The Gillen Report

Preliminary report into the law and procedures in serious sexual offences in Northern Ireland

Part 1

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And if there may seem to be a weight of tradition against change, at least it is worth remembering that the apparent heresies of one generation become the orthodoxies of the next. The ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility.

Sir Owen Woodhouse

Sexual crime is one of the worst violations of human dignity. It can deeply traumatisate the victims, their family and even whole communities. Serious sexual offences in general and rape in particular are crimes of alarming prevalence. They are unique in the way they strike at the bodily integrity and self-respect of the victim. Women, men (around 8% of victims according to the Stern report in 2010), children and people of all ages, classes and ethnicities can become victims. It happens across cultures and in some, including here in Northern Ireland, shame and social pressures will prevent it being reported.

These crimes are a blight on our society, with profound consequences for victims and for society at large. In the wake of recent trials of such offences both here and in England and Wales, public disquiet has clearly grown, hence the urgent need for this Review to examine the law and procedure surrounding serious sexual offences.

It is right to say that in England and Wales the volumes of rape defendants prosecuted and convicted following an initial allegation of rape have reached the highest level ever, with a steady conviction rate and police recorded crime figures showing an increased willingness of victims to come forward and report these crimes to the police. In 2016/17 in England and Wales there were 5,715 more convictions for sexual offences (including rape and child sexual abuse) than in 2007/08, and figures show reports of rape in Northern Ireland have more than doubled in the last decade, going from 415 in the 2007/08 financial year to 967 in 2017/18.

Nonetheless, despite these figures and many positive changes in law and procedure and various governmental initiatives over the past three decades, the remaining statistics still shock. These offences seem to defy the ordinary trial processes. Conviction rates for rape in particular are lower than in other areas of offending and the attrition rates of those who complain are high.

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As potential offences, they are seriously under-reported, with complainants regularly opting out of the very system that is supposed to recognise their rights, despite the fact that most sexual crime is more often than not perpetrated by someone known to the victim, not always well known but sufficiently acquainted to bedevil the subsequent attempts to secure justice.

The obligations the state has to those who have suffered a violent sexual crime that strikes at the whole concept of human rights and bodily integrity are much wider than simply working for the conviction of a perpetrator.

We want to ensure that victims of sexual offences are treated with dignity and respect on the path to trial and in the court. Sexual violence is a traumatic crime, and it is crucial that victims have confidence in the criminal justice system to report abuse and thereafter travel through the process unscathed, while ensuring that those who are accused are accorded a fair trial.

Once cases come before the notice of our police, Public Prosecution Service (PPS) and courts, not only must complainants and accused be treated with sensitivity and respect but must be secure in the knowledge that rape myths and stereotypes that may have invaded our legal process for so long have been dispelled as far as is possible.

In short, we need not only a criminal justice system whereby alleged perpetrators are treated fairly when brought to justice but one that treats complainants with dignity and compassion and enables them to provide their best evidence.

In making this plea, I take the opportunity to record that, during the course of this Review, I have come across a wide range of deeply dedicated and committed men and women in the judiciary, the legal professions, the voluntary sector, representatives from victims’ organisation groups, the police, the prosecution service, politicians from all the main parties, the press and members of the public at large who are enthusiastically working hard to address most if not all of the problems that I have observed in the criminal justice process.

My fervent hope is that these good people, who have already embarked to some extent on the changes necessary, will not only be encouraged but be empowered to do more on the path of radical change that this Review recommends and convince others working with them that this is an urgent and important priority.

Equally importantly, I sincerely hope that this Review will also be read by the public at large who are not employed at the coalface in processing serious sexual offences but whose informed support is vital if many of the changes I propose are to carry weight and gather momentum. To that end, I trust that this Review is bereft wherever possible of the patronising legal jargon that so often afflicts people in my profession and that the messages are simple and clear.

Many of the topics to which I have devoted individual chapters would have merited inquiries in their own right. They have been individually the subject of a plethora of previous reviews, learned academic treatises, research and controversial assessments.
The issue of serious sexual offences against children, for example, is a topic in its own right, and we could have taken up the entire review process dealing with it alone.

My concern, therefore, has been to create signposts for those in authority in these fields of law and procedure. It should be seen as part of a wider response of the community to these particularly invasive and traumatic aspects of serious sexual offences.

My perception is that public concern over issues raised by sexual offending has never been higher. The problems we face in this jurisdiction are not unique. Interestingly, the demand for a review of the law and procedure of serious sexual crimes and ancillary issues has surfaced for some time now not only in Northern Ireland but, as our research has shown, in neighbouring jurisdictions and countries worldwide.

Thus we have researched experiences and literature on these topics worldwide to 15 other countries, as this Review will reveal in each chapter. I have personally spoken to judiciary/lawyers/victims’ groups and advocates etc. in many jurisdictions.

I am acutely aware that cultural differences exist in our various countries and that problems experienced and solutions sought are far from being necessarily transferable to a small jurisdiction such as ours.

Nonetheless, when different systems have virtually identical issues and similar outcomes — as they clearly have — we must take note of those experiences particularly when they inform our own conclusions and strive to benefit from the solutions proffered.

The task I faced in taking up the Review was to assess and make recommendations on how the position in law and procedure of complainants might be improved while not compromising the fundamental trial rights of those who are accused (or, indeed, in some cases not even yet accused) of such offences.

The chapters, whilst recognising the great improvements in recent years, are calculated to establish a number of confidence-building blocks, none of which will solve our existing problems on their own but which cumulatively are intended to introduce radical overall change.

At this pre-publication stage of the Review, where I have formed some tentative conclusions in the wake of all the interviews and research conducted, I am anxious to hear the views of the public at large along with other key stakeholders, interested organisations and individuals to whom I have not yet had the opportunity to reach out.

The recommendations are merely my early thoughts inserted to give a guide to the direction in which I am leaning but which I am quite prepared to alter or abandon in light of the responses emerging in this two-month consultation period. They represent adjustments to the law and procedure not only to encourage and empower individuals to come forward and speak out but to create a fairer and less daunting process for those who have done so whilst protecting the rights of an accused to a fair trial.

Two final matters of caution. First, we must ensure, as Baroness Stern asserted eight years ago, that the low conviction rate for these crimes, however measured, does
not take over the debate to the detriment of other important outcomes for victims and those accused. It is, of course, important to prosecute and convict but a range of priorities needs to be balanced.

Secondly, resources are always the elephant in the room in the realm of law reform. First-class services cost money. Finance is scarce and the government is beset with an abundance of priorities. However, it has to be recognised that in the field of serious sexual offences a sound service saves money in the medium and longer term by preventing years of ill health and instability in those who have been victims. We have to invest to save.

Hence counselling for victims of these offences is vital. Resources need to be allocated to the voluntary sector to help victims to recover and get on with their lives.

Similarly, changing public attitudes to these offences is important if we are to lay claim to live in a civilised society, and we need financial allocations to the education of young people and society generally about these crimes.

Finally, a system that unflinchingly prosecutes perpetrators needs a police and prosecution service that are properly funded to meet these needs.

I finish these with four beliefs that I formed within days of taking up this task and to which I have remained wedded throughout this odyssey into serious sexual offences. They form the very spine of this Review and course through all my recommendations.

- First, the massive under-reporting of these crimes and the high attrition rate are unacceptable in a society that lays claim to the rule of law.
- Secondly, the pathway from initial complaint through to trial is too steep, too long and too unwieldy for both complainant and accused. It needs urgent reform.
- Thirdly, the current trial process is too daunting for complainants and needs radical revision.
- Fourthly, many of the problems in the present law and procedure spring from the culture within which we all currently live. Positive affirmative education on the realities of serious sexual offences and their consequences must be given not only to juries actually hearing these cases but, perhaps more importantly, to the public at large if we are to embrace a truly just, fair and civilised concept of the rule of law.

The Right Honourable Sir John Gillen
November 2018
Acknowledgements

I wish to express my sincere thanks to those who participated in this Review, in particular those complainants and acquitted defendants whose courage and generosity in volunteering to come and share their experiences has enabled me to understand the issues in a manner I could not otherwise have done.

I also wish to thank all the individuals and groups who contributed to the Review and who gave so generously of their time and information. These included judges, the legal profession, civil servants, prosecutors, victims’ groups, human rights groups, police, the press and politicians throughout Northern Ireland and the rest of the UK, Ireland and numerous countries abroad. It has been impossible to name all of them and I apologise for the unavoidable omissions.

I record a special note of gratitude to all those in England and Wales, Scotland, Ireland, the states of Massachusetts and New York, South Africa, New Zealand, Australia and Canada who so generously gave me their time, skills and experience in lengthy, time-consuming, face-to-face and telephonic meetings. They were a paradigm of cross-jurisdictional and international cooperation in these matters of common concern. Without exception they all contributed invaluably to my thinking on these matters. It is my fervent belief that the subjects dealt with in this Review are international in their scope. It is by joint endeavours and a sharing of knowledge and information that we can meet the challenges most effectively in the future.

Special thanks are also due to the 11 members of my Advisory Panel and Mrs Kathryn Logue BL who worked tirelessly to assist me to complete this task within the assigned timetable. I have rarely come across such a gifted and stimulating group of professionals, whose cumulative creativity and insight far outshone my efforts. They have all made indelible marks on this Review. I make it clear, however, that ultimately they are not responsible for the views I have expressed or what is omitted from this Review. This was an entirely independent Review by me and any brickbats should shower down solely on me.

Last, but most certainly not least, I wish to thank the simply brilliant Review team that was assembled to assist me in this task, namely Siobhán Fitzpatrick, Rebecca Jackson, Aileen Lavery, Dianne Lowry, Una McNeill, Ken Mack, Noel Marsden, Claire Milliken and Caroline Perry.

Under the inspiring leadership of Angela Ritchie, they have worked unceasingly to meet every onerous demand I made of them on a daily basis — many of which in hindsight were overtaxing and unreasonable. Their opinions, which I sought on many occasions, were invariably a bellwether of reason and good sense. Without their contribution, this task would never have been completed.
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Terms of reference

1. The Criminal Justice Board has commissioned a review of the law and procedure in prosecutions of serious sexual offences. The review will be led by a former Lord Justice of Appeal, the Right Honourable Sir John Gillen, and will operate under the following terms of reference.

2. The review will investigate the law and procedure covering the prosecution of serious sexual offences in Northern Ireland. In conducting its work, the review will have regard to the practice and procedure for progressing such cases in other jurisdictions.

3. The purpose of the review is to determine whether current arrangements deliver the best outcomes for victims, defendants and justice, and to make recommendations for improvements.

4. The review will consider the ‘victim’s journey’, from the initial complaint through to the point of court disposal. It will take appropriate account of the views of individual victims and victims’ organisations, legal practitioners, and the criminal justice organisations involved in the conduct of such cases.

5. The review will be supported by an advisory panel. It will also seek input from external stakeholder groups and members of the public will be encouraged to contribute on the basis of their personal experiences.

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1 For the purposes of this review serious sexual offences are defined as those offences tried in the Crown Court on indictment.
Scope
The scope of the review will include, but is not limited to, the following areas:

- disclosure of evidence;
- support for complainants, victims and witnesses — from the time of the initial complaint through to post-trial support;
- measures to ensure the anonymity of the complainant;
- the arguments for defendant anonymity;
- pre-recorded cross-examination;
- the impact of social media on the conduct of court hearings;
- provisions for restrictions on reporting; and
- restrictions on public attendance at court hearings.

Timing
2. The Review will commence in May 2018 and will report at the end of February 2019.
Definition of Serious Sexual Offences

The main sexual offences within the remit of this Review are contained in The Sexual Offences (Northern Ireland) Order 2008 and they are summarised below for ease of reference.

Article 5  Rape - A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis

Article 6  Assault by penetration

Article 7  Sexual assault

Article 8  Causing a person to engage in sexual activity without consent where the activity involves penetration, if the activity caused involved:

- penetration of B’s anus or vagina;
- penetration of B’s mouth with a person’s penis;
- penetration of a person’s anus or vagina with a part of B’s body or by B with anything else; or
- penetration of a person’s mouth with B’s penis.

Article 12  Rape of a child under 13

Article 13  Assault of a child under 13 by penetration

Article 14  Sexual assault of a child under 13

Article 15  Causing or inciting a child under 13 to engage in sexual activity where the activity involves penetration, if the activity caused or incited involved:

- penetration of B’s anus or vagina;
- penetration of B’s mouth with a person’s penis;
- penetration of a person’s anus or vagina with a part of B’s body or by B with anything else; or
- penetration of a person’s mouth with B’s penis.
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Article 16  Sexual activity with a child where the activity involves:
• penetration of B’s anus or vagina with a part of A’s body or anything else;
• penetration of B’s mouth with A’s penis;
• penetration of A’s anus or vagina with a part of B’s body; or
• penetration of A’s mouth with B’s penis.

Article 17  Causing or inciting a child to engage in sexual activity where the activity involves penetration, as outlined at Article 15 above

Article 18  Engaging in sexual activity in the presence of a child

Article 19  Causing a child to watch a sexual act

Article 20  Sexual offences against children committed by children or young persons

Article 21  Arranging or facilitating commission of a sex offence against a child

Article 22  Meeting a child following sexual grooming etc.

Article 23  Abuse of position of trust: sexual activity with a child

Article 24  Abuse of position of trust: causing or inciting a child to engage in sexual activity

Article 25  Abuse of position of trust: sexual activity in the presence of a child

Article 26  Abuse of position of trust: causing a child to watch a sexual act

Article 32  Sexual activity with a child family member where the accused is over 18 and the activity involves penetration as outlined at Article 16 above

Article 33  Inciting a child family member to engage in sexual activity where the accused is over 18 and the activity involves penetration as outlined at Article 16 above

Article 37  Paying for sexual services of a child where the child is under 13, or where the child is under 16 and the activity involves penetration as outlined at Article 16 above

Article 38  Causing or inciting child prostitution or pornography

Article 39  Controlling a child prostitute or a child involved in pornography

Article 40  Arranging or facilitating child prostitution or pornography

Article 43  Sexual activity with a person with a mental disorder impeding choice where the activity involves penetration as outlined at Article 16 above

Article 44  Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity where the activity involves penetration as outlined at Article 15 above
Article 45 Engaging in sexual activity in the presence of a person with a mental disorder impeding choice

Article 46 Causing a person, with a mental disorder impeding choice, to watch a sexual act

Article 47 Inducement, threat or deception to procure sexual activity with a person with a mental disorder where the activity involves penetration as outlined at Article 16 above

Article 48 Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception where the activity involves penetration as outlined at Article 15 above

Article 49 Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder

Article 50 Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception

Article 51 Care workers: sexual activity with a person with a mental disorder where the activity involves penetration as outlined at Article 16 above

Article 52 Care workers: causing or inciting sexual activity where the activity involves penetration as outlined at Article 15 above

Article 53 Care workers: sexual activity in the presence of a person with a mental disorder

Article 54 Care workers: causing a person with a mental disorder to watch a sexual act

Article 55 Administering a substance with intent with the intention of stupefying or overpowering a person to engage in a sexual activity

Article 56 Committing an offence with intent to commit a sexual offence where the offence is committed by kidnapping or false imprisonment, or where the offence is committed by assault and the intended sexual offence is rape or assault by penetration (Article 5 or Article 6)

Article 57 Trespass with intent to commit a sexual offence where the intended offence is rape or assault by penetration

Article 58 Sex with an adult relative: penetration

Article 59 Sex with an adult relative: consenting to penetration

Article 60 Exposure: the intentional exposure of genitals with the intention of causing alarm or distress

Article 61 Voyeurism: observing another person doing a private act for the purposes of sexual gratification
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Article 73  Intercourse with an animal; penetration by penis of the vagina or anus of a living animal

Article 74  Sexual penetration of a corpse; penetration by a body part of anything else to a part of the body of a dead person

A number of other legislative instruments include provisions for sexual offences in Northern Ireland.

Section 69 of the Serious Crime Act 2015: Possession of a paedophile manual

Section 90 of the Justice Act (Northern Ireland) 2015: Sexual communication with a child

Section 51 of the Justice Act (Northern Ireland) 2016: Disclosing private sexual photographs/ films with intent to cause distress

Section 63 of the Criminal Justice and Immigration Act 2008: Possession of extreme pornographic images

Article 3 of the Protection of Children (Northern Ireland) Order 1978: Indecent photographs of children
Executive summary

The rise in Prosecutions for sexual offences presents one of the most profound challenges for the courts ... in the early 21st century. These cases are almost invariably of the utmost importance because of the direct impact ... on victims and the indirect impact it has on the wellbeing of our society.

Lord Justice Fulford, Senior Presiding Judge for England and Wales, May 2016

1. The Criminal Justice Board,² which exists to oversee reform, change and openness in the criminal justice system, commissioned an independent review of arrangements around delivery of justice in serious sexual offences.

2. The Criminal Justice Board commissioned a Review of the law and procedures in Serious Sexual Offences in Northern Ireland in April 2018. The Right Honourable Sir John Gillen, a former Lord Justice of Appeal, leads the Review, supported by an independent advisory panel made up of representatives of victims’ groups, the Northern Ireland Human Rights Commission, the judiciary, members of the legal profession, the Police Service of Northern Ireland (PSNI), the Public Prosecution Service (PPS), the National Society for the Protection of Children from Cruelty (NSPCC), those with legislative responsibility for justice and the law, and those with an academic view.

3. The work of the Review team encompasses and is focused on the formal terms of reference.¹

4. Where it is considered in the public interest and it would bring necessary context or add value to the Review, other related topics have also been considered.

5. The scope of the Review includes, but is not limited to, the following areas:
   - support for complainants, victims and witnesses, from the time of the initial complaint through to post-trial support;
   - restrictions on public attendance at court hearings;
   - pre-recorded cross-examination;
   - the impact of social media on the conduct of court hearings;
   - delay in the court system;

¹ Rook & Ward on Sexual Offences: Law and Practice.
² The Criminal Justice Board is responsible for overseeing and progressing justice-led Programme for Government commitments, agreeing shared priorities across justice, monitoring progress towards achieving them change and openness in the criminal justice system. The Board is currently chaired by the Permanent Secretary of the Department of Justice and comprises the Lord Chief Justice, the Chief Constable, the Director of Public Prosecutions, and senior officials from the Department of Justice.
• disclosure of evidence;
• the definition of consent;
• the arguments for defendant anonymity;
• the voice of marginalised communities;
• support for children and vulnerable adults;
• arguments for jury trials in serious sexual offences;
• complementary mechanisms to the criminal justice system; and
• provisions for restrictions on reporting.

6. The Review formally commenced in May 2018 and focuses on the time frame of an offence, beginning when it was committed to its eventual disposal in the justice system.

7. The work of the Review team has involved direct contact with over 200 organisations and individuals to hear first-hand evidence and accounts from a wide range of interested parties. Contributors included complainants, defendants who were subsequently acquitted, statutory and voluntary organisations, members of the judiciary and those involved in the legal profession. The work has also drawn on the experiences of 15 countries and various jurisdictions across Europe, the US, South Africa, Australia and New Zealand.

8. It is widely believed that the UK has one of the finest justice systems in the world. However, in relation to serious sexual offences specifically, the essential background to the Review is that there appears to be a lack of public understanding and confidence, and profound professional concern about, the process of the law in investigating, processing and determining these cases.

9. Public concerns abound. Reaction to recent trials in Northern Ireland and other parts of the UK involving high-profile individuals, the outcry in England over a series of collapsed trials, and issues around disclosure failings that have contributed to miscarriages of justice are just a few examples of those very real concerns. Equally concerning are myths around rape which need to be robustly challenged. We need some radical rethinking of societal attitudes to sexual abuse in the wake of public campaigns. These concerns and others sit against a backdrop of lengthy delays in the court process in Northern Ireland compared with other parts of the UK.

10. The preliminary report is the result of listening closely to the voices of those involved in the criminal justice system. It attempts to address the flaws that appear to exist in the law and procedures in serious sexual offences.

11. While within the terms of reference, there is no requirement to publish a preliminary report, it is being made publicly available for consultation purposes, from 20 November 2018 to 15 January 2019.
Executive summary

12. To ensure that final conclusions have been fully informed, anyone with observations, comments or who wishes to make a positive contribution to the work is invited to submit their views directly to the team. Submissions can be made anonymously in the knowledge that all responses will be carefully considered.

13. The preliminary report can be found online at: https://gillenreview.org. The closing date is 15 January 2019. Late responses may not be considered.

Responses can be made by telephone, letter or email using the following details:

Email: enquiries@gillenreview.org

Telephone: 028 9026 1361

Address:

The Gillen Review
6th Floor, Millennium House
25 Great Victoria Street,
Belfast BT2 7AQ

14. In addition you are invited to participate in a short anonymous online survey on the following link:


Chapter 1 – Background

15. It has not been the intention of this Review to reinvent the wheel. Whilst I am satisfied that much needs to be changed in terms of the law and procedure relating to serious sexual offences, it cannot be ignored that in recent years there have been many improvements made in the law relating to such offences, in the treatment of complainants, in the standards of investigation, in a far more coherent and enlightened approach to prosecutions than before and in improved court processes and procedures. This opening chapter rehearses some of the salient background issues.

Chapter 2 – The voice of complainants

16. This chapter is the result of my listening to complainants and reading the literature about impediments to justice and a fair trial that confront complainants in serious sexual offences. It addresses the challenges they feel they face legally and procedurally. Indeed, one of my recommendations is that this listening process should continue, with complainants being invited to give feedback of their experience after every trial.

17. The chapter investigates why there is gross under-reporting of these crimes, with England and Wales figures for 2016/17 (reported in 2018) suggesting
that of those who had experienced rape or assault by penetration (including attempts) since the age of 16, only one in six (17%) had told the police. The level of reporting has increased somewhat in Northern Ireland over the last year but it is still unacceptably low.

18. For those who do complain to police, the path from complaint was harrowing and the attrition rate was high. Of those who venture into the process, around 40% regret it and drop out.³

19. Complainants who follow the whole process through to the end face the reality that conviction rates are very low. This chapter sets out a raft of relevant statistics on the process but two merit brief reference in this summary.

20. First, in cases that are actually heard in the Crown Court involving sexual offences, the overall conviction rate is falling. It was 63.8% in 2017/18 compared with 73.8% in 2016/17.

21. Secondly, in the Crown Court where the charge was rape, 45.0% of defendants were subsequently convicted of at least one offence of some nature. However, only one in six defendants (15.0%) were convicted of an offence of rape. All these figures for sexual offences are in stark contrast to non-sexual offences, where the conviction rate in the Crown Court is 88.2%.

22. Doubtless one explanation for these differences is that in many serious sexual offence cases it is a question of one person’s word against another, without any independent objective evidence. Nonetheless, the conviction rate is troublingly low in serious sexual offence cases.

23. All of these concerns are explored and remedies proposed in detail in the succeeding chapters.

Chapter 3 – Restricting access of the public

24. I favour confining access to trials of serious sexual offences to officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant or, where the accused is under 18, of the accused, to remain in court together with such other persons (if any) as judges, or the court, as the case may be may in their discretion permit to remain.

25. In saying this, I fully appreciate that a criminal trial is a public event. The principle of open justice puts the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process.

³ PPS review of cases in which there was a No Prosecution decision. Includes victim withdrawal and those where a report had been made by a third party to police but the victim did not wish the matter to be investigated. Similar findings by PSNI of 41% from research completed for rape incidents reported during January to July 2017.
26. However, open justice is never an absolute concept. In Northern Ireland we exclude the public in family cases and youth justice cases.

27. Members of the public are excluded from attending rape trials and certain other sexual offences in the Irish courts. In New Zealand, New South Wales and, even more relevantly, Scotland, the public are excluded when the complainant gives evidence.

28. In the context of a small jurisdiction with local courts; public familiarity with the complainant is often present. There is also the risk of jigsaw identification where revelation of disparate matters such as location, addresses, schools, friends and family members of the complainant can all be easily pieced together locally to identify the complainant despite the presence of special measures to protect identification.

29. Moreover, confidence-building measures for complainants who fear the cruel glare of public exposure (particularly in high-profile trials in front of packed public galleries) are now vital.

30. If we are to challenge gross under-reporting, high dropout rates and an unacceptably daunting trial process, I consider the arguments in favour of restricted access measures carry convincing weight.

Chapter 4 – Pre-recorded cross-examination

31. The evidence-in-chief of a complainant is often video recorded shortly after the initial report has been made to police. This often takes place at a police station. The recorded evidence is subsequently made available to be presented at trial in that video format.

32. In addition to evidence-in-chief, I am in favour of the facility of pre-recorded cross-examination, away from the court, being afforded initially to children and vulnerable complainants and eventually to all complainants.

33. Provided all the relevant documentation had been disclosed to the defence, this cross-examination could take place long before the trial itself and in a location remote from the court setting if necessary. This would take place without public presence, with the defendant observing by a live link and, in the case of children, with questions approved in advance by the judge. The cross-examination would be recorded and shown to the jury in this format, which can be edited to exclude any prejudicial material.

34. This would represent another vital building block in restoring the confidence of complainants in the criminal justice system and procedure. It would potentially reduce or eliminate the need for a complainant to give evidence in person

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4 The definition of ‘vulnerable’ should be extended to include all complainants in serious sexual offences as is the case in Scotland.
at trial. It would permit them to give evidence remotely in a safe and secure environment away from the court and the defendant.

35. The risks of secondary victimisation and traumatisation for the complainants are thus substantially reduced.

36. It lends itself to better-quality evidence as it is given closer to the alleged event and is recalled at a time when the complainants are removed from court stressors.

37. This is particularly relevant in the case of young children and vulnerable complainants whose memories can fade more rapidly than others and who are more prone to guessing when unsure.

Chapter 5 – Separate legal representation

38. Complainants are often shocked, and members of the public surprised, to discover that complainants do not have legal representation. Prosecuting counsel represents the state and complainants are simply witnesses.

39. I consider that a measure of publicly funded provision of legal representation for complainants is essential and would represent yet another confidence-building block for complainants.

40. This concept is neither novel nor uncommon in both inquisitorial and adversarial systems worldwide.

41. The right to have legal representation to oppose cross-examination on previous sexual history and to oppose disclosure of personal medical records seems eminently sensible.

42. I also consider a measure of legal advice to explain the complexities of, and the legal developments occurring in, the legal process should be available from the time the matter is first reported to the police up until the commencement of the trial although not during the trial. This would be time-limited and would avoid the costs of legal attendance during the trial, which in itself might confuse the jury as to the respective roles of counsel. A classic example might be to advise on whether police were unreasonably seeking complainants to declare excessive amounts of personal data under the threat of not proceeding with the case.

Chapter 6 – Myths surrounding serious sexual offences

43. Frustratingly, many people, men and women, still harbour often unspoken views about appropriate behaviour for individuals according to their gender. For example, if a woman has had consensual sexual relations with other men in the past or has consented previously to the man against whom she is now making an allegation of rape, she has gone some considerable way to forfeiting the right of refusal.
I am in favour of positive steps being taken to combat the presence of rape myths and stereotypes about sexual offences that are embraced by juries and that may influence their judgement.

These myths may include that:
- rape only occurs between strangers;
- victims provoke rape by the way they dress or act;
- victims who drink alcohol or use drugs are asking to be raped;
- rape is a crime of passion;
- if complainants did not scream, fight or get injured, it was not rape;
- you can tell if someone ‘really’ has been raped by the way they act;
- victims cry rape when they regret having sex or want revenge;
- only gay men get raped/only gay men rape men;
- sex workers cannot be raped;
- a woman cannot be raped by her husband/partner;
- victims who have remained in an abusive relationship are responsible for any rape that follows;
- victims will report immediately and give consistent accounts; and
- false allegations are rife.

To combat these myths, we need local research to be commissioned to ascertain their prevalence and extent in Northern Ireland.

We should also introduce educational material which could include a short video outlining the fallacy of these matters and judicial directions to this effect for the benefit of educating jurors at the very commencement of the trial, together with, if necessary, expert evidence on the subject.

Of equal importance is the need for well-funded public and school campaigns to debunk these myths and address the consequences of serious sexual offences.

I am in favour of strong measures to control the current impact that social media is having in trials of serious sexual offences.

Use of social media is having an adverse impact to the extent that in some instances it is potentially:
- removing the right to complainant anonymity;
- destroying the reputations and lifestyles of complainants and innocent accused persons;
- nullifying the integrity of judicial orders;
rendering jury trials unfair; and
• impairing the administration of justice overall.

51. This is a widespread concern throughout jurisdictions worldwide. We need to avoid piecemeal approaches and instead to push forward a cohesive national framework to meet a problem that is national in nature and potentially strikes at the heart of our criminal justice system.

52. That joint approach needs to be based on empirical evidence rather than broad assumptions often based on anecdotal accounts.

53. There is currently a government inquiry into the whole issue being carried on in England and Wales, and we should be wary of taking unilateral steps in Northern Ireland until that is completed in early 2019.

54. To an extent, we are belatedly addressing it. In dealing with social media, we need to see a mix of persuasion balanced with regulation.

55. Hence we have recommended borrowing from those other jurisdictions a suite of legislative and procedural steps to combat the current menace.

