Response on behalf of the Midlands Circuit, Northern Circuit, North Eastern Circuit, South Eastern Circuit, Wales and Chester Circuit and Western Circuit to the Law Commission's Consultation on Evidence in Sexual Offences Prosecutions

The six Circuits of England and Wales represent and provide advice and support for over 7000 self-employed and employed barristers working in the geographical areas represented by their Circuit.

The Circuit Leaders are extremely grateful to the individual barristers from each Circuit who have considered, analysed and then discussed with others, this lengthy and important Consultation document. There may have been differences in views, but the collaborative approach has resulted in a Response that all Circuit Leaders endorse and commend.

The Circuit Leaders are:

Midlands Circuit: Michelle Healey KC

Northern Circuit: Jaime Hamilton KC

North Eastern Circuit: Jason Pitter KC

South Eastern Circuit: Leon Kazakos KC

Wales & Chester Circuit: Caroline Rees KC

Western Circuit: Jo Martin KC

Executive Summary of Objections

The Circuits object to the greater part of the proposals set out in the consultation for the following reasons:

(i) There is no, or no adequate, evidential basis for identifying the trial process as causing the problems of under-reporting and disengagement by complainants of RASSOs and the perpetuation of rape myths;

(ii) The proposals, jointly and severally, seek to limit a defendant's ability to challenge serious criminal allegations made against him;

(iii) The proposals, jointly and severally, seek artificially to enhance a complainant's credibility and/or protect it from proper forensic scrutiny;

(iv) The proposals seek to undermine the binary nature of the adversarial system, creating a three-party structure in which the defendant is outnumbered;

(v) The proposals seek to expand beyond the terms of Article 8(2), the Data Protection Act 2018 and the UK GDPRs the protection of a complainant's personal data;

(vi) The proposals seek to qualify the defendant's Article 6 rights in order to accommodate the complainant's expanded right to privacy;

(vii) The proposals will extend the scope of a criminal trial far beyond its proper function;

(viii) The proposals create an inexplicable inconsistency between the disclosure/admissibility tests for private data held by third parties and those for private data held by the complainant or defendant;

(ix) The proposals create an unjustifiable asymmetry of rights and protections for both complainants and defendants according to the nature of the allegation being prosecuted.

Overall Observations

Whilst the introduction to this consultation[1] disavows any intention to address the conviction rate in RASSO cases, the frequency with which the rate is cited as a failing in the justice system suggests that the issue lies very close to the minds of those drafting the proposals. The objectives of the proposals are described as:

> *"improving the understanding of consent and sexual harm that informs the substance, practice and application of the law; improving the treatment of complainants; and ensuring that defendants receive a fair trial."*

Since all proposals address themselves to the trial process, we conclude that the first two objectives proceed from a position that both substantive and procedural law operate within a deficit of understanding of consent and sexual harm and do so with the result of permitting or encouraging the unjustifiable treatment of complainants.

Broadly speaking, we disagree with the Commission's approach. The changes needed are societal, not legal or procedural. Locating reforms in the criminal justice system is akin to combatting a proliferation of industrial injuries by making changes to the operation of A&E departments.

Practitioners should regularly expand and update their understanding of consent and sexual harm. Judges should be swift to restrict conduct designed to bring unnecessary humiliation or distress to a complainant. Where there is room for improvement in dealing with emotive and highly sensitive cases, that need does not come anywhere close to justifying a change in substantive law or procedure; in our experience, it is achieved by training and the cultivation of real excellence in advocacy. As experts, barristers can, and do, successfully defend clients in RASSO cases without deploying a single rape myth, or engaging in bullying, hectoring or aggressive tactics. The Circuits, the Inns of Court and the Criminal Bar Association all provide specialist education and training for those practising in this field.

[1] §1.2 Consultation Document

There is little in the consultation document to persuade us that the protection of the right to a fair trial has enjoyed any real centrality in the drafting of the proposals; the almost unwavering focus of the consultation is how the privacy rights accorded to complainants in the process of investigation and litigation can be expanded beyond the provisions of Article 8(2), the DPA 2018 and the UK GDPR.

The introductory paragraph[2] goes on to say:

> *"However, the project sits within a wider context of decades of work by campaigners, governments, parliaments, courts, police and many others that has tackled the breadth of those complexities and sought to improve justice outcomes for complainants of rape and serious sexual offences."*

Described as a 'wider context', the inescapable premise of these proposals is that the conviction rate is too low, and that changes are needed to increase it; the phrase "improving justice outcomes for complainants" cannot be sensibly construed to mean anything else. There is no recognition of the fact that defendants in RASSO cases suffer poor justice outcomes, in particular as a result of inadequate understanding and application of the disclosure regime. The document mentions the 2015/16 CCRC Annual Report and the 2018 Disclosure Review in the wake of the case of Liam Allan but seems to favour the slender argument that a perceived overreaction to problems with disclosure is now responsible for an excessively lax approach to the disclosure of personal data in RASSO cases. The view from the ground could not be more different; disclosure failures continue to beset cases of every type, and RASSO allegations are no exception.

It is worth noting that, while the consultation relies heavily on those (largely reiterative, and often evidentially fragile) sources articulating the complaint that the conviction rate is too low and that the interference with a complainant's Article 8 protections is too high, it prefers to leave untouched the well-evidenced and largely unaddressed systemic failings in disclosure, reported on with a depressing regularity. This is a striking omission for a

[2] §1.2 Consultation Document

consultation in which the protection of a defendant's right to a fair trial is one of the three stated objectives.

We accept the proposition that a great number of victims of RASSOs do not take their complaints to the police. Such limited information as is available about the reasons for this indicates that the overwhelming reason is that they fear being disbelieved. In the self-selecting, non-representative sample used in Molina & Poppleton's 2020 survey, 60% of respondents (amounting to somewhere between 36 and 79 people) said that the fact that they had "heard negative things about the trial process" was important in their decision not to report.

At §1.78, the justification for proposing significant changes to the trial process, and incursions into the defendant's ability to challenge the allegations made against him, is expressed as follows:

> *"Reforms to the trial process will, we hope, be instrumental not only in doing justice to complainants and defendants, but also in diminishing any mismatch between complainants' expectations of treatment and the reality of treatment in the courts, so that it has a positive effect on other aspects of complainants' engagement with the criminal justice system."*

We are acutely concerned that the Commission has not undertaken a more thoughtful analysis of the mismatch referred to. There is nothing in the paper to support the conclusion that the fault lies in the trial process rather than the information provided to complainants. There is no examination of what complainants' expectations were or how they were formed. If they were told they could not be "treated badly"[3], did they understand that to mean their veracity was not to be challenged, or that they would not be asked anything which might upset them? Were the "negative things about the trial process" factually correct or not? What was the nature of the negativity? Being publicly disbelieved is distressing to anyone, irrespective of the nature of their complaint. Speaking publicly about any sexual encounter is difficult, distressing and humiliating for anyone. Such reactions are inevitable for most people

[3] §1.76

involved in RASSO cases, including many defendants. Distress is not a legitimate measure for establishing the contours of a trial, in particular where the consideration is confined to the distress of a witness from one side of the case. To justify interference with the rules of evidence or conduct of the trial, distress must be both gratuitous and avoidable.

There is, in short, no evidential basis for taking the starting point that the changes which restrict the scope of challenge to a serious allegation will remedy the problems identified. We are of the view that there is a deficit in public education about the criminal justice system, and that the deficit is particular acute in respect of RASSO cases.

Criminal barristers frequently encounter misinformation about the conduct of such trials. This ranges from the belief that s.41 has made no difference to the approach taken to sexual behaviour evidence, to the notion that the trial is a kind of therapeutic process, free of challenge and designed to bring "closure" to a victim. We regard the frightening and extreme language used by campaigners with real anxiety; phrases such as "the decriminalisation of rape" and "digital strip search" achieve the aim of making an impact on the legislature, but do little to inform complainants of the realities of the criminal justice system, and we fear will only instil in victims a sense of hopelessness and discourage them from reporting their experiences.

Before endorsing any changes to the trial process, and certainly changes which touch upon disclosure, admissibility or the scope of challenge we would ask for much greater precision in identifying the problems those changes purport to remedy, as well as a proper evidential foundation for the assertion that the trial process is where change is needed. We would also counsel in the strongest terms a substantial improvement in the provision of public information about, and engagement with, the process of RASSO trials.

Many of the proposals we regard as unfair, misplaced and, in some respects, susceptible to legal challenge. We are not persuaded in the slightest that the case is made for raising the bar to disclosure or admissibility of material which is already relevant. Some of the concepts proposed as "enhancements" to the assessment of disclosability and/or admissibility are nebulous and dangerously

vulnerable to ideological interpretation. Some of them amount to a very significant *de facto* expansion of public interest immunity. Some of them fetter the judicial assessment of relevance by the introduction of remote and wholly irrelevant matters. Many of them are premised on an apparent desire to elevate a complainant's Article 8 protections to such an extent that they rival the Article 6 protections of a defendant. It must be emphasised that Article 8 protections are qualified, qualifications which find expression in Article 8(2), and in the provisions of the DPA 2018 and the UK GDPR. The right to a fair trial is absolute. In the context of a criminal trial, almost invariably involving a significant intrusion on the private lives of both parties, and similarly involving an assessment of the credibility of both parties, this equiperation would result in an unjustifiable, disproportionate and entirely artificial conflict of rights. If subjected to the "intense focus test" for the resolution of conflicting rights, articulated by Lord Steyn in In Re S[4], there is no doubt that the primacy of Article 6 would prevail. The protections to which a complainant is entitled under Article 8 are already given proportionate effect by the DPA 2018 and the UKGDPR, as well as the generally meticulous judicial awareness and monitoring of how personal data is used during a trial; the expansions proposed by this consultation would be grossly disproportionate and wholly unnecessary.

[4] *In re S* [2004] HL 47 per Lord Steyn at §17 ""First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

Chapter 3: Personal Records Held by Third Parties (TPM)

It is difficult to imagine circumstances in which evidence affecting a complainant's credibility could be more central, more relevant, or more prominent than when a jury is tasked with judging the sufficiency of the complaint, and where a defendant is taking issue with the account the complainant has given.

There appears, however, to be a very serious misunderstanding in many criticisms of "unnecessary/disproportionate" requests for disclosure of personal data and/or TPM.

At §1.61 the consultation cites of Chief Constable Sarah Crew, whose deprecation of the obtaining, disclosure and use of a complainant's history of lies to undermine her/his credibility seems to emanate from the belief that such a practice has no purpose but the perpetuation of rape myths within the police force.

The Executive Summary to the Government's Response to the 2022 HO consultation 'Police requests for Third Party Material' complains that TPM requests about complainants "can sometimes be unnecessary and disproportionate, and made to establish victim (sic) credibility, that is, whether the victim has a history of being truthful, as opposed to the facts of the case". Further complaints about material relating to credibility are repeated throughout the Response.

It is, of course, a grave misapprehension that material going to a witness's credibility does not assist the jury in the ultimate question about the facts of the case. If such a failure to understand the process operates at governmental level and the most senior ranks of the police force, the mismatch between the expectations of victims and the realities of the trial process is perhaps unsurprising.

At §3.54, under the heading 'Is There A Case For Change?', the Commission's argument, against the extensive investigation and findings of Sir John Gillen's Report into law & procedures in serious sexual offences in Northern Ireland, that the failure lies in the law rather than in its application, is set out in full as follows:

> *"Nevertheless, as the current legal framework shows, judicial scrutiny does not occur at each stage of the process and, in addition, there is evidence that disproportionate requests are made for the disclosure of complainants' personal records, which carries some considerable risk to complainants and to the objectives of a trial"*

The nature of the "considerable risk" to complainants or to the objectives of a trial is not described even in the most general of terms. The only evidence offered of requests being disproportionate is a reference to the 2022 HO consultation 'Police requests for Third Party Material':

> *"In a recent Home Office consultation, only 3% of the 200 police respondents and 34 CPS respondents agreed that police requests for third party material were "always necessary and proportionate"*

We think it is helpful to put this reference in its context. It was one of 6 options in answer to a question "In your view, what are unnecessary and disproportionate requests for third party material driven by?". The question was addressed to TPM requests for all categories of cases, not just RASSOs. There were 406 respondents, including 169 from non-CPS/police categories. They answered as follows:

1. Requests are always necessary and proportionate: 3%
2. Requests take a long time to be fulfilled and so all possible material is requested in case it is needed: 49%
3. Defence lawyers ask for an unnecessary/disproportionate of third-party material via the police: 47%
4. The CPS ask for an unnecessary/disproportionate amount of third-party material via the police: 71%
5. Police predict that the CPS will require a lot of third-party material and therefore request an unnecessary/disproportionate amount: 60%
6. Police lack the necessary training and expertise: 37%

The HO consultation itself was not an enquiry into whether TPM requests were unnecessary or disproportionate, but proceeded on the basis that they were,

and to a problematic extent. The question already having been begged, it is of no surprise that the HO consultation was able to provide some support for the Commission's preferred position.

Over 50% of the respondents were from the groups whose misapplication of the disclosure regime has been the critical focus of reviews such as Sir John Gillen's reports. The Government response to the HO consultation notes the stark difference between the police and CPS respondents and the barrister respondents, the latter being universally of the view that TPM requests were proportionate and necessary. Criminal barristers have a clear and accurate understanding of how the disclosure regime should be applied and can be presumed to be well-placed to make assessments of proportionality and necessity.

The complainant's right to privacy is unwaveringly relied upon to justify the proposed restrictions for TPM. This concern seems entirely absent in respect of the disclosure and admissibility of private data (which may be at least as intrusive and intimate in its nature as TPM) which is held by the complainant and/or defendant.

