Bar Council response to the Law Commission's Consultation on Evidence in Sexual Offence Prosecutions

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's Consultation on Evidence in Sexual Offence Prosecutions.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Introduction

4. This response engages with the Law Commission's thorough review of the way in which material is gathered, disclosed and deployed in criminal proceedings concerning allegations of sexual offending. The consultation paper is commendably wide-ranging and ambitious, and while the Law Commission has (in our view

[1] Available here: https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/

properly) acknowledged that certain of the more radical reforms ventilated in the paper are not viable, it is right that such ideas are discussed, and, where they are rejected, that reasons are given for such.

5. We would however flag a few notes of caution at the outset of this response. First, an obvious limitation of the criminal justice system as a driver of societal change is that it can only ever deal with complaints about events that have (or may have, or are alleged to have) already occurred. While the overriding objective of the criminal justice system undoubtedly includes the conviction of the guilty and the acquittal of the innocent through the trial process, it is unrealistic to expect any reform to have a meaningful impact on reducing the incidence of commission of sexual offences. For example, it has not, to our knowledge, been credibly argued that deterrent sentencing might play a part in reducing the commission of such offences: despite increases in the maximum penalties for various sexual offences (largely arising from the transition from the old Sexual Offences Acts to the Sexual Offences Act 2003), and occasional pronouncements that those convicted of sexual offences were serving longer than ever before,[2] the prevalence of such offences in society, while fluctuating, does not appear to have changed significantly in the last 20 years, according to the ONS. [3]

6. Accordingly, the focus of any reform of the criminal justice system in this area ought to be firmly on ensuring that where offences are said to have been committed, they are thoroughly investigated, fairly prosecuted, and properly defended. Through a just process, just outcomes will result.

7. Secondly, it follows from the above that the function of a criminal trial should determine the scope of the evidence that is admitted (and gathered) in those proceedings. The purpose of a criminal trial is to test whether the prosecution can satisfy a jury so that they are sure of a defendant's guilt. The fairness of the process to the individual whose rights are most directly engaged by a criminal trial – the accused, being the one who is in peril in the proceedings – ought not to be compromised by the pursuit of collateral goals, however well-intentioned. A criminal trial is a poor vehicle

---

[2] See for example https://www.gov.uk/government/news/sex-offender-sentences-hit-record-levels

[3] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesprevalenceandtrendsenglandandwales/yearendingmarch2022

in which to seek the advancement of wider public policy goals, however understandable and laudable.

8. Finally, the success or failure of the criminal justice system to properly deal with allegations of sexual offending needs to be considered within the legal framework of the offence-creating provisions. For as long as it is possible for an acquittal to result from a case in which, while a jury was sure that a complainant did not consent to certain conduct, they considered that the defendant may have had a reasonable belief in consent, there will inevitably be more acquittals than there are non-consensual sexual encounters. That is not an evidential difficulty but a function of the primacy that the law has traditionally placed on requiring certainty as to a defendant's guilty mind in order to sustain a conviction of a criminal offence. The following should be seen in that context.

Responses to Evidence Questions

CHAPTER THREE

Consultation Question 1.
Are agreed facts regularly used as a practical strategy for addressing public interest immunity matters?
Does the use of agreed facts in this context pose any risks or concerns?

9. (a) Yes.

(b) One occasional side-effect of presenting evidence by way of a set of agreed facts, rather than calling the evidence live and permitting it to be explored in cross-examination while a witness is still present and able to answer, is that a jury may at a late stage ask for further clarification / explanation of the matters covered in the agreed facts. That is not unique to agreed facts arising from sensitive material. For example, in trials spanning the full range of criminal cases, character evidence is often reduced to agreed facts where a defendant has a stale conviction for an unrelated offence that is considered irrelevant, and where he may receive a modified good character direction. In such cases a formulation such as "the defendant has never been convicted of any offence of dishonesty" may be used in a trial concerning theft or fraud, or "the defendant has no convictions for offences of violence" may be adopted in a trial on a charge of assault occasioning actual

bodily harm in which self-defence is raised. Such formulations may lead a jury to ask "does he have any other convictions", to which the tried and tested response from the judge is typically along the lines of, "You have heard all of the relevant evidence in this case. Do not speculate about what other evidence there may have been ... " This practice is generally considered to provide adequate protection against jury speculation, on the basis that juries are generally trusted to follow the directions of law. It is nonetheless something that always needs to be considered when reducing facts to writing rather than calling live evidence.

Consultation Question 2.
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?

10. No. There is in our view no need to create a bespoke regime covering a discrete set of offences. The issues relating to relevant unused material in rape and serious sexual offences cases are just as likely to arise in many other cases, not all of which may involve those in a close relationship. Such material commonly emerges in investigations into offences of violence, false imprisonment, kidnap, malicious communications – indeed any offence in respect of which a complainant or significant witness is said by a defendant to have made a false complaint or statement motivated by financial or other advantage to themselves.

11. The CPIA 1996 has been in operation for many years, and with the assistance of guidance from the Court of Appeal, there is in place a regime that is sufficiently comprehensive and robust to deal with even the most complex of cases. It already involves consideration of a wide range of extraneous material not central to a criminal investigation; routinely this will cover social services records, school and educational records, medical records and counselling notes. In recent years this has also included scrutiny of a significant amount of data from social media, videos, messages and the like from downloads from cloud-based repositories or devices with storage of almost infinite capacity.

12. Obviously, only that which is of relevance to the issues in any particular case falls to be considered, and 'fishing expeditions' are already prohibited. The police and lawyers involved on behalf of the prosecution are required to provide schedules of

unused material monitoring and recording everything and justifying either its disclosure or non-disclosure.

13. At the present time, if the defence have any concerns that material is held by the prosecution which ought to be disclosed, there exists a procedure under s.8 CPIA for judicial oversight of any such documents and records as may be thought to undermine the prosecution case or assist the defendant in the presentation of their defence. If all parties focus on the issues and put the required resources in to addressing any disclosure concerns, the present disclosure regime works effectively.

Consultation Question 3.
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?

14. Yes (if such a regime is required at all). Plainly there should be control over such material consistent with DPA processing principles.

Consultation Question 4.
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?
If so, or if not, for what reason?

15. See above. We do not consider there to be a need for a bespoke regime.

Consultation Question 5.
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?

16. Agreed, the governing principle on access to such material should be relevance to the trial issues.

Consultation Question 6.
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?
If so, or if not, for what reason?

17. No. Any complete prohibition will inevitably at some stage result in miscarriages of justice. In many cases in which such documents are obtained they make no difference to the evidence and are not used, but it is nonetheless common for them to reveal information or further lines of enquiry that are undeniably highly significant to the case – e.g. the conduct alleged being attributed to somebody else at an early time, or statements being made that are unambiguously at odds with the allegations.

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

18. We agree that such decisions should fall to a judge, and that the task of filtering in advance should fall to the police and prosecution, unless it is considered that the material may contain legally privileged material relating to the defendant or a third party who has not waived that privilege, in which case independent counsel should be instructed in the normal way.
19. While, on one view, it might be thought more consistent with the objective of protecting a complainant's privacy to require independent counsel to perform the task of filtering the material than the police, that would represent a considerable departure

from the provisions of the CPIA, would be costly, and would import further delay into the process. It would also render more complicated any process of challenge to a decision not to make any requested disclosure.

20. For practical reasons concerning listing it is unlikely to be possible to ensure that these decisions are made by the trial judge, as disclosure matters need to be resolved well in advance of any trial, and it is generally difficult if not impossible to guarantee that a particular judge will try a particular case. (This has proved to be an issue when seeking to list s.28 cross-examination and the ensuing trial before the same judge.)

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?
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.)

21. Provided that consent is freely given, specific, informed and unambiguous (in line with the Article 4(11) GDPR definition) we do not consider that any further protective measures are required.

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?

22. Like the Law Commission, we are undecided on this question. Plainly, third party material may bear on the charging decision: while a decision to charge is rarely the end point of an investigation, it would in many cases be undesirable to require a charging decision to be taken before certain potentially relevant material could be obtained. A test similar to that applied in Scotland, requiring that the investigating

authority demonstrate its necessity for the purpose of reaching a charging decision, might therefore fit the perceived problem.