56. These include a raft of measures to:
• restate and control the status of these social media platforms;
• enact strong judicial powers to control access to websites in the course of the trial process;
• create fresh offences aimed specifically at jurors who offend against judicial guidance on this issue;
• improve attempts to encourage jury understanding of the dangers; and
• provide a publicly funded public/school education campaign to promote appreciation of the problems social media throws up for the rule of law.

Chapter 8 – Cross-examination on previous sexual history

57. I am committed to invoking measures to enforce the law prohibiting cross-examination about previous sexual history save in the rare circumstances that the law currently admits.

58. It is not difficult to understand how research evidence and witness testimony over decades have raised concerns about the extent to which rape complainants are facing humiliating and traumatic trial processes.

59. Phrases such as ‘second rape’ or ‘judicial rape’ have become common parlance due to the enduring evidence from complainants of their adverse treatment in court.

60. Accordingly, restrictions on sexual history evidence, by limiting evidence and cross-examination to only highly probative material, are justified by the need to
reduce the humiliating and distressing nature of cross-examination in rape trials as well as protecting a complainant’s right to privacy.

61. There are too many voices being raised suggesting that our present restrictions on such cross-examination are being ignored and that courts are insufficiently robust in protecting complainants in such matters.

62. This chapter recommends a number of measures to encourage a more robust judicial attitude to restricting cross-examination on previous sexual history including, as earlier set out, the right for the complainant to be legally represented should it arise.

Chapter 9 – Delay

63. The criminal justice system, from the beginning of the process to the end, in Northern Ireland takes twice as long as the system in England and Wales. The delays are increasing year-on-year for serious sexual offences.

64. For adults, the greatest delay is found in rape cases (based on principal offence disposed). The 943 days average in 2017/18 for rape cases is 69% longer than the overall Crown Court average (558 days).

65. However, the greatest delay of all is found in serious sexual offences involving children (based on principal offence disposed), where cases take an average of 986 days to complete.

66. The average time taken for sexual offences excluding rape in the Crown Court (based on principal offence disposed) has increased by 22% since 2015/16 from 687 days to 839 days in 2017/18.

67. Tackling the inordinate delay in the system is one of the cornerstones of this Review. The delay is found in the PSNI investigation, the Public Prosecution Service (PPS) allocation of cases for consideration and in the court process itself. There are far too many adjournments and a failure to mandate early engagement of both defence and prosecution counsel to address the issues in a timely fashion.

68. I sense an air of organised hypocrisy around this issue. Everyone loudly recognises that the delay in processing serious sexual offences is long and yet little or nothing is done to address a feature that is growing and deteriorating year by year.

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5 From offence reported to case dealt with at court.
6 Relate to substantive versions of the offence only.
7 Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.
8 Relates to cases where the principal offence was a sexual offence that specified the victim was a child in the offence description.
69. This unending delay makes a major contribution to the reluctance of complainants to engage and places an unacceptable stress on both the complainant and the accused.

70. In this chapter I outline a number of root-and-branch changes, which include:

- the urgent need for the PSNI to be guided in its inordinately drawn-out investigative procedures from the very outset by the PPS;
- the disclosure process, in itself probably the major cause of delay, to be gripped from day one of the investigation (see chapter 10, below);
- the PPS to urgently end a system that can allow files to lie unallocated for months on end;
- the PSNI and the PPS to be properly resourced to achieve these ends;
- a completely fresh approach to judicial case management, with firm time limits, an end to a culture of unjustified committal proceedings and unmerited adjournments, and early mandatory engagement of defence lawyers in the entire process; and
- provision of properly coordinated technology so that valuable court and jury time is not wasted by interminable breakdowns in current systems.

Chapter 10 – Disclosure

71. Disclosure is fundamental to a fair trial and involves the obligation on the part of the Public Prosecution Service to disclose relevant material collected by the PSNI in the course of an investigation to the defence. The obligation is to disclose any material found that may undermine the prosecution case or support the defence case. In England and Wales disclosure errors have led to miscarriages of justice and some people have gone to prison as a result.

72. The significant growth in the use of digital technology in society has meant that the way in which crimes are investigated and prosecuted has evolved. This has placed a significant strain on the capacity and capability of those carrying out investigations.

73. It continues to blight our criminal justice system, despite the flaws having been highlighted for some years. The recent history of reform, despite a plethora of reviews and guidelines, in this area discloses a saga of protracted dimensions and continued inertia.

74. The current system is being operated in a completely outmoded, inadequate and inefficient manner, bereft of modern technology and sufficiently skilled operators.

75. If the seemingly immutable problem of disclosure is not addressed in Northern Ireland, delay in the system will remain endemic, innocent people may be convicted and justice will be irreparably damaged.
76. The legislation that governs disclosure, namely the Criminal Procedure and Investigations Act 1996, although predating the enormous expansion in electronic communication and social media, is perfectly adequate to meet the challenge. The problem has been, and continues to be, the flawed implementation over several years.

77. This chapter makes a large number of detailed recommendations to address these flaws. These include:

- challenges to the PSNI culture, which too often fails to see disclosure of third-party material/schedules of unused material as at the very core of the investigative process and the imperative of timely decision-making;
- that disclosure is currently seen merely as an add-on at the end of investigations, which then adds enormous delay to the whole matter; that has to change;
- the need for specially trained designated police Disclosure Officers, working with PPS guidance, in all serious sexual offence cases where disclosure is an obvious issue;
- early positive and enthusiastic meetings between, and the engagement of, the defence and the Public Prosecution Service to exchange disclosure schedules is another vital ingredient;
- firm judicial case management, with judges setting time limits for disclosure schedules to shape expectations and allow for measurement and evaluation of progress, is also pivotal; and
- finally resources have to be invested in training skilled disclosure operators and technological advances to hasten the process.

Chapter 11 – Consent

78. Consent is often the crucial issue in serious sexual offences, and yet it is a very complex and difficult legal area.

79. It is defined under The Sexual Offences (Northern Ireland) Order 2008 (the 2008 Order) as follows: ‘A person consents if he agrees by choice, and has the freedom and capacity to make that choice.’ It was designed to centre sexual offence law upon respect for individual sexual autonomy and freedom of choice.

80. The difficulty is that the definition is vague, with the result that juries may bring sexual stereotypes into play in determining whether there was consent.

81. Moreover, requiring the defendant, as the law does, to ensure he has a reasonable belief that consent has been given does not clearly define or suggest what should and should not be considered reasonable, again leaving the door open for stereotypes to determine assessments of reasonableness.
82. I believe there should be a discernible shift towards a requirement for some measure of affirmative or participative expression of consent and away from a focus on resistance as a means to prove the absence of consent.

83. Accordingly, we have proposed amendments to the 2008 Order as follows:

- to follow the example in New Zealand and to provide that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
- to expand the range of circumstances as to when there is an absence of consent to include, for example (i) where the complainant submits to the act because of a threat or fear of violence or other serious detriment to the complainant or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where the complainant is overcome, voluntarily or not, by the effect of alcohol or drugs; and
- to add that, in determining whether there was a reasonable belief in consent, the jury should take account of a failure to take any steps to ascertain whether the complainant consented.

84. Separately, I have considered introducing the concept of gross negligence rape, as in Sweden. This would apply if the accused genuinely believed there had been consent but had no reasonable grounds for so believing as they had failed to take reasonable steps to ascertain consent. I have rejected it as it might risk undermining the egregious nature of the offence and establish an unwelcome hierarchy of rape.

Chapter 12 – The voice of the accused

85. Currently, the complainant in serious sexual offence cases is anonymised because otherwise complainants would be unlikely to come forward. The accused is not anonymised unless there would be a risk to their life or to do so would cause the complainant to be identified.

86. I do believe that the accused should be anonymised pre charge. I do not favour a change in the current law to anonymise the identity of the accused after they have been charged.

87. This matter generated more controversy and division of opinion than any other issue in this Review.

88. Despite the severe consequences, both physical and mental, often suffered by accused persons (and their close family members) who have been acquitted of serious sexual offences, together with the public opprobrium often visited on them (and their families), I currently consider there are two key reasons for maintaining the status quo.
89. First, a crucial advantage of the publication of the name of the accused post charge — and I emphasise post charge — is that there is clear evidence in Northern Ireland and elsewhere that it serves to bring forward other complainants — for example, in institutional abuse or serial offender cases.

90. Such additional witnesses can be vital in a genre of crime where it is often a case of one person’s word against another with little further evidence, where currently approximately 83% of complainants are not reporting to the police and where acquittal rates are already very high.

91. Secondly, it is extremely difficult to justify the identity of an accused being anonymised in serious sexual offences and not in other heinous offences such as murder, crimes of unspeakable cruelty to children and other offences of non-sexual extreme violence etc.

92. It is not without significance that Ireland is the only common law country that we know of that grants anonymity as a matter of course to accused persons post charge, and even this is limited to only certain sexual offences and not all, albeit that many follow the same path that we currently adopt in Northern Ireland of granting anonymity where otherwise the identity of the complainant would be revealed and in cases where a threat to life etc. can be established.

93. The principle of publication post charge should therefore remain. It is noted that teachers should have the same statutory protection as in England and Wales.

94. Publication of a person’s identity pre charge clearly falls on the other side of the line and I recommend that this be prohibited save in the rare instance where it can be established it is in the public interest not to do so when, for example, an accused has taken to flight.

Chapter 13 – The voice of marginalised communities

95. If the law and procedures in serious sexual offences are to be fairly applied to all our citizens, it must include those in marginalised communities, minority black, Asian and ethnic minorities, those with physical and learning disabilities, those with mental health problems, LGBT+, older people, Traveller communities, sex workers and purely in the context of serious sexual offences, males, who, for a number of reasons, may be even more reluctant than others to report these crimes and come within the criminal justice system.

96. We must reach out to these groups. We desperately need empirical research commissioned by government to learn the prevalence, extent, nature and experiences of serious sexual offences among these groups, with a consideration of what laws, procedures and mechanisms, including specialist sexual violence services, alone or in combination with the conventional law and procedures in the legal system, may establish a construct of victim justice for them.
Chapter 14 – The voice of the child

97. The issue of child serious sexual abuse is a topic in its own right.

98. In Northern Ireland in 2011/12, there were 985 sexual offences recorded in relation to children. In 2017/18 this had almost doubled to 1,936. Sexual offences against children make up the majority of reported sexual crime to the PSNI. As already indicated, these cases generate the longest delay.

99. However, the under-reporting and attrition rate of sexual crime against children and young people is enormous. The Children’s Commissioner for England found that only one in eight children who are sexually abused were identified by professionals.

100. Our concern, therefore, has been to create signposts for those in authority in this field as part of a wider response of the community to this particularly invasive and traumatic aspect of serious sexual offences.

101. I do not consider the interests of children as complainants or as accused requires legislative change.

102. The fact of the matter is that there is overwhelming evidence that the law as it stands is not being employed consistently or, in some cases, at all as it was intended.

103. The failures include:
   • lack of awareness of the nature of child trauma amongst professional lawyers/judges/police;
   • refusal to adequately address special measures at court for them;
   • excessive and damaging waiting times;
   • rare use of registered intermediaries;
   • chaotic achieving best evidence (ABE) interviews at an early stage with technical failures; and
   • failure on the part of the Department of Justice to adequately introduce reforms suggested some ago by the Independent Inquiry into Child Sexual Exploitation.

104. These are but some of the problems besetting the treatment of children in these cases, which require new and creative procedures. We have addressed each of these problems in a specific set of recommendations.

105. In particular, we have recommended a fresh culture of cross-examination, where defence must produce written questions in advance for judicial approval, certain facts should be agreed in advance and questions must accommodate the age and frailties of a child’s memory with simple language, without additional comment. Moreover, we have recommended a greater emphasis on the training of all involved in the criminal justice system and a much firmer case
management process with a strong emphasis on protecting children from being re-traumatised by the very process that is meant to protect their rights.

106. Finally, I have urged that informed and creative consideration be given by the Department of Justice to the Barnahus scheme in Iceland and its offshoot, now being piloted in Child Houses in England and contemplated in Scotland. The Barnahus model seeks to embed the justice process within child protection disclosure procedures by ensuring legal, social care and medical professionals work collectively and aims to provide a comprehensive service for children in serious sexual offences.

Chapter 15 – Training

107. I share the concerns of a number of complainants who perceive there to be a continuing lack of understanding throughout the process about the impact that a trauma can have on a victim and how they respond to the trauma.

108. Training on the prevalence and changing character of serious sexual offences should be undertaken on a regular basis, regularly refreshed and include an assessment of those identified as most vulnerable (for example, people with disabilities, older people, ethnic minorities and those with insecure immigration status).

109. Thus all publicly funded advocates should have to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences. It is noteworthy that legally aided family practitioners are on an approved list.

110. Issues surrounding appropriate procedures do not operate in isolation but rather interact with and compound one another. Successful measures of training should engage multiple stakeholders simultaneously, including not only key service providers but also community leaders, non-governmental organisations and peer groups among others.

111. Training of participants in the criminal justice system surrounding serious sexual offences requires a coordinated approach in which common practice threads are included by each different discipline. The Department of Justice, I suggest, is best placed to take the lead in coordinating such a training strategy.

Chapter 16 – The jury system

112. A growing number of credible voices are asking whether the jury system remains fit for purpose in serious sexual offences in the wake of low convictions, the apparent polluting effect of rape myths and stereotypical characterisation and the menace of social media intrusion. Abolition of juries in these cases would solve the problem of jury myths and social media intrusion, and provide
reasoned judicial decisions for both complainants and accused persons instead of what some see at times as imponderable jury verdicts.

113. Whilst increasingly I see the strength of the arguments in favour of a judge-alone or ‘judge with two assessors’ remedy (and a growing number of legal professionals and laypeople have strongly pressed me on this latter suggestion), I am not persuaded at this time that there is an evidential basis for such a fundamental change to our long-standing commitment to jury trial.

114. The jury system in criminal trials is based on the principle that the determination of guilt or innocence of an accused should be undertaken by members of the community in Northern Ireland who can be relied on to follow judicial direction in order to guarantee a fair trial. Our whole system is based on faith in juries to be loyal to their oath and to follow judicial directions.

115. Moreover, in the troubled context of Northern Ireland, it is important to have citizens actively engaging in the administration of justice.

116. In any event, juries of 12 coming fresh to the task arguably are quintessentially better suited than battle-hardened judges, who have ‘heard it all before’, to determine truth or fiction in cases where often it is a pure question of credibility.

117. However, I believe legislation should make broad provision for those rare cases where the judge, ‘in the interests of justice’ or ‘the effective administration of the law’ accedes to an application by either of the parties for a judge-alone trial.

118. This should occur only where the defence consents and makes the application in the first place. A classic example might be where a high-profile case had received such widespread publicity that it would be difficult for any jury to form a view untainted by the publicity to which it had inevitably been exposed.

119. I found no basis either for the Scottish concept of not proven verdicts as it might only introduce further uncertainty and doubt about jury verdicts; or a gender quota for juries without evidence-based research favouring it.

Chapter 17 – Measures complementing the criminal justice system

120. One of the key themes of this Review is the need to increase the sense of autonomy and free choice of complainants. The fact of the matter is that there is massive under-reporting of serious sexual offences and, of those who do come forward, an unacceptable number then drop out.

121. For many reasons the criminal justice system is not meeting the needs of such complainants. If we are to address this problem, we need to balance seemingly contradictory imperatives: individual autonomy versus collective good; and adherence to rules versus common-sense flexibility.

122. Hence this chapter recommends that the Department of Justice consider the concept of restorative practice and alternative provision of facilitator services
as an additional aspect within the criminal justice system for serious sexual offences, whilst canvassing the possibility of alternative solutions outside the system for those complainants who find it currently unacceptable.

123. Such an approach must be completely victim-led. By victim-led, I mean the victim alone must be able to exercise their choice to explore this avenue in a totally unpressurised and open fashion. It is only by adopting this approach that we will avoid the risk of re-traumatising complainants. It should only be invoked in those cases where complainants have specifically requested to engage this process and, of course, where the perpetrator not only agrees but has admitted guilt. Absent the express wish of the victim and the unequivocal admission of the perpetrator, it cannot and should not be used.

124. There will clearly be circumstances where it cannot be permitted. These would include, for example, where the use of extreme physical violence had been used, multiple perpetrators, use of a weapon, where there was obvious evidence of abuse of power and manipulation during the process, and, of course, child sexual abuse.

125. To aid this process and to provide further avenues of autonomy and control to complainants, I recommend repealing section 5 of the Criminal Law Act (Northern Ireland) 1967 to permit doctors, nurses, social workers and counsellors to discuss the complainant’s account with them, without the legal obligation to report the matter to police save where children and vulnerable adults were involved.

Chapter 18 – Resources

126. The state and policymakers have two fundamental and unbreakable obligations: first, to those who have suffered unspeakable sexual crimes that strike at their human dignity and bodily integrity, with life-changing consequences in many cases; and, secondly, to those who are accused of these offences so as to ensure a fair trial and the innocent are not convicted.

127. Resources necessary to implement this Review have to be seen in the context of the cost of sexual violence to victims and the community at large. It is staggering in its dimensions.

128. The estimated cost of domestic violence and abuse in Northern Ireland for 2011/12 was calculated by the then Department of Health, Social Services and Public Safety as £674.3 million.

129. The costs for sexual violence occurring outside of the partner setting and excluding child victims of rape and sexual assault was calculated to be £257.3 million for 2011/12.

130. These Northern Ireland figures are unsurprising in light of a report from the Home Office in July 2018, *The Economic and Social Costs of Crime*, which
recorded the annual cost of rape in 2015/16 prices was £4.8 billion (for an estimated 121,750 rapes) and for other sexual offences (an estimated 1,137,320 cases) £7.4 billion.

131. In this report, I have made a series of recommendations, both strategic and operational. All of these seek to deliver both short-term and long-term improvements to our current arrangements for delivering justice in serious sexual offence cases, many with potentially far-reaching benefits. They have the potential to have a powerful physical and mental impact on both complainants and accused.

132. Resourcing, to a large extent, lies at the heart of our system’s ability to deliver many of these improvements. It is not a case of doing more with less or simply working smarter, but of properly identifying where additional resource is required to deliver my recommendations and ensuring that it is in place as soon as possible. Without this investment, at least some of the recommendations cannot be successfully implemented, and if efforts are made to do so in the absence of adequate resourcing, they are liable to fail in their aspiration.

133. The relevant statutory agencies need to conduct a comprehensive resource impact assessment, with the assistance of affected stakeholders, into my recommendations, individually and cumulatively. This should include both the direct costs arising — for example, from deployment of additional PSNI and PPS resources — and indirect/consequential costs — for example, revisions required to the legal aid regime to support any enhanced services from counsel and solicitors at court.
Key recommendations

This report contains a large array of individual recommendations, all of them important and relevant, and together they create a pattern of coordinated reform.

Sixteen key recommendations have emerged, around which the others revolve:

1. There is a clear need for increased awareness of the existence of and reasons for the vast under-reporting of serious sexual offences and the high dropout rate of those entering the criminal justice system.

2. Access of the public to trials involving serious sexual offences to be confined to close family members of the complainant and the defendant. Access for the press should be maintained.

3. Provision should be put in place to allow for early pre-recorded cross-examination, initially of vulnerable people, to be conducted away from the court setting. This provision should eventually be extended to include all complainants in serious sexual offences.

4. A measure of publicly funded legal representation should be offered to complainants from the outset.

5. Measures should be introduced at the outset of the trial to combat rape myths. This may involve presenting to the jury educational material, a short video, judicial directions and, where appropriate, supported by expert evidence. In the wider context there is a need for an extensive public awareness and school education campaign.

6. New legislation should be developed and introduced to manage the dangers created by social media. There is a need to increase jury awareness of the risks social media create, specifically in serious sexual offence trials.

7. A more robust judicial attitude and case management approach to prevent improper cross-examination about previous sexual history.

8. Steps need to be taken to combat excessive delay in the justice system. A wholly new mind-set is required, which will involve front-loading the legal system with an early-time-limited and case managed system that has at its core early joint engagement by both prosecution and defence representatives.

9. To introduce into the disclosure process greater and earlier trained Police Service of Northern Ireland (PSNI) specialists, with guidance from the Public Prosecution Service (PPS) from the outset, firm time-limited and early judicial management, and resource-led development of relevant digital technology.
10. The identity of the accused should be anonymised pre charge and the accused should have the right to apply for a judge-alone trial in the rare circumstances where the judge considers it to be in the interests of justice. I do not consider the identity of the accused should be routinely anonymised post charge.

11. The Department of Justice should take steps to commission individual research projects to gather knowledge and data in Northern Ireland on the prevalence, extent, nature and experiences of serious sexual offences. This should be aimed to identify how current law and procedures impact on black, Asian and minority ethnic groups, immigrants, LGBT+, Traveller communities, sex workers, older people and those people with a physical or learning disability or those with a mental health condition.

12. Introduction of a radical departure from the traditional style of advocacy when dealing with children and vulnerable adults is needed. The potential traumatisation of children and vulnerable adults must be prioritised. New advocacy skills are required by the legal professions to match this new culture.

13. The Judicial Studies Board, the Bar Council and the Law Society should afford a higher priority to training and awareness from outside agencies on such matters as the trauma suffered by victims, rape mythology, jury misconceptions and jury guidance. Training should also include topics such as under-reporting and the reasons around withdrawal of complainants from the process of sexual offences, and how best to approach the cross-examination of children and vulnerable witnesses.

14. All serious sexual offences should continue to be tried in the Crown Court with a jury, without the need for a gender quota or a not proven verdict.

15. Alternative mechanisms, including an entirely victim-led concept of restorative practice, should be considered both inside the criminal justice system and parallel to it.

16. The appropriate statutory agencies should deliver a comprehensive resource impact assessment, with the assistance of affected stakeholders, into my recommendations, individually and cumulatively. This should include both the direct costs arising — for example, from the deployment of additional PSNI and PPS resources — and also indirect and consequential costs — for example, revisions required to the legal aid regime to support any enhanced services from counsel and solicitors at court.
Chapter 1

Background
All manner of reforms are introduced. Legal changes are intended to ameliorate the experience of complainants … but nothing seems to work. Women are blamed for drinking too much and behaving in ways deemed provocative. Their credibility is impugned and their reputation laid bare … one person’s word is set against another and the subject matter is the febrile one of sex, it does not take great skill to undermine a complainant.

Baroness Helena Kennedy QC, Scotsman, 2018

1.1 It has not been the intention of this Review to reinvent the wheel. Whilst I am satisfied that much needs to be changed in terms of the law and procedure relating to serious sexual offences, it cannot be ignored that in recent years there have been many improvements made in the law relating to such offences, in the treatment of alleged victims and in the standards of investigation, in a far more coherent and enlightened approach to prosecutions than before and in improved court processes and procedures.

1.2 It is important, therefore, that in this chapter I give some indication of what has already been achieved and the foundation upon which I believe improvements can be made.

The law

1.3 The fact of the matter is that The Sexual Offences (Northern Ireland) Order 2008, which has sprung from the Sexual Offences Act 2003 in England and Wales, represents the most important overhaul of the law at least since Victorian times. In the precursor to the 2003 Act, the White Paper, Protecting the Public, stated:

The law on sex offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in the Sexual Offences Act 1956, and most of that was simply a consolidation of 19th century law. It does not reflect the changes in society and social attitudes that have taken place since the Act became law and it is widely considered to be inadequate and out of date.

1.4 The key objective of the legislation was to modernise the law of sexual offences by refocusing it on critical issues such as consent and the protection of sexual autonomy. The main principles underling it were non-discrimination between men and women and non-discrimination between those of different sexual orientation, the protection of the public, especially vulnerable people and children, and, finally, compliance with the European Convention on Human Rights (ECHR). The legislation has achieved many of its aims even though it is far from problem-free.

1.5 We in Northern Ireland have built on our legislation and the ensuing summary that I set out is but part of the canvas that contains our law and procedures.
Charters
1.6 The Victim Charter was placed on a statutory footing in November 2015, accompanied by a range of supplementary documents including an easy-read guide and a young person’s guide to the charter. The charter provides victims with relevant information and clearly sets out what they can expect as they move through the criminal justice system.

1.7 To complement the charter, an information leaflet for victims of crime has been available since December 2014. This should be given to all victims of crime by the police, setting out information on key stages of the process and highlighting where further information can be obtained.

1.8 A Witness Charter was also published in 2017, setting out the entitlements of, and standards of service for, witnesses of crime. It will be placed on a statutory footing soon when the necessary legislative mechanism becomes available.

Public Prosecution Service
1.9 The Public Prosecution Service (PPS) has established a serious crime unit, which deals with serious sexual offences. The formation of the serious crime unit in the PPS and the public protection branch in the Police Service of Northern Ireland (PSNI) means that, for the first time, there are clear dedicated staff in both organisations working on sexual offences. These structures help to develop case strategy as a prosecution team, encompassing all aspects of the investigation and prosecution of the case.

1.10 The PPS policy on prosecuting cases of rape also sets out the responsibilities of the prosecutor at each stage of the prosecution process, including the test for prosecution. In respect of public interest, the policy notes: ‘If the Evidential Test is passed, whilst each case must be considered on its own merits and particular circumstances, rape is considered so serious that it is likely that prosecution is required in the public interest.’

1.11 It also sets out the views and interests of the victim and the action to be taken if a victim withdraws support for the prosecution noting that:

    Sometimes a victim will ask the police not to proceed any further with the case or will ask to withdraw the complaint or, where they have made a statement, indicate that they no longer wish to give evidence. This does not necessarily mean that the case will be stopped.

1.12 The PPS, in joint working with the PSNI, has established dedicated victim and witness care units (VWCUs), which are staffed by PPS and PSNI staff who have access to both the PPS and PSNI information systems.

1.13 Victim and witness care units
• Provide a dedicated case officer for each case to act as a single point of contact for victims and witnesses at all stages from receipt of the police investigation file through to the conclusion of court proceedings.

• Will ensure that victims are informed of the progress of the case in which they are involved using, where possible, the victim’s preferred means of communication — for example, phone, email, letter and, where practicable, at their preferred time of day.

• Will also conduct a three-tier needs assessment for each victim and witness at a key stage of the process. The initial assessment will be conducted when a file is received. An enhanced assessment will be conducted when a decision to prosecute is taken and the case is to be listed for trial. A final assessment will be conducted prior to the trial commencing.

1.14 The purpose of the assessments is to ensure that the particular needs of victims and witnesses are met as far as possible and to identify as early as possible whether a victim or witness may require the assistance of special measures to enable them to give their best evidence at court or other measures such as a witness anonymity order.

1.15 The PPS will ask the court to have regard to the availability of victims and witnesses when the court is fixing a date for trial. Victims and witnesses will be contacted by the VWCU and consulted about the dates they are available to attend court. A requirement to attend court will be sent to the victim and witnesses advising them of the dates that they are required to attend to give evidence.

Police Service of Northern Ireland

1.16 The PSNI public protection branch was established in April 2015. The branch is part of the crime operations department and is staffed by those having responsibility for proactive and reactive investigations in relation to adult safeguarding, child sexual abuse and exploitation, child internet protection and e-safety, domestic abuse, rape crime and management of sexual and violent offenders.

1.17 The teams are based across Northern Ireland, with a majority attached to five public protection units, coterminous with the five health and social care boundaries, to support effective partnership working and safeguarding.

1.18 Joint protocol investigations are carried out in partnership with social services in the areas of child abuse and adult safeguarding, together with social workers specialising in dealing with child sexual exploitation who are co-located within each of the units.

1.19 The PSNI/PPS sexual assault advice clinics assist in bringing about speedier outcomes for complainants of sexual violence. They are internal clinics.
attended by a senior PPS prosecutor and a detective sergeant from the child abuse investigation unit (CAIU) and rape crime unit (RCU) to obtain advice on prosecutions.

1.20 It results in a reduction in the resource requirement for police investigations in cases that are unlikely to meet the test for prosecution and aims to increase confidence levels.

1.21 The PSNI has also published a number of leaflets and guidance documents. *Sex & the Law* is a leaflet published in 2014 that provides information to adults and young people about what is meant by consent, matters concerning possessing/taking indecent images, legal ages for certain activity and who to contact if you are a victim or concerned about someone’s behaviour.

1.22 For the past number of years, the PSNI has delivered the Without Consent it is Rape campaign to secondary schools, presented by the RCU and uniformed officers. The campaign was also distributed to the wider public through social media and is available on the PSNI website.

1.23 The PSNI has partnered with a number of sexual support agencies to develop a campaign to raise awareness and understanding of the issues of sexual crime and the topic of consent. The first phase, which will be targeted at young adults aged 16–28, commenced in October 2018. The strapline that there is ‘No Grey Zone’ underpins the campaign, which will seek to reach audiences through social and mainstream media channels.

1.24 The RCU provides an information pack to all victims, containing various leaflets from Nexus, Victim Support and the Rowan centre etc. They also provide a leaflet that explains to victims the pathway they will follow after making a report to the police. This leaflet contains the telephone numbers of several organisations that can provide support.

1.25 The PSNI has led a project in relation to sex workers and introduced sex worker liaison officers to build confidence in reporting incidents where sex workers have been the victims of crime.

