CBA Response to The Law Commission Consultation entitled,

'Evidence in Sexual Offence Prosecutions'

October 2023

1. This response has been prepared on behalf of the Criminal Bar Association RASSO working group and is the combined work of the group. Specific contributors are: Tana Adkin KC, Chair of the CBA, Mary Prior KC, Vice Chair of the CBA; John Riley, Vice Chair of the CBA RASSO group; and Steven Bailey, Anne Richardson, Alex Greenwood, David Allen, Lorraine Mustard, Sally Hobson, Matthew Roberts. We are indebted to all the work carried out – both academically and otherwise – by very many others, including Professor Laura Hoyano, whose efforts have been tireless for many years.

2. Across England and Wales, Criminal Barristers prosecute and defend in rape and serious sexual (RASSO) cases. Most Counsel who conduct rape cases prosecute and defend these cases in equal measure. The Criminal Bar Association (CBA) is the professional body which represents the exceptionally talented Counsel who conduct these cases. Regrettably, when successive governments and advisory bodies consider changes in law and procedure for criminal cases they rarely take advice from us. Between us, we have many years' experience in conducting criminal trials across England and Wales. The CBA is always willing to help and advise policy makers and governments to ensure that changes are practical, of benefit and achievable in the present and/or the near future.

3. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

4. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

5. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

6. This Law Commission consultation paper suggests, in many different ways, that Criminal Barristers who are defending in a trial need to be supplemented with (1) an advocate for the complainant, (2) a specialist advocate to cross-examine the defendant, and should be subjected to disciplinary proceedings if they ask a disagreeable question. This is based on anecdotal, small scale studies, and research from Australia, New Zealand and Canada on how their advocates conduct cases there and it is part of a clear process to make rape trials fundamentally different in law and procedure to any other criminal case, including the suggestion that the right to a jury trial (which defendants in every other case which carries more than six months' imprisonment have) will be removed because jurors, unlike in every other offence, however complex, cannot be trusted to follow legal directions in rape cases.

7. In order to prosecute RASSO cases in England and Wales, Counsel must apply to join a Crown Prosecution Service (CPS) Panel. The CPS has four panels, from beginner level one to most experienced level 4. RASSO cases can only be prosecuted by Counsel at levels 3 and 4. The RASSO panel commenced in 2012. The criteria for application are worth reading[1]. The CPS requires that Counsel prosecute fairly and independently, to treat everyone with respect and to behave professionally. Poor conduct will mean removal from the panel.

8. The RASSO criteria include a good awareness of the experience of complainants, of trauma, of myths and stereotypes, consent, disclosure, special measures, section 41 (cross-examination on previous sexual history) and bad character.

9. This means that Counsel who prosecute in RASSO cases have undertaken the specific training required to conduct these cases professionally, meet and assist complainants through the trial process with relevant special measures, and advise on prosecution trial strategy.

10. Defence advocates in RASSO cases have significant experience and skill in questioning complainants; not least because most barristers who conduct RASSO work both prosecute and defend, so by definition most who defend will have received the training which is mandatory for prosecution advocates.

11. It should also be noted that this training – which in turn draws on extensive and regularly-updated guidance from the CPS – has to be repeated and refreshed every three years as a condition of continuing to receive instructions to prosecute RASSO cases, and is often provided by practitioners, at considerable cost to themselves in terms of financial expense and time. All

1 https://www.cps.gov.uk/advocate-panels, https://www.cps.gov.uk/advocate-panels/advocate-panels-2020-panel-general-crime-and-rasso-list

concerned with this review will be bound to know, and ought to be doing all they can to make it clear to the public and to all stakeholders, that advocates who undertake and conduct RASSO work, on both sides, are overwhelmingly experienced professionals dedicated to the fair treatment of all involved in the process, be they complainants, witnesses or defendants.

12. Members of the Judiciary who preside over rape trials receive special training and refresher training to do so. Judges come from the profession and were often senior practitioners who regularly conducted RASSO cases. There is currently no obligation on the Judiciary to conduct RASSO cases.

13. For RASSO practitioners, the emotional toll of this work can become overwhelming. We often deal with the pain and grief of a different victim every week as trials are now back to back. In addition to presenting evidence in the current trial, each evening consists of attempting to keep up with a phenomenally heavy workload of upcoming cases which have to be prepared for preliminary hearings. The workload is relentless.

14. RASSO work is not compulsory for criminal practitioners. It is a choice. Many feel unable to undertake this exceptionally challenging work and many more are now turning away from RASSO cases. The work is comparatively poorly paid and each case requires significant and substantial preparation. The emotional toll of these cases plays its part in advocate burn out. Whilst successive governments indicate that RASSO work is a priority, their failure to properly remunerate these cases suggests otherwise.

15. It is against that background that we continue to conduct RASSO cases. The practitioners who do so, do so because they are committed to being a voice for the vulnerable. Repeated, unjustified, anecdotal criticism of their work causes significant upset and frustration and adds

to the reduction in numbers willing to conduct the work.

16. Perfectly properly, the CPS demand that all RASSO work is conducted to the highest and most professional standard. There are currently 668 barristers who are recorded as being accredited to prosecute RASSO trials in England and Wales. Not all of those continue to conduct such cases and many have ceased doing so this year when promised increases in payments for written work and when promised commitments as to taking account of availability of counsel when listing cases have failed to materialise. It is inevitable, therefore, that there are likely to be only enough counsel to populate approximately 300 RASSO trials across the whole jurisdiction at any given time.

17. One of the major difficulties in thoughtful and considered progress in RASSO cases is the fundamental lack of understanding of how the processes actually work in a criminal trial. Any academic or employee of a victim's group is able, should they wish to do so, to shadow a criminal practitioner for a week or longer to see what we actually do and how we actually do it.

18. It appears to be habitually forgotten that the offence of rape carries a two-fold evidential burden on the prosecution. Firstly the prosecution must prove so that a jury is sure that the complainant did not consent to sexual intercourse with the defendant. Secondly, and of equal importance, the prosecution must prove so that a jury is sure that the defendant did not reasonably believe that the complainant consented.

19. The admission of evidence in RASSO cases has the same starting point as evidence in every other criminal trial. It must be relevant to an issue in the case and admissible in law. Evidence which does not meet this test is not permitted to be placed before the jury.

20. A myth is a widely held but false belief. A stereotype is a widely held oversimplified opinion, prejudiced attitude, or uncritical judgment. Myths are false. Stereotypes may be false but may, in particular factual circumstances be true. These two concepts are not the same.

21. There is a non-evidenced based, anecdotal belief, that Counsel habitually question complainants as to myths. Such questioning would be objected to by the prosecutor and prevented by the trial Judge. Research on advocates in the County Court of Victoria or any other jurisdiction where English is spoken (paragraph 2.35) cannot inform law reform in the United Kingdom. The questioning styles and techniques used overseas are not the same as those used here.

22. Questioning as to stereotypes is permissible if there is an evidential basis upon which the questioning arises out of an issue in the case. If the issue is whether the defendant reasonably believed that the complainant consented to sexual intercourse, it is plainly important for the defence to ask the complainant what the complainant did or did not do to demonstrate to the defendant that they did not consent. Such questioning is relevant and admissible.

23. There is a growing academic discourse from those who have never or rarely observed any jury trials from beginning to end to postulate that juries cannot be trusted to make decisions in rape cases because they are not able or willing to dismiss myths and stereotypes from their decision making. This belief is based on mock jury trials, often in different jurisdictions with jurors who have different cultural beliefs and backgrounds to those within England and Wales. Even research on real jurors in overseas jurisdictions cannot properly inform reform here because there is no proper consideration of the differences in culture and beliefs between nations which are considerable. Research undertaken within the United Kingdom on real jurors as to myths and stereotypes is dismissed and undermined as being partial. We disagree and reject the

attacks on real jury research and, by inference, the attacks on juries. The research undertaken in a forensic, peer reviewed way, with real jurors reflects the experience of our practitioners who ,between them, have hundreds of years of practical knowledge of what jurors actually do.

24. In addition, the premise that jurors are influenced by myths and stereotypes has been demonstrated by scientific research on real jurors to be, for the most part, a myth. Jurors do not believe that defendants should be acquitted because of myths and stereotypes in most cases. Where there remain uncertainties, focussed and careful judicial directions can preclude errors occurring.

25. One of the main reasons why we can be sure that juries do make accurate decisions is that when RASSO cases get to the criminal courts the conviction rate is high. A defendant is more likely to be found guilty than not. This inconvenient research is dismissed by those who believe that the conviction rate is far too low on the basis that it may not be impartial and is subjective. The same critique can be made of research on mock juries in this and in other quite different jurisdictions.

26. We are very concerned about the message being presented of a low conviction rate, an inability to trust jurors and an unprofessional body of barristers asking inappropriate questions. The attrition rate in rape cases is frighteningly high. We are worried that complainants do not go to the police or support prosecutions based upon the alarming "facts" being presented in the media about these cases.

27. We are very concerned that the purpose behind this consultation is an effort to "increase" the low conviction rates in these cases by removing juries, who, it is said, cannot be trusted to come to decisions based on the evidence, in favour of Judge only trials. It is doubted that anyone has

troubled to ask the Judiciary. A 100% conviction rate for any crime can never be the desired outcome because it would demonstrate that the prosecution only ever pursued cases in which conviction was certain. In our criminal justice system the prosecution must make the jury sure of the two fold test already described. That might be a distinction between rape and some other criminal allegations, but the burden and standard of proof remain essential constants and should never be diluted.

28. The Crown Prosecution Service has to apply the Code for Crown Prosecutors. This dictates that if there is sufficient evidence to provide a reasonable prospect of conviction, and prosecution is in the public interest, then a charge follows. Since it is difficult if not impossible to imagine a situation in which it would not be in the public interest to prosecute for rape, the analysis will invariably come to an assessment of the evidence and whether a reasonable prospect of conviction exists; and of course the reviewing lawyer will at all times apply the relevant guidance and will guard against any misconceptions.

29. It therefore follows that a process in which the decision as to charge is (absolutely properly) based on different criteria from a decision as to guilt of that charge, then – with rape as with any other criminal allegation – there will always be trials which result in acquittals. Acquittal does not mean that the jury thought the complainant was lying, or that the jury applied false beliefs/etc; it might simply mean what it says: that on the evidence presented the jury were not sure of the defendant's guilt.

30. That determination is a sign of a healthy and properly-functioning criminal justice system, administered fairly and without fear of or favour towards any category of participant or stakeholder. With this in mind, and also bearing in mind that many of the failings perceived by

the Law Commission lie not in the trial process itself but in other areas – police perceptions, complainant attrition to name but two – we suggest that at least some of the proposals in this consultation paper, for instance an invitation to consider trials without juries or alterations to the rules of evidence governing the admissibility of character or sexual behaviour evidence, might be based on a flawed analysis of what is "wrong" with the ways in which criminal trials in general (and rape trials in particular) are currently conducted.

31. What then are the problems in RASSO cases and what are the solutions?

32. The percentage of cases which get to court is woefully low. Operation Soteria has been working on improvement of referral by the police of RASSO cases to the CPS at an early stage. We cannot, as a professional body, increase the number of cases which reach the courts. That is a matter for the police.

33. Early pro-active involvement with complainants is key to success in a prosecution case. Prosecution trial counsel should be involved from the outset, either pre-charge or immediately post charge in a meeting in which the complainant can be advised as to the process, special measures, their rights and obligations and the likely timescale. Continuity of Counsel is vital for a complainant and must be taken into account when cases are listed. The significant backlog of cases within the Crown Court must be considered and RASSO cases must be given priority. Far too many cases are removed from the list 48 hours or less before a trial date. That causes distress and misery for complainants, defendants and both counsel in the case. Cases which are stood out in this manner which have been prepared for trial in the days leading up to the listing attract no payment for Counsel and are then often fixed when Counsel cannot conduct them. This real frustration is causing advocates to stop doing this work. In addition, listing failures to take account of instructed advocates' availability for ground rules hearings or s28 hearings [for

pre-recorded cross examination] and the failure of advocates' payment schemes by both the LAA and the CPS to pay advocates adequately for such hearings, further encourages experienced and otherwise dedicated professionals to abandon RASSO work for more reliable and certain sources of income, whether in other areas of criminal practice or in different areas of law altogether.

34. Complainants are provided with ISVAs[2]. ISVAs are [or should be; there are still alarming anecdotes about ISVAs giving complainants advice which is simply wrong in law] specially trained to provide information and support, discussing reporting options, supporting with communication with the police and support in the lead up to trial. They also support complainants with housing, employment, study, counselling and sexual health follow ups. Whilst there were well founded criticisms when this service began, national accredited training programmes now mean that ISVAs are part of the key to success in prosecutions.

35. Court technology is woefully inadequate. Jurors are obliged to observe pre-recorded evidence and live link from a considerable distance in many court rooms. Sound and picture quality are often poor, with complainants being placed as far from the camera as possible so that nuances of facial expression and body language are lost. If this is the best way forward then significant investment in the court estate is required. In addition the levels of police training for ABE questioning vary across the country and many ABE interviews are not fit for purpose. This may well be a better area to consider funding of advocates to question witnesses on an ABE so that questions are relevant, admissible and chronological. Currently, there is a rush to use section 28 for all complainants and to use live link for all cross-examination. We consider that research is required as to whether s28 is having any impact on conviction rates before it is spread widely.

2 Independent sexual violence advisors

We are aware that Professor Cheryl Thomas has been undertaking such research but the results are not yet known.

36. The suggestion that complainants require a legal advocate of their own to deal with disclosure, section 41 and bad character matters is a reflection of faults within the system. The CPS have accepted a series of failings in communication with witnesses during the period post-charge to trial and post-trial to appeal. New practice standards have been set in place.

37. Interaction between complainants and prosecution Counsel should be standardised across England and Wales. Each region has its own policies. In some areas, Counsel are paid to conduct an early engagement meeting with a complainant, in others this meeting is neither valued nor funded.

38. The paragraphs above note ways in which listing failures and inadequate remuneration discourage advocates from continuing to conduct RASSO work. This will be exacerbated as s28 hearings are now more widely available and must be expected to be used more often: simply put, the [no doubt well-intentioned] extension of the s28 regime injects more hearings into an already crowded and backlogged system. To the extent that these considerations are relevant to and inform much of the discussion in this consultation – and our view is that these considerations are intrinsic to this consultation because they impinge directly on public confidence in the trial process, and thus affect the even larger areas of concern around charging and attrition rates – we propose a radical but useful innovation: that there be one or two days on each circuit on which no work is conducted in Crown Courts except for ground rules hearings and s28 hearings; and that the currently inefficient systems by which s28 hearings are recorded be replaced by a much more nimble and flexible system directed to the needs of CJS stakeholders rather than the profits of recording service providers.

39. Complainants tell us that their biggest issue is lack of knowledge which comes from lack of inclusion in the process. The CBA intends to publish a paper on engagement with complainants early in the New Year. Whilst the CPS has helpful information for complainants on its website, complainants do not know it is there and do not access it. We contend that all complainants should receive a handbook which includes a step-by-step approach to the criminal justice process, sources of additional information and contact emails/telephone numbers.

40. Wholesale disclosure of medical, counselling, education records of complainants does not occur save in exceptional cases. Complainants are asked by the police to consent to wholesale disclosure without being given a clear and concise explanation as to what might be provided to whom and why. Cross-examination on previous sexual history is limited by section 41 Youth Justice and Criminal Evidence Act 1999. Peer reviewed academic research requested by the CBA which shows its limited scope is rejected by this consultation paper because it is suggested (without empirical evidence) that the answers might be subjective. There is no subjectivity in answering questions as to whether applications were made, succeeded or failed. We reject the critique and rely on this academic research on real advocates rather than anecdotal reports based on small samples of cases.