23. Against that, however, is the argument that if the complainant chooses not to consent to the obtaining of third party records that may support their case (and hence inform a positive decision to charge that would otherwise not be made), they should be allowed that control over their personal data, provided they are properly informed that if it is not obtained then proceedings may not be instigated. There would be no adverse impact on the fairness of the investigative process resulting from that position.

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?

24. If the complainant consents to access but the record holder does not, we consider that it would be appropriate to permit an application to be made to the court for such records pre-charge, in order that any charging decision may be made on the most informed basis possible. A test similar to that applied in Scotland in relation to obtaining such records without the complainant's consent might well be appropriate.

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

25. Yes, as is currently the case. We do not consider that there should be any temporal restriction. The earlier that matters are fully investigated (and if appropriate disclosure made) the better.

Consultation Question 12.

We provisionally propose that disclosure of personal records held by third parties should require judicial permission.
Do consultees agree?
We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent.
Do consultees agree?
Should there be any restrictions on disclosure in the early stages of proceedings?

26. This proposal would place a substantial burden on the judiciary, when there is already a significant shortage of judicial time to hear cases. We do not consider that it is necessary, if informed consent is given to the prosecution team. Any decision to disclose material to the defence currently has to be made by a lawyer from the prosecuting authority.

27. As to the last question, the only restriction on disclosure in the early stages of proceedings should be that mandated by the CPIA, *i.e.* that only material that meets the disclosure test should be disclosed. If that test is applied, the earlier any disclosure is made 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?
Are there factors we should remove, modify or add?

28. The Canadian model adopts the same test for production as disclosure. That is markedly different from the CPIA regime, which (a) places a greater obligation on the prosecutor to ensure themselves that all relevant material has been obtained, and all reasonable lines of enquiry followed, and (b) provides a separate test which the prosecutor, in the first instance, applies to determine whether any material they hold is required to be disclosed to the defence. This is a robust mechanism which rightly recognises the experience and independence of prosecutors. Any move away from the CPIA scheme would be a significant change in practice, which would come with the following potential negative effects:

(i) Transferring work from the police, CPS and prosecution counsel to the judges, which would further burden already over-stretched courts;
(ii) Generating a disconnect between the disclosure regime applied to cases concerning sexual allegations and all other criminal offences.

29. As noted above in response to other questions, we consider that the statutory scheme within CPIA (when combined with the ability to apply for a witness summons of material that will not voluntarily be provided) is presently fit for purpose, with no need for further reform of the law in this area. Failings in the disclosure process are, in our experience, normally due to failures (through lack of resources or otherwise) to follow the existing regime properly.

30. As to the specific factors flagged up above, we consider that the focus ought to be relevance (however defined) to trial issues. Certain of the factors listed above relate to matters that are collateral to the function of the criminal process. In particular, (d) appears to be entirely irrelevant to the question to be determined (and as noted in the consultation paper it is not clear how it could apply), and while it is understandable that (e) to (g) are raised as matters to consider, we do not see how they could fairly

prevent the obtaining of material that is necessary for an accused to make a full answer to the allegation.

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?
Are there any other grounds we should consider?

31. Provided that the test for requiring the production of records is adequately understood, there is no need for a separate filter, expressed in negative terms as in the Canadian model. Further, and in any event, there is an inherent problem with requiring the defence to identify with greater particularity precisely what is contained within records to which, self-evidently, they have not had access. It is not an undue interference with a complainant's privacy to require records to be produced to the police and prosecution for the purpose of considering whether any material contained therein meets the test for disclosure. The scheme of the CPIA is designed with just this mechanism in mind: only material which is reasonably considered capable of assisting the case for the defence or undermining the case for the prosecution is required to be disclosed, and if such material exists it is right that it is made available to the defence.

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

32. Again, we disagree, and consider the CPIA regime to be appropriate. See above in response to Q13.

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

33. We disagree. The focus of a criminal trial is properly on whether the prosecution is able to satisfy a jury so that they are sure of the guilt of the defendant. It is not the forum in which to conduct a balancing exercise involving wider policy considerations such as encouraging the reporting of sexual assault offences. Accordingly, any questions of the obtaining of records, or the admission of evidence, need to be seen through the prism of the function of a criminal trial.

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.

34. We consider that the balance is fairly struck at present, as expressed in the Crown Court Compendium sample direction on inconsistent accounts, and in the CPS guidance, which recognises that inconsistent accounts are likely to be disclosable. Determining the significance of any inconsistency is pre-eminently the province of the jury. Defendants, when giving evidence, frequently depart from their significant comments upon arrest, or add flesh to the bones of an interview, or even provide a gloss on a defence statement settled with the assistance of counsel. They are quite properly cross-examined on any inconsistencies, which are sometimes compelling evidence of guilt and on other occasions are easily explicable as the product of, *inter alia,* confusion, panic or intoxication. The same should apply to complainants who have given inconsistent accounts, some of which may be explicable on grounds of trauma, or similar panic or confusion, and some of which may be evidence of confabulation or unreliability. There is no more reliable way of determining the

explanation for an inconsistency that subjecting it to scrutiny, argument and informed consideration.

CHAPTER FOUR

Consultation Question 18.
We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence.
Do consultees agree?
We provisionally propose that there should not be a complete ban on the admission of third-party sexual behaviour evidence.
Do consultees agree?

35. Agreed. For the reasons (and examples) set out in the consultation paper. We also agree that the present system is both too restrictive in certain respects and too permissive in others.

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?

36. As to (1), that would appear to be a sensible threshold for the admission of such evidence, provided that relationship evidence is excepted. If relationship evidence is required to be treated as SBE, then an additional limb of admissibility along the lines of "important explanatory evidence" should also be available.
37. As to (2), presumably the court would retain a general exclusionary discretion to refuse to admit evidence sought to be relied upon by the prosecution against a defendant pursuant to Section 78 PACE 1984. For defence applications, for the reasons set out in response to Q20, we do not agree that 'prejudice to the administration of justice' is the appropriate test. Rather the court should assess whether the admission of the evidence is in 'the interests of justice', which will focus on trial-specific factors.

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

38. Given the purpose of a criminal trial, our view is that the judge's focus should be firmly on the relevance of any evidence sought to be admitted to trial issues, and (if this next step were to be considered necessary) the impact of admitting the evidence, or otherwise, on the fairness of the proceedings, rather than collateral matters.
39. Any list of factors to take into account in this area (and similar) ought not to be exhaustive.

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

40. Agreed, save for the requirement to provide drafts of proposed questions and the prescriptive requirement as to which factors should be addressed by judges.

41. While drafts of proposed questions may sometimes be helpful for the purposes of illustrating a mode of examination (for example when considering how to approach a witness with a particular impairment, or a child) there should be some latitude to cross-examine responsively depending on answers received. Drafts of proposed questions are often impractical, as applications for the admission of SBE are likely to occur many weeks/months prior to the trial itself. Further, the advanced drafting of questions turns cross-examination into a stilted and ineffective process and denies the jury exploration of a topic or issue that can be extremely helpful to their task. In this context the key issue is certainty as to what a witness is and is not to be asked about, and once that is clear further constraints on advocates are simply a time-consuming and unnecessary interference with the trial process. Any questioning perceived to be improper can of course be stopped by the judge mid-flow.

42. A requirement that judges ought to address all of the factors in their written reasons is unnecessary, as judges can be trusted to provide satisfactory written reasons. Such a requirement risks judges merely paying lip service to factors that are naturally less relevant to a given case than others (particularly as some are likely to be entirely irrelevant in any given case).

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

43. We consider that all forms of communication should be potentially capable of being brought within the definition of SBE, provided the particular facts in the case under consideration support such a conclusion. We note the academic concerns referenced by the Commission, but are unaware of any actual instance in which the current legislation has been held by a Court to be incapable of covering communications, which are normally treated the same in the criminal law whether the

communications are via social media, text message, email, traditional letter or the sharing of images.

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?