1.26 The PSNI also sits on the regional rape working group across the United Kingdom.

1.27 The service takes the training of officers very seriously in relation to serious sexual offences. The Review team attended two training courses. One was a foundation course for student police officers, focusing on the role of police when responding to reports of rape and other serious sexual offences. Addresses were given by Nexus on the work of that organisation, and the work of a registered psychotherapist, Zoe Lodrick, who specialises in sexual trauma. We were struck by the enthusiasm and the knowledge of the student officers, who clearly had prepared well for the course.
1.28 Detectives are also given training in an initial crime investigators’ development programme, with input from the public protection unit specifically dealing with sexual offences relating to serious sexual offence investigations involving adults.

1.29 Qualified police officer trainers with experience of duties in a RCU and CAIU deliver specialist detective training to detective constables, detective sergeants and detective inspectors with the RCU who investigate serious sexual assaults.

1.30 The PSNI also provided a specialist child abuse investigator development programme covering both alleged sexual and physical assault. That course runs over a 10 day period and also includes a helpful presentation by Nexus. Completion of this training course results in professional accreditation on a national database. Completion of continuous professional development is necessary to maintain the accreditation.

Government strategies

1.31 The Department of Justice (DoJ) became responsible for the legislative and policy framework for the justice system in April 2010. The department has taken a number of important steps in the area. The undermentioned is by no means an exhaustive list, but includes the following:

- First, the five-year victim and witness strategy, *Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime*, was published in 2013 along with a two-year and three-year action plan.

- That strategy, including the new three-year victim and witness action plan 2017–20, sets out a range of steps to improve the experience of victims and witnesses moving through the criminal justice system, including the introduction of the Victim and Witness Charters, use of registered intermediaries (RIs), the victim and witness care unit, the PPS serious crime unit and the Rowan Sexual Assault Referral Centre.

- The current plan included legislation to reform the committal process, rolling out the indictable cases pilot, the registered intermediaries schemes to magistrates’ court, evaluating the work of the Independent Sexual Violence Advocates (ISVAs), undertaking work to reduce victim/witness waiting time at court, reviewing the work of the serious crime unit, use of special measures including a registered intermediary, and the rolling out and expanding the work of the victim information portal.

- Under the five-year strategy, the work would include obtaining the views of victims and witnesses about their experience of the criminal justice system and using this to review and improve the services.

- The Department of Justice has undertaken programmes of qualitative research into the experiences of young victims of crime within the criminal justice system.
A paper relating to research into the experiences of victims of sexual violence and abuse was published in November 2015. A sexual violence and abuse action plan was developed by the DoJ as a result of this research. This tied in with the PPS publishing an updated victim and witness policy in 2017 that included details of the service’s approach to meeting the needs of vulnerable and intimidated witnesses.

1.32 A seven-year strategy, Stopping Domestic and Sexual Violence and Abuse in Northern Ireland, was published in March 2016 by the then Health and Justice Ministers. The strategy is intended to tackle both domestic and sexual violence and abuse as well as having a society in Northern Ireland in which domestic and sexual violence is not tolerated.

1.33 Action plans have been published yearly since 2016/17, with the most recent year 3 action plan published in August 2018.

1.34 A number of procedural changes are under way, including the indictable cases process, which began a rolling single phase implementation on 2 May 2017 across all regions and districts for four offence types, which sadly does not include serious sexual offences.

1.35 Proportionate forensic reporting across all forensic classifications has been implemented, including biology, which is most closely associated with sexual offences. This project commenced in May 2016 and completed in August 2017.

1.36 The cybercrime unit, in collaboration with the PPS, has introduced proportionate forensic reporting for certain cases requiring cyber evidence.

1.37 A pilot scheme for Belfast district electronic support unit and the child internet protection unit launched on 1 May 2018. Work is under way to roll out proportionate forensic reporting across all cyber support units.

1.38 The problems facing the department were highlighted in a Criminal Justice Inspection Northern Ireland (CJINI) report, which provided a thematic inspection of the handling of sexual violence and abuse by the criminal justice system in Northern Ireland.

1.39 Various reports have emanated from the CJINI report. For example, in 2013 it concluded that many of the issues arising in the investigation and prosecution of sexual violence and abuse would need to continue to be a priority for the criminal justice system, particularly the PSNI and the PPS, noting a specific need to focus on attrition rates and victims. The topic of sexual violence and abuse is a priority for CJINI.

1.40 CJINI looked at the issues relating to victims in 2011 and highlighted in its report the care and treatment of victims and witnesses in the criminal justice system in Northern Ireland. It published a further report on the use of special measures in the criminal justice system in Northern Ireland in April 2012.
1.41 It provided a follow-up report on the care and treatment of victims and witnesses, incorporating the use of special measures, in 2015 and noted the considerable progress that had been made in relation to services for victims and witnesses, with 96% of recommendations having been achieved.

1.42 A report in November 2015 from CJINI found significant failings in terms of the quality of case files and the timeliness of their submission to the PPS from the PSNI. As a result, the PSNI and the PPS have taken forward a joint project of work based on those recommendations. A further report from CJINI is imminent.

1.43 The Speeding up Justice programme has led to the indictable cases process and proportionate forensic reporting as indicated above.

1.44 In recent years the Department of Justice has also liaised extensively with partners who represent what might be considered ‘minority groups’ or ‘hard-to-reach/seldom heard’ groups. This is through public consultation as well as ongoing and proactive engagement under the Stopping Domestic and Sexual Violence and Abuse in Northern Ireland strategy and associated governance arrangements.

Future developments
1.45 There are still pieces of work being carried out by the DoJ and its criminal justice partners in relation to sexual offences and services to victims and witnesses. These include:

- Pre-recorded cross-examination is to be introduced.
- Ensuring more permanent funding of ISVAs and independent domestic violence advocates through an advocacy support service.
- A review of sentencing policy to consider victims’ understanding of the sentencing process.
- Introduction of a statutory case management scheme later in 2018, and work is continuing towards the implementation of the remaining sections of the Justice Act (Northern Ireland) 2015, including sections as they relate to committal proceedings.
- Committal reform to be implemented by April 2019, subject to the legislation being passed.
- Currently, a review of the law on child sexual exploitation and sexual offences against children is being carried out following the report of the Independent Inquiry into Child Sexual Exploitation in Northern Ireland by Kathleen Marshall, and a Report on Justice in the 21st Century: Innovative Approaches for the Criminal Justice System in Northern Ireland. A consultation paper on child sexual exploitation will be published before the end of 2018; and
- Consideration of section 5 of the Criminal Law Act (Northern Ireland) 1967.
Other agencies

1.46 Outside the Department of Justice, a considerable amount of help is open to those who have suffered as a result of serious sexual offences. The help includes, for example:

1.47 Nexus NI, which is the trading name for the organisation also registered as the Northern Ireland Rape Crisis Association. Hence, although the Rape Crisis and Sexual Abuse Centre no longer has a presence in Northern Ireland, that service is not strictly necessary given developments within Nexus NI and the partnership by groups representing victims developing a regional rape crisis service.

1.48 Training for the volunteers in that organisation has started, although interaction with victims/complainants will not start until December 2018, when the training is completed.

1.49 Women’s Aid provides a 24-hour domestic and sexual violence helpline. The organisation is sending more people affected by sexual violence for specialist counselling.

1.50 In addition, there is Victim Support NI, which provides familiarisation visits to courts for the victim. All staff and volunteers undergo internal core learning, which is accredited to Open College Network (OCN) level 3 standard. This training has been designed to meet the Skills for Justice National Occupational Standards for working with victims and survivors. The organisation adopts the World Health Organization’s psychological first aid model, which is a trauma-informed model designed to support individuals in the immediate aftermath of a significantly stressful event or crisis. Staff and volunteers undertake ongoing training and development throughout their time with the organisation, including applied suicide intervention skills training (ASIST), accompanying officer training (accredited to OCN level 3), mental health training, safeguarding and sexual and domestic violence awareness.

1.51 Victim Support NI successfully obtained funding from Comic Relief and the Department of Justice in 2016 to create Northern Ireland’s first two independent sexual violence advocates. The programme was originally established as a three-year pilot.

1.52 The ISVAs provide an informative non-judgmental support service to victims who have already engaged with the police or the criminal justice system, or those who are thinking of reporting their crime. The service is also available to those with complex advocacy needs and those at risk of further violence.

1.53 There are currently only two ISVAs. Both have received specialist ISVA training through LimeCulture, which is one of the UK’s leading training and development organisations for sexual violence.
1.54 ISVAs also undertake specialised ISVA training, accredited by NCFE, which focuses on the core skills and competencies required for ISVAs and designed to meet the Skills for Justice National Occupational Standards relevant for ISVAs.

1.55 The ISVAs have had over 525 referrals for their service. Between them, they have a current active caseload of 203 clients. The Department of Justice has agreed to fund them for 18 months when the Comic Relief funding runs out in September 2018.

1.56 The Stern Review in 2010 identified ‘unanimous praise’ for the work of ISVAs, noting that they can have a particularly strong role in supporting victims aged under 18 through the process. Stern reported that ISVAs are ‘effective, cost-effective and affordable’. Research in 2009 found that complainants identified the support of ISVAs as essential to their recovery.

1.57 Women’s Aid in Belfast is a further support mechanism. This group provides confidential support, information and emergency accommodation for women and children affected by domestic violence and sexual assaults.

1.58 The Men’s Advisory Project exists to offer males who are the victims of sexual assault support and assistance.

1.59 The Rowan centre is the regional sexual assault referral centre (SARC) for Northern Ireland. The service, which opened in 2013, is jointly funded, managed and governed by the Department of Health, Social Services and Public Safety and the Police Service of Northern Ireland.

1.60 Staff at the Rowan deliver a range of support and services 24 hours a day, 365 days a year to children, young people, women and men who have been sexually abused, assaulted or raped, whether this happened in the past or more recently.

1.61 The centre provides victims of crime with a comprehensive and coordinated package of care to promote recovery and well-being. The centre itself also has facilities for a high standard of forensic examinations and other methods of collecting evidence including achieving best evidence (ABE) interviewing suites.

1.62 Self-employed registered intermediaries, of whom there are currently 27 with a further 12 being recruited, are available and are communication specialists who can help vulnerable persons to give evidence to the police or at court if they have significant communication difficulties.

1.63 Since 2013, there have been just over 2,000 requests from all users — the PSNI, the PPS and defence practitioners. In 2017/18, 81% were requested by the PSNI, 9.5% by the PPS and 8.5% by solicitors.

1.64 Registered intermediaries tend to be used mostly in cases involving young children or those with learning disabilities. In terms of offence type, the largest category is sexual offences, with 40% of requests for this crime type. Using communication aids such as alphabet boards is usual.
1.65 The DoJ funds the provision of support services at court through Victim Support NI and the National Society for the Prevention of Cruelty to Children (NSPCC) young witness service. These services include support for witnesses (trained staff from the witness service) for adult witnesses, and the young witness service (for witnesses under 18). They are available to provide support.

1.66 Court familiarisation visits with trained staff from Victim Support NI for adult witnesses or from the NSPCC for witnesses who are under 18 will provide a tour of the court buildings and explain the court process. They will also point out the appropriate court facilities in terms of waiting rooms and entrances.

1.67 In this context, I also mention the Safeguarding Board for Northern Ireland, established in 2012, which is underpinned by the Safeguarding Board Act (Northern Ireland) 2011. This places a statutory duty on member agencies, including the PSNI, to cooperate with one another and to make arrangements to safeguard and promote the welfare of children.

1.68 There are several subgroups and panels, including a child sexual exploitation subgroup, which has organised media campaigns and supported performances in schools and youth forums to raise awareness of child sexual exploitation.

Conclusion

1.69 Accordingly, despite the flaws outlined in the course of this Review, it would be a mistake on the part of the public to think that nothing has been done or is being done to change the face of the law and procedures relating to serious sexual offences. It is a complex and difficult task, and this Review is but one more voice in the chorus crying out for change.
Chapter 2

The voice of complainants
But the most beautiful of all doubts  
Is when the downtrodden and despondent raise their heads and  
Stop believing in the strength  
Of their oppressors  

Bertolt Brecht  
‘In Praise of Doubt’

Issue

Has the criminal justice system failed complainants and do the present law and procedures afford them a fair trial process in serious sexual offences?

Background

2.1 Of all the experiences I had personally interviewing many individuals for the purpose of this Review, the most harrowing were the meetings with those, males and females, who had volunteered bravely to share their experiences of the criminal justice system with me and the Review team and who virtually without exception felt they had been let down by our justice system.

2.2 Some had delayed for many years before reporting and thus reflected the gross under-reporting of these crimes, some who, having reported, had withdrawn from the process and reflected the high attrition rate, and some who had gone through the full daunting process until verdict. Without exception, all expressed grave disquiet about disparate aspects of the current law and procedure.

2.3 Nomenclature is always important and difficult in this sensitive field. The legal process demands that a person complaining of a serious sexual offence is a ‘complainant’ or ‘alleged victim’. The accused person is innocent until proved guilty and is therefore described as an ‘accused’. Hence, this is the nomenclature that I have largely observed throughout this Review.

2.4 The complainants I met swooped at their subject from unexpected angles — a cubist portrait of the whole experience. Aflame with a sense of injustice, they remained burdened with the thought that the justice system had been in many instances a source of creative malice. The secondary victimisation experienced by many of these complainants was clear to me from the outset.¹

2.5 Each of those complainants was given two promises. First, we would not re-traumatise them by discussing the details of those assaults to which they had been subjected, save to identify the generic nature of the attack alleged.

¹ For anyone who wants an insight into the impact of these crimes on victims I urge you to read the statement made by a young college student in USA who was raped whilst unconscious by a former Stanford student and swimmer. He was sentenced to six months in jail because a longer sentence would have “a severe impact on him,” according to the judge. https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra#.hyDNPgy2L
2.6 Secondly, nothing would be reported in this Review that would serve to identify them. Save where they chose to identify themselves, I neither learned nor sought their surnames or any other identifying feature. I promised them all strict confidentiality.

2.7 The narrative that emerged echoed precisely what we discovered in the literature worldwide that we researched surrounding such experiences and in the lengthy exchanges I had with victims’ groups, including Victim Support NI (VSNI), Women’s Aid, Nexus NI, the Men’s Advisory Project (MAP), One in Four2, Independent Sexual Violence Advocates (ISVAs) in terms of challenges that victims have raised with them, the Public Prosecution Service (PPS), which has published a review into the plight of victims of rape, and discussions at the Rowan Sexual Assault Referral Centre.

2.8 The wisdom in meeting them was to observe the subtle expansion of the lens from that of their own despair to a systemic and devastating criticism of the system to which we are all wedded.

2.9 I have at all times in this Review been conscious of what the UN noted in 1999.3 Victims should be supported in their efforts to participate in the justice system through direct and indirect means; timely notification of critical events and decisions, provision in full of information on the procedures and processes involved; support of the presence of victims at critical events; and assistance when there are opportunities to be heard.

Statistics

2.10 The number of rape offences increased by almost 12% — or 106 offences — in Northern Ireland from September 2017 to August 2018, compared to the preceding 12 months, police have said. In 2017/18 there were 967 rapes reported and in 112 (11.6%) of these, the victim was male. In 2017/18 there were 2,476 other sexual offences reported, of which 2,350 had a person victim4. Males accounted for 25.1% (589) of victims.

2.11 A review of rape and sexual assault by penetration cases5 reported to the police from 1 April 2017 to 30 September 2017 revealed the following background findings, based on the information gleaned from 566 incidents where there were 546 victims and 410 identified suspects:

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2 a group in Ireland who work with adult survivors of child sexual abuse, who support clients through the criminal justice system and who had published an informative report based on 10 clients who had been through the process to trial with extensive recommendations entitled “Only a Witness --The experiences of clients of One in Four in the criminal justice system”.


4 State based crimes and crimes where the victim was a police officer on duty are not included. Much of the difference in 2017/18 between sexual offences recorded crime totals and those with a person victim relate to offences of exposure and attempted offences within classification 88A Sexual Grooming.

5 Information correct as at 2nd October 2018 but may be subject to change.
Victim | Suspect
--- | ---
Total | 546 | 410
Age range | 2 to 88 | 5 to 73
Under 18 | 219 (40%) | 81 (20%)
Over 60 | 16 (3%) | 15 (4%)
Mental health condition/vulnerability | 218 (40%) | 74 (18%)
Had consumed alcohol | 197 (36%) | 133 (32%)
Had taken drugs | 42 (8%) | 22 (5%)

10% of victims were male
31% of incidents were reported to police within 24 hours of the incident occurring
35% of incidents reported to police were ‘historic’ in that they were more than one year old prior to being reported
47% of reports to police were made by the victim while 53% were reported by a third party
Of reports made by a third party:
33% were made by social workers
26% were made by a relative of the victim
17% were made by friends of the victim
16% were made by healthcare professionals
7% were made by other police officers or counsellors

within the incidents reported, there were 17 repeat victims
90% of those suspects were known to the victim either as an acquaintance, family member or intimate partner at the time of the alleged offence

- Sexual abuse and rape has more recently been associated with intimate partner violence, with approximately one-third to one-half of abused women reporting it.  The PSNI data for 2017/18 shows that there were 675 sexual offences with a domestic motivation and accounts for 19.6% of all sexual offences. In 2017/18, offences of rape with a domestic abuse motivation accounted for 29.4% (284) of all rape offences recorded by the police.

**Conviction rates for cases disposed of at court in Northern Ireland, 2012–17**

<table>
<thead>
<tr>
<th>Case type</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crown Court: rape offences</td>
<td>54.1%</td>
<td>18.8%</td>
<td>50.9%</td>
<td>52.6%</td>
<td>43.3%</td>
<td>24.5%</td>
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<tr>
<td>Crown Court: all sexual offences</td>
<td>71.6%</td>
<td>54.3%</td>
<td>63.1%</td>
<td>74.6%</td>
<td>69.9%</td>
<td>54.1%</td>
</tr>
<tr>
<td>Crown Court: all cases except sexual cases</td>
<td>85.3%</td>
<td>84.2%</td>
<td>87.0%</td>
<td>87.0%</td>
<td>87.7%</td>
<td>88.1%</td>
</tr>
<tr>
<td>Crown Court: all cases</td>
<td>84.1%</td>
<td>81.5%</td>
<td>84.6%</td>
<td>85.9%</td>
<td>86.2%</td>
<td>83.9%</td>
</tr>
</tbody>
</table>

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7 Source DoJ - Note:
1. Figures are based on principal offence disposed. This is usually the offence which received the most substantial penalty at the time the participant was dealt with by the court.
2. Figures relate to initial disposals only. Outcomes of appeals are not included.
3. Figures relating to rape relate to substantive versions of the offence only.
2.12 The PPS published a bulletin in October 2018 regarding statistics on sexual offences during the 2017/18 financial year. These figures included the following:

- The PPS received a total of 1,587 files involving a sexual offence. This was an increase of 21.0% on 2016/17 (1,312). There was a rise of 34.2% in the number of files received involving a rape offence, from 395 to 530.
- Files received included a total of 1,700 suspects, 567 of whom were charged or reported for rape (an increase of 36.6% on 2016/17) and 1,133 for other sexual offences (an increase of 15.1%).
- A total of 1,478 information requests were submitted to police during 2017/18 in relation to cases involving a sexual offence, an increase of 11.1% on 2016/17 (1,330).
- 1,652 prosecutorial decisions were issued by the PPS in respect of suspects in cases involving sexual offences. The evidential test for prosecution was met in relation to a sexual offence in 23.2% of decisions, which included 351 decisions for prosecution and 32 for diversion from the courts. At 23.2%, the percentage of decisions meeting the test in relation to a sexual offence represents a reduction on 2016/17 (34.7%).
- Of the 1,212 decisions for no prosecution, the vast majority (97.0%) did not pass the evidential test. The remaining 3.0% did not pass the public interest test.
- Indictable prosecution decisions (prosecution in the Crown Court) in respect of sexual offences were issued in an average of 285 calendar days (229 days in 2016/17). Summary prosecution decisions (prosecution in the magistrates’ or youth courts) required an average of 87 days (70 in 2016/17).
- 224 defendants were dealt with in the Crown Court in relation to sexual offences. The overall conviction rate was 63.8% compared with 73.8% in 2016/17.
- 60 defendants were dealt with in the Crown Court for an offence of rape and 45.0% of these were convicted of at least one offence (that is, any offence). Approximately one in six defendants (15.0%) were convicted of an offence of rape.

2.13 A report from the UK government states that fewer than 6% of rapes reported to the police result in an offender being convicted of this offence.

2.14 I can deduce the following from these figures:

- The eventual conviction rate from time of reporting is extremely low.
- The number of suspects on files received by the PPS for sexual offences has increased year on year.

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The proportion of these suspects that police recommend prosecution for has been decreasing, from 46.5% with a prosecution recommendation in 2015/16 to 41.2% in 2017/18.

The number of decisions issued for suspects for a sexual offence has increased.

The number of decisions issued for no prosecution has increased. The proportion of those being prosecuted on indictment for sexual offences has shown a decline.

The conviction rate for defendants dealt with in the Crown Court for sexual offences has also dropped. This includes convictions for any offence, not specifically related to a sexual offence.

The conviction rate is very low, particularly in cases of rape.

2.15 Recent figures from the CPS in England and Wales revealed that the number of rape charges had fallen by 23%, the lowest in a decade, despite a rise in reports of rape to police. The CPS charged 849 fewer defendants in 2017/18 than in the previous year according to the service’s annual Violence Against Women and Girls (VAWG) report.

2.16 The fall in charging is related to a drop in cases being put forward by the police. Police referred 9.1% (599) fewer rape cases in 2017/18, which contributed to the fall in the number of the accused charged. The figures show the charging rate, the proportion of cases referred by police that lead to charges from prosecutors fell by 8.6 percentage points to 46.9%. This is the lowest recorded rate since 2010/11, when it was 41.7%.

2.17 The number of cases ‘administratively finalised’, when cases are dropped by police at an early stage following consultation with the CPS, jumped by 72% to an all-time high, with more than a fifth (21.7%) of pre-charge decisions for rape being “administratively finalised”.

2.18 These figures emerged in the wake of allegations made in The Guardian newspaper, firmly denied by the CPS, that prosecutors in England and Wales have been quietly urged in training seminars to take a more risk-averse approach in rape cases to help stem widespread criticism of the service’s low conviction rates.

2.19 The conviction rate in 2017/18 in rape-only trials involving 18-24 year old men was 32%. The number of successful prosecutions against men aged 25-59 was much higher, at 46%. In the past five years, the conviction rate for 18-24 year old men who stood trial in rape-only cases has not risen above a third. Of the 1,343 rape-only cases the CPS has taken against young men, only 404 were convicted, an average of 30%. The conviction rate for 18-24 year olds in all rape cases, including those involving child abuse and domestic abuse, stood
at 35% in the five years to 2017/18. However, the conviction rate in the same types of cases for men aged 25-59 was significantly higher, 49%.

2.20 Interestingly, these developing figures are not echoed in Northern Ireland although our figures for comparison purposes are very small and relate to a three-year period.

2.21 For male defendants dealt with during 2015–17, based on those where any of the offences were rape, the conviction rate for rape for 18–24-year-olds was 23.5% compared with 15.8% for 25–59-year-olds.

2.22 The number of 18–24-year-old males dealt with for rape (34) is much lower than those males aged 25–59 (101). Figures for 18–24-year-old males make up 19.1% of those dealt with for rape while 25–59-year-old males make up 56.7%.

2.23 As in England and Wales, the number of rapes reported to the PSNI has shown an increasing trend since 2000/01, with the level recorded in 2017/18 (967) over four times that recorded in 2000/01 (232). There was a 17.8% increase in the number of rapes reported between 2016/17 and 2017/18. The increase in the number of rape offences during 2014/15 may in part be due to clarification received from the Home Office in relation to the redefinition of consent in The Criminal Justice (Northern Ireland) Order 2008.

2.24 The number of rape recorded crimes for male victims has remained fairly steady over the last three years. Rapes with a male victim make up 11.6% of rape recorded crimes in 2017/18.

2.25 The figures for historic sexual offence cases suffer from a dearth of consistent figures.

Under-reporting

2.26 There is reportedly massive under-reporting of these crimes on a scale few of the rest of us fully appreciate. Individuals, males and females alike, do not report the incident. The Office for National Statistics in February 2018 published ‘Sexual Offences in England and Wales’ and looked at this issue. Those who had experienced rape or assault by penetration (including attempts) since the age of 16 were asked who they had personally told. Nearly one third of victims (31%) had not told anyone about their most recent experience, while 58% told someone they knew personally and 30% told someone in an official position. Only around one in six (17%) had told the police.

2.27 Men are even less likely to report rape, with only around 4% of male complainants likely to report rape9. Men may be less likely to report for fear of being disbelieved, blamed and exposed to other forms of negative treatment.

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9 Spruin, E., Reilly, L. (2018) An Exploration into Acceptance of Male Rape Myths within the UK
2.28 The statistics branch of the PSNI advised their analysts do not hold any statistics on the under-reporting of sexual offences. We sought statistics from the PPS and the Department of Justice but none were held. This is a gap that needs to be filled in Northern Ireland.

2.29 The increases in sexual offence recorded crimes do not mean, of course, that more sexual offences are being committed. Increased reporting is an encouraging sign that more complainants are prepared to come forward, that there is greater public understanding and that the system is increasingly approachable.

2.30 However, an organisation providing counselling for complainants and who served on the Review’s advisory panel asserted at the same time that its workload had increased by 50%. The former Chief Executive of Nexus, Cara Cash-Marley, confidently asserts that a large number of people are still afraid to report cases to the police. Ms Cash-Marley reported that demand for their counselling service has risen significantly in the last few years and has been used by children under the age of 10, with a 50% increase in referrals for the specialist counselling service in two years. Nexus is seeing people from aged eight and above due to a rising demand.

2.31 In England, January 2013, an official statistics bulletin10 was produced by the Ministry of Justice, the Home Office and the Office for National Statistics touching on the issue.11 It brought together, for the first time, a range of official statistics from across the crime and criminal justice system, providing an overview of sexual offending in England and Wales. The report was structured to highlight: the victims’ experience; the police role in recording and detecting the crimes; how the various criminal justice agencies deal with an offender once identified; and the criminal histories of sex offenders.

2.32 Based on aggregated data from the Crime Survey for England and Wales in 2009/10, 2010/11 and 2011/12, on average, 2.5% of females and 0.4% of males said that they had been a victim of a sexual offence (including attempts) in the previous 12 months. This represents around 473,000 adults being complainants of sexual offences (around 404,000 females and 72,000 males) on average per year.

2.33 These experiences span the full spectrum of sexual offences, ranging from the most serious offences of rape and sexual assault to other sexual offences like indecent exposure and unwanted touching. The vast majority of incidents reported by respondents to the survey fell into the ‘other sexual offences’ category.

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10 An Overview of Sexual Offending in England and Wales
11 See also Office for National Statistics, Focus on violent crime and sexual offences, England and Wales: year ending Mar 2016: Analyses on violent crime and sexual offences from the year ending March 2016 Crime Survey for England and Wales and crimes recorded by police, February 2017
2.34 It was estimated that 0.5% of females report being a victim of the most serious offences of rape or sexual assault by penetration in the previous 12 months, equivalent to around 85,000 complainants on average per year. Among males, less than 0.1% (around 12,000) report being a victim of the same types of offences in the previous 12 months.

2.35 Around one in 20 females (aged 16–59) reported being a victim of a most serious sexual offence since the age of 16. Extending this to include other sexual offences such as sexual threats, unwanted touching or indecent exposure, this increased to one in five females reporting being a victim since the age of 16.

2.36 Around 90% of complainants of the most serious sexual offences in the previous year knew the perpetrator, compared with less than half for other sexual offences.

2.37 Females who had reported being complainants of the most serious sexual offences in the last year were asked, regarding the most recent incident, whether or not they had reported the incident to the police. Only 15% of complainants of such offences said that they had done so.

2.38 This under-reporting figure is sadly unsurprising. In Northern Ireland the Queen's University Belfast (QUB) student-led organisation SCORE, (Student Consent Research Collaboration) produced the Stand Together Report of 2017. The Stand Together Survey is the first report on non-consensual student experiences at QUB and in Northern Ireland as a whole. Around 3,000 QUB students surveyed anonymously recorded that 246 students had experienced an episode of an attempted penetrative assault and 169 students had experienced an episode of a penetrative assault. However, only 4% reported to police and 2% reported to the university.

2.39 Finally, in Ireland, The SAVI Report: Sexual Abuse and Violence in Ireland in 2002 recorded that 42% of women and 28% of men had undergone some sort of sexual abuse or assault in their lifetime. Ireland is considering a further report along these lines.

Why is there under-reporting?

2.40 Frequently cited reasons for not reporting the crime in the Ministry of Justice report of 2013 were that it was ‘embarrassing’, they ‘didn’t think the police could do much to help’, the incident was ‘too trivial or not worth reporting’, or they saw it as a ‘private/family matter and not police business’.

2.41 A large majority of offenders sentenced for sexual offences each year had not previously been cautioned or convicted of a sexual offence — over 80% in each of the last seven years.

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2.42 The PPS, in its Policy for Prosecuting Cases of Rape, recognised that complainants of rape have difficult decisions to make that will affect their lives and the lives of those close to them. Barriers exist that mean that some people are less likely to report offences.

