and assume that a "real" victim would not seek compensation. It is noted that the same lines of questioning do not exist in other trials where victims are similarly entitled to claim compensation.<sup>11</sup>

<sup>8</sup> *Mader* [2018] EWCA Crim 2454 also ensures that the effect of admitting the evidence is not to water down the protection provided by the prosecution's primary obligation to prove its case and any good character direction given for the defendant.

<sup>9</sup> HMCTS, *The Criminal Injuries Compensation Scheme 2012* (June 2019) (CIC Scheme), para.4

<sup>10</sup> See Office of the Victims' Commissioner, *Compensation without re-traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation* (2019) p.76.

<sup>11</sup> G. Hanna, "Supporting victims through the trial process" in R. Killian et al (eds), *Sexual Violence on Trial* (2021) p.65.

Given that the time limit for making a claim frequently expires before the trial, complainants are left with two unsatisfactory options: submit their application at the conclusion of the criminal proceedings with no certainty that they will meet the criteria for extension of the time limit; or make their claim within the time limit and risk being cross-examined on it. However, the Commission did not propose extending the time limit for claims as this would not address the underlying risk of myths being introduced. Further, delaying claims unfairly delays payments of compensation to complainants.

Considering the prejudicial potential of such evidence, the Commission proposed subjecting compensation claims to the same restrictions as SBE, outlined above.

### Methods of countering rape myths during the trial

The Commission considered ways in which rape myths could be addressed during the trial.

#### *Judicial directions*

Example directions in the *Crown Court Compendium*<sup>12</sup> encourage judges to give appropriately tailored directions to juries during the trial to address myths that might influence their decision making.<sup>13</sup>

There is disagreement about whether judicial directions are effective. The Commission heard that directions can be hard for jurors to understand, may be used inconsistently, or may be incapable of addressing deeply ingrained beliefs. However, others, including judges, felt that when properly tailored to a case, judicial directions work well. The Commission asked whether the Judicial College should consider amending the example directions to better reflect empirical evidence on responses to sexual violence and whether there should be new directions, for example, for male complainants.

To address the inconsistent use and content of judicial directions, the Commission also considered whether there should be a rebuttable presumption that a direction on rape myths will be given, as in Scotland. If so, it asked what the triggering conditions should be, and if the test for rebutting the presumption should be that a reasonable jury would consider the evidence, question, or statement to be material.

#### *Expert evidence*

Expert evidence is currently inadmissible to explain general behavioural responses to sexual violence because such responses are regarded as within the knowledge of the judge and jury. Instead, judicial directions are seen as the appropriate way to counter rape myths.

England and Wales is an outlier among common law jurisdictions in its restrictive approach. Some have argued that expert evidence is needed to explain to jurors in general terms the complex physical and psychological responses to sexual violence that can lead to seemingly counterintuitive behaviours by victims. In their opinion, expert evidence has an educative function, assisting the jury in evaluating the evidence. Those against favoured judicial directions as they felt that jurors would give undue prominence to expert evidence. Further, they suggested that such evidence risks creating new stereotypes of how a victim of sexual assault should behave.

Others were concerned that there would be a battle of the experts between the prosecution and defence.

The Commission asked whether expert evidence of general behavioural responses to sexual violence should be admissible to address rape myths.

#### *Limitations on conduct*

How a case is conducted by counsel and regulated by the judge invariably has an impact on how the jury interprets the evidence. If the conduct of the trial itself is influenced by rape myths, they are likely to influence juror thinking. Countering myths and misconceptions and limiting their introduction in the conduct of the trial process is essential to increase public confidence and reduce the potential for complainant distress and resulting attrition. The Commission's proposals for limits on conduct will be addressed in greater detail in the next issue of *Archbold Review*.

In brief, the Commission asked whether training on rape myths should be mandatory for practitioners working on sexual offences cases. It also provisionally proposed that the threshold for restrictions on lines of questioning should continue to be relevance. Further, it asked whether there are any other types of potentially prejudicial evidence beyond sexual behaviour and compensation claims which should be subject to an enhanced relevance threshold.

### Empowering complainants in sexual offences prosecutions

One of the objectives of the Commission's review was to improve complainants' experiences of sexual offences prosecutions. In the consultation paper, the Commission considered how this might be achieved without infringing the defendant's fair trial rights.

#### *Independent legal advice and representation*

In general, though the individual complainant is integral to the prosecution's work, their interests do not override the prosecution's obligation to act in the public interest.

The position of complainants in sexual offences prosecutions is unique when compared to those of most other offences. Sexual offence trials are often described as "credibility contests" between the complainant and defendant. Further, they can involve the complainant's personal and sensitive information being used at trial. At present, complainants do not generally have the right to independent legal advice (ILA), unless they privately instruct a solicitor, or to independent legal representation (ILR).

The Commission provisionally proposed that complainants should have the right to be heard on applications where their privacy rights are most engaged—applications in respect of their SBE and personal records. In its view, if complainants had the right to participate, they would be able to advance arguments and provide important information in support of their privacy rights which currently no party can do as effectively or independently. In the Commission's view, the right to be heard should be accompanied by publicly funded access to ILA and ILR from qualified professionals as it would undermine the benefits of these proposals if they were only available to those with means. This would ensure complainants understand their rights, allow effective representation of their interests, and challenge of inappropriate applications.

<sup>12</sup> Judicial College, *The Crown Court Compendium – Part 1: Jury and Trial Management and Summing Up* (June 2022) 20-1, "Sexual offences – The dangers of assumptions".

<sup>13</sup> *D* [2008] EWCA Crim 2557; [2009] Crim. L.R. 591.

Concerns have been raised that introducing a right to participate alongside ILA and ILR would result in the defendant essentially facing two prosecutors.<sup>14</sup> Some have expressed the view that this is too great a challenge for the adversarial system.<sup>15</sup> However, in the Commission's view, by having a limited right to participate in specific applications only and clearly defining the scope of ILA and ILR, the defendant's fair trial rights are protected and any impact on the adversarial system remains proportionate.

### *Special measures*

Complainants in sexual offences prosecutions are frequently required to give oral evidence at trial; the process is recognised as causing them considerable stress.<sup>16</sup> Complainants in sexual offences are automatically eligible to apply for the following special measures in the YJCEA 1999: use of screens, live link, pre-recorded evidence, giving evidence in private, and removal of wigs and gowns. Currently, the prosecution has to apply and provide evidence that the measure will improve the quality of the complainant's evidence.<sup>17</sup>

Considering that a large number of special measures applications are unopposed and that applying for a direction is an intrusive process, the Commission provisionally proposed that complainants in sexual offences prosecutions should be automatically entitled (without providing evidence as to the need) to standard measures (such as those detailed above), with the ability to apply for additional measures. A model of automatic entitlement would, it argued, create greater consistency, improve complainants' confidence in the system and reduce the burden on resources.

Accordingly, the Commission's proposals would mean complainants become automatically entitled to give evidence in private. England and Wales remains the only UK jurisdiction to routinely require complainants to give evidence in public. The power to exclude the public from court, with an exemption to allow a member of the press to remain, is already available,<sup>18</sup> but stakeholders suggested there is a reluctance to use this provision due to the open justice principle. Allowing complainants to give their evidence in private without the additional stress of being observed by others, including the defendant's supporters, is beneficial to them and the trial process and the exemption for a member of the press protects open justice.

### **Need for holistic reform**

The Commission is interested in the reform landscape more holistically and considered how some reform options might need to be pursued together to be effective and others might have cumulative effects. In its view, a holistic consideration of issues is vital to achieve the overall objectives of the project because the issues addressed are complex and multifaceted. Impact may be determined by reference to several different measures including costs as well as non-

financial factors such as impacts on the complainant and the defendant and delays.

For example, some combinations of measures, such as ILR and the use of specialist examiners, may be more effective in improving the treatment of complainants than isolated measures. Together, they may have a greater impact on improving stakeholders' and public confidence in the trial process and may increase complainants' sense of agency while reducing the risk of retraumatisation. However, it might be that certain combinations of reform options could risk interfering with the defendant's fair trial rights even though individual reform options do not.

### **Considering radical reform**

As outlined above, research suggests that there is a risk that jury deliberations are influenced by rape myths.<sup>19</sup> Some stakeholders have raised concerns about merely tinkering at the edges of sexual offences prosecutions, creating a perception of change without any real impact. Therefore, the Commission considered radical reform options. Given the contentious nature of the issues it invited views and further evidence rather than making provisional proposals.

### *Specialist examiners*

The process through which complainants give evidence in court might itself be traumatising. Some academics have argued for a "trauma-informed approach" to be adopted when obtaining the complainant's evidence,<sup>20</sup> while others have pointed to issues with the adversarial system where counsel employ combative tactics rather than assisting the complainant in giving their best evidence.<sup>21</sup> One way to address this concern is to introduce specialist examiners who cross-examine the complainant instead of counsel.

The benefits of this model include a focus on trauma-informed practices, reduced judicial intervention and appropriate questioning from the outset. There are also some clear disadvantages such as added costs, difficulties with the availability of specialist examiners and the risk that specialist examiners would not test the complainant's account sufficiently to uphold the defendant's fair trial rights. It might also be possible to implement a trauma-informed practice without this measure. The Commission asked whether a pilot of specialist examiners should be introduced and if so, for which parts of the complainant's evidence and whether a specialist examiner should be a lawyer or communications expert.

### *Specialist courts*

Another method of addressing the concerns about sexual offences prosecutions is to introduce specialist sexual offences courts. A specialist court could be a single room within a courthouse, or an entire building. In its most limited form, a specialist court could mean specialised listing and prioritising of sexual offences cases. Such a court would need fully trained staff, would be technologically equipped to make effective use of special measures and would also have separate entrances and waiting areas for complainants.

14 L. Hoyano, "Reforming the adversarial trial for vulnerable witnesses and defendants" [2015] Crim. L.R. 107, 112.

15 T. O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (2020) [6.16]–[6.17].

16 L. Ellison and V. Munro, "A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials" (2014) 23 *Social and Legal Studies* 4.

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

18 YJCEA 1999, s.25(3).

19 S. Dinos et al, "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?" (2015) 43 *Int'l J. Law, Crime and Justice* 36, 44, 47, fn.3.

20 A. Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault* (2020), Chs 9–12.

21 V. Munro, "A Circle That Cannot Be Squared? Survivor Confidence in an Adversarial Justice System", in M.A.H. Horvath and J.M. Brown (eds), *Rape: Challenging Contemporary Thinking – Ten Years On* (2023).



However, if an entirely separate court were to hear sexual offences cases, it might increase delays and require additional resources. Since prioritised listing for sexual offences cases already exists, a specialised court might not make much difference. Further, requiring practitioners and judges to deal with sexual offence cases over a prolonged period might lead to entrenched views or burnout. Moreover, this might send a message that defendants in sexual offences cases are more dangerous or guilty impacting on public perceptions of the fairness of these trials.

The Commission asked whether sexual offence prosecutions should take place in a specialised courtroom, and what its features should be.

### *Juryless trials*

Although juries are regarded as integral to the adversarial process for serious criminal cases in England and Wales, some<sup>22</sup> have suggested that juries might not be the best way to reach a verdict in sexual offences prosecutions, given the risk of contamination of their deliberations by rape myths discussed above. One way of dealing with this could be to replace the jury with a judge, panel of judges or a judge with lay assessors trained on the effects of rape myths.

<sup>22</sup> V. Munro, "A Circle That Cannot Be Squared? Survivor Confidence in an Adversarial Justice System", in M.A.H. Horvath and J.M. Brown (eds), *Rape: Challenging Contemporary Thinking – Ten Years On* (2023), p 212.

However, trial by jury is a sacrosanct element of the adversarial process. Removal of juries could reduce public confidence in the jury system for other types of offences. It would also remove the defendant's right to be tried by their peers, which is an important check against oppression.

On the other hand, as sexual offences cases are frequently a "credibility contest", decided on limited evidence, jurors are more likely to rely on their own pre-existing beliefs rather than the evidence and this risks advocates playing to jurors' beliefs or stereotypes. It may also be particularly traumatising for the complainant to give evidence before 12 laypeople.

The Commission asked whether there should be mandatory removal of juries in serious sexual offences cases, or whether the defendant should have the option of a non-jury trial.

### **Next steps**

The consultation paper and a summary can be found on the project page. The Commission is now analysing responses to inform the development of final recommendations. To stay updated with the progress of this project, sign up to the mailing list on the project page.<sup>23</sup>

<sup>23</sup> Available at <https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/>.

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