



**Law
Commission**
Reforming the law



Review of Evidence in Sexual Offences

A Background Paper

Who we are

The Law Commission is a statutory independent body. We aim to ensure that the law is fair, modern, and simple. We are experts in law reform and have conducted a number of reviews looking at evidence in criminal proceedings and sexual offences.

This paper

This document is intended to provide an introduction to the project and has three main purposes:

1. to outline the scope of this project
2. to provide an introduction to the main legal concepts and issues we are likely to address
3. to answer some frequently asked questions about the origins and timeline of this project

We will commence our project with research and by talking to stakeholders who work within or have experience of the criminal justice system in the context of sexual offences. We will formulate provisional proposals for reform following this initial phase. Our work is always informed and shaped through public consultation. We intend to publish a comprehensive consultation paper by the end of July 2022, asking all interested parties what they think about our provisional proposals before we consider and draft final recommendations to the government and Parliament.

Why are the Law Commission reviewing the use of evidence in prosecutions for sexual offences?

The Government published the findings of the “‘End to End’ Review of the Criminal Justice System’s Response to Rape” (“Rape Review”), on 18 June 2021. The review concluded that the prevalence of rape and sexual violence offences against adults¹ has remained steady in the last five years, but there has been a marked decrease in the number of prosecutions since 2016/2017.²

Research showed that there are many reasons for the decline in cases reaching court. It highlighted a common perception among participants in the review that jurors lacked knowledge of the behaviour of victims, the impact of rape trauma and forensic science.³ Many participants in the review proposed remedying this with more jury education on rape myths, consent, biases and rape trauma.

1 For the purposes of the Rape Review, adults are defined as individuals aged 16 and over.

2 Lord Chancellor and Ministry of Justice, *The end-to-end rape review report on findings and actions* (2021) CP 437, 3; Lord Chancellor and Ministry of Justice, *Rape Review Progress Update* (2021); Rachel George (Home Office) and Sophie Ferguson (Ministry of Justice), *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report* (2021).

3 Rachel George (Home Office) and Sophie Ferguson (Ministry of Justice), *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report* (2021), 62.

As part of the Rape Review, we were asked by the government to examine the law, guidance and practice relating to the use of evidence in prosecutions of sexual offences against adults. We were also asked to consider the need for reform in order to increase the understanding of consent and sexual harm and improve the treatment of victims, while ensuring that defendants receive a fair trial.

In the context of ensuring the right to a fair trial is safeguarded, the project will consider the current approach to addressing misconceptions and more generally how we support and protect the personal dignity and privacy of complainants during the trial process including:

- the use of the judge's directions to the jury and juror education generally
- the rules on admission of expert evidence to counter misconceptions
- the rules relating to the admission of evidence of the complainant's sexual history
- evidence of and judicial directions to the jury about the defendant's and complainant's character
- the rules relating to the disclosure and admissibility of the complainant's personal records including medical and counselling records
- the availability and use of special measures for complainants during the trial.

What is the process for investigating and prosecuting a sexual offence?

To illustrate the process, we provide a case study below focussing on an offence of rape as it proceeds through the criminal justice system from report to jury trial.⁴ We consider the issues that can arise during the process from the early investigatory stages to arrest and charge, and then management of a case through to trial. This includes applications to admit certain types of restricted evidence, such as bad character evidence and sexual behaviour evidence. In the case study, we will also consider applications to disclose confidential material concerning the complainant's physical and/or mental health. We then go on to consider the types of misconceptions that can arise during the trial process and how the current law works to address them.

Samira's allegation against Marco

Samira Kaur is a 25-year-old woman. She calls her sister one morning and tells her that she was raped by Marco, a work colleague, the night before at their office. She attends the police station with her sister that afternoon to report the rape.

4 Rape is defined in Sexual Offences Act 2003 s1 as the intentional penetration of the vagina, anus or mouth by a penis where the complainant does not consent and the defendant does not reasonably believe that the complainant consents.

Samira's interview

When Samira reports what happened to the police, specially trained police officers should interview her to understand what has happened and to gather evidence about the crime. They will interview Samira in accordance with national guidance on best practice for interviewing victims of a sexual crime by recording it on video.⁵

During the investigatory stage and throughout proceedings, she will be known as 'the complainant'. In the event of a conviction, Samira will be referred to as the victim. It is important to note that the use of this terminology is not intended to convey any opinion regarding the truth of the allegation, it simply means the allegation is untested at this stage in proceedings and has not been proven in court beyond reasonable doubt. Likewise, before charge Marco will be referred to as a 'suspect'. This reflects the presumption of innocence of the defendant in criminal cases. Once a prosecution has begun, Marco will be referred to as 'the defendant'. If he is convicted, the term 'offender' may be used.

Once a report has been made to the police by Samira, she may receive assistance, medical help and emotional support from a specialist centre or organisation where physical evidence of the crime can be gathered. Independent sexual violence advisors ('ISVAs') may also play a role in working with Samira. They provide adults who have experienced sexual violence with support, advice and help. They may be based in Sexual Assault Referral Centres ('SARCs') or other specialist sexual violence and abuse organisations.

In this case, as Samira told her sister about the rape first, it is likely that Samira's sister would be asked to provide a witness statement setting out the circumstances in which she was contacted, the relevant details of their conversation and how the report came to be made to the police. This is known as 'recent complaint evidence'.

Samira may be asked to provide her mobile telephone at this stage if relevant evidence might be obtained from it, such as text messages between her and the suspect.⁶

Marco's arrest and interview under caution

Samira's allegation is against her colleague, Marco, who is already known to her. As Samira can identify her alleged rapist, the police may invite Marco to attend the police station voluntarily for an interview under caution, or the police may have grounds to arrest and interview him and to search for and seize evidence such as electronic devices. The results of any physical examination may also play a part at this stage.

5 See Ministry of Justice, National Police Chiefs' Council, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*, (January 2022), **Achieving Best Evidence in Criminal Proceedings (publishing.service.gov.uk)**.

6 The extraction of information from electronic devices voluntarily provided by complainants is currently before Parliament. See Police, Crime, Sentencing and Courts Bill 2021, Part 2, Ch 3, cls 37 to 41.

Marco is considered to be innocent until proven guilty beyond reasonable doubt following a fair trial. At this early stage, all allegations of rape are subject to the requirement that the police pursue all reasonable lines of enquiry, whether these point towards or away from the suspect.⁷ Allegations are also assessed and considered under the Code for Crown Prosecutors, issued by the Director of Public Prosecutions. The Code sets out the general principles Crown Prosecutors should follow when they make decisions on cases. This means Marco will be charged where there is sufficient evidence to provide a realistic prospect of conviction and it is in the public interest to pursue the case. The police and Crown Prosecution Service ('CPS') will consider all of the evidence available in making this decision. The CPS have additional guidance aimed at tackling misconceptions that should be consulted as part of their charging decision. The case will be reviewed by experienced CPS lawyers working in specialist Rape and Serious Sexual Offences ('RASSO') units. These lawyers have been specially trained to deal with rape cases, the traumatic impact of the crime and the myths and misconceptions that may arise. The case will continue to be reviewed throughout its life as evidence begins to emerge from the investigative process undertaken by the police.