2.43 Examples cited, which reflected our experience interviewing complainants, included the following:

- Complainants who are or have been in a relationship with their attacker may blame themselves or feel that others will blame them.
- Perceptions of shame and the fear of not being believed or of being blamed and judged abound. In this context, I strongly recommend a useful short video about rape myths, James Is Dead, produced by Nexus.13
- Complainants may also face additional difficulties such as disruption to the lives of their children and extended families.
- People from Black, Asian and minority ethnic communities and members of the Traveller community may have experienced racism or prejudice and may fear that they will not be believed or not be treated properly. As a result, they may be reluctant to report offences or support a prosecution.
- Cultural and religious beliefs and norms may also prevent some people from reporting offences or supporting a prosecution.
- In cases involving rape within same-sex relationships, complainants may fear homophobic reactions from the criminal justice system, as well as being outing by the process.
- Disabled people may fear reporting rape if the offender is a carer. In addition, some may fear the loss of residential care.
- Communication issues may also be a barrier to disabled people reporting rape. Older people, in particular, may be deterred from reporting rape by feelings of shame or embarrassment.
- People with learning difficulties or mental health problems may feel that they will not be believed if they report being raped.

2.44 Frequently cited other reasons that emerged in our discussions with complainants for not reporting the crime were:

- A sense of shame at what had happened and somehow feeling responsible for what had happened.
- Feelings of worthlessness — ‘I am nobody’ — and that any complaint ‘would not get anywhere’. A general feeling that they will not be believed is prevalent.
- There is a perception, often encouraged by ill-advised police officers declaring this pretrial, that the chances of conviction are very low.

13 Please see the Nexus NI video, James is dead via YouTube: https://www.youtube.com/watch?v=Op14XhETFbw
• Family pressures to withhold accusations: no one was on their side.
• A desire to avoid the perpetrator going to jail, particularly if they were a close family member or partner.
• Concern about what the court process would involve.
• Concern about publicity, social media coverage and exposure to the public gaze. Interestingly, the Dublin Rape Crisis Centre, which made a most helpful submission to our Review, recorded:

In the aftermath of the verdict [of the recent high-profile case in Belfast], rape crisis centres around the country reported receiving similar calls to ourselves, from complainants of sexual violence who were glad they did not report their incidents to the authorities and those who had expressed a wish to withdraw complaints already made. They spoke about the extent of the media coverage and how for many it infiltrated their day to day lives because it was on every media outlet and the topic of everyone’s conversation.

Why is there a high withdrawal rate?

2.45 For those who did complain, the path from complaint was harrowing and the attrition rate was high. Of those who venture into the process, around 40%\(^\text{14}\) regret it and fall out.

2.46 The issue of attrition in rape cases, or dropout from the criminal justice system, has been highlighted by researchers as a concern for many years. Since the 1970s, it has been apparent that rape cases are less likely to progress from reporting to prosecution and conviction than other types of offences\(^\text{15}\) and attempts have been made to reduce attrition, in particular through changing police attitudes and practice.

2.47 For instance, police circulars\(^\text{16}\) were issued in England as long ago as the 1980s to shift practice regarding police treatment of victims and the criming of rape cases, although without much impact at that time.\(^\text{17}\)

2.48 Since the mid 2000s, a more concerted process of government review regarding criminal justice approaches to sexual offences has involved a series of critical

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\(^\text{14}\) PPS review of cases in which there was a No Prosecution decision. Includes victim withdrawal and those where a report had been made by a third party to police but the victim did not wish the matter to be investigated. Similar findings by PSNI of 41% from research completed for rape incidents reported during January to July 2017.


\(^\text{16}\) “25/1983 and 69/1986”

reports and inspections, again highlighting the large attrition rate in rape cases and the need for a more victim-focused approach.\textsuperscript{18}

2.49 In the past decade in Northern Ireland, there have been efforts by the PSNI, the PPS and the courts to improve their responses to the investigation, prosecution and conviction of rape offences through training, better recording and provision of information, support and anonymity for complainants, and monitoring of files (see chapter 1, ‘Background’).

2.50 The Stern Review into rape cases in England and Wales suggested that ISVAs are the most effective, cost-effective and affordable example of a reform to a system, making an enormous difference to how complainants feel about what is happening to them as they progress through the criminal justice system.

2.51 Limited evidence from Crown Prosecution Service (CPS) data suggests that ISVAs may reduce the number of retractions by complainants (Brown et al., 2010). Hohl and Stanko (2015) also found that support by a sexual assault referral centre halved the odds of withdrawal by complainants.

2.52 Yet, notwithstanding recognition of the problem for decades and steps taken to address the issue, the rate of dropout remains stubbornly high.

2.53 In terms of reasons for withdrawal, the ISVAs in Northern Ireland to whom I spoke identified a number of key challenges that complainants have raised with them:

- Stories about, and fear of, aggressive and sexually intrusive cross-examination at trial abound. Complainants fear techniques that seek to victim blame by questioning complainants on their dress, how they have conducted themselves, previous unrelated sexual histories, questions about alcohol consumption, mental health issues and questioning based often on rape myths. I pause to observe that this echoes the experience related to me by complainants who reported being cross-examined in a fashion that was less than the dignified and courteous manner guaranteed by the Victim Charter. Victim Support reports this as the reason given by many complainants as to why they would never report again if something similar happened.

- Criminal injuries compensation: complainants are asked if they have applied for criminal injury compensation and, in some recent cases, some complainants have even been asked this question even if they have not applied for compensation.

- Delays and court adjournments: the ISVAs report that complainants are frustrated with the length of time it takes to bring cases to completion. They report that adjournments contribute to the attrition rates of complainants.

\textsuperscript{18} Criminal Justice Joint Inspection (2012) Forging the links: Rape investigation and prosecution: a joint review by HMIC and HMICPSI.
who wish to withdraw from their cases. We found the seemingly endless delays a not infrequently stated cause of attrition when speaking to complainants.

2.54 We noted there were a number of areas in the Northern Ireland Victim and Witness Survey giving weight to these concerns from a different angle relating to:

- Complainants not being kept informed about case progression despite the various protocols in place by the PSNI and the PPS. The complainant has no access to ICOS (integrated court operations system) to find out the progress of the case/any variation made to the accused’s bail conditions etc. Without a solicitor, no access is permitted.
- Cases being dropped without adequate explanation: levels of dropped cases and formal police cautions/warnings need to be researched and recorded.
- Concern in historical sexual abuse cases where the alleged offenders are getting older and more infirm.
- Lack of understanding about the impact of trauma: ISVAs report that complainants perceive there is a continuing lack of understanding throughout the process about the impact that a trauma can have on a victim, in particular, how they respond to the trauma, their recall of that trauma and how this is articulated in court. There is a genuine concern that, despite legislative cover in the Northern Ireland Victim Charter, the PSNI is not referring a sufficient number of complainants to Victim Support. Recent figures show a referral level of 37%. The crucial importance of this is that all referrals received by Victim Support are contacted by telephone within two working days, undergo a needs assessment that includes referral on to the ISVA service and all other services available to them.
- A defendant not giving evidence is another source of misunderstanding and frustration as some complainants do not realise that the defendant does not have to take the stand in their own defence.

2.55 It should be noted, however, that the PPS changed its practice in relation to what constitutes the ‘public interest’ in allowing victims/witnesses to withdraw from prosecution. Previously, there had been a reluctance to force witnesses to attend court and give evidence against their wishes. There is increasing effort being applied to ‘case build’, that is, to gather supporting evidence in anticipation of the witness not being willing to attend court and greater use of witness summonses to require victims and witnesses to attend court. These clinics relate to sexual offences only and are called sexual assault advice clinics. The aim is to identify at an early stage those cases that will not be able to progress to a prosecution and also provide advice to police with regard to other lines of investigation that may be able to strengthen a weak case.
2.56 The issue of compelling witnesses to testify, where they are reluctant to do so, remains contentious, with the PPS attempting to give increasing support to those considered to be especially vulnerable or intimidated. Training has been delivered to all prosecutors with regard to domestic abuse and additional guidance provided with regard to the decision to summons a witness and, should they fail to attend, seek an arrest warrant. The PPS have a number of Domestic Violence Champions across the jurisdiction. The Champions provide advice and support to colleagues within the PPS but do not solely specialise in directing on domestic violence cases.

2.57 Guidance was issued to all public prosecutors and panel counsel in May 2016 with regard to consulting with victims and witnesses, and training was subsequently provided on sexual offences and domestic abuse in June 2017 with further sessions to be provided.

2.58 The PSNI is now obliged to provide victims of crime with a written acknowledgement, including a crime reference number, the name and contact details of the investigating officer and the location of their police station. This enables victims to contact the officer or, if unavailable, be put through to the contact management centre. The duty officers are trained to assist or pass a message on to the appropriate officer. In relation to contacts within the criminal justice system, victims find it helpful to deal with the same police officer for the duration of their case and Department of Justice (DoJ) research (2016) confirmed this. In more serious incidents, the police have appointed specialist domestic abuse officers who provide continuity for the victim in terms of a point of contact for the duration of the investigation.

2.59 During the police investigation stage, victims are entitled to receive an update from the police (within 10 days) on what they are doing to investigate the crime. The police are trained to liaise with the victim on what further updates are to be provided as appropriate on what to expect from the criminal justice system.

Why is the trial process so daunting?

2.60 The interviews I had with complainants frequently raised the issue of the trial process itself re-traumatising them and echoed the contents of the literature on the matter. The concerns included the following:

- Giving humiliating and intensely personal evidence in public is a major and understandable concern, particularly where there is the ever-present fear of what may be reported or alleged on social media.
- Waiting time before giving evidence was at times unacceptably long, adding to the stress on the complainant without adequate explanation as to why it was taking so long.
• Current committal proceedings (which I recommend in this Review should be discontinued) are often listed as a mixed committal, which then turns into a conventional preliminary enquiry hearing on the morning of the matter, after the complainant has suffered the stress and worry of a court appearance, only to be told that they are not required. This is quite unnecessary and that practice should be strongly deprecated, given the additional stress and delay this process is causing.

• Complainants to whom I spoke echoed precisely what has been reported elsewhere19 expressing disappointment with the brevity of the meetings with the legal team, the lack of opportunity or time to build a rapport with the legal representatives before going into court, the lack of information provided about what would happen in court, communication difficulties with some barristers referring to them as stand-offish, cold and clinical whilst others noted the lack of updates from the PPS on the progress of their respective cases. Moreover, the lack of information found expression also in not being given adequate explanation as to why a particular sentence had been passed and what, for example, the defendant being placed on the sex register meant etc.

• Rape myths are a trial reality and can often form the basis of aggressive cross-examination and attract the unreasonable thinking of jurors. Moreover, for all kinds of societal reasons, complainants often buy into these myths, blaming themselves. I regard them as a major challenge to the concept of a fair trial.

• The prospect of having previous medical and sexual history ruthlessly explored in cross-examination is a major fear of the trial process.

• The reality of facing one experienced barrister, or often more than one, on behalf of the defendants in circumstances where they see themselves as alone and having no legal representation. Perfectly properly, prosecuting counsel will have informed them that they represent the state and not the complainant. This was highlighted, in particular in a recent high-profile case in Belfast. There were four accused. The young woman complainant was without legal representation in relation to whether the sexual activity had happened at all or was consensual, whereas each of the four accused, perfectly properly, had a separate legal team entitled to cross-examine her, leaving her unsupported.

• In some of our older courthouses there is a real fear and indeed a real risk of encountering the defendant and their families. Even where there are separate witness waiting areas (and the quality of many of these need upgrading), access to toilets or smoking areas and limited options for

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entering the building all raise this risk. In a recent report of 2017\textsuperscript{20} the most frequently identified concerns related to coming into contact with the defendant and their supporters (48% of respondents), intimidating behaviour of the defendant or their supporters (46%) and being cross-examined (33%). The proportion of respondents who reported feeling intimidated at some point in the process has remained relatively stable across the various years of the survey (25% in 2008/09; 24% in 2016/17).

- Victim personal statements (VPSs) are potentially a source of therapeutic relief to complainants after conviction of the accused. However, they are clearly not understood and rarely invoked. Whilst it is right to say that the DoJ has revised and reprinted the VPS leaflet and will be working with the PPS, the PSNI and the voluntary sector to increase their awareness of this and establish what refresher training could be undertaken, the statistics show how rarely they are used. The number of VPSs made in the financial years 2016/17 and 2017/18 in cases which involved a decision of indictable prosecution in relation to a sexual offence was 35 and 27 respectively. VSNI and the National Society for the Prevention of Cruelty to Children (NSPCC) at present assist individuals with preparing their statement and also provide guidance.

2.61 Baroness Helena Kennedy QC in March 2017 summed the matter up well in the following words:

All manner of reforms are introduced. Legal changes are intended to ameliorate the experience of complainants ... but nothing seems to work. Women are blamed for drinking too much and behaving in ways deemed provocative. Their credibility is impugned and their reputation laid bare — where one person’s word is set against another and the subject matter is the febrile one of sex, it does not take great skill to undermine a complainant.

Effect of serious sexual violence

2.62 Sexual violence offences are associated with a wide range of serious physical and psychological effects for women and men, including injuries, depression, anxiety, post-traumatic stress disorder, a shattering of self-confidence, years of flashbacks and nightmares and increased drug and alcohol dependency,\textsuperscript{21} although research consistently shows that women victims suffer more from


these negative effects than men.22 These physical and psychological effects are often long term and affect not only victims of violence but their children and other family members.23

2.63 In terms of financial impact, the estimated cost of health and social care support in Northern Ireland as a result of domestic violence and abuse24 was approximately £50.2 million for 2011/12, with the total estimated economic cost of domestic violence in Northern Ireland for the same year standing at around £674 million.

2.64 The same report calculated that the costs for sexual violence occurring outside of the partner setting for Northern Ireland were estimated at £257 million for 2011/12. This cost estimate excludes costs for child victims of rape and sexual assault, which it has not been possible to calculate. In this respect the cost estimate is considered to be an underestimate.

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Discussion

2.65 These concerns are not without objective foundation. My experience in this Review of the law and procedures in serious sexual offences persuades me that many of these fears are justifiable, rational and compelling. Brief reference to the issues that are being considered in this Review will suffice to make the point.

Open justice

2.66 This is dealt with in chapter 3. Our insistence on the concept of open justice and the full admission of any member of the public who wishes to attend trials of serious sexual offences provides for, at times, a humiliating and stressful experience for complainants. The prospect of facing this experience contributes to under-reporting and withdrawal.

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Pre-recorded cross-examination

2.67 I deal with this concept in chapter 4. Currently, gruelling cross-examination awaits the complainant at trial, which is often long delayed, before the public in a court building. Pre-recorded cross-examination in the investigation of sexual offences is not yet introduced in Northern Ireland. Evidence should be gathered and recorded when it is fresh in the complainant’s mind, in a way that makes it acceptable as evidence in court and, at the same time, allows the complainant to deal with the trauma and, hopefully, heal. This will require adjustments to both the collection of the evidence for evidence-in-chief as well as for cross-examination.

Separate Legal representation

2.68 For the most part, a complainant is not legally represented even though the only issue may be whether the evidence of consent of the complainant or accused will be preferred by a jury. Particularly in cases where consent is contested, complainants and accused people should arguably receive some measure of legal support to explain the process as the matter proceeds up to trial and where their sexual history and their medical records are to be explored. I consider changing this in chapter 5.

Myths surrounding serious sexual offences

2.69 Complainants have good cause to be fearful of the myths that surround these offences and with which they are often confronted at trial. They have to be addressed if trials are to be fairly conducted both from the practical view of educating the jury and the wider vista of educating the public. I consider such in chapter 6.

Social media

2.70 In some trials the untruthful and inaccurate vilification of complainants on social media can be the greatest burden of all and is one of the strongest chill factors in impeding fair participation in the criminal justice system by complainants. I deal with the almost insoluble problem of controlling social media in chapter 7.

Cross-Examination on previous sexual history

2.71 Despite legislation restraining cross-examination on previous sexual history, the experience and perception of complainants, backed up by research by, for example, Dame Vera Baird QC, is that this is all too common. I deal with this in chapter 8.
Delay

2.72 Rape cases for the years 2015/16, 2016/17 and 2017/18 were not only taking far longer to be disposed of than in England and Wales but longer than the average time for all cases. The average time taken from offence reported to case dealt with at court during those three years respectively was 827, 921 and 943 days.

2.73 Delay is dealt with in chapter 9. It contributes substantially to the attrition rate of sexual offence cases from the criminal justice system as the pressure of an inordinately lengthy process punctuated by on average six/seven adjournments increases the stress to breaking point.

2.74 There are delays in the investigation of the crime, including gathering evidence; in the examination of the file by those prosecuting; in getting a date for the hearing to the commencement of the trial and adjournments thereafter; insufficiently consistent and comprehensive case management regimes; and unacceptable waiting times at the hearing.

2.75 We should be looking at options such as enabling complainants to be able to track the progress of their case throughout the criminal justice system and starting trials in the afternoon so all preliminary matters are dealt with, leaving the complainant to start promptly the next morning.

2.76 Examining the systemic causes for attrition rates and identifying a workable methodology for streamlining the handling of prosecutions for sexual offences would contribute to minimising both delay and harm to the victim.

Making the process less daunting

2.77 To reduce the instances and dispel the image of complainants facing an unnecessarily traumatic cross-examination, publicly funded advocates should have to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences.

2.78 Achieving best evidence (ABE) is the process by which complainants in serious sexual offence cases have their evidence presented at trial by means of a digitally recorded interview conducted by a police officer.

2.79 ABEs have been the subject of trenchant criticism by lawyers and, indeed, the judiciary during this Review. They are said to be unduly lengthy, rambling, filled with repetition and irrelevancies, often devoid of vital material that is used against the complainant at trial, and at times incomprehensible.

2.80 They become fertile ground for cross-examination of the complainant at trial. In some cases they are so poor that the prosecution no longer relies on them.

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25 Based on the principle offence disposed and relate to substantive versions of the offence only.
26 Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.
and in a recent trial where this occurred, the defence played the ABE before the jury as part of their case. I am of the view that professionally qualified barristers should carry out these interviews or, failing that introduction, police officers conducting them need specialised training from members of the Bar.

2.81 To demystify and lessen the stress element, the DoJ should set up a victims’ information service, including a helpline and website, to ensure better information and support. That service should offer a one-stop shop, enabling victims to submit complaints and feedback about their experience.

2.82 As mentioned above, complainants should be enabled to track the progress of their case throughout the criminal justice system.

2.83 All Crown Court buildings, no matter how old, should have separate waiting areas and separate entrances for victims of crime.

2.84 In addition, all vulnerable victims and witnesses will be given the opportunity to give evidence remotely from the court building.

2.85 For those witnesses attending, they should be given pagers (particularly if the venue is close to retail centres or cafes) or be contacted on their mobile so they do not have to wait interminably in the stressful court precincts.

Consent

2.86 The complexities surrounding this concept are often beyond the comprehension of many complainants and are dealt with in chapter 11. Arguably, our law is too vague in this area and permits a jury’s understanding of what evidence constitutes reasonable belief in consent on the part of an accused person to be invaded by misguided rape myths and stereotypical thinking.

Marginalised communities

2.87 Undoubtedly, people from Black, Asian and minority ethnic communities and members of the Traveller community may well have experienced racism or prejudice and may fear, understandably, that they will not be believed or that they will not be treated properly. As a result, they may be reluctant to report offences or support a prosecution. Cultural and religious beliefs may also prevent some people from reporting offences or supporting a prosecution. The Traveller community have also mentioned through An Munia Tober that complainants are frightened to report sexual assault in case their children are taken away from them. Other research on Black, Asian and minority ethnic communities point to a reluctance to report an offence where there is financial dependency.

2.88 Those who have physical and mental disabilities, older people, the LGBT+ community, men and sex workers all have complainants who find the current criminal justice system too daunting in reporting and processing serious sexual offences. I address these issues in chapter 13.
Children

2.89 Children face unique challenges within our system and require urgent creative thinking on our part if we are to afford them true justice. We have to question whether the conventional adversarial system is appropriate or just for children. There needs to be a new approach to cross-examination in which defence questions are approved in advance, and thereafter monitored, by the judge. These questions need to be fashioned with all the frailties and vulnerabilities of children in mind. We should also be looking abroad to Europe at the non-adversarial system Barnahus concept being currently explored in England.

2.90 Proper court facilities for both adults and children is but one aspect of the problem. We need to view these problems of courthouse accommodation constructively, even in old unsuitable courthouses, by such steps as providing telephone calls to their mobiles or pagers for witnesses so that they do not have to wait in the court building, choosing alternative remote sites outside court buildings, creating separate entrances where none is available. I address issues regarding children in chapter 14.

Training

2.91 Training on the consequences of serious sexual offences for those involved in the criminal justice system is crucial. I believe that there is ample justification for ISVAs reporting that complainants perceive there is a continuing lack of understanding throughout the process about the impact that a trauma can have on a victim and how they respond to the trauma. I deal with this in chapter 15. I note, for example, in England, solicitor advocate members sit with barristers on a judicially-led committee working to develop specific training aimed at advocates who appear in trials involving such witnesses. In England their proposals, still not perfected, oblige all publicly funded advocates to have to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences.

Low conviction rate

2.92 The perceived low conviction rates contribute to the sense of hopelessness that is a factor in withdrawal and, indeed, in under-reporting.

2.93 During 2017/18, 224 defendants were dealt with in the Crown Court in relation to a sexual offence, a decrease of 16.1% on 2016/17.

2.94 It is worth repeating what is mentioned earlier in this chapter. Of the 224 defendants, 63.8% were convicted of at least one offence (that is, of any offence). Just under three fifths (56.7%) were convicted of a sexual offence. The overall conviction rate in 2017/18, at 63.8%, is ten percentage points lower than 2016/17 (73.8%). During 2017/18, 60 defendants were dealt with in the Crown Court for an offence of rape. Of these defendants, 45.0%
were convicted of at least one offence (that is, any offence). Around one in six (15.0%) defendants were convicted of an offence of rape. It has to be borne in mind that these figures are those who make it to court. The percentage of those who report a rape and after the full process, many months later, see a conviction is less than 6% according to a UK government report.

2.95 The figures outlined above in England about the disparity in conviction rates for young men aged 18–24, and the publicity attendant on the falling rate of rape prosecutions for whatever the reason, all serve to elevate the fears that the justice system is not keeping pace with the public outcry about these offences. The belief is that juries are reluctant to convict young men, making allowances for a defendant the younger he is, on the basis that he may not have known what he was doing at 24, but, if he was older than that, he does. In addition, jurors may have the fear of the consequences such a ‘rapist’ label will have on the future of such young men.

2.96 The often unspoken, despairing view of the complainants I met was to question why as a society we make excuses for the behaviour of young men and why we leave young women and girls to live with the consequences of that.

2.97 Equally, it has to be appreciated that there are inbuilt aspects of most serious sexual offences that distinguish them from many other offences and give some measure of rational explanation for low conviction rates:

- rarely evidence of a physical injury — the presence or absence of an injury is a neutral finding;
- inconsistency in memory is an effect of trauma;
- late reporting, which damages credibility;
- piecemeal accounts: with time, support and encouragement, complainants feel ready to disclose, the most serious disclosures often made later;
- there is rarely supporting or forensic evidence;
- rarely, if ever, eyewitnesses; and
- most defendants are of previous good character; it is usually one word against another.

**Criminal Law Act (Northern Ireland) 1967**

2.98 There should be no added pressure in terms of reporting these crimes. Complainants need time to come to terms with what has happened and to talk their way through the process. Those with whom they discuss these matters should not be at risk of criminalisation by not reporting the offences. I discuss this and an amendment to section 5 of the Criminal Law Act (Northern Ireland) 1967 in the context of an obligation to report the crime to the police in chapter 10, ‘Disclosure’. 
Measures complementing the criminal justice system

2.99 We should be exploring methods of encouraging victims who deliberately eschew coming within the ambit of the criminal justice system to step forward and be afforded an opportunity to confront the perpetrator in circumstances not confined to a criminal justice setting. The concept of victim-led restorative justice as another option for victims who wish to preserve a sense of autonomy and control which they feel the conventional criminal justice system does not afford them is discussed in chapter 17.

Specialist courts

2.100 Specialist courts focus on a specific type of crime and aim to reduce delays and fast-track cases, improve conviction rates and the effectiveness of the court system in addressing the issues, and experiences of court processes for victims and their families. While only a few comprehensive reviews of the impact of specialised courts have been conducted to date, these studies have generally recorded positive outcomes. Specifically, specialised domestic violence courts have been linked to significantly lower rates of rearrest among defendants, and significantly higher rates of conviction; nearly twice that of other courts in one study from South Africa (Jewkes et al., 2015). A study from England and Wales reported that domestic violence courts enhanced the effectiveness of court and support services for victims, improved advocacy and information sharing, and increased levels of victim participation and satisfaction, thereby increasing public confidence in the criminal justice system (Cook et al., 2004).

2.101 However, to introduce specialised courts in Northern Ireland for all serious sexual offences is arguably to paint on too wide a canvas and would make little inroad into the large number of such cases in Northern Ireland as discussed in chapter 17.

Technology

2.102 As discussed in chapter 9, ‘Delay’, in England and Wales, the CPS and HM Courts and Tribunals Service (HMCTS), are jointly leading a project to introduce a single online case management system from pre charge to disposal, so that all parties (including complainants and witnesses) can access one digital case file. It also aims to introduce Wi-Fi to all courts, new equipment for presenting digital evidence in court and to roll out video link systems. At the very least, this would permit complainants to access the progress of their case without awaiting human intervention from the PSNI or the PPS. I recommend such introduction in Northern Ireland.

2.103 In suggesting this, I note that in 2017 the PPS launched a new online Victim Information Portal (‘Track My Crime’) which allows adult victims to track the key milestones in their case via their computer or any web-enabled phone or mobile device. This aims to improve the victim’s access to information about their case.
Cross-examination of complainants and witnesses by counsel

2.104 Defence counsel must be free to robustly challenge the complainant's evidence. My experience is that most counsel do this in a thoroughly professional and fair manner. However, reports from Victim Support and complainants speaking to me are to the effect that this is not always the case. As indicated in earlier in this chapter, the tone, pace and volume of cross-examination in some instances is less than the courteous and dignified treatment that should be accorded to all witnesses. Judges need to be more interventionist to discourage this in all instances where it arises.

Cross-examination by accused persons

2.105 In Northern Ireland litigants in person (LiP) charged with a sexual offence are prohibited from cross-examining the complainant in connection with that offence or in connection with any other offence (whatever the offence) that the LiP is charged with in the proceedings under Article 22 of The Criminal Evidence (Northern Ireland) Order 1999.

2.106 They are prohibited from cross-examining child complainants and child witnesses under Article 23 and other relevant witnesses under Article 24.

2.107 The court may appoint a legally qualified representative if the defendant is unable to do so (Article 26). Article 26(5A) provides that the DoJ will pay reasonable costs, fees and expenses properly incurred.

2.108 Article 27 allows the judge to give a warning to the jury to ensure the accused is not prejudiced by any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person and by the fact that the cross-examination has been carried out by the legal representative.

2.109 In most of the countries that we examined in this Review, there is similar specific legislation in place to stop personal litigants from cross-examining the complainant in sexual offence cases.

2.110 Even where this not the case — for example, in the US and South Africa — there are mitigating actions that can be taken by the court if necessary to prevent an accused in person cross-examining the complainant.

2.111 Consequently, the complainant need have no concerns about this type of cross-examination occurring.

Discussion

2.112 I end this chapter by offering some small measure of reassurance to complainants. Professor Cheryl Thomas, a distinguished academic from England to whom I refer in more detail in chapter 4 and 6, generously spent time discussing her previous enormous experience of jury research with me and
made the following compelling, albeit perhaps surprising, points about jury verdicts in rape cases, having analysed every single jury verdict in every rape case in every Crown Court in England and Wales (over 40,000 jury verdicts) over a 10-year period (2006–16):

- Juries in England and Wales generally convict more often then they acquit on rape charges (albeit this clearly does not apply to young men). The jury conviction rate for all rape charges in England and Wales in the ten-year period is 55%. This is higher than the jury conviction rate for many other serious offences including grievous bodily harm, manslaughter and attempted murder.

- The rape conviction rate widely reported in Northern Ireland is somewhat misleading in relation to juries. Most reports of rape conviction rates in England and Wales cite a figure of 6% to 10%. This refers to the percentage of allegations of rape made to the police that result in convictions. It is impossible to compare this figure to any other offences because no other offences are calculated in this way by official statistics.

- Jury conviction rate is specifically the percentage of rape charges put to a jury that juries deliberate on that result in conviction; this is the 55% finding from her research covering every rape charge put to a jury over ten years. There is no single offence of rape in England and Wales or Northern Ireland. There are, in fact, 11 different rape offences, which vary according to the gender and age of the complainant and whether it is a historical allegation or current. She has analysed the jury conviction rate for each of these 11 different rape offences and finds:

  - There is no evidence of systemic jury bias against female complainants.
  - Jury conviction rates for rape offences vary by the specific rape offence, but some of the highest jury conviction rates in rape cases are for female complainants and some of the lowest are for male complainants.
  - The majority of rape charges that juries decide involve female complainants under 16. Jury conviction rates in these cases are as high as 63%. There are very few criminal offences of any kind with a higher jury conviction rate than this. This is not a new development — that is, it is not a result of an increase in charges of historical sex offences.