The case for change is inadequately researched, unsupported by reliable evidence and wholly unconvincing.

Consultation Question 1.

14.1 Are agreed facts regularly used as a practical strategy for addressing public interest immunity matters?

Answer: Yes.

14.2 Does the use of agreed facts in this context pose any risks or concerns?

Answer: Presentation of evidence in this way may deprive a complainant/witness of the opportunity to answer a point made in the defendant's favour.

Consultation Question 2.

3.88 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?

Answer: No. The police and, to a lesser extent, the CPS too frequently fail to apply the disclosure regime properly. This fact has not been significantly altered by multiple reviews or judgments from the upper courts. Adding further restrictions to a legal framework whose application is already inadequately understood is likely to compound the chances of injustice to defendants. The remedy is in ensuring the those charged with operating the disclosure regime fully understand how it operates. Failings in investigation and disclosure jeopardise the fairness of a defendant's trial and risk wrongful convictions. The desire to protect a complainant's Article 8 rights cannot begin to justify the creation of such a risk.

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?

Answer: No. The reasonable expectation of privacy is the manifestation of a derogable right, and is displaced by the defendant's absolute right to a fair trial and by the statutory requirement of investigators to pursue all reasonable lines of enquiry, whether they point towards or away from a suspect. The limitations on the protection of private material are already set out in the DPA 2018 and the UKGDPR.

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?

Answer: We do not accept that there should be a bespoke regime. The proposition that evidence of the complainant's personal data adduced by the Defence must have an enhanced relevance, but that evidence of the defendant's personal data adduced by the Prosecution need only be relevant is a transparent violation of the principle of the equality of arms.

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?

Answer: Yes. For the avoidance of doubt, there should not be any further restriction than those already in place.

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?

Answer: No. There are very few cases in which such records will, when obtained, contain anything which meets the test for disclosure, and so the interference with privacy for the overwhelming majority of complainants is minimal. However, any change in the law must be tested against the worst case scenario. In the event that a complainant makes a remark to an ISVA etc which does meet the test for disclosure (the most extreme example being an admission that the allegation is fabricated, or misattributed), the prohibition would deprive the prosecution of crucial information and put the defendant at serious peril of being wrongly convicted.

Consultation Question 7.

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?

Answer: Yes

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?

Answer: If the police and CPS are properly trained in the application of the disclosure regime, there should be no difficulty with this proposal. Independent counsel must be instructed, however, where there is a risk that the exercise will involve access to legally privileged material.

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

Answer: Ideally, yes. Practically speaking, this is not achievable without an increase in judicial resources which the jurisdiction is unlikely to see for many years.

Consultation Question 8.

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?

Answer: No. Assuming complainants are provided with accurate and appropriately specific information in order to decide whether to consent, and that their consent is obtained without any improper pressure, we are not persuaded that extant protections are inadequate or require amendment.

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.)

Answer: None

Consultation Question 9.

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?

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

Answer: Yes. Assuming the likely relevance of the records to the charging decision can be demonstrated.

Consultation Question 10.

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?

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

Answer: As above.

Consultation Question 11.

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?

Answer: Yes.

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

Answer: On the contrary. The earlier such matters are settled, the better.

Consultation Question 12.

We provisionally propose that disclosure of personal records held by third parties should require judicial permission.

Do consultees agree?

Answer: No. A proper application of the extant disclosure regime is adequate for this exercise. This is another proposal which is wholly impracticable under current constraints.

We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent.

Do consultees agree?

Answer: We do not agree with the predicate proposal, but if it were to be adopted, we see no justification for prohibiting disclosure where a complainant has given proper consent.

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

Answer: On the contrary. The earlier such matters are settled, the better.

Consultation Question 13.

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 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?

Answer: No. There is no sustainable argument for deviating from the current regime. An "enhanced" relevance threshold creates an asymmetry between the investigation and litigation of RASSO cases and of other criminal matters; this results in an asymmetry between the protections afforded to defendants/complainants according to the type of offence being prosecuted. Victims of domestic violence, elder abuse, modern slavery, child cruelty, harassment and coercive control are also highly likely to suffer from consequential trauma, and to find a close examination of their personal data distressing and humiliating. Those who are the victims of false allegations,

however rare such offences may be, will often have experienced the shame and humiliation of an untrammelled trawl through their personal data. The elevated protections contended for here will not benefit such victims at all.

The assertion that the obtaining of TPM generally is routinely, or significantly, disproportionate and unnecessary enjoys no reliable evidential support whatsoever. Similarly, no evidence has been presented to justify a distinction between RASSO cases and other criminal allegations.

The factors proposed are inappropriate to the exercise in question. (a), (b) and (h) are irrelevant and misplaced at this stage. (c) and (e) are already displaced by the terms of the DPA 2018, Article 8(2) and the UK GDPR. (d) is unworkably nebulous and vulnerable to lengthy ideological interpretation (is it 'biased' to consider the possibility that a complainant is lying? Is it 'discriminatory' to wish to investigate a suspect's assertion that the complainant is fabricating the allegation as an act of retribution for being sexually rejected? What about if the rejection was because the suspect realised the complainant was transgender?). (f) and (g) seek to subordinate the purpose of a criminal trial to matters which are irrelevant, remote and arguably political. Such a fettering of the scope of investigation, prosecution and judicial decisions is likely to be unlawful.

Are there factors we should remove, modify or add?

Answer: The interests of justice test itself should be removed.

Consultation Question 14.

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?

Answer: Absolutely not. Judges are well-versed in identifying speculative requests. Defendants should not be expected to provide specificity in respect of material they have not seen and have had no input into, since that defeats the purpose of the request. If the records requested may reasonably contain

material relevant to an issue in the case – including the complainant's credibility – that should be sufficient.

Are there any other grounds we should consider?

Answer: No

Consultation Question 15.

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?

Answer: No. The current regime is appropriate, proportionate and, when properly applied, achieves the correct balance of interests. Failures of disclosure continue to result in miscarriages of justice. Raising the disclosure threshold increases that risk by a degree that cannot be outweighed by consideration of any of the interests advocated by the Commission.

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?

Answer: See Question 13.

Furthermore, the 'interests of justice' test proposed amounts to a *de facto* expansion of the PII regime. PII is, for good reason, a very narrow set of categories, since material which is *prima facie* disclosable should only be withheld from the defence where the countervailing interests are sufficiently serious, significant and of such weight that they can justify what would otherwise be a breach of disclosure duties under the CPIA. To widen the ambit of non-disclosure of relevant material on the basis, not of the complainant's safety or any comparably grave interest, but of her privacy, or of policy considerations wholly unconnected with the trial itself, is absolutely unconscionable.

Are there factors we should remove, modify or add?

Answer: See Question 13

Consultation Question 16.

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?

Answer: No. For all the reasons provided above, there is no identifiable need to restrict admissibility further than the current regime stipulates.

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?

No. The response to Question 13 applies here.

Are there factors we should remove, modify or add?

N/A

Consultation Question 17.

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.

These are not factors which should play any part in decisions to seek production or to disclose such material; to do so requires the exclusion of the possibility of the defendant's innocence in order to exclude evidence which is relevant and should be assessed by a jury. Such an approach makes no accommodation of the fact that some complainants may have been traumatised by something other than the material events, or may not be traumatised because (i) that is not how they have responded to the events in question (perhaps because they were habituated to the circumstances of the offending); (ii) the complainant is not telling the truth about the events of which s/he complains; or (iii) the complainant is not telling the truth about the trauma of which s/he complains. If the possibility of trauma is an adequate basis for excluding inconsistencies in a complainant's account, then the Commission will presumably extend the same reasoning to inconsistencies in the account any defendant who asserts that he has been traumatised by being subject to a false allegation of rape.

Chapter 4: Sexual Behaviour Evidence

Consultation Question 18.

We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence.

Do consultees agree?

Answer: Yes.

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

Do consultees agree?

Answer: Yes.

Consultation Question 19.

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?

Answer: We agree with (1). We disagree with (2) for the same reasons set out in Questions 13, 15 and 16. We propose that the test should be that the evidence has substantial probative value in respect of a matter in issue as between the parties (either defendant and prosecution, or defendant and co-defendant) and that to refuse its admission might result in the rendering unsafe a conclusion of the tribunal of fact.

Consultation Question 20.

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.
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?
Answer: No. We disagree with this test.

Should the list include "any other factor that the judge considers to be relevant to the individual case"?
Answer: No

Consultation Question 21.

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?
Answer: We agree with the detail of the evidence in question and the purpose of its admission. We suggest that drafts of questions should be confined to topics and the purposes of those topics. Precise questions should not be required in the absence of an additional legitimate need, such as a review from an intermediary. The judge should have the discretion to waive the requirement for written questions.

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?
Answer: Yes.

We provisionally propose that the written reasons should address all of the factors judges are required to consider.

Do consultees agree?

Answer: See the alternative test proposed in answer to Question 19.

Consultation Question 22.

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?

Answer: No. What is and is not sexual behaviour is frequently fact sensitive. Criminal courts are very well-versed in dealing with sexual behaviour which uses modern forms of communication.

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

Answer: We see no need for this.

Consultation Question 23.

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?

Answer: We repeat, what is sexual behaviour is frequently fact sensitive. The purposes of introducing evidence about a complainant's clothing or behaviour such as dancing must be established before it should be embraced by the sexual behaviour restrictions. A complainant may assert that she has chosen to wear highly concealing clothing since the event; evidence that she has, in that time, worn clothing that is highly revealing will be relevant to her truthfulness, not to her sexual behaviour.

Consultation Question 24.

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?

Answer: None at all.

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?

Answer: We see no need for such a change. What is sexual will depend on too wide a number of factors to restrict or prescribe the Court's assessment in any particular case.

Consultation Question 25.

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?

Answer: Yes

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.

Answer: None. If the evidence extends into what the Court determines is sexual behaviour beyond the fact of the relationship, that will fall within the SBE restrictions.

Consultation Question 26.

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?

Answer: No. The relevance test is always applied. The need to avoid rape myths in the conduct of RASSO cases has been clearly established; the risk that such myths will skew a jury's otherwise fair assessment of the issues in the case is powerful enough to justify the restriction. In other classes of offence, where rape myths will have no realistic bearing on a jury's determination, the restrictions on SBE are not necessary.

Consultation Question 27.

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?

Answer: Yes.

Consultation Question 28.

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.

Answer: No, complainants should not be notified at all of an application to admit SBE when it is made, when it is decided, or the result. To notify a complainant of an application is to unnecessarily worry them, at any stage this would be the case, whether the application failed or not. All witnesses, particularly those complainants in RASSO cases will be met before trial by prosecuting counsel and told (as far as is permitted) what the defence is, and that they will not be asked any questions that are not allowed by the Judge. This should allay any fears they have that cross-examination is a free-for-all. It is not.

Chapter 5: Character Evidence

General Observations regarding this Consultation Paper:

The Law Commission has been asked to consider why there has been a decline in rape convictions since 2016 and to focus upon how evidence is used in trials involving sexual offences. The Law Commission has said that it has three goals in mind; improving the understanding of consent and sexual harm, improving the treatment of complainants and ensuring that defendants can receive a fair trial.

Whilst most of the proposals are well-intentioned, many of them feed into the myth that the conviction rate (once a case has been charged and appears before the Crown Court) is very low indeed. This is not the experience of criminal practitioners and is a message that needs to be sent out to victims of sexual crime who may be considering whether or not to report a matter. Misinformation will undoubtedly put people off reporting crime or withstanding the rigours of the investigation and trial process.

Care must therefore be taken that any changes are not knee-jerk reactions to a decline in the conviction rate in an effort to bolster a complainant's evidence at trial. Such changes are not answers to the real issues and could potentially prejudice a defendant's fundamental right to a fair trial. They could also lead to regressive steps in the treatment of complainants.

In chapter 5, there is a suggestion that evidence of a complainant's good character could be deployed to put them on an equal footing with a defendant who is entitled to a good character direction. The question is also posed as to whether a defendant should be permitted to assert their good character at all. These questions are really troubling from both a Prosecution and Defence perspective. A defendant, who is presumed innocent until proved otherwise, is entitled to tell the jury of their good character. This is undoubtedly relevant to the issues in the case as to whether they have committed the alleged offence. Any qualification to that good character is tempered by an appropriate direction in light of *R. v. Hunter*.

Equally troubling, to suggest that a complainant's 'good character' could be placed before a jury, ignores the experience of practitioners that a large proportion of complainants are extremely vulnerable and may have 'bad character'. This should not place them at a disadvantage because they do not have 'good character' that can be balanced against the defendant's character.

This could lead to a two-tier system of complainants which may put people off reporting crimes or supporting a prosecution if they feel their evidence is less worthy than that of another complainant.

In a system which is currently at breaking point, with buildings and technology which are not fit for purpose, elongating trials with witness character evidence is likely to be counterproductive and potentially more intrusive into a complainant's private life.

There are certainly areas within the Criminal Justice System which require improvement and one area that may require more consideration is how complainants can feel involved and engaged throughout the process. It is a regular grievance from complainants that they do not know what is happening at each stage of their case. There are indeed many diligent and dedicated officers who keep complainants updated with the progress of the case but there are lots who do not. It is incumbent upon all of those working within the Criminal Justice System to support both complainants and defendants throughout what is undoubtedly an extremely traumatic time in their lives.

Consultation Question 29.

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…….

Do consultees agree?

