Submissions to the Home Affairs Select Committee's Investigation into the Investigation and Prosecution of Rape for the Roundtable of Barristers 24 November 2021

Introduction

1. The Criminal Bar Association (CBA) is the largest specialist Bar association, with over 3,500 subscribing members, representing all practitioners in the field of criminal law at the Bar in England and Wales. The international reputation enjoyed by our Criminal Justice System (CJS) owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. Most CBA members routinely both prosecute and defend, including in Rape and Serious Sexual Offences (RASSO) cases, and hence have a deeply informed and uniquely balanced perspective on the functioning of the CJS in this area, and its ability to deliver the Overriding Objective that such cases be dealt with "justly".[1] We address the Select Committee's questions from that perspective. We have re-ordered the topics slightly to reduce repetition.

The approach to RASSO cases by the Police and CPS

3. The experience of CBA members who prosecute and defend RASSO cases is that their handling has changed out of all recognition from how they were dealt with 30 years ago. Generally, these changes have been positive, most notably in the police's and CPS's attitude toward, and investigation

[1] Criminal Procedure Rules r. 1.1(1).

practices for, RASSO cases, and the introduction of Special Measures for how complainants give their evidence.

4. Both organisations have gone through many different investigative and prosecutorial 'cultural' changes. Policing and CPS guidance has been subject to numerous positional amendments over time. Indeed, arguably there have been so many changes (through numerous RASSO Reviews, Reports, Thematic Inspections, Serious Case Reviews etc), that neither organisation has had time to adjust to the changing landscape. For example, the imperative "to believe" RASSO complainants has been a rollercoaster of practice over many years, with Sir Richard Henriques in 2016 identifying the inherent conflict between this policy and statutory duties of impartiality and diligent investigation.[2] Indeed, police and CPS come under external pressures to take more cases to trial which may not satisfy the threshold for prosecution under the Code for Crown Prosecutors, with expectations of complainants poorly managed. Legislation requires that a RASSO case, like any other, must meet the Full Code Test and this bar should not be lowered.

5. Clearly, over the past decade deep budgetary cuts have resulted in a significant loss of experience in the Police and CPS of investigators and prosecutors. The volume of cases having to be processed at every stage of the CJS is overwhelming. Most Crown and Youth Courts will have RASSO cases as a large percentage of their daily case load.

6. RASSO work requires fully funded specialist teams of well-trained, experienced investigators and prosecutors, working in tandem from an early stage with specialist advocates, to focus on the complex and diverse issues present in these exceptionally intimate and traumatic cases, where the alleged victim usually is also the principal witness.

[2] Sir Richard Henriques, *An Independent Review of the Metropolitan Police Service's Handling of Non-Recent Sexual Offence Investigations against Persons of Public Prominence* (commissioned by the Commisioner of the Metropolitan Police, 31 October 2016).

The drop in rape prosecutions

7. Despite a record number of complaints of sexual offending being made to police, figures indicate that prosecutions in such cases are at an all-time low, although the conviction rate itself has remained broadly stable. A record backlog in the courts had already accumulated before the pandemic,[3] due to the refusal of the Ministry of Justice to fund enough sitting days, which were cut by almost 15% from 2018-19 to 2019-20, leaving many court rooms empty every day across the system. The backlog spiked by 23% in the year leading up to the pandemic, and a further spike of on top of that of 48% after its onset, with RASSO cases disproportionately affected. In the second quarter of 2021 alone, the National Audit Office reported that the number of sexual offence cases stuck in the Crown Court for over a year leapt by 435%.[4]

8. Annex A shows the age and gender profiles of complainants currently in the CJS. They are overwhelmingly children and young people whose childhoods and teen years are blighted by the systemic delays in trial dates, due to under-resourcing.

9. There are two key, and related, reasons for the steep decline in RASSO cases getting to trial: complainants withdrawing their support from the prosecution; and funding cuts throughout the system choking the progression of cases at every stage.

   (a) Complainant withdrawal

10. Many people now live their lives online. Two points often overlooked by critics are that:

[3] 38,411 cases as of 31 Dec 2019, rising to 58,827 cases as of 31 Dec 2020, of which 5,799 were sexual offences.

[4] National Audit Office, *Reducing the Backlog in Criminal Courts* (Session 2021-22, HC 732, 22 October 2021 p 4, and para 9.

(i) a request for the extraction of digital material, and other information classified as private and personal, can be made by investigators under the *Attorney General's Guidelines on Disclosure 2020* only if it is documented as "strictly necessary" and "proportionate" in order to pursue an identified reasonable line of inquiry, as required by the Criminal Procedure and Investigations Act 1996 (CPIA) Code of Practice;

(ii) such material can be central to, or greatly strengthen, the prosecution's case.

In many instances complainants conclude, sometimes too hastily, that the intrusion into their lives by the disclosure process will be too great. Better explanations and reassurances to complainants should be provided as to why this exercise has become necessary, whether it might even assist the prosecution, what it entails, and how the material might be used, with all the legal safeguards to respect privacy. A standard written handout for police to provide to complainants could be helpful, as well as legal advice (addressed below). Police need intensive practical training in the latest edition of the *A-G's Guidelines*, including how to explain the process to complainants as described in Annex A to those *Guidelines*.

11. The worked case examples in Annex B to these submissions illustrate how long complainants have to wait to see their case get to trial, with cancelled trial dates being all too frequent an occurrence. They may, understandably, decide to get on with their lives rather than remaining mired in a seemingly interminable criminal process. For many, their mental health cannot cope with the strain of delay. They may prefer to receive psychotherapy in a more targeted form than that permitted under current CPS *Guidelines on the Use of Therapy*,[5] which has to protect the integrity of their evidence. These factors are exacerbated for young complainants.

[5] Those Guidelines are currently under review by the CPS; a public consultation closed on 30 October 2020.

12. More courts and more sitting days are required to try cases within a sensible timeframe. The current turbulence in listing must be eliminated, especially for these cases. Guaranteed fixtures for all RASSO trials are the only solution. This used to be the practice and the norm in court listing.

(b) <u>The serious consequences of funding cuts throughout the system</u>

13. *Police*: funding cuts have meant fewer trained and experienced officers. CBA members are aware from their regular contacts with police officers that many have become so overworked they have left specialist teams due to stress and ill health, and frustration with inadequate resources to investigate RASSO cases properly.

14. *CPS*: Deep cuts over a decade have meant fewer staff handling more work, often leading to staff taking medical leave caused by the extreme pressure, with consequent heightened burdens for their colleagues. In some CPS areas a CPS lawyer may have a case load of over 100 RASSO cases. CPS areas have different policies as to what types of cases must be diverted into the RASSO teams. Greater investment in the CPS to employ and train far larger teams of RASSO lawyers is the only solution. The most recent announcement of budgetary increments recruitment will have to be spread across many areas, and are inadequate to address the pressures on existing RASSO teams.

15. *Advocates*: The preparation and presentation of RASSO cases at court is a highly skilled and sensitive task, requiring experienced and highly trained advocates. There are fewer advocates prepared to do such cases when the rates of funding are low, cases often take years to reach trial (and therefore, finally, payment for any work), routinely require analysing a significant amount of digital extraction and third party material, and involve vulnerable witnesses who require exceptionally careful handling. Often a fully prepared case may fall out of the list at the last minute, and is relisted for a time when the prosecuting or defence advocate is not available, meaning there is no payment for any of that pre-trial work.

16. If these cases are to be given the service they require, then fees must be significantly increased and pre-trial preparation remunerated to attract and retain specialist advocates. By way of example, the fee for all work by prosecution counsel on a case involving multiple rapes of a young child, which resulted in guilty pleas and a sentence of 22 years, was £876. This worked out at approximately £43 per hour *before* Chambers rent/fees, tax and national insurance.

Improving complainants' experiences of the criminal justice system

(a) Access to independent legal advice

17. In the Rape Review the CBA has taken the position that complainants, and also the investigation process, would benefit from access to publicly funded independent legal advice at two pre-trial stages:

    (a) *the disclosure phase*, encompassing legal representation in defence applications for disclosure, including from third parties; and

    (b) in *defence applications under the Youth Justice and Criminal Evidence Act 1999 (YJCEA) s.41*, to ask the complainant questions regarding previous sexual behaviour.