2.113 I regard the matters set out in the above paragraph as small comfort to complainants. I am satisfied that, whilst there has not been a collapse in justice in rape and other serious sexual offences, nonetheless, the law and procedure need radical revision if we are to recapture the confidence of complainants in the administration of justice and the rule of law. That is the task I have set myself in the succeeding chapters.
Proposed recommendations

Virtually all the issues raised in this chapter are the subject of recommendations in succeeding chapters, so they are not set out here. However, it is worth setting out some of the steps to reduce the trauma of this process that may not fit easily into those chapters.

17. All publicly funded advocates should have to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offence cases.

18. Achieving best evidence (ABE) interviews should be conducted by professionally qualified barristers.

19. The Department of Justice should set up a complainants’ information service, including a helpline and website, to ensure better information and support. That service should offer a one-stop shop, enabling victims to submit complaints and feedback about their experience.

20. Complainants should be enabled to track the progress of their case throughout the criminal justice system.

21. All Crown Court buildings, no matter how old, should be given separate waiting areas and separate entrances for complainants of crime.

22. In addition, all vulnerable victims and witnesses should be given the opportunity to give evidence remotely from the court building.

23. Witnesses attending court should be given pagers or be contacted on their mobiles so they do not have to wait interminably in the stressful court precincts.

24. Availability of voluntary personal statements should be more carefully explained to victims.

25. The judiciary should carefully scrutinise at preliminary or Ground Rule Hearings, the admissibility of cross-examination on the subject of criminal compensation claims made by complainants.

26. The judiciary should be more interventionist to ensure complainants and other witnesses are treated in a courteous and dignified manner.
A review of the law and procedures in serious sexual offences in Northern Ireland
Chapter 3

Restricting access of the public
In the final analysis, the open court principle is not an end in itself, but a means to promote the rule of law and the administration of justice. It follows that openness may yield where the paramount object that it serves — preserving the integrity of the administration of justice — so requires … Likewise, the principle of openness does not extend to measures that may bring the administration of justice into disrepute by impairing the fairness of court proceedings or transforming them into a means of entertainment.

The Right Honourable Beverley McLachlin
‘Courts, Transparency and Public Confidence: To the Better Administration of Justice’

Issue
Should access of the general public to Crown Court cases involving serious sexual offences be restricted?

Current law
3.1 The principles of open justice and freedom of the press are two of our most fundamental principles and have long existed in our criminal justice system.

3.2 Lord Diplock\(^1\) famously set out two requirements of open justice: first, that proceedings be held in open court to which the press and public can be admitted; and secondly, that nothing should be done that discourages the publication of ‘fair and accurate reports of the proceedings’\(^2\).

3.3 Open justice demands that all proceedings and written judgments of the courts are to be held in open court and be freely reported unless the judge or the law determines otherwise. This means the press are free to report on proceedings including details of the accused.

3.4 The openness of judicial proceedings is a fundamental principle enshrined in Article 6(1) of the European Convention on Human Rights (ECHR) — the right to a fair trial.

3.5 This underpins the requirement for a prosecution witness to be identifiable not only to the defendant but to the open court. It supports the ability of the defendant to present their case and to test the prosecution case by cross-examination of prosecution witnesses. In some cases, it may also encourage other witnesses to come forward.

3.6 In a case\(^3\) in 2005 the issue was whether an eight-year-old child’s identity could be protected where his mother was on trial for his brother’s murder.

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1 In Attorney General v Leveller Magazine Ltd [1979].
2 See also Al Rawi and others v The Security Services and others (2011) UKSC 34.
3.7 Lord Steyn summarised the position as follows:⁴

A criminal trial is a public event. The principle of open justice puts, as has often been said, the Judge, and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.

3.8 Article 10 of the convention also reflects the principle of open justice in its assertion of the right to freedom of expression and freedom of the press. Accordingly, nothing should be done to prevent the publication to the wider public of accurate reports or proceedings by the media unless there is good and lawful reason. As Bentham famously said: ‘Publicity is the very soul of justice’.

3.9 However, the principle is never absolute.⁵ Hence the Sexual Offences (Amendment) Act 1992 provides that where there is an allegation that a sexual offence has been committed against a person, that person’s name or image should not be published if it is likely to identify them.

3.10 Once an allegation of one of the relevant offences has been made, nothing can be published that is likely to lead members of the public to identify the victim. The offences listed in the 1992 Act include most offences under The Sexual Offences (Northern Ireland) Order 2008.

3.11 The rationale for the rule is that, without a guarantee of anonymity, the victim of a rape offence may not be prepared to report it or to give evidence against the perpetrator in court. This is what distinguishes complainants from those who are accused of serious sexual offences.

3.12 As indicated in chapter 12, the accused may make representations seeking anonymity when it is established his human rights are potentially engaged and at risk.

3.13 Section 11 of the Contempt of Court Act 1981 empowers the court to impose a ban on the publication of any name or other matter in connection with the proceedings before it and which it has allowed to be withheld from the public. The section complements the common-law power of the court, sitting in public, to receive a small part of the evidence (such as the name and address of a witness) in a form that is not communicated to the public.

3.14 Current practice is that the witnesses should not be required to disclose their address to the defence or in open court generally unless it is necessary.

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⁴ At paragraph 30 of the judgement in the case.
⁵ De Tommaso v Italy (2017) 65 EHRR 10 at para163.
3.15 The law is littered with other examples of where the principle of open justice can sometimes act as a bar to successful prosecutions and, accordingly, legislative breaches to the monolith often occur.

3.16 Thus, for example, Articles 4 to 21 of The Criminal Evidence (Northern Ireland) Order 1999 enacted the special measures relating to vulnerable witnesses.

3.17 Special measures provisions in the 1999 Order included evidence given in private (Article 13), whereby the judge/magistrate may clear the courtroom of those who do not need to be in the courtroom when the witness is giving their evidence. Only legal representatives connected with the case and one nominated press member will be allowed to remain. This measure applies to sexual offence and intimidation cases only.

3.18 Interestingly, an English case of Richards in 1999 was helpfully drawn to my attention, which suggested that the court may go beyond the statutory framework if it believes that clearing the court is ‘strictly necessary’ to ensure justice is done. Open justice had to yield to the broad principle that justice had to be done.

3.19 Section 9 of the Justice Act (Northern Ireland) 2011 inserted a new Article 10A in the 1999 Order, providing that adult complainants alleging sexual offences are entitled to give video-recorded evidence-in-chief.

3.20 The Youth Justice and Criminal Evidence Act 1999 sets out a range of special measures that are available to witnesses in criminal proceedings who are deemed to be in fear or distress — for example, screening the witness from the accused, evidence by live link or evidence given in private.

3.21 Section 46 of the Act (brought into effect by The Youth Justice and Criminal Evidence Act 1999 (Commencement Order No. 1) (Northern Ireland) Order 2004 enables courts to make a reporting direction in relation to adult witnesses, which prohibits any matter relating to the witness to be included in any publication during the lifetime of the witness if it is likely to lead members of the public to identify the individual as a witness in criminal proceedings.

3.22 In addition, there are certain situations where proceedings can be heard in camera — namely in private — when the public are excluded and the doors of the courtroom are closed.

3.23 Excluding the public by virtue of the court’s inherent common-law powers is justifiable if the administration of justice so requires. The question for the court is to decide whether a sitting in private is necessary for the administration of justice — for example, if there is a possibility of disorder. A decision to sit in camera is not justified merely on the grounds that a witness will find it embarrassing to testify.

3.24 The necessity principle may be of relevance if a witness is unable or unwilling to give evidence unless the public gallery is cleared.

3.25 The main object of the courts is to ensure that justice is done. Before making an application for a hearing or part of a hearing to be held in camera, prosecutors must consider whether the concerns of the witness could be adequately met by use of appropriate special measures. A prosecutor can make an application for proceedings to be held in camera for reasons of national security or for the protection of the identity of a witness or any other person.

3.26 The disadvantage of applying for all or part of a case to be heard in camera is that the outcome of the application will not be known until the trial is underway, which may not provide the reassurance necessary in advance.

3.27 The trial judge, in the exercise of his inherent jurisdiction to control the proceedings, may permit a departure from this practice in appropriate cases. The witness will not be required to give their name in public and will usually be allowed to write their name down. In certain types of cases — blackmail, for instance — this has become accepted practice so that the name of the witness is not in the public domain.

3.28 However, it has to be recognised that, under the current system, the anonymity of the complainant in serious sexual offences is often undermined by use of the complainant’s name in the bill of indictment and throughout the court trial, despite the name not being displayed on the notice board outside the court.

3.29 Moreover, the public can normally see complainants on the live link and hear their voices, even when they are shielded by a screen from seeing the accused if they so choose.

3.30 This, of course, contrasts with police officers or soldiers who are granted anonymity for Article 2 of the ECHR reasons/security issues, who have true anonymity as they are only ever referred to by a cipher and are not revealed on a screen save to counsel.

Background
3.31 The principle of open justice has thus always been one of the fundamental pillars of our criminal justice system.

3.32 Accordingly, unlike Ireland, the public in Northern Ireland are admitted to serious sexual offence cases.

3.33 What has to be addressed is whether the unrestrained admission of the public in serious sexual offence cases is contributing or detracting from the need to ensure that justice is done.

3.34 There is massive under-reporting of serious sexual offences to the Police Service of Northern Ireland (PSNI). There are victims of rape and other serious sexual
offences who suffer in silence, masking their pain in rueful pragmatism and for whom the criminal justice system seemingly has nothing to offer.

3.35 An official statistics bulletin produced by statisticians in the Ministry of Justice, the Home Office and the Office for National Statistics in 2013 reported for England and Wales, inter alia and based on aggregated data from an earlier crime survey, that on average 2.5% of females and 0.4% of males said they had been a victim of a sexual offence (including attempts) in the previous 12 months. This represented around 473,000 adults being victims of sexual offences on average per year. The following chilling figures emerged:

- Around one in 20 females (aged 16–59) reported being a victim of a most serious sexual offence since the age of 16.
- Around 90% of victims of the most serious sexual offences in the previous year knew the perpetrator.
- And yet only 15% of victims of such offences said they had reported the incident to the police. These are figures echoed in other countries we have researched.

3.36 The cited reasons in that report for this vast under-reporting echoed the fears expressed to me by a large number of complainants I have met and which are set out in chapter 2. In most instances, the reasons included the fear of what the criminal justice process would involve and trepidation at the prospect of laying bare their most humiliating experience before the public, reflecting their feelings of shame and embarrassment in reporting the crime.

3.37 A recent high-profile rape trial in Northern Ireland, heard over 40 days before a packed court, illustrated well the fears some of them hold. Anecdotally, the press have reported that members of the public had attended the trial literally in busloads from outside the jurisdiction on a regular basis solely for the voyeuristic purpose of witnessing the evidence of the young female complainant spread over eight/nine days and also that of the accused.

3.38 In a small jurisdiction such as Northern Ireland, with Crown Courts scattered across the country, complainants are regularly giving evidence about their most intimate personal details in sexual offence trials in their local courts. Whilst experience shows that these trials are usually heard before admittedly much smaller public attendances, nonetheless, the hearing takes place in circumstances where the identities of all the parties are widely known throughout the locality. Even one spectator can be enough to spread the lurid details. It can thus be an exercise in abject public humiliation, which is relayed widely across the locale.

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3.39 Can this situation possibly contribute to ameliorating the vast under-reporting and high attrition rate much less ensuring a witness gives of their best in the witness box despite the presence of special measures?

Other jurisdictions

Ireland

3.40 In Ireland the general public are precluded from attending the trial for rape and aggravated sexual assault. However, it should be noted that the concept of special measures as we understand it does not yet exist in that jurisdiction.

3.41 Section 11 of the Criminal Law (Rape) (Amendment) Act, 1990 replaced section 6 of the Criminal Law (Rape) Act, 1981 with the following:

6.—(1) … in any proceedings for a rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or of aiding, abetting, counselling or procuring the offence of aggravated sexual assault or attempted aggravated sexual assault or of incitement to the offence of aggravated sexual assault or conspiracy to commit any of the foregoing offences, the judge, the justice or the court, as the case may be, shall exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons (if any) as the judge, the justice or the court, as the case may be, may in his or its discretion permit to remain …

Subsections (1) and (2) are without prejudice to the right of a parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court.

In any proceedings to which subsection (1) applies the verdict or decision and the sentence (if any) shall be announced in public.

3.42 My experience of speaking to High Court judges, the Attorney General, the Department of Justice and counsel in Ireland in April 2018 was to the effect that they fully endorsed this approach for the following reasons:

• there has been no adverse feedback whatsoever about the advent of public closure given that the press are permitted to report on the trial (provided the complainant and accused are rendered anonymous) and certain others are also permitted to attend; and

• in relatively small jurisdictions where identities are widely known, the admission of the public, particularly in the wake of social media, would render the anonymity of the complainant a complete misnomer and inhibit a complainant, particularly in the humiliating circumstances of relating intimate sexual details.
Scotland

3.43 The public are excluded during the entirety of the complainant's evidence but not otherwise. There is no statutory obligation to this effect but, invariably, in every serious sexual offence, the procurator fiscal makes a successful application to exclude the public (except the press) once the complainant is to be called to give evidence. Again, whilst there is no statutory obligation to preserve the anonymity of the complainant, the press invariably preserve that anonymity.

Australia

3.44 The judge is empowered to exclude the public in high-profile cases attracting publicity if they deem it 'in the public interest'.

3.45 For example, an Australian special protection is supplied to complainants during committal hearings involving sexual offences, which includes closing the court while complainants give evidence. An array of public issues informs these kind of restrictions. They include the perceived vulnerability of complainants, their privacy and the important likelihood that complainants might not come forward to bring charges of this nature if they sense they might be in the media spotlight.

Canada

3.46 The open court principle, including the opportunity for public attendance during court proceedings, is highly prized in Canada.

3.47 While the presumption in favour of open court is strong, it is not absolute and exceptions are possible. The Canadian approach aims to achieve the maximum protection of open justice at the same time as safeguarding counteracting interests such as the privacy of complainants in sexual offence cases.

3.48 The 1982 Charter of Rights and Freedoms established more onerous requirements in regard to exceptions to the principle, which must satisfy the Supreme Court’s multi-criteria standards of justifiability.

3.49 However, Canadian research in 2017, whilst summarising a number of perceived advantages of the open court principle, highlighted potential advantages of limiting public scrutiny in delivering justice, including encouraging witnesses to testify without fear of publicity, protecting vulnerable witnesses, preserving the privacy of participants in the justice process, and saving financial or emotional costs to such participants.

France

3.50 Public court hearings and decisions in France are deemed a fundamental legal principle, and this applies to all categories. Exceptions are possible but are strictly defined. In criminal matters, exceptions to the principle of openness may
be made where there is a ‘danger for the serenity of hearings or for reasons of good morale’.

Germany
3.51 In criminal cases, hearings and other court dates are open to the public. However, in some cases, such as in proceedings concerning young people or national security matters, confidentiality outweighs public access.

Iceland
3.52 Court hearings are, as a general rule, to be conducted in public, although legislation provides for a number of exceptions. Where exceptions apply, the judge may choose to hold a hearing in camera, particularly to protect the complainant in cases of sexual offences against adults or children, to protect witnesses, or if it is in the state’s interest.

New Zealand
3.53 Public access to the courts is a key aspect of the justice system in New Zealand, where open justice finds expression in open court hearings, in public access to court records and in the publication of reasons for and outcomes of a proceeding. Courts have powers to restrict open justice in criminal proceedings, although the starting point always relates to open judicial proceedings.

3.54 However, section 199 of the Criminal Procedure Act 2011 is the relevant legislation for our purposes, providing that, in sexual offence cases, the court is required to exclude all persons while the complainant gives evidence. The exceptions are: the judge and jury, counsel, officers of the court, the police employee in charge of the case, any member of the media, anyone whom the complainant requests to be present, and anyone permitted by the judge to remain.

Norway
3.55 Public access to court hearings is a key aspect of the administration of justice in Norway. Exceptions do exist — for example, to provide legal protection for an offender, the complainant or a witness, out of concern for an efficient and correct procedure or for reasons of national security and privacy. Privacy is particularly important in cases of sexual offences against children, in which questioning of the complainant can take place outside the court. Where courts are closed, normally only those involved in the proceedings are admitted, although observers, such as the press, may be allowed after due consideration.

South Africa
3.56 The Constitution of South Africa established the right to a fair public hearing before a court. The High Court may order proceedings to be held confidentially,
although this rarely happens in practice. The limited circumstances in which this power may be exercised relate to where the presiding officer considers it to be in the best interests of the proper administration of justice.

United States

3.57 The Sixth Amendment to the US Constitution gives the defendant an absolute right to a public trial in every criminal case, and the First Amendment gives the public (including the media) a right to be present and to report on the proceedings. There are very narrow exceptions, but the strong presumption is that everything is public. Online activism and the potential for jury contamination are definitely a challenge.

3.58 The complainant’s name is generally redacted from court files, or the portions of a file that identify the complainant are kept sealed. But once the case gets to trial, the complainant has to testify in open court and give a real name, and the public are entitled to be there. The news media generally do not identify complainants of sexual assaults, but that is a matter of custom, not law. The courts do not protect the defendant’s identity, although sometimes, if there is a genuine dispute about the identification of the perpetrator, a defendant may be permitted to shield his face in the courtroom during arraignment or at other early stages so as to prevent publicity that might contaminate witnesses who may later be asked to identify him. The news media get quite upset when this happens.

3.59 The US Constitution and court tradition give citizens the right to access court proceedings, and federal court hearings are open to the public with ‘few exceptions’. These exceptions include during high-profile trials where there is limited space for observers and where security reasons limit access, including in order to protect a minor or a confidential informant.

Arguments in favour of the status quo

3.60 The principle of open justice dates back to the 12th century. It involves people’s access to observe the goings-on in a courtroom. It was later extended to the media as the eyes and ears of the public in court. Fair and accurate media coverage is the default position for most democratic countries. The starting point for consideration of publicity in all courts is, therefore, the principle of open justice, which it is believed promotes the rule of law. It also promotes public confidence in the legal system and dispels fears of secret courts and mistrust of what is going on in the courts without public knowledge. The principle has been described as being ‘at the heart of our justice system’ in a seminal case in 1913.

3.61 Since the enactment of the Human Rights Act 1998, the common-law principle of open justice has been reinforced in different forms by Article 6 and Article 10
of the European Convention on Human Rights. It has been held that the principle of open justice is to be derogated only to the extent that it is strictly necessary to do so.

3.62 In recent years, there has been an emerging and growing consensus that the law should be reformed — for example, in family justice — to ensure greater transparency in proceedings concerning the welfare of children. The role that public debate and the jealous vigilance of an informed media has to play in exposing miscarriage of justice and in preventing future miscarriages of justice must not be underestimated. The public have a right to know what is going on and there is a need for the public to be confronted with what is being done in its name. Criminal justice merits public discussion, particularly in the context of Northern Ireland, where transparency and accountability in the justice system is arguably a paramount consideration.

3.63 In the review of family justice in Northern Ireland, published in September 2017, it was noted:

Those who operate in the family justice system need to be proactive in shining a light on our work so as to generate a far greater understanding among the public of what lies behind the important decisions that are taken about children by the courts, as an arm of the state, in the public’s name.

3.64 Public confidence in the process is necessary and the risk of closed courts is that the public become suspicious of what is being done in its name without having the right to be present and observe. Why should the public be excluded from these offences and not, for example, sordid sadistic murders, child cruelty, humiliating robberies of elderly people who have been tortured etc.?

3.65 There already exists statutory opportunities to exclude the public, as indicated above, under the current law for vulnerable witnesses.

3.66 Crown Court judges in Northern Ireland report that in most serious sexual offence cases, the number of members of the public attending is extremely low, albeit there can, of course, be notable exceptions to this, especially where the case has attracted high publicity.

3.67 There are alternatives to complete closure as outlined in other jurisdictions. Moreover, if we had, as they do in England, remote evidence centres away from the main court buildings where, when allied with pre-recorded cross-examination, complainants can give their evidence, there would be no need for complainants to even attend the main court building (the evidence of the complainant being given by way of achieving best evidence (ABE) and cross-examination through a video) and thus the whole trial could still be heard in public.
Chapter 3 | Restricting access of the public

Is there compelling evidence for a change in the legislation to restrict admission of the public?

3.68 The arguments in favour of a change and the introduction of legislative change to exclude the public from offences involving serious sexual crime are as follows.

3.69 Open justice is never an absolute concept. First, members of the general public are successfully excluded from attending rape trials in Irish courts. In New Zealand, Australia and, more relevantly, Scotland, the public are excluded when the complainant gives evidence. Recent experience in Northern Ireland of a high-profile trial illustrated distasteful aspects of voyeuristic and unsavoury interest in high-profile cases with, anecdotally, people travelling from outside the jurisdiction of Northern Ireland to attend the spectacle of a young woman giving evidence alleging rape against her. Turning courts into such a spectacle for voyeuristic entertainment value cannot be in the public interest and, more importantly, is not calculated to afford appropriate respect to the accused and complainants as well as the administration of justice. There is a clear distinction to be made between what interests the public and what is in the public interest.

3.70 The public face of the court system must operate in a way that is seen to be fair, respectful and efficient, and in accordance with common sense. Witnesses need to be treated fairly and humanely so as to ensure that they are encouraged to participate in the criminal justice system. Giving evidence in court is a difficult enough task without being exposed to the cruel gaze of packed courthouses where the spectators attend at least partly to hear the salacious details from humiliated witnesses.

3.71 There is clearly an under-reporting of rape cases, and in those that are reported an alarming 40% withdraw\(^8\) from the process. Experience of the victim support organisations and my own experience in interviewing complainants is that the prospect of public humiliation in front of a large number of spectators or, in a small local court, the risk of even one person knowing them is at least one factor contributing to a refusal to engage with the criminal justice system.

3.72 If public confidence in the criminal justice system is to be increased so that people fearlessly come forward to report offences of serious sexual crime and are able to give their best evidence, it is necessary to exclude the general public in these cases.

3.73 Few, if any, other types of crime expose the complainants or, indeed, the accused to such humiliation and intimate details in the giving of evidence. In short, the fear of exposure and the personal, painful and humiliating information that can get out into the public domain causing embarrassment, shame and long-lasting humiliation in local neighbourhoods and communities.

\(^8\) PPS review of cases in which there was a No Prosecution decision. Includes victim withdrawal and those where a report had been made by a third party to police but the victim did not wish the matter to be investigated. Similar findings by PSNI of 41% from research completed for rape incidents reported during January to July 2017.
is a real deterrent against coming forward in a small jurisdiction like Northern Ireland. Moreover, in no other crime type, no matter how sordid or unsavoury, is there the combination of a high attrition rate (40% drop out) and low conviction (in the most recent Department of Justice figures available\(^9\) for 2017 there was a conviction rate of only 24.5% for rape,\(^10\) 54.1% for all sexual offences, in comparison to a conviction rate of whereas 88.1% of other offences excluding sexual offences). Radical measures have to be introduced to change this.

3.74 The *Equal Treatment Bench Book* for England and Wales (2018) states that, often, measures such as giving evidence from behind a screen or ordering that a witness should adopt a pseudonym will be sufficient to protect the complainant and so the granting of any order would occur only in exceptional circumstances. However, in a small jurisdiction such as Northern Ireland it may, of course, be possible to still identify individuals through their voice, jigsaw identification and the general evidence given at trial. This fear of identification may deter some complainants from the process entirely and may well be a factor in the gross under-reporting of these crimes.

3.75 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also highlights the importance of protecting the survivor’s privacy, offering ‘proper assistance’ and preventing fear or intimidation. These principles are reflected in the European Parliament’s 2012 directive on victims’ rights, which also state a requirement for courts to prevent secondary victimisation and intimidation within the criminal justice system.

3.76 In short, more rigorous assessment needs to be applied in Northern Ireland than elsewhere in the United Kingdom, taking into account the unique nature of a small state where geographical and cultural considerations will have to be applied. A small and otherwise innocuous reference to a particular area or geographical location could serve to identify the complainant and render useless the legal anonymity of the complainant or the accused (see later discussion of the accused’s anonymity).

3.77 Public confidence in the courts and the preservation of strong elements of open justice can be addressed by admitting, as in Ireland, the press, relatives of the complainant and others permitted to attend by the trial judge. The admission of the press and responsible reporting should be sufficient to translate into appropriate transparency from the public’s point of view.

3.78 Attending court in person is not practical for any but a handful of people in most criminal trials and live streaming and broadcasting of court proceedings remain restricted. The only way that citizens can be informed about what takes place in most of our courts is through media reports. In that way the media

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9 Based on the principal offence disposed.

10 Relate to substantive versions of the offence only.
serve both as the eyes and ears of the wider public and also as a watchdog. Consequently, restricting public access to all but the press and families of the parties in such trials scarcely changes the position for the vast majority of the public and does little to impede public confidence in the administration of justice and the rule of law.

3.79 The presence of the press secures several objectives of open justice:

- it enables the public to know that justice is being administered impartially;
- it reduces the likelihood of uninformed or inaccurate comment about the proceedings; and
- it deters inappropriate behaviour on the part of the court.\(^\textbf{11}\)

3.80 Needless to say, the verdict of the jury, and the sentencing process if conviction ensues, can be held in open court.

3.81 Vesting a discretion in the court to decide which cases should be heard in public and which should not, based on some vaguely worded interests of justice or strict necessity test, is rife with difficulty and accompanied by the danger of inconsistency and uncertainty. How would a judge at the outset of proceedings in a small jurisdiction determine whether or not a particular case would attract publicity of an intrusive and unacceptable nature until the trial had actually started, by which time it would all be too late? How would the system guarantee any level of judicial consistency in such a broad discretion so as to avoid a loss of public confidence and sense of unfairness in its application?

3.82 The halfway house of pseudonyms or ciphers and screens is useless in small communities where even the sound of the voice of the complainant is enough to identify them. Facial identification is all too easy in a small local jurisdiction and with modern technology.

3.83 In just a decade, the rapid growth of easy online communication threatens to dissolve the protective walls that are built around a complainant's anonymity and, for that matter, if we change the law, an accused's anonymity. One major way to combat this, whilst not being a complete answer, is to exclude the public at large from such proceedings. At least this reduces the opportunity for social media to intrude on the justice of the case.

3.84 Information emanating from spectators at trial that has the potential to be spread through social media conversations in a manner that is not as easily controlled as information disseminated through mainstream media can easily influence jurors and prejudice an ongoing trial.

3.85 Particularly in large courts, it can be difficult for a judge or, for that matter, counsel to observe the behaviour of large sections of the public in high-profile

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Discussion

3.86 I am acutely aware of the fundamental principle of open justice which has, with certain limited exceptions, been a pillar of our criminal justice system and a crucial component in commanding public confidence in the courts for many years.

3.87 Moreover, the advent of possible pre-recorded cross-examination, albeit currently confined in statute to children and vulnerable witnesses, and the establishment of remote evidence centres — for example, at the Rowan centre — could ameliorate the stress of attendance at courts for many complainants. There already is statutory provision made for clearing the court when children give evidence, albeit rarely invoked.

3.88 Nonetheless, in the context of a small jurisdiction with local courts where public familiarity with witness identity is a reality and where confidence-building measures for complainants are now a vital requirement if we are to challenge gross under-reporting and high attrition rates, I consider the arguments in favour of a change to the status quo carry the greater weight.

3.89 That intrusion into the principle of open justice is in large measure confined so long as we adopt the approach taken by Ireland and elsewhere. Ireland gives full attendance rights to bona fide accredited press representatives and family members, together with a general discretion vested in the judge to admit others.

3.90 It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public who would be normally entitled to attend but, for purely practical reasons, almost always do not or cannot do so.

3.91 In truth, experience reveals that very few people do attend serious sexual offence trials and, therefore, press freedom is more than sufficient to meet the open justice principle in such cases from a purely practical point of view. On a more prosaic level, even when small numbers attend, in small local communities the right to anonymity is rendered ineffective.

3.92 Experience has shown that, particularly in certain trials where the national or local profile of the parties is high, the process of permitting uncontrolled public access can lead to gross abuse and blatant sexual and unsavoury voyeurism. Such attendance serves not only to deter, intimidate and humiliate witnesses, whose right to anonymity is destroyed even when special measures are invoked,
but brings the whole legal process into disrepute, fuelling already existing fears about reporting to the police.

3.93 The advent of social media has made instant reporting of witness identity and other unsavoury and simply untruthful information about such witnesses impossible to control at a practical level. Restricting public access is yet one more method, albeit an imperfect one, of preventing that happening.

3.94 I accept the argument that vesting a wide discretion in the court to decide which cases should be heard in public and which should not, based on some vaguely worded interests of justice or strict necessity test, is a recipe for uncertainty and inconsistency in terms of application. The very fact that Article 13 of the 1999 legislation is so rarely invoked, even in the case of child complainants, is testament to the fact that too wide a discretion in this field is rife with difficulty and uncertainty. Unless it is applied at the earliest stage of the proceedings, when in most cases it is impossible to know the full circumstances that may unfold, it is a useless remedy and applying it thereafter is probably too late to be effective. The law always has a preference for clarity and certainty in its application.