41. Questioning on previous sexual history is not common and only occurs if a successful application is made for the same. Despite its criticism as being partial which we do not accept, Professor Laura Hoyano's research for the CBA demonstrates that s41 is not widely used. It is accepted that complainants are not always advised in accordance with section 41 of these applications sufficiently in advance so that statements can be taken from them before the application is heard. Courts do not always allow sufficient time for Counsel to speak to

complainants about these matters. Continuity of Counsel would significantly assist with ensuring these applications are considered in the round.

42. Bad character has relevance and is admissible in RASSO cases in the same manner that it is relevant in any other criminal trial. If a complainant has admittedly made a false allegation of rape in the past that is a matter that a jury can take into account in deciding whether the prosecution have proved their case. Legal directions ensure that this is not determinative.

43. There must always be a recognition that the trauma and distress in RASSO cases applies to a complainant and to a defendant. A defendant has a fundamental right to have a fair trial. Examples of convictions which have been overturned are well known. Not every person who alleges that they have been raped is telling the truth and not every defendant is a rapist. In circumstances where a complainant has not consented to sexual activity it is still eminently possible that a defendant can reasonably believe that a complainant has consented. Both parties can be telling their truth. Rape can carry life imprisonment and there must always be proper safeguards in place to ensure that defendants have fair trials.

44. We acknowledge the opportunity to respond to this consultation, which seeks to address vitally important areas of criminal practice and public concern. Our responses to the questions in the consultation paper are set out below, chapter by chapter. Where necessary, we have included observations on specific topics. As an association of expert counsel in this particular field, we of course remain committed to any further discussion which might prove useful.

CONSULTATION CHAPTER 3: PERSONAL RECORDS HELD BY THIRD PARTIES

Generally speaking, we do not share the Commission's concerns about the risks identified in relation to disclosure of third-party material (TPM). There has been a significant improvement in the prosecution approach to disclosure of TPM. The introduction of the Disclosure

Management Document (DMD) sets out the extent of the prosecution enquiries and requires meaningful active engagement by the defence in relation to identification of the issues and the necessity for further enquiries. Difficulties are encountered as a result of lack of experience/training on the part of investigators and prosecutors and as a consequence of sparse resources/lack of funding.

Allegations of sexual offending are serious in nature and very often result in lengthy custodial sentences being imposed together with mandatory or discretionary ancillary prohibitive orders commensurate with the risk posed by the offender. It is essential that the investigatory and prosecutorial process remains alive to the life changing consequences to those who are convicted of sexual offending. The process leading to conviction must be both fair and impartial. Every allegation of sexual offending is fact specific and may be committed alongside other types of offending such as domestic abuse, assault, controlling or coercive behaviour, blackmail, kidnap, fraud etc. It is our view that the investigative and prosecutorial approach to sexual offending should be consistent with the approach taken in all criminal cases. The 'reasonable line of enquiry' test should not be altered just because a sexual offence is alleged and there should be no shifting of the burden and standard of proof simply because the offending is sexual in nature. It would be impractical and unfair to have a different set of investigatory and disclosure rules governing sexual offending whether it is stand-alone sexual offending or sexual offending and other criminal activity. Where offending involves sexual allegations the investigation and prosecution is conducted by specialist teams (investigators and lawyers) whose task it is (1) to remain impartial and independent and (2) to present the tribunal of fact with reliable and credible evidence. Very often the sole issue for the tribunal of fact is the whether the prosecution can prove a case based entirely on the credibility of the complainant. It follows that the credibility of the complainant should be scrutinised during the investigatory and prosecutorial process. We do not

think that *'special'* rules should apply to either process simply because the offending is sexual in nature.

We agree that victims of sexual offending might sometimes feel that they are being subjected to a level of scrutiny that is unjust. It is the responsibility of those who investigate, prosecute, defend and try cases to ensure that lines of enquiry do not extend beyond that which is necessary and that the complainant understands the rationale behind any particular invasive line of enquiry. We note that within the Chapter addressing these matters there is no reference to the burden and standard of proof and are concerned that the very foundation upon which a tribunal of fact must approach sexual allegations may be shifted as a result of proposed special investigatory and/or prosecutorial rules imposed in such cases.

In most criminal cases the burden is on the prosecution to prove the allegations to a very high standard, so that the tribunal of fact is sure. In line with those fundamental principles the police must conduct all reasonable and necessary lines of enquiry. The Chapter does refer to a defendant's right to a fair trial. This is fundamental to any criminal case. During a trial the defence must be in a position to challenge disputed evidence and the prosecution are obliged to assist the defence by providing disclosure of material that may undermine the prosecution case and/or assist a defendant's case. The police have greater investigatory powers and resources than the defence and must ensure that those are deployed fairly and without restriction based upon the type of offending that is alleged. There is a risk that giving complainants special rights to intervene in investigations might result in the investigation not being conducted fully and properly. We propose that greater financial resources should be provided to ensure the following:

- That complainants are informed of the reasons why particular investigations are necessary and are reassured that those who deal with personal information are professionals governed by ethical codes.

- That investigations can be pursued in a timely fashion to avoid the lengthy delays often encountered in obtaining TPM.
- That there should be a unified protocol deployed in England and Wales for the obtaining of TPM from, for example, educational facilities, healthcare and medical facilities and social care, within criminal investigations and proceedings.

Consultation Question 1.

14.1 Are agreed facts regularly used as a practical strategy for addressing public interest immunity matters? 14.2 Does the use of agreed facts in this context pose any risks or concerns?

This question arises from 3.40:

"Having set out the law, it is not clear to us how often PII applications are made, nor how often they succeed. It may be quite rare, given that PII protects against very serious risks, such as exposing the identity of an informant (for example, a person who has provided information about child abuse), and may be most relevant where the record holder is a local authority. We have also had some indication from stakeholders that PII matters can be resolved by the use of agreed facts, though it is not clear whether such agreement overcomes problems of violation of the complainant's right to respect for their private life. We welcome insights into and views on the use of agreed facts."

We do not think that this is a significant problem arising during the prosecution of sexual offending and where it does arise it is a matter of judicial discretion that will either result in (a) an order that material is disclosed to the defence because the defendant cannot have a fair trial without it, or (b) an order that material is withheld on the grounds of PII because the defendant can have a fair trial without the material. In the event that material is ordered to be disclosed the prosecution must then decide whether in fact to disclose it. If a decision is made not to disclose that will inevitably result in an acquittal (the prosecution accepting that D cannot have a fair trial without access to the material). If a decision is made to disclose the material it will be a matter for the advocates to determine how to deal with the material and the assistance of the Judge may be sought in that regard. Agreed Facts consist of evidence that both parties agree upon and ensures that the tribunal of fact receives accurate evidence. The judge may determine admissibility of evidence and has overriding responsibility to ensure that a jury is not misled in any way.

PII issues are rare and it is difficult to generalise the nature of such issues.

Consultation Question 2.

14.3 Our provisional view is that for sexual offences there should be bespoke provisions with a unified regime governing access, production, disclosure and admissibility of personal records held by third parties. Do consultees agree?

We agree that there should be a unified protocol deployed but we think it is wrong and unnecessary to restrict such a protocol to sexual offences. The police will often investigate sexual offending that is said to have been committed alongside other types of offending - domestic abuse, assaults, controlling or coercive behaviour, kidnap, blackmail etc. and it would create unfairness and to have a different regime simply because one or more offences is labelled 'sexual'.

Consultation Question 3.

14.4 We provisionally propose that any regime regulating the access, production, disclosure and admissibility of professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy. Do consultees agree?

In general we agree with this proposition. We provisionally propose that any regime regulating the access, production, disclosure and admissibility of professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy.

Consultation Question 4.

14.5 Should medical records related to physical evidence associated with the events that are the subject of the complaint fall outside of the scope of a bespoke regime and remain within the existing general framework?

14.6 If so, or if not, for what reason?

It is our view that there should be a consistent approach to all TPM. It is difficult to see the logic in separating 'types' of records where the aim is to ensure that all relevant material is obtained and disclosed.

Consultation Question 5.

14.7 Our provisional view is that that there should not be a complete prohibition on the access, disclosure or admissibility of pre-trial therapy records in sexual offences prosecutions. Do consultees agree?

As set out above, there should be a consistent approach to any material that is capable of impinging upon any issue in the case and investigations and prosecutions of sexual allegations should not be restricted. The prosecution frequently seek to rely upon complaint evidence to show that a complainant has been consistent when speaking about offending. It is of utmost importance that any inconsistencies/lies etc. within accounts provided to others are available to investigators and are disclosed to the defence. Such material goes directly to the credibility and reliability of the complaint and the judge will oversee the admissibility of such evidence and direct the tribunal of fact in due course.

Consultation Question 6.

14.8 Should there be a complete prohibition on the access by compelled production, disclosure or admissibility of any complainant-support records, such as records held by Independent Sexual Violence Advisers, witness supporters and intermediaries?

14.9 If so, or if not, for what reason?

To completely restrict access to such material would prevent the police being able to fully and properly investigate complaints and inevitably undermine the prosecutorial process. We strongly oppose any such prohibition.

Consultation Question 7.

14.10 We provisionally propose that where an external person is responsible for deciding whether personal records held by third parties should be produced to police and prosecution, or should be disclosed to the defence, then that external person should be a judge. Do consultees agree?

14.11 We provisionally propose that the police and prosecution (rather than independent counsel) should filter material before it is examined by a judge. Do consultees agree?

If we correctly understand that an 'external' person is someone who is not an investigator or prosecutor then that is the current position. We also point out that applications for a witness summons (to produce material) can be made by any party including the defence, and that any such application must be made to a judge. We think that the prosecution advocate should be responsible for placing material before a judge.

Should the judge making the determination be the trial judge (as is the position in Canada)?

In an ideal world, yes. However we think that experienced judges who are familiar with the issues in the case are well equipped to deal with disclosure issues.

Consultation Question 8.

14.13 We provisionally propose that some measures (but not judicial scrutiny) should be put in place to ensure that complainants who are asked to consent to access have greater protection than is presently the case, both pre-charge and post-charge. Do consultees agree?

Any police request for consent access to material must be proportionate and it is not our experience that there is abuse of material gathered in this way. The protections currently in place by virtue of the disclosure review processes are sufficient.

14.14 Providing that the record holder also consents to access, if protective measures are to be put in place for complainants who consent to access, what should those measures be? (Although our provisional proposal does not include judicial scrutiny, we do not exclude it from responses to this question.)

We do not think that further measures are required.

Consultation Question 9.

14.15 Prior to charge, if the complainant refuses consent to access, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced?

14.16 If so, should this be limited to specific circumstances and, if so, to which special circumstances?

We think that if this is considered a reasonable line of enquiry the answer must be yes. It is impossible to set out the circumstances in which an investigative discretion should be utilised. The prosecution

should not be restricted by a prescribed set of circumstances. Investigative discretion should be retained.

Consultation Question 10.

14.17 Prior to charge, where the complainant consents to access but the record holder does not consent, should police and prosecutors be permitted to apply to the court for an order for personal records held by third parties to be produced?

14.18 If so, should this be limited to specific circumstances and, if so, to which special circumstances?

See answers above.

Consultation Question 11.

14.19 We provisionally propose that after a suspect has been charged, police, prosecutors and defence should continue to be permitted to apply to the court for an order for personal records held by third parties to be produced. Do consultees agree?

Yes, if needed.

14.20 If so, should there be any restrictions on permission to apply in the early stages of proceedings?

No.

Consultation Question 12.

14.21 We provisionally propose that disclosure of personal records held by third parties should require judicial permission. Do consultees agree?

We strongly disagree with this proposal. This would fundamentally undermine and remove the duties and responsibilities of the prosecution to ensure that the defence are provided with all relevant material. It should not be forgotten that those who receive personal records are professionals who should be trusted to deal with such material sensitively.

14.22 We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent. Do consultees agree?

We think that this is unnecessary and is shifting investigatory responsibilities to the judiciary in circumstances where there are sufficient safety measures already in place to prevent any abuse.

14.23 Should there be any restrictions on disclosure in the early stages of proceedings?

Absolutely not. It is imperative that all parties have material that impacts upon the proceedings at the earliest possible opportunity. Failure to obtain and / or disclose at an early stage could result in unnecessary incarcerations and charges.

We do not understand the logic of placing restrictions on applications in the early stages of proceedings. Good case management would encourage this to happen.

Consultation Question 13.

14.24 For compelled production to police and prosecutors, we provisionally propose adapting the Canadian approach to production to the court (discussed at paras 3.230 and 3.234 to 3.235 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties: must be likely relevant to an issue at trial or to the competence of a witness to testify; and access or production to the police or prosecution must be necessary in the interests of justice. Do consultees agree?

We think that the 'relevance' test that is in place to compel production of documentation covers those issues. Applications for material must be based on material that is relevant to an issue and that would include competency. It follows that judicial discretion incorporates the interests of justice.

14.25 We provisionally propose setting out the Canadian list of factors to be considered when the court decides what is necessary in the interests of justice, which are:

> (a) the extent to which the record is necessary for the accused to make a full answer and defence;
> (b) the probative value of the record;
> (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
> (d) whether production of the record is based on a discriminatory belief or bias;
> (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
> (f) society's interest in encouraging the reporting of sexual offences;
> (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
> (h) the effect of the determination on the integrity of the trial process. Do consultees agree?

14.26 Are there factors we should remove, modify or add?

14.27 For disclosure to the defence, the Canadian regime lists grounds that are, on their own, "insufficient grounds" for a defence application asking the court to require records to be produced to

the court for the first stage of review (set out at paras 3.231 to 3.233 above). These are designed to prevent speculative requests.

Is a preliminary filter of this kind valuable and are the grounds appropriate?

14.28 Are there any other grounds we should consider?

We do not think it is necessary to adopt a complex set of factors to consider. Whether disclosure is in the public interest is primarily a judicial discretion based upon a knowledge of the issues in the case.

Consultation Question 15.

14.29 For disclosure to the defence, we provisionally propose adapting the Canadian approach to disclosure (discussed at paras 3.236 to 3.237 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that personal records held by third parties:

- must be likely relevant to an issue at trial or to the competence of a witness to testify; and
- disclosure to the defence must be necessary in the interests of justice. Do consultees agree?

14.30 We provisionally propose setting out the Canadian list of factors to be considered when the court decides what is necessary in the interests of justice, which are:
(a) the extent to which the record is necessary for the accused to make a full answer and defence;
(b) the probative value of the record;
(c) the nature and extent of the reasonable expectation of privacy with respect to the record;
(d) whether production of the record is based on a discriminatory belief or bias;
(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(f) society's interest in encouraging the reporting of sexual offences;
(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
(h) the effect of the determination on the integrity of the trial process.
Do consultees agree?

It is our view that the current system and procedure for disclosure is well equipped to deal with 'fishing expeditions' and it is unnecessary to reform it.

14.31 Are there factors we should remove, modify or add?

We are of the view that the system and procedure for defence applications for disclosure does not require reform. To adopt the Canadian approach would be to unnecessarily complicate a system that is fair, impartial and not in need of change.

Consultation Question 16.

14.32 For admissibility as evidence, we provisionally propose adapting the Canadian approach to admissibility (discussed at paras 3.238 to 3.241 above and described again in this consultation question). This provisional proposal would use an enhanced relevance test such that material in personal records held by third parties is admissible if:
• the evidence is relevant to an issue at trial or to the competence of a witness to testify; and
• it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
Do consultees agree?
14.33 We provisionally propose setting out the Canadian list of factors to be considered when the court decides whether the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. These factors are:
(a) the interests of justice, including the right of the accused to make a full answer and defence;
(b) society's interest in encouraging the reporting of sexual assault offences;
(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
(e) the need to remove from the fact-finding process any discriminatory belief or bias;
(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
(g) the potential prejudice to the complainant's personal dignity and right of privacy;
(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
(i) any other factor that the judge .... considers relevant.
Do consultees agree?
14.34 Are there factors we should remove, modify or add?

Reform is unnecessary. Before a prosecution is embarked upon it is incumbent upon the prosecution (including the police) to ensure that a full and proper investigation has been conducted. The boundaries of any such investigation should not be restricted just because the allegations are sexual in nature.