We agree. The Criminal Justice Act 2003 permits applications to be made to adduce non conviction evidence where it is relevant to the facts of the case. Non-conviction evidence is admissible as important explanatory evidence, to

establish a propensity to behave in a particular way, to correct a false impression and when there has been an attack upon a prosecution witness. This expands significantly upon the common law position and is used regularly. It is the experience of criminal practitioners that Judges readily entertain applications based upon non-conviction material where it is right and proper to do so. There is no requirement for this area of the law to be changed because it is working in practice.

Consultation Question 30.

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 or bad character evidence?

It is concerning that some form of explanation of the law may be required for those who are reviewing and prosecuting cases of this nature and the Judges who are adjudicating upon the applications. It is fair to assume those making and determining the applications are conversant with the relevant provisions and the type of evidence that is required to support the appropriate applications. It is the experience of criminal practitioners that RASSO trained lawyers are extremely experienced in these matters and do not require further guidance upon the law or case building. There may well be an issue in areas where there are fewer experienced CPS lawyers, but it is the responsibility of the CPS to provide the appropriate level of training to those coming into this type of work.

Whilst there is general confidence in the knowledge and skills of RASSO lawyers, the Crown Prosecution Service rely upon the material provided to them by the investigating authorities. They can only work with the information they are given. There is perhaps a need for further training within the police as to the type of material that should be considered before a file is submitted for a charging decision. Checks should be made from DVU records, social services records and police systems generally to see whether there is a pattern of relevant behaviour displayed by a suspect. The police also need to consider how

that material can be presented and speak to potential witnesses to ensure they would be prepared to give evidence in support of a bad character application. There should also be consideration as to whether the bad character evidence should be the subject of a charge in its own right as that is often an argument raised in response to a bad character application.

If so, which body should publish such guidance?

We believe there is already sufficient guidance in place from the Crown Prosecution Service's perspective regarding bad character evidence and case building. However, we are of the view that the police would benefit from a greater understanding of what is expected in support of an application to the Crown Court.

Consultation Question 31.

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. This is a fundamental right of a defendant who is presumed innocent until a jury says otherwise. It can often be very difficult for a defendant to defend themselves when all they can do is simply deny an offence occurred. It can therefore be helpful to a jury to have some understanding of a defendant's background to see whether they are the type of person who would commit the offence in question. If a person is said to have controlled, coerced and sexually abused a long-term partner, it must surely be right that a previous long-term partner is permitted to say that type of behaviour was no part of their relationship. Equally, it must be right that a person who has good standing in a community can call evidence to speak of their character to demonstrate they are less likely to jeopardise that good standing. In light of R. v. Hunter, there is much greater scrutiny of the type of good character direction that is given and defendants no longer have an unqualified right to a good character direction where it is not proper to give one.

To suggest that a defendant should not have the right to introduce evidence of their good character would be a real inroad to a defendant's right to a fair trial.

Consultation Question 32.

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

Do the consultees agree?

We do not. To give a judicial direction about the absence of evidence of the complainant's good character would see a distinction in how complainants are treated in sexual cases to any other type of case.

The wording suggested above is ambiguous and leads a jury to speculate. If the suggested wording is 'you have not heard evidence of the complainant's good character,' this may lead the jury to infer that the complainant is of good character without further question or qualification. This could, in practice, weigh heavier in a complainant's favour than the presentation of evidence of their good character which could be challenged. The right to a fair trial is once again in jeopardy.

This could also create imbalance where there are multiple complainants who may have different backgrounds. It must be the case that if such a direction is proposed, it could only be made in respect of those complainants who do not have previous convictions. This would highlight distinctions between complainants of good character and those with bad character. Whilst the direction may suggest no adverse inference should be drawn, it would lead to wild speculation as to why complainants are treated differently.

Consultation Question 33.

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 the consultees agree?

We agree. It would not be fair to defendants to expand the principles relating to the admission of the complainant's good character. This could turn trials into a popularity contest between the complainant and the defendant and would significantly expand the issues at trial. A complainant's good character evidence would be subject to challenge and could lead to the defence introducing rebuttal evidence. It is likely this would distract from the real issues in the case. It would undoubtedly lengthen trials in a criminal justice system that is already at breaking point.

It also creates a 'two tier' system of complainants; those who have good character and those who do not. To suggest that a complainant's 'good character' could be placed before a jury ignores the experience of practitioners: A large proportion of complainants are extremely vulnerable and may have 'bad character'. This should not place them at a disadvantage because they do not have 'good character' that can be balanced against the defendant's character. This would be particularly apparent in cases where there are multiple complainants who have different backgrounds. It is likely this type of discrimination between complainants could put victims of sexual crime off reporting offences for fear of how they may be perceived. This would be a significant step back in the progress that has been made the prosecution of sexual offences and the fair treatment of complainants.

Consultation Question 34.

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

It should be highlighted to the jury they have heard evidence of the complainant's good character for the very limited reasoning envisaged in the case of R. v. Mader rather than the wider scope of 'complainant character affirmation'. It must be made plain that the good character evidence has been

admitted because it is relevant to an issue in the case and that issue should be identified.

What should be the content of any guidance?

See above

Consultation Question 35.

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 they 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 is admitted**
d. **The risk of a disproportionate advantage to the defendant if such good character of 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 jury direction that explains its relevance.**

Do the consultees agree?

We do not agree there should be an expansion of the principle. However, if there is to be any expansion, we largely agree with the criteria set out above with the following specific observations:

Para 2 - This may lead to a significant distraction from the real issues in the case and would require rigorous judicial intervention. It will inevitably lead to additional legal arguments in the course of the trial and would lengthen the trial estimate.

It also means that complainants who have a wider support network may be an a better position to secure evidence from people who can speak of their qualities than those who do not. This could lead to a two tier system of complainants.

Such evidence may also fall into the trap of myths and stereotypes: It may suggest that a complainant could never behave in a way that has been suggested by the defendant because their past character suggests otherwise. Criminal practitioners have welcomed judicial directions in recent years regarding the responses of complainants who have experienced trauma and how there should not be any expectation of a particular reaction in a particular situation. Equally, the Courts have experience that can people behave in a way that is very much out of character. To rely purely on a complainant's past behaviours is potentially dangerous.

A defendant is permitted to introduce this type of evidence regarding their own character because they are on trial and it is the defendant who must suffer the significant consequences of an adverse outcome.

Para 4 - A complainant currently does not have the right to be heard upon an application to introduce their bad character or their past sexual history. It is difficult to reconcile why there should be a right to be heard in these circumstances.

Consultation Question 36.

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 the consultees agree?

There is potentially argument for the test in respect of the admission of sexual behaviour evidence to be simplified. The current statutory regime is complicated and inconsistently applied. This is addressed in another chapter.

However, questions regarding false allegations fall squarely within the bad character regime, where there is a route to admissibility via s.100 of the Criminal Justice Act 2003. Unlike the s.41 YJCEA 1999 route to admissibility, s. 100 is somewhat clearer.

S.100 of the Criminal Justice Act 2003 prevents the questioning of a complainant about their bad character unless the Court is satisfied that the material is important explanatory evidence [s. 100(1)(a)] or the material has 'substantial probative value in relation to a matter in issue in proceedings and is of substantial importance in the context of the case as a whole' [s.100(1)(b)]. This is a high threshold which is usually rigorously scrutinised. The Court already requires an evidential basis to suggest that the complainant has made a false allegation and will not admit cross examination upon this subject in the absence of such a basis. Experienced prosecutors readily argue this point in order to protect complainants from spurious suggestions they are prone to making false complaints.

To alter the test to align with the proposed test for the admission of sexual behaviour evidence would mean that there would be a different test for the admission of bad character evidence in this particular category of case. There is no good reason why this particular type of bad character evidence should be out of line with all other bad character evidence in other cases.

S.100 CJA 2003 and s. 41 YJCEA 1999 have worked together in practice for many years, even though the route to admissibility is quite different. If there is to be any change to the admissibility of sexual behaviour evidence, it does not follow that the current non-defendant bad character regime should alter. To make it yet more difficult to introduce evidence of past false complaints is contrary to the principles of the defendant's right to a fair trial.

Consultation Question 37.

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?

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

Where evidence of previous false allegations is admitted, it is a matter for the Trial Judge to direct the jury regarding the significance of this evidence and how it may impact upon the issues in the case. The jury will have to consider the importance of that evidence upon the particular case they are trying and determine whether it impacts upon the complainant's credibility. To add a direction that it is a myth that complainants commonly make false complains of rape could fundamentally undermine the significance of that evidence. If there is evidence the complainant may have made untruthful allegations in the past, that is evidence to be weighed in the balance rather than discounted as a myth.

Chapter 6: Criminal Injuries Compensation Claims

General Observations:

For many years, it has been the experience of criminal practitioners that Trial Judges are not impressed by the questioning of complainants as to whether or not they have made an application to the Criminal Injuries Compensation Authority. Trial Judges often intervene, usually in the presence of the jury, to say that it is the right of every alleged victim of crime to seek compensation for physical or psychological injury directly attributable to that crime. Under the current regime, applications for criminal injuries compensation must be lodged within two years of the alleged offence (with some exceptions), which invariably means that an application is made by a complainant before a trial has concluded. Criminal practitioners are aware that such questions are frowned upon and tend not to ask these questions routinely and without a proper evidential basis.

This is in line with questions that were regularly asked in the past as to whether a complainant cried out during a sexual attack, whether they fought back., whether they sought immediate assistance and whether they reported matters at the earliest opportunity. Defence advocates are aware those lines of questioning will be met with a myths and stereotypes direction, which largely undermines the point they were seeking to make.

However, criminal practitioners recognise there are still occasions where questioning upon those topics is appropriate. There may be other objective evidence in the case which suggests that it would be wrong to treat those matters simply as myths. This must also be the case where there is objective evidence that the complainant may have a financial motive for making a false complaint. Cross examination about a financial motivation would then be relevant. It would be wrong to prevent this line of questioning or subject it to a higher threshold of admissibility. A route to cross examination is often previous inconsistent statements under Denman's Act, part of which calls for the party seeking to cross examine to establish the context.

Inhibiting such questions would impinge upon a defendant's right to a fair trial as it may prevent a defendant from introducing relevant evidence.

It is not suggested in the Consultation paper that prosecutors cease to routinely ask a defendant 'why would the complainant make the allegation up against you?' This is often the trigger for a defendant's (usually unfounded) response that the motivation may be financial.

Consultation Question 38

We provisionally propose that evidence and cross examination about criminal injuries compensation claims should require leave and should be subject to an enhanced relevance admissibility threshold and structured discretion similar to sexual behaviour evidence

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?

We do not agree. It is unlikely that questions regarding CICA claims will be routinely deployed where there is no relevant basis for the questioning. The Trial Judge is likely to intervene in the presence of the jury and undermine any point the advocate was attempting to make if the point has no relevance. This would be entirely counter-productive from a defence perspective and would have the perception from jury's point of view that the Judge has stepped in to protect the complainant.

If the line of questioning is relevant, there is no reason why questions should not be asked about CICA claims without an enhanced relevance admissibility threshold. A defendant has the right to have relevant and admissible points raised upon their behalf without additional hurdles to overcome.

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?

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 perpetuating myths or misconceptions**

We do not agree that an enhanced admissibility test is required for this type of evidence. However, should this test see favour, the principal factor for the admission of the evidence should be the overarching interests of justice, which includes the defendant's right to a fair trial.

Are there any other factors that the judge should consider when deciding whether to admit evidence of a criminal injuries compensation claim?

No

Should the list include 'any other factor that the judge considers to be relevant to the individual case'?

No. All factors should be in line with the interests of justice.

Consultation Question 39

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

If the evidence regarding a criminal injuries compensation claim is admitted with the leave of the Judge, it is likely the Trial Judge will be in the best position to craft a direction pertinent to the facts of the particular case. It is difficult to see what standard direction could be given in a case involving questioning upon this topic.

Similarly, if an inappropriate question is asked, it will be a matter for the Trial Judge as to whether it is appropriate to address the point and how it should be addressed. It is within the Trial Judge's discretion to direct a jury to disregard a piece of evidence should that be considered an appropriate course.

Chapter 7: Special Measures

Overview:

The central premise of Chapter 7 of this Consultation Paper that the automatic eligibility to special measures of complainants in the trials of sexual offence should be replaced with an automatic entitlement to certain measures, without the need for explanation.

That premise appears to be founded on the inaccurate assumption in para. 7.61 that it is burdensome necessity for a complainant to make a witness statement, justifying which special measures ought to be granted. As discussed below, that assumption is misconceived. There appears to be no convincing reason why the current regime of automatic eligibility for special measures should be replaced with an automatic entitlement to certain measures. Indeed, the Consultation Paper cites, at paras. 7.45 – 7.47 and 7.66 – 7.70, a body of persuasive evidence which suggests that the current regime, of automatic eligibility, should be refined and improved to best meet the needs of complainants. The purpose of special measures is to enable a witness to give his or her best evidence. That objective is best met by measured consideration of the needs of a particular witness on the facts of the case in which he or she is to give evidence, not by automatic entitlement to certain measures.

To that end, these Responses make a number of counter-proposals, including

(a) That applications for special measures be made after "Stage 2" in criminal proceedings, that is, after a Defendant has served his or her defence statement. Such a change in timetable would allow the police and prosecuting authorities a better opportunity to collect further and more detailed information about the most appropriate special measures for a particular witness, in the circumstances of the case in which he or she is to give evidence;
(b) That ACPO and/or Attorney-General's guidance be published for the police and prosecuting authorities about the gathering of information to properly inform a special measures application;
(c) That the Lord Chief Justice and/or Senior Presiding Judge publish guidance to the judiciary about the appropriate use of under-utilised special measures, such as the power to exclude the public during the evidence of certain witnesses;

(d) That the Ground Rules Hearing be abolished and replaced with more flexible alternatives, which can be adapted to the needs of individual cases.