3.95 I am conscious that a compromise on exclusion during the whole trial, as in Ireland, is to adopt the approach invoked in Scotland, New Zealand and South Africa, namely to exclude the public only during the evidence of the complainant.

3.96 While this does ease the burden on the witness of giving humiliating and personal evidence, it does not address the problem in a small jurisdiction of protecting the identity of the complainant. Jigsaw identification from other parts of the evidence — the voice of the complainant, locations, addresses, friends and relatives present and giving evidence etc. — is all too easy in local courts. A key component of the requirement for complainant anonymity disappears. This is precisely the argument outlined to me by colleagues in Dublin who supported their approach.

3.97 A further protection should be the use of ciphers applied to a complainant’s identity in all court hearings, including the initial charge sheet and bill of indictment, albeit the full identity must be revealed to the accused. Their image should not be publicly displayed during any hearing save to the accused and their representatives. This may have implications for the Northern Ireland Courts and Tribunals Service (NICTS) and its IT systems, which need to be addressed.

3.98 In passing, I note that the anonymity of the complainant lasts for the complainant’s lifetime and ceases when they die. This no doubt reflects the fact that the primary purpose of granting anonymity is to spare the victim the
indignity and potential harm of being identified as such and the risk that this could deter them from coming forward.\textsuperscript{12}

3.99 This could deter some victims coming forward if, for example, they have a terminal illness. Moreover, it might also be extremely distressing for their families. I believe anonymity for complainants should be made permanent.

Proposed recommendations

27. That the public at large be excluded in all serious sexual offence hearings save for officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court together with such other persons (if any) as the judge, or the court, as the case may be, may in their or its discretion permit to remain.

28. A cipher be applied to the complainant’s identity in all court hearings, including the initial charge sheet and the bill of indictment (albeit the identity must be revealed to the accused) and their image not to be publicly displayed during any hearing save to the accused and their representatives.

29. Anonymity of complainants be made permanent so that it applies even after death.
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Chapter 4

Pre-recorded cross-examination
A review of the law and procedures in serious sexual offences in Northern Ireland
Pre-recording of direct evidence has become routine in some other jurisdictions ... to the extent that objections to it on principle have become rare in recent times, and workable solutions, both legal and administrative, have been found to common technical hitches.

Rape Crisis Network Ireland, 2018

Issue
Should the practice of pre-recording the cross-examination of the complainant contained in Article 16 of The Criminal Evidence (Northern Ireland) Order 1999, but not yet introduced, be now commenced in serious sexual offences?

Current law
4.1 The Criminal Evidence (Northern Ireland) Order 1999 (The 1999 Order) extends to Northern Ireland a range of provisions in the Youth Justice and Criminal Evidence Act 1999 (YJCEA) enabling special measures directions (SMDs) to be issued. These measures include what is sometimes referred to as the ‘full Pigot’, in which both the evidence-in-chief and the cross-examination of a witness is pre-recorded before trial (as opposed to the ‘half Pigot’ option in which only the evidence-in-chief is pre-recorded).

4.2 Article 16 makes specific provision for video recorded cross-examination and re-examination to complement video recorded evidence-in-chief ahead of trial. The judge and legal representatives must be able to see and hear the examination and communicate with persons in whose presence the recording is being made. However, the recording is in the absence of the accused, although the accused is to be able to see the examination and communicate with their legal representative.

4.3 Once the recording has been made, further cross-examination is not possible without a further SMD and this will be given only if the party seeking it can show that they have become aware since the recording was made of a matter that they could not have ascertained by reasonable diligence before the time of the recording.

4.4 Article 16 of the 1999 Order was commenced on 3 April 2017 insofar as it relates to proceedings in the Crown Court and committal proceedings in the magistrates’ court in relation to an offence that is alleged to have occurred in the local government district of Belfast (see The Criminal Evidence (Northern Ireland) Order 1999 (Commencement No. 11) Order 2017). However, my understanding is that no applications have yet been made in Northern Ireland for this particular SMD.
4.5 Complainants in sexual offence cases benefit from a presumption of eligibility for certain special measures on the ground of fear or distress under Article 5(4) of the 1999 Order, unless the witness has informed the court of a wish not to be eligible by virtue of the presumption. These include video recorded evidence-in-chief (see Article 10A of the Order inserted by the Justice Act (Northern Ireland) 2011), but do not yet include pre-recorded cross-examination. Essentially, then, Northern Ireland operates a half Pigot option for complainants in sexual cases.

Background

4.6 The Department of Justice (DoJ) has made a commitment through the victim and witness action plan and received ministerial agreement to pilot the special measure of pre-recorded cross-examination for vulnerable or intimidated witnesses in Belfast Crown Court, with a view to extending the scheme to all Crown Courts. This is the only special measure provided by Article 16 of The Criminal Evidence (Northern Ireland) Order 1999 which has not yet been commenced.

4.7 Work undertaken by the pilot project group, comprising representatives from the Public Prosecution Service (PPS), the Police Service of Northern Ireland (PSNI), the Office of the Lord Chief Justice (OLCJ), the Northern Ireland Courts and Tribunals Service (NICTS), Victim Support NI, the National Society for the Prevention of Cruelty to Children’s (NSPCC) Youth Witness Service, the Law Society and the Bar Council, and chaired by the department, had been based on the idea that all vulnerable or intimidated witnesses who were eligible for special measures in Belfast Crown Court and who had recorded their evidence-in-chief would have the opportunity to have their cross-examination recorded before the trial.

4.8 This pilot has been on hold since February 2017. A major issue is that it is the experience of the judiciary in Northern Ireland that timely disclosure is not being achieved, with it often being delivered up to the last minute or, indeed, even during the trial, thus impacting on the viability of the prospect of early cross-examination. Further concerns were also raised about the concept of questions being agreed in advance and how it could impact on the introduction and success of the pilot.
Other jurisdictions

England and Wales

4.9 In 1989, the Home Office issued its publication, *Report of the Advisory Group on Video Evidence* (known as the Pigot report), ¹ which recommended that the whole of a child’s or vulnerable witness's testimony, including cross-examination, should be pre-recorded. Although this proved controversial, the Pigot report has been highly influential and laid the ground for reform in Australia, England and Wales, and New Zealand, as outlined below.

4.10 Pre-recorded cross-examination under section 28 of the YJCEA is being slowly implemented across England and Wales. In 2009 the government gave a commitment to implement it for a ‘limited number of witnesses who would otherwise be unable to access justice’, subject to the successful development of rules of procedure and practitioner guidance.²

4.11 A commencement order introduced it on a pilot basis from 30 December 2013 in three Crown Court centres (Kingston upon Thames, Leeds and Liverpool) for witnesses who had received a section 27 direction (that is, one enabling a vulnerable or intimidated witness to have their evidence-in-chief video recorded) and were vulnerable on the basis of their age (being under 16) or if they suffered from some learning or physical disability.

4.12 The key policy aims of section 28 cases were for the cross-examination to happen earlier in the process in order to improve the quality of the evidence given by the vulnerable witness. It is also meant to decrease the amount of waiting time for vulnerable witnesses.

4.13 During the pilot, section 28 hearings were scheduled a number of months after the preliminary hearing to allow for full disclosure and consideration of the achieving best evidence (ABE) interview. The Crown Prosecution Service (CPS) must apply for special measures, including a section 28 hearing, and a date for the Ground Rules Hearing (GRH), will be agreed. This usually occurs in the week before the section 28 hearing. The judge may also require regular updates prior to these hearings on the preparedness of counsel for the section 28 hearing.

4.14 In practice, applications for special measures were rarely objected to and even more rarely refused.

4.15 Pilot protocols made a GRH mandatory for section 28 cases. The principal matters discussed and determined at this hearing are: the likely length of cross-examination; the nature of the questioning (including limitations on ‘putting the

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4.16 In both Leeds and Liverpool, it was the practice to require defence counsel to submit their proposed questions in advance for approval in a GRH form. This form also required counsel to certify that they had read the judicial protocol on the implementation of section 28, and the relevant toolkit on the Advocate’s Gateway, which provides guidance on the way to cross-examine children in an age and development-appropriate way.

4.17 The section 28 hearings took place in a court setting, with a live link to a video interview suite within the court building. A day or so before the hearing, the witness viewed a video of their ABE interview. On the day of the hearing, they arrived at the interview suite and in most cases the judge and counsel met them to introduce themselves before going up to court. In court, the entire proceedings were recorded, including the preliminary stages of establishing video-link contact.

4.18 The cross-examination was conducted with the witness being able to see counsel on screen. In the courtroom there was a screen showing the vulnerable witness. The process was then like a normal video-link examination.

4.19 In some cases the presiding judge deemed it fitting that they and counsel should join the witness in the video suite in order to carry out the questioning. This occurred where the vulnerable witness had particular communication difficulties or where the vulnerable witness was very young and close interaction was necessary to hold their attention.

4.20 At the end of the hearing, there was a brief discussion with counsel about whether the recording should be edited. As the questions are predetermined, this did not happen often.

4.21 Elements of the section 28 pilot include: rigorous judicial control driven by the Criminal Procedure Rules, practice directions and new plea and trial preparation hearings; heightened awareness of inappropriate questioning reinforced by robust Court of Appeal judgments; and tighter rules on disclosure and discounts for guilty pleas. Courts must now take ‘every reasonable step’ to facilitate witness participation.

4.22 Many practitioners involved in the process recognised the importance of the GRH in the success of the pilot because questions asked were more relevant and focused as a result of the additional scrutiny.

4.23 However, practitioners reported issues with technology including sound quality during playback, insufficient amount of screen space dedicated to witnesses, and the fact that the section 28 equipment caused live link rooms to be unable

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to be used for other live link evidence. Some defence barristers felt pre-recording cross-examination hindered their ability to effectively question the vulnerable witness.

4.24 The England and Wales Ministry of Justice (MoJ) evaluation found it difficult to assess whether pre-recorded cross-examination under section 28 of the YJCEA improved witness recall because there were still long periods that passed between incidents occurring and the witness giving evidence. A high proportion of witnesses included in the pilot gave evidence many months after the offences were said to have occurred.

4.25 At the same time, section 28 cases (where pre-recorded cross-examination took place) took on average around half the time for cross-examination to take place compared with section 27 cases (where witnesses’ evidence-in-chief was recorded but they had to attend trial to be cross-examined).

4.26 Most practitioners considered that there were benefits for witnesses in section 28 cross-examinations that helped their recall.

4.27 There was a view among practitioners that the questioning style in section 28 cases was better than in other cases because questions were more focused and relevant than in other cases. This seemed to be due to the GRHs prior to the hearing.

4.28 The cross-examination period was much shorter in section 28 cases, generally between 20 and 45 minutes as opposed to 45 minutes to three hours in section 27 cases.

4.29 Although the content of cross-examinations was stressful for both witnesses in section 27 and 28 cases, section 28 witnesses reported more positive experiences of cross-examination than section 27 cases (although not all section 28 witnesses reported positive experiences).

4.30 Practitioners also considered that the trauma from cross-examination was reduced in section 28 cases.

4.31 In addition, witnesses benefited from much less waiting time in court: preset listing times of cross-examinations and start times were nearly always kept.

4.32 There were fewer cracked trials for section 28 cases than section 27 cases and there were more guilty pleas before trial in section 28 cases. Although the reasons for this were unclear, one perception was that this was because evidence was being gathered and disclosed to defendants earlier.

4.33 Trial durations were slightly shorter on average in section 28 cases than in section 27 cases. There was little difference in the rates of conviction at trial for section 27 and section 28 cases.

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4.34 Following the largely positive evaluation of the pilot by the MoJ in 2016, the government announced its intention to roll out section 28 across Crown Courts in England and Wales for children and persons suffering from incapacity who are eligible for special measures under section 16 of the YJCEA.  

4.35 Although initially planned for 2018, it said that this had been fast-tracked so that from September 2017 complainants of rape and other serious sexual offences could have their cross-examination evidence pre-recorded and played during the trial.

4.36 The Lord Chief Justice issued a correction to this announcement. He stated that work to increase the number of courts where vulnerable witnesses avail themselves of section 28 hearings would continue on a carefully phased basis to ensure that, before commencement, the police, the Crown Prosecution Service, the advocates and the court were all appropriately trained and that the necessary IT is in place.

4.37 This has yet to occur because of the need to ensure there are robust and secure IT systems in place for national roll-out.

4.38 Our understanding is that section 28 will be extended slowly for child complainants, eligible witnesses (as defined by section 17(4) of the YJCEA) and adult victims following technological improvements and showing final recordings to section 28 pilot judges. If the judges are content with the quality of the recordings, it will be signed off.

4.39 Our understanding from the enquires we have made suggest that the use of section 28 with children has been particularly successful:

- More guilty pleas have emerged since, without the issue of consent, there can be less room for manoeuvre for defendants.
- It allows children to give their evidence more quickly (three to four months). It is very beneficial for children to get it over and done with. Therapy cannot start until the trial has occurred in case it affects the child’s understanding or memory of the alleged event.
- The GRH is very effective. In the pilot sites, defence practitioners are on board, judges are more confident and everyone is now more experienced. It means that there are no leading or complicated questions. This often results in a 10–20-minute hearing, which means children can be cross-examined with minimal disruption. They can arrive at court at 9.30 am and leave by 10.00 am.
- The drama of the courtroom is removed. Barristers are not performing for the jury or their client. The hearing is short with only the necessary questions asked.

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• There is more flexibility to get better evidence. Rooms have been changed to respond to a child’s needs — for example, one child gave evidence from a tent.

4.40 The roll-out for children has not been without difficulty. Technology is a problem. A lot of capacity is required and there have been issues with playback. The whole network must be upgraded. The section 28 pilot sites used DVDs, which are not fit for purpose. It must move to cloud-based technology. Once this is resolved, they should be in a position to progress.

4.41 The success of the pilots was helped by dedicated practitioners and judges working in small pilots.

4.42 In cases with adult complainants, section 28 may not necessarily be granted. Our enquiries suggest there may be downsides to this concept.

4.43 Cross-examination of adult complainants is lengthier. GRHs with adults are more complicated. Questions are more nuanced and there is less control.

4.44 It may not be in the complainant’s best interests to invoke section 28. For some, attending court and being involved in the process is part of closure.

4.45 There are, therefore, different considerations with adults. A selection of special measure options for adults may be more suitable as one size may not fit all.

4.46 Police training is required on this concept.

4.47 There is no conclusive evidence either way as to the impact of an adult complainant’s pre-recorded evidence on a jury.

4.48 Complainants, therefore, have to be made aware of the potential risks of section 28 pre-recording for adult complainants.

4.49 There is also a huge volume of these types of cases and this may have resource and financial implications.

Scotland

4.50 Provisions in the Victims and Witnesses Act (Scotland) 2014 extended the definition of vulnerable witnesses in criminal proceedings to include witnesses under 18, complainants of sexual offences, domestic abuse, human trafficking and stalking. These witnesses have an automatic entitlement to use standard special measures, which include the use of a live TV link to provide evidence, a screen and supporter.

4.51 Section 271H of the Criminal Procedure (Scotland) Act 1995 specifies that ‘giving evidence in chief in the form of a prior statement’ and the ‘taking of evidence by a commissioner’, which is recorded and can be used for both evidence-in-chief and cross-examination, are special measures that can be authorised by the court for the purposes of taking the evidence of a vulnerable witness.
4.52 They are not, however, standard special measures. Anecdotal evidence indicates these provisions were rarely used up until 2015 but that, since then, there has been an increase in the use made of them in cases being tried in the High Court.

4.53 On 29 March 2017 the Lord Justice Clerk, Lady Dorrian, introduced new guidelines for the process of taking evidence by a commissioner, effectively requiring a GRH before a commission can take place.

4.54 In 2015 the Scottish Courts and Tribunals Service (SCTS) published its *Evidence and Procedure Review Report*, which recommended that consideration is given to the development of a new structured scheme that treats children and vulnerable witnesses in an entirely different way, away from the court setting altogether.6

4.55 Research for the Scottish Courts and Tribunals Service review indicated that pre-recorded evidence is rarely used in comparison with other types of special measures.

4.56 A High Court practice note issued in 2017 sets out steps to improve the process of taking evidence by a commissioner.7 It requires that, before a commission can take place, the parties must appear at a court hearing to discuss in detail all the measures that will ensure that a witness can give their evidence fully and with the minimum risk of further trauma.

4.57 The practice note also lists the practical arrangements that should be considered in advance, such as: determining the best location and environment for the recordings to take place, the timing of the session and what aids to communication may be required, all taking into account the specific needs of the witness.

4.58 Additionally, it requires the parties to consider and discuss in advance the lines of inquiry to be pursued, the form of questions to be asked and the extent to which it is necessary for the defence case to be put to the witness.

4.59 Progressing this work, the Scottish government committed to considering whether further legislative changes are necessary to enable the greater use of pre-recorded evidence.

4.60 In 2017 the Scottish government launched a consultation on a proposal to include the use of prior statements of evidence-in-chief and evidence by a commissioner to become a standard special measure.8

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4.61 A majority of consultees supported this change and there was overwhelming support for the long-term aim of a presumption that children and other vulnerable witnesses should have all their evidence taken in advance of a criminal trial. The vast majority of consultees considered that a child accused should also be able to give pre-recorded evidence in advance of a trial.

4.62 An inter-agency report chaired by Lady Dorrian recommended in September 2017 that the entire evidence of child victims under 16 be taken by an expert forensic interviewer and pre-recorded, with no questioning by lawyers at all in the majority of cases, taking inspiration from the Barnahus or ‘child’s house’ model in place in Scandinavian countries. The report proposed that this model should also be used occasionally for child complainants under 18 and for vulnerable adult complainants very occasionally.

4.63 The programme for government 2017/18 announced the Scottish government’s intention to introduce a Vulnerable Witnesses and Pre-recorded Evidence Bill to reduce further the need for children and vulnerable witnesses to give evidence in a courtroom and creates a new rule in favour of children (defined as those under 18) having their evidence pre-recorded in advance of trial in the most serious of cases.

4.64 A secondary legislation power is also included in the Bill to extend the new rule to categories of adults ‘deemed vulnerable witnesses’ in solemn cases. The policy intention is that a GRH will take place before every commission.

4.65 Interestingly, a Scottish Courts and Tribunals Service review noted that anecdotally there is little evidence of an improvement in conviction rates since the introduction of special hearings. This was a finding replicated in England in the findings after the introduction of the pilot cases.

Iceland and Norway

4.66 Iceland and Norway use models based on the Barnahus concept (see chapter 14, ‘The Voice of the Child’). Cross-examination in this model is significantly removed from traditional cross-examination. In both jurisdictions, it takes place via an investigative interview away from the courtroom. In Iceland, the interviewer questions the child while professionals, including the defence attorney, watch via video link and put questions to the child via the interviewer using an earpiece.

4.67 In Norway, a specially trained police interviewer is the only person who questions the vulnerable witness. To satisfy the Article 6 requirement, the

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interviewer can take suggestions from the defence lawyer as to lines of questioning.

Australia

4.68 In 1992 Western Australia became the first common-law jurisdiction to implement what has been referred to as the ‘full Pigot’ approach. It introduced legislation to allow a child or vulnerable witness's evidence-in-chief and cross-examination to be recorded prior to the trial hearing. This is intended to help to avoid or mitigate the adverse effects on the witness, both in the short and long term. In particular, the fact that the special hearing is held before the trial itself allows the healing process to commence sooner.

4.69 Legislation permitting, on application, the pre-recording of a vulnerable witness's evidence-in-chief and cross-examination exists in Queensland, South Australia, Victoria, Western Australia, the Australian Capital Territory and the Northern Territory. The original Western Australian provisions have been amended on a number of occasions since then to expand the scope of and strengthen the protections provided.

4.70 Throughout this process, any special witness (meaning any person who would be likely to suffer severe emotional trauma or be likely to be so intimidated as to be disadvantaged as a witness, if required to give evidence) will routinely be interviewed by specially trained police officers in a visually recorded interview (VRI), which is similar to the achieving best evidence interview. This interview forms the evidence-in-chief.

4.71 The witness will have the opportunity to view their VRI in the days before the special hearing. This hearing then takes place in a normal courtroom, which is equipped for the giving of evidence by CCTV. The special witness provides evidence to the court remotely.

4.72 The judge, prosecutor and defence counsel are in court. The special witness adopts the VRI and is then cross-examined by the defence counsel. They are then re-examined if necessary.

4.73 The video may not be edited without the approval of the judge. The video tape is stored by the court for use at the trial and, rather than being submitted as an exhibit, is treated as oral evidence.

4.74 In Victoria, the video or audio taping of evidence (VATE) provisions apply only to young or cognitively impaired complainants in sexual offence proceedings.

4.75 In this process, the whole of the evidence (cross-examination and re-examination of a child or vulnerable complainant) must be given at a special hearing, recorded as an audio visual recording, and is treated by the court as the direct testimony of the complainant.
4.76 The accused and their legal practitioner are present in the courtroom of the special hearing. The accused is not in the same room as the complainant when they are giving evidence. Rather, the accused is entitled to see and hear the complainant via CCTV or other facilities.

New Zealand
4.77 In June 2011, the Court of Appeal in New Zealand heard two appeals in relation to pretrial cross-examination. The court held that, although the Evidence Act 2006 expressly permits the pre-recording of cross-examination (under sections 103 and 104), its use will ‘be part of an answer in rare circumstances, but they will be rare’.

4.78 In the same year, the New Zealand cabinet agreed to a number of reforms relating to child witnesses that included a legislative presumption in favour of pre-recording the entire evidence of child witnesses under 12 years of age and introducing a right to a support person.

4.79 An interesting paper from New Zealand revealed that the process led to an increase in guilty pleas as well as charges being dropped or amended after a pre-recorded hearing.

Ireland
4.80 Current provisions in Ireland deal only with the video recording of the complainant’s statement and not cross-examination. Section 16 of the Criminal Evidence Act, 1992 allows for the video recording of any statement made by a person under 14 years of age (and up to the age of 18 in respect of certain offences) to be admitted as evidence in criminal proceedings in relation to sexual offences or offences involving violence.

4.81 The Criminal Justice (Victims of Crime) Act 2017 transposes into law directive 2012/29/EU, which establishes minimum standards on the rights, support and protection of victims of crime. The directive defines a child as someone who is under the age of 18.

4.82 This legislation extends existing provisions so that the video recording of a child victim’s statement may also be admissible in evidence if the child was under 18 when it was recorded, notwithstanding that they have turned 18 by the time of the trial.

4.83 The Rape Crisis Network Ireland (RCNI) asserts that pre-recording a statement soon after a complaint has been made maximises the witness’s potential to give their best evidence. It also suggests that this helps to minimise the risk of

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secondary traumatisation by reducing exposure to the criminal justice process itself.

4.84 RCNI advises that, for some very vulnerable witnesses, pre-recording their statement may actually be very distressing because they have been filmed during the sexual violence and/or exploitation, so warn that it cannot be compulsory in every case. It recommends a practical, flexible approach to overcome the most common problems raised elsewhere, such as disclosure, when pre-recording cross-examination.15

4.85 In April 2018 the Minister for Justice and Equality announced a review of the legal protection offered to complainants in sexual assault cases in Ireland.

France

4.86 In France, the child complainant of an alleged sexual assault should be questioned by specially trained professionals in the national police force (brigades de protection des mineurs) or national gendarmerie (brigades de prévention de la délinquance juvénile). These brigades are responsible for conducting the investigation and interviews of child victims and, depending on the case, also child witnesses. Some youth brigades are exclusively competent to deal with child suspects.

4.87 Questioning may also take place at forensic units, where a medical practitioner collaborates with the judge and performs medical procedures at their request. This must be video recorded. Recording the interview aims to minimise the number of interviews.

4.88 In practice, however, the child will be interviewed at least three times: once by the police at the formal interview; once by their lawyer; and once by the judge, who will ask the child to reiterate or approve previous statements.

4.89 Upon written decision of the public prosecutor or investigatory judge, this recording can be exclusively a sound recording when the best interests of the child require.

United States

4.90 The confrontation clause enshrined in the Sixth Amendment to the Constitution as interpreted in recent Supreme Court decisions would seem to have cast something of a shadow over the development of special measures in the US.

4.91 There is Supreme Court authority for the admission of pre-recorded evidence in the case of a vulnerable child complainant of sexual abuse, provided the accused has an opportunity to challenge the statement. However, there does not appear to be a practice of pre-recorded cross-examination.

Canada

4.92 Sections 715.1 and 715.2 of Canada's Criminal Code allow for the use of a videotape of evidence of a complainant or other witness under the age of 18 or a witness who suffers from a disability, provided the witness adopts the contents of the recording while testifying.

4.93 But pre-recorded video evidence applications are rare for vulnerable adult witnesses and there does not appear to be a practice of pre-recorded cross-examination.

Impact of pre-recorded cross-examination

4.94 In light of the oft-repeated assertion that jurors prefer theatre to film\(^{16}\) and that evidence by video has a reduced impact, thus affecting the trial outcome, the Review team researched cross-jurisdictional literature on this topic.

4.95 Although, as the studies in the bibliography carried out with mock jurors show, there is a mixed response to this issue. The Scottish government recently carried out an evidence review that examined the impact of pre-recorded evidence and/or live link testimony upon juror decision-making in criminal trials across a range of jurisdictions.\(^ {17} \)

4.96 The report draws on international evidence from simulated or mock jury experiments and concludes that there is no compelling evidence that the use of pre-recorded evidence or live links, whether by child or adult witnesses, has an effect on verdict outcomes in (mock) criminal trials.

4.97 These studies can be difficult to compare because complainants’ testimony is introduced in different ways across studies and legal systems.

4.98 There are also issues around the sampling of participants to act as mock jurors as a large proportion of studies have relied on undergraduate students who volunteer in exchange for course credit. This is not reflective demographically of the jury-service-eligible population.

4.99 Nonetheless, the study concludes that, while individual jurors may initially favour a child’s live testimony, the evidence suggests that where a group deliberation component is built into the research design (to simulate the trial process), this preference does not translate in any consistent or reliable way into verdict outcomes.

4.100 The review finds that, in respect of adult witnesses, the evidence base is more limited.\(^ {18} \) A number of studies in Australia and England show that the use of

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pre-recorded evidence or live links by adult female rape complainants does not significantly influence (mock) jurors’ evaluations and verdicts.19

4.101 The position in respect of adults in other trials is less clear and requires further investigation, but there is not as yet compelling evidence of a verdict impact on (mock) jury decision-making.

4.102 The evidence review highlights a number of operational factors that may influence jurors, such as the length and format of forensic interviews, audio and visual quality of evidence, and camera perspective, which, it is suggested, should be considered when using pre-recorded evidence to avoid undue influence upon jurors.

4.103 The Scottish government recommends that further research be carried out to provide a richer and more diverse range of studies in relation to adult complainants and modes of evidence delivery. The research base examining the use of pre-recorded testimony by adult male complainants is also much less established.

4.104 Many commentators and practitioners believe that enabling a child complainant to give evidence without entering an unfamiliar courtroom or facing the accused will ameliorate stress and increase their ability to give the best evidence.

4.105 The Scottish evidence review notes that existing research provides a convincing evidence base for rejecting the idea that removing children from court and presenting their evidence via a screen reduces the ability of (mock) jurors to accurately interpret behavioural cues and distinguish truth from fiction.20

4.106 Importantly, Professor Cheryl Thomas (from University College London’s faculty of laws), with funding from the Nuffield Foundation, is leading the first empirical research study of the impact of the digital courtroom on jury trials, the impact of special measures for vulnerable witnesses, whether jurors believe myths and stereotypes in some cases, how to prevent juror misconduct, how to improve jury deliberations and how best to provide support for jurors during and after trial.

4.107 Professor Thomas, who is extending her researches to Northern Ireland this autumn, is using a rigorous, multi-method approach to understanding jury decision-making and is working exclusively with real juries in courts. This study is scheduled to complete in late 2019.


Arguments against the introduction of pre-recorded cross-examination

4.108 There are issues with technology in England, which have included sound quality during playback, insufficient amount of screen space dedicated to witnesses and the fact that the section 28 equipment caused live link rooms to be unable to be used for other live link evidence.

4.109 These operational challenges and technical difficulties may distract juries by poor audio and visual quality. Factors such as camera perspective may bear careful scrutiny for the potential to influence jurors.

4.110 Some defence barristers have felt that pre-recording cross-examination hindered their ability to effectively question the vulnerable witness.

4.111 Use of special measures by a complainant may alter a juror’s assessment of the credibility of the testimony. Could it imbue a complainant’s testimony with an undeserved level of credibility or raise a juror’s suspicion about their credibility?

4.112 Is it fair to afford this opportunity to the complainant but not the defendant in a trial environment?

4.113 It could reduce a juror’s ability to read a complainant’s body language in order to pick up on useful non-verbal cues of deception or veracity grounded in assumption.

4.114 Video testimony could lack the immediacy and persuasiveness of a complainant’s live in court testimony. Does this create distance between the complainant and jury? It was suggested to the Stern Review that ‘juries prefer theatre to film’. 21

4.115 Is it unfair to require the defence to cross-examine the main prosecution witness before the formal trial has begun?