Marco denies the allegation of rape. He accepts that sex took place but tells police in an interview that he believed Samira consented.

Rape is a serious offence which can only be tried in the Crown Court where the defendant is an adult. Marco will have to attend the magistrates' court where the case will initially be managed. The court will make a decision on whether Marco will be remanded in custody or given bail. The case must then be sent to the Crown Court where Marco will enter a plea of not guilty. A trial date will be set and the prosecution and defence legal representatives will discuss the case with the judge to make key decisions about when and how the trial will take place.⁸

In order to convict someone of rape, the prosecution must prove that the complainant did not consent and that the defendant did not reasonably believe the complainant consented. Commonly the key issue in cases like this is consent. In many cases, the jury will only hear evidence from the complainant and the defendant and have to decide who they find credible. There may be no other evidence to assist them in their task.

There may be other issues depending on the facts of the individual case. For example, the defendant may argue that he was not the rapist and has been wrongly identified.

In this case, Marco says that although there was no direct conversation about consent, Samira did consent and he reasonably believed that she was consenting from their interaction that evening and her behaviour. Whether Samira did consent, whether this was Marco's belief and if so, whether his belief was reasonable, will be for the jury to decide, looking at all the circumstances of the case, including any steps Marco took to establish whether Samira consented to sexual contact.

7 Police and Criminal Evidence Act 1984, Code C Revised: Code of Practice for the detention, treatment and questioning of persons by Police Officers, Para 11B.

8 See Judiciary of England and Wales, *The Better Case Management (BCM) Handbook* (2018), **Better Case Management Handbook (judiciary.uk)**.

The evidence

Disclosure

Marco is entitled to information regarding Samira's allegation in order to prepare his case. This ensures that he is able to have a fair trial. There is a disclosure process which requires the prosecution to provide Marco and his legal representatives with (i) the evidence they will rely on at trial and (ii) any material that is capable of undermining the case for the prosecution or assisting Marco's case.

Marco also has an obligation to make disclosure of his defence in a defence statement once the prosecution case has been served on him. Marco is obliged to tell the court and the prosecution the nature of his defence, including any specific defence that he relies upon. He must also state any positive facts he relies upon and mention any facts he disputes — such as no reasonable belief in consent — and give reasons why. Finally, he must set out any points of law which will be part of his case.

Sexual behaviour evidence

One legal issue that may arise in this case is whether evidence can be admitted or questions asked regarding Samira's own sexual behaviour. The law prohibits Marco or his advocate from presenting evidence or asking Samira questions about her previous sexual behaviour without the permission of the trial judge. Marco may argue that he should be allowed to introduce evidence of Samira's previous sexual behaviour. He can only rely on a limited number of exceptions to the general rule that such evidence is prohibited and if his case does not fit one of these 'gateways', he will not be permitted to do so. The gateways are discussed in further detail below.

Marco wants to rely on WhatsApp messages sent by Samira which are sexual in nature. Marco's advocate must apply to the judge for leave to put these messages before the jury and to ask Samira questions about them. Marco's advocate may base their application on the gateway which permits sexual history evidence where it is not relied upon to prove Samira consented.⁹ In this case, Marco may wish to rely on the messages to show why he reasonably believed that she was consenting.

In addition, the judge must also be satisfied that not to admit the messages might make the jury reach an "unsafe" conclusion on any relevant issue in the case. The messages are not admissible if the judge decides that it is reasonable to assume that the main purpose of presenting the evidence is to cast doubt on Samira's credibility.

Confidential medical and counselling records

Another legal issue that may arise is if Marco applies for disclosure of information held by a third party such as a counsellor or a psychotherapist which is not in the hands of the prosecution. Marco discovers that Samira is receiving counselling through an employee scheme at their workplace.

Marco believes that there might be important material which will support his case, contained in Samira's counselling records. He has heard rumours from colleagues that Samira has some misgivings about making the allegation and is reluctant to go to court. He believes that she may have discussed this with her counsellor.

9 Youth Justice and Criminal Evidence Act 1999, s 41(3)(a).

If the prosecution have not seen these records, a prosecutor or Marco's representatives may apply to the court for a witness summons to require the counsellor to produce their records. A judge will only order the counsellor to produce evidence if they are satisfied that it is material to the case, and it is in the interests of justice to do so.

Special measures

Samira will be the main witness in the case. She will need to give her evidence so it can be considered by the jury. In a criminal trial, the complainant will be asked questions first by the prosecutor ('examination in chief') and then by the representative for the defendant ('cross-examination'). The complainant may be asked questions by the prosecutor to clarify any matters that arose in cross-examination ('re-examination').

During the trial, a number of measures exist to provide support to witnesses like Samira when they give their evidence. These include giving evidence through a live link from another location outside of the courtroom, or from behind a screen.¹⁰ These measures are intended to improve the quality of the witness' evidence by reducing any fear or distress. The law also prevents a defendant in a sexual offence trial from personally questioning the complainant directly in court.

In this case, Samira's video-recorded interview with the police will be played to the jury and this will stand in place of a live examination in chief although she may be asked some supplementary questions by the prosecutor to clarify or address anything that was not covered in the interview. Marco's advocate will then have the opportunity to ask questions of Samira, in cross-examination. There are a number of purposes to cross-examination but in our adversarial system it is key to a fair trial to test the complainant's evidence, bring out evidence in support of the defendant's case and if there are grounds to do so, undermine the complainant's credibility. It is most likely that Samira will sit outside the courtroom away from the defendant and be cross-examined over a live link by his advocate.

Judicial directions

At the end of the trial, before the jury retire to consider their verdict, the trial judge will give directions to the jury based on the judge's experience of hearing cases involving sexual offences and their specialist training. These directions are designed to counter commonly held misconceptions which could distract the jury from their task of considering the evidence in the case and determining the facts. The specific directions will be tailored to the issues raised in this case.

10 Other available special measures include the complainant's evidence being given in private, removal of wigs and gowns and the pre-recording of the complainant's evidence. For more details, please see below at page 20.