44. Not as a blanket rule. Expressly including evidence of clothing worn by a complainant or behaviour such as dancing as being subject to SBE restrictions is problematic. Such a provision is ripe for misunderstanding by members of the public, who may view the law providing additional restrictions on such evidence as encouraging the perception that certain items of clothing or certain behaviours are sexually provocative and are a feature of sexual assault cases (and others cannot be). It would also be difficult to define what types of clothing or what types of dancing are capable of attracting SBE restrictions and to attempt to do so may again risk engaging in the myths and misconceptions associated with rape/sexual assault cases.

45. Moreover, if such evidence is uniformly excluded, it risks removing context from the jury as to the interaction between the defendant and the complainant; for instance, if the pair met at a nightclub, evidence as to if/ how the pair looked or were acting is likely to be crucial for the jury to understand the interaction/ relationship between the pair (and, importantly, how each may have perceived it at the time). As stated at paragraph 4.213, if such behaviour or clothing is argued to relate to sexual activity or sexual reputation, the SBE restrictions will in any event apply.

46. Judicial direction should be sufficient to ensure juries are not overly preoccupied with evidence such as clothing/ dancing and do not stray into the twin myths warned of by McLachlin J in *R v Seaboyer* [1991] 2 SCR 577.

47. In any event, such questioning would only be proper (and permissible) if it were relevant to an issue in the case. Judges can be trusted to regulate such lines of enquiry, and prosecutors can be trusted to object if lines are perceived to be crossed.

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?
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?

48. We are not aware of any issues in this regard. The common-sense approach advocated in *R. v. Mukadi* [2003] EWCA Crim 3765 is a sensible one. The range of behaviour that is considered sexual is likely to vary from person to person, and indeed can be context-specific. Any attempt to specifically define sexual behaviour also risks alienating certain demographics or members of society and risks limiting the protection of the SBE restrictions to those who align with particular perceptions of 'sexual' behaviour. The 'matter of impression and common sense' approach endorsed in *Mukadi* allows for consideration of the context of the behaviour and the individuals who engage in said behaviour.

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?
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.

49. Agreed. Such evidence may well be relevant to provide the appropriate context for consideration of any issues. [as explained in the consultation paper]

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?

50. Yes. In essence it is a species of character evidence (perhaps less pejoratively described as "conduct evidence") and the rationale for controlling its admission applies equally to cases which do not concern allegations of sexual offences.

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?

51. Yes. Save that agreement of the parties – subject to judicial supervision – should be a permissible gateway. Practitioners can be trusted to identify the real issues in the case, but may perhaps be required by a judge to justify any agreement with reference to the relevance of the evidence to trial issues.

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.

52. There is an existing requirement on prosecutors to inform complainants of likely issues – see CPS guidance. That would seem flexible enough to include informing them that SBE is likely to be covered at trial. There would only be a need for this to be done once the evidence has been deemed admissible (or indeed, inadmissible). There would seem to be no real advantage to informing them of applications made which may yet be rejected. Sharing with complainants why and how decisions regarding SBE are made can only improve the public's understanding of decisions regarding SBE admissibility and encourage complainants to feel properly supported and considered during the trial process.

CHAPTER FIVE

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 by the defendant. This is because:

(1) Where a defendant has been charged with rape or a serious sexual offence then non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour may be admissible under gateways (c) and (d) of section 101(1) of the Criminal Justice Act 2003.
(2) Where gateway (c) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence, non-sexual physical violence, or controlling or coercive behaviour:
(a) against the complainant; or
(b) against another person, where a complainant knew of that previous conduct against another and feared the defendant would now commit those acts against them.
(3) Where gateway (d) is relied on then admissible evidence may include non-conviction evidence of previous sexual violence against the complainant or against another person.
Do consultees agree?

53. Yes.

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 bad character evidence?
If so, which body should publish such guidance?

54. We do not presently consider there to be such a need.

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?

55. Yes.

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 then, if the trial judge decides that fairness demands it, there should be a jury direction that

explains why the jury has heard no evidence of the complainant's good character and that no inference adverse to the complainant should be drawn from its absence. Do consultees agree?

56. Yes.

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 consultees agree?

57. Yes.

Consultation Question 34.
Where the jury has heard evidence of the complainant's good character should there be guidance about directions?
What should be the content of any guidance?

58. That question rather puts the cart before the horse. The jury would only hear such evidence if it were deemed to be relevant (currently, on *Mader* grounds). If that were to happen, such a direction should follow.

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 that may be admitted into evidence.
(2) Other good character evidence may be admissible where the trial judge is of the view it is appropriate.
(3) A determination regarding admissibility should take account of the following:
(a) the relevance of the evidence;
(b) risks to the complainant's well-being;
(c) the risk of unfairness to the defendant if such good character evidence is admitted;

(d) the risk of a disproportionate advantage to the defendant if such good character evidence is not admitted; and
(e) whether bad character evidence may be introduced to counter the good character evidence.
(4) The complainant should have a right to be heard before any evidence of their good character is admitted.
(5) Where any evidence of the complainant's good character is admitted then it should be accompanied by a direction to the jury that explains its relevance.
Do consultees agree?

59. We do not consider that the *Mader* criteria require expansion. It is the defendant who is in the jury's charge. We do not understand that witnesses in respect of whom no evidence of character is given are generally believed by juries to have some stain on their character: the *Vye* direction is tailored to the particular circumstances of a defendant in a criminal trial. In any event, if there were to be an expansion of the law in this regard, there would be no justification for limiting it to any particular offence or class of offences given that the credibility of complainants can be potentially relevant in respect of almost every imaginable criminal offence.

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 consultees agree?

60. Evidence of the deliberate making of false allegations is, fundamentally, evidence of unlawful, criminal activity (perverting the course of justice, wasting police time etc). The restrictions on SBE are in place to prevent unwarranted intrusions into the personal lives of witnesses regarding lawful but private behaviour. As such, evidence of false allegations is more akin to bad character evidence than sexual behaviour evidence, and if the tests are to be different for these two categories of evidence, then the former is a better fit, and covers this area entirely.

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?

61. We are not persuaded that this is generally required. If the defence were to make such a suggestion in any given case, that could be addressed by way of judicial direction as appropriate.

CHAPTER SIX

Consultation Question 38.
We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require leave and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence.
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?
Which, if any, of the following factors should the judge consider when deciding whether to admit evidence or permit cross-examination about criminal injuries compensation claims:
(1) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;
(2) the interests of justice including the defendant's right to a fair trial;
(3) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and
(4) the risk of introducing or perpetuating myths or misconceptions.
Are there any other factors that the judge should consider when deciding whether to admit evidence of a criminal injuries compensation claim?
Should the list include "any other factor that the judge considers to be relevant to the individual case"?

62. A CICA claim which is inconsistent with the testimony of a witness should continue to be considered within the current rules of disclosure and admissibility. A CICA claim which is consistent may be thought to be equally indicative of a true complaint as a false one. Furthermore, given the legal obligation for timely lodging of a claim, often in our experience these matters can be dealt with relatively shortly and swiftly by the prosecution, if raised by the defence. Restriction on the admissibility of consistent CICA claims are likely to engender more litigation, not less, given that often a defendant claims to have no idea why someone would have made a false allegation about them other than if they were seeking to financially benefit. Directions as suggested below are a better, more proportionate, response to addressing any improper inferences from the making of CICA claims.

63. As to limb (2) of the proposed test, see the answer given above to Question 19.

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.
Do consultees agree?

64. Yes.

CHAPTER SEVEN

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?

65. We are unpersuaded. The term is never likely to be used before a jury (or at least it need not) and judges are already required to direct juries that they should read nothing into the use of such measures, which are described as being typical in cases

of this nature. If this terminology is to be adopted in this area, it ought to be adopted across the framework of the CJA / YJCEA etc.

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?

66. We are not opposed to such a presumption, although we do not consider that at present there is any issue with the grant of special measures, where requested (as they routinely are).

Consultation Question 42.
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?
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.
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.

67. We agree that introducing an automatic entitlement to special measures would be of value and would effectively simply streamline the process that already exists, in which special measures applications are rarely opposed and invariably granted. We agree that the s.19(3) safeguard should be retained.

68. We do not consider that prescriptively requiring ground rules hearings would be beneficial – even apart from issues around the capacity of judges, courtrooms and counsel to facilitate such hearings, we do not consider that there is a general need for such a formalised enquiry into what special measures are required. It may be greater consistency could be introduced at the interface between the police / CPS and complainants, but that could probably be achieved through training (which would in any event be needed) rather than legislation.