4.116 Defence lawyers have expressed concern that they cannot prepare to cross-examine the most important prosecution witness until shortly before the trial is scheduled.

4.117 Would this be unworkable with disclosure being completed just before trial? Will this require tight but unrealistic timetabling by lead judges?

4.118 Witnesses may be recalled to give evidence if substantial information emerges after the pre-recorded hearing before trial.

4.119 Process costs such as increased work for practitioners in preparing for pre-recorded cross-examination and the knock-on effect of delay in cases being tried.

4.120 Concerns that the process emotionally distances the jury from the evidence, which might lead to unfair treatment of the complainant and less likelihood of conviction.

4.121 The MoJ evaluation reported that the section 28 pilot processes had a perceived impact on the workload of all practitioners because of the expedited time frames at the outset of cases and the additional hearings required for section 28 cases.\(^\text{22}\)

4.122 Difficulties relating to disclosure were reported by both police and the CPS, and a key challenge reported by defence advocates was obtaining instructions from defendants at an earlier point.

4.123 There is a downside to roll-out being contemplated at a time when there are already considerable pressures on the police and the PPS. The work required to have investigations and disclosure completed in time for pre-recorded cross-examination is in practice bound to limit the number of cases when Article 16 applications are going to be made by the PPS. This is particularly the case in serious sexual offence cases, where disclosure demands in terms of social media output etc. are often considerable.

4.124 There are also fears that, once pre-recorded cross-examination has been completed, Article 16 cases will go to the back of the queue and lead to longer delays before trials are completed, resulting in a lack of closure for complainants. The perceived benefits of pre-recorded cross-examination in terms of relieving stress may not, therefore, be as great as is claimed.

4.125 There is less time for agreement for a guilty plea and, once cross-examination has started, the defendant loses credit for a later plea of guilty.

4.126 If questions have to be submitted in advance, what happens if the evidence takes an unexpected turn?

Is there compelling evidence for its introduction?

4.127 A crucial element in favour of this concept is that it can be yet another vital building block in restoring the confidence of complainants in the justice system and procedure by potentially reducing or eliminating the need for a complainant to give evidence in person at trial and permitting them to give evidence remotely in a safe and secure environment, away from the court and the defendant. The risks of secondary victimisation and traumatisation for complainants are thus substantially reduced.

4.128 This is the kind of measure that, if appropriately well known, can at a legislative stroke remove one of the contributors to the unacceptably high under-reporting and attrition rates.

4.129 It lends itself to better-quality evidence as it is given more contemporaneously to the alleged event and is recalled at a time when the complainants are removed.

from court stressors. This is particularly relevant in the case of young children, whose memories can deteriorate more rapidly than adults.

4.130 The research from Scotland and England showed that there was little evidence of an improvement of conviction rates since this introduction and thus it does not prejudice the defendant.

4.131 Pre-recorded evidence may reduce a complainant’s waiting time at court. It may also minimise disruption for complainants, who can provide their testimony at a convenient time rather than being required to attend court and wait to see whether they are called.

4.132 It could reduce the duration of the trial hearing itself and thus reduce costs.

4.133 There may be better case management as the principal evidence becomes available to all sides at an early stage in proceedings.

4.134 It may facilitate pretrial decisions by the prosecution and the defence.

4.135 Irrelevant or inadmissible material can be edited out and related issues resolved later.

4.136 It could also minimise ‘system abuse’ of complainants — for example, by reducing the need to repeat evidence — and increase guilty pleas where the evidence given is compelling.

4.137 It could provide complainants with finality; if there is a retrial, the evidence has already been captured.

4.138 Questioning can be carried out in a sensitive manner that is appropriate to the needs and vulnerabilities of the complainant.

4.139 The evidence from the research is that it is rare for complainants to be required to give evidence again because new issues arise or new evidence becomes available. This may be because prosecutors who make the application for pre-recorded cross-examination choose their cases carefully.

4.140 From the accused’s point of view, they have the opportunity to see and consider the evidence against them from an early stage, affording them a timely opportunity to reflect on their own evidence and witnesses in rebuttal or to make a plea deal.

Discussion

4.141 Pre-recorded cross-examination is an idea whose time has come, in my opinion. It is being rolled out in the rest of the UK, and the legislation admitting it to Northern Ireland should be commenced.

4.142 It is part of the necessary changing face of law and procedures to encourage complainants to come forward and give their evidence in circumstances that are
more likely to elicit the truth than at present. It tackles head-on a system where delays and intimidating court atmospheres are not conducive to true justice.

4.143 It reassures complainants that this is a ‘once and for all’ experience, carefully controlled by the judge. It is impossible to believe that, in this modern era, the technical problems that have bedevilled the English situation cannot be soon solved and eradicated. However, such a development is without doubt a vital precursor of its introduction in Northern Ireland.

4.144 There are genuine concerns in Northern Ireland that pre-recorded cross-examination will not work until we have solved the problem of late disclosure and ensured that technology is of the required standard and recordings are of good quality. The fear is that since disclosure is often not completed until the last moment, cross-examination will have to be revisited during the trial and, in any event, cannot be carried out on an informed basis without all the relevant documentation being disclosed.

4.145 Of course in many cases disclosure is not even an issue or is of very modest proportions. In those where it does arise, the steps I have recommended in chapter 10 on ‘Disclosure’, with more specially trained Disclosure Officers in the PSNI guided by the PPS, earlier defence engagement in the process and robust case management timetabling and practising disclosure should reduce the problem. The Recorder in Liverpool, who has vast experience in processing pre-recorded cross-examinations since the inception of the scheme in England, assured me that disclosure rarely surfaced as an insuperable problem in his experience.

4.146 One of the effects on investigators and prosecutors in England was that the disclosure process had to begin at the start of the investigation so that the defence has the material it needs in advance of their opportunity to challenge the witness’s account. This can only be a positive step in upgrading the vital importance of an early grip on disclosure conceptually.

4.147 The English experience is that it is only in the rarest of cases that the witness has to be recalled because one new factor has arisen. In any event that is always a risk in the present system.

4.148 Creative thought should be given, especially in the case of all children and indeed all vulnerable witnesses, to conducting such hearings in appropriate centres, remote from the court building — for example, the NSPCC offices.

4.149 The widely expressed view that it somehow dilutes the effect of the evidence has no empirical or research foundation, and the findings in Australia that the conviction rates were unchanged should reassure defendants and complainants. The fact of the matter is that we are all well used to watching TV screens in our everyday life.
4.150 The presence of prepared and judicially approved questions should not provide an impediment to cross-examination since highly experienced Crown Court judges in Northern Ireland will obviously act with flexibility in the event of evidence taking an unexpected turn.

4.151 Moreover, I see no reason why a plea of guilty entered after the cross-examination but before the trial should not be afforded some measure of discount.

4.152 I am fully in agreement with the Criminal Justice (Victims of Crime) Act 2017 that transposes into law directive 2012/29/EU, which establishes minimum standards on the rights, support and protection of victims of crime and defines a child as someone who is under the age of 18. This will increase the number of children who can avail themselves of this process.

4.153 Serious sexual crimes are very often perpetrated by those who have chosen victims who are vulnerable. Hence those currently qualifying for special measures in Northern Ireland are vulnerable and intimidated adult witnesses and children.

4.154 I am fully in favour of following the Scottish example of extending the definition of vulnerable witnesses in criminal proceedings to include all alleged victims of sexual offences, domestic abuse, human trafficking and stalking. The fact of the matter is that virtually all such complainants in serious sexual offences are vulnerable and deserve to be treated as such. Vulnerable witnesses should have an automatic entitlement to use standard special measures, which include the use of pre-recorded cross-examination.

4.155 In the meantime, pre-recorded cross-examination of vulnerable witnesses in serious sexual offence cases should commence on a carefully phased basis to ensure that, before commencement, the police, the PPS, practitioners and the court are all appropriately trained and that the necessary IT is in place.

4.156 Training for the professions and judiciary is important. A judicial protocol should be drawn up on the manner of implementing such hearings. The Bar Council and the Law Society should produce a manual dealing with the concept.

4.157 The hearings themselves should be carefully orchestrated. There should be an obligatory GRH for all pre-recorded cross-examination hearings.

4.158 It should be the practice to require defence counsel to submit their proposed questions in advance for approval in a GRH form.

4.159 In order to ensure there has been proper training and preparation, the precedent set in Liverpool should be followed, whereby counsel should be required to certify that they have read the judicial protocol on the implementation of the concept.
4.160 I conclude by recognising that introducing pre-recorded cross-examination will require the Legal Services Agency for Northern Ireland to make provision for separate fees for what is essentially front-loaded work. Such hearings should be treated as the first day of the trial and the legal aid rules should reflect this.
Proposed recommendations

30. Pre-recorded cross-examination of vulnerable witnesses in serious sexual offence cases should commence on a carefully phased basis to ensure that, before commencement, the police, the Public Prosecution Service, practitioners and the court are all appropriately trained and that the necessary IT is in place.

31. If this roll-out is successful, it should be followed by a pilot scheme involving all adult complainants in all serious sexual offences.

32. A judicial protocol should be drawn up on the manner of implementing such hearings.

33. Bar Council and the Law Society should produce a manual dealing with the concept for guidance purposes.

34. There should be an obligatory Ground Rules Hearing for all pre-recorded cross-examination hearings.

35. It should be the practice to require defence counsel to submit their proposed questions in advance for approval in a Ground Rules Hearing form.

36. Counsel should be required to certify that they have read the judicial protocol on the implementation of the concept.

37. Such hearings should take place in a court setting, with a live link to a video interview suite within the court building.

38. In the case of vulnerable witnesses, consideration should be given to centres remote from the court building with the use of live link.

39. Prior to the hearing, the witness should have an opportunity to view a video of their achieving best evidence interview.

40. On the day of the hearing, in most cases, the judge and counsel should meet a child witness to introduce themselves before going up to court.

41. The presiding judge may deem it fitting that they and counsel should join the child or other vulnerable witness in the video suite in order to carry out the questioning.

42. The definition of vulnerable witnesses in criminal proceedings should include witnesses under 18, complainants of sexual offences, domestic abuse, human trafficking and stalking.

43. The Legal Services Agency Northern Ireland should make provision for separate fees for pre-recorded cross-examination.

44. Hearings of pre-recorded cross-examinations should be treated as the first day of the trial and the legal aid rules should reflect this.
Chapter 5

Separate legal representation
A review of the law and procedures in serious sexual offences in Northern Ireland
Do not go where the path may lead, go instead
where there is no path and leave a trail.

Ralph Waldo Emerson

Issue
Should our system provide publicly funded legal representation for complainants?

Current law
5.1 There is no publicly funded legal aid for complainants in Northern Ireland connected to serious sexual offences. A lawyer representing complainants has no right of audience at a trial for serious sexual offences.

5.2 Complainants generally have no formal standing in most common-law jurisdictions and in the UK are normally called as a witness in the trial. In our criminal justice system, as in England and Wales, there are only two parties: the state and the accused. Invariably, prosecuting counsel will explain to a complainant that they are simply a witness in the prosecution case and they are not separately represented by counsel.

5.3 It is thus important to remember that the Public Prosecution Service (PPS) is not the legal adviser of the victim nor does it act as their legal adviser. It is an independent prosecuting authority that is required to have regard to the overall public interest and not only the particular interests or concerns of any one individual.

5.4 Whilst Articles 13 and 14 of the victims’ rights directive 2012/29/EU give victims a right to legal assistance, it is applicable only where they have the status of parties to the criminal proceedings.

5.5 However, both the Police Service of Northern Ireland (PSNI) and the PPS have stressed to me that the particular views of, and impact on, the victim are an important consideration when making prosecution decisions.

5.6 The European Convention on Human Rights (ECHR) provisions are, of course, relevant to our law in Northern Ireland. The literature shows that, traditionally, member states have treated complainants’ rights as secondary to those of the accused. However, ‘a growing body of academic opinion argues that the ECHR does place positive obligations on the State to protect victims’.

5.7 The literature highlights the following Articles of the ECHR as having potential relevance to representation for complainants under current law.

5.8 Article 3 of the ECHR — prohibition of torture — provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’.
5.9 One academic study1 rather bravely suggests that certain court procedures in sexual offence cases — for example, harassing the complainant, asking them intimate questions about menstrual cycles and displaying underwear — aim to humiliate and may contravene complainants’ Article 3 rights, noting that some jurisprudence has found that acute psychological suffering can reach the minimum level of severity needed to ground claims under Article 3. Frankly, I doubt that such questioning would ever be permitted to this degree in this jurisdiction.

5.10 ECHR Article 6 enshrines the right to a fair trial and requires equality of arms. In Bulut v Austria,2 it was held that each party must ‘be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent’.

5.11 It has been argued that there are inequalities between the complainant and defendant in the courtroom, as the complainant is not a party to proceedings. For example, the complainant’s testimony is often treated with disbelief and the defence may seek to undermine their character or actions.

5.12 The European Court of Human Rights has held3 that a partie civile has a right to a fair trial under Article 6 of the convention.

5.13 However, the European Court of Human Rights has not determined the compatibility of auxiliary prosecutors or complainants’ lawyers with the defendant’s right to a fair trial in Article 6.

5.14 ECHR Article 8 enshrines the right to respect for private and family life as indicated later in this chapter in relation to Scotland.

5.15 Finally, Article 13 provides that everyone whose rights and freedoms as set out in the convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

Background

5.16 One of the recurring criticisms heard from complainants is that they often feel that they themselves are placed on trial as well as the accused. The perception is that defence counsel routinely, in pursuing their defence of consent, utilise rape myths, seek disclosure of the complainant’s medical and sexual history, and question their motives in coming forward.

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3 Perez v France ECHR application number 47287/99.
5.17 In reviewing the effectiveness, efficiency and fairness of the legal system, concerns have been raised about the extent to which victims are able to exercise opinion and voice in an arena where their personal lives are so affected.

5.18 My interviews with complainants and discussions with support agencies reveal low levels of satisfaction from those accessing services. Many report that, given what they have read and/or seen, they would not engage with the criminal justice system. Low prosecution rates, fierce cross-examination and sensational press coverage have all added to this. There is also a visible ripple effect with family members and friends also losing confidence in the system.

5.19 In Sara Payne’s 2009 report, Redefining Justice, in England and Wales, many victims were angry that their place within the criminal justice system was effectively as a witness in their own case. Many participants in the report were concerned that, in contrast to the defendant, who had their own legal representation, the complainant had no such representation.

5.20 Research by Victim Support in 2013 in England and Wales found that many complainants did not understand that the prosecution counsel was acting for the Crown rather than for the complainant. A lack of communication between the prosecution barrister and complainant in many cases contributed to this misunderstanding.

5.21 This mirrors precisely the grave concerns that surfaced in my interviews with complainants in Northern Ireland.

5.22 Unquestionably, the position in Northern Ireland has improved over time. The Victim Charter, which is on a statutory footing, places an obligation on the police and the Victim Witness Care Unit to keep complainants and witnesses informed at various points in the process and provides a single point of contact should they have any queries. Both the PSNI and the PPS have put in place firm policies for keeping the complainant up to date with developments in the case and providing a named person with whom the complainant may make contact about the progress of the trial.

5.23 Moreover, as the ‘Background’ chapter reveals, a great deal of support from voluntary associations is now available to a complainant during the process in a manner that was not the case 20 years ago. It should be noted that an advocacy support service is to be introduced in 2019 by the Department of Justice providing support at various stages of the process.

5.24 Good examples of the new approach are found with:

- the rape crime unit (RCU) of the PSNI, who provides a pack to all victims with various leaflets from support services and the pathway they will follow after making a report; and
- the recent establishment of the Rowan Sexual Assault Referral Centre to enhance collaborative working relationships and practices between the
PPS, the PSNI and Forensic Science Northern Ireland (FSNI) in relation to investigations with the purpose of ensuring speedy decision-making and explanation to the complainant.

- The Victim Charter has also played an important role in this new approach.

5.25 However, the key factor is that none of this provides informed legal advice. Virtually without exception, every complainant to whom we spoke voiced the desire to have access to free legal advice during the whole process from report of the crime to trial. The absence of this arguably provides yet another impediment to complainants on the steep path from reporting to trial. It contributes to the troubling concept of complainants being alone against an array of defence lawyers, which in turn feeds into the unacceptably high under-reporting and attrition rates.

Other jurisdictions

5.26 We have looked at the policy, practice and experience across 15 jurisdictions worldwide: Australia, Canada, England and Wales, France, Germany, Iceland, the Netherlands, Belgium, Sweden, New Zealand, Norway, Ireland, Scotland, South Africa and the US.

5.27 It is clear that around the globe there is growing awareness of complainants’ rights, along with a rise in policies to support their participation in the criminal justice process.

5.28 A wide range of models is in place internationally, ranging from non-legal advocates providing general support to complainants to specialised legal representation beginning just prior to, or around the time of, reporting the alleged offences.

5.29 In continental European systems with a judge-led, inquisitorial approach, independent legal representation for complainants is integral to the process.

5.30 However, in common-law jurisdictions, independent legal representation for complainants is comparatively rare. Complainants in common-law systems generally have no formal standing and can express views only when being questioned as a witness.

Non-legal advocates

5.31 Non-legal advocates typically provide support to complainants, particularly in relation to their physical safety, emotional and health needs, and rights. They often provide information and may accompany complainants to court, carrying out a supportive role without intervention rights. They may be community-based or system-based.

5.32 One-stop shop centres for complainants are common across many jurisdictions and aim to limit the amount of steps a complainant must take to access justice.
5.33 Such centres, including the Rowan centre in Antrim, which I believe is a real centre of excellence and which I have had the privilege to attend to view its work, share a number of characteristics internationally, including that they are tailored to the individual complainant, collaborate with other agencies and service providers, offer ongoing support and empower the complainant. Other services in Northern Ireland, such as the Independent Sexual Violence Advocate (ISVA) pilot and the National Society for the Prevention of Cruelty to Children (NSPCC) young witness service are outlined in the ‘Background’ chapter. Independent sexual violence advisers in England and Wales: evaluation has found ISVAs to be ‘effective, cost-effective and affordable’.

5.34 Some key examples of non-legal support across the jurisdictions considered include the following.

Scottland

5.35 In December 2013 the Scottish government, Rape Crisis Scotland and Police Scotland launched Support to Report, a National Advocacy Project, a 24-hour advocacy support service to support complainants at the initial stage of reporting to the police. It aimed to improve available support; reduce attrition by developing a better understanding of a complainant’s motivation for not proceeding with the criminal justice process; and to grow experiences of the system. It quickly grew to include support provided before, during and after reporting to police, including at trial. Findings of a 12-month evaluation of the service included:

- advocacy support had a positive impact on the complainants’ ability to engage with the criminal justice process;
- complainants valued the practical and emotional support provided; and
- the findings support wider evidence that supporting complainants through the criminal justice process reduces attrition and, as a result, increases rates of conviction.

5.36 An evaluation of the national advocacy project in 2018 found that there was high take-up of the service and that complainants were ‘overwhelmingly positive’ about the support they received. Aspects particularly valued included: the extensive support available; its consistency and flexibility; information provision; emotional support; and assistance through the court process. In March 2018 the pilot scheme was extended, allocating £1.7 million to do so. We are currently seeking costings from the Scottish government.

South Africa

5.37 In South Africa complainants do not have access to independent legal representation. The South African Law Reform Commission produced a discussion paper in 2002 rejecting the role of Private Accessory Prosecutors
(PAPs) as exists in Germany, where the private accessory prosecutor and their legal representative have extensive rights at trial.

5.38 However, it does have Thuthuzela Care Centres, situated within public hospitals and introduced as part of a national anti-rape strategy, providing complainants with a range of integrated services including medical care, counselling and court preparation within public hospitals.

5.39 Research links Thuthuzela Care Centres with reduced rates of attrition and increased conviction rates. Indeed, the UN has described it as a ‘best practice model internationally’. The centres deal with around 20% of complainants in South Africa, and the trial completion time for cases dealt with by the centres has decreased from a national average of around two years to seven and a half months.

United States

5.40 At the federal level, complainants are entitled to information, support, compensation and to make a victim impact statement. The prosecutor’s office provides these entitlements, which do not include legal representation.

5.41 Victim advocates — whom I met in the District Attorney’s Office of New York and who impressed me enormously — provide crisis intervention, information and emotional support to complainants, and seek to support them in regard to their physical safety, health, emotional well-being and rights.

5.42 They also support complainants through the criminal justice process, including accompanying them to the medical forensic examination, attending police and other investigative procedures and court. They may carry out roles such as developing a safety plan and supporting the complainant in obtaining a protective order.

Efficacy of non-legal advocates

5.43 Robust evidence on the efficacy of non-legal advocates is limited. However, in general, research suggests that such advocacy supports complainants in their recovery and increases their engagement with other services, including the criminal justice system.

5.44 Potential challenges in relation to non-legal advocates include heavy workloads, which may inhibit their ability to build a relationship with the complainant, logistical challenges and funding issues. In addition, there is no evidence that the presence of a non-legal advocate improves treatment of the complainant by other parties.
Legal representation

5.45 Legal representation is fundamentally different to non-legal representation. Where the former is provided, there are key differences in approaches between jurisdictions with an adversarial system and those with an inquisitorial system.

5.46 In those jurisdictions where the victim is entitled to legal representation, their lawyer assumes the role of keeping them informed about the progress of the investigation and the conduct of the trial. In Northern Ireland there is a statutory obligation under the Victim Charter to do so. However, the complainant requires not merely a recitation of what is happening but an informed explanation of why it is happening and what rights they have to rectify problems arising. The complainant's lawyer passes information from the police and prosecution to the complainant so that a single well-informed channel of communication with the authorities is created for the victim. Moreover, that lawyer will usually carry more weight than the complainant and can ascertain, for example, why logjams and delays in the process are occurring and what can be done to resolve them.

5.47 However, even where the complainant is entitled to pretrial legal representation, complainants often remain unaware of their entitlement, since in many jurisdictions the police are not obliged to inform them of the availability of legal representation.

5.48 In Denmark, by contrast, police must inform the victim of her right to a lawyer at the initial report stage and before charge.

5.49 As indicated above, in continental European countries with predominantly inquisitorial approaches, legal representation for complainants is integral to the trial process. The following are examples.

France and Belgium

5.50 In France and Belgium, the complainant has partie civile status, entitling them to a lawyer to pursue civil claims, which are heard as part of the criminal trial proceedings. The complainant's lawyer has rights akin to those of prosecution and defence counsel, including accessing evidence, cross-examining the defendant and addressing the court.

5.51 In France, this representation is means-tested and funded by the state. In cases where the complainant has to pay for their own lawyer, they may seek reimbursement from the defendant if convicted. However, police officers are not required to notify the complainant of the availability of this funded legal representation.

5.52 The Stern Review (2010) in England, identified this legal representation as important for victims, noting that they can call witnesses on the complainant's
behalf and address the court regarding the amount of compensation payable to the victim.

5.53 Nonetheless, cross-examination in France and Belgium continues to be perceived as harsh, and it is reported that the bench stays passive.

Germany
5.54 The German inquisitorial system is judge-centred and founded on the pursuit of truth, with no distinction made between the prosecution and defence cases, or between evidence-in-chief and cross-examination. The approach does have some adversarial aspects although cross-examination does not happen regularly in practice.

5.55 Complainants have two key state-funded options for legal advocates: legal representation for witnesses and legal representation for private accessory prosecutors, who have similar rights at trial to the public prosecutor. Legal representatives for victim witnesses who are not eligible to participate as a PAP, or do not wish to, can make applications on the complainant’s behalf, including to exclude the public or the defendant during their testimony or to allow video testimony and can be present during the complainant’s questioning. They can object to ‘abusive, compromising, disrespectful, suggestive or leading questions’.

5.56 PAPs — and most complainants adopt this option — have the status of a second or auxiliary prosecutor and have many rights at trial. These include the right to be heard at trial when the prosecution is heard, question the accused, witnesses and experts, object to questions and court orders, and make statements, including a closing statement.

Sweden
5.57 In Swedish (predominantly adversarial) trials, the defendant and witness give narrative-style testimony before being questioned. Cross-examination is permitted, although it is carried out in a gentle, non-confrontational manner.

5.58 Like their German counterparts, complainants in Sweden have a strong procedural position and can be a party to the trial alongside the prosecutor. Complainants in rape cases have the right to court-appointed legal counsel, who has competence to act from the start of the preliminary investigation. The state funds the complainant’s lawyer.

Iceland
5.59 In Iceland, independent legal representatives assist the complainant and protect their interests, may be present during police questioning and suggest questions for the police to ask the complainant. Whilst they may not address the complainant in court, they can suggest questions to the judge.
Adversarial common-law system

5.60 In stark contrast, a general characteristic of the adversarial system is that complainants and witnesses have no standing in the process and no right to legal advice or representation during the trial.

5.61 Research from a number of jurisdictions, including virtually all the complainants to whom I spoke in Northern Ireland, suggests that complainants often do not understand that the prosecutor does not represent them, or why this is the case.

5.62 Thus, independent legal representation is much less common among jurisdictions with adversarial systems.

5.63 An Irish report\(^4\) in September 1998 of a comparative analysis of laws and procedures relating to rape and their impact upon victims of rape in the then 15 member states of the EU found that those women who were legally represented were much more confident in giving evidence and much less hostile to defence counsel. There was a highly significant relationship between legal representation and an overall satisfaction with the legal process.

5.64 That report recorded that, in pretrial in general, there is a distinct lack of information available to victims about the progress of the investigation and about the pretrial procedures.

5.65 The difficulty in accessing information is a significant cause of stress for victims and was commented upon in strong terms by the participants in this study. Of the participants, 11 out of the total sample of 20 experienced difficulties getting information about the progress of the case generally and would have liked to have received information about the workings of the legal process, the role of different legal personnel and the conduct of the trial.

5.66 In particular, great dissatisfaction was found among the participants over the lack of follow-up information from police after they had made the initial report of rape. Some women were not contacted for a number of months after reporting the rape.

5.67 The problem is that in many jurisdictions, nobody is given responsibility for informing the victim. While the police may have done so in practice (particularly in Northern Ireland and Ireland), no formal duty was imposed upon them to provide information and so the level of information received by the victim might vary depending on the individual police officer.

Ireland

5.68 In Ireland, under the Sex Offenders Act, 2001, where a defendant wishes to introduce evidence about the complainant’s previous sexual history (introduced

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Consequently, the Legal Aid Board provides a legal advice service free of charge to (non-means-tested) complainants in prosecutions for rape and certain sexual assault cases.

The legal representation is strictly limited to the application stage, so if the judge grants the application, the complainant is no longer represented.

Rape crisis groups have called for the scope of this representation to increase.

Nonetheless, 2010 research\(^5\) found that in the cases observed, the separate legal representative remained in court during the complainant’s cross-examination, even when their formal role was complete.

Research in 2007 and 2008 showed that separate legal representation was used in one in five sexual offence cases at the Central Criminal Court. It also found that the legal representative continues to play a role once sexual history evidence is admitted, assisting the court to limit the scope of the cross-examination.

The Stern Review in England in 2010 stated that, while the representation is limited, it provides ‘an important recognition’ that complainants must be allowed to participate at times within the trial process as more than witnesses, with a view to protecting their own rights and interests.

In terms of cost, the Department of Justice and Equality in Dublin has indicated to our Review that the Legal Aid Board has advised that 43 legal aid certificates were issued in 2017 to provide for complainant representation in rape trials. For the same period, the total expenditure was €66,389, which includes €7,023 in respect of advice in five cases before they went to trial.

Troublingly, an article in the *Irish Times* in 2017 reported that complainants were being discouraged from contesting these applications as a successful application could lead to a conviction being overturned on appeal.

Moreover, Victim Support in Belfast has indicated that it has been unable to find any example of the service being used to enable a lawyer to attend court with the victim.

The Minister for Justice and Equality has announced a review of the investigation and prosecution of sexual offences. Additional legal representation for complainants is under consideration as part of this review.

A TD introduced the Criminal Justice (Victims of Crime) (Amendment) Bill 2018 to the Dáil on 28 June 2018 to provide for legal representation at the earliest stage of reporting. The Bill proposes to amend the Criminal Justice (Victims of

Crime) Act 2017 by ‘affording relevant information and legal advice to victims of alleged offences involving sexual violence, gender-based violence or violence in a close relationship and to provide for related matters’.

5.80 In particular, the Bill aims to ensure that complainants of sexual or gender-based violence are provided with legal advice by a departmental-funded solicitor ‘advising the victim of the process involved and actions required in order for criminal proceedings in respect of the alleged offence to be brought and heard’. The full extent of what is contemplated will doubtless emerge in the course of the Review mentioned above.

England and Wales

5.81 England and Wales was of particular interest to me. Normally, as in Northern Ireland, no provision is made for legal representation.

5.82 However, in light of the limitations of the ISVA role, Northumbria is piloting the use of Sexual Violence Complainants’ Advocates (SVCAs) for victims of sexual violence. This Home Office-funded project provides a form of independent legal representation at the following stages:

- reporting advice on the process and what to expect;
- achieving best evidence (ABE): attendance at interviews to ensure procedures are followed and victims are aware of their options;
- investigation/disclosure: ensuring the complainant’s Article 8 rights are considered; and
- pretrial/trial: acting in the best interests of the complainant at hearings for the right to cross-examine on previous sexual history and attending trial as a silent party to ensure no sexual history evidence is introduced without a successful application.