The principle of 'reasonable lines of enquiry' should remain and not be subject to erosion just because the allegation is sexual.

The disclosure system is adequately equipped to deal with applications in relation to personal records and does not require any or any significant reform.

We accept that there needs to be a consistent and unified approach to the obtaining and disclosure of TPM. We also accept that complainants require education about the necessity of such disclosure but there should be no erosion of the investigative burden or shifting of the burden and standard of proof just because of the nature of the allegation.

A fair system requires adequate funding.

Consultation Question 17.

14.35 We invite consultees' views on how our provisional proposals for compelled production and disclosure should respond to inconsistencies evident on a complainant's personal records which may be the product of trauma.

If there are inconsistent accounts from a complainant about the incident they must be disclosed. A warning as to inconsistencies will be given but it is a matter for a jury to determine whether any inconsistency is as a result of trauma, memory difficulties or dishonesty.

CONSULTATION CHAPTER 4: SEXUAL BEHAVIOUR EVIDENCE

Consultation Question 18.

14.36 We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence. Do consultees agree?

Yes. Article 6 Human Rights Act would be infringed.

14.37 We provisionally propose that there should not be a complete ban on the admission of third-party sexual behaviour evidence. Do consultees agree?

Yes.

Consultation Question 19.

14.38 We provisionally propose that sexual behaviour evidence should only be admissible if:
(1) the evidence has substantial probative value; and
(2) its admission would not significantly prejudice the proper administration of justice.
Do consultees agree?

1) Yes. The use of "substantial" provides a sufficiently high hurdle to prevent specious or trivial applications.

2) "The proper administration of justice" is a vague expression with limited meaning. It introduces "administration" as a relevant factor to matters where the overarching consideration is the fairness of

the trial. It is suggested that the overriding objectives of the Criminal Procedure Rules (1.1(2) a-e and g) might provide a more appropriate and clearly defined set of principles.

Consultation Question 20.

14.39 When the judge is deciding whether sexual behaviour evidence:

(1) has substantial probative value; and
(2) its admission would not significantly prejudice the proper administration of justice, and therefore can be admitted, which, if any, of the following factors should they consider:
(a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;
(b) the interests of justice including the defendant's right to a fair trial;
(c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and
(d) the risk of introducing or perpetuating myths or misconceptions.

It is not accepted that "The proper administration of justice" is an appropriate term when dealing with balancing the competing interests when determining whether SBE should be introduced.

(a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;

Yes, the complainants Article 8 Right to Privacy is an important consideration, subject to qualification in accordance with law.

(b) the interests of justice including the defendant's right to a fair trial;

Yes, the Article 6 overarching consideration which being unqualified should take primacy.

(c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions;

No, this is incorporated into the complainant's article 8 Right which should provide adequate protection and encourage reporting and the giving of evidence.

(d) the risk of introducing or perpetuating myths or misconceptions.

No, inevitably material of this kind may involve material capable of being used in this way. Strong judicial direction warning of the dangers of this material should suffice. There is a real risk that

introducing an additional hurdle of this kind could confuse and result in exculpatory material being improperly excluded impacting upon the Article 6 Right of the accused.

14.40 Are there any other factors that should be included in the legislation that the judge should consider when deciding whether to admit sexual behaviour evidence?
14.41 Should the list include "any other factor that the judge considers to be relevant to the individual case"?

The introduction of the phraseology from the overriding objective of the CPR Part 1.1(2)a-e and g provides tested factors already familiar to practitioners and the judiciary which would provide a structure within which such decisions could be made.

Consultation Question 21.

14.42 We provisionally propose, as is currently required, that applications to admit sexual behaviour evidence should be made in writing and that the application should include: detail of the evidence sought to be admitted; the purpose for which its admission is sought; and drafts of any proposed questions. Do consultees agree?

The Criminal Procedure Rules 2020 (SI2020/759) Pt22.4(2)a and b already contain such requirements.

14.43 We provisionally propose that the judge should be required to provide written reasons for their decision on an application to admit sexual behaviour evidence. Do consultees agree?

No, such an approach would be time consuming and is unnecessary as all Crown Court proceedings are recorded and reasoned rulings are already provided.

14.44 We provisionally propose that the written reasons should address all of the factors judges are required to consider. Do consultees agree?

We do not accept that written reasons are required but in respect of oral reasoning there could be no objection to the Judge being required to address all the relevant factors accepting that there is an exercise of judgement and different cases may mean different considerations may have greater priority (accepting that the Article 6 Right remains paramount).

Consultation Question 22.

14.45 Are consultees aware of any more modern forms of communication that are not currently covered by the definition of sexual behaviour in section 41 of the Youth Justice and Criminal Evidence Act 1999, that should be covered by any restrictions on sexual behaviour evidence?

No, the flexible nature of the present definition is not prescriptive and can therefore cater for developments in communication not presently foreseen which a more defined approach may exclude.

14.46 Should the legislation defining sexual behaviour include explicit reference to forms of communication and social media as a form of sexual behaviour?

No; see above. Such an approach is unnecessary and may contain potential pitfalls.

Consultation Question 23.

14.47 Should the restrictions on sexual behaviour evidence also apply to evidence relating to clothing worn by the complainant, or behaviour such as dancing, even when such evidence does not fall within the definition of sexual behaviour?

It is hard to envisage a situation where the introduction of evidence of for example "provocative dancing or clothing" would be sought to be adduced other than in connection with the facts of the allegation the subject of charge. In those circumstances it is highly likely that the *prosecution* would seek to admit such evidence as relevant to the defendant's sexual desire for the complainant.

It is hard to envisage a scenario in which the defence would seek to adduce such evidence where it does not relate to the events at the material time. Such material would be irrelevant and inadmissible under the present generic test as to the admissibility of evidence.

This contention that Counsel habitually ask such questions is rejected.

Consultation Question 24.

14.48 Are consultees aware of any evidence that suggests the definition of "sexual behaviour" in section 42 of the Youth Justice and Criminal Evidence Act 1999 is interpreted differently to, or at odds with, the definition of "sexual" in section 78 of the Sexual Offences Act 2003?

No

14.49 Should the definition of "sexual" in section 78 of the Sexual Offences Act 2003 apply to any definition of "sexual behaviour" for the purposes of restricting sexual behaviour evidence in criminal proceedings?

Simplicity is always desirable and a single definition would be of assistance to all.

Consultation Question 25.

14.50 We provisionally propose that relationship evidence that is relevant as explanatory or background evidence only, should not be within the scope of any framework that restricts sexual behaviour evidence. Do consultees agree?

Yes

14.51 We invite consultees' views on whether there should be any restrictions on relationship evidence to ensure that it is only admitted as background or explanatory evidence, and what form those restrictions should take.

The adoption of the criteria for the admissibility of Defendant's bad character evidence could provide guidance in respect of the admission of relationship evidence:

S101(1) Criminal Justice Act 2003

a - All parties agree;

c - It is important explanatory evidence;

d – it is relevant to an important matter between the prosecution and defence.

Consultation Question 26.

14.52 Should the framework that restricts sexual behaviour evidence apply whenever sexual behaviour evidence is sought to be admitted, rather than being limited to a particular class of offences?

The myths and stereotypes have direct relevance in connection to offences of a sexual nature. Whilst such myths and stereotypes may have relevance in connection with other offences (domestic violence for example) their relevance is less apparent. The admission of such material remains subject to the restrictions on relevance and the limitation of such matters by prescription may give rise to injustice where the evidence is relevant, would not fall within any gateway and would not engage any myths or stereotypes.

Consultation Question 27.

14.53 We provisionally propose that any framework that restricts sexual behaviour evidence should apply to evidence sought to be admitted on behalf of both the defendant and the prosecution. Do consultees agree?

The defence and prosecution have different roles and responsibilities.

The defence overwhelming concern is the assertion of the rights of the defendant.

It is legitimate to place restrictions on that which is being asserted by a defendant to protect the right of the complainant.

By contrast the prosecution is a "public authority" (see s6 Human Rights Act 1998) and governed by the necessity for compliance with Art 8 ECHR.

The prosecution should have a discretion to admit the material without restriction on grounds of relevance. Any further restriction could in fact restrict the prosecution's ability to adduce such material. Such matters could be governed by a requirement to consult with the complainant and determine the wishes of the complainant to ensure Article 8 compliance.

Consultation Question 28.

14.54 We invite consultees' views on whether complainants, where they do not have a right to be heard as is currently the case, should be informed of an application to admit sexual behaviour evidence:

(1) when it is made;
(2) only when it is decided regardless of outcome; or
(3) only when it is successful.

Currently, section 43(1) YJCEA 1999 prevents the presence of the complainant in applications but the complainant can provide a statement in advance of the application being heard to address the issues raised in the application. Complainants tell us of their frustrations when not consulted about these matters in advance when they may have documentary or other evidence which undermines the assertions made. The counter position is that the risk of informing the complainant of an application is

that it is likely to engender additional stress / distress which if unsuccessful was wholly unnecessary. In any event there can be no objection to informing complainants after the application as this is likely to have a reassuring impact.

CONSULTATION CHAPTER 5: CHARACTER EVIDENCE

The legislative regime introduced 20 years ago, which built on common law and other legislative principles, has led to the development of a considerable body of case law, comment and Practice Rules on the topic. The inherent fear that bad character applications are overused and have extended far beyond that which was anticipated continues. The limitations of use of bad character, explained in legal directions, means that it cannot be the sole or main factor upon which guilt is determined. Evidence of reprehensible behaviour amounting to domestic abuse towards women is problematic but can amount to admissible evidence in some RASSO cases and is gaining some judicial traction. For example, in abusive relationship cases the past behaviours and day to day operation of a complainant gradually showing that their behaviour changed due to the oppressive conduct of the abuser have been and are admitted to show the extent of the abuse suffered. We acknowledge that there may be significant evidence of reprehensible behaviour by a defendant, however it is clear that time, in terms of case preparation time, for formulating a whole distinct area of work to explain actions in regard to rape or other RASSO offences is extremely challenging, let alone the cross-interest issue of admissibility, sufficient evidential certainty, collateral litigation etc. There are many reasons militating against developing this whole area of such cases not least of which is the daunting prospect of ever longer trials or multiple hearings in order to accommodate extended enquiries into backgrounds which would then place more pressure on the system as a whole. It is our experience that the Crown, CPS and Prosecuting Counsel are seeking to adduce past relevant, albeit wide ranging, bad behaviours as potential bad character. Such extensions will develop over time and be subject to growth according to Judicial determinations. We do observe that advancements in this area will be assisted by such examinations of a defendant's past behaviour becoming part of a prosecutorial offer of service to the complainant as

part of our general theme of greater engagement with the principal witness in the case. The police might be encouraged to delve more deeply into defendants' behaviours both with the complainant and with other past partners to assist with enhanced bad character evidence whether by the use of an investigative ABEs or the use of statements in addition to the ABE. The counter argument is that many of the concerns expressed in the Report in regard to non- conviction bad character based on past behaviours said to contribute to the positions of both the defendant and the complainant would be unfairly prejudicial against the defendant. Over-concentration on these collateral issues might cause jurors to focus on them rather than on the relevant issues in the case.

Overall we observe that the law as it stands is sufficiently robust to accommodate the issue of an expanded non – conviction based bad character/bad behaviour regime. We do not consider that the criminal justice system is equipped to cope with a large additional field of work and that the police and CPS would require considerable asset support in order to achieve this goal. The proposed regime may have drawbacks for the complainant.

Good character

If the defendant's character was and is an evidential issue it must reflect both sides of that "coin". If Bad Character is evidentially capable of being part of the evidence against the defendant and for the Crown, then to an extent the Defendant's good character must also assist him to the limited extent that it does. Our comments above do take account of the descent in to cross-allegations in non -conviction bad character and how this might divert away from the issues in a rape trial. We have observed that often the court will express concerns in terms of focussing on the issues in the case rather than collateral matters.

Given the respective positions of the Defendant and complainant the *status quo* should be kept, eg that the Defendant must be able to rely to the limited extent that he can on his good character, and that there should be no like provisions for the complainant as, given what we have set out above, there would

then need to be what would become a clumsy regime of directions regarding complainants' "bad character", whatever that might mean.

We note that – at least in this context – reference to a complainant's "bad character" is likely to overlap substantially with issues regarding a complainant's previous sexual behaviour. We address such issues elsewhere in our response to this consultation and expect that anyone interested in our response will read our comments accordingly.

We do not think that there is any benefit to there being a system of admitting evidence of the complainant's good previous character. However; we are of the view that some focused judicial explanation as to why there is no reference to complainants' good character in criminal trials could be made. There is some information to suggest that people on juries do not understand [or at least question] why they hear about the Defendant's good character and nothing about the complainant's. A simple judicial direction about the state of the law and respective positions might assist when good character, especially the two limbs, which are a little nonsensical to the external observer, is given along the lines we suggest might assist a jury to understand the situation.

Consultation Question 29.

14.55 We provisionally propose that the bad character provisions of the Criminal Justice Act 2003 do not require amendment to accommodate non-conviction evidence of previous sexual violence, non-sexual violence, or controlling or coercive behaviour by the defendant. This is because:

(1) Where a defendant has been charged with rape or a serious sexual offence then non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour may be admissible under gateways (c) and (d) of section 101(1) of the Criminal Justice Act 2003.

(2) Where gateway (c) is relied on then admissible evidence may include non- conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour:

(a) against the complainant; or

(b) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.

(3) Where gateway (d) is relied on then admissible evidence may include non- conviction evidence of previous sexual violence against the complainant or against another person.

Do consultees agree?

We agree with the general observation on the applicability of the law as it stands being sufficient for current purposes.

Consultation Question 30.

14.56 Is there a need for guidance about the law to assist prosecutors in case building and making applications and judges in determining applications regarding the admissibility of non-conviction bad character evidence?

14.57 If so, which body should publish such guidance?

The law on adducing bad character evidence is plain. There is a need for a new policy in respect of case building at police/CPS level. The limited resources currently available and the paucity of experienced police officers and RASSO practitioners would not be able to support such a change.

Consultation Question 31.

14.58 We provisionally propose that the defendant's right to introduce good character evidence and the associated law relating to directions should be retained. Do consultees agree?

Yes

Consultation Question 32.

14.59 We provisionally propose that, if the jury has heard no evidence about the complainant's good character and the complainant has no prior convictions then, if the trial judge decides that fairness demands it, there should be a jury direction that explains why the jury has heard no evidence of the complainant's good character and that no inference adverse to the complainant should be drawn from its absence. Do consultees agree?

We disagree. Any reference to the complainant's good character could only be made if there had been a full and forensic examination of the complainant's past conduct as is being suggested for the defendant. Where the Defendant has put forward his good character there might there be room for a direction as to why the jury are not hearing any character issue for the complainant and this could only to be in reference to the law as it stands. However, such a position would fundamentally alter the strength of the one point that a defendant may have in his favour when a case boils down to one person's word

against another. The complainant is not on trial and faces no penalty on an acquittal. A change in the law for rape cases would make an already difficult task more difficult. Unless this was brought in for all criminal offences it would be untenable.

Consultation Question 33.

14.60 We provisionally propose there should be no substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in R v Mader. Do consultees agree?

Yes

Consultation Question 34.

14.61 Where the jury has heard evidence of the complainant's good character should there be guidance about directions?

14.62 What should be the content of any guidance?

In the unlikely event that the jury do hear evidence of the complainant's good character (and here we observe that the various issues taken up in the Report concerning past behaviour supporting bad character for the Defendant may impinge on concomitant good character for the complainant re attitudes and responses etc), which would on the current law of evidence be unlikely, then we observe that there would need to be a full and judicially-agreed range of directions. Even if the Defendant's good character directions are limited in any event, then the same inevitable limitations would have to apply to the complainant. Credibility and its associated parameters are a matter for the jury to assess in the trial. No jury would benefit from a collateral "tit for tat" exchange of exponential character escalations.

Consultation Question 35.

14.63 We provisionally propose that if there is to be a substantive expansion of the law permitting the admission of evidence of the complainant's good character beyond the principles set out in *R v Mader*, such expansion should be limited to:

(1) Where the complainant has no previous convictions or has no previous convictions relevant to credibility or propensity, then that may be admitted into evidence.
(2) Other good character evidence may be admissible where the trial judge is of the view it is appropriate.
(3) A determination regarding admissibility should take account of the following:
(a) the relevance of the evidence;
(b) risks to the complainant's well-being;
(c) the risk of unfairness to the defendant if such good character evidence is admitted;
(d) the risk of a disproportionate advantage to the defendant if such good character evidence is not admitted; and
(e) whether bad character evidence may be introduced to counter the good character evidence.
(4) The complainant should have a right to be heard before any evidence of their good character is admitted.
(5) Where any evidence of the complainant's good character is admitted then it should be accompanied by a direction to the jury that explains its relevance.

Do consultees agree?

We do not agree with any expansion of evidence bearing on a complainant's good character. The mere iteration in the report of the possible ranges of argument demonstrates the complexity and confusion open in this regard. There will in many cases be far too many temptations for in-depth cross allegations which are unnecessary. There is also a considerable risk of inviting increased s41 applications, and the whole debate over previous sexual behaviour and activity will rise again.

Consultation Question 36.

14.64 We provisionally propose that where the defendant seeks to adduce evidence that the complainant has made false allegations of sexual assault on previous occasions, the admissibility threshold should be the same as that used for sexual behaviour evidence. Do consultees agree?

Provable allegations of false complaints are complex but do impinge upon credibility. Provably false allegations are rare. A failure to pursue a previous allegation or a previous acquittal are more common. We do not believe that the greater restrictions on sexual behaviour should apply to allegations in the instant case of a defence that says that the complainant is lying in this case given that she has lied before. This amounts to bad character evidence of a complainant. We take the view that the current regime, governing defence claims that a complainant has previously made false allegations, is adequate to the tasks raised here: if there is admissible evidence from which the jury might reasonably conclude that the complainant has previously told relevant lies, then the trial judge should be asked to rule on

admissibility; if not, then not. Even if any such evidence is adduced before a trial jury, than the jury can be trusted with the admissible evidence subject to judicial directions. Far better in these circumstances for the complainant to be able to give her account for the jury to consider.

Consultation Question 37.

14.65 Should the Judicial College consider introducing an example judicial direction for cases where false allegations are introduced that addresses the myth that complainants commonly make false complaints of rape?

14.66 If so, what should be the content of such a direction?

We do not believe that this is necessary. We do not hold the view that juries commonly believe the *myth* of complainants generally making false accusations. Rather we prefer to rely on Professor Thomas' research on juries and alleged myths that support our view of the reliability of jury decision making. We are deeply concerned about the Report's attitude towards the only reliable jury research concerning conviction rates and myth assumptions published by Professor Thomas which gives academic support for views long held by the Criminal Bar. For this helpful and instructive long-term, real jury research to be dismissed by the Report is a significant disappointment and a bar to progress in directions that ought to help complainants and their criminal justice experience.

CONSULTATION CHAPTER 6: CRIMINAL INJURIES CONSULTATION CLAIMS

We are deeply concerned as to the reliability and sources of legitimacy for assertions made as absolute positive statements concerning trends and effects in RASSO cases. We ask rhetorically, on what type of sound empirical research are the assumptions in this chapter made? Reference to "stakeholders" or single participant comment does not help the confidence of the CBA in the extent of the underlying evidence for such concern and extrapolation. We are particularly concerned about statements attributing "…jury prejudice…" concerning issues that the Commission Report then delineates into jury *Myth and Misconceptions,* with no evidential basis to support the assumption. We do not recognise

that there is an imbedded myth that juries will believe the "myth" that complainants make false complaints just to lodge a dishonest CICA claim, nor is there any evidence from real jury research to sustain the alleged myth that juries believe that complainants make false, dishonest CICA claims. We are concerned that the Report has created or surmised a "myth", attributed it to juries and then proposed measures to counter it.

We do not share the Commission's concerns about cross-examination on CICA claims as a matter going to credit as being a significant problem. We question the evidential basis of this contention because, mirrored by many other "concerns" within the paper, this does not match our collective professional experience. We do not accept that such questioning would automatically fall into the category of myth/misconception because there can be an evidential basis for questioning a complainant as to whether there is a financial motive for a complaint being made in some cases. Any evidence which may demonstrate a motive to fabricate is a legitimate source for examination and exploration. There are any number of good solid and practical arguments that militate against this argument, not least of which is the clear possibility of criminal legal proceedings for perverting the course of Justice etc were it to be obvious that such a course had been taken by a false complainant. We question with profound concern the attributed *myth* that juries allegedly hold this particular myth "…*stakeholders have told us that the existence of a CICA claim is rarely relevant, and that the purpose of such cross -examination is to play to juror prejudices and to taint their deliberations. These prejudices <u>may</u> include jurors over – estimating the prevalence of false complainants and or assuming that a "real" victim would not wish to seek compensation*." Although we are not told the professional experience of the stakeholders in question it is clear such stakeholders do not comprehend why cross -examination of a complainant on this topic is deployed. The quotation from the CEO of Victim Support and Victims of Crime Commissioner in Northern Ireland observes that "….whether explicitly or subtly made in the courtroom, feed into wider, largely sexist, stereotypes portraying victims as "gold-diggers". Tellingly, our staff have not witnessed the same propensity for this line of questioning in other criminal trials where victims are equally entitled to

and do apply for compensation…". It is not plain how many trials the staff have witnessed from commencement to conclusion but there may be a clear reason for this difference of approach. CICA claims may have an independent or corroborative aspect such as medical records in cases of violence and banking records in fraud. RASSO cases are often self-reported with an accepted lack of corroborative evidence. Such questioning can have benefits for the prosecution case. Given the time limits for complainants to make a CICA application, a claim can be made and result in a payment of compensation years before a trial takes place. A complainant's willingness to participate in the trial process thereafter would be a strong indicator of veracity and truthfulness. Should such questioning arise a complainant may indicate that their evidence is supported by the successful claim and their determination to continue to seek non-monetary justice. We challenge the contention that juries would hold a view that a "real victim" would not wish to seek compensation. The opposite is likely; why should a true complainant not seek compensation for a wrong they have been done?

We note in this chapter, as with others, with concern that the report constantly refers to a defendant's right to a fair trial and obviously acknowledges that this is a fundamental feature of criminal proceedings. However, the frequent reference to some form of legal restriction or prevention to defence questions, undermining the defendant's Article 6 rights is unrealistic and would if implemented be subject to challenge. Trial Judges regulate the fairness of proceedings. The frequent practice of trial Judges when explaining their roles to a jury at the start of a case is that they, the Judge, are the arbiters of the law and that they are there to see that fairness is done in the proceedings; some describe themselves as the "referee", controlling the trial according to the law. The facts are for the jury to determine against the background of applicable law, practice and procedure.

We observe generally that proposals in the Report for "bespoke" RASSO laws or practice directions etc relating to any issue but especially disclosure, which covers all crimes, is likely to be impractical. It would make the role of police and CPS impossible if they were expected to apply bespoke approaches for one type of offence as opposed to another. There is a wealth of legislation, practice case law etc that

govern how cases are dealt with. We also observe a concern whereby the report raises negative issues based on solitary comments. For example; if there is a defence attack based on a CICA claim yet it was not the complainant who made the claim, rather it being another agency within the process, then the futility of the defence questioning is made out. It is anticipated in such an instance that the defence would have been given effective disclosure to allow them to assess the value of such questioning: if it was to harm the defence case, for instance if the CICA claim was not made by the complainant but by another actor, then why cross examine on it?

We propose a significant theme in our response to this Report: that complainants in RASSO cases need to be far more engaged in and prepared for the process from investigation to and including trial. In this chapter context complainants ought to have it explained to them that far from their claim to the CICA being a sign of weakness, it may be that they will be cross examined on it, but the nature of their preparation by police and CPS should include robust defences of their right to make a claim, and if it is agreed and paid, then they pursue the criminal case, that this could be seen as a powerful indicator of their resolve and veracity. We propose a "contract of engagement and preparation" where written and understood levels of service, explanation and preparation are set out as between the complainant, other relevant witnesses and police / CPS so that all understand who is to do what in regard to whom.

The fear, as alleged, surrounding this topic needs countering, as do the concerns of police officers about their assumptions relating to how CICA claims will be used, treated etc. A better perspective, if complainants want to make a claim, is to be positive and robust about such claims. Turn their "use" around, make them a strength if needed, make sure [subject of course to rules concerning witness coaching] that a complainant has solid answers to the cross -examination if it is to come. If relevance is an issue there are ways to ensure that is so. The minimum expectation would be for a credit attack including a CICA claim to be in a defence statement, something along these lines:

> "..not only do the defence say that the complainant is lying or making up this allegation but it is also informed by a dishonest, (which must follow), claim to the CICA.".

Even a general allegation of "it's not true" incorporating a reference to a CICA claim would trigger investigation and response by the Crown in the pre - trial process and can be raised as an arguable issue with the Judge.

We do not accept the premise that a defence claim of an untruthful allegation of sexual assault is motivated for a false CICA claim is difficult to counter. If this is part of the defence case as stated at a preliminary stage it can be met by the Crown in response to this part of the defence. The challenge or rebuttal needs to come in further questions in chief, additional questions from Prosecution Counsel to the complainant or in re-examination. It may include the provision of additional evidence about the claim or by highlighting evidential features of the case that support the claim or merely the mechanics of making a CICA claim. We additionally warn against any suggestions of curtailing by legislation or otherwise the content of Counsel's speeches. Using claims for CICA as an example of such a prohibition is poor, it ignores the value of making a virtue out of a seemingly hopeless defence attack on the strength of the Crown's presentation of the case and is a dangerous path to go down.

We do not agree that CICA claims in sex cases have a unique potential to cause prejudice. The issue where there is one in RASSO cases is often an argument about credit, reliability, veracity and to an extent behaviour that is alleged by the defence to be counter to expectation so that the jury cannot or may not be sure as to guilt. All of these issues can be and are capable of being countered in the trial by positive explanation. There could be changes in the way in which the CICA scheme operates, but it would need to be an overall change for all offences, again multiple rules just for one offence will not be practicable.

We agree that there can not be an outright ban on a challenge to credit on the basis of seeking compensation. We have set out above ways to counter this claim, let alone the clear capacity for complainants to make a legitimate claim. In any event how is it to be determined that a compensation claim is valid and reliable any more than the sexual assault claim based on self-reporting in a trial? Since the abandonment of the evidential rules requiring corroboration in RASSO cases, potentially

unsupported self-reporting allegations of sexual assault are made and have to be determined by a jury. What is important is how such cases are presented and run. The idea that a legitimate line of defence enquiry and attack is denied is unlikely to be adopted or enforced by a judiciary at whose professional heart is the fairness of the proceedings. In addition, this along with other suggestions that involve a dissection of potential defence lines of question on the basis of some notional judicial control / intervention would make the pre-trial process ever more long and complex. The system can little cope with the advent of s28 procedures, with all their concomitant problems, yet to be resolved and complicated by the ever fewer number of counsel on both sides being willing to undertake such cases, let alone a large further regime of pre-trial litigation over a variety of question methods.

Consultation Question 38.

14.67 We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require leave and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence.
14.68 This would require that evidence and cross-examination about criminal injuries compensation claims would only be admissible if:

(1) the evidence has substantial probative value; and
(2) its admission would not significantly prejudice the proper administration of justice.

Do consultees agree?
14.69 Which, if any, of the following factors should the judge consider when deciding whether to admit evidence or permit cross-examination about criminal injuries compensation claims:

(1) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;
(2) the interests of justice including the defendant's right to a fair trial;
(3) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and
(4) the risk of introducing or perpetuating myths or misconceptions.

14.70 Are there any other factors that the judge should consider when deciding whether to admit evidence of a criminal injuries compensation claim?
14.71 Should the list include "any other factor that the judge considers to be relevant to the individual case"?

We do not agree that cross examination about CICA claims should be subject to judicial leave, subject to a notional enhanced relevance admissibility threshold and "structured" discretion test. We are of the view that this would create an unnecessary fetter on the right of the defence to challenge a complainant's credit and reliability and ignores the very practical value of "counter defence tactics" in

the presentation of the Crown's case. Were such an imposition to be inserted anywhere, the only criteria would be interests of justice and fair trial with regard to the individual case and issues in that case as raised by the defence. We do not agree that there is any provable or reliable "myth or misconception" in this situation. Complainants need to be properly informed, without fear, of their capacity if they choose, to make a CICA claim according to the rules that apply. The Crown deal with the consequences from that decision if there are any.

Consultation Question 39.

14.72 We provisionally propose that the Judicial College consider whether judicial directions should be used:

(1) where permission is given to adduce evidence and cross-examine regarding a criminal injuries compensation claim; or
(2) to address the risk of jurors relying on misconceptions if inadmissible evidence of a criminal injuries compensation claim is introduced or prohibited cross-examination on such a claim occurs.

Do consultees agree?

We do not agree with this question as is clear from the above. There is without issue room for a revision of judicial directions and with some power, but in order to make those we will propose relevant, acceptable and workable amendments or additions to judicial directions eg in regard to the "timeliness of reporting". We do not accept that questioning about CICA claims is a highly prejudicial area of concern. Such questions can be rebutted and used against a feckless defence. Restricting reasonable defence lines of "attack" is neither advisable, practical or likely to be effective. Making this topic the subject of protracted satellite litigation will protract an already long delayed system. Ultimately this is an issue of case management for the parties.

CONSULTATION CHAPTER 7: SPECIAL MEASURES

Consultation Question 40.

14.73 We provisionally propose that in sexual offences prosecutions, the term "measures to assist with giving evidence" should be used instead of "special measures". Do consultees agree?

YES - this is a better term than “special measures”

Consultation Question 41.

14.74 We provisionally propose that complainants in sexual offences prosecutions should not be included in the categories of “vulnerable” or “intimidated” witnesses under sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999. Instead they should be automatically entitled to measures to assist them giving evidence solely on the basis that they are complainants in sexual offence prosecutions. Do consultees agree?

YES; automatic entitlement encourages engagement from witnesses and focusses thought at PTPH/GRH

Consultation Question 42.

14.75 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to standard measures to assist them giving evidence, with the ability to apply to the court for additional measures. Do consultees agree?

YES to auto-entitlement to standard measures; and there should be a form specifying which measures are sought to encourage early engagement and focus.

All provisions proposed at para 7.76 are to be encouraged and supported, with the following caveat and comments regarding meetings between complainants and prosecution counsel.

We note that these proposals do not suggest pre-trial/pre-hearing meetings with trial counsel as a matter of course. This should be incorporated within the rights of a witness in the Victim’s Charter. While pre-trial meetings between prosecution counsel and complainants are a good idea in principle, unless and until continuity of counsel is assured – which depends on factors such as reliable, fixed listing and the availability of instructed counsel [which is not assisted by the fact that years of underfunding have contributed to, amongst other problems, too few qualified counsel being prepared or available to undertake RASSO work] then this is wise: it can be unsettling for complainants to meet new counsel at short notice. That said, the courts should be encouraged – even mandated – to allow replacement counsel sufficient time to build a rapport with a complainant if counsel has had to come into a case late.

Consultation Question 43.

14.78 We provisionally propose that time limits for special measures applications should not be changed or removed. Do consultees agree?

Yes

Consultation Question 44.

14.79 We invite consultees' views on the role of Ground Rules Hearings in sexual offences prosecutions. In particular:
(1) The benefits and costs of having Ground Rules Hearings in every sexual offences prosecution.
(2) Whether they should be mandatory, or whether there should be a presumption that Ground Rules Hearings should be used in all sexual offences prosecutions where a complainant is required to give evidence.
(3) Whether the role and purpose of Ground Rules Hearings should be made clearer in guidance, training or legislation.
(4) Any other views on how courts and practitioners can be encouraged to utilise Ground Rules Hearings in all cases where they may be useful.

Courts should consider the need for GRH on a case-by-case basis, but with the expectation that they will be the norm: this would encourage early and focussed engagement and thought, so should be a specific requirement for consideration at PTPH.

We note and adopt the observations in the report that a GRH could be a useful forum for addressing such pre-trial applications as s41 applications to cross examine about sexual behaviour and bad character, at least in circumstances where a ruling regarding bad character does not need to be deferred until a point during the trial.

This will only work, however, if GRHs take place before a judge who is certain to be the trial judge, who has sufficient information on the digital case to make decisions and with a guarantee that both counsel instructed for trial are able to attend the GRH. While we note that efforts are made to ensure continuity in this way at the moment, that continuity is all the more vital if the GRH is to be used for the extended purposes proposed here. Certainty in listing across the lifetime of the case therefore becomes all the more vital, and counsel's fees need to be given better weight; unless the CJS can retain

an adequate supply of counsel who are both qualified and willing to undertake RASSO trials on a regular basis, then most or all of the [often laudable] ambitions in this consultation paper will fail.

Consultation Question 45.

14.80 We provisionally propose that a complainant in a sexual offences prosecution should be automatically entitled to the use of a screen so that they cannot see the defendant while they give evidence in court. Do consultees agree?

Yes

Consultation Question 46.

14.81 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use a live link to join the trial proceedings and give evidence. Do consultees agree?

Yes; and we encourage the use of live link from a location away from the court building in appropriate cases. We also note that some courts still do not give sufficient attention to the fact that if a witness gives evidence via live link, the defendant – who obviously has to be present while the evidence is given – will be able to see the witness unless the screen/s showing the witness is/are screened from the defendant's view. That facility needs to be available in all court rooms in which RASSO trials [or parts of them; s28 hearings] are conducted, and complainants need to be made aware consistently that even "basic" measures such as screens or live link can be used in conjunction with each other. For a witness to give their best evidence the technology must permit clear visual and audio facilities.

Consultation Question 47.

14.82 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to pre-record their evidence. Do consultees agree?

Yes, however this has to be in a complainant's best interests. That is often not the case at the moment.

We know that the current contract which HMCTS has with Vodafone is not fit for purpose: it is impossible to pause a recording to enable legal discussions "in the absence of the jury" as the need

arises; this in turn makes it necessary for the court and counsel [counsel usually taking the lead, unpaid] to edit the recording after the event; and the current contract requires a court and a recording session to be booked for half a day even if the hearing is likely to be short. Perhaps when we move to the more flexible HMCTS-based recording system when the Vodafone contract expires, we could suggest that there are 2 days a month when no court does anything except GRHs and s28 hearings?

S28 is being used as a means of avoiding listing difficulties because once the recording is completed the case ceases to be a priority and the trial can take place 2 or more years later. This practice has to end: whilst of course it is said that a complainant's part in the trial process is in one sense "over" once they have given their evidence in a pre-recorded s28 process, that is only true in that limited sense: the fact that the rest of the trial process remains outstanding must inevitably weigh heavily on any complainant or defendant, often leaving them unable to look forward or past the trial until after a verdict is reached.

We note that – obviously – when s28 hearings become more frequent, as will inevitably be the case now that the s28 system applies to adult complainants and a wider variety of witnesses, the pressures on listing and judicial time will become all the greater unless practical solutions are found; and we can think of nothing more practical than dedicated court days for GRHs and s28 hearings.

We note also that this might perhaps encourage counsel to continue taking RASSO work – both prosecuting and defending – but, linked with this fundamental and existential concern regarding retention, we also encourage both the CPS and the LAA [and thus the MoJ] to pay counsel a trial brief fee for both the s28 hearing and for the "resumed trial" day, with consideration also being given to paying counsel on both sides a refresher fee for the GRH.

Without amendments to the fee regime/s, we fear that very soon even fewer counsel will be prepared to conduct RASSO work of any kind; and if that comes to pass then all of the problems which this consultation paper seeks to address will be exacerbated rather than ameliorated. We note the euphemism from the House of Commons Committee report quoted at the end of paragraph 7.119 of the consultation paper.

Consultation Question 48.

14.83 We provisionally propose that, for complainants in sexual offences prosecutions, evidence in chief, cross-examination and re-examination should all be able to be pre-recorded before trial and should not depend on there being an admissible Achieving Best Evidence (known as "ABE") interview. Do consultees agree?

Yes. On the subject of the quality and "focus" of the initial ABE from a witness, we note the variable quality of ABE interviews and hope that, with guidance and training, they will improve. As to the "narrative flow" of ABE interviews, we wondered whether there might be benefit in aligning the ABE process with the process by which a witness gives a written s9 statement: that is, that there be a general discussion of the evidence and issues as a preliminary step [obviously video-recorded if it is anticipated that the witness might give EIC via ABE, so that this preliminary recording is available for disclosure if need be], followed by a "formal" video-recorded ABE which could then be planned by the interviewer's taking into account the points raised in the preliminary interview. The feedback from some psychologists at a conference on this subject was that this would be an undesirable course, as it is important to record the witness' immediate and free recall; but this author recalls no specific reported research on the subject. We suggest that this particular aspect of RASSO cases receive further focussed attention.

Consultation Question 49.

14.84 When a direction is made for the use of a measure to assist the complainant in a sexual offences prosecution to give evidence, should the defendant be able to see the complainant when:
(1) the complainant gives evidence behind a screen;
(2) the complainant gives evidence using a live link;
(3) the complainant is pre-recording their evidence;
(4) the complainant's pre-recorded evidence is disclosed to the defence; and
(5) the complainant's pre-recorded evidence is played in court.

Unless there are good and compelling reasons why a person accused of a crime should not be entitled to see and hear all that a jury sees and hears then the principle that justice must be fair and open applies. A defendant cannot see a complainant if they are behind a screen. The other determinations must be made on a case-by-case basis.

Consultation Question 50.

14.85 We provisionally propose that, where a defendant has a vulnerability or impairment that requires them to watch someone speaking in order to understand what they are saying, provision should be made to allow them to see the complainant while they give evidence. This should be allowed even if the complainant has chosen to use a measure to assist them give evidence that would otherwise prevent the defendant from seeing them. Do consultees agree?

YES because otherwise the accused could not have a fair trial. However, the current poor quality of

visual and audio recording is unlikely to permit this currently.

Consultation Question 51.

14.86 We provisionally propose that where a screen, live link, or pre-recorded evidence is used for a complainant in a sexual offences prosecution to give evidence, it should include measures to prevent the complainant from being seen by the public observing the trial. Do consultees agree?

Each case will depend upon its merits. There will be cases where this is appropriate.

Consultation Question 52.

14.87 If measures prevent the complainant in a sexual offences prosecution from being seen by the public in the court when they use a screen or live link to give evidence or when their pre-recorded evidence is played, but the public are still able to hear the evidence, should there be an exemption to allow:
(1) a member of the press; or
(2) any other individual or group
to see the complainant?

No.

Consultation Question 53.

14.88 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the exclusion of the public from observing the trial while they are giving evidence, whether in court or by live link, or while their pre-recorded evidence is played. As is currently the case under section 25 of the Youth Justice and Criminal Evidence Act 1999, exclusion of the public would not apply to: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, all of whom would still be permitted to attend. Do consultees agree?

No. This should be determined on a case-by-case basis and should be a subject for mandatory discussion at PTPH/GRH.

Consultation Question 54.

14.89 If the public are excluded from observing the trial while a complainant in a sexual offences prosecution is giving evidence, whether in court or by live link, or while their pre-recorded evidence is played, should there be an exemption to allow the attendance of any other individual or group, in addition to those listed in the Consultation Question above?

We do not accept this basic premise. This should be a case-specific discussion at or after GRH.

Consultation Question 55.

14.90 We provisionally propose that the current powers to direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant should continue. Do consultees agree?

Section 41 YJCEA 1999 makes it mandatory for hearings in respect of previous sexual history that the application is dealt with in private. Currently the decision to grant or refuse is given in public. If the decision is to refuse we wonder whether that ought to be given in private. Legal rulings in respect of bad character can be dealt with in private, depending upon the circumstances of the case, but there appears to be no good reason why these matters should automatically be dealt with in private. It should be determined on a case-by-case basis at the GRH.

14.91 We invite consultees' views on whether, for sexual offences prosecutions, there should be a power to direct the exclusion of the public with the exception of: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, from observing the following:
(1) The whole trial.
(2) The verdict and sentencing hearing.
(3) When the victim personal statement is read.
14.92 If so, should this power be discretionary, or should the complainant be automatically entitled to such a direction?
14.93 If there is a direction for the public to be excluded from observing the whole trial, the verdict or sentencing hearing or when the victim personal statement is read, should there be an exemption, in addition to those listed above, to allow the attendance of any other individual or group?

Whilst it should be possible to exclude the public in certain cases it should be a power used sparingly because justice needs to be open and accessible. In addition a defendant should be able to have a supporter in court with him if appropriate because it is traumatic to be accused of rape.

Complainants sometimes wish to see a trial before they face their own trial and this would be prevented if members of the public were routinely excluded from RASSO trials. If a complainant wished to sit in the public gallery after giving evidence it would seem unfair to prevent others from sitting there, including supporters of the complainant. Both sets of family members may benefit from observing the trial. Other victims may come forward if they have observed the trial. This must be decided on a case-by-case basis.

Consultation Question 56.

14.94 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to have wigs and gowns removed while they are giving evidence. Do consultees agree?

Yes - but they should also be told that they [or the prosecution] can tell the court that they are comfortable with normal court dress, if that helps them. Many complainants prefer court dress.

Consultation Question 57.

14.95 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of a supporter when they are giving or recording their evidence at court or remotely. Do consultees agree?

No (1) the supporter needs to be a properly and consistently trained and regulated/accredited person, and (2) the need should be discussed on a case-by-case basis at PTPH. Experience demonstrates that family members are too emotionally involved to assist, even if they are not witnesses in the case; which would obviously prevent them from being supporters in court anyway. Automatic entitlement will create difficulties if there is a shortage of trained supporters available in any given case. It should not be

a reason to adjourn a trial whilst the backlog of cases means that such an adjournment would be for 1-3 years.

Consultation Question 58.

14.96 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of an Independent Sexual Violence Adviser as a supporter when they are giving or recording their evidence at court or remotely. Do consultees agree?

No - see the caveats in question 57. Whilst ISVAs are a valuable resource, there is also a need to progress cases efficiently.

Consultation Question 59.

14.97 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use an accessible entrance and waiting room that is separate from members of the public and the defendant. Do consultees agree?

Yes. All witnesses should have this right in all cases, albeit many Court centres cannot accommodate this and there is a particular difficulty for disabled complainants and witnesses with accessing the remote link rooms in many court centres. Before this could become an *entitlement*, work would be required on the Court estate.

Consultation Question 60.

14.98 We invite consultees' views on how the current legislation and practice of the use of intermediaries is working in respect of complainants in sexual offences cases with disabilities and disorders.
14.99 We invite consultees' views on how the current process might be improved.
14.100 For complainants in sexual offences prosecutions who have experienced trauma, we invite consultees' views on whether, and if so, how the impact of that trauma could best be reflected in the assessment and use of intermediaries.

We suggest detailed discussion [as necessary] at PTPH of the need for a registered intermediary: the entire CJS is limited by central government funding decisions in what it can do to assist any way in which the criminal justice process might promote the interests and well-being of any stakeholder, including any defendant. Without necessary resources across the entire CJS – including consideration of funding for

intermediaries to assist witnesses – then we fear for the future viability of RASSO trials in particular and criminal trials as a whole.

Consultation Question 61.

14.101 We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the use of live link or screens to facilitate their attendance at the verdict and sentencing hearing. Do consultees agree?

Yes- Live link should be available. Screens would only be relevant if the complainant wished to read a victim impact statement to the court.

Consultation Question 62.

14.102 Are there any other measures that should be made available to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence?

14.103 If yes, should they be available:
(1) as a "standard measure" to which the complainant is automatically entitled; or
(2) as a measure for which, as is currently the case, the complainant is automatically eligible to apply on the grounds that it would improve the quality of their evidence?

Court familiarisation visits are vital because they inform many decisions regarding trial logistics, especially at court centres where not all courtrooms are the same layout – eg Lincoln. Such visits should be a standard entitlement and HMCTS should facilitate them as a matter of course.

Consultation Question 63.

14.104 We invite consultees' views on whether there should be specific, or different, provisions for measures to assist defendants in sexual offences prosecutions to give evidence, beyond those currently available for all vulnerable defendants.

Eligible defendants should have the same entitlements and relevant considerations as eligible complainants/prosecution witnesses; a level playing field. We have never understood [logically, as opposed to politically] why this entitlement under YJCEA 1999 has never been brought into force such that defendants have had to go through the artificial process of applying under common law

authorities. There is a significant unwillingness of the judiciary to appoint an intermediary for a defendant at all and an even greater unwillingness throughout the trial. This requires training so that the requirement for a defendant to fully participate in the trial process is understood.

Consultation Question 64

14.105 We provisionally propose that the Judicial College consider providing training to the judiciary on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court. Do consultees agree?
14.106 We provisionally propose that legal professionals receive training on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court. Do consultees agree?

We agree. Criminal Practitioners who conduct RASSO prosecution cases must undergo specific training every three years in order to conduct these cases and this could form part of that training. All advocates are trained in questioning the vulnerable. However, there is little peer reviewed, evidentially based research on what impact special measures do have on juries. Such proper research as there is, based on research on real juries within our jurisdiction in England and Wales should be used. Professor Cheryl Thomas's work on juries reflects our anecdotal experience of such cases and should be properly considered even if it does not always suit the narrative of its opponents.

CONSULTATION CHAPTER 8: INDEPENDENT LEGAL ADVICE AND REPRESENTATION FOR COMPLAINANTS

Consultation Question 65.

14.107 We provisionally propose that complainants should have a right to be heard in respect of applications relating to the admission of their personal records or sexual behaviour evidence. Do consultees agree?

Firstly, a general response to the basic premise that it comes as a surprise to some complainants that they are not parties to the prosecution, but witnesses. This has been experienced throughout the courts by those prosecuting such cases and is reinforced by misleading television programmes which depict a

Complainant having conferences in Counsel's chambers, without a member of the CPS being present, and effectively calling Prosecution Counsel "my" barrister.

This could be alleviated by more accurate information being disseminated by the police and ISVAs before the case gets to court.

There is a clear difference between Complainants being able to access independent legal advice about their right to privacy in relation to private data and the provision of independent legal representation. In general, given there is a widespread misunderstanding and confusion as to what the parameters are in relation to the obtaining and use of such data, it would be helpful to have a proper and standardised approach to the advice given to Complainants. In her comprehensive article in 2015 "Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants", Professor Laura Hoyano dealt with the question of legal advice and representation for Complainants (CLR 2015 at 116). This article does not appear to have been quoted anywhere within the report.

However, the provision of independent legal representation as to the view of the Complainant is fraught with difficulty, in our opinion. There is already a gross shortage of lawyers, both solicitors and Counsel, undertaking RASSO work, and those who do prosecute RASSO cases are required, quite properly, to undergo extensive training to deal with vulnerable witnesses. In addition, the report does not appear to have considered the situation when a Complainant is a child. Would the legal advice and/or representation be afforded to the parents or guardian of the Complainant? Would this be in the presence of the Complainant? Who would choose which adult would be thus advised/represented? What would be the situation if all suitable adults were in fact witnesses (or a defendant!) in the trial?

Moreover, to accommodate legal representation for the Complainant at any pre-trial hearing would mean that particular lawyer's availability would need to be taken into account, with the possibility of creating yet further delay in an already overloaded system. If it is envisaged that the Complainant's lawyer would remain throughout the various pre-trial hearings and the trial itself, the timetabling of trials would become even more problematic.

Every RASSO prosecutor is required to challenge disclosure requests and section 41 applications robustly. Judges are also becoming increasingly reluctant to grant such applications without a very good reason to do so, bearing in mind the balancing act in a criminal trial. ILR will not prevent a complainant becoming distressed when an application he/she objects to has been granted. Where such applications are successful, it is part of prosecution Counsel's duty to explain to a complainant the reasons for the outcome. The independent lawyer proposed for the complainant is under no such duty, and there may be a schism created between a complainant and their ILR, if the complainant does not feel that the outcome of the application was what they wished.

Paragraph 8.38 of the report deals with the lack of lawyer/client relationship between prosecution Counsel and the complainant. One of the matters dealt with in this paragraph complains that Counsel is not allowed to discuss some of the evidence with the complainant. Does the report therefore envisage that the ILR would allow such discussion? How would such a proposition chime with the fundamental duty not to coach a witness? Given the ILR would have a duty of confidentiality, how could anyone know what parts of the evidence had been discussed with the complainant?

There is already an appropriate level of scrutiny for sensitive and difficult areas of evidence. SBE can ONLY be introduced within the framework of section 41. Para 8.40 suggested that defence barristers introduce SBE outwith this framework. If this is happening, it should be robustly dealt with by the trial Judge and by a comprehensive response from prosecution Counsel to the section 41 application or any attempt to get SBE in "by the back door". If such attempts are made within the trial process "on the hoof", the provision of ILA and ILR will not prevent such an application, only the trial Judge and prosecution Counsel, both of whom are present at the trial, can stop this.

The CBA do not agree with the proposal as set out in Q 65. A much more detailed and nuanced statement from the complainant in relation to permission for third party material (a "Stafford statement") could provide the same assurances and the complainant already has the opportunity to refuse to have such material placed before the court, with the reasons for that refusal.

A complainant might not understand the legal reasons why a section 41 application, if made, might be successful. ILA and ILR will not change that. Robust challenges to such applications should and are being made daily in courts. It is incumbent upon prosecution Counsel to explain to a complainant why such an application is being made and why it has been successful.

Consultation Question 66.

14.108 We provisionally propose that complainants in sexual offences cases should have access to independent legal advice, assistance, and representation in respect of requests and applications relating to personal records and sexual behaviour evidence. Do consultees agree?
14.109 If consultees do not agree that complainants should have access to independent legal advice, assistance, and representation, we invite consultees' views on whether complainants should have access to:
(1) Independent legal advice only?
(2) Independent legal advice and assistance only?
(3) Independent legal representation only?
(4) None of these?

We do not agree with the proposition suggested at 14.108.

"None of these" is the response required, for the reasons set out above in response to question 65.

Consultation Question 67.

14.110 We provisionally propose that independent legal representation for complainants in sexual offences prosecutions should include representation at court when applications for admission of such evidence are determined, whether that is pre- trial or during the trial in the absence of the jury. Do consultees agree?

We do not agree with proposal at paragraph 8.159. The availability of RASSO counsel is a nationwide problem at present and likely to continue in the foreseeable future given the backlog of cases in the Crown Court which continues to grow and which some have calculated will take 15 years to clear. There are simply insufficient specialist lawyers undertaking RASSO work to make the proposal viable. At present, RASSO lawyers have to undertake extensive training prior to accepting any instructions, and therefore even if funding and availability were not issues, the availability of training and the time taken to train such people would add further delay to an already overstretched system. The funding of

such a proposal, including the provision that the ILR would be available throughout the trial, would be a huge drain on resources which are better deployed to increase the number of specialist RASSO advocates.

Furthermore, and with particular reference to the proposal that ILR is made available during the trial process, given the report envisages ILA having already been given pre-trial, it is reasonable to assume that the Complainant would seek the same lawyer to represent their interests at trial. That person's availability would therefore need to be taken into consideration at each and every hearing and throughout the trial. Given the paucity of available lawyers at present, such need for representation would further delay the trial process for any Complainant which can only be to their detriment. In paragraph 8.142 it is stated "The trial would need to be adjourned to make time for the complainant to instruct a lawyer and for the lawyer to prepare to make representations to the court on the application. Provision of legal advice and representation can be prompt (for example, when a defendant is arrested, they are able to instruct a lawyer to represent them at the police station within hours). Also, applications relating to SBE and personal records are relatively narrow in scope and would not require the length of preparation needed for a whole trial". This totally misunderstands the way in which lawyers prepare for any hearing as in order to appreciate the relevance of any material all material relating to the allegation must be considered, nor does it take into account the time needed for a lawyer to remain throughout the trial to deal with any applications which arise.

Consultation Question 68.

14.111 We provisionally propose that independent legal advice and assistance should include, where appropriate, legal information leaflets, online and telephone advice, and in-person advice and assistance. Do consultees agree?

There can be no sensible objection to legal information leaflets for Complainants, given that all parties will know what is in them and the information is not case specific. However, the objections to other means of providing ILA remain. The fundamental objective of all who investigate, conduct or support in RASSO cases, including the police, the CPS and ISVAs, should be to properly explain proceedings to

a Complainant within the confines of the "Speaking To Witnesses At Court" guidance and the CPR. This protects the Complainant, and therefore his or her evidence, by ensuring all contact with others is properly confined.

Consultation Question 69.

14.112 We provisionally propose that legal advisers and representatives should be permitted to access documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence. Do consultees agree?

The CBA do not agree with this proposal. Since there can be no disclosure of what was discussed between the complainant and their ILR, the parameters of the complainant's answers to sexual history cannot be known or explored by the parties. It is the complainant who is at risk of adapting, even sub-consciously, their evidence to meet other material and therefore should be protected from this risk.

In certain circumstances it may be necessary, to fulfil the broad-brush approach envisaged by Q 69, to have access to the defendant's personal records. What power would the ILR have to compel such disclosure to the ILR and the complainant? The risk and scope of satellite litigation is vast.

Consultation Question 70.

14.113 We provisionally propose that legal advisers and representatives should be permitted to engage directly with police, prosecutors and defence counsel where necessary. This is in order to obtain trial documents necessary to provide full and frank advice, assistance and representation (while bound by the rules on witness coaching) relating to personal records and sexual behaviour evidence. Do consultees agree?

The response to Q69 under para 2 is pertinent to Q70. Moreover, what sanctions does the report envisage should any of the parties named not engage with the ILR?

In what way is it envisaged such engagement would take place? Round the table with all present? Mention/disclosure hearing before the trial Judge? Separate telephone calls or conferences? Would it be an ongoing permission, revisited when further documentation or statements have been obtained? In what way would the other parties be remunerated for their time? Who would decide which documents

were and were not relevant for the stated purpose of providing full and frank advice, assistance and representation to the complainant?

The proposal particularly for Prosecution and Defence Counsel to engage with the ILR has not been costed, nor has a protocol been prepared, canvassed or piloted to consider how this would work in practice. If there is disagreement between the parties, presumably this will have to be adjudicated on by the trial Judge. As we have said before, this adds a further layer to the proceedings which will cause unnecessary delay and cost.

Consultation Question 71.

14.114 We invite consultees' views on whether the independent legal representative for the complainant should be permitted to:

(1) attend the trial and, not in the presence of the jury, make representations to the judge in respect of compliance with the order permitting the relevant evidence to be admitted;
(2) attend and make representations only while the complainant is giving evidence relating to their personal records or sexual behaviour, including during cross-examination, whether at trial (including in the presence of the jury) or during a pre-trial hearing at which their evidence is recorded; or
(3) make representations to the court during the whole trial in the presence of the jury.

The CBA do not agree that ILR is necessary at all. However, in an attempt to answer Q71, it cannot be right that objections and representations to questions and evidence are made in the presence of a jury. This is a fundamental tenet of the criminal justice system, namely that matters of law are dealt with in the absence of a jury. To suggest otherwise indicates a lack of understanding of our Criminal Justice System.

Similarly, to deal with any matters in the presence of the complainant would alert the witness to a difficulty or objection, which should be dealt with in the absence of witnesses.

In addition, matters of admissibility of personal records and sexual behaviour are not dealt with during cross-examination but in advance of the trial commencing.

Consultation Question 72.

14.115 We provisionally propose that independent legal advice and independent legal representation for complainants in sexual offences cases should only be provided by qualified legal professionals. Do consultees agree?

The CBA agree that, in the event that ILR is extended to complainants, it should only be provided by qualified legal professionals, with rights of audience in the Crown Court, moreover professionals who have themselves completed the relevant RASSO training and RASSO courses and who would fit the criteria of grades 3 and 4 for CPS RASSO panel advocates.

Consultation Question 73.

14.116 How should the role of independent legal advisers and representatives be defined?
14.117 Would written guidance, such as a code of conduct, be useful? If so, what should it include?

The roles of independent legal advisers and representatives should be defined in either a statutory instrument or the CPR. They should be very carefully considered to deal with every conceivable situation.

A code of conduct with the necessary sanctions for non-compliance should be written and should incorporate the same duties, responsibilities and limits as are placed on prosecution Counsel at present. Notes of any meetings or conversations with complainants should also be kept, as it may be necessary in certain circumstances for these to be disclosed. Sanctions for non-compliance with any code of conduct should also be considered.

Such independent advisers will require professional indemnity insurance.

Consultation Question 74.

14.118 We provisionally propose that complainants in sexual offences cases should have access to independent legal advice and assistance in relation to their right to measures to assist them give evidence (currently called "special measures"). Do consultees agree?

The CBA do not agree with this proposal. However, from the experience of many Counsel in court, it does appear that special measures are not universally explained properly or sufficiently to complainants, prior to an application being made. On many occasions complainants have not been

made aware of the availability of a "menu" of special measures which can be used in tandem with one another to facilitate the complainant giving evidence. These measures can easily be explained to a complainant in a booklet.

In addition, Counsel have experienced situations where a complainant has been told they can NOT give evidence live in court, despite wishing to do so.

Both of these situations, and many other confusions surrounding special measures, can be managed without recourse to ILA or ILR. ISVAs are [or should be] well versed in the various special measures available and are the professionals best placed to advise those they are supporting, in conjunction with the police. It is noted that the report suggests the police might wish a complainant to give their evidence in a certain way. Better training for the police and ISVAs, coupled with a more detailed MG2 statement when applying for special measures will allow a complainant's voice to be heard. On the day of the complainant giving evidence, it is always possible to alter the special measures in an oral application, should the ccomplainant wish that to be done. To have ILA and/or ILR as proposed in Q74 would be a waste of badly stretched resources.

CONSULTATION CHAPTER 9: LIMITATIONS ON THE CONDUCT OF SEXUAL OFFENCES TRIALS

Consultation Question 75.

14.119 Should it be mandatory for practitioners to undergo training on myths and misconceptions in order to work on sexual offences cases?

We do not consider mandatory training to be necessary. As is noted in the consultation paper § 9.8 the Crown Prosecution Service (CPS) has a panel of specialist advocates who have already undergone a rigorous selection process. Once accepted onto the panel there is an obligation to remain refreshed on current law and practice. Nationwide there is already the opportunity to attend Circuit wide specialist training. Many barristers both prosecute and defend and the opportunity to attend this training is

afforded to all barristers, regardless of whether or not they prosecute. Similarly the CBA offers training and education to its members annually, covering a wide portfolio of topics in RASSO across it conferences and Winter lecture series delivered by leaders in the field.

Consultation Question 76.

14.120 We provisionally propose that, in sexual offences prosecutions, the test for determining acceptable lines of questioning of a witness on subject matter which might otherwise invoke myths and misconceptions should continue to be relevance, other than for questioning about sexual behaviour or claims for criminal injuries compensation. Do consultees agree?

Agreed. The difference between inviting generalisations and addressing those issues which are pertinent to each individual case can be complex and are best dealt with by the trial judge.

Consultation Question 77.

14.121 We invite consultees' views on whether there are any types of potentially highly prejudicial material or factual scenarios beyond sexual behaviour and claims for criminal injuries compensation where evidence and cross-examination should be subject to an enhanced admissibility threshold rather than the relevance threshold?

Where the complainant's employment may at first blush, invite reliance upon general myths and stereotypes, this issue might benefit from judicial guidance, either pre-trial or during trial. A context-sensitive approach is desirable, without the need for an enhanced admissibility threshold.

Consultation Question 78.

14.122 We invite consultees' views on how the situation can be improved so that the requirement for lines of questioning to be relevant is considered and adhered to in each case. Some possibilities include:

(1) codification of the relevance threshold;
(2) a requirement that lines of questioning are discussed and approved by a judge at a hearing in advance;
(3) that the Judicial College consider whether a direction should be given where a line of questioning is deemed irrelevant because it relies on myths.

It is acknowledged that judges have an active duty to stop irrelevant questioning and frequently do so. It is not uncommon for counsel to raise, where appropriate, issues which require judicial guidance prior to the commencement of the trial or to flag up an area for further discussion. Nor is it uncommon

for issues to be dealt with as they arise, in the absence of the jury. Counsel are best placed to deal with concerns on a case by case basis with judicial assistance and intervention, where necessary from their opponent. Any consideration of a definition of relevance must be within the context of a criminal trial and the issues of the case. Frequently we have seen cases reported in the press or on social media in which the author has perceived the inclusion of irrelevant material or questioning without having regard to the overall content of the trial or function of the judge. The trial process works well but the understanding of how it works less so.

Consultation Question 79.

14.123 Should the Judicial College consider providing guidance to judges on how best to respond to generalisations which rely on myths or misconceptions where they are raised in counsels' speeches? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;
(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or
(3) suggesting that delayed reporting, in itself, makes complainants less credible.

(1) Such a generalisation would be without any basis and no member of the RASSO group has ever heard an opponent suggest this in a speech. Defence Counsel would be invited to correct this. Judges are already well placed to deal with this within the directions they give juries often now at the start of trials.

(2) If the facts of the case indicate a complainant's evidence requires greater scrutiny then there is nothing wrong in principle with suggesting that, and it has always been a question of weight. It is illogical to suggest otherwise given the centrality of their evidence which is marked by additional measures such as video interviews and other special measures. The same applies to any suggestion that a defendant's evidence may require greater scrutiny, if the evidence supports such an assertion then it cannot be said to be a generalisation.

(3) There is already a robust direction dealing with this issue. The Crown are permitted to adduce evidence of *recent* complaint. A defendant is not allowed to adduce evidence of recent denial. Juries are reminded that repetition to and by a third party, of itself, does not go to the truth of an allegation. The immediacy (or otherwise, subject to judicial direction) with which such a complaint is made is something a jury is entitled to consider when considering where the truth lies. Delays in reporting may or may not impinge on credibility because each case turns on its own facts. Whilst there may be many good and powerful reasons why a complainant waits to report an allegation there can be circumstances where a false allegation is made because a complainant becomes aware of a change in a defendant's personal life or is determined to seek revenge for some wrong. The timing as to how an account unfolds is best dealt with by a judge on a case by case basis, this includes when a defendant provides an explanation later than they could otherwise be expected to.

It is understood that the judiciary are already made aware of generalisations which rely on myths and stereotypes, and receive training before sitting in sexual offences cases. The Crown Court Compendium (June 2023) highlights in Chapter 20 a multitude of areas that the judge may direct the jury upon.

Consultation Question 80.

14.124 Should the Judicial College consider providing guidance to judges on warning advocates about the potential for professional misconduct consequences to follow from their reliance on myths and misconceptions in the conduct of a sexual offences case?

AND

Consultation Question 81.

14.125 Should the Bar Standards Board consider making explicit reference in its Code of Conduct to the potential for professional misconduct consequences to arise from reliance on myths and misconceptions in sexual offences cases?

In response to both these questions: No. Counsel are guided by their Code of Conduct and expected to observe their Core Duties. Any warning by a Judge as to misconduct may deter Counsel from pursuing a legitimate line of questioning, which in turn may risk unfairness.

It is noted at § 9.129 of the consultation that there might be many reasons as to how it is an advocate *may,* unintentionally, stray into reliance upon myths and stereotypes, one such reason given is "work pressures". Given the current pressures on the criminal justice system and the apparent shortage of experienced counsel to appear in sexual offences cases, further pressures would do little to encourage advocates to accept instructions or continue to accept instructions in this specialist area. A warning rather than redressing the balance during summing up could appear unduly heavy handed.

Further, we note that the BSB Handbook requires reporting of professional misconduct only if that misconduct is "gross." That qualification is there for a reason and is justified. To introduce a lower test for reporting in RASSO cases would be a further mis-step because it would again introduce a distinction between RASSO trials and other criminal trials. The laws [and we emphasis that they ARE laws] regarding the admissibility of evidence remain applicable to ALL trials, be they RASSO trials or not.

Consultation Question 82.

14.126 Should the Bar Standards Board consider explicitly stating in its Code of Conduct that generalisations relying on myths and misconceptions about sexual offences in advocates' speeches are prohibited as they constitute a breach of the duty not to mislead the court? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;
(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or
(3) suggesting that delayed reporting, in itself, makes complainants less credible.

Advocates do not make crass generalisations about every complainant in every case. There may be instances where a delay in reporting impinges upon credibility. The key evidence in a case where the case relies on the evidence of one witness may mean that the jury must scrutinise that evidence more carefully than that of officers who attend the scene and take statements. Counsel are guided by their Code of Conduct and expected to observe their Core Duties, which include: CD1 You must observe your duty to the court in the administration of justice. CD 3 You must act with honesty and with integrity. CD5 You must not behave in such a way which is likely to diminish the trust and confidence which the public places in you or in the profession. Where an advocate makes a decision intentionally

to place reliance upon myths and stereotypes without any evidential basis for doing so then there is already sufficient redress under the current Code.

Consultation Question 83.

14.127 Should the Judicial College consider providing guidance to judges on warning advocates about the possibility of a wasted costs order where reliance on myths and misconceptions in their conduct of a sexual offences case has caused costs to be wasted?

If there is any reason for a jury to be discharged because judicial directions cannot correct any false impression created by counsel then there is already plain guidance on the issue of wasted costs and with that the inevitable referral to the BSB. In such rare cases where Counsel has behaved improperly in speeches the Court of Appeal have made it plain that the solution is judicial direction to the jury, not to discharge them. Wasted costs will not therefore apply.

CONSULTATION CHAPTER 10: JURY DECISION MAKING

Reference is made to research from Australia which indicated that evidence at trial that the complainant had kissed a man earlier in the evening was admitted. The legal direction as to stereotypes is criticised because it was not *mandatory ie you cannot*. Firstly, such evidence would fall foul of s41 and would not be admissible. Secondly, such directions on stereotypes are not mandatory but depend on the jury's fact finding.

Consultation Question 84.

14.128 Should there be a rebuttable presumption that a direction on myths or misconceptions will be given?

There is a presumption that the directions in the Crown Court Bench Book should be given, tailored to the specific facts of the case. The direction would have to be tailored to the facts of the case. Not all cases include reference to all stereotypes. If directions are made "rebuttable" is it suggested that a Judge

would have to give a written ruling as to why the judge has not given directions? What would the sanction be?

14.129 If so, what should be the triggering conditions for a presumption in favour of a direction? For example, these could be that evidence is or will be led, questions are or will be asked, or an application by the parties.

The Judge will have read the prosecution papers, defendant's interview, defence statement and any applications which have been granted regarding previous sexual behaviour or bad character. As a result the Judge ought to be able to identify, with the assistance of Counsel, any stereotype or myth which might apply. That identification would be the trigger, but other directions may be required once the evidence is heard. Tailored directions would then be given in one or two stages.

Consultation Question 85.

14.130 Should the test for rebutting the presumption be where no reasonable jury would consider the evidence, question, or statement to be material, as it is in Scotland?

If there is a rebuttable presumption, then the test should be that the trial Judge does not consider that the evidence, question or statement is material. The suggested approach is too prescriptive and narrow. Marginal relevance may give rise to a determination that it would be inappropriate to give a direction. Reasoned judgements should be mandatory to justify the rebutting of the presumption but no more.

Consultation Question 86.

14.131 In relation to which myths or misconceptions should there be such a rebuttable presumption? Some examples from other jurisdictions are:

(1) delay;
(2) absence of resistance; and
(3) inconsistency.

If such a presumption existed then the directions should be provided addressing the following areas: no typical rape victim or perpetrator, responses to rape, absence of physical injury, delay in reporting, inconsistency, perpetrators can be people you know, lack of necessity for distress by complainants at

the time or in giving evidence, inconsistencies. An absolute direction would be unnecessarily prescriptive.

Consultation Question 87.

14.132 Are there any myths or misconceptions for which the decision to give the direction should remain entirely at the discretion of the judge? If so, in relation to which myths or misconceptions?

All should be a matter for the Judge to use his or her discretion depending on the facts of the case.

Consultation Question 88.

14.133 We provisionally propose that the content of a direction should not be mandatory or the subject of a presumption and should be left entirely to the judge's discretion. Do consultees agree?

Yes. Clear and focussed guidance in the Crown Court Bench Book could be provided for each typical direction so that the Judge has the basis upon which to frame a decision. Judges have discretion to use their own words in directions provided that they follow the guidance in the Bench Book. Cases repeatedly indicate that following the Bench Book guidance is the safe and easiest way to avoid difficulties. Some of the current suggested directions are over long and complex. An overly prescriptive approach, apart from impinging on the independence of the judiciary, might lead to juries focusing on myths and stereotypes other than those which are central to the issues they may have to consider.

Consultation Question 89.

14.134 Should the Judicial College consider amending the Crown Court Compendium example directions on delay and freezing better to reflect the empirical evidence about complainants' responses?

The misconceptions are (1) that a late complaint must be false and (2) that a complainant must fight/protest. These are misconceptions not myths. Evidence as to motives for a delayed complaint and what a defendant may have understood if a complainant has frozen may be relevant and admissible. If there is uncontroversial, evidence based, scientific research on freezing that could be incorporated into

a direction, but research is rarely that. There can be no such uncontroversial research on delay because there are false allegations. Any direction must be balanced so that it demonstrates what the opposing views are (see R v Miller [2010] EWCA Crim 1578).

Consultation Question 90.

14.135 Are there any example directions other than those on delay and freezing which do not reflect the empirical evidence, and therefore the Judicial College should consider amending?

We have not been provided with a definition of empirical evidence for these purposes. All directions will be adapted by the Judicial College on a regular basis as knowledge develops. An up to date direction in respect of rape in a context of domestic abuse is required.

The only research into jury deliberations currently available from Professor Cheryl Thomas (at [2021] CLR 987 1004) does not support jury bias due to myths and prejudice as being widespread. Further, the two areas she identified as requiring consideration were the prevalence of stranger and acquaintance rape and the emotion of the complainant when giving evidence.

Consultation Question 91.

14.136 We provisionally propose that the Judicial College should consider whether additional example directions are needed in order to address the particular myths and misconceptions relating to male complainants. Do consultees agree?

Yes. For example, myths exist suggesting that (1) only homosexual males sexually assault men, and (2) homosexual men are more promiscuous etc. Myths such as these might well need to be the subject of appropriately tailored directions.

Consultation Question 92.

14.137 Should the Judicial College consider an additional example direction to address the presentation and particular myths and misconceptions relating to complainants with a mental health condition or learning disability?

If a complainant's presentation is affected by a mental health disorder that should be a matter which is reduced to agreed facts, as with any learning disability. If there is evidence before the court that the condition has no impact on credibility or ability to give evidence then that should be a specific direction rather than a myth or misconception. Juries habitually hear from vulnerable witnesses who fall into these categories. There is no special requirement for a specific direction in RASSO cases.

Consultation Question 93.

14.138 We invite consultees' views on the effectiveness of the example directions on:
(1) the prevalence of acquaintance rape as opposed to stranger rape; and
(2) distress shown by the complainant when giving evidence?

Professor Cheryl Thomas's recently published long-term research into myths and stereotypes demonstrated that jurors can believe that rape is something that tends to occur amongst strangers. That judicial direction should be strengthened to take account of this misconception. Similarly her research demonstrated that jurors may expect distress from complainants. The direction given for distress is much more detailed and does not require adjustment.

Consultation Question 94.

14.139 Are there any other groups of complainants or myths and misconceptions which are not currently addressed by example directions and should be?

Continued contact with a defendant by a complainant. Continued sexual activity after the event by a complainant with a defendant. Sex workers. Escorts. The misconception that meeting via a dating application implies consent to sexual activity. Lack of physical injury.

Consultation Question 95.

14.140 We provisionally propose that the Judicial College consider training about the use and benefits of split directions and split summing up for myths directions. Do consultees agree?

The RASSO training programme for the judiciary is forward thinking and detailed. If there were currently no training on such matters it should be included. Our understanding is that there is.

Consultation Question 96.

14.141 Should expert evidence of the general behavioural responses to sexual violence be admissible to address myths and misconceptions in sexual offences trials?

No. An expert in such circumstances cannot comment on the specific facts of any particular case in relation to the credibility of the complainant as that would usurp the role of the jury. RASSO trials are already difficult enough to get listed. Taking account of the availability of experts, should sufficient experts be available in this field, would add significant expense and delay to court processes because there would quickly develop a body of defence experts who would give contrary evidence. The result would be a "battle of the experts" which would divert the jury's attention from the central issues in the case.

Further, experts are not required to deal with myths and misconceptions currently. Judges simply say that experience has taught/informed us that… Expertise might be required in cases where a complainant has suffered PTSD or suffers from any significant mental health disorder outwith the experience of jurors, but expert opinion is already admissible on such specific issues in appropriate cases.

Consultation Question 97.

14.142 We invite consultees' views on the use of written juror information notices to address myths and misconceptions amongst jurors?

We have seen a proposed written juror notice regarding myths and stereotypes prepared by Professor Cheryl Thomas which the CBA approves and recommends.

Consultation Question 98.

14.143 We invite consultees' views on the use of education videos to address myths and misconceptions amongst jurors?

Education videos would be very difficult to provide to jurors because in each area of misconception a further explanation would have to be given of why a defendant might indicate that such a matter had relevance. Myths may be a different matter as they are plainly false. We do recommend general education of the public about RASSO cases and intend to produce a series of short podcasts on this subject towards the end of 2023. The Government may wish to provide education about these matters.

Consultation Question 99.

14.144 We invite consultees' views on the use of online interactive tools to address myths and misconceptions amongst jurors?

The cost of such matters and the absence of any detail here means that we cannot support such a suggestion.

Consultation Question 100.

14.145 Are there any other methods for addressing myths and misconceptions amongst jurors that we should consider?

Jurors are members of the public. If there are widely held myths and misconceptions then this should be dealt with by general education. Jurors bring their own life experiences to the Court.

Consultation Question 101.

14.146 Should there be further commissioning of, or permission for, research that engages real jurors? If so, what criteria should govern access and what conditions should be placed on research?

Yes. There has been ongoing research for 20 years on real jurors within our jurisdiction but it must be limited to general observations and not observations on the trial that they are conducting.

14.147 Should researchers and juror participants be given a statutory exemption from section 20D of the Juries Act 1974 that makes it an offence intentionally to "disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or to solicit or obtain such information"?

No. Deliberations in the jury room are and must remain sacrosanct. Should discussions take place between any outside person and a juror which might impinge on the fairness of the trial process or provide grounds for an appeal it would be contrary to the rules of justice for such information to be hidden. In addition, complainants and defendants may well have a right to see and consider any research conducted on jurors who deliberated in their case. Research, even anonymised, would require publication to enable other colleagues to comment on the findings from the factual basis. Defendants, complainants and witnesses might be capable of being identified through discussions of the facts of the case. Jurors would not feel comfortable knowing that their discussions could be considered and research demonstrates that it is not possible to know if jurors are telling some or all of the truth about their reasons for decision making if questioned. Any such research would require recording of discussions. Jurors may become reluctant to be involved in trials.

Consultation Question 102.

14.148 Which of the following methods should be prioritised for introduction and which is likely to be the most effective combination to address myths and misconceptions, alongside judicial directions?

(1) expert evidence of general behavioural responses to sexual violence;
(2) written information notice;
(3) an education video; or
(4) an online interactive tool.

Written information notice.

CONSULTATION CHAPTER 11: RIGHT OF APPEAL

Consultation Question 103.

14.149 Should there be a right, for all parties to the relevant application, to appeal the decision on an application to admit evidence relating to either the complainant's personal records or sexual behaviour?

We are in favour of retaining the current rights of appeal of all parties in respect of sexual behaviour or third party material which strike a reasonable balance between fairness and avoiding delay. The trial

Judge is uniquely placed to determine trial decisions and such decisions will not be overturned in any intermediate appeal unless they are decisions that no reasonable tribunal would make.

Consultation Question 104.

14.150 We provisionally propose that complainants who have a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant. This will only occur where the decision is made at a "preparatory hearing" (a hearing that can be ordered by a judge pursuant to section 29 of the Criminal Procedure and Investigations Act 1996). Do consultees agree?

We do not accept that complainants should have a right to be heard on matters of law. One of the consequences of such a right would be a right of appeal. However, if a complainant is given such a right to be heard during the trial process then logically the complainant would have to be given a right to appeal in order to make their right to make submissions effective and broadly equivalent to the rights of the prosecution and defence. However, outside of preparatory hearings (which we believe to be extremely rare in RASSO cases) then it is hard to see what appeal rights a complainant could be given: a complainant cannot enter into an 'acquittal agreement." If such a right were granted then a defendant would also have to be given a right to appeal an adverse ruling. Currently a defendant only has a right to appeal against conviction, should a conviction follow such a hearing. We presume that a complainant would naturally seek to appeal any ruling that was adverse to them and therefore, subject to the necessity of obtaining funding and permission for such an appeal, then appeals may be relatively frequent. So far as relevant to the concerns addressed in this consultation as a whole, we observe that extending such rights to complainants as (as it were) "parties in their own right" would risk extending the (already unacceptable) delays in, and costs of, RASSO trials; particularly in the current climate of court backlogs and underfunding, we question the utility of this.

Consultation Question 105.

14.151 We invite consultees' views on the following:

(1) Could preparatory hearings be better used to determine applications regarding the admissibility of evidence relating to the complainant's personal records or sexual behaviour?

RESPONSE - We think that the current regime for preparatory hearings is satisfactory. They are very rare in RASSO cases, but they are a possibility. The reason they are not held more often for RASSO cases, we suspect, is the likelihood of them causing considerable further delay. In addition, disclosure upon which such applications is made is often provided close to trial due to delays in provision of the material to the CPS.

(2) Should the complainant have any further right of appeal against decisions regarding the admissibility of evidence relating to their personal records or sexual behaviour that is not limited to decisions made at preparatory hearings? If so, should that right of appeal be:

(a) Limited to decisions that are made before the trial commences; or
(b) Not limited so that the right includes a right to appeal a judicial ruling on admissibility made during the trial?

See above. If a complainant is to be given a right to make representations at such applications (which we oppose) it would seem appropriate to give the complainant some right of appeal.

Consultation Question 106.

14.152 We provisionally propose that complainants should have access to independent legal advice and representation when they have a right to appeal a judicial ruling relating to evidence of their sexual behaviour or personal records. Do consultees agree?

We agree that if a complainant was to be given such rights of appeal, they would need to have access to independent legal advice and representation to make this right of appeal effective. This may be subject to a means test and possibly contributions as for civil legal aid and criminal legal aid. Perhaps some assistance could be derived from the right to representation of third parties in POCA proceedings. We query where the funding would come from for such representation, and if such money was available, we would urge that it would be better spent elsewhere to improve the complainant's overall experience in the Criminal Justice System. The right of a complainant to representation would be likely to significantly delay trials because of the necessity of adjourning for representation to be obtained, and possibly legal aid to be granted, where an issue concerning third party material or sexual behaviour

evidence arises, including possibly during the trial. In view of the usual length of a RASSO trial, delays in the case which would enable complainants to appeal or defendants to appeal during the trial process would be likely to cause the trial to be stopped and a fresh trial commenced. Jurors are given a two week slot, Counsel are committed for the length of a trial but will then immediately move to another one. Courts are already overcrowded. The shortage of RASSO-qualified counsel is noted elsewhere in this response. Both trial counsel and counsel for the complainant would have to attend the appeal which would be about seven days after such application was lodged if expedited. That would mean that any jury who were kept waiting for a decision would have lost the impact of the complainant's evidence when the case recommenced and may cause more adverse outcomes. If the trial ends then the period before which the trial could be re-listed is likely to be 2-3 years.