    The aim of such legal advice and representation would be to ensure that the complainant's ECHR Article 8 rights are placed before the court from the complainant's perspective, whilst allowing the prosecution in its constitutional role as a minister of justice to focus on the interests of justice, entailing the appropriate balance between the complainant's privacy rights and the defendant's right to a fair trial at common law and under ECHR Article 6. The former is already the law in third party disclosure applications, under a ruling of the High Court in *R (on the application of B) v Stafford Combined Court* [2006] EWHC 1645 (Admin); [2007] 1 WLR 1524, but this entitlement is widely overlooked, or regarded as satisfied by the complainant signing a consent form -- without legal advice. The Criminal Procedure Rules provide that where disclosure of a confidential document is sought from a third party, the court may require that notice of the

summons be given to the person to whom the record relates,[6] and the court may invite that person "and his or her representative" to assist the court in assessing any objections based on rights and duties of confidentiality.[7] However this conditional right is triggered only if the third party (not the complainant) objects to production to the production of the record.[8] The role of the complainant's legal adviser would have to be very carefully defined in a Code of Practice. That adviser must be a senior qualified solicitor, highly experienced in RASSO cases.

(b) Prerecording of evidence

18. The CBA has submitted to the Rape Review that YJCEA s. 28 needs to be reformed to make it a more flexible and effective tool for the prosecution to present its case. It is striking how passive prosecuting counsel must appear to a jury in a s.28 case, having virtually nothing to do with the presentation of the Crown's crucial witness. The police in effect conduct examination-in-chief – while they are in the midst of an initial investigatory interview exploring what offences were committed, when and by whom, so as to meet the charging criteria and the drafting of an indictment. Then defence counsel takes over for cross-examination. Allowing prosecuting counsel their usual flexibility to decide how best to frame the Crown's case, and to interact in a meaningful way with the witness by conducting a more substantial, or indeed a complete, examination in chief at the s.28 hearing, can allow the evidence to be presented more coherently to a jury than might be possible in an ABE interview.

19. Moreover, s.28 currently requires that the ABE interview be admitted in evidence as the witness's examination in chief as a precondition to the witness being afforded access to giving pre-trial recorded evidence. This

[6] Criminal Procedure Rules r.17.5(3)(b)(i).

[7] Criminal Procedure Rules r.17.6(3)(b).

[8] The case for legal representation is more fully developed by Laura Hoyano, "Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants" [2015] Crim LR 107 at 124-126.

means that many complainants are excluded from the protection of this Special Measure, because the ABE interview is largely or wholly unusable or inadmissible, or where the police have elected to take written witness statements instead (eg in cases of serial offending where one or more written witness statements, often taken over successive interviews, are used to obtain a more coherent and cohesive account from the witness). This precondition should be removed from s.28.

20. There are other amendments which the CBA has submitted to the Rape Review should be made, including clarifying the eligibility criteria for s.28 where the ABE interview was conducted when the witness was under 18, but has since turned 18 whilst awaiting the pre-trial examination, usually because she is caught in the queue, often because of listing or disclosure problems.

21. Finally, s.28 should be extended to the Youth Court, where district court judges are now trying "grave crime" cases such as rape, sitting without a jury.[9]

Data requests made of complainant and defendant in RASSO cases, and other disclosure issues

22. Please note the points above regarding disclosure as one factor in complainant attrition. We explain here the current systemic difficulties with the current disclosure regime in practice, with which the hugely under-resourced and overworked Police and CPS are tasked.

Roles and Policies: the intrinsic tension

23. There is a fundamental tension between the prescribed roles and aims of the Police and CPS in investigations, providing sensitive handling, emotional care and assurance to complainants on the one hand, and their statutory duty under the CPIA 1996 to retain their impartiality, pursuing all

[9]The case for reforming s.28 is further explained by Laura Hoyano and John Riley, "Making s.28 More Flexible and Effective" (June 2021) Counsel 46.

reasonable lines of inquiry, including those which lead away from the suspect.[10] This tension makes itself felt throughout the pretrial process.

24. The mechanics of considering disclosure in a timely and thorough manner are hampered at virtually every turn, be it material held by a local authority, NHS Foundation Trust, GP, or the family court, on digital devices, or even the Police's own investigation material. There must be an accelerated and seamless national policy backed by legislative change and detailed guidance to implement it, underpinned by significant investment in technology.

25. Cases that are not properly investigated due to lack of resources often fail to reach the charging thresholds and criteria under the Full Code Test requiring a reasonable prospect of conviction.

26. The training given to Police disclosure officers needs a fundamental review, with intense and interactive training as well as transparency as to their legal obligations in an investigation. CBA members are often told by police officers that they consider that the level, amount, and quality of training they receive on disclosure law is deficient. In turn that means the CPS may not be receiving all of the relevant material they should be considering under the disclosure regime. Defence and prosecution legal practitioners are ideally placed to carry out this training.

27. Without well-resourced, dedicated teams able to advise upon and analyse digital extraction and other records swiftly and effectively, investigations are delayed, resulting in distressed or disaffected complainants. Inevitably, serious disclosure problems arise down the line which cause trial dates to be vacated, often just before they are scheduled to start. Investment in national data download centres and targeting software to protect complainants' privacy interests by focused searches is urgently required.

[10] CPIA 1996, Code of Practice para 3.5.

The National Disclosure Improvement Plan

28. In direct response to two major disclosure failures in high-profile rape cases (Liam Allen and Isaac Itiary) the then Director of Public Prosecutions, Alison Saunders, instituted a national forum on disclosure and prosecution, which resulted in the National Disclosure Improvement Programme (NDIP). A joint CPS and police project, ambitious and wide in its objectives, it sought to refresh disclosure policies across all prosecutions, but with special attention to RASSO cases. The CBA considers that whilst the national policy objectives are laudable, their implementation at not only a regional level, but at the individual decision-maker level, requires greater improvement: policy without culture change is ineffectual.

29. NDIP initially imported processes and procedures from major crime investigations such as Murder, Terrorism, and Serious Fraud. The challenge was to adapt those procedures to the volume of investigations that the police routinely face, especially RASSO. One immediate recommendation, implemented for RASSO alone, was the use of the Disclosure Management Document (DMD). This had previously been used in major crime to great effect when considering lines of inquiry contained within digital devices or storage, which serves to highlight that these resources and techniques were not new. The CBA contends that the funding, resources, culture, and investigative techniques from these other grave offence investigations should be fully adopted and deployed in RASSO investigations; this would require a major financial investment in police and CPS staff.

30. As part of NDIP, there was a checklist agreed between the police and the CPS as to the material required for a police file to be considered for charging by the CPS. This process was rightly designed to standardise file submissions to the CPS, but it appears to have become a straitjacket in which the process has overridden sensible judgement in the timely charging of offences. We understand that these checklists are not considered by CPS lawyers, but rather by paralegal staff who are not in a position to distinguish

between which missing parts are fundamental to a case, such as missing ABE interviews, and what could be pursued later, without delaying the case's progression. The delay in charging RASSO cases is partly attributable to the back and forth between the CPS and police over these checklists. The December 2019 Inspection by the CPS Inspectorate showed that only about half of the police files sent to the CPS for charging decisions met the required standard.[11]

31. Further, there is hesitancy by some in the CPS to charge cases unless all disclosure has been completed prior to charging. Disclosure is an ongoing duty under the CPIA, so it is not necessarily required to complete the process before a charging decision can be made and the case listed for its first hearing, (although of course there may be cases where late-discovered exculpatory evidence requires the discontinuation of the case).

32. The CBA is particularly concerned that, despite these processes and safeguards in the new regime, major disclosure failures are still occurring.

The End-to-End Rape Review

33. The objective of the CBA's representatives, who attended every meeting, was to seek to set the Review on a realistic pathway, and to assist in promoting amongst civil servants, criminal justice agencies, and stakeholders, a full understanding of the problems in the CJS generally, and in RASSO prosecutions specifically. We undertook in the first meeting to keep the discussions confidential to protect candour, and we have honoured that commitment throughout the process.

34. Many recommendations in the Report were not as systemically helpful as they might have been, but we think it inappropriate to go into detail other than to express our reservations about two matters. First, the proposed framework to "hold each part of the system accountable for its part in driving

[11] HMCPSI, *2019 Rape Inspection: a Thematic Review* para. 5.11

improvements" must not encroach on the independence of the CPS, the judiciary, and prosecuting advocates. Second, the use of 'scorecards' to measure one of the most sensitive and nuanced categories of investigations in criminal law, involving the exercise of professional judgment concerning the interaction of adults and young people in emotionally charged situations, can be counterproductive and undermine professional judgment.[12] We note that the Rape Review Report, into which we had no real input, did nonetheless adopt three of our proposals:

(a) the professionalisation of Independent Sexual Violence Advisors (ISVAs), with a national Code of Practice; however, we would like to see a national delivery of professional training by a single provider, and a regulatory structure, analogous to those in place for Registered Intermediaries;

(b) the publication of a new edition of *Achieving Best Evidence in Criminal Proceedings*; the current edition is from 2011 and so every day hundreds of ABE interviews are conducted by investigators according to outdated guidance which no longer reflects the law. The new edition had been presented to ministers for sign off in February 2016. The Ministry of Justice has committed to publishing it (now updated for the Domestic Abuse Act) before the end of 2021;

(c) legal representation of complainant in two tightly framed phases of the case (described above).

Sufficiency of safeguards for a defendant's right to a fair trial

35. The CPS is to publish "*victim focussed policies setting out what survivors or rape and sexual assault can expect from the criminal justice system*." Documents published by the police and CPS should avoid language which assumes all those accused of rape are "perpetrators," and all complainants

[12] Jerry Z Muller, "Against Metrics: How Measuring Performance by Numbers Backfires: What Happens When Employees Care More about Their Stats Than about What's Best for the Organisation?" https://getpocket.com/explore/item/against-metrics-how-measuring-performance-by-numbers-backfires.

"victims", to respect the presumption of innocence and those institutions' duty of impartiality in performing their functions.

36. It is useful to consider some of the distinctions between the treatment of the complainant and the defendant.

- Complainants obtain the assistance of intermediaries as of right under the YJCEA 1999 when the statutory criteria are met. There is no right to an intermediary for vulnerable defendants: an intermediary appointment is granted rarely for when they give evidence, and one is even more rarely made for the entirety of the case to aid them in following the evidence.

- Complainants are entitled to have an ISVA with them at trial. Defendants rarely have the benefit of a supporter unless they have specific vulnerabilities over and above being accused of a crime.

- The trial judge gives a 'myths and stereotypes' direction explaining that complainants may be inconsistent in their accounts, or have acted in ways that the jury may not expect a victim to behave, yet still may be telling the truth; but if the defendant, having suffered the trauma of arrest and deprivation of liberty, gives inconsistent accounts, that is treated as impacting on credibility.

- The prosecution can call witnesses to whom a complainant made a first account as evidence of the truth of that statement; the defendant cannot do the same.

- The use of a dock for young people with no previous convictions accused of sexual offences stands in contrast to a range of protective special measures available to a complainant, including being screened from the defendant's view.

37. Disclosure of telephone and social media evidence is often key to adequately preparing a defence. Late disclosure, often hours before a hearing is due to commence, makes effective preparation by defence advocates extremely difficult. Disclosure of telephone evidence must be completed early in the course of the cases, and vitally so in cases where the pre-recorded s.28 cross examination is undertaken.

38. Lengthy delays, removal of cases from the trial list at the last minute, and consequent change of counsel due to chronic listing problems seriously affect defendants, not just complainants. Defendants may have been dismissed or suspended from their employment and face other disruption in their lives. Defence witnesses and other evidence may no longer be available, and memories of events deteriorate.