Scotland

5.83 Complainants in Scotland have no rights to legal representation. However, an advocacy support service is available.

5.84 The Scottish Executive considered a victim’s legal advocate to represent the interests of a vulnerable witness during cross-examination in 2002. Such a lawyer would be known as an amicus curiae (literally ‘friend of the court’). He would be able to apply for the witness to be allowed to use special measures. Another aspect of the role would be to object swiftly to inadmissible or inappropriate questions. However, the concept was not taken further.
5.85 Complainants have the right to object to disclosure of their medical records to the accused’s defence team to ensure it is restricted to the minimum necessary, the Court of Session has ruled.\(^6\)

5.86 Lord Glennie in the Outer House upheld a petition for judicial review by a woman, WF, who challenged the refusal of legal aid to assist her in objecting to the disclosure of her medical records to the lawyers for the alleged perpetrator. Since her medical records were likely to contain highly sensitive material, any disclosure required her to be heard in compliance with her right to privacy under Article 8 of the ECHR (see above).

**Denmark**

5.87 The Danish model includes some inquisitorial elements although it is adversarial in nature. State-funded legal representation has been extended from initially being available for rape complainants only to now being available to all victims of crime. The police advise the complainant of this right when they report, and the complainant’s advocate can be present at the police interview and ensures they are kept updated about the progress of the case.

5.88 At trial, the complainant’s advocate can be heard only on matters directly affecting them. Their role is only to protect the interests of the complainant. They are unable to call or cross-examine witnesses and cannot make submissions on points of law. They have the right to be present throughout the victim’s examination and cross-examination and can object to questions put by both the prosecution and defence. At sentencing they may call witnesses to address the impact of the crime on the complainant.

**Norway**

5.89 Norway operates a similar model to Denmark. The advocate may also appeal against a decision by police or prosecution to drop the case.

**Australia**

5.90 In Australia, in general, complainants do not have a right to legal representation. This has been rejected in the past due to a belief that the adversarial system, constructed as a two-sided contest between the prosecutor and the defendant, does not allow for participation of the complainant as a third party through a legal representative, without breaching the accused’s procedural rights.

5.91 However, more recently there have been calls to consider implementing complainant legal representation within clearly defined and limited parameters.

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\(^6\) Re W for judicial review of a decision by the Scottish Minister to refuse to make a determination for legal aid in her favour (2016) CSOH 27. See also R(B) v Crown Court at Stafford [2007] 1 WLR 1524 and M v Director of Legal Aid Casework [2014] EWHC 1354 (Admin).
Since 2011 New South Wales has introduced a state-funded legal representation scheme for complainants of sexual offences when addressing the court in regard to the prevention or restriction of disclosure of sexual assault communications. Legal aid is available to eligible complainants who wish to be legally represented. All complainants of sexual assault may access a lawyer free of charge.

Prior to this legislative introduction, a pilot of the scheme in 2009 found that representation prevented or limited access to complainants’ confidential records in 91% of subpoenas. It resulted in ‘very positive’ feedback from complainants, who stated that it had increased their awareness of their rights.

At the International Criminal Court (ICC), complainants’ views and concerns are represented where their personal interests are affected. The Office of the Public Counsel for Victims (OPCV) acts as an independent body and is responsible for providing legal research and advice to complainants as well as acting as legal counsel for unrepresented complainants.

In response to criticism about the treatment of complainants, the US Department of Defense introduced a special victims’ counsel (SVC) programme in 2013 within the civil judicial system. Special victims’ counsel are legal assistance attorneys who have received specialised training and are designated by the judge advocate general. SVCs represent the best interests of their clients as appropriate even when their client’s interests do not align with those of the state.

In Wisconsin, West Virginia and New Hampshire, complainants are entitled to legal representation in relation to applications to adduce sexual history evidence.

In the Canadian adversarial system, defendants’ rights are central to the Constitution, meaning that it is difficult to enforce complainants’ rights. The focus has traditionally been on developing integrated support agencies incorporating health and counselling, as well as legal advocates who deal with the police and prosecution.

Nonetheless, complainants of sexual assault have limited opportunity for participation. They are able to invoke section 7 of the Charter of Rights and Fundamental Freedoms and the Criminal Code to defend their privacy and equality rights and oppose defence applications for the disclosure of their personal records. However, it is worthy of note that, in June 2017, the Ministry of Justice and Attorney General of Canada have introduced legislation that
provides that a complainant has a right to legal representation in rape shield proceedings.

5.99 However, only British Columbia and Manitoba provide complainant legal representation for third-party disclosure applications. In practice, few complainants avail themselves of the opportunity for independent legal representation.

5.100 In 2016 Ontario launched a pilot programme offering vouchers for up to four hours of free legal advice to complainants of sexual offences, who may speak to the lawyer in person or by phone. Under the programme, lawyers can answer particular questions but cannot represent complainants through the justice system.

5.101 In April 2018, Quebec developed a hotline whereby complainants of sexual violence can speak to a Crown prosecutor free of charge. The aim is to encourage more complainants to report offences to the police.

5.102 However, some rape crisis organisations have suggested that complainants need legal advocacy rather than advice.

Arguments in favour of the status quo and no legal representation for complainants

5.103 The main principled argument against according complainants the rights to independent legal representation during the criminal trial is that it is difficult to see how such a scheme can fit easily into the adversarial system in which, in a criminal trial, there are only two parties: the prosecution representing the public interest in the name of the Crown on whose behalf the proceedings are brought, and the accused.

5.104 Lord Justice Auld put the argument against independent legal representation for complainants most strongly in his Review of the Criminal Courts of England and Wales some time ago:

To put an alleged victim whose account the defendant challenges – as will often be the case – in the ostensibly privileged role of an auxiliary prosecutor would be unfair. Whilst the current concern for the plight of victims in the criminal justice process and the steps taken to right it are thoroughly justified, care must be taken, in particular where there is an issue as to guilt, not to treat him in a way that appears to prejudge the resolution of that issue.

5.105 The argument that equality of arms requires that victims be afforded the same protection of their interests as defendants misconceives the principle of equality of arms in criminal proceedings, which are between the prosecution, representing the state, and the defence, and not between the complainant and the defence. The accused is not in the same position as the complainant. It is
because the accused is at risk of losing their freedom that they are entitled to a defence lawyer, whereas the complainant is not and so is not entitled to the same degree of rights protection.

5.106 Complainants have no inherent claim to any special status, rights or representation, and are simply witnesses to an alleged crime. They are witnesses not parties to the proceedings.

5.107 These models of legal representation can be viewed as a direct challenge to the defendant’s rights, as their role is to challenge the conduct and approach of the defence, in contrast to the more therapeutic and practical approach often taken by non-legal advocates. There is a concern that third-party representation elevates private interests to a par with those of the state, contravening criminal justice norms of public prosecution.

5.108 Some commentators are concerned that, with independent legal representation for the complainant, the defendant would face two prosecutors (see in particular the German auxiliary prosecutor approach), disrupting the principle of equality of arms and the right to a fair trial.

5.109 Legal representation for complainants is not necessary as the role of protecting the complainant and their rights can be achieved by complainants’ advisers and support persons, the public prosecutor and the judge. It would risk displacing the responsibilities of the judge and prosecutor.

5.110 It is difficult to predict the costs of legal representation for complainants.

5.111 It may also add to the length of criminal trials.

5.112 Allowing complainants of serious sexual offences to have legal representation is unfair when this right is not available to complainants of other trials.

Is there compelling evidence for the provision of legal representation?

5.113 For many complainants, the absence of a legally trained advocate acting on their behalf is both shocking and upsetting. Complainants are often left feeling vulnerable and exposed, merely seen as ‘collateral damage’ in a process to which they are not a party and have no independent voice. Some research shows that complainants’ fear of mistreatment by the criminal justice system is a factor in under-reporting and that a lack of willingness to testify on the part of complainants can lead to prosecutorial withdrawal.

5.114 Research suggests that providing legal representation to complainants to support them through the criminal justice process can be effective at reducing secondary trauma, reducing attrition and thus may improve low conviction rates. It is the most effective way of supporting complainants during trials.

5.115 The adversarial focus that underpins cross-examination at trial provides a risk of re-traumatisation for complainants. The use of advocates who are legally
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trained means that complainants are likely to see less use of the myths and misconceptions that may be invoked currently by defence teams. These are damaging on many levels.

5.116 The use of independent, legally trained advocates makes it easier for complainants to access the specific information that they need regarding the trial. Both prosecutors and witness service supporters are working within tight guidelines regarding contamination of evidence or alleged coaching. Lack of information is often cited by complainants as a primary complaint with criminal justice engagement and they can often feel unprepared for the nature of questioning.

5.117 When complainants are offered this level of support, it can lead to them being a more effective witness. The stress that complainants are under when giving evidence can be reduced when a legal advocate is present as they are more confident in their presence.

5.118 The key study prepared for the Dublin Rape Crisis Centre, referred to above, is widely cited in the literature and although conducted in 1998, the study’s key findings still hold strong.

5.119 A complainant’s legal advocate could challenge the appropriateness of questioning and ensure that the complainant’s rights under the EU directive and Northern Ireland Victim Charter to dignified and respectful treatment are upheld alongside their Article 3 and Article 8 rights. Rape trials, due to their very nature, have a greater risk of impacting on the rights of the complainant. Whilst they may have no inherent claim to special status, the human rights and dignity of the complainant must also be ensured throughout the process. In the absence of any actor whose key role is to safeguard these rights, complainants are rendered vulnerable.

5.120 There is evidence in the literature to show that court-related stress can make complainants more vulnerable to suggestion by counsel as a result of retrieval failures of short-term memory, which reduces the quality of testimony. In addition, this causes incomplete description of events and an increase in errors and inconsistencies in testimony, and testimony can take longer to provide.

5.121 One academic report argues that giving complainants procedural rights in their case can empower them and provides an opportunity to remove a perceived hierarchy between the active party and the passive complainant. She suggests that legal representatives for complainants would increase the degree of agency that complainants possess.

5.122 Arguably, there is an imbalance in the current system: defendants are given individual legal representation, which includes ability to call character witnesses

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and challenge the complainant directly through counsel. The complainant is not given any ability to be considered a party in proceedings and therefore cannot access character witnesses even though character is so often used by defence when discussing behaviours of complainants. An interesting study in Scotland\textsuperscript{8} found that prosecutors were reluctant to shield witnesses from character attacks as they feared to do so would convince the jury that the prosecutor was hiding something.

5.123 There are several points in the process where the voice of the victim could be heard, which may improve their experience and help to ensure their rights are protected. Pretrial this could include representation at interview stage, when decisions are being made to change charges, special measures hearings, applications for previous sexual history and discussions regarding disclosure. At trial their role could protect their rights whilst being examined by both parties as well as ensuring adherence to previous applications.

5.124 Whilst this will mean complainants in serious sexual offences being treated differently to other complainants, complainants of sexual assault may face a higher risk of re-traumatisation through the criminal justice process than in other crimes. There may be greater and more complex needs of complainants of sexual violence, with many suffering trauma and negative implications for their health, relationships and employment.

5.125 Whilst the trial judge and prosecution counsel can be relied on to ensure a complainant is fairly treated, arguably, safeguarding the complainant’s rights is not the main role of the courts or public prosecutor, who must also consider the public interest and the accused’s right to a fair trial. As a result, it is argued that they cannot give the complainant’s interests due attention at all times.

5.126 There is a belief widely held by complainants and victims’ groups that it is difficult for judges to balance their duties towards the complainant and that excessive intervention may form grounds for an appeal if a defendant believes they have been unfairly treated. In addition, there is a general acceptance among the judiciary of the importance of allowing counsel to carry out their role fully.

5.127 The counterargument against the danger of an open-ended increase in costs by admitting legal representation on behalf of complainants is threefold:

- Experience in Ireland has shown that a limited admission of legal representation is not expensive. Such hearings are held at a preliminary stage before the actual trial, are tightly focused and time-limited.
- It could limit inappropriate and inadmissible questions and objections to such questions, thereby reducing trial length.

• Such costs as may arise may be offset to an extent through savings made elsewhere. For example, fewer non-legal advocates for complainants may be required, and there may be longer-term savings for the health sector if legal advocates have the effect of reducing traumatisation for complainants.

5.128 As chapter 13, ‘Voice of marginalised communities’, reveals, there are particular difficulties for those with disabilities with understanding legal documents, terms and concepts.

5.129 In any event, the arguments against a general right to legal representation for complainants in criminal trials do not mean that complainants should be denied legal representation in particular situations where public prosecutors may be unable to protect their legitimate privacy interests.

5.130 Where applications are made for third-party disclosure, for example, prosecutors may be unfamiliar with the arguments the complainant might wish to raise to protect their interests under ECHR Article 8.

5.131 A similar situation may arise when applications are made to cross-examine on sexual history evidence. Here the focus of the prosecution and the court is on identifying the relevance of the proposed line of questioning, and without legal representation complainants’ privacy interests may be adversely affected. In both of these situations the case for legal representation is stronger.

Discussion

5.132 I consider that a measure of publicly-funded provision of legal advocate representation for complainants is necessary and would represent yet another confidence-building block for complainants.

5.133 Our extensive and detailed research has shown that the concept of legal representation for complainants in serious sexual offences is neither novel nor uncommon in both inquisitorial and adversarial systems. In truth, we in Northern Ireland appear to be one of the very few jurisdictions where at least discussion of such a concept has been ignored.

5.134 It is symptomatic of such apathy that the Legal Services Agency identified only one occasion when exceptional funding was sought and granted to enable a complainant to personally challenge the right to their medical rights being disclosed contrary to Article 8 of the ECHR, the matter always seemingly being left to the PPS, notwithstanding developments in Scotland.

5.135 The right to have legal representation to oppose cross-examination on previous sexual history is a further example of where such a step could radically address another widespread fear held by complainants. In fact, this right should only rarely arise and would not be expensive as the experience in Ireland has shown. Moreover, the presence of counsel, at a time-limited pretrial hearing to determine this issue provided it is not raised at trial at the last minute, would
highlight the issue in a manner that would help to restrain the perceived abuse of this restraint during trial.

5.136 However, I consider the need for a measure of legal representation goes beyond these two situations. I endorse entirely the proposal in Ireland (and echoing developments in Denmark etc.) that legal advice should be available from when the matter is first reported to the police up until trial.

5.137 The non-legal advice available, although providing invaluable support, is simply inadequate when the need for explanation as to the highly complex legal process in these cases arises. I share entirely the view reportedly expressed by the current chair of the Criminal Law Committee that solicitor practitioners are ideally placed to provide wraparound support to complainants. A lawyer could meet the complainant in an office environment before the trial to talk about legal issues and provide an overview of the process. Solicitors could offer this service in a way that does not impact on the running of the case and would be acutely aware of the dangers of alleged coaching in a way that may not be in the gift of persons without legal training, who often feel constrained in the manner they give advice.

5.138 Moreover, when advice is being given on disclosure/previous sexual history etc. the presence of professional privilege assures the complainant of unchallengeable confidentiality.

5.139 This service would, through a single channel of communication to the complainant and the authorities, allow the complainant to obtain legally informed information about their rights and what is going on during the process.

5.140 In addition, however, the presence of a solicitor on behalf of the complainant at the ABE, raising queries on their behalf to the police and the PPS about such matters as delay/progress of the case, reasons why adjournments are being sought, the nature of special measures open to them, meeting with Crown counsel prior to trial, notice of and presence at preliminary and Ground Rules Hearings and what they involve etc. will all apply entirely appropriate pressure to the PPS so as to inspire complainants with greater confidence in the whole system.

5.141 I consider that public knowledge of such a facility and an obligation on the PSNI (as in Denmark) to inform the complainant of its existence at the very outset of the process would be yet another confidence-building block to challenge the under-reporting and attrition rates that currently beset the system.

5.142 The cost of this latter proposal could, of course, be capped (as occurs in Canada) with a limited number of hours available subject to a provision for exceptional circumstances.
5.143 A possible variation on this legal advice coming from solicitors in private practice could be to utilise the services of in-house lawyers from the voluntary sector. For example, a trained solicitor working for a charity on a flat annual salary could be used to provide the level of advice referred to and would employ counsel when something required a challenge before the court itself. For my own part, I enter some doubts as to whether such lawyers would have the necessary day-to-day experience in ongoing trials so as to give practical legal advice to the complainants, whereas those in active private practice will undoubtedly have such skills.

5.144 Great care would also need to be taken to ensure that there was not an overlap with current support services and the advocacy services, which I understand the Department of Justice is intending to introduce. Legal representation would be strictly confined to legal issues, and rights arising and fees would be paid only for that work.

5.145 In its most ambitious form, the role would encompass legal advice, advocacy and representation from reporting to trial, appeal and compensation. However, few if any jurisdictions provide this (with the possible exception of some of the Scandinavian countries). At this stage I am not currently minded to recommend such a full roll-out of legal representation, albeit I recognise the strength of the logic and the argument for it.

5.146 My hesitation springs from the following matters:

- The costs of solicitor and counsel sitting through an entire trial in every serious sexual offence or, indeed, even every rape trial would be prohibitive in an era of financial austerity. The recent high-profile rape trial in Northern Ireland lasted over 40 days, albeit that was atypical.
- The presence of more lawyers acting on behalf of the complainant with rights to raise issues or even to cross-examine on behalf of the complainant has the potential not only to complicate an already complex process but to protract the whole trial.
- The presence of counsel or solicitor for a complainant would be confusing for a jury, be incongruous in an adversarial system where the two parties are the accused and the state, and have the appearance of two prosecutors rather like the German PAP system, where the complainant’s lawyer has the status of a second or auxiliary prosecutor.
- There is no reason why all the information that the complainant requires and the issues they wish to raise cannot be dealt with in a timely, comprehensive and cost-effective manner in pretrial preliminary and robust Ground Rules Hearings. The attendance, if necessary, of a lawyer on behalf of the complainant at these hearings would lift the profile of any such issues, and I am confident that these rulings would be robustly defended by judicial intervention at the trial.
5.147 Experience shows that our Crown Court judges are acutely aware of these issues and, together with prosecution counsel, can be depended on to take these issues forward on behalf of the complainant at trial.

5.148 I add one rider to this. I note that the pilot scheme in Northumbria contemplates a lawyer on behalf of the complainant attending trial as a silent party to ensure no sexual history evidence is introduced without a successful application. This is in the wake of some informed thinking that too often the prohibition on cross-examination about previous sexual history is subtly sidestepped in many trials. This presence might be confined, for example, to the evidence-in-chief and cross-examination of the complainant. This pilot should be carefully monitored (doubtless there will be a review of the project) to ascertain whether my fears are confounded and in that event the issue can be revisited.

5.149 Finally, four necessary adjuncts to this proposal are as follows. First, that there be consistency in the attendance of the same Crown counsel (either junior or senior counsel) during the various ground rules/preliminary/committal hearings as well as at trial.

5.150 I am informed by the PPS that its policy is that the complainant should meet the prosecuting counsel not less than one to two weeks in advance of trial. Regrettably, that has not been the experience of several of the complainants to whom I have spoken and who met counsel only for the first time on the morning of trial.

5.151 I appreciate that exceptional circumstances can arise such as illness or another trial overrunning. However, greater emphasis must be placed on this requirement so that counsel, for example, does not heedlessly take the risk of another case overrunning in cases of this genre by passing over the papers at least two weeks in advance if there is the slightest risk of such an occurrence. The PPS should take a serious view of where late passing on occurs in serious sexual offence cases. Complainants find the late arrival of hitherto unknown counsel on the morning of trial extremely disconcerting and unsettling at a time when they are feeling vulnerable, especially where last-minute developments occur in the case requiring detailed explanation.

5.152 Secondly, we should coordinate early advice support and borrow from the Scottish experience where in December 2013 the Scottish government, Rape Crisis Scotland and Police Scotland launched Support to Report, a 24-hour advocacy support service to support complainants at the initial stage of reporting to the police. It aimed to improve available support, reduce attrition and improve experiences of the criminal justice process. It quickly grew to include support provided before, during and after reporting to police, including at trial.

5.153 Thirdly, as the Legal Services Agency does operate an advice and assistance (green form) scheme, and it may be that, with some creative thought, this
scheme could be extended or appropriately adjusted to provide the kind of advice to complainants throughout the process from reporting up to, but not including, trial, which I am now recommending.

5.154 Fourthly, this proposal for separate legal representation would be funded through legal aid. A decision would have to be taken if this were to be means-tested. My preference is that it should not, but I am open to dissuasion. Such steps may require amendments to primary legislation to allow criminal legal aid certificates to be awarded to non-defendants or, alternatively, affirmative secondary legislation to bring the representation within the scope of civil legal aid.
Proposed recommendations

45. Publicly funded legal representation should be granted to complainants in all serious sexual offences in the following circumstances:

- to afford relevant information and legal advice throughout the process up to the commencement of the trial;
- where complainants wish to exercise the right to appear in court to object to disclosure of their medical records to the accused’s defence team or to ensure it is restricted to the minimum necessary; and
- where they wish to appear in court to object to the introduction of their previous sexual history.

46. That consideration be given to extend legal representation during evidence-in-chief and cross-examination at the trial itself after completion and assessment of the current pilot scheme in Northumbria.

47. An obligation to be placed on the PSNI to inform the complainant of the existence of such legal advice at the very outset of the process.

48. The Public Prosecution Service should make it a term of counsel’s retention that, save in very exceptional circumstances, the same counsel (either junior or senior counsel) shall attend any preliminary/ground rules/committal hearings as well as the trial itself.

49. The Department of Justice should fund a Support to Report 24-hour advocacy support service, similar to that in Scotland, to support complainants at the initial stage of reporting to the police.
A review of the law and procedures in serious sexual offences in Northern Ireland
Chapter 6

Myths surrounding serious sexual offences
A review of the law and procedures in serious sexual offences in Northern Ireland
When you watch court cases you really do have empathy with the victims because you see how human it is to change your story. All the things that disqualify your account to a court are what we do as human beings.

Gayle in Consent
a play by Nina Raine

Issues
- Do rape myths exist and who holds them?
- If they exist, is there evidence that they pollute jury verdicts despite the directions of the judiciary?
- How should we best address the problem?

Current practice
6.1 Judges in Northern Ireland recognise the potential dangers of what may be the widely held presence in our society of misconceptions, myths and stereotypes about rape and other sexual offences.

6.2 Hence, conventionally, in the course of the closing address to a jury in such trials, judges address this mischief.¹

6.3 In Northern Ireland, in the absence of judicial templates in our Crown Court Bench Book, we borrow from templates provided to the English judiciary in their Crown Court Compendium.

6.4 Judges point out to jurors that experience shows that a number of myths are erroneously held and should be dispelled.

6.5 It reads:

The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

6.6 Additionally, the potential for expert evidence to be introduced to address the danger of stereotypical thinking has been a matter of debate over the years but has always to date been generally resisted in Northern Ireland and the rest of the UK on the basis that it invites elongated, costly and witness-rich procedures that over complicate an already complex set of offences.

Background
6.7 There appears to be a growing recognition that rape myths are impacting outcomes. Hence, the Home Office in London has confirmed that it is scoping new policies with a view to educating the public on rape myths and the Judicial College is planning to pilot a new jury information video that addresses myths.

6.8 Sadly, many people — men and women — still harbour often unspoken views about appropriate behaviour for women and men: for example if an individual has given themselves freely to that person in the past or has consented previously to that individual against whom they are now making an allegation of rape, they have gone some considerable way to forfeiting the right of refusal.

What are rape myths?
6.9 The Public Prosecution Service (PPS) Policy for Prosecuting Cases of Rape states that prosecutors are aware that there may be myths and stereotypes around rape. It notes that the PPS does not allow these to influence decisions and provides a number of examples, namely that:

- rape occurs between strangers in dark alleys;
- victims provoke rape by the way they dress or act;
- victims who drink alcohol (especially whilst in the company of others or men) or use drugs are asking to be raped;
- rape is a crime of passion;
- if victims did not scream, fight or get injured, it was not rape;
- you can tell if someone ‘really’ has been raped by how they act;
- victims cry rape when they regret having sex or want revenge;
- only gay men get raped/only gay men rape men;
- sex workers cannot be raped;
- a woman cannot be raped by her husband/partner;
- victims who have remained in an abusive relationship are responsible for any rape that follows;
6.10 The literature and the legal authorities on the subject notes that a multitude of rape stereotypes are in existence. Additional examples not within the PPS policy include that some consensual sexual activity is consent to all sexual activity rape victims will be bruised, particularly in the genital area; threats of violence will be used; a woman can always withhold consent no matter how drunk she is; genuine victims will always report rape immediately, give a thoroughly consistent account of events and display emotion when recounting them; and an attractive male does not need to have sex without consent.

6.11 Alcohol presents substantial problems for jurors. A recent piece of research in July 2018 revealed that jurors often negatively evaluate complainants making allegations of rape when those complainants were intoxicated at the time of the assault.

6.12 It is, therefore essential that legal practitioners have effective methods of ensuring that jurors use evidence of intoxication for the legally permissible purpose, which is to determine the complainant’s cognitive capacity to consent.

6.13 A further rape myth is that false allegations are very common, with many believing that they make up a large proportion of rapes reported to the police.

6.14 Although neither the Department of Justice (DoJ) nor the PPS hold any figures on false accusations of rape, they assert that such cases rarely come to court.

6.15 When such a prosecution does occur the publicity attendant upon it is often wholly disproportionate to the rarity of the offence and serves only to feed the myth.

6.16 Similarly in England and Wales, the Crown Prosecution Service (CPS), said it does not collate figures on how many individuals have been prosecuted for allegedly making false rape allegations. A CPS review over 17 months from January 2011 to May 2012 revealed that there had been 5,651 prosecutions for rape and 35 prosecutions for making false allegations of rape, together with 111,891 prosecutions for domestic violence and six for making false allegations of domestic violence. There were also three prosecutions for false allegations of both rape and domestic violence. Furthermore, the report shows that a significant number of these prosecutions involved young, often vulnerable people. About half of the cases involved people aged 21 years of age and under, and a number involved people with mental health difficulties. In certain instances, the person alleged to have made the false report had undoubtedly been the victim of some kind of offence, even if not the one that they had reported.

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6.17 It will be seen, therefore, that there were only a very small number of individuals prosecuted for having made a false complaint.

6.18 However, recently the CPS has been criticised by MPs for its exceptionally aggressive prosecution of false rape claims, which they warn could deter victims from reporting rape.

6.19 It is also inaccurately believed that many of the allegations of rape or serious sexual assault are fuelled by a desire for compensation. In fact, as the figures for criminal compensation show (see appendix B below) most claims are for children under 18 and only a minority are by adults.

6.20 The purpose of these myths and stereotypes is thought to be to move blame from the perpetrator towards the alleged victim. It is argued that they also serve to minimise the harmfulness of rape, particularly in cases involving an intimate partner.

Male rape myths

6.21 Studies suggest that a number of factors mean that sexual violence perpetrated against men receives less attention than against women and that men are less likely to report such offences.

6.22 In line with rape myths applying to women, it is argued in a recent study (albeit one confined to university students) that those myths applying to men are often deeply rooted in traditional gender norms and stem from the same patriarchal structure.

6.23 These gender norms hold that men possess traits such as independence, toughness, power, aggressiveness, control and dominance, while victims of rape are often portrayed as weak, defenceless and feminine. Myths in the study included:

- ‘real’ men would not put themselves into a position where they could be raped;
- men cannot be forced to have sex against their will;
- sexual assault of men by women is improbable, as women are sexually passive and men sexually dominant and assertive;
- only gay men can be raped, or rape other men (the article notes that media coverage of allegations against Kevin Spacey and their conflation with homosexuality has contributed to this myth);
- men are less affected by sexual assault than women; and
- male victims show lower levels of masculinity.

6.24 An earlier US study identified a high prevalence of sexual victimisation among men, in many circumstances similar to that experienced by women. It
highlighted a number of factors that perpetuate misconceptions about male rape:

- ideas that female-perpetrated abuse is rare or non-existent;
- a view that men welcome all sex;
- a notion that ‘real’ men can protect themselves;
- an idea that gay male victims likely ‘asked for it’;
- perceptions that male victims experience less harm; and
- male victims sometimes experience physical sexual arousal during non-consensual sex, which may add to the misapprehension that the activity was welcome.

Who holds these myths?

6.25 Research identifies a number of groups in society that are more likely than others to hold rape myths.

6.26 As we found in interviewing complainants, many women who have experienced rape are more likely to interpret their own behaviour in line with these myths and may for years after blame themselves for not resisting during the offence, or even may not label their experience as rape.

6.27 The groups that research identifies as more likely to hold rape myths include:

- men in comparison with women although some women also hold them;
- older people in comparison with their younger counterparts;
- people from less well-off backgrounds; and
- individuals who hold negative attitudes towards women and other groups (such as people of different races, sexual orientation, class).

6.28 Research has also claimed that participants with high levels of rape myth acceptance tend to allow this to influence their judgements. Indeed, the evidence suggests that rape myths can influence every stage of the criminal justice process.

6.29 Interestingly, a 2018 study from Denmark suggests that the majority of reported rapes are closed during the police investigation. Results of that research into Danish police indicated that prominent characