

EVIDENCE IN SEXUAL OFFENCES PROSECUTIONS – OVERVIEW OF KEY PROPOSALS IN THE CONSULTATION PAPER

Who are we?

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

What is this consultation paper about?

- 1.2 In its End-to-End Rape Review, the Government looked at the decline in conviction rates since 2016 – one outcome was its request to us to examine the law, guidance, practice, and procedure in sexual offences prosecutions.
- 1.3 There are many complex reasons for the decline in conviction rates and this is not our focus. Instead, our focus is on how evidence is used in trials involving sexual offences, with three goals in mind: improving the understanding of consent and sexual harm; improving the treatment of complainants; and ensuring that defendants receive a fair trial.

What are we doing?

- 1.4 As this is a consultation paper, we do not make any recommendations to the Government for reform. We are consulting with stakeholders and members of the public on a series of questions and provisional proposals about changes to sexual offences proceedings.

What happens next?

- 1.5 Our consultation period opens on 23 May and concludes on 29 September 2023, with a view to us publishing our recommendations to the Government for reform in our final report in 2024.

What are our key topics?

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

- 1.6 The defendant's right to a fair trial is a fundamental constitutional right recognised by the common law and guaranteed by the European Convention on Human Rights. The complainant's right to respect for their private life is also at stake in sexual offences prosecutions. The European Court of Human Rights has decided that "measures may be taken for the purpose of protecting the [complainant], provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence." Remedying shortcomings in the treatment of complainants does not mean neglecting or undermining a defendant's absolute right to a fair trial. We examine this carefully throughout.

Rape myths

- 1.7 "Rape myths" are genuine and sincere beliefs that are factually incorrect and derived from stereotypes. For example, there is a myth that rape will always be reported promptly – the reality is that most rapes are never reported, and delay is common. The weight of evidence suggests that, despite myriad strategies to minimise their effects, it appears likely that myths and misconceptions about rape and sexual assault

still contaminate aspects of the trial process and certainly there are risks that happens. We consider reform strategies to minimise the risk that trials will be affected by myths and misconceptions.

Access to complainants' personal records, including counselling records

- 1.8 Complainants often fear – with good reason – that, even where their records are not relevant, deeply personal material will be revealed and used against them to traumatic effect and to secure an acquittal. As a result, some complainants will not proceed, or therapy may be compromised or delayed. To address this, we provisionally propose the introduction of a bespoke regime for access, disclosure and use of complainants' personal records involving greater judicial oversight. This includes a judge applying a heightened thresholds to determine applications using tests adapted from Canada. The judge will consider factors 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.

Sexual behaviour evidence ("SBE")

- 1.9 It has long been acknowledged that introducing evidence of the complainant's sexual behaviour at trial risks both subjecting the complainant to unnecessarily intrusive and humiliating questioning and reliance on myths and misconceptions about their credibility, consent and moral worth. We provisionally propose replacing the current regime for restricting the use of evidence of and questions about the complainant's sexual behaviour, which has been criticised as being too complex and both too broad and too restrictive. We instead suggest the use of an enhanced relevance threshold to admit this evidence. When applying this threshold, a judge would consider a range of factors including the defendant's right to a fair trial; respect for the complainant's private life; the benefits of encouraging reporting of sexual offences; and the risk of introducing or perpetuating rape myths.

Criminal Injuries Compensation claims

- 1.10 When the complainant has applied for compensation, the suggestion sometimes made to the jury is that the complainant's criminal allegation is false and for the purpose of financial gain. Because it carries a risk of introducing myths and misconceptions about the prevalence of false complaints, we provisionally propose that the use of evidence and questioning of complainants regarding claims for compensation from the Criminal Injuries Compensation Authority ("CICA") should require permission from a judge and should be restricted using a heightened threshold, similar to the one we suggest for SBE.

Special measures

- 1.11 We are the only jurisdiction in the UK that routinely requires complainants to give evidence in public. A right to have the public excluded would allow complainants to give evidence without additional stress and concern about being observed, and possibly identified, by strangers, family and friends of the defendant, or multiple reporters and bloggers. This is particularly important given the sensitive nature of the evidence they will be giving and the questions they will be asked. We provisionally propose that sexual offence complainants should be automatically

entitled to a range of measures to assist them to give evidence, including giving their evidence without the public present. To reflect the importance of open justice, the current exemptions would apply which enable a member of the press to attend and report.

Independent legal advice and representation (“ILA” and “ILR”)

- 1.12 Currently, complainants do not have a right to participate in applications relating to their personal records or evidence of their sexual behaviour. As these applications directly engage complainants’ right to respect for their private life, we provisionally propose that complainants should have access to independent legal advice, assistance, and representation in respect of requests and applications for personal records and in relation to SBE. They should have a right to participate in personal records and SBE applications, and to have independent legal advice and representation at pre-trial and trial hearings (without the jury present) to decide such applications. We also provisionally propose that complainants should have the same limited right of appeal against these decisions that other parties currently have.

Limitations on the conduct of sexual offence trials

- 1.13 We invite feedback on how better to control barristers’ questioning of complainants which relates to myths and misconceptions, such as requiring advance approval of lines of questioning by a judge; or setting out factors for judges to consider when deciding if a line of questioning is relevant; or judges using a higher threshold than relevance for potentially highly prejudicial evidence.

Jury decision making

- 1.14 We consider how best to educate and assist jurors in order to minimise the inadvertent influence of myths and misconceptions in deliberations, thereby helping them in performing their function as decisionmakers in sexual offences trials. We ask for views on how existing judicial directions to address rape myths could be improved by amending them or expanding them. We invite views on whether expert evidence, which is not currently admissible, should be used 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, for example, freezing during the assault, or delayed reporting to the police. We also invite views on whether the law should change so researchers can find out more about how juries deliberate.

Specialist courts

- 1.15 We ask whether sexual offences trials should take place in a specialised court or courtroom: where everyone working on the trial has received specialist training in trauma-informed practices; with appropriate technology for effective use of measures to assist with giving evidence; with separate entrances and waiting areas; and with prioritised listing of cases. The aims would be to improve complainants’ experiences, decrease the risk of traumatising, and tackle myths and misconceptions.