For example, one of the issues is that Samira delayed reporting until the following day. The trial judge might give a direction about this in the following terms:

“Members of the jury, you will recall that Ms Kaur called her sister the following day and told her that she had been raped by one of her work colleagues. She went to the police station at 2pm the same afternoon and reported that the defendant had raped her. It is the experience of these courts that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed, confused or even guilty, and may not speak out until some time has passed. There is no typical reaction. Every case is different. You should consider the length of, and the reasons for, Ms Kaur’s delay in making the complaint and ask whether or not the delay makes her evidence more difficult to believe.

You should not assume that because Ms Kaur’s complaint was late that it must inevitably be false, just as, had she made an immediate complaint, that would not mean it must be truthful. You should consider the reasons that Ms Kaur gave for the delay. You will remember that during her evidence she said that she was shocked and confused. She worried about what her family would think if they were to find out and also that she blamed herself for the rape. You must weigh up all of these matters when deciding whether you are sure that Ms Kaur has given truthful and reliable evidence...”

The jury are highly likely to be given written directions on how they should approach the case that they can take with them into the jury room.¹¹ These directions will help them with how to approach the charge that Marco faces and what they need to be satisfied of before they may convict him. If the jury are not satisfied that the prosecution have proved each part of the offence so that they are sure, they must acquit Marco.

In the remainder of this paper, we will look at the impact of sexual offences on victims before turning to consider some of the issues highlighted in the case study in more detail, including:

1. what misconceptions are and how the law currently tackles them
2. how evidence is currently used in sexual offence trials
3. how witnesses are supported to give their evidence

We will then move on to discuss how we might do things differently and some of the options for reform.

11 *BQC* [2021] EWCA Crim 1944, paras 69 to 75.

The impact of sexual offences on victims

Rape is a grave attack on an individual's bodily integrity, autonomy and personal dignity. Sexual violence can have a profound impact on a victim's physical and mental health, their ability to engage with the outside world and their general wellbeing.

However, how this distress and harm manifests itself in the individual is incredibly varied. It may be invisible to an outside observer but remain ever present beneath the surface. There is no standard or typical response to experiencing sexual harm.

Nor is the potential for further harm necessarily limited to the rape or sexual assault itself. There is increasing recognition of the emotional and psychological effects of sexual offences on the victim and how they can be worsened or manifest during the trial process.¹² The process of investigating an offence requires individuals who have experienced profound trauma to co-operate and engage in a process which necessarily intrudes into their privacy and personal dignity. This may have tangible consequences for their physical and mental health. Questioning to build a case risks re-traumatising the victim who must relate and relive a distressing and harmful event in their life.

The trauma of rape may affect the way in which a victim gives evidence. The impact of a traumatic event such as rape can cause feelings of anxiety, guilt and shame.¹³ Individual complainants may present as calm or controlled or they may be visibly upset and emotional. Either can represent an individual's authentic response to trauma, as can many other behaviours.

The victim's ability to recall details of the traumatic event may be fragmented and may change over time. Victims may find it difficult to give a coherent, chronological narrative account and feelings, sensations and emotions may be more prominent. Victims may, as part of their psychological response to trauma, avoid talking about the incident and may forget important parts of what happened. They may also experience symptoms of Post-Traumatic Stress Disorder ('PTSD').¹⁴

12 See Rook & Ward, *Sexual Offences Law & Practice* (6th ed 2021) pp 1337-1338.

13 *R v D* [2008] EWCA Crim 2557.

14 See for example AW Burgess and LL Holmstrom, "Rape Trauma Syndrome" [1974] *American Journal of Psychiatry* 131, 981–986; American Psychiatric Association, *Diagnostic and statistical manual of mental disorders: Fourth edition—text revision* (2000).

Misconceptions

What are misconceptions?

Concern has long been expressed about the existence of misconceptions about sexual harm and its effects and it is these concerns which led to the development of judicial directions to counter them.¹⁵ However, research demonstrates that these misconceptions persist among the general public.¹⁶

Misconceptions are, in simple terms, beliefs which, although genuinely and sincerely held, are accepted to be factually incorrect. They may be present in well-intentioned and fair-minded people. In the context of sexual offences, such beliefs may amount to assumptions or individual perceptions of how a “real” rape victim would behave based on a person’s own history and experience or a stereotype.

The danger inherent in such misconceptions is that they may be inadvertently deployed in evaluating the reliability of the complainant’s or defendant’s account. As a result, a false but sincere belief can contaminate the decision-making process and inadvertently lead a jury into error despite their best intentions. Open minds may become closed ones.

Academics have researched the extent to which people who serve on juries may hold misconceptions. Some studies involved mock trials with members of the public eligible to complete jury service acting as jurors.¹⁷ One study asked questions of real jurors who had undertaken jury service in England to establish whether misconceptions were widely held.¹⁸ There is no consensus on how pervasive these misconceptions are, but the research confirms that they exist in the community. All of these studies found evidence of jurors or mock jurors expressing false beliefs about rape and rape victims.

15 R v D [2008] EWCA Crim 2557. See also R v Miller [2010] EWCA Crim 1578.

16 L Ellison and V Munro, “A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 13 *New Criminal Law Review* 781; L Ellison and V Munro, “Better the Devil You Know: Real Rape Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations (2013) 17(4) *International Journal of Evidence and Proof* 299; Cheryl Thomas, “The 21st Century Jury: Contempt, Bias and the Impact of Jury Service” [2020] *Criminal Law Review* 987; J Chalmers, F Leverick and V Munro, “Why the jury is, and should still be, out on rape deliberation” [2021] *Criminal Law Review* 753, 757; Cheryl Thomas, “A response to ‘Jury is Still Out’” [2021] *Criminal Law Review* 772.

17 Three studies in England and Wales funded by the Economic and Social Research Council are reported in, (1) E Finch and V Munro, “Breaking Boundaries? Sexual Consent in the Jury Room” (2006) 26 *Legal Studies* 303; (2) L Ellison and V Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *British Journal of Criminology* 202; L Ellison and V Munro, “Getting to (Not) Guilty: Examining Jurors’ Deliberative Processes In, and Beyond, the Context of a Mock Rape Trial” (2010) 30 *Legal Studies* 74; L Ellison and V Munro, “A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 13 *New Criminal Law Review* 781; L Ellison and V Munro, “Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation” (2009) 18 *Social and Legal Studies* 291; (3) L Ellison and V Munro, “Better the Devil You Know: Real Rape Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations (2013) 17(4) *International Journal of Evidence and Proof* 299.

18 Cheryl Thomas, “The 21st century jury: contempt, bias and the impact of jury service” [2020] *Criminal Law Review* 987.

A significant number of misconceptions have been identified.¹⁹ In this paper we set out some examples of commonly held misconceptions which are accepted to be untrue but which some may nevertheless believe. We will consider in our review whether reform can help reduce the proportion of jurors who are unclear about misconceptions and correct those who hold false beliefs.

A real rape victim would show distress and emotion

The Evidence: When giving her evidence, Samira appears calm and collected and describes the offence without visible emotion.

The Misconception: A real rape victim would cry or be distressed when describing what happened to them.

The Error: Lack of emotion is a reliable indicator that Samira is not telling the truth.

There is no single reaction to a traumatic event. Victims of rape may react in many different ways depending on a number of factors such as their individual experiences and personal history, their domestic circumstances, their cultural beliefs, their ability to access support, the type of trauma that they have suffered and whether they perceived a threat to life.²⁰ It can be difficult to disclose or report a sexual crime because of feelings of guilt or shame or fear of being stigmatised as a result. A person suffering from life-changing trauma may be highly emotional or they may experience shock and appear calm or emotionally numb.

The available evidence suggests that there is no clear collective view held by jurors in England and Wales on whether a rape victim will display visible emotion when giving evidence. For example, research by Professor Cheryl Thomas QC, Professor of Judicial Studies at University College London and Director of the UCL Jury Project found that 43% of jurors said they would expect a complainant to be very emotional when giving evidence about a rape, while 22% said they would not expect this and 35% were uncertain.²¹

Scottish jury research indicated that mock jurors in their sample of three juries expected more visible emotion and, in particular, a reaction to the defendant's presence. Only one juror attributed the complainant's calm demeanour and flat delivery to the trauma of rape. Professors Louise Ellison and Vanessa Munro concluded that mock jurors appeared to have little understanding of the psychological effects and external pressures that could influence a rape complainant's demeanour in court.²²

19 See Crown Prosecution Service, *Legal Guidance, Rape and Sexual Offences, Chapter 4: Tackling Rape Myths and Stereotypes* (2021), **Rape and Sexual Offences - Chapter 4: Tackling Rape Myths and Stereotypes | The Crown Prosecution Service (cps.gov.uk)**

20 See for example DG Kilpatrick, BE Saunders, A Amick-McMullan, CL Best, LJ Veronen and HS Resnick, "Victim and crime factors associated with the development of crime-related posttraumatic stress disorder" (1989) 20 *Behavior Therapy* 199.

21 Cheryl Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] *Criminal Law Review* 987.

22 L Ellison and V Munro, "Reacting to Rape, Exploring Mock Jurors' Assessments of Complainant Credibility", (2009) 49 *British Journal of Criminology* 202, 212.

A real victim would have tried to fight and would have visible injuries as a result

The Evidence: When giving her evidence, Samira described that she “just froze” and didn’t remember crying out. In cross-examination, she said she was scared but accepted that she did not cry out and that she did not fight back. She could not explain why she did not fight back.

The Misconception: A real rape victim would scream and fight to get free.

The Error: Her failure to offer resistance and inability to provide an explanation are reliable indicators that Samira was not raped.

It is an accepted fact that due to the nature of an exceptional trauma such as rape, brain survival responses are triggered, and these are instinctive and primitive. A person may fight or flee but other survival responses may emerge instead and they may “flop, freeze or befriend”.²³ A person’s response is not something they can control. In fact, there is no typical response to rape and an individual’s response will be affected by the trauma of the event, their perception of threat and their personal history. If a person does not behave in the way that we expect them to, or they behave in a way that seems illogical or counter-intuitive, this is not reliable evidence of falsity or consent.

In academic research studies, some acquittal verdicts have been based, in part, on the false belief that an absence of injury and/or resistance is evidence of consent. Some believed that a genuine complainant would have offered physical resistance to an attack despite experts agreeing that many will freeze in this situation.²⁴

In Scottish mock jury research, the view was expressed during deliberations that a complainer’s failure physically to resist an attack might be indicative of her consent in the overwhelming majority of their sample; 28 of the 32 juries who participated.²⁵ Of 771 jurors surveyed by the UCL jury project, 3% agreed that “a rape probably didn’t happen if the victim doesn’t have bruises or marks.” An additional 10% were “not sure” about this.²⁶

A real victim would report the rape to the police immediately

The Evidence: When giving her evidence, Samira tells the court that she was raped around 10pm. She called her sister the following morning to tell her what had happened. After speaking to her sister, they went to the police station together to report the rape in the afternoon.

The Misconception: A real rape victim would contact the police immediately to report the crime.

The Error: The delay in reporting is a reliable indicator that Samira was not raped.

23 Crown Prosecution Service, *Legal Guidance on Sexual offences Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes* (2021); See also P Levine with A Frederick, *Waking the tiger: healing trauma* (1997).

24 J Chalmers, F Leverick and V Munro, “Why the jury is, and should still be, out on rape deliberation” [2021] *Criminal Law Review* 753, 757.

25 J Chalmers, F Leverick and V Munro, “The Provenance of What Is Proven: Exploring (Mock) Jury Deliberation In Scottish Rape Trials” [2019] *Scottish Jury Research Working Paper* 2 8-11.

26 Cheryl Thomas, “The 21st century jury: contempt, bias and the impact of jury service” [2020] *Criminal Law Review* 987.

Many victims of rape do not immediately report what happened to the police or may turn to someone else such as a friend, relative or doctor. They may experience feelings of fear, shame and guilt which create obstacles to reporting. The process of reporting rape and the investigation of a complaint can be intrusive and traumatic. This can deter victims from seeking help and they may require support and encouragement to report.

In Scottish mock jury research, jurors received a direction from the trial judge that there might be good reasons why a person might delay reporting and that this does not necessarily indicate a false complaint. However, in 13 out of 32 juries there was a concern about a short delay of 40 minutes before reporting. One juror relied on the delay and the fact that the complainant called a relative before reporting the matter to the police as a factor that led him to favour a not guilty verdict.²⁷ Of 771 jurors surveyed by the UCL jury project, 7% agreed that “it is difficult to believe rape allegations that were not reported immediately.” An additional 20% were “not sure” about this.²⁸

Tackling misconceptions

In the case study, the potential impact of misconceptions both separately and cumulatively could be very significant. A juror or jurors may believe that they have three reliable indicators that Samira was not raped when considering her evidence and place weight upon them in reaching their verdict. They may rely on these indicators during deliberations and put them before their fellow jurors as reasons in favour of a not guilty verdict.

The primary tool deployed to tackle misconceptions in the courts in England and Wales is judicial direction to the jury. Judges who hear these cases receive specialist training based on extensive experience of trying difficult and sensitive cases. The Court of Appeal accepted in *R v D* that a trial judge may give directions to the jury to counter the risk of misconceptions held by jurors about sexual behaviour and reactions to non-consensual sexual conduct.²⁹

Judges are assisted by the Crown Court Compendium, which is guidance produced by the Judicial College. It is written by senior members of the judiciary and academics. In relation to sexual offences, it draws upon expert guidance on the impact of trauma and collective judicial experience in trying cases involving sexual offences.

Directions may be given at the outset of the case or later as part of summing up the case to the jury. For example, the judge may direct the jury about Samira’s apparent lack of emotion or distress when giving evidence, her delay in making a complaint and the difference between submitting to and actively consenting to a sexual act. The judge will balance the direction to ensure that the defendant’s case is put before the jury but that the misconception is explored as well.

27 J Chalmers, F Leverick and V Munro, “Why the jury is, and should still be, out on rape deliberation” [2021] *Criminal Law Review* 753, 758.

28 Cheryl Thomas, “The 21st century jury: contempt, bias and the impact of jury service” [2020] *Criminal Law Review* 987.

29 *R v D* [2008] EWCA Crim 2557. See also *R v Miller* [2010] EWCA Crim 1578.

How is evidence currently used in sexual offence trials?

We will now move away from the case study and the issue of misconceptions to provide a brief overview of the current law within the scope of our project. We begin by examining the law on evidence in sexual offence trials.

Sexual history evidence

Section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the admission of evidence of the sexual behaviour of the complainant in trials of sexual offences unless a judge rules that the evidence fits within one of the limited number of exceptions.

The intention behind these provisions was to counter two fundamental misconceptions known as the “twin myths.” The concept of the “twin myths” originates from the Supreme Court of Canada’s decision in *R v Seaboyer* in which these were described as “the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief”.³⁰ The restrictions therefore aim to prevent a woman’s sexual experience and history from being used either as evidence of her consent on the occasion in question (because having consented to sex in the past does not mean she consented on this occasion) or as a tool to attack her credibility as a witness (because being sexually experienced does not make her dishonest).

The objective of this provision is to exclude irrelevant and highly prejudicial evidence while ensuring that the defendant has a fair trial.³¹ It permits only relevant and probative evidence which fits within a limited number of gateways. These gateways are outlined below.

Gateway 1: Similarity

This exception permits evidence that relates to whether the complainant consented to sex with the defendant where the sexual behaviour is “in any respect, so similar” to (i) any sexual behaviour of the complainant that took place as part of the event that is the subject matter of the charge or (ii) any other sexual behaviour of the complainant that took place at or about the same time as that event and the “similarity cannot reasonably be explained as a coincidence”.³² The judge must pay due regard to the importance of protecting the complainant from humiliation and indignity, but the test for whether the evidence ought to be admitted is whether it is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.³³

Gateway 2: Not an issue of consent

Section 41(3)(a) permits sexual history evidence where it will not be used to prove whether the complainant consented to sex with the defendant. Evidence may be permitted under this exception in relation to whether the defendant had a reasonable belief in consent, for example.³⁴

30 *R v Seaboyer* [1991] 2 SCR 577, 630 (SCC).

31 *R v A (No 2)* [2001] UKHL 25, paras 27, 38 See also Lord Hope’s speech at para 76.

32 Youth Justice and Criminal Evidence Act 1999, s 41(3)(c).

33 *R v A (No 2)* [2001] UKHL 25, para 46, per Lord Steyn.

34 Youth Justice and Criminal Evidence Act 1999, s 42(1)(b): ““issue of consent” means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);”

Gateway 3: Sexual activity “at or about the same time” as the alleged rape

Section 41(3)(b) permits evidence of sexual behaviour taking place “at or about the same time” as the alleged offence which is interpreted narrowly, and does not extend to “days, weeks or months”.³⁵

Gateway 4: Rebuttal evidence

Section 41(5) permits the admission of sexual history evidence where it is necessary to rebut evidence presented by the prosecution. This might be evidence which challenges or undermines part of the prosecution case.

The judge may not admit the evidence if it does not come within one of these gateways.

Additional requirements

In addition to coming within one of the four gateways, the court must also be satisfied that not to admit the evidence might make the jury reach an “unsafe” conclusion on any relevant issue in the case.³⁶

The evidence cannot be general evidence of the complainant’s sexual preferences; it “must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant”.³⁷ Where gateways 1 to 3 are in issue, the evidence is not admissible if the judge decides that it is reasonable to assume that the main purpose of presenting the evidence is to cast doubt on the complainant’s credibility (whether they should be believed).³⁸

Issues

Sexual history evidence can be highly prejudicial and may distort the outcome of a trial. The possibility that it will be admitted at a future trial can also act as a significant deterrent to the complainant against reporting a sexual offence or supporting a prosecution.

The history of the current provision dates back to 1975, when the government set up an Advisory Group on the Law of Rape which recommended some restrictions on the admission of a complainant’s sexual history. These were enacted in section 2 of the Sexual Offences (Amendment) Act 1976.

In June 1998, the Home Office published the report of the working group: “Speaking up for Justice”. It found that section 2 was not working effectively to regulate the use of sexual history evidence in the courts and was being interpreted contrary to its original objectives. The report recommended a new structure for regulating this type of evidence which led to new provisions in the Youth Justice and Criminal Evidence Act 1999 that are still in force today.³⁹

However, the current law remains controversial. There are concerns about whether the current provision consistently achieves its objective of tackling the twin myths. These concerns focus in particular on the application of the similarity exception and the admission of evidence of the complainant’s previous sexual history with individuals other than the defendant (‘third party evidence’).

35 *R v A* [2001] UKHL 25, para 40.

36 Youth Justice and Criminal Evidence Act 1999, s 41(2)(b).

37 Youth Justice and Criminal Evidence Act 1999, s 41(6).

38 Youth Justice and Criminal Evidence Act 1999, s 41(4): “no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.”

39 Youth Justice and Criminal Evidence Act 1999, ss 41-43.

The courts have held that sexual behaviour evidence may be relevant evidence which a jury must hear in order to ensure a fair trial for the defendant.⁴⁰ We will consider the process for applications to admit sexual behaviour evidence and the extent to which the complainant should be involved. We will also consider how the law is being applied, whether it works to counter misconceptions and whether reform is needed to make the law more effective, clear and simple.

Expert evidence

In England and Wales, expert evidence is not generally used to counter misconceptions like those in the case study. The courts have decided that expert evidence is only admissible if it is “necessary”. It must provide helpful information which is likely to be outside a judge or jury’s knowledge and experience.⁴¹ It is not generally accepted that these matters are outside the common understanding of the jury. The courts have concluded that where the jury need assistance, the remedy is appropriate judicial direction which provides a more balanced approach to both the prosecution and defence cases.⁴²

Issues

Many jurors may not have experience or understanding of the psychological and physiological impact of a sexual offence upon a victim. Misconceptions surrounding rape and other sexual offences may therefore lead jurors to misinterpret a victim’s behaviour or cause them to doubt their credibility as a witness.

General expert evidence could explain to jurors and judges, for example, that the three features of Samira’s evidence are common and should not necessarily lead to the conclusion that her account cannot be relied upon. As yet, there has been no empirical research in England and Wales with real jurors to establish whether expert evidence, coupled with judicial directions, would assist jurors who are unsure about misconceptions or hold a sincere but false belief. We will consider whether expert evidence should be permitted to help juries better understand and evaluate the evidence in these types of cases.

Medical and counselling records

There is a clear public interest in encouraging those who have suffered trauma to access appropriate therapeutic care and support to protect their mental health. The confidentiality of the process is an important part of the effectiveness of therapeutic intervention.

As part of the trial process, the defence may seek disclosure of material created and kept by third parties which relates to the complainant. This may be material retained by an individual, organisation, or government department such as social services records, counselling notes or mental health treatment records. There is a tension here between the need for confidentiality within therapeutic care, and the need to provide the defendant with relevant evidence in the interests of justice.

40 *R v A* [2001] UKHL 25.

41 *R v Turner* [1975] QB 834.

42 *R v ER* [2010] EWCA Crim 2522.

There are rules in place to manage applications for the disclosure of evidence held by third parties where the complainant does not consent. Investigators and prosecutors must consider Articles 6 and 8 of the European Convention of Human Rights. Article 6 protects the defendant's right to a fair trial. Article 8 protects the right to private and family life. Investigators must also consider whether disclosure is necessary and proportionate to guard against any "unjust intrusion of privacy".⁴³ A judge can issue a witness summons to compel a third party to produce relevant evidence if it is considered to be material to the case. If disclosure is resisted, the court will consider whether the evidence attracts public interest immunity, in which case it will not be disclosed.

If evidence is considered to be material to the case, third party disclosure can be resisted on the grounds of public interest immunity where a confidential relationship exists and disclosure would be in breach of an ethical or social value involving the public interest.⁴⁴ A court must balance the public interest against the interests of justice in ensuring a fair trial.

Issues

The risk of disclosure of confidential therapeutic records may deter complainants from receiving necessary support which has an impact on their mental health and overall recovery.⁴⁵ The value of such records is also questionable when the discussion is for therapeutic purposes rather than to establish an accurate and precise narrative. Trauma and in particular, PTSD necessarily have an impact on the ability of complainants to recall a chronological sequence of events with precision. Although there are rules in place to ensure that only relevant and material evidence is disclosed and put before the court, we will consider whether there is a case for stronger protection of such records in the public interest. We will consider whether the therapeutic relationship should be protected in the same way as the lawyer-client relationship currently is – allowing for confidential material to attract privilege. We will also consider whether the admission of such records coupled with expert evidence would better assist a jury than the raw information contained within.

43 Attorney General's Office, *Attorney General's Guidelines on Disclosure: For investigators, prosecutors and defence practitioners* (2020), paras 11 to 13 and 42.

44 *D v NSPCC* [1977] 1 All ER 589, at 618 per Lord Justice Edmund-Davies.

45 See J Temkin, "Digging the Dirt: Disclosure of Records in Sexual Assault Cases" (2002) 61 *Cambridge Law Journal* 126 at 131-132.

Character evidence

The law regulates what a jury will hear about a defendant's character, as well as how and when it may be disclosed to them.

A defendant in a criminal trial for a sexual offence may have no previous convictions for any other crime. This is evidence of their good character.

A defendant may have previously been convicted of another offence or offences. If so, a prosecutor may wish to rely on a conviction or convictions as evidence of the defendant's bad character, depending on whether it is relevant to the particular circumstances of the case.

In some cases, a defendant may have behaved in a way which is reprehensible but falls short of a criminal conviction; in simple terms, behaviour which is blameworthy and would attract strong criticism from most people. The prosecution may also wish to rely on evidence of this behaviour as bad character evidence.

There are rules about whether evidence relating to the defendant's "bad character" is admissible at trial. And defendants without previous convictions are entitled to a direction from the judge to the jury as to their "good character".

Bad Character

Evidence of a defendant's bad character must fall within one of seven gateways to be admitted:⁴⁶

1. all parties to the proceedings agree on the evidence being admissible
2. the evidence is introduced by the defence or is given in answer to a question asked by the defence in cross examination and intended to elicit it
3. it is important explanatory evidence
4. it is relevant to an important matter in issue between the defendant and the prosecution
5. it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant
6. it is evidence to correct a false impression given by the defendant
7. the defendant has made an attack on another person's character

The judge also has a discretion to exclude evidence of bad character on grounds of fairness.⁴⁷

If the defendant has a previous conviction for rape or sexual assault and is now charged with a similar offence, the prosecution may apply to admit evidence of that conviction and to ask the defendant questions about it in cross-examination.⁴⁸ The prosecution will argue that it is relevant to an important matter in issue: whether the defendant has a propensity for sexual offending.⁴⁹ The defence may argue that the evidence should not be admitted.

46 Criminal Justice Act 2003, s 101(a)-(g).

47 Criminal Justice Act 2003, s 101(3): applies to gateways 4 and 7 listed above (s 101(d) and s 101(g) of the Criminal Justice Act 2003).

48 Criminal Justice Act 2003, ss 98 and 101: Bad character of non-defendants (including complainants and other witnesses) is considered under section 100 of the Criminal Justice Act 2003.

49 Criminal Justice Act 2003, s 101(d).

The judge will not admit the evidence if it appears to them that the admission of the evidence would have such an adverse effect on the fairness of proceedings that it should not be admitted.

Good Character

In the case study, if, in contrast, Marco had never been convicted of a criminal offence, he would be entitled to a good character direction. This means that after the defendant has given evidence at the conclusion of the case,⁵⁰ the judge will draw the jury's attention to the fact that he has no previous convictions and tell the jury this can be taken into account in two ways. First, it is a positive feature when assessing the credibility of the defendant's account (whether it should be believed). Secondly, it may make it less likely that the defendant acted as the complainant said. However, the weight to be placed on good character is a matter for the jury and it will depend on the context of the case. If they have an old or irrelevant conviction, a defendant may only be entitled to a modified good character direction. In some circumstances a judge may decline to give this direction, such as where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give a direction.⁵¹

Issues

Stakeholders have told us that they are concerned that good character directions can have a disproportionate effect, tilting the scales in favour of the defendant, when nothing at all is said about the complainant's character. This is particularly acute where the case is finely balanced and the jury are asked to decide whether they accept the complainant's evidence or the defendant's evidence.

We will consider to what extent the law on character works effectively in trials of sexual offences.

50 Or if the defendant does not give evidence but has made a pre-trial statement.

51 *R v Hunter and others* [2015] EWCA Crim 631.

How are witnesses supported to give their evidence in sexual offences cases?

In addition to the law and rules on disclosing and admitting evidence, the law allows the provision of practical assistance to support witnesses with giving their evidence.

Special measures

Special measures were introduced in the Youth Justice and Criminal Evidence Act 1999 ('YJCEA 1999') to help alleviate some of the fear and distress that "intimidated" witnesses may feel when giving evidence and to provide adjustments to assist "vulnerable" witnesses.⁵² These adaptations to ordinary trial proceedings are intended to maximise the quality of the witness' evidence, for example by providing a screen to shield the complainant from the defendant.

Vulnerable witnesses may be eligible by reason of their age or characteristics and include children or those for whom the quality of their evidence is likely to be diminished due to a mental disorder, a significant impairment of intelligence and social functioning or a physical disability or physical disorder.⁵³

Intimidated witnesses are those suffering from fear or distress in relation to giving evidence in the case.⁵⁴ Complainants in sexual offences cases are automatically eligible as they are classified as "intimidated" witnesses.⁵⁵

The following measures are available for complainants in sexual offences cases (intimidated witnesses):⁵⁶

1. Screens: giving evidence behind a screen to shield the witness from the defendant
2. Live link: giving evidence remotely via live link to allow the witness to give evidence from outside the courtroom, either from another room within the court building or another suitable location
3. Evidence given in private: excluding members of the public and journalists (save for a single representative) from the public gallery
4. Removal of wigs and gowns
5. Pre-trial video-recorded evidence in chief
6. Pre-trial video-recorded cross-examination or re-examination (currently a pilot in seven Crown Courts)

A package of special measures can be put together to assist a witness. Evidence of complainants in sexual offences cases is normally given by way of pre-trial video-recorded evidence in chief and any cross-examination is usually via a live link. Pre-trial video-recorded cross-examination is also being piloted in some courts and it is anticipated that it will be rolled out nationwide.⁵⁷

52 Youth Justice Criminal Evidence Act 1999, ss 16-33.

53 Youth Justice Criminal Evidence Act 1999, s 16.

54 Youth Justice Criminal Evidence Act 1999, s 17.

55 Youth Justice Criminal Evidence Act 1999, s 17(4).

56 Youth Justice Criminal Evidence Act 1999, ss 23-30. See also the Criminal Procedure Rules, rule 18.8 -18.13.

57 Lord Chancellor and Ministry of Justice, *The end-to-end rape review report on findings and actions* (2021) CP 437, para 110.

Issues

Legal provision for special measures applies to both prosecution and defence witnesses. It divides witnesses eligible for special measures into two categories: vulnerable and intimidated. Arguably these terms are unhelpful, as complainants of sexual offences may not be in fear or distress or consider themselves to be intimidated. The measures are commonplace and reflect the nature and particular sensitivities of the case.

There has been a significant evolution in the way that witnesses may be treated in court including the use of Ground Rules Hearings, which are pre-trial case management hearings at which directions may be given to facilitate the effective participation of any person, including witnesses, in the proceedings.⁵⁸ Treating people fairly requires awareness and understanding of their different circumstances. Judges have considerable experience in adapting the trial process to accommodate the witness and are guided by the Equal Treatment Benchbook, which provides guidance on tailoring proceedings to ensure effective participation.⁵⁹ There is good reason to consider whether to require reasonable adjustments tailored to the witness to ensure equal treatment.

We will examine how special measures are working, whether any additional measures are needed and whether reform could improve their effectiveness for witnesses while ensuring a fair trial for the defendant.

How could we do things differently?

There are a number of ideas for reform that we will consider as part of the project. We outline a few of the main proposals below but we anticipate that in speaking to stakeholders, other ideas and proposals will emerge.

Putting expert evidence before the jury to help them

At present in England and Wales, expert evidence is not used to counter common misconceptions about victims of sexual offences. As we note above, it is generally considered to be unnecessary as these are matters within the common understanding of the jury.⁶⁰

Many jurors may not have experience or understanding of the psychological impact of a sexual offence upon a victim. Misconceptions surrounding rape and other sexual offences may lead jurors to evaluate the truthfulness of an allegation based on false beliefs, causing them to doubt the complainant's credibility as a witness. Sexual violence may arise in the context of an abusive relationship and the impact on the complainant may be complex and difficult for a jury to understand without knowledge or experience of the effects of long-term abuse.

58 See Criminal Procedure Rules Part 3 and Criminal Practice Direction I General Matters 3D.

59 Judicial College, *Equal Treatment Bench Book* (February 2021), <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>.

60 *R v Turner* [1975] QB 834.

There may be good reason to allow expert evidence to correct misconceptions. The review will consider whether the use of expert evidence of this nature should be permitted and any alternative means of improving juror education.

In other jurisdictions, including New South Wales in Australia, expert evidence is used to provide jurors with important background information which may include an explanation of common responses to trauma. This enables the jury to assess the credibility of the complainant, armed with the understanding that trauma can manifest in a multitude of ways. The expert does not give an opinion on the behaviour or credibility of the particular complainant, but rather a general explanation of the types of behaviours which are common in people who have suffered trauma. It is then left to the jury to apply the evidence, equipped with this knowledge. The Office of the Director of Public Prosecutions has commented that “[e]xpert evidence has been used in NSW in relation to the behavioural responses of adults who experience sexual assault”.⁶¹

There are examples in the USA of rape cases in which expert evidence on rape trauma was successfully adduced.⁶² Some US states have also enacted laws to permit expert evidence in relation to domestic abuse. For example, California⁶³ and Oklahoma⁶⁴ permit expert evidence in relation to the effects of domestic abuse on the beliefs, behaviour and perception of the victim.

Reforming the rules on admitting evidence of sexual behaviour

We will consider the need for reform of the provisions restricting the use of evidence of complainants’ prior sexual history in section 41 of the Youth Justice and Criminal Evidence Act 1999 by examining how these decisions are currently made. We will consider whether the limited exceptions are working effectively. In particular, we will ask whether the thresholds for admitting this type of evidence are correctly calibrated bearing in mind the risk of prejudice to the complainant and the need to ensure a fair trial for the defendant.

61 New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (2020) Report 148, para 8.148.

62 *State v Brodniak* (1986) 221 Mont 212, 718 P2d 322; *State v Kinney* (13 October 2000) No. 99-122 (Vermont). Expert evidence of Dr Barbara Ziv, a forensic psychologist, was also presented in the trial of Bill Cosby on historical sexual abuse allegations. National Public Radio, “Why Prosecutors In Bill Cosby’s Case Focused On Addressing Misconceptions About Rape” 27 April 2018, <https://www.npr.org/2018/04/27/606580169/why-prosecutors-in-bill-cosbys-case-focused-on-addressing-misconceptions-about-r?t=1633534141589>.

63 California Evidence Code, s 1107.

64 Oklahoma Statutes, Code of Criminal Procedure, rule 22-40.7.

We will consider areas for reform that have been discussed such as:

- a) in what circumstances, if any, should third-party sexual history evidence be admissible - this is evidence which shows that the complainant has had prior sexual activity with someone other than the defendant
- b) how well the similarity exception is working - this exception allows evidence of sexual behaviour taking place “at or about the same time” as the alleged offence
- c) revising the belief in consent exception “to reflect both the Sexual Offences Act 2003 and the fact that it is not generally reasonable to formulate a belief in consent on the basis of past history”⁶⁵
- d) considering how the law works from the perspective of both the defence and the prosecution and whether any provisions ought to be extended to sexual history evidence offered by the prosecution
- e) the impact of new forms of sexual history evidence via social media and instant messaging
- f) the procedure governing applications to use such evidence including whether complainants should be represented and have a voice
- g) whether a right of appeal should be introduced in relation to decisions to admit evidence of the complainant’s prior sexual history

Other jurisdictions have different approaches to sexual behaviour evidence. For example, the Canadian Criminal Code prohibits evidence of a complainant’s sexual activities from being used improperly.⁶⁶ It aims to counter “false logic” so that a complainant’s previous sexual activity cannot support an inference that she is more likely to have consented or make her account less worthy of belief.⁶⁷ If a defendant wishes to rely on this type of evidence, the court will focus on its relevance and whether it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.⁶⁸

In considering the application, the court must consider a list of factors:

1. the interests of justice, including the right of the defendant to make a full answer and defence
2. society’s interest in encouraging the reporting of sexual assault offences
3. whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case
4. the need to remove from the fact-finding process any discriminatory belief or bias
5. the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury
6. the potential prejudice to the complainant’s personal dignity and right of privacy
7. the right of the complainant and of every individual to personal security and to the full protection and benefit of the law
8. any other factor that the judge, provincial court judge or justice considers relevant

65 Rook & Ward, *Sexual Offences Law & Practice* (5th ed 2016), para 26.180, citing L Kelly, J Temkin, S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (2006), p 76.

66 Canadian Criminal Code RSC 1985, s 276.

67 See *R v Barton* [2019] 2 SCR 579 (SCC) and *R v Boone* 2016 OWCA 227, 347 OAC 250, para 37.

68 Canadian Criminal Code RSC 1985, s 276(2)(c).

We will also consider the impact of section 41 in the context of character evidence more generally.

Re-examining the rules on the disclosure and admission of the complainant’s confidential medical and therapeutic records

We will examine the need for reform of the rules and procedure governing the pre-trial disclosure of complainants’ prior medical and counselling records and the admission of such records at trial, including:

1. whether the complainant should be able to participate in the application to admit evidence of their prior medical and counselling records
2. whether confidential communications between a complainant and a suitably qualified medical or counselling professional for a therapeutic purpose should be better protected. We will look at whether these types of records should be subject to privilege, a legal concept that recognises the public interest in maintaining confidentiality and could protect material created in the course of a therapeutic relationship by allowing the professional to withhold this evidence from disclosure.

This approach has been adopted in New South Wales, Australia, under the sexual assault communications privilege.⁶⁹ Canada has also adopted a more rigorous test and procedure in the Criminal Code. The provisions cover documents containing personal information where there is a reasonable expectation of privacy. The Criminal Code lists a series of assertions which, on their own, are insufficient to meet the test for disclosure such as that the requested record may disclose a prior inconsistent statement or that the record may relate to the credibility of the complainant or witness.⁷⁰

Evaluating how well special measures are working to support witnesses

We will consider the need for reform of the legislative framework governing the use of special measures for complainants, including alternative arrangements for giving evidence in trials of sexual offences. We will consider the effect of individual special measures on complainants, defendants and juries and related practical factors such as separate entrances and spaces at court for complainants. We will examine whether there should be a presumption that one or a combination of special measures should be offered as a default for complainants. We will consider the current ambit and operation of Ground Rules Hearings in the context of sexual offences cases.

69 Criminal Procedure Act 1986, ss 295-306. See Glenn Bartley, “Sexual Assault Communications Privilege under Siege” (2000-2001) 6 *NSW Bar Association Journal* 65; A Jillard, J Loughman and E MacDonald, “From Pilot Project to Systemic Reform: Keeping Sexual Assault Victims’ Counselling Records Confidential” (2012) 37 *Alternative Law Journal* 254.

70 Canadian Criminal Code RSC 1985, ss 278.1-278.91.

Current special measures permit complainants to give their evidence in private. We will consider whether the public at large should be excluded from sexual offences hearings and trials save for certain identified persons.⁷¹ Unless they elect otherwise, complainants in sexual offences cases are automatically eligible for special measures because they are deemed to be “intimidated” witnesses whose evidence is likely to be diminished by “reason of fear or distress” about giving evidence. We will review this definition including its overlap with provisions for vulnerable people in the courts required by the Criminal Practice Direction and Criminal Procedure Rules.

Our process

The project will commence with pre-consultation research. We will speak to a wide range of people involved in the investigation and prosecution of sexual offences in the criminal justice system. We will also speak to individuals and organisations who advise and support both complainants and defendants and provide therapeutic assistance. We will consult academics who have undertaken research in this area. Our objective is to understand what the problems are and whether there are law reform solutions which can help while ensuring that both the complainant’s right to their private life and the defendant’s right to a fair trial are protected.

Our pre-consultation work will help us develop provisional proposals for reform, which we will explain in a consultation paper. We will hold a three-month public consultation, inviting responses to our provisional proposals. We will analyse those responses and develop policy before writing our final report containing recommendations for the government and Parliament.

Timetable

We launched the review on 17 December 2021. We will publish a consultation paper by July 2022 and will publish our final report by July 2023.

Contact us

You can contact us by emailing: **evidence_in_sex_offences@lawcommission.gov.uk**

If you have been affected by any of the issues in this paper, there are a number of organisations who can provide support and assistance. You can contact:

999 in an emergency, **999**.

NHS information and support: **<https://www.nhs.uk/live-well/sexual-health/help-after-rape-and-sexual-assault/>**

The 24-hour freephone National Domestic Abuse Helpline, run by Refuge, on **0808 2000 247** or **<https://www.refuge.org.uk/get-help-now/>**

The Rape Crisis national freephone helpline on **0808 802 9999** (12-2.30pm and 7-9.30pm every day) or **<https://rapecrisis.org.uk/get-help/>**

71 A similar recommendation was made by the Gillen Review and is currently being implemented in Northern Ireland. See Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland Recommendations* (2019), **<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>**

