



CBA Response to CPS Consultation on Rape and Sexual Offences Legal Guidance

January 2021

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Question 1

Do you think that the new guidance in *Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences* in relation to the principles to consider when applying the evidential test will assist prosecutors in arriving at Code compliant charging decisions in RASSO cases?

The CBA suggest the following in order to emphasise the importance of Prosecution decisions being made in a fair and impartial manner:

- 1) The references to 'victim', should be replaced by 'complainant'.
- 2) The suggestion that a Prosecutor should have a 'belief' that the complaint is true is misplaced and dangerous.

A Prosecutor's role is to evaluate the evidence in an unbiased manner and apply the Code test. It is the role of the Jury to decide if they are sure a complainant is telling the truth, not the Prosecutor.

- 3) The suggestion that the suspect's account should not be afforded 'equal weight' should be rephrased. There should not be any suggestion that the evidence of any witness is inherently worth more or worth less because they are either a suspect or a complainant.
- 4) When dealing with inconsistencies the Guidance should make clear a further statement can be taken from a complainant to see whether they accept any

apparent inconsistencies and/or whether there is an explanation for them if this is relevant to the charging decision, or if there is any other evidence that can be obtained.

Question 2

Is the new content in *Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences* around the impact of trauma including the linked online trauma training video accurate and comprehensive?

The Guidance appears comprehensive and correctly identifies the need for expert evidence to be obtained where appropriate, however again the CBA is concerned by the use of the word 'victim' as opposed to the more neutral term 'complainant'.

Question 3

Will the [updated content within Chapter 3](#) covering reasonable lines of enquiry and disclosure covered at Sections D, E and F assist prosecutors with balancing the needs of the investigation and the right to privacy?

Digital evidence

The CBA suggests that it would be helpful to include a reminder to Prosecutors of the importance of ensuring that the right type of download is undertaken in respect of any digital devices, if an examination is appropriate. Some types of material (such

as apps/photographs etc) are better recovered by one level of download/ or type of software than other types of material (such as text messages) and Prosecutors should direct their mind to this when considering evidential opportunities.

Medical evidence

The experience of CBA members is that it is rare for the FME to be included in a case conferences without this being requested by Trial Counsel. The CBA endorse the suggestion in the guidance.

The CBA suggest it is important to obtain expert evidence where there are no injuries to explain the significance of the lack of injuries to a jury. As pointed out in the Guidance, juries can wrongly infer that the lack of injuries is supportive of consent, expert medical evidence explaining that this is not the case is important.

Question 4

Is the [revised content on 'rape myths and stereotypes'](#) accurate and comprehensive and do you think it will assist prosecutors in making decisions which are not clouded by myths or stereotypes?

The CBA notes the findings outlined by Dr Cheryl Thomas at [2020] Crim LR 11.

However, the CBA considers that explicitly acknowledging and debunking myths is important to ensure charging decisions are approached in the correct way - a fair and impartial assessment of the evidence on the facts of each case, not automatic assumptions based upon myths and stereotypes.

Question 5

Does the revised content adequately cover the development of rape myths in the digital age?

Yes.

Question 6

Does the revised content clearly highlight the tools available to prosecutors and advocates when challenging rape myths?

The CBA endorses the emphasis on the importance of the presentation of evidence at trial.

The CBA notes that the guidance still provides (in Chapter 10) that a complainant must always be notified if a section 41 application has been successful.

Whilst usually the appropriate approach, the CBA's view is that it should not be automatic.

This is an area which needs to be approached with the utmost sensitivity and judgment and with full regard for the complainant's autonomy and mental health.

For example, where allowing the jury to witness the complainant's first reaction to patently false assertions by the defence would have significant power and is an appropriate course taking into account all factors, including the impact on the complainant; or where mental health professionals recommend a course is adopted to minimise the impact on the complainant's mental health by not prolonging the stress and anxiety about giving evidence.

The CBA's position is that the Trial Advocate (who has undergone a rigorous selection procedure in order to be able to conduct these types of cases), the CPS Lawyer, Officer in the case, and any mental health professionals involved in the care of the complainant, will be best placed to make that decision and it should not be automatically prescribed.

Question 7

In [Chapter 5, 'Issues relevant to particular groups of people'](#), is the content covering 'pre-existing mental illness and potential psychological reactions to sexual abuse' including the linked 'psychological evidence toolkit for prosecutors' accurate and comprehensive?

The guidance is helpful. The CBA notes that CBA members will also utilise the Advocates Gateway and are committed to ensuring that all witnesses are treated with sensitivity and respect in order to maximise the quality of their evidence and minimise the impact of the trial process.

Question 8 Is the content of the 'same sex sexual violence toolkit' accurate and comprehensive?

See above in respect of Question 7.

Question 9 Is the content in relation to additional parts of Chapter 5 accurate and comprehensive?

The CBA has no observations.

Question 10

Do you have any other feedback you wish to share around how the revised guidance could be improved?

Delay

It has been the experience of members of the CBA that charging decisions in many cases are being significantly delayed by the combination of:

- the decision of the police to release suspects under investigation rather than on bail, meaning officers are then often diverted away to other investigations which are perceived as more urgent because of deadlines;
- the lack of police resources to progress investigations resulting in delays;
- the delays in obtaining third party material or completing digital forensic examinations.

In many instances cases are being delayed years. The CBA's view is that this is unacceptable and that these issues need to be reviewed urgently to ensure:

- (1) The police investigate these sensitive offences expeditiously;
- (2) Material is provided as a matter of urgency from Local Authorities so that charging decisions are not unduly delayed. If necessary independent counsel could be instructed to review material to ensure there are no unnecessary delays;
- (3) Devices are examined as quickly as possible by a digital forensic expert. If necessary, consideration should be given to outsourcing this work to independent forensic providers to avoid delays to the charging process resulting from backlogs in police forensic units.

The CBA recognise that resources are a significant issue in respect of these matters but the impact on both complainants and defendants, and on the quality of the evidence, where cases are delayed by many years, cannot be over stated.

Early involvement and role of Trial Advocate

The CBA would highlight the following:

- that Trial Advocates who conduct these serious and sensitive cases, have undergone considerable training and a rigorous selection process and should be entrusted to make decisions in cases. This can only enhance the confidence of those in the justice system by ensuring that the case is being handled from the beginning by suitably experienced independent counsel who will do her/his utmost to ensure that the most appropriate course of action is taken.
- that early involvement of Trial Counsel can often focus issues and reduce lines of inquiry in a more effective and efficient way. It is crucial for there to be good lines of communication between the lawyer and the officer in the case and counsel. Unfortunately, the experience of CBA members, is that this is not always achieved.
- The CBA training committee has an excellent reputation for delivering courses which are at the forefront of cultural and institutional change. It would not be difficult to ensure that any such course or courses are constructed with the active participation of the Crown Prosecution Service, the Victims Commissioner and non-governmental organisations.
- The CBA would also suggest that the CPS should consider including the CBA in joint training sessions run by the CPS for the police and other relevant authorities and bodies.