CONSULTATION CHAPTER 12: HOLISTIC REFORM

Consultation Question 107.

14.153 Considering the measures on which we invite views or make provisional proposals throughout the consultation paper and taking account of the following factors, are there particular combinations of measures which are particularly impactful and beneficial? What are these measures and their impact?

(1) positive impacts on complainants' experiences of the trial process;
(2) positive impacts elsewhere in the criminal process;
(3) negative impacts on the defendant's right to a fair trial;
(4) delay;
(5) costs;
(6) burdens on the parties, court, police, and complainant;
(7) unintended consequences; and
(8) other ongoing reform.

14.154 Are there particular combinations of measures which are a cause for concern? What are these measures and their impact?
14.155 Are there any combinations of measures which should be prioritised? Why?
14.156 Is the data we describe above regarding costs, case volumes, case delays and rates of attrition accurate and is there any other available data which will assist?

The delay in the prosecution of sexual offences is a major cause for concern throughout: at the initial investigation stage, file submission to the Crown Prosecution Service and then a trial listing. Together

this means it is frequently several years from initial complaint to resolution in court. Such delay has an impact not only on complainants but also on defendants.

There is also a misperception in the media that there is a low conviction rate. However for cases that do proceed to trial that is not the case.

There are a number of ways in which the severe issues of delay, lack of confidence and complainant attrition can be addressed. These are discussed throughout our response but in brief here we offer the following:

Firstly there is the question of resources: for the system to regain credibility in the eyes of the public there needs to be substantial investment in the police service, CPS, and courts.

Secondly, the issue of third party material and access which is dealt with in Chapter 3. The idea in the report of a bespoke, unified regime that governs access to, and production, disclosure and admissibility of personal records held by third parties is a good one. The present system has developed piecemeal over time and struggles to accommodate the increasing and varied amount of third party information available.

Thirdly, the honest provision and dissemination of accurate information – without any underlying political motivation or agenda, eg re conviction rates – is a vital basis for any reasoned discussion of this or any other criminal justice issue.

14.154 Are there particular combinations of measures which are a cause for concern? What are these measures and their impact?

14.155 Are there any combinations of measures which should be prioritised? Why?

As we discuss with reference to consultation chapter 4, the abolition of section 41 YJCEA 1999 to be replaced with an enhanced admissibility test with a ruling by the trial Judge might be interesting, but one which on mature consideration we oppose for the reasons we set out.

As discussed with reference to consultation chapter 8, the idea of independent legal representation for complainants would cause very significant further delays. For instance, at present there is a perception by complainants that counsel instructed by the CPS is in fact 'their barrister' whereas that is not in fact

the case and can lead to conflicts when dealing with the issue of material pertaining to a complainant or sexual behaviour applications. The proposals in the consultation paper are the wrong answers to the wrong questions.

The idea that there should be any reference to the good character of the complainant confined to sexual offences is a fundamentally flawed concept. It seeks to enhance in the eyes of the jury the status of the complainant whereas the focus of the jury should be on the quality of their evidence. It would serve to distinguish sexual offences from all other criminal offences. Any change in the law would mark a radical departure which is not justified.

Section 28 pre-recorded cross examination seems to be here to stay but currently causes many problems – as we discuss – which frequently stem from shortages of resources and counsel. It merits separate and more detailed consultation and consideration in the future.

We address concerns such as these elsewhere in our response. We recognise that reasonable views might vary; but we do strongly advocate the view that if the s28 regime is to work, then it absolutely must be planned properly, funded properly, and accommodated properly by listing officers in such a way as to ensure that the case remains a priority once any witness's evidence is pre-recorded under the s28 procedure.

It is also axiomatic – as noted throughout our response to this consultation – that any governmental response to this whole consultative process MUST allocate adequate financial resources to ALL aspects of the matters discussed: if that does not happen, then ALL of the [mostly well-intentioned] measures proposed by the Law Commission will be bound to fail.

If that failure occurs, then – particularly in the light of recent legislation [and, further, proposed draft legislation] dictating that prisoners convicted of sexual offences should serve ever longer proportions of

their sentences in custody – then [particularly regarding recent reports of judicial guidance regarding the imposition of immediate custodial sentences] we fear for the consequences for the efficiency of the CJS as a whole, and thus we fear that none of the Law Commission's proposals will work any good at all.

The consultation highlights an issue with 'myths and stereotypes' in cases of rape. There is little or no evidence to justify this as a real and major concern. There are already a wealth of judicial directions available to a jury regarding this and often judges will provide such directions both at the beginning of the trial and also again in written format at the end of the trial. There is little need for reform in this area of the law.

Above all there should be a commitment to fund the system properly at all stages. Far too frequently sexual offences trials are removed from the court list one or two days before trial due to lack of a court room or a judge and then re-listed many months later. Funding here of course also includes funding the advocates who conduct this work.

14.156 Is the data we describe above regarding costs, case volumes, case delays and rates of attrition accurate and is there any other available data which will assist?

Data for the cost of funding for ISVAs and intermediaries should be taken into account.

CONSULTATION CHAPTER 13: RADICAL REFORM

Consultation Question 108.

14.157 We invite consultees' views on whether a pilot of specialist examiners should be introduced.

We are not in favour of specialist examiners and therefore suggest that the resources necessary to undertake such a pilot scheme would be better spent elsewhere. Using specialist examiners removes the ability of defence counsel to cross examine the most fundamental witness in the case. This would

represent a wholesale departure from the adversarial style of advocacy and serve to create an unfair distinction between sexual offences and other criminal offences. Advocates, judges, police officers and registered intermediaries already have considerable responsibilities and training when it comes to questioning witnesses. The system for cross examination is already highly regulated through the use of advocacy toolkits, intermediaries and ground rules hearings as well as judicial directions. There is already a detailed ground rules hearing process at which frequently a list of questions intended for cross examination are considered carefully prior to the hearing which will carefully set the parameters for cross examination with the aim of reducing trauma. This is case managed by a judge who has also undergone specialist training. The focus should be on improving their understanding of recent research on trauma, not adding a further set of professionals and duplicating the responsibilities that currently exist.

We note the Law Commission's point that the legislation already provides for intermediaries to conduct questioning on behalf of a party but we are not aware of any cases where a judge has directed that these currently existing powers be used, or where such an order has been sought by one of the parties. This proposal is sought to be justified on the basis that the use of a specialist examiner would reduce the trauma involved in giving evidence and would therefore achieve an improvement in the evidence. If there is medical evidence of significant trauma, over and above the trauma that many witnesses in criminal cases suffer when subjected to criminal offences (violence, coercion, strangulation, blackmail, kidnap) then Counsel will adapt their questioning in accordance with their training. Experts in speech and language therapy are not legally trained and their role is to facilitate communication. They cannot and would not wish to test and challenge a complainant's account.

Consultation Question 109.

14.158 We invite consultees' views on the best model for a pilot of specialist examiners:

(1) specialist examiners taking all of the complainant's evidence;

(2) specialist examiners undertaking what is currently cross-examination; or

(3) no fixed approach, with the amount of evidence taken by specialist examiners varying with the requirements of a particular case.

We are against this in principle, but note in particular that witnesses' 'evidence in chief' in such cases is usually adduced through a police officer in a visually recorded interview, months or years before the trial, at a time when the incident has just occurred. If it is suggested that specialist examiners conduct such work they would need to be available 24 hours a day and made privy to police information so that the questioning could be focussed. This would impact on independence. If specialist examiners were to be introduced their role would have to be limited to that of cross-examination only which would occur after (1) a defendant has been interviewed and charged and provided an account (2) the prosecution had complied with their duties of disclosure (3) all reasonable lines of enquiry by the defence had been undertaken and (4) the defendant and defence team had been consulted as to the lines of questioning to be considered. One person cannot be an enabler and an accuser.

Consultation Question 110.

14.159 We invite consultees' views on whether communication experts or lawyers should be used as specialist examiners.
14.160 Should any alternative professions be considered?
14.161 Should there be a hybrid approach, which would vary depending on the context and the complainant?

Registered intermediaries are speech and language specialists who work with vulnerable witnesses. On any occasion when they have been working with a defendant and asked by Judges to explain law or procedure if Counsel are not present they have rightly refused to do so. A degree in law takes three years. A post graduate qualification in law another 12 months and thereafter 12-24 months of training is required. Intermediaries are not trained advocates and are not regulated as such. Specialist Examiners would have to have some legal training to know (for example) what questions to a witness risk making a defendant's previous convictions admissible. In practice, specialist examiners would be likely to be advocates who have undergone further communications training – which already describes most of the advocates in RASSO cases.

There are no alternative professions which could be trusted to undertake the task of cross examination. There should be no departure from the traditional model of cross examination by counsel representing their client in accordance with their professional standards.

Consultation Question 111

14.162 Do consultees agree that the model of specialist examiners considered would not pose issues for legal professional privilege? If not, please give details of the foreseen issues.

No. The defendant would have to instruct the examiner on what their case was, in order for it to be put to witnesses. This would require the examiner to have responsibilities not to divulge such information to the complainant or to the police and prosecutor and would require the examiner to be present during conferences where the D provided instructions. The report assumes that the defence case statement is the entire template for cross examination and therefore it should not be necessary to obtain confidential information from a defendant. This is a fundamental misunderstanding of the purpose of a defence statement. A defence statement is neither a civil pleading which serves as evidence in chief nor a proof of evidence and does not include each and every matter which a defendant intends to instruct counsel to ask the complainant about.

IF YOU DO NOT AGREE PLEASE GIVE DETAILS OF THE FORESEEN ISSUES

Quite often the defence case statement will aver that a defendant reasonably believed in consent which is sufficient for that document but insufficient to merely put in cross examination for example.A defence case statement is served in order to facilitate secondary disclosure, it is not a proof of evidence. In sexual offences this disclosure can often be voluminous and include inconsistent statements and other undermining material which the defence would seek to put in cross examination.

The defendant may also provide comments on other witnesses in the case which require cross examination of the main complainant. All these potentially valid areas of cross examination would not be available from a perusal of the defence case statement.

Consultation Question 112.

14.163 We invite consultees' views on whether specialist sexual offences courts should be introduced to deal with the delays and the content of sexual offences prosecutions.

We do not support this proposal. It would reduce flexibility and so increase delay. At present, judges and prosecution advocates in the Crown Court have to be specially trained to do RASSO work. With a specialist judge and specialist advocates we see nothing further to be gained by using a specialist room. There is no substitute for adequate funding of the court system. Absence of funding causes delays. If proper funding and resources were provided then there would be absolutely no need to introduce specialist sexual offences courts.

Consultation Question 113.

14.164 We invite consultees' views on the necessary features of a specialist court, including:

(1) specialist listing;
(2) specialisation within existing courts; or
(3) entirely separate courts.

RASSO cases already have specialist listing in practice because of the necessity of finding a specialist judge. Entirely separate courts would lead to avoidable delay, for example, in a 9 courtroom court centre, if a judge and court room became free because another trial had not gone ahead, it would be unfortunate if that court was not able to start a sexual offences trial because it was not a 'specialist court' and which therefore led to a sexual offences trial being adjourned, perhaps for years, which would otherwise have gone ahead.

All those who undertake this type of work are already required to undergo specialist training and defence advocates must not accept work which is beyond their professional capability.

The prospect of separate courts would not assist the position due to the lack of the number counsel willing and able to undertake this type of work. In addition it would prevent counsel from attending

other hearings listed in the same court centre before the commencement of the trial which enables continuity of counsel for complainants and defendants.

Consultation Question 114.

14.165 Do consultees agree that jury screening would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions? If not, which model of jury screening would consultees support?

There is no different regime for sexual offences than for other offences. If the statistics are correct then several members of a jury panel will have been the victim of a sexual offence perpetrated on them as a child or adult. Should they be screened out in this suggestion? The concept of jury screening would rely upon completion of a form by prospective jurors. This is an inherently unreliable and time-consuming manner of screening.

Jurors are already directed in detail in sexual offence cases as well as being required to ensure that their fellow jurors adhere to those directions. It follows from what we say above that we do not support any model of jury screening beyond that which operates at the moment, and which works well.

Consultation Question 115.

14.166 Do consultees agree that a requirement for juries to provide reasons for their verdicts would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions?

We agree that such a requirement would NOT be useful. It would lead to the creation of a distinction in the jury system between sexual and non-sexual offences as well as creating a significant number of practical issues.

14.167 We invite consultees' views on the mandatory removal of juries from sexual offences trials currently heard in the Crown Court.

The removal of the public as a jury from trying serious sexual offences would undermine public confidence in the criminal justice system. Jurors are perfectly capable, if directed properly (and supported), of discharging their role in a sexual allegation case. Sexual offences trials involve

assessments of the reliability of an individual's account, and often, sexual or domestic relationships between individuals. Many jurors have some experience of this in their own lives. This is much more likely to be the case that in prosecutions involving, for example, corporate fraud, organised crime, breach of health and safety legislation or corporate failure to prevent bribery or money laundering, where juries are asked to reach decisions in areas which may be further removed from their own life experience. We are not persuaded by the evidence as its stands that juries act on rape myths and cannot be dissuaded from doing so by strong advice from the judge. Defendants under 18 tried in the Youth Court are already in a mandatory regime of jury less trials. Perhaps some research comparing their experience and the results of such trials, compared to jury trials, may be of assistance?

The entire basis for removing jurors on the assumption that they cannot reach verdicts based on fact and law due to myths and stereotypes is rejected and is not supported by the research done in this country on conviction rates and on myths and stereotypes. It is inevitable that if juries were removed from trials in any pilot scheme that the profession as a whole would refuse to take part in it as has been demonstrated in Scotland.

Consultation Question 117.

14.168 We invite consultees' views on the defendant being able to elect to have a sexual offences trial without a jury.

We do not support this proposal, in part because we believe that the take-up would be very low. It is worth noting that defendants can already elect a trial without a jury for triable either way sexual offences where a short sentence of imprisonment on conviction is anticipated and there is no other reason for the magistrates' court to send the case to the Crown Court for trial.

Consultation Question 118.

14.169 We invite consultees' views on the best model for a juryless trial:

(1) a single judge;
(2) a panel of judges; or

(3) a panel with a combination of judges and lay assessors.

We fundamentally reject the contention that jury trials should be abolished. Other systems which rely on an inquisitorial rather than adversarial system cannot be used as comparison here. A defendant has a right to trial by jury in all criminal cases which the government has determined could carry sentences of over six months. Rape is no different. While we accept that RASSO cases necessarily have particular features which can in appropriate circumstances require particular evidential rules and careful handling, the fact remains that an allegation of rape remains an allegation of a crime. That means we abandon the basic rules of fair process and entitlement to trial by our peers at extreme peril: peril to defendants, to complainants, and to the criminal justice system as a whole. Were such a regime to be introduced, contrary to our views, the best model (because it currently exists and therefore only needs to be extended) would be to amend the allocation or sentencing guidelines to extend the scope of summary trials for RASSO. Those trials would take place before one legally qualified judge or three lay judges advised by a legally qualified advisor.

CONCLUSION

The law and procedure in respect of RASSO cases is ever changing, often with knee jerk reactions which appeal to sections of the public. Rape destroys lives and leaves a life long legacy for complainants. False allegations of rape also destroy lives. This area of law requires long term cross-party collaborative decisions, proper funding of courts, police, CPS, counsel and intermediaries to enable the most vulnerable to be heard and to ensure that when successive governments assert that they take this offending seriously, that is more than just words. The CBA remains committed to working with all other stake holders in the criminal justice system to bring about effective change.

The Criminal Bar Association
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