Consultation Question 43.
We provisionally propose that time limits for special measures applications should not be changed or removed.
Do consultees agree?

69. Agreed. In any event they are sufficiently flexible to work effectively in practice.

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.

70. We do not consider that there should be ground rules hearings in every sexual offences prosecution. The court has power to order one where it is considered to be required, and our experience is that where one or more parties, or the court, considers that a pre-trial hearing is required to determine issues of admissibility, special measures, and similar matters, such hearings can be listed, and are frequently effective. The current degree of flexibility works reasonably well in our experience, provided that the parties have sufficient time to get to grips with the issues under consideration. However, not every case has a need for a pre-trial hearing, and the pressures on listing (acknowledged in the consultation paper) and counsel (of whom there are already too few, particularly in the field of sexual offences) militate against a requirement to list unnecessary hearings.

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?

71. As observed above in response to Questions 41 & 42, while we do not understand there to be any difficulty with the grant of such applications at present, we agree that either a presumption or some form of automatic entitlement to special measures would be of some benefit, in streamlining the process. Complainants could of course always elect not to take advantage of the measures (as some now do, even where they have been granted).

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?

72. If requested, yes. See above.

Consultation Question 47.

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

73. As above.

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?

74. We agree with this. We would flag one potentially important omission in the legislation around special measures, which is that the measures available do not all extend to the Youth Court, in which s.28 pre-recorded cross-examination is not available. The trend at present is for more cases generally to be tried in the Youth Court, where this is possible. Indeed many serious sexual offences alleged to have been committed by youths could be tried there. There does not seem to us to be any principled reason a complainant required to give evidence in the Youth Court ought not to be afforded the full panoply of protections that are available in the Crown Court. The fact that Youth Court proceedings are designed to be less intimidating, and are conducted in private would not affect a complainant's concern about facing the accused, and while delays in the Youth Court are not as severe as those in the Crown Court, the need to capture evidence at the earliest possible opportunity retains its importance. Any extension in this regard would of course need to be met by commensurate funding.

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.

75. (1)-(2) No (subject to the next question) as that would minimise the reassurance the complainant may feel.

(3)-(5) Yes. These would be less likely to have any impact on C's evidence as it is given, but would enable D to fully experience and participate in their criminal trial.

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?

76. Yes. Though that would probably in practice militate in favour of C giving remote evidence rather than behind a screen, where the risk of their evidence being unduly affected is lessened.

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?

77. Yes, if this is said to be required by the witness in order that they give their best evidence.

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?

78. There would seem to be little justification for the making of any exceptions for particular members of the public or press, if the overall need for preventing the public seeing the witness has already been made out. Any exceptions will inevitably reduce the effectiveness of the special measure in enabling the witness to give the best quality evidence. However, it may be that this is a matter that is best considered on a case-by-case basis, with representations from the press on the question of open justice received where they would assist.

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?

79. We disagree with this blanket proposal. The well-established jurisprudence on the principle of open justice would require cogent evidence or a strong public policy decision to justify a derogation from it. An automatic exclusion is a step too far. A demonstrable need for preventing public and press access (in whole or in part) should be made out in each case before it occurs, otherwise the interference with the principle of open justice may be disproportionate. Courts are well equipped to conduct the balancing exercise between Article 10 rights and those that militate against open justice on occasion, including Articles 6 and 8.

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?

80. There should be a route by which permission to apply to the court to attend can be made. Interested groups might include: academics, those from various interested

charities / NGOs, pupil barristers or other trainees (likely covered by any legal representative exemption), a friend or family member of the complainant or potentially the defendant. It would be for the judge to give a reasoned ruling on individual applications.

Consultation Question 55.

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?

81. Yes.

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.

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

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?

82. No. There is a powerful public interest in open justice. The need to compromise this interest to protect the identity of complainants in prosecutions for sexual offences is well understood (via a reporting restriction), as is any need in any particular case to ensure that they are able to give their best evidence (via restrictions on access to the proceedings at this stage of the trial). There is no comparable justification for restriction on attendance of the press or public throughout the remainder of the trial.

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?

83. No. This is court dress. The removal of court dress in the trial process originated out of concern about the fairness of trying child defendants in an adult court. The factors that militate in favour of making the environment less intimidating to a child cannot automatically be read across to adults.

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?

84. If such is required by the complainant, and subject to a safety valve akin to that which applies to any other special measure, we are not opposed to this suggestion. However, care would plainly need to be taken to ensure that the supporter has no influence on the evidence being given, particularly where that evidence is taken remotely.

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?

85. As above, Q57.

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?

86. Where practicable, yes. Private waiting rooms are already available at most (if not all) Crown Courts. Accessible entrances may be more difficult to achieve without increased staffing and perhaps modifications to the court estate, but would be welcomed in principle.

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.

87. This is a matter best dealt with by experts in the field. The Bar has become accustomed to the use of intermediaries. Where medical or other relevant need is properly demonstrated, then intermediaries can be of real utility and should be available. However, that need should always be properly scrutinised, in order that delay and expense is not incurred through the appointment of intermediaries who are not in truth required.

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?

88. Yes.

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?

89. N/A

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.

90. We do not currently see the need for this, outside accommodating defendants with particular vulnerabilities.

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?

91. We are not persuaded that this is required. The concern noted in the consultation paper – that judges and legal professionals may consider that special measures diminish the impact of a witness's evidence on the jury, whereas the evidence on this matter is mixed – does not in our experience typically inform decisions as to the application for, or grant of, such measures. As noted above, applications for special measures are routinely made, rarely if ever opposed, and invariably granted.

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?

92. For reasons given above, we do not consider that such training is required.

CHAPTER EIGHT

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?

93. No. One of the most critical issues concerning RASSO prosecutions is tension between the expeditious, efficient and robust prosecution of such cases and resource constraints. The courts currently have a range of resources to ensure only that evidence which is relevant and necessary to ensure a fair trial is admissible. Having a 'right to be heard' (in the sense of the right to make submissions direct to the court) creates a problematic layer of complexity which will lead to delay in the litigation process. The police have the first task of determining whether, in the context of the issues in the case, records/text communications etc may satisfy the disclosure test and their input would be required at this early stage if a complainant was permitted to make representations. There may not yet have been a charging decision by the CPS. Once the case reaches the stage of pre-trial hearings, s.41 applications would be considered at the ground rules hearing prior to the pre-recorded section 28 hearing (or at some other pre-trial hearing, convened for that purpose). The CPS are well equipped to receive and make representations on behalf of complainants. Adding a further voice is unlikely to assist a judge dealing with pre-trial matters to determine what steps are appropriate in any particular case. Representations made on behalf of a complainant will either duplicate those made by the CPS or cut across them.

94. Further, at the present time it is well known that there are insufficient barristers (or other suitably qualified and experienced advocates) to prosecute and defend in serious criminal cases and that many self-employed practitioners have chosen not to participate in rape and serious sexual offence trials, especially those involving the section 28 process. On an almost weekly basis cases are being adjourned up and down the country for want of a barrister to prosecute. Although there is a list of RASSO trained and approved advocates on the CPS panel, cases are sometimes being returned to less qualified and unapproved counsel, where no other resource is available.

95. In addition, there is already a backlog of over 60,000 cases before the Crown Court and trials are having to be listed nearly 2 years after a not guilty plea is entered at a pre-trial preparation hearing in a bail case. There are too few courts, judges and recorders to deal with the trials and other hearings presently being brought before the courts. Unfortunately, bail cases are routinely being taken out of the lists even after

waiting nearly 2 years to be heard as custody cases are given priority and/or other trials have over run.

96. If properly trained, qualified and regulated advocates are to be found to speak on behalf of complainants at any hearings and particularly if they are going to be present for any significant part of a trial (potentially the complainant's evidence and cross examination, witnesses of first complaint, medical witnesses or the defence case) we have doubts as to their availability, and in any event there would need to be significant additional resources made available by the government to ensure proper resourcing and remuneration of those advocates.

97. Similarly, if Crown Court judges are to be required to review all such unused material as is referred to in the proposals, and hearings for SBE and submissions from complainant's advocates are to be heard, that will place great strains on the judicial system, and on the availability of judges and courts to hear trials. Again, very significant additional resources would need to be made available to ensure that there was no prejudice caused to the current trial listing position (which is already straining under an unacceptable backlog).

98. A more proportionate and effective way of ensuring that a complainant's views on particular pre-trial matters are heard would be for them to be rendered into a further statement (or additional recorded interview) dealing specifically with the issue under consideration. Any such statement could be required to be taken into account by the prosecution (when making representations) and the Court (when determining any pre-trial issue).

99. If a right to make submissions direct to a court is to be created, it should be accompanied by the creation of clear procedure rules so as to ensure written applications, promptness of resolution and avoid delay (and allow for sufficient exercise of appeal rights, see below).

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?

100. The correct way of looking at this is whether complainants should have a right, and then whether they should have independent legal advice, assistance and representation to assist them in exercising that right. As stated above, our view is that the 'right to be heard' should be limited to a further statement/interview which the Court and prosecution are required to take into account. Such a right would not require independent legal advice, assistance and representation. If by contrast a right to make submissions direct to a court is to be granted, then complainants should, given the forensic nature of the exercise of the right, have access to the full gamut of legal services, including representation. It would be unthinkable to expect complainants - the alleged victims of serious sexual offences – to attempt to address courts themselves as 'litigants in person'.

If consultees do not agree that complainants should have access to independent legal advice, assistance, and representation, we invite consultees' views on whether complainants should have access to:
(1) Independent legal advice only?
(2) Independent legal advice and assistance only?
(3) Independent legal representation only?
(4) None of these?

101. See above.

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 pretrial or during the trial in the absence of the jury.
Do consultees agree?

102. If the right to make submissions direct to a court is to be granted, then representation is fundamental to the proper exercise of the right, see above. However, as stated, we do not consider that such a right should be granted.

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?

103. There is no issue about complainants receiving information about their rights by such means if it is required, but for the purposes of providing a statement proper assistance should be capable of being provided by the CPS and police in meetings with the complainant (and a right or expectation for such meetings could be specified in the Victims Code).

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?

104. If it is necessary to allow legal advice and representation, then the legal representatives should have access to all relevant documentation to assist in the provision of advice as per the usual codes of conduct. It would however be difficult properly to propose the correct bounds of the documentation required. A judge would need to make the decision based on all the material before them, including documentation that it is unlikely to be in the interests of justice for a complainant, as a witness, to see (for example defence statements supplied under Part I CPIA.

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?

105. Yes – the normal rules of conduct and correspondence between legal advisors/representatives on behalf of a complainant and the other parties should apply. Such correspondence should however only take place with the litigators for each party - so representatives for the complainant to defence solicitors and the CPS,

not directly with the police or defence counsel. Where a complainant is unrepresented, the same should apply - correspondence only directly between the complainant and the *litigators.* Otherwise there is too much room for confusion, inappropriate release of material or indeed breach of the conduct rules imposed on advocates conducting litigation.

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;
(2) attend and make representations only while the complainant is giving evidence relating to their personal records or sexual behaviour, including during cross-examination, whether at trial (including in the presence of the jury) or during a pre-trial hearing at which their evidence is recorded; or
(3) make representations to the court during the whole trial in the presence of the jury.

106.
(1) We do not agree that there should be any 'monitoring' of the compliance with a court order – such monitoring is properly done in an adversarial system by the opposing party (inevitably the prosecution in this scenario) and the judge who is best placed to ensure that the Court's own orders are complied with. The presence of a further advocate opposed to the interests of the defendant playing any substantive role in the trial risks leading to a perception of an undesirable inequality of arms.
(2) See above.
(3) We do not agree. As drafted, this would include representations in respect of any matter which touches on SBE – law, admissibility of evidence, procedure, questions from the jury etc.. Currently all submissions on the law, and many other matters, are made in the absence of the jury. This is because, with good reason, it is feared that the jury's function – assessing only admissible evidence within a legal framework which is solely determined by the judge – would be irredeemably compromised by hearing submissions on the evidence, which might not be led before them, or law, which might not reflect the judge's final directions. Additionally, these representations could significantly interrupt and delay the trial, and adversely affect the flow of evidence and its comprehension by the jury

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?

107. Yes (and our responses above are predicated on that basis). It would be wholly inappropriate (and expose the Court processes to very substantial risks) if anyone who is not a suitably qualified, experienced and regulated legal professional were to engage in such activity.

Consultation Question 73.
How should the role of independent legal advisers and representatives be defined? Would written guidance, such as a code of conduct, be useful? If so, what should it include?

108. Written procedural rules would be required, over and above guidance, in the view of the Bar Council so as to make the function and role of the independent legal advisor/representative in the court process clear, limiting their role to advice and representation as to the admissibility of personal records and sexual behaviour evidence. If those providing the advice, assistance and representation are regulated legal professionals then no additional 'code of conduct' should be required, as the regulatory bodies already provide detailed ethical rules and guidance (which can be expanded upon by the professional bodies if those bodies believe it necessary). Advice and assistance should be via a qualified solicitor. Representation should be by counsel or solicitor with higher rights.

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?

109. There would not need to be 'legal' advice and assistance in this respect – such advice is commonly given by liaison officers with the police, and by witness care

service staff, who are not legal professionals. Properly trained lay persons can therefore offer advice as to the range of special measures available.

CHAPTER NINE

Consultation Question 75.
Should it be mandatory for practitioners to undergo training on myths and misconceptions in order to work on sexual offences cases?

110. We do not consider this to be necessary. What is really meant by the expression "myths and misconceptions" is arguably no more than that there are no unqualified normative forms of behaviour in the field of sexual conduct – any more than there are in any other field of human activity. (Such "myths" are thought to be more prevalent in cases involving sexual allegations.) The core "myth" is that all individuals when placed in a particular scenario will act alike, which is plainly nonsense and properly falls to be called out as such if it is sought to be deployed in criminal proceedings. The appropriate remedy is arguably no more and no less than a direction that the jury should guard against generalisations and focus on the evidence in the case.

Consultation 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?

111. Agreed. Relevance plainly ought to be the touchstone here, as it is generally. The careful analysis set out in paras. 9.67-9.69 of the consultation paper properly notes the distinction between reliance on generalisations and focusing on issues that matter to the particular case.

Consultation Question 77.
14.121 We invite consultees' views on whether there are any types of potentially highly prejudicial material or factual scenarios beyond sexual behaviour and claims

for criminal injuries compensation where evidence and cross-examination should be subject to an enhanced admissibility threshold rather than the relevance threshold?

112. N/A

Consultation 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.

113. If there is a concern at the Bar that a particular line of questioning may cross a line, then it would be helpful (both to the questioner and the witness) for it to be canvassed in advance with the trial judge. However, it may be that counsel can be trusted to examine appropriately, with the practical sanction for crossing a line being interruption from their opponent / the judge and a direction to the jury that a particular line of questioning was inappropriate. A light touch rather than a fixed rule may be most appropriate.

Consultation 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.

114. We understand that training may already be given to judges on these points, and they are reflected in the current edition of the Crown Court Compendium (at 20-1 and 20-2).

115. As recognised by the Crown Court Compendium the ways in which matters such as late complaints, displays of emotion, intoxication and previous sexual conduct fall to be dealt with in a criminal trial is infinitely variable. On occasion a delayed complaint will be entirely understandable and indeed convincingly explained by the witness. In other cases there may be no obvious reason for the delay, but rather a peculiarity about the timing of the complaint that makes the lateness of the reporting a natural feature of scrutiny and point of criticism. Similarly, on occasion previous sexual conduct may be entirely irrelevant to the issues being determined by a jury, while in other cases the admissibility of such evidence may be central to their understanding of the dynamic at work between two individuals who give competing accounts. What matters in each case when determining admissibility of evidence / appropriate lines of questioning and address, is the extent to which the observed behaviour can properly be said to be relevant to the trial issues. If it is relevant, then (as explained through the careful examples set out in the Compendium) the jury can be directed in due course on the competing arguments as to the weight to be afforded to that behaviour. If it is not relevant to any trial issue, it will not and should not be admitted. What a "myths and misconceptions" direction amounts to, therefore, is merely proper judicial comment on competing arguments, rather than a legal direction to follow a particular line of reasoning. That is entirely appropriate, given that there is no principle of law at play here; rather what is required is a corrective to any ventured suggestion that there is only one way in which a genuine victim of a sexual offence may act.

116. As to the particular generalisations identified in the question:
Re: (1), such a suggestion – if made without a proper evidential foundation (as would seem inevitably to be the case) – ought not to be permitted, in the same way as other non-expert statements of general application would not be permitted, unless they conformed to recognised societal norms or established investigative principles (e.g. "follow the money" in a case of financial crime).

As to (2), there is nothing objectionable in principle in identifying witnesses whose evidence is of particular significance to the proceedings, and as a consequence inviting greater scrutiny of their evidence than those whose evidence is either uncontroversial or inconsequential. It is equally proper for juries to be invited to consider the evidence given by the defendant with particular care, given that it is he (typically a "he") who is in their charge and hence at peril in the proceedings.

As to (3), there is an inherent tension here with certain ways in which juries are typically directed to approach evidence in criminal cases. For example, the admissibility of recent complaint evidence and *(a fortiori*) *res gestae* hearsay is founded on the idea that a complaint which is contemporaneous or near-contemporaneous might be thought to carry particular weight as against a later complaint. While it is plainly correct to observe that merely because someone does not make a complaint as soon as reasonably practicable, that does not signify that the complaint is a false one, it must be relevant for the defence to explore reasons for the lack of immediate complaint, as a corollary to the prosecution being able to rely on the immediacy of complaints in appropriate cases. The obvious counterpoint to this is that any defendant who keeps their powder dry, only revealing their defence at a late stage in the proceedings, may be similarly – and rightly – vulnerable to criticism.

Consultation 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?

117. No. It is the duty of all advocates to observe the applicable Codes of Practice governing their conduct. Warnings ought not to be necessary. Further, their heavy-handed use (or concern that such warnings / referrals may be made lightly) may risk adversely affecting legitimate lines of examination / address.

Consultation 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?

118. No. This is unnecessary. There are already provisions governing inappropriate conduct in the conduct of examination or speeches, including Core Duty 5 ('You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession') and specific rules on not knowingly or recklessly misleading the Court and not abusing a position as an advocate (rC3), which includes not making submissions, representations or any other statement, or asking any question of a witness which the advocate knows is untrue or misleading

(rC6) and not putting forward a personal opinion of the facts or law (rC7). There are also rules prohibiting discriminatory activity on the grounds of *inter alia*, sex and sexual orientation. Making specific reference to 'myths and misconceptions' risks inappropriate regulatory oversight of legitimate lines of questioning, given the wide range of myths and misconceptions, and the infinite variety of factual circumstances which might properly call for particular matters to be legitimately examined.

Consultation 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.

119. Such explicit guidance ought not to be required. As to the three specific suggestions listed in the question, see the discrete responses on each topic that are given above in response to Q79.

CHAPTER TEN

Consultation 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?

120. No. It is up to advocates to inform themselves of any risk arising. Furthermore, it may adversely affect the conduct of proper examinations and address to the jury.

Consultation 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.

121. No. This should be for the discretion of the judge. The Crown Court Compendium itself already deals with the variability of requirements for such a direction.

Consultation 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?

122. N/A

Consultation 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.

123. N/A.

Consultation 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?

124. These should all remain entirely at the discretion of the judge as per the answer to Q84 above.

Consultation 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?

125. Yes.

Consultation 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?

126. Yes.

Consultation 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?

127. We have not identified any, but would defer to the research and views of particular subject matter experts in this regard.

Consultation 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?

128. Yes.

Consultation 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?

129. Yes.

Consultation 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?

130. The current directions are effective, but may well be capable of improvement. We would defer to the research and views of subject matter experts in this regard.

Consultation Question 94.
Are there any other groups of complainants or myths and misconceptions which are not currently addressed by example directions and should be?

131. We have not identified any, but again would defer to the research and views of particular subject matter experts in this regard.

Consultation 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?

132. Our experience is that the split summing-up is now the norm across the full range of criminal cases, with (typically written) directions of law being given to the jury in advance of closing speeches, and the summary of the evidence being given thereafter. Where appropriate, the second part of the summing-up may involve a call-back to the directions of law, to which reference can easily be made if they are in writing.

Consultation Question 96.
Should expert evidence of the general behavioural responses to sexual violence be admissible to address myths and misconceptions in sexual offences trials?

133. No. As noted above, the function of a "myths and misconceptions" direction is really simply to ensure that a jury does not wrongly conclude that all individuals, when placed in a particular scenario, will inevitably respond in the same way. The introduction of expert evidence to such an exercise would risk leading to satellite litigation, with competing experts instructed, which would over-complicate a straightforward "do not generalise" direction and potentially divert the jury's attention from the evidence in the case.

Consultation Question 97.
We invite consultees' views on the use of written juror information notices to address myths and misconceptions amongst jurors?

134. We understand that Professor Cheryl Thomas has drafted a document similar in format to the 'pink form' given to juries at the beginning of a trial regarding prohibitions on juror research etc. More standard directions could properly be given at the beginning of the case, when the issues may only be known in headline form, followed by more tailored written directions of law at the /conclusion of trial to the extent required in each case.

Consultation Question 98.
We invite consultees' views on the use of education videos to address myths and misconceptions amongst jurors?

135. As above, we consider that case-specific tailored directions would be preferable.

Consultation Question 99.
We invite consultees' views on the use of online interactive tools to address myths and misconceptions amongst jurors?

136. As above, we consider that case-specific tailored directions would be preferable.

Consultation Question 100.
Are there any other methods for addressing myths and misconceptions amongst jurors that we should consider?

137. N/A

Consultation 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"?

138. We are not yet persuaded that there is real benefit to be gained from a reform such as this.

Consultation 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.

139. Generally, we do not believe that jury trials should be the forum for proper public education about these issues, which can and should take place in any event.

140. Specifically:

(1) This should not become a norm in criminal trials. It is an invitation to then have a 'war of experts' about whether or not a particular response or presentation by a complainant is or is not indicative of truth or lies, wholly usurping the role of the jury.
(2) There is scope for this, provided that it consists of directions from a judge that can be tailored to the requirements of a particular case.
(3) As this would be more difficult to tailor to the demands of specific cases, it is less of a priority.
(4) As above.

CHAPTER ELEVEN

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 sexual behaviour?

141. We would not support a right for the defence or prosecution to appeal on an interlocutory basis the outcome of pre-trial decisions regarding the admissibility of complainant's personal records or sexual behaviour. It would seem anomalous to have that right purely for victim witnesses in those cases, and not other sorts of cases

involving criminal offences which may be of similar importance and sensitivity to the victims/witnesses or relevant family members e.g. domestic violence, homicide, kidnapping etc. Furthermore, there is no demonstrated need for such a right to be afforded to defence or prosecution in serious sexual offence cases – the current appellate system appears to work just as well for the parties in those cases as it does in other cases.

142. However, if there is to be a right of complainants to be heard on such applications, then (in order to be an effective right that is compatible with the principles of natural justice) it is likely to need to be backed up by the ability to challenge first-instance decisions by way of appeal or review. Any right of appeal on an interlocutory basis should be limited to the complainant. Very clear procedure rules would have to be created to allow for the exercise of appeal rights prior to, and without delaying, trials, particularly where the defendant is remanded in custody. There would also have to be a commensurate increase in funding, not only of the complainant's advice and representation but also of the defence and prosecution parties so that the relevant evidence is provided and considered, and the relevant applications served, wherever humanly possible in sufficient time to allow for the exercise of any appeal rights. If a judge exceptionally permits an application to adduce SBE during the trial, an interlocutory right of appeal against such a decision, given the relatively short length of trials of sexual offences, would often require the discharge of the jury. For obvious reasons such a course may not be in the interests of 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?

143. Under Part II CPIA 1996 preparatory hearings are reserved for 'long, complex or serious cases, normally terrorism (and under ss.7-10 Criminal Justice Act 1987 they

are reserved for fraud cases). In addition, the current rules require that 'substantial benefits' be shown before a judge may order such a hearing. As a result, preparatory hearings do not often occur in cases of murder, let alone rape and serious sexual offences.

144. Applications such as those regarding the admissibility of evidence relating to personal records or sexual behaviour are, in the experience of those contributing to this response, never currently determined at preparatory hearings. They are dealt with at Further Case Management Hearings or Mentions in which there is no automatic interlocutory right of appeal for either the prosecution or defence in relation to admissibility arguments, and we take the view that this should remain the case even if a complainant is allowed separate representation.

145. Furthermore, under s.8 CJA 1987 and s.30 CPIA 1996 a preparatory hearing is deemed to be the 'start of the trial', with a consequent effect on the 'custody time limits' of the defendant - namely that it stops running – thereby potentially removing the imperative on the court system to have the substantive trial of a defendant who is remanded in custody begun within the statutory time limit set by Parliament – see *Re Kannaris* [2003] 2 Cr. App. R. 1. There is already a concern that the pre-recording of cross-examination under s.28 may be leading some courts to de-prioritise trials, and this would arguably only be compounded if the CTL imperative fell away.

146. Additionally, where a preparatory hearing is ordered, the same judge would typically carry out both that hearing and the substantive trial. That would be almost unworkable within the current criminal justice system (see for example the demonstrated impossibility of guaranteeing that the same judge and advocates conducting s.28 YJCEA 1999 pre-recorded cross-examination sessions are able to appear in the later substantive trial).

147. The proposal would cause a radical expansion of the preparatory hearing scheme in respect of these cases in a manner which may have extreme ramifications for the expeditious and efficient disposal of these trials. It would also seem that many aspects of the preparatory hearings scheme would have to be revised as a result, and so in effect the proposal must actually be to create a new category of 'preparatory hearing' which does not have the same features as existing preparatory hearings and is designed to deal with different issues in different cases. If this proposal is adopted, the hearing should therefore be termed, and dealt with, as a different type of hearing e.g. 'pre-trial sexual evidence hearing'.

148. In any event, this would not resolve the issue, as the consultation recognises – because such decisions often arise during the course of a trial, either because a pre-trial decision has to be revisited as a result of in-trial developments, or the need for the application has not arisen pre-trial and is only made for the first time as part of the trial.

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?

149. Such applications are already dealt with at FCMHs, Ground Rules and Section 28 hearings. The listing of such applications as preparatory hearings purely to allow a further right of appeal for a complainant to appeal is not consistent with our understanding of the intention behind preparatory hearings. The practical effect of such a proposal would be to grant (in effect) the prosecution a further opportunity to appeal, not afforded to the defence.

(2) Should the complainant have any further right of appeal against decisions regarding the admissibility of evidence relating to their personal records or sexual behaviour that is not limited to decisions made at preparatory hearings? If so, should that right of appeal be:
(a) Limited to decisions that are made before the trial commences; or
(b) Not limited so that the right includes a right to appeal a judicial ruling on admissibility made during the trial

150. It would seem inconsistent to have a right of appeal against pre-trial decisions, and not against in-trial decisions, particularly where the applications to admit the evidence may, for good reasons, only arise during trial. However, for reasons set out above, we do not consider that such a procedure should be introduced.

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?

151. If (contrary to our view) complainants are to be granted such rights then they should have access to independent legal advice and representation. It would be unthinkable that complainants would ever be expected to exercise such appeal rights as litigants in person, as to do so would simply add to the trauma and stress of participating in the judicial system as a victim and witness. That right to ILA/ILR should be equally available to, and exercisable by, every complainant, regardless of means, and so if it were to come into force, it must be the subject of a properly funded legal aid scheme.

CHAPTER TWELVE

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

152. N/A

CHAPTER THIRTEEN

Consultation Question 108.

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

153. We disagree, if this proposal is intended to relate to cross-examination. What is required, if there are defects in the examination of complainants, is improved training of questioners, rather than the creation of an entirely new panel of individuals (who will inevitably need to be drawn from somewhere and trained up).

154. However, we acknowledge that ABEs may be susceptible to improvement through the use of specialist examiners (or better trained officers). The suggestion of follow-up ABEs – conducted by specialist examiners (who could be prosecution counsel) after the initial account – might be worth trialling.

Consultation Question 109.
We invite consultees' views on the best model for a pilot of specialist examiners:
(1) specialist examiners taking all of the complainant's evidence;
(2) specialist examiners undertaking what is currently cross-examination; or
(3) no fixed approach, with the amount of evidence taken by specialist examiners varying with the requirements of a particular case.

155. See above. There is scope for a trial of specialist examiners (ideally counsel/higher court rights advocates) in respect of ABEs. There should be no move to replace competent instructed defence counsel for cross-examination (or for that matter examination in chief). If more training is considered to be required, above and beyond that which is already featured in e.g. the Advocates Toolkit and provided by the CBA and other organisations, then that would be far more efficient than requiring non-lawyers with experience in other fields to effectively obtain a legal qualification.

Consultation Question 110.
We invite consultees' views on whether communication experts or lawyers should be used as specialist examiners.
Should any alternative professions be considered?
Should there be a hybrid approach, which would vary depending on the context and the complainant?

156. We would encourage the use of legally-trained trial-experienced advocates, such as counsel, at all stages of examination. What is required is that those conducting

questioning are well versed in the ethics, law and practice of examining witnesses. We understand the procedure under ss.34-36 YJCAE 1999 to work well at present – it is not infrequently adopted in the Magistrates' Court, where the limited availability of legal aid means that defendants are often required to represent themselves.

Consultation Question 111.
Do consultees agree that the model of specialist examiners considered would not pose issues for legal professional privilege? If not, please give details of the foreseen issues.

157. The requirement for all communication to take place before a judge would mean that there was no issue about privilege, but there would be issues about a defendant being able to converse freely and securely with those conducting his defence (or a part of it), which is the right that the concept of legal professional privilege is designed to protect – LPP not being an end in itself, but a means to enable clients to ask questions and take advice without fear of ramification or unwanted disclosure. The experience of those who actually represent defendants is that this is a wholly vital part of the trial preparation process. We oppose the model proposed for that reason.

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.

158. It is probably too early to comment meaningfully on the practical impact of pilot specialist courts. However, as a matter of <u>principle</u> their value is questionable. The reorganisation of the court estate holds only superficial appeal while the overall capacity and condition of the estate remains as limited as it is at present.

159. Serious sexual offences are already dealt with in all courts by ticketed (accredited) judges and prosecuted by specialist prosecutors, with experienced and specialist defence advocates generally instructed. Specifically designating the court they are in would not add anything without increased resource being applied. Additionally, diverting cases away from the area in which complainants, defendants and witnesses live is likely to increase the burden on those who are expected to participate in such trials (worsening the prevailing trend of a reduction in access to local justice).

160. Where such an initiative does have potential value is in relation to additional support for victims in terms of training for court staff and expert at court support. However, that could just as easily be introduced without designating specialist courts, by increasing the resource available at each existing court centre.

161. If all that is proposed is that specialist cases are removed from the general backlog queue and provided with their own courtrooms, that raises obvious questions of allocation of resources. What proportion of courtrooms would need to be specialised in order to reduce the waiting time for such cases? (For example, if the volume of specialist cases represented 25% of court sitting days, but fewer than 25% of courtrooms were designated for such cases, that would actually increase rather than decrease the wait for trial in such cases.)

162. If the concern is delay in the trying of serious sexual offences, an alternative way of incentivising timely listing would be to create a CTL-equivalent protocol whereby serious sexual offences are required to be listed for trial within a certain time period. However, the sanction for breach of such a time limit would be difficult to identify, and in any event such a protocol would do nothing to help the overall backlog, and would result in other bail cases falling back in the queue.

163. On the other hand, if the proposal is to create additional new specialist court centres on each circuit, which would relieve the burden on the existing estate by increasing overall capacity, staffed with specially trained staff, that could potentially make a difference both to the backlog and the experience of participants in the criminal justice system (provided that reasonable access to local courts remained – any increase on the travel burden to participants in criminal trials should be minimised).

164. As regards other forms of specialist courts (eg. for fraud cases), the same points apply as above. While this could make a huge difference to existing Crown Court centres in relieving them of the burden of long trials, and therefore alleviating the backlog, again this would require additional resource rather than the re-designation of the existing estate. The more specialist courts that are set up without increasing resources, the more other cases are pushed back in the queue. Categorising priority of victims is a hopeless task; the effect of delay on a victim of serious violence cannot be said to be any less damaging than that on a victim of a sexual offence.

165. One further observation that we would make relates to listing of trials following s.28 cross-examination. Some practitioners have reported that such trials are de-prioritised on the basis that the complainant's evidence has already been captured.

While that removes a facet of urgency, there is still ultimately a complainant who is waiting for the outcome of 'their' case, and a defendant awaiting resolution of proceedings against them. There is therefore some concern that use of s.28 may have provided an excuse for not dealing with these cases in as timely fashion as would otherwise have been the case.

Consultation Question 113.
We invite consultees' views on the necessary features of a specialist court, including:
(1) specialist listing;
(2) specialisation within existing courts; or
(3) entirely separate courts.

166. See above.

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? If not, which model of jury screening would consultees support?

167. Agreed. Screening is generally objectionable. A jury of 12 – provided with appropriate legal guidance by the judge, and assisted in their approach to the evidence by competing arguments presented by parties – should provide an appropriate check against any issues in this regard. If there is an issue with the way that certain conduct is perceived by society as a whole, the proper answer to that is not to try and engineer juries to be representative of only the currently approved views, but to embark upon a programme of education and information which is made available to the whole of the public, akin to national public health campaigns around smoking, wearing seatbelts, drink driving etc. Such a programme would also have the prospect of changing attitudes in a way that reduces the incidence of sexual offending, which would ultimately be of far greater value to society as a whole than merely finding new ways in which to prosecute offences after they are alleged to have happened.

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?

168. Agreed, for the reasons set out in paras. 13.212-13.213 of the consultation paper. Judges now routinely provided juries with a "route to verdict" document which they are required to work through systematically (though not to populate and return to the court). That approach is generally thought to engender appropriately structured decision-making by juries, to which we do not consider a requirement to add reasons would add anything. In any event, there is no reasonable basis to suppose that a jury would be able to articulate an unconscious bias.

Consultation Question 116.
We invite consultees' views on the mandatory removal of juries from sexual offences trials currently heard in the Crown Court.

169. We do not agree that juries should be replaced with judges for the trial of sexual offences. As observed in the consultation paper at 13.219:

"The principles underpinning the right to a jury trial include the right for the defendant to be tried by their peers on matters of community importance; democratic participation; oversight of the court process as a protection against oppression; and developing public awareness about the legal process."

170. See for example this answer to a Parliamentary Question during July 2021, when consideration was being given to whether juries might be selected from only the vaccinated:

Matthew Pennycook (Lab) (Greenwich and Woolwich): (29861) To ask the Secretary of State for Justice, what assessment he has made of the potential merits of prohibiting those people selected for jury service from serving on juries if they have not received both doses of a covid-19 vaccine.

Chris Philp (Con) (Croydon South): We have assessed the option of creating juries with only fully vaccinated people. We believe that selecting a jury in this way cannot currently be made consistent with the random jury selection process and would introduce bias to the makeup of juries. We have assessed, therefore, that the proposal would not be in the interests of justice.

The institution of trial by jury is a key component of our criminal justice system and the interests of justice are paramount in determining how juries are selected. The random selection process exists to ensure not only that there is no bias but also that juries are representative of the communities from which they are drawn. The principle of the random selection of jurors has long been an integral part of maintaining a fair justice system.

...

171. The abolition of jury trials is a complex and extremely controversial subject. In addition to the constitutional implications of such a move, specific concerns with this proposal include:

- The range of life experiences juries bring to bear on cases is likely to be of particular importance in the evaluation of (usually) private human interactions

- Conversely, any (perceived) ingrained judicial prejudices are likely to be particularly detrimental to a fair determination of where the truth lies in such cases

- That could lead to a perceived lack of legitimacy of verdicts and a negative impact on public confidence in the criminal justice system. The justice of a conviction for a serious sexual offence (and therefore its conclusive nature) may become downgraded in the public eye.

- A risk of media pressure / scrutiny on judges who routinely try such cases, which might impact on, or be perceived to impact on, the tribunal's ability to make correct decisions.

- The staleness ("case-hardening") that inevitably results from trying case after case with similar lines of prosecution and defence (which does not apply to the current infrequent use of judge-alone trials where it is required on a case-specific basis, e.g. because of jury tampering).

- Judges are human too, and while they can receive all the training that can be mustered, there is an inevitable risk that they will themselves carry prejudices and misconceptions about human conduct – and unlike a jury deliberation, which provides a forum for ventilation and challenge of any preconceptions, there would be no check against any judicial unconscious bias.

- There is a risk of creating a two-tier system of justice if all prosecutions of sexual offences can be tried by judge-alone, in contrast to any other offences.

172. To test the hypothesis that judges would be better decision-makers than juries, consideration should be given to the observations of Cossins quoted at para. 13.246, fn 322 of the consultation paper:

> *Cossins highlighted the special features of sexual offences, which raise:*
> *inherent shortcomings associated with using laypeople as the triers-of-fact in the type of trial where a complainant's testimony is likely to be uncorroborated because of the very nature of how sexual assault is perpetrated. Typically, this means that in sexual assault trials there will be:*
> *i.no ear- or eyewitnesses;*
> *ii.a delayed complaint;*
> *iii.no forensic evidence of the alleged sexual act, or the inability of forensic evidence to prove lack of consent;*
> *iv.no confirmatory medical evidence of the sexual act;*
> *v.the consumption of alcohol and/or drugs by the complainant and/or the defendant;*
> *vi.counter-intuitive responses by the victim during and after the sexual assault; and*
> *vii.word against word oral evidence.*
> *As a result, the jury will be reliant on the inexact 'science' of credibility assessments to determine guilt/innocence.*

173. Even if it were conceded that the conclusion – that in many cases alleging sexual offending juries are reliant on the inexact "science" of credibility assessments – may be correct, one might reasonably ask what additional resource judges possess that would enable them to determine guilt to the criminal standard in a different way? Statistics about the prevalence of rape or other serious sexual offences in society cannot sensibly assist in determining where the truth lies in any individual case. What is identified as the "leniency asymmetry effect" may in fact be a function of the burden and standard of proof. It is hard to see how replacing juries with judges can act as the panacea that some appear to think, while the evidence on which cases are decided, and the evidential threshold to be applied, remain the same.

174. If the prospect of judge-alone trials is to be pursued, it should not be mandatory but determined by a judge on a case-by-case basis. For example, if an indictment alleges a sexual offence together with murder or a robbery, it would have to follow that the judge would return verdicts in respect of all the counts on the indictment, since it would be unworkable to have different tribunals – judge and jury – reaching their own verdicts in respect of different offences arising from the same set of facts. A

mandatory 'judge-alone' rule would therefore likely have unintended consequences of pre-determining the nature of the indictment, and potentially leading to separate trials with the need for the complainant to give evidence more than once. If that is to be avoided by not indicting other offences on a sexual offences indictment, then it would result in the full criminality of the defendant's conduct not being properly reflected on the indictment. Alternatively, if the judge-alone rule would not apply to cases where other offences were alleged, that would result in sexual offence complainants receiving the 'benefit' of a judge-alone trial only in some cases, dependent upon the indicting practice of the prosecuting authority. This state of affairs would appear confusing and arbitrary to complainants and the public, and do little to advance confidence in the criminal justice system.

Consultation Question 117.
We invite consultees' views on the defendant being able to elect to have a sexual offences trial without a jury.

175. We do not presently see a need for this, and many of the justifications for retaining jury trials generally would apply equally to this scenario.

Consultation Question 118.
We invite consultees' views on the best model for a juryless trial:
(1) a single judge;
(2) a panel of judges; or
(3) a panel with a combination of judges and lay assessors.

176. N/A.

Bar Council[4]
29 September 2023

For further information please contact:

Eleanore Lamarque, Policy Manager, Regulatory Issues, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: ELamarque@barcouncil.org.uk

[4] Prepared by the Law Reform Committee and the Legal Services Committee