Consultation Question 40.

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?

Response:

No. The premise for making such an alteration, as set out at para. 7.24 of the Consultation Paper is flimsy and tenuous. The word "special," in its ordinary sense, means "particular; not general." In contrast to the approach proposed by the Commission, of automatic entitlement to certain measures (in contrast to the current position of automatic eligibility), this Respondent holds the view that complainants in sexual cases do not form a homogeneous class, and that each complainant is worthy of proper, informed consideration of which particular measures would assist him or her to give his or her best evidence. When thus analysed, the expression "special measures" is entirely appropriate. It is well-understood and a change of nomenclature would serve no material function

Consultation Question 41.

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?

Response:

No.

This question appears to proceed on the premise that a complainant to a sexual offence is categorised as vulnerable or intimidated witness by statute. That premise is not well founded.

Although the title to Chapter I of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA 1999") is "SPECIAL MEASURES DIRECTIONS IN CASE OF VULNERABLE AND INTIMIDATED WITNESSES," the expressions "vulnerable" or "intimidated" appear nowhere in the body of s.17 of that Act:

- The heading to s.17 is, "Witnesses eligible for assistance on ground of fear or distress about testifying." That terminology appears accurate and unobjectionable. No one would seriously argue that giving evidence about the subject matter of most indictments for sexual offences is anything other than distressing;
- The test within s17(1) requires an assessment of whether "evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings," and is not dependent upon an evaluation of the "vulnerability" of a witness; nor does it categorically define such a witness as "intimidated;"
- Nor is the "vulnerability" or "intimidation" of a witness included within the non-exhaustive list of matters which the court should take into account for the purpose of s.17(2) (although the behaviour of the Accused, his family and associates can b taken into account, no label is affixed to the complainant in that regard);
- As far as the automatic eligibility of a witness to a sexual offence (s.17(4A)) to special measures is concerned, the subsection granting that automatic eligibility (s.17(4)) simply reads, "the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection." The words "vulnerable" and "intimidated" are not used.

On the foregoing analysis, it can readily be appreciated that the statute does not in any direct or meaningful sense categorise a complainant in a sexual case as "vulnerable" or "intimidated." With due deference to the stakeholders, whose opinions informed this question, there seems to be an unwarranted focus on

two words in the title of a chapter of a statute, without proper consideration of the substance of the statute itself. One must work quite hard to draw the inference which is the central premise of this question. If (which is not admitted) any change need be made, simple delete the words "Vulnerable and Intimidated" from the heading to Chapter 1 of the YJCEA 1999 and replace with "Certain." That does not, however, appear to the Respondent to this question to be either a reform of substance, or a good use of Parliamentary time.

Consultation Question 42(A).

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?

Response:
No.

Once again, this question seems to proceed on two inaccurate, or potentially inaccurate premises, viz:

- it is necessary) for an application for special measures under s.19(1) YJCEA 1999 to be supported by a witness statement from the complainant (paras. 7.42; 7.61); and.
- It is burdensome for a complainant to make such a statement (para. 7.61).

There is no requirement under s.19(1) for an application for special measures to be supported by a statement from a witness. Crim PR 18.10 does not impose a requirement for such an application to be supported by evidence – merely that the application should explain how the witness is eligible, how the measures sought would improve the witness's evidence, propose the measures sought, and report any views the witness has expressed. Indeed, as the consultation paper acknowledges, under the statute, a court may make such a direction of its own motion, without evidence and without a written application (para. 7.41).

The genesis of these inaccurate premises in the Consultation Paper is a passage, which is conspicuously unsupported by proper evidence, at 7.42, "To assist the court, generally a statement from the witness or information is provided explaining which special measures are sought and the reasons for this." Pausing there, that is simply not the experience of this Respondent. The majority of special measures applications in sexual prosecutions encountered by this Respondent are drafted by CPS paralegals, unsupported by evidence.

At any event, what the Commission takes to be "general" practice seems to have taken on unwarranted and inaccurate significance by the time the conclusion at para. 7.61 is reached: "This suggests that an automatic entitlement to certain measures would merely give effect to what is already happening in practice, without requiring the complainant to face any additional burden of providing evidence in support of an application." As observed above, <u>there is no such burden and no such requirement.</u>

Given that complainants to sexual offences are automatically eligible for special measures by virtue of ss.17(4) and (4A) YJCEA 1999, the further presumption of automatic entitlement to "standard" special measures is unnecessary and would be inimical to the (proper) concerns expressed at paras. 7.45 – 7.47 and 7.66 – 7.70 of the Consultation Paper.

As the consultation paper observes, the granting of special measures by way of live link or screens has become routine in the Crown Court. There is no obvious requirement to codify that routine in statute or in the Crim PR. Indeed, a codified presumption in favour of certain measures has the obvious potential to exacerbate the problem that "the needs of a witness who did not fit into an 'obvious' category might be missed," (para. 7.46) and the granting of special measures without the proper identification of a witness's particular vulnerabilities (para. 7.47).

In every case, what is required is a proper assessment of an individual witness's requirements so that the object of the statute (that the quality of evidence given by a witness is not diminished) is met. The requirement in Crim PR 18.10 is not

burdensome and it is not reposed upon the complainant. It asks no more than is reasonable to enable the court to make a special order tailored to the needs of the witness. Moreover, the source of the "explanation" required from Crim PR 18.10 is not prescribed. The information which informs that "explanation" might come from an investigating police officer, an intermediary, an ISVA, a treating clinician, a forensic psychiatric or psychological expert instructed by the Crown, or any person who knows the witness well.

Equally, some complainants might wish to set out their requirements in their own words. They should not be inhibited from so doing by the impediment of an unnecessary statutory presumption.

The evidence cited in the Consultation Paper more supports an improvement in practice, than in the amendment of legislation. An improvement in practice might be supported by the issuing of properly-formulated guidance or a protocol from the Attorney-General, as has occurred in other aspects of criminal litigation, notably disclosure.

Consultation Question 42(B).

If complainants are automatically entitled to standard measures to assist them to give evidence, it could be of benefit to require the prosecution to indicate on an application form which of the measures the complainant wants and which they do not want, without requiring any information or evidence in support. We invite consultees' views on this.

Response:
As observed above, the requirement to give an explanation of (but not evidence in support of) the special measures requested is not burdensome. It is proportionate to the objective of avoiding the risk of the quality of the evidence to be given by an eligible witness being diminished, and to tailoring a special measure, or combination of measures, to the needs of a particular witness. This Respondent considers that, while there might be improvements in practice, the

procedural requirements currently in force are unobjectionable and proportionate.

Consultation Question 42(C):

We invite consultees' views on additional provisions that may facilitate individualised consideration of complainants' wishes and needs in relation to assistance with giving evidence:

(1) A statutory obligation for enquiries to be made about complainants' requirements.

(2) Police Witness Care Units having primary responsibility for assessing complainants' needs and facilitating assistance measures.

(3) Better use of Ground Rules Hearings to identify complainants' requirements

(see from paragraph 7.183 of the consultation paper for further detail of the

use of Ground Rules Hearings in this context).

(4) Consistent use of court witness familiarisation visits for complainants to see

how the measures work in practice at court.

(5) Consistent use of meetings between complainants and the CPS to identify

and discuss required measures.

Response:

Within this chapter of the Consultation Paper, there is an unreconciled conflict between an individualised approach based on the needs of induvial witnesses and a standardised approach based on presumptions about the efficacy of certain measures, or upon assumptions about complainants in sexual cases as a general class. The latter approach is the less preferable. As observed above, for the objective of allowing a witness to give his or her best evidence to properly be met, the individualised approach should be favoured.

As observed above, Crim PR 18.10 requires an individualised explanation of the special measures sought, without imposing the burden of formal evidence upon the Crown, leave alone upon the complainant. That being so:

(1) There is no need for such a statutory obligation, having regard to the requirements of Crim PR 18.10;

(2) A police witness care unit ("PWCU") may be an appropriate starting point for the assessment of a complaint's requirements, but, as observed above, the sources of information which inform the explanation required by Crim PR 18.10 are not prescribed. To impose upon the PWCU the burden of assessing a witness' needs might lead to important sources of information being overlooked. A better starting point might be for the investigating officer to identify proper potential sources of information to inform a decision about special measures, with less complex cases then being referred to the PCWU and more complex cases being referred to the CPS and/or counsel for advice, or to an appropriately qualified forensic expert for evidential input. This would necessitate the special measures application being made at a later stage in the proceedings than it currently is, but that proposal is addressed below. Furthermore, Attorney-General's or ACPO guidance has the potential to improve practice in this care;

(3) Addressed below;

(4) Witness familiarisation visits, in the experience of this Respondent, are routinely offered to complainants in a wide variety of cases, but particularly in the prosecution of sexual offences. They are not, however, routinely accepted by complainants. It seems difficult to prescribe a consistent use of such visits in those circumstances;

(5) CPS lawyers, and, indeed counsel, are by the nature of their function, more removed from complainants than investigating police officers are. There are thereby less well informed about an individual's particular requirement than the investigating police officer. The ability to refer the question of special measures to a CPS lawyer and/or counsel for written advice, or a Special Measures Meeting, already exists. CPS or counsel's advice would doubtless be more useful if sought after the investigating officer has had the opportunity to gather information about the needs of a witness: as to the timetabling of the special measures application, see below. The use of such advice or meetings

might usefully be addressed in ACPO or Attorney General's guidelines. Beyond that, this Respondent sees no benefit in further fettering the discretion of an investigating officer.

Consultation Question 43.

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

Response:
No.

The requirement to make a special measures application 10 days after a not-guilty plea is artificial and arbitrary. Particularly in complex cases charged under the threshold test, the information available to the Court at PTPH is often incomplete, and sometimes woefully so. The Commission, at 7.84 rightly observes, "the PTPH may be too early in the process for parties to make informed applications for all measures to assist witnesses give evidence."

The most appropriate special measures directions are those tailored to the specific needs of an individual complainant, and an individual case. The most appropriate time for special measures applications to be made are after Stage 2 in the standard progress of a case – that is, after a defence statement has been served and the Crown is better informed about the likely issues in the case. If the opinion of a CPS lawyer or counsel need be sought about the most appropriate special measures for a particular witness, making an application after Stage 2 would give time for that to be done. Unless a special measures direction can be made without written application at PTPH, the standard time for a special measures application should be 10 days after Stage 2.

See also the response to Question 60, below.

Consultation Question 44:

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.

Response:

(1) This Respondent has not identified any benefits to having a Ground Rules Hearing ("GRH") in the prosecution of every sexual offence. Indeed, it is the opinion of this Respondent that they be abolished and replaced, as to which, see below.

There are, however, a number of costs. In the weekly circular published to members of the Midlands Circuit by the Circuit Leader, on 13th September 2023, the observation was made, "There is still a shortage of RASSO barristers." In addition to the resource issues created for both costs and listing (7.88) and "severe listing pressures," (7.91) there is a real difficulty with the availability of appropriately trained and qualified counsel and solicitor-advocates to prosecute sexual offences. It is the experience of this Respondent that trial counsel is often unavailable for a GRH under the timetable which currently prevails. Because the GRH is usually treated as a hearing concerning how a witness with special measures is to be cross-examined (c.f. para. 7.92 of the Consultation Paper), prosecuting counsel at those hearings is often not the advocate who will conduct the trial.

The difficulty may lie in the terminology. As the Consultation Paper observes at 7.92, the GRH does not always result in detailed, pre-trial consideration by the parties and court of special measures. The GRH routinely does not serve its intended purpose. The name "Ground Rules Hearing" naturally connotes a discussion about how a witness is to be questioned. Part of the difficulty may flow from the expectations such a name creates on the Bench and at the Bar, and from the imposition of a single case management structure on type of litigation which has the potential to vary hugely in complexity from case to case.

As observed above, the most appropriate time to make an informed application for special measures is after the service of a defence statement and witness requirements. That will not necessarily be the best time for the consideration of all the other matters which need be determined at a GRH. Further evidence, or disclosure, which might inform bad character or s.41 (previous sexual behaviour) applications may not have been served, particularly in complex cases charged under the threshold test.

It is the experience of this Respondent that (where they are necessary at all, which is by no means every prosecution of sexual offences) Ground Rules Hearings – in the sense of considering how a witness with special measures is to be questioned – are almost always most usefully held on the day of trial (or pre-recorded cross-examination). The relevant barristers or solicitor-advocates and judge are, by necessity, present. Any intermediary will be present. By that stage, if a witness wishes to undertake a familiarisation visit, it will have been done. If an order has been made for cross-examination questions to be prepared and considered by an intermediary, that will have been done. All parties will be focused on the case at hand and less distracted by the pressures of other work.

In the view of this Respondent, there is real value in abolishing the routinely-failing GRH and replacing it with a three-stage model, better attuned to the reality of criminal litigation, with a degree of flexibility to permit the Court and parties to tailor the pre-trial procedure to the requirements of an individual case.

It is suggested that a better model would be:

(i) Firstly, the Plea and Trial Preparation Hearing. At that hearing (inter alia), a decision should be made as to what, if any, further hearings are required before trial;

(ii) Secondly, a Sexual Offences Case Preparation Hearing after Stage 2 (service of a defence statements and witness requirements). There should be a presumption in favour of such a hearing, but no more than a presumption. It might be dispensed with if the Court and parties agree, having regard to the requirements of the case. Such a hearing should consider: fully informed special measures applications; service of further evidence; secondary disclosure; and further directions for s.41 (previous sexual behaviour) or bad character applications, fully informed by the issues put in play be the defence statement. Such a hearing, if held, should be remunerated as a (further) PTPH for counsel;

(iii) Thirdly, a Witness Examination and Special Measures Hearing. The Court and parties should carefully consider whether such a hearing is necessary at either the PTPH and/or SOCPH. There should be a presumption in favour of such a hearing, but no more than a presumption. Such a hearing should take place on the day a witness is to be examined (either the day of pre-recorded cross-examination, or the first day of trial) and be so remunerated. The purpose of the hearing would be to address how a witness with special measures is to be examined, with the assistance of an intermediary and pre-prepared questions, where ordered, and to reconsider the special measures to be put in place, if any information has emerged since the PTPH or SOCPH. Any bad character or s.41 (previous sexual behaviour) applications should be heard and determined at such a hearing. The parties should be in a position to assist the court as to whether such hearings would be contentious or otherwise: uncontentious hearings might take up to half an hour; more contentious hearings, with contested applications, might delay the witness's evidence until the afternoon, or the following day.

(2) See above. The GRH should be abolished and replaced with a SOCPH and WESMH. There should be a presumption in favour of such hearings, but no more than a presumption.

(3) See above. The GRH should be abolished and replaced with a SOCPH and WESMH. The purpose of such hearings should be clearly set out in the Crim PR and Crim PD.

(4) See above. It is the opinion of this Respondent that the GRH should be abolished and replaced.

Consultation Question 45:

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?

AND

Consultation Question 46:

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?

Response:

No. There is no need for such a codified entitlement. As the Consultation Paper observes, there is already a presumption in practice in favour of such measures. Furthermore, as argued above, the Consultation Paper cites persuasive evidence that a more individualistic approach to special measures should be taken, to better accommodate the needs of individual witnesses. The codification of an automatic entitlement to a screen or live link is inimical to that individual, nuanced approach.

Consultation Question 47:

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

Response:

No. There are three reasons why such an entitlement should not be implemented at this time.

Firstly, there is an inadequate evidential basis to support the proposition that the pre-recording of evidence elicits the best evidence from witnesses. There is a persuasive body of evidence to suggest the contrary.

In the first place, each of the criticisms of recorded police interviews ("ABE interviews") at paras. 7.121 and 7.122 is perfectly well founded. Further examples of poor police practice in such interviews include:

- Lack of structure by the questioner. By the time a witness gives an ABE interview, she or he has usually given a first, short account to a police officer, taken down long-hand. Such accounts are seldom used to give structure to the questioning, leading to interviews which seem poorly prepared and difficult for judges and juries to follow;
- Forensically inappropriate questioning: Far too frequently, witnesses are asked to draw freehand plans of rooms or places (in one example this Respondent recently had to contend with, the complainant's own bedroom) which are readily accessible, and could and should be illustrated with photographs taken by a SOCO, or with photographs from Google Earth, or other such freely available resource. By asking witnesses to draw freehand plans, unnecessary pressure is placed on the witness, who may have little to no skill in technical drawing; the narrative flow of the interview is broken; and the task of editing the interview made all the more difficult, particularly where questions are asked while the witness is attempting to draw. The resultant drawing are usually of no, or trivial, evidential value. The Respondent also has experience of other cases in which interviewing police officers have failed to properly appreciate

witnesses' needs or vulnerabilities and, in some regrettable cases, have elicited answers based on avoidable misunderstandings, the correction of which unnecessarily protracts interviews.

- Legally inappropriate questioning: too often, leading questions are asked by investigating officers, or inappropriate sentiments are expressed by investigating officers as part of their questions.

Moreover, it is the experience of this Respondent that some of the criticisms made of pre-recorded cross-examination at para. 7.115 are well-made and deserve further attention. In complex cases, charged under the threshold test, it can be difficult, or even impossible, for the Crown to properly meet its disclosure duties in time for a pre-recorded cross-examination hearing. The "accelerated timeline" referred to in para. 7.114 cannot avail the police when seeking to fully investigate a complex case against an Accused charged and in custody awaiting trial. It is the unfortunate experience of this Respondent that the pre-recorded cross-examination of child witnesses in serious and sensitive cases has been delayed, adjourned or abandoned, sometimes at the last moment, because the case had not reached a state of preparation for cross-examination to take place.

The quality of recording and playback of pre-recorded cross-examination remains a real issue. These include the poor placement of microphones, so that the witness is notably less audible than counsel, and an unfortunate tendency for the first syllable or so of a witness's answer to be lost in the recording at some court centres.

It is the view of this Respondent that the Consultation Paper has too quicky dismissed the concerns of practitioners and the judiciary on the question of whether video recorded evidence in fact elicits a witness's best evidence, and preferred an incomplete body of flawed evidence from mock-jury studies. The citation of Ellison and Munro's mock-jury studies at 7.125 is unpersuasive: is it significant that the consultation paper suggests "jurors were less influenced by the way the evidence was delivered than by whether they subscribed to rape myths and misconceptions," which heavily implies that there was some

influence. The reliance on the Australian study contains an important caveat: "where there was a clearly visible and audible screen or recording." It is too often the case in the Courts of England and Wales that:

- TV screens are unacceptably remote from the jury;
- The sound quality of recordings is poor, either because microphones are placed too far away from witnesses (it is almost universally the case that the questioner is significantly more audible than the witness; see above) or because the quality of speakers available in court is poor (c.f. para. 7.123 and the recommendations of the OVC report there cited).

The MOJ is right to recommend further research. It is the opinion of this Respondent that to enact an automatic entitlement to video-recorded evidence without a proper evaluation of Professor Thomas's further research would be precipitous and premature.

Secondly, the Consultation Paper has quoted concerns from the judiciary and from practitioners concerning the availability of court resources for mandatory Ground Rules Hearings. The limited availability of properly qualified barristers, particularly prosecuting barristers, has been raised above in connexion with the same topic. Those concerns must inevitably apply in the case of pre-recorded evidence. It would be unwise at best, futile at worst, to implement an automatic entitlement to the pre-recording of evidence unless and until there were a guarantee of proper resources and personnel to meet such an entitlement.

Thirdly, the Consultation Paper does not take into account the significant delays now endemic in the criminal justice process. In the experience of this Respondent, in a case where evidence from a complainant is pre-recorded, it is far from uncommon for the residue of the trial proper to take place a year or more after the recording. As the Consultation Paper observes at para. 7.120, "However, after recording their cross-examination, complainants may remain in limbo until the trial has reached its final conclusion. The Joint Inspection stated that while recording their evidence earlier in the process may alleviate some of the distress for complainants, "[the distress] remains until the case has

concluded." Not only do the endemic delays have the potential to cause unforeseen distress to complainants, but there is the real risk of an improper disadvantage to the Accused, who (if he or she chooses to give evidence) is faced with the deterioration of his or her memory of a year or more. There seems no convincing justification for why the Accused should automatically be put to such a disadvantage by the enactment of an automatic entitlement of a complainant to pre-record his or her evidence.

It is the firm opinion of this Respondent that in light of the forensic, technical and resource-founded difficulties with pre-recording a complainant's evidence, a judicial evaluation of the requirements of the case in deciding whether or not all or part of a witness's evidence should be pre-recorded remains an important safeguard for the fairness of the proceedings for both the Prosecution and Accused.

Consultation Question 48.

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?

Response:
No, because this Response supports the principle of judicial evaluation of the most appropriate special measures for a particular witness according to the requirements of the particular case and, therefore, the principle of automatic entitlement to pre-recorded evidence for all complainants in sexual cases is not admitted.

That having been said, the Consultation Paper is correct to cite JUSTICE's perception of the "disparity of quality" between video recorded evidence in chief carried out by police officers and video recorded cross examination by an "experienced and prepared advocate," at para. 7.121. This Respondent

therefore proposes that, where there is a judicial determination that pre-recording of a witness's evidence is the most appropriate special measure for the requirements of a given case, then a complainant who has not given an "ABE" interview should not be deprived of the most appropriate special measure. Likewise, where (as is often the case) there is an inadequate ABE interview, then the complainant should have the opportunity of presenting her or his best evidence by re-recording her or his evidence with the benefit of examination in chief by a properly prepared, appropriately qualified barrister or solicitor-advocate.

Consultation Question 49.

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.

Response:

In all cases, save (1), where it is (usually) impractical, the Accused should be able to see a witness giving evidence against him. The views of Professor Hoyano and Dr Fairclough, expressed at para. 7.147, and the arguments at paras. 7.150 and 7.151 are persuasive. The assertion at 7.151 that "the defendant is still able to participate fully through his legal representative," is flawed. Vicarious participation is by its very nature not full participation. Moreover it is comprehensively refuted by the more persuasive assertions which precede, that the Defendant is prevented from seeing the evidence in its entirety, and that legal representatives may thereby be prevented from properly advising their clients.

In stark contrast, the unnamed "stakeholders," whose role(s) is not adequately or properly defined, who told the Commission (at 7.141), who "explained that complainants also do not want the defendant to see them," is a poor evidential foundation for further limiting an Accused's participation in his or her own trial. The question is not so much what a complainant wants, but what will enable the complainant to give his or her best evidence while procuring a fair trial for the Accused, in which he or she can properly participate.

Consultation Question 50.

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?

Response:
Yes, with the caveat that (save where it is impracticable, such as with the use of screens), for the reasons advanced above, any Accused ought to be able to see a witness giving evidence against him or her.

Consultation Question 51.

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?

Response:
No.

It is almost invariably the case that when a complainant is afforded the special measure of screens, the screen applied obscures the view of the witness from both public gallery and dock.

In the case of a live link, or pre-recorded evidence, a judge already has the discretion to order a screen in conjunction with another measure (para. 7.160). Given that, "The purpose behind measures to assist the complainant to give evidence is to protect their dignity while affording them the chance to give their best evidence at trial," (para. 7.163)," if a judge assessed that a combined measure such as screens and a live link, or screens and pre-recorded evidence, would facilitate that objective, he or she has the power to so order. There is no convincing reason given in the Consultation Paper why the position should alter.

The observation at 7.159, that, "The Angiolini Review heard that "complainants are shocked to find" that at trial, during the playback of their ABE interview and their live link evidence, they could be seen by the public gallery and by the defendant, potentially leading to their identification," comes close to stereotyping the reaction of class of witnesses drawn from a huge variety of backgrounds, constitutions and attitudes. Moreover, it tends to suggest that poor or inaccurate information was given to such complainants about the operation of public justice. As argued above, what is required in choosing special measures is the right measure, or combination of measures, which permits an individual witness to give his or her best evidence. That cannot be achieved by seeking to portray the views of a large class of disparate and different individuals as homogeneous, or by stereotyping.

As the Commission observes, at para. 7.181, "Family courts have long been criticised for a presumption of privacy." There is a real danger of the criminal courts, whose jury is shown in research to be one of the more trusted constitutional institutions, to suffer a diminution in public confidence if a presumption of privacy is included for certain classes of criminal case with adult complainants and Accused.

Consultation Question 52.

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?

Response.
No.

If a judge has assessed that the witness's best evidence would be given in such a way that prevents him or her being seen by the press or public gallery, then the requirement of open justice is met by permitting such persons to hear the complainant.

Consultation Question 53.

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?

Response:
No.

As observed above, research shows that the jury is one of the most trusted public institutions in England and Wales and a presumption that the public should be excluded from evidentially significant portions of trials in certain classes of case carries with it the inherent risk of diminishing public trust in the determination of criminal allegations by a jury. An automatic entitlement to have excluded the public during a complainant's evidence goes too far.

But the Consultation Paper does present a persuasive argument that judicial discretion to exclude members of the public during a complainant's evidence is significantly under-used, where the adoption of such a measure might make a significant difference to the quality of a witness's evidence. The Lord Chief Justice and/or Senior Presiding Judge should consider publishing new guidance to the judiciary concerning the better exercise of the power under s.25 YJCEA 1999 in accordance with the objective of eliciting the best evidence from witnesses eligible for special measures.

Consultation Question 54.

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?

Response:

There are cases in which it would be proper for expert witnesses to be present in court while a complainant gives evidence. The court should have a power to permit attendance of persons (upon the application of such persons, or by either party) whom the presiding judge is satisfied that it is in the proper interests of justice to be present and their presence would not materially diminish the quality of the witness's evidence.

Consultation Question 55(a).

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?

Response:
Yes.

As to the observation at 7.179, "it is already mandatory that certain pre-trial hearings should take place in private. For example, an application for leave to introduce sexual behaviour evidence must be heard in private. It is inconsistent that there is no mandatory hearing in private when the complainant gives evidence on these matters," there is no such inconsistency.

In the experience of the Respondent to this question, applications to adduce previous sexual behaviour evidence are very, very frequently refused. The exclusion of the public from applications to introduce evidence of sexual behaviour has at its core the rationale that a complainant should be protected from having potentially irrelevant sexual behaviour, which will not feature in evidence, repeated to the general public.

Consultation Question 55(b).

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.

(1) Not in most cases. Such a measure would be inimical to the principle of open justice, for the reasons already explored above. Two alternatives present themselves:

(a) Firstly, in the trial of alleged sexual offences where either the complainant or Accused is under the age of 18 years, there might be a power to hold all or part of the trial in private, with a presumption in favour of exercising that power, on the basis that criminal proceedings in the youth court are heard in private, and that children and young people, who have yet to reach intellectual or emotional maturity, are more likely to be affected by distress in giving evidence about acutely personal events and allegations;

(b) In the case of adult complainants, a proportionate alternative, to protect the privacy of the complainant but to achieve the objective of open justice, and in conjunction with other special measures in appropriate cases, would be to refer to the complainant throughout by judicially determined pseudonym throughout.

(2) No. Such a measure would be inimical to the principle of open justice, for the reasons already explored above. An proportionate alternative, to protect the privacy of the complainant but to achieve the objective of open justice, would be to refer to the complainant throughout by judicially determined pseudonym throughout.

(3) Yes. The impact statement is evidence: see Crim PD VII Sentencing F.3(b) and (c). The same power to exclude members of the public from Court should apply equally, both to evidence in the contested part of the trial, and to evidence of impact at sentence, subject to the same test.

Consultation Question 55(c).

If so, should this power be discretionary, or should the complainant be automatically entitled to such a direction?

Response:

If implemented, the power to exclude the public from all or part of the trial should be subject to the same test as other special measures, save in those cases

where the complainant or Accused is under the age of 18, in which case, there should be a presumption in favour of exercising such a power.

In the case of adult complainants, given that the present Respondent only accepts that the power to exclude members of the public should apply to the complainant's evidence, whether at trial, or evidence of impact at sentence, it would be a matter for the judge's assessment of whether the evidence of the witness would be diminished without the exclusion of the public being directed.

Consultation Question 55(d).

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?

Response:
Without admitting that such a broad power should exist in the case of adult complainants, the court should have a power to permit attendance of persons (upon the application of such persons, or by either party) whom the presiding judge is satisfied that it is in the proper interests of justice to be present and their presence would not materially diminish the quality of the witness's evidence.

Consultation Question 56.

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?

Response:

The Respondent to this question has for some years been a proponent of the abolition of the forensic wig as an article of dress which is not only "archaic and exclusionary" (para. 7.195) but also ridiculous. Forensic wigs are all too frequently unkept and dirty and inconsistent with the dignity which courts strive to maintain. That is not, however, the object of the consultation question.

Given that the Commission concedes, "There is limited evidence available about the use of this measure in the context of sexual offences," (para. 7.197), consistent with the principle that where there is no proper evidence to propose or enact a reform, no reform should be enacted or proposed, and while the forensic wig remains mandatory for members of the bar in most other criminal matters on indictment, the proper answer to the question posed is (regretfully) "no."

Consultation Question 57.

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?

Response:
No. It is necessary for the proper maintenance of order of the proceedings for there to be judicial oversight and control over persons admitted to the court to sit in close proximity to a witness giving evidence in serious and sensitive cases, such as the prosecution of sexual offences on indictment. There might instead be a presumption in favour of a complainant to an alleged sexual offence being accompanied by a supporter whom the Court is satisfied is a fit and proper person to act as a supporter to a witness in the trial of sexual offences on indictment.

Consultation Question 58.

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?

Response:

No. For the reasons given above, there might instead be a presumption that an ISVA is a fit and proper person to act as a supporter to a witness in the trial of a sexual offence on indictment, unless the contrary be proven.

Consultation Question 59.

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?

Response:

No, for the reasons given at 7.216: "The availability of this measure obviously requires adequate court facilities to accommodate it. Where courts do not already have adequate facilities to accommodate separate and accessible entrances for witnesses, it could be costly to do so. For example, it may necessitate construction work on the court building. We acknowledge the argument that a formal requirement for separate accessible entrances and waiting rooms could ultimately lead to improvements in court infrastructure. However, this would be in the long term and the funding implication is a very present barrier." To enact an automatic entitlement to a measure which cannot be uniformly applied would be incoherent and futile.

Consultation Question 60.

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. We invite consultees' views on how the current process might be improved. 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.

Response:

At present, the currently legislation and practice works adequately, but no more than adequately. Too often, intermediaries provide reports and make recommendations which are not predicated upon a proper assessment of a witness' disability or disorder, such as medical records, the report of a forensic psychologist or psychiatrist, or even an occupational therapist, but upon the self-report of a witness, or anecdotal material from a witness's family or friends. This too frequently leads to an unduly pessimistic assessment of a witness's ability to withstand cross-examination, which is not born out when evidence is given. That might have negative consequences for a complainant's evidence: for example, on the basis of an intermediary's report with an inadequate evidential foundation, a judge, seeking to act in the best interests of a complainant, might restrain defence counsel from asking a question to which the witness would have a perfectly robust and persuasive answer. In such circumstances, the jury would be deprived of that answer, as would the Crown in making a persuasive case to the jury concerning the credibility of that witness.

By altering the stage at which the Crown is required to make an application for special measures (see above), the Crown would have the opportunity to gather further, proper evidence concerning a witness's disability and disorder, including commissioning a forensic expert report in cases which merit such a report, and in which the witness consents. In such cases, an intermediary's report might then be better informed and better tailored to the needs of the

individual witness. The above observations are equally applicable in the case where a witness is said to have suffered trauma.

Consultation Question 61.

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?

Response:
If a complainant has been afforded special measures at trial, if would be consistent to afford him or her comparable special measures to attend the return of a verdict, or the sentencing hearing, subject to a judge finding that it is compatible with the interests of justice so to do, and that the provision of such special measures would not lead to the undue delay or disruption of proceedings.

Consultation Question 62.

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?

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?

Response: No other measures other than those currently enacted in statute present themselves to the Respondent. But consistent with the views expressed in this Response, any additional measures should be subject to the automatic

eligibility of the complainant to apply on the grounds that it would improve the quality of her or his evidence.

Consultation Question 63.

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.

Response:

(a) The well-known singer Cliff Richard, in voicing his support for the pressure group FAIR, said, "Even though untrue, the stigma [of being suspected of a sexual offence] is almost impossible to eradicate." To achieve parity with the rights of complainants, a person suspected or accused of a sexual offence should be the beneficiary of rebuttable presumption in favour of anonymity until such time that he or she is convicted. That presumption might be disapplied on application by the police or competent prosecuting authority if a judge of the Crown Court considers that it would be in the interests of justice so to do; for example, if there is good reason to believe that the publication of the name of an Accused might assist the police or prosecuting authority with further or wider investigations;

(b) The Commission rightly observes, "There is an imbalance between vulnerable witnesses and defendants in respect of their eligibility for statutory special measures. The use of live link is the only measure in the YJCEA 1999 in force that may be directed for a defendant. The eligibility criteria for live link are more restrictive for vulnerable defendants than for vulnerable witnesses…" The test for eligibility for special measures for an Accused person giving evidence should be the same as for any other witness: "if the court is satisfied that the quality of evidence given by the Accused is likely to be diminished by reason of fear or distress on the part of the Accused in connection with testifying in the proceedings."

(c) The following measures should be available:

a. Screening the Accused from the public gallery;

b. Giving evidence over a live link;
c. Giving evidence in private (where the Accused is under the age of 18, there should be a presumption in favour of exercising such a power);
d. Removal of wigs and gowns (where the Accused is under the age of 18 years, there should be a presumption in favour of exercising such a power);
e. Examination of Accused through an intermediary;
f. Being accompanied by a person whom the Court is satisfied is a fit and proper person to act as a supporter.

Chapter 8: Independent Legal Advice & Representation for Complainants

A View From The Ground

If a member of the public approaches alleged sexual offences on the basis of myths/misconceptions/stereotypes, then, if anyone like that appears on a jury, their views will be entrenched.

I have heard "myths and stereotypes" views expressed by defendants (young and old), and partners/parents/supporters of defendants, even supporters of defendants who have been abused themselves, defendants who have been abused themselves. I spend time in conference (with defendants) explaining myths and stereotypes and how certain lines of questioning will be dealt with by a judge in directions to the jury to counter any thoughts of the jury applying them. It falls on deaf ears. Educating the public to understand myths and stereotypes would help. Why can't this be part of every school's education policy? Why can't there be a public education campaign about it?

These cases involve word on word, often, in order to challenge such serious allegations, all there is explore is delay/opportunities to complain/motive for lying etc. Matters which may trigger complaints of myths and stereotypes being deployed, but it does not mean these issues of delay etc are irrelevant on the specific facts of each case.

I have never heard any opponent make a "generalised" myths and stereotypes comment/argument in closing or in questioning. On one occasion, this year, one defence barrister out of 12, in a trial that had lasted 3 months, made an inappropriate comment about a complainant in his closing speech. The complainant was not present to hear it (as there are very rarely there in any event at that stage in the trial) but it was noticed and commented upon by all parties as being inappropriate because it was such an extraordinary event that the comment was made – it was shocking because it was nothing any of us present at the trial had ever heard before and we were all counsel above 10

years call. The advocate who made that comment never prosecutes, and I doubt had ever been on a course for advocacy in sexual offence cases or for vulnerable witnesses. It did not go down well with the jury, he was convicted. So, bad behaviour of advocates is so rare, in sex offences trials, this is the only time I have seen it.

This consultation seems to have a starting point that all complainants should be believed and then focussing on ways to get a jury to believe a complainant, at the expense of a defendant's fair trial. In the current climate, where there is a crown court backlog, where (on the NEC), RASSO lawyers who prosecute are becoming a rare breed, most of the measures suggested will generally be costly/create more delay/work for all the parties and thus, provide even less of an incentive for lawyers to apply to join the CPS RASSO panel or conduct cases for the defence.

Since s.28 cross-examination procedures were introduced, the amount of work involved in conducting RASSO cases has become intolerable, with the introduction of some of the measures suggested in the LC's document, it will be even more so and I did not think what was possible.

Consultation Question 64.

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?

No. The purpose of special measures is to assist witnesses give their best evidence. The perceived or feared effect on a jury should play no part in the judicial decision, since that is concerned exclusively with the quality of the evidence, not its impact or influence on the jury. It is not the judge's job to assist the Prosecution in presenting a more impactful case, especially if doing so reduces the ability of a witness to give her/his best evidence.

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?

No. See above.

Consultation Question 65.

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?

No. The current regime adequately deals with the admissibility of personal records or SBE. The CPS are well equipped to deal with the disclosure process, counsel are regularly asked to advise on the same if an issue arises as to whether a document in disclosable. Further, relevance and admissibility are subject to judicial scrutiny. If there is need for more direct/specific requests made for personal records, then that should be a matter for police training.

Consultation Question 66.

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?

No.

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?

Information can be provided in the form of an information document but sufficient police training to focus on the their applications for the records should deal with the problems raised in the LC document. A leaflet could set out general legal advice. The judge/prosecution/police all are there to provide the balance at the applications stage for personal records and SBE.

(2) Independent legal advice and assistance only? NO

(3) Independent legal representation only? In relation to refusal of consent/witness summons.

(4) None of these?

Consultation Question 67.

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?

No – this would incur inordinate delay, appear unfair and weighted against the defence (along with the prosecutor present) and is unnecessary. It would have the appearance of undermining the role of the judge/showing a lack of confidence in the judicial system.

Consultation Question 68.

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?

Online information/leaflets would be fine.

Consultation Question 69.

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?

We do not agree that complainants should be provided with legal advisers or representatives. If this measure were introduced, the necessary docs they should have access to would be relevant only to the application, with full transparency for the defence and prosecution and record kept of documents accessed.

Consultation Question 70.

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?

We do not agree that complainants should be provided with legal advisers or representatives. If this measure were introduced, their engagement should be limited to the specific application under scrutiny. Information provided would

have to be limited to information particular to the issues to be determined and a record would need to be kept of the contact.

Consultation Question 71.

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;

We do not agree that complainants should be provided with legal advisers or representatives. If this measure were introduced, the representations must be confined to the compliance with an order.

(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

No - this will interfere with the binary adversarial model. The jury will potentially be confused as to why there appear to be 2 prosecutors, which could impact on the fairness of the trial. Prosecution counsel are experienced and well equipped to deal with improper questioning, and the judge's role is to ensure that only relevant and admissible evidence is adduced and to deal with inappropriate questioning. An SBE application requires questions to be set out within it, for the judge to scrutinise, any judge/prosecution will ensure those questions are not expanded upon improperly during evidence. Any judge/prosecution counsel will ensure questions are not asked that are not relevant/admissible in relation to the personal records.

(3) make representations to the court during the whole trial in the presence of the jury.

(1) No

(2) No, as above. This could result in an unfair trial/perception of unfairness as it would result in the total interference with the binary adversarial model, for the reasons set out above. Also, as set out above, there are adequate processes/directions/safeguards in place already to deal with any issues that may arise over evidence relating to personal records and/or sexual behaviour, such as the consideration by all parties as to what is admissible/consideration by the CPS as to what is disclosable/scrutiny by the judge as to what is admissible/relevant and the duty on all parties to adhere to a court ruling on the admissibility of evidence.

Consultation Question 72.

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?

Yes. They should also have sufficient experience of dealing with sexual offences cases.

Consultation Question 73.

How should the role of independent legal advisers and representatives be defined?

Not agreeing that ILA or ILRs are necessary but, if they are permitted, they should be defined as limited in role to when a relevant application is made for personal records/SBE and only ever for hearing in the absence of the jury. They should be restricted to only give advice on the legal basis of an application, the rights of the complainant in relation to it and legal consequences of non-adherence. They should be able to give general advice of adverse consequences

of their refusal/consent to an application but not specific to the evidence in the case.

The other issue with this is that the complainant may say something in their discussions with the IA or LR that potentially is undermining for the defence case and ought to be disclosed, this will need to be dealt with, within the role, as in that situation, LPP should not attach to such material.

Would written guidance, such as a code of conduct, be useful? If so, what should it include?

Not agreeing that ILAs or ILRs are necessary but if they are permitted, there should be a code of conduct, including dealing with not being permitted to coach a witness and what constitutes witness coaching/what documents they are able to seek/what records they must keep of documents accessed/discussed and with who/discussions with the complainant.

Consultation Question 74.

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?

No. The police and the CPS can and should explain this properly to the complainant, so that they have all the information required to make informed decisions. ISVAs also provide assistance about this. Prosecution counsel already have special measures meetings with complainants and are instructed to do this. If the witness is particularly vulnerable, then an intermediary can also assist with this.

Chapter 9: Limitations on Trial Conduct

General Observations:

We agree that the use of 'myths and misconceptions' should be challenged at all stages of a criminal trial. And we agree that that should include taking those measures which can sensibly be taken to ensure that advocates neither use or perpetuate such myths.

It is important to stress that a Judge takes responsibility for the conduct of a trial, that trial Judges already have wide powers to regulate the way in which a trial is conducted, and that the principal role of a Judge is to ensure fairness for all participants in the trial. All Judges trying cases involving serious sex will be ticketed to do so and will have had up-to-date training including the addressing of myths and stereotypes.

Advocates have different roles to perform. Defence advocates are under a duty to put forward their client's case in the best possible light and follow his instructions insofar as it is consistent with their professional duty. It is difficult occasionally to differentiate what may appear a lazy stereotype versus a legitimate instruction particularly where the Defendant is claiming a reasonable belief in consent. An adversarial process is one where a defence advocate can be expected to be doing everything within the limits of what is proper and fair to put forward their client's case and, where necessary, to weaken the case for the Crown. In a properly conducted criminal trial, both prosecutor and judge will keep a watchful eye on what a defence advocate is saying and doing.

Question 75.

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

Continuing professional development ('CPD') is mandatory for all barristers. In our experience, advocates want to keep abreast of developments in the law – statutory changes, new reported cases, Sentencing Guidelines, and frequently

changing policies and protocols. It can be, and often is, difficult for barristers to keep up-to-date with such developments when there are so many other demands on their time.

We agree that training about myths and misconceptions is an important part of keeping updated with how trials involving sexual allegations will be progressed. We understand and support the mandatory nature of training for those who wish to be appointed to the CPS' RASSO panel. We also support the mandatory training which Judges must receive every three years, and the inclusion of modules relating to myths and misconceptions within such training.

However, we do not support the suggestion that such training should be made mandatory for defence advocates. As indicated above, CPD is already mandatory. We believe that it would be wrong to impose further constraints on what defence practitioners choose to undergo each year by way of training. They should be able to choose what aspects of training are most pertinent to their practices, bearing in mind that they are less likely to provide a good service for clients accused of sexual offences if they do not keep fully abreast of issues (including training on myths / misconceptions) that relate to such work.

When defending in trials involving vulnerable witnesses, defence advocates are already required to satisfy the Court, using the GRH form, of their suitability to act and cross-examine in such cases.

We do not accept the suggestion implicit in the report's para 9.14 that mandatory training for defence advocates would not set a precedent because of the existing requirements for those appearing in the Youth Court to register with the BSB and declare that they have the "specialist skills, knowledge and attributes" to do so. As set out in para. 9.15, training for those who appear in the Youth Court is available, but is not (we believe) mandatory for those who defend in the Youth Court.

As such, we agree with the observations made at paras 9.20 – 9.22 inc. Mandatory training would be likely to have the effect of limiting client choice.

It would impose further burdens on those whose resources are already very stretched. And it would potentially act as a further disincentive to advocates to take on sexual offence work.

We suggest that the approach taken in New Zealand – where training of this sort is not mandatory but is instead "strongly encouraged" – would be a sensible one to take.

Question 76.

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?

We agree that, in considering admissibility of topics for the questioning of a witness, 'relevance' should continue to be the appropriate test. We do not support the introduction of further "enhanced admissibility thresholds".

Question 77.

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?

We are not in favour of "enhanced admissibility thresholds".

Question 78.

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.

As the Commission correctly notes, several topics which **may** give rise to arguments based on myths and misconceptions may also, depending on the facts of a case, give rise to legitimate questioning and legitimate comment. A principal one of these relates to timing – the timing of a complaint to friends or relatives, as well as the timing of a complaint to the police or other body. In our view it would be wrong to disallow questioning about the timing of complaint for fear that such questioning might lead to impermissible arguments being deployed in a closing speech: the timing of a complaint is often an important part of the factual matrix of a case.

Equally, Judges (and prosecutors) should be alert to the fact that some defence advocates may seek to make use of the fact that a complaint could have been made earlier. Even in cases where a complaint is made extremely soon- sometimes less than an hour – arguments might be deployed that it could have been made even sooner. Appropriate directions may well be needed to challenge any such argument: trying to ban such questioning , or comment, is likely to be futile.

A second important example relates to alleged or accepted inconsistencies in a complainant's account: it is hard to imagine that questioning should be stopped, or regulated, concerning differing accounts given to people at different times. Whenever a complainant's veracity – or accuracy – is being challenged, the defence will argue that the fact that a complainant gave or allegedly gave

differing accounts is a legitimate topic to explore. We suggest that, like timing of complaint, it would usually be wrong to stop such questioning. Whether a direction about how trauma can operate on memory is appropriate is a different question.

Some other topics are, we suggest, less likely to yield relevant evidence. "Lack of resistance" and clothing worn by complainants are two of these. A complainant will very often have explained her own actions during a period of alleged sexual assault during a VWI interview. Where she has said that she has not physically resisted, she will often – maybe usually – have explained within the VWI why she did not. In this scenario, we suggest, Judges and prosecutors would be well advised to be watchful with regards to cross-examination. Questioning is unlikely to be addressed at trying to elicit evidence that a complainant in fact DID resist; it is more likely to be addressed at underlining the fact of a lack of resistance in order to utilise a myth / misconception within a closing speech.

The Commission gives a good example at para 9.36 - a rhetorical question used by defence counsel in a closing speech – "would a victim not at least scream or do something to show some kind of resistance?" This sort of comment is frequently anticipated in many cases of alleged sexual assault. While various methods can be considered to try to prevent such a comment, the reality is that the possibility of such a comment should be considered in advance by trial judges and prosecutors and dealt with in advance. The use of some judicial directions before a complainant gives evidence, appropriate directions within a split summing-up, the power of a judge to correct a defence advocate when an inappropriate remark / submission is made, and the power of prosecuting advocates to comment on the evidence to help explain why a complainant may have acted as she did – these are all ways of counter-acting such comments. Trying to prohibit such comments, or threatening sanctions against defence advocates if they contravene rules made in advance, are both less likely to be effective and tend to give the impression of trying to prevent a defendant from having a fair trial.

Equally, and perhaps more obviously still, questioning a complainant about her choice of clothing before a sexual assault takes place is unlikely to have any legitimate relevance to the issues before a jury. However, there may be cases where the clothing worn may be relevant to a factual dispute which the jury has to consider; thus a blanket rule against questioning on a specific topic should be avoided.

Having considered several of the topics which often arise in practice, we suggest that trials of sexual offences should include, at or very soon after the start of a trial, a discussion between Judge and counsel about appropriate 'opening directions'. These could either be included within the general 'homily' always given to a jury at the outset of a trial, or – perhaps better – in advance of the first evidence to be given in the case (usually, although not always, the calling of a complainant to give evidence either 'live' or through the playing of a pre-recorded VRI interview).

Such 'opening directions' would be tailored to the specific issues to be determined within a trial. As part of the discussion which would have taken place earlier, a Judge would have invited advocates to address the court as to whether various issues would be raised as part of the trial. These might include:

(a) timeliness of complaint (either to friends / family, to police or other authority; or both);
(b) alleged inconsistency in accounts;
(c) alcohol / drugs;
(d) lack of resistance / shouting etc;
(e) clothing.

As suggested at para 9.49, if a defence advocate indicates that a topic WILL be raised, a judge would be entitled to require the advocate to explain its relevance to the issues for the jury to determine. We suggest that, as a 'rule of thumb', some questioning about issues raised in paras (a)(b) and (c) is likely to be acceptable and to go to relevant issues; questioning about issues raised in paras (d) and (e) is less likely to be so, and more likely to require justification. If an

advocate has said that an issue will NOT be raised during the trial – and then proceeds to raise it at a later stage - a Judge could and should raise the issue immediately and, without a satisfactory reason being given as to why matters have changed, prohibit further questioning on the topic.

Introducing an "enhanced relevance test" to issues such as the timing of complaints, or inconsistencies within accounts given by a complainant to different people and/or at different times, would be burdensome, time consuming, and potentially unfair to a defendant. Where relevance is uncertain, a judge should query whether it exists. No more complicated system is needed.

For the same reasons, we are not in favour of 'codification of the relevance threshold'. As set out above, each case is fact specific; what is needed is flexibility of approach rather than more rules. We are equally not in favour of a requirement that lines of questioning are considered in advance – but, as explained above, do believe that trials should adapt so that discussions about lines of cross-examination take place more frequently and with more rigour.

We suggest that Opening Directions, and keeping a close eye on potentially controversial issues, should help to eliminate the use of myths and misconceptions. The commission discusses various research papers, some of which suggest that defence advocates "go further than they should". The answer to almost all of these observations is that it is the trial judge's function to regulate the conduct of the trial. Well trained and experienced Judges can usually see possible problems some way ahead; they can and should discuss potentially controversial issues with counsel at appropriate stages of the trial.

By contrast to all of the above, we note also the example comment in a defence closing speech given at para 9.37 – "the experience of the courts is that false allegations of this type are made, sadly regularly made…" We suggest that this is the type of remark which may not be capable of being anticipated in advance of a closing speech. We suggest that such a remark should be dealt with by a firm rebuke from a Judge. As we understand it, it is not true that false sexual

allegations are 'regularly made', and a Judge in such a scenario could and should correct defence counsel in strong terms.

Question 79.

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.

We do not believe that 'guidance' to judges, on how to respond to generalisations relying on myths or misconceptions when raised in speeches, is necessary or desirable. Judges already have all the tools, and training, which they need to ensure that trials are fair.

With respect, some of the quoted contributors appear to have limited understanding of how a criminal trial operates. There is already a process in almost all cases where the legal directions are agreed and often given prior to speeches so that advocates can tailor closing to what is agreed is the correct law. Beyond that, "Controlling the content of speeches" suggests inviting counsel to become mouthpieces for speeches approved in advance – this is not what advocacy is about, and most advocates would, we believe, firmly refuse to take part in such a system. Cossins appears to want to prohibit, through legislation, mention of many topics which may have relevance in the trial process: adoption would immediately make trials unfair to many defendants.

The question also asks about guidance when a suggestion is made that a delayed report makes a complainant less credible. 'Guidance' is not needed. There is already a specimen direction on exactly this issue. In appropriate cases it could be given twice – firstly immediately before a complainant gives

evidence (or is cross-examined), secondly in the summing-up. If a split summing-up, a firm correction could be made to any inappropriate comment within the defence advocate' s speech.

Question 80.

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?

No. See below.

Question 81.

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?

No. See below.

Question 82.

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.

No.

Our experience is that advocates almost invariably do their utmost to provide a high-quality service to their clients and to the courts. Barristers have had to face increasing and unremitting challenges over the last ten years - including

poor rates of pay, Covid, and the pressures of attempts to clear or at least reduce the huge backlogs that have been generated – and many have left the profession.

Against that background, we oppose suggestions that further measures should be taken to encourage disciplinary action, or warn about the risk of disciplinary action, against those trying to do their job in what are often very challenging situations.

As far as the BSB is concerned, disregarding clear directions from a judge can constitute a breach or breaches of the BSB Handbook (para. 9.133). Judges already have more than adequate powers to deal with any such instances of deliberate behaviour. We make clear that, in our experience, such situations are vanishingly rare.

What would be the benefit of guidance to judges about warnings to advocates (Q80)? Is it suggested that Judges should provide warnings that, if the words of a defence advocate's closing speech strays beyond some line, that the judge will encourage / instigate misconduct proceedings against her/him? In most instances, such a warning would seem extraordinary to an impartial member of the public watching proceedings; would seem grossly unfair to a defendant and his/her supporters; and would undoubtedly often act as a challenge to a defence advocate not to do their best for her/his client.

The Commission should be aware that, just as there are dwindling number of barristers practicing at the criminal Bar in general, so there are dwindling numbers who are willing to take on sexual trials in particular. Measures such as these would undoubtedly be seen as another reason not to take this sort of work. If the Commission wishes highly skilled and dedicated barristers to continue to take on this work, measures such as those suggested in these questions are likely to be wholly counter-productive.

Question 83.

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.

No. Again, powers are already available to sanction improper acts within the courtroom. We suggest that it is quite right that a high threshold exists for the imposition of a wasted costs order.

We repeat the observations made above in response to Q80 – 82 inc

There is even less value in judges having guidance on warning advocates about wasted costs orders than warning them about professional misconduct consequences. In any scenario where reliance on myths / misconceptions have already "caused costs to be wasted", there is nothing to be gained from some form of judicial warning. All cases are fact specific, and any scenario where the issue of wasted costs is being actively considered is highly unlikely to benefit from generalised 'guidance'.

Chapter 10: Jury Decision Making

General Observations:

We agree that additional or alternative ways of educating jurors about myths and misconceptions is a worthwhile endeavour.

It is difficult to consider changes to existing judicial directions when there seems to be little available empirical research as to the effect that such directions have had on juries since they were introduced. Much of the consultation refers to stakeholders' impressions and feelings about the effect of such directions – and these clearly conflict with each other.

Timing of directions: in our response to chapter 9 we suggested that much more use should be made of 'opening directions'. It seems to us that directions aimed specifically at reducing the risk of jurors allowing myths and misconceptions to affect their evaluation of a witness' evidence need to be given in advance of that witness giving evidence. There is no harm in the same direction being given again at the conclusion of the trial.

We agree that split summings-up can help to focus a jury's mind on the specific issues which they will need to consider in arriving at verdicts.

Question 84.

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

We agree that most trials involving sexual allegations benefit from a suitably tailored direction about myths and misconceptions. We do not think that too mechanistic an approach is required. It is an issue which should be canvassed between the judge and the parties - we suggest both at the start of the trial and shortly before directions are given at the end of the trial.

Some trials do not require such a direction. The defence may be mistaken identity; that an admitted sexuaI act did not involve penetration; that an admitted sexual act took place when a complainant was above a certain age threshold. So-called 'paedophile hunter' cases are unlikely to require a direction. In addition, where the defence is not that a complainant consented, but solely that a defendant had a reasonable belief in consent, such directions may not be needed.

As such, we are not convinced that there needs to be a 'rebuttable presumption'. What is needed is discussion about appropriate directions, both at the outset of a trial and towards its conclusion. It may be that judges need to be reminded through training that appropriately tailored directions should be given in all sexual cases, without adding more formality to the process. We also feel that advocates should be encouraged to make more reference to the content of the Crown Court Compendium, easily available online.

Question 85.

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?

This would be unobjectionable if a rebuttable presumption were to be introduced.

Question 86.

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 a rebuttable presumption were to be introduced, it should only operate on those myths and misconceptions which actually feature in the case at hand. This may relate to the content of a VWI or other evidence, become apparent through enquiry as to what cross-examination is planned, or through listening

to cross-examination. The three examples given here are all examples of those myths for which directions should be given in appropriate cases.

Question 87.

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.

See above – we are not persuaded of the value of a rebuttable presumption.

Question 88.

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?

We agree that there should not be mandatory wording to directions. Quite the opposite. In our experience, inappropriate or irrelevant directions undoubtedly have the effect of making judges lose the attention of jurors. Tailoring of the wording of directions is essential for them to have proper effect and to ensure that the trial process appears fair to all parties.

Question 89.

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?

We accept and agree that existing wording can very probably be improved. As to response to rape (and other sexual assaults), we are inclined to agree that "there is no typical response to rape" is too bland an observation to be of much use to jurors. We are inclined to agree that, in appropriate cases, specific reference to the common response of victims to freeze would be an improvement.

We are less inclined to agree that amendment to the 'delay' direction is needed.

Question 90.

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?

No others that come to mind.

Question 91.

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?

We accept and agree that there may well be scope for additional model directions aimed at particular types of case. This question is based on the product of limited research, and we are not convinced that a new model direction is needed specifically for male complainants. The examples given in paras 10.87 and 10.88 would seem potentially to apply equally to female complainants.

Question 92.

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?

Yes. We feel that it is important to note that any such new direction should apply to all witnesses in a trial – other Crown witnesses, a defendant, and/or defence witnesses. We feel that it may assist a jury, in assessing a witness' credibility, to have information about such conditions and how that may affect

her / his presentation in giving an account or answering questions. We feel that this would usually be preferable to the alternative suggestion – the calling of expert evidence - which, in the majority of cases, would be a cumbersome, time-consuming and expensive process.

Question 93.

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?

We do not see the value of a direction about the relative prevalences of stranger and acquaintance rape. As to distress, the current direction – telling a jury that distress is irrelevant unless a jury is sure that it is genuine - strikes us as outdated and in need of modification.

Question 94.

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

We see value in the drafting of model directions catering for cases involving cultural issues about which jurors may not have experience (as per para. 10.35), potentially including a direction in line with that given in the case of Andreous (para 10.36).

Question 95.

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?

Yes

Question 96.

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

The Circuits are undecided on this question.

As is made clear within the consultation paper, there are at least two significant potential dangers in the Crown seeking to call expert evidence about "general behavioural responses to sexual violence". Such an expert can be cross-examined. And a defendant is entitled to seek to call his own expert to try to counter such evidence. As such, there may be good tactical reasons why the Crown would not wish to call such evidence and would wish instead to rely upon judicial directions that both cannot be undermined and have the authority of coming from the bench.

That said, some members believe that there are likely to be appropriate cases where expert evidence of this sort can assist a jury. We suggest that cases of 'freezing', and/or cases where a complainant reports a 'recovered memory' of abuse, may be two examples. Conversely, 'freezing' as an adrenal response may be accepted as quite widely understood by the public and therefore evidence which requires no more than a judicial direction. Cases in which a complaint has simply been delayed, and/or where inconsistent accounts have been given, may be thought to be less amenable to such expert evidence.

Question 97.

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

We understand this question to relate to the content of the notices handed to jurors at the start of a trial. We feel that there are obvious benefits to the fact that this notice is currently used for all trials. If the suggestion is that the existing notice is amplified / supplemented by further wording for cases

involving sexual allegations, we are opposed: we feel that there are more effective ways of challenging myths / misconceptions.

Question 98.

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

We are not enthusiastic about the potential value of an educational video (nor, even less as per para.10.183, three differing videos depending on the status of the relevant complainant – adult female, adult male, child) to be watched by a jury. Such an exercise would either be so generalised as to be meaningless or would be so specific as to amount to propaganda. This sense will be exacerbated if the complainant is matched for the case. A better case might involve a general educational video before a juror were assigned to any case so that the subject matter did not feel so pointed. This could be watched before any 'opening directions' are given by a trial judge – which should be more tailored to the facts of the case.

If adopted, some thought would need to be given to situations as to the appropriate video to be played where a case involves complainants who are both female and male; or who were children but are now adult.

Question 99.

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

We are opposed to this. We assume that the intention is that such tools would be available to jurors / prospective jurors away from the courtroom and so away from scrutiny of trial participants. We anticipate that such tools may be used more by some jurors / prospective jurors than others, contrary to golden rules within the trial process about jurors receiving the same material.

Question 100.

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

See our responses elsewhere – the much more widespread use of opening directions, and ensuring that directions are properly tailored to the facts of each case. It is worth bearing in mind that some research suggests that most women in the UK have been subjected to some form of unwanted or non-consensual sexual behaviour. Women who have been victims of sexual offending and misconduct sit on juries every day. The experience they bring to the process of determining RASSO cases should not be ignored.

Question 101.

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?

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. We would be gravely concerned at the overturning of principles that have underpinned the principles of confidentiality as to deliberations in the jury room. Those who participate in the system are used to seeing the care and responsibility juries take in reaching their verdicts. The singling out of these types of offences to go behind those discussions is a dangerous precedent to set, and one which we fear could be misused to cherry-pick examples of infelicitously phrased justifications by people not used to drafting reasons and not able to justify their reactions by the specifics of the case under discussion. Ultimately there is a risk this could undermine faith in the jury system quite

wrongly leading to incursions on the right to trial by jury – perhaps initially for this type of offence, and thereafter for others as it suits political ends.

If this is to be contemplated notwithstanding our concerns, immense care and sensitivity needs to be taken over the method of research. It could not be compulsory either for jurors to participate in the research or in a trial which was likely to be subject to the research. There would indeed need to be a statutory exemption as above. We suggest that prospective jurors would have to be made aware that the trial which they may be asked to try is one which had been identified for post – trial interview, so that they could 'opt out'; and that jurors should be interviewed individually, and only once. It is obvious that great care would need to be given to ensure anonymity of jurors and cases.

Question 102.

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) a written information notice; (3) an education video; or (4) an online interactive tool.

(1) – albeit that it may only have value in a fairly low proportion of cases.

Chapter 11: Right Of Appeal

Consultation Question 103.

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 SB?

No**.** These applications are scrutinised by the trial judge and reasoned decisions given. This will incur undue delay, protracting the trial process (for all parties including the complainant).

Consultation Question 104.

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?

No, for the same reasons set out above.

Consultation Question 105.

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?

Presently, these arguments are sometimes catered for in a GRH, where the complainant is vulnerable/child and when the cross-examination is to take place soon after, so in some cases, this is already happening with the use of the

section 28 procedure. Otherwise, the admissibility of SBE evidence and the disclosure of personal records are presently dealt with within the trial process, by way of appropriate written applications and judicial scrutiny. It is unlikely that the vast majority of sex offence trials would trigger s.35 of the CPIA 1996, as the vast majority of RASSO would not qualify for such a hearing.

If "Preparatory hearings" were to be used more to decide such applications then there would need to be a consideration at a very early stage about obtaining third party material and making disclosure (akin to the approach for a section 28 hearing)

There is also a practical difficulty in securing judicial time for such hearings prior to trial when resources in the CJS are under such extraordinary pressure.

(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:

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

None of the above, for the same reasons set out above.

Consultation Question 106.

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?

Not accepting that complainants have a right of appeal but if they do then, they ought to have ILA and ILR, which ought to be an advocate trained and experienced in this area.

Chapter 12: Holistic Reform

Consultation Question 107:

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?

The factors are: -

(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.
Please share your views:

N/A

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

N/A

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

Please share your views:

The issue of sexual behaviour evidence is one when frequently occurs in sexual offence cases. The statutory framework provided by section 41 YJCEA is complicated and needs to be urgently replaced with a simplified model with a single unified test applied by the trial Judge.

Equally, as already noted a major cause for delay in sexual offence cases relates to the application for third party material, consideration of the same and potential disclosure. The system for this material needs urgent reform and the implementation of a clear unified regime, as well as proper, unified training of police officers in the application of the disclosure regime.

Above all to deal generally with the issue of delay 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.

Is the data we describe at paragraphs 12.13 to 12.20 of the consultation paper, regarding costs, case volumes, case delays and rates of attrition, accurate and is there any other available data which will assist?

Please share your views:

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

Chapter 13: Radical Reform

Question 108:

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

NO box ticked

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 a distinction between sexual offences and other criminal offences.

It is not a necessary step to take when 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.

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. This premise ignores the fact that a complaint may in fact not be a true complaint at all and still needs to fairly and rigorously tested in cross examination.

In any event, this premise is ill founded since it is simply not possible to remove the potential for trauma entirely within the context of a complainant making serious sexual allegations. There are already a number of special measures which are routinely deployed to minimise the inherent trauma present.

The real danger in the use of specialist examiners is that they will not seek to test a complainant's account sufficiently and thereby infringe the defendant's right to a fair trial.

Counsel who defend in these cases are already trained and complainants are frequently accompanied by a registered intermediary.

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.

Question 109 :

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

Option (2) ticked

As indicated above, a pilot of specialist examiners ought not to be introduced at all for the reasons stated.

There is a real danger if specialist examiners were to conduct both examination in chief and cross examination that there would simply be no distinction between the two at all.

If specialist examiners were to be introduced their role should be limited to that of cross examination only which would occur after a defendant has been interviewed and charged and provided an account.

Consultation Question 110:

We invite consultees' views on whether communication experts or lawyers should be used as specialist examiners?

The only individuals who ought to be specialist examiners are lawyers since they are trained not only in advocacy but also in the necessary legal skills to develop suitable lines of questioning.

Registered intermediaries have a limited understanding of the criminal justice system from only one perspective , they are not trained advocates and are not regulated as such. They would be too closely aligned to a complainant in order to ensure that a defendant's case is put.

Should any alternative professions be considered?

There are no alternative professions which could be trusted to undertake the task of cross examination.

Should there be a hybrid approach?

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:

Do consultees agree that the model of specialist examiners considered would not pose issues for legal professional privilege?

No. The report assumes that the defence case statement can be the entire template for cross examination and therefore it should not be necessary to obtain confidential information from a defendant.

There is a fundamental difference between a defence case statement and the client's instructions contained in a proof of evidence. It is startling that a consultation from the Law Commission should demonstrate so profound a failure of understanding in the process in which the document seeks to intervene.

If you do not agree please give details of foreseen issues

A defence case statement is served in order to facilitate secondary disclosure, it is not a proof of evidence.

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.

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:

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

There is no substitute for adequate funding of the court system which at present is plainly lacking resulting in delays occasioned by a lack of resources. If proper funding were to be implemented then there would be absolutely no need to introduce specialist sexual offences courts.

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.

Consultation Question 113:

We invite consultees' views on the necessary features of a specialist court, which could, for example, include: -

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

At present, the court system is underfunded and under resourced with an increasing back log of cases and a lack of available Judges and court rooms and advocates to accommodate such trials. There is already prioritisation of sexual offences within listing.

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. There is already a high degree of specialisation in sexual offence cases for both counsel and judges.

Specialisation within existing courts with a commitment of increased funding would alleviate delays in these types of cases to an extent.

Consultation Question 114:

Do consultees agree that jury screening would not be useful in addressing the reliance on myths and misconceptions in sexual offences prosecutions?

Yes, jury screening would not be useful

No, jury screening would be useful Other

Agreed. 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.

If you do not agree, and believe that jury screening would be useful, which model of jury screening would consultees support?

N/A

Consultation Question 115:

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?

This is agreed. 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.

Consultation Question 116:

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

Jury trial is the only aspect of the criminal justice system in which Global Majority (Black, Asian and minority ethnic) defendants do not suffer negative outcomes disproportionately[5].

The lack of available support for jurors trying serious sexual offences after they have returned their verdicts is deplorable with many often facing trauma from the trial process as a result.

The removal of the public as a jury from trying serious sexual offences undermines 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.

Consultation Question 117:

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

The right to trial by jury alone should be preserved for sexual offences. By creating a distinction to elect judge only trial solely for sexual offences undermines overall confidence of the public as a whole in the administration of justice.

[5] See: Professor C. Thomas 'Are Juries Fair' 2010, update 2014

Consultation Question 118:

We invite consultees' views on the best model for a trial without a jury: -

(1) a single judge; (2) a panel of judges; (3) a panel with a combination of judges and lay assessors; or (4) other.

We cannot provide views. We are fundamentally opposed to the abolition of jury trial for sexual offences and do not wish to endorse any model for a lesser standard of justice.

-END-