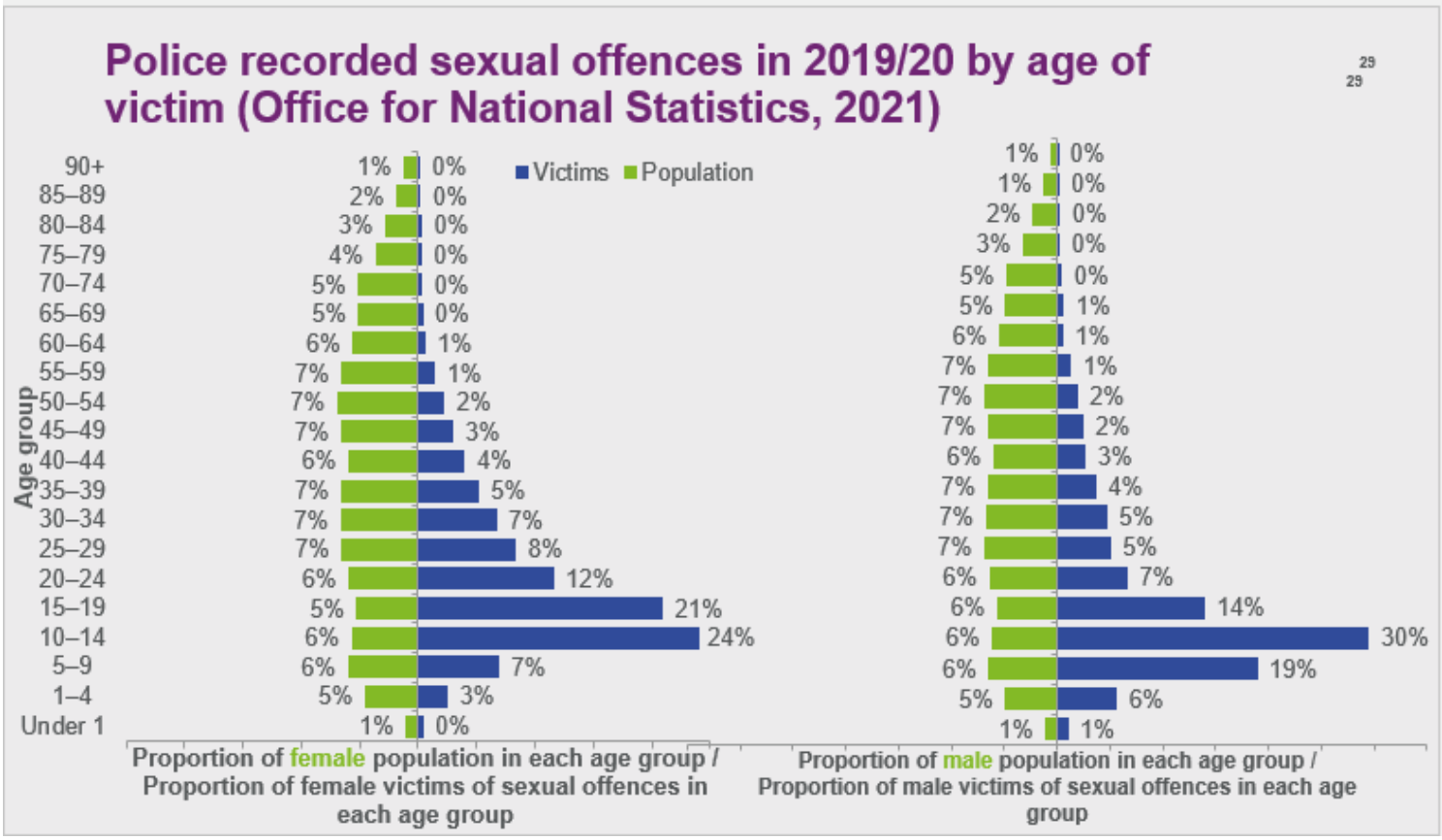
Submitted on behalf of the Criminal Bar Association

22 November 2021

… Annexes A and B attached

ANNEX A

The age and gender profiles of complainants in RASSO cases in the CJS[13]



[13] Used with the kind permission of the Centre of Expertise on Child Sexual Abuse.

ANNEX B

Actual Cases Illustrating the Causes of Endemic Delays

Example #1: multiple historic alleged offences with several complainants

The defendant is charged with 25 counts of serious sexual assaults on seven females, most being children at the time.

The investigation began in 2015. The defendant was interviewed for the first time in June 2015, then later in 2016 and 2017. The defendant first appeared in the Magistrates Court in the first week of November 2020.

Prosecuting counsel was instructed at an early stage, on 21 September 2020, and given access to the digital case on 11 November 2020. She first advised in writing, including advice on the drafting of the indictment, on 14 November 2020.

The Plea and Trial Preparation Hearing [PTPH] took place on 3 December 2020, when a trial date of 13 October 2021 was fixed for 15 days.

At a hearing on 25 June 2021 the court informed parties that a murder case took priority, so the October trial date could not be maintained. All parties urged the court to look for other courts that could accommodate the October trial date. The court indicated if this was not possible, the next available date was 23 June 2022.

There was a further hearing on 9 July 2021 because the Crown had informed the court that its witnesses were dismayed at losing the October trial date, particularly as some had really significant health issues. The court secured a slot for the trial at a ‘Nightingale Court’ on 4 October 2021. Both trial counsel rearranged their diaries to make themselves available for this new trial date, returning other briefs because they felt this trial took priority. Witnesses were informed, and arrangements made. No doubt the defendant too made suitable preparations.

A vast amount of work was undertaken in relation to trial preparation including the consideration of hundreds of items of third party material, conferences with CPS and officers, the editing of multiple ABE interviews, preparation of a lengthy prosecution opening note, order of witnesses, jury bundle, discussions between counsel to resolve legal issues etc.

At the Pre-Trial Review hearing [PTR] on 24 September 2021, the last hearing before the scheduled 4 October trial date, the court advised that there was no Judge available at the Nightingale court to sit for the length of the trial, so the fixture would be broken again. The trial was refixed for 24 October 2022 [a slightly earlier date was possible, but neither counsel was available].

As a result of this further delay, two complainants have suffered mental ill health and have totally withdrawn their co-operation for the case. One has asked for no further communication of any kind. Others are considering their position. One is so unwell that the prosecutor is considering a s.28 application to secure her evidence in case she dies before the October 2022 trial date. The anxiety it is causing them all cannot be put into words.

The defendant is in a wheelchair; his condition will no doubt deteriorate in that time. The stress a criminal case places on defendants and their families should not be under-estimated.

If the trial goes ahead in October 2022, it will be **seven years** from the start of the investigation and **two years** since the defendant's first court appearance.

Both counsel prepared the trial to the point of readiness once, and will have to do so again a year later, for no extra fee. They lost other briefs in order to do this trial.

No fee whatsoever has yet to be paid to either counsel despite a vast amount of work and hearings, and will not be paid for at least another year. This is why this work is such an unattractive proposition for so many at the Bar. Each time there is a hearing, counsel travel to court, pay to do so, all the while knowing there will be no payment for at least another year.

It would be wrong to assume that nothing happens in the gap between the case being adjourned and the new trial date – this week alone prosecuting counsel has received four emails regarding this case, each requiring a careful response. This is just one of many such examples in counsel's professional diary.

Example #2: Alleged recent sexual assaults of a teenaged stepdaughter

The defendant faces allegations of serious sexual abuse of his stepdaughter between February-August 2017 when she was 14.

She provided her two video interviews to police in November 2017 and May 2019. She was 15 at the date of her first interview.

The defendant was postal requisitioned on 29 May 2020, and had his first Magistrates court appearance on 8 February 2021.

Counsel was instructed to prosecute on 4 March 2021. She advised on 5 March 2021. At the PTPH on 8 March 2021, not guilty pleas were entered and a trial date fixed for 22 November 2021.

Two video interviews were edited by the parties on 5 June 2021, and prosecuting counsel prepared an opening note, witness order and jury bundle on 23 September 2021. There was a further case management hearing on 15 September 2021.

On 18 November 2021, the Thursday before the trial was set to begin on the following Monday, the parties were advised no court/judge was available to try the case, and instead the case would be listed for a ‘mention’ on 22 November to re-fix the trial. Enquiries reveal the court is looking at dates in June 2022, which will be after defence counsel, who has had conduct of the defendant’s case from the outset, will have retired. It will be **4.5 years** after the complainant first provided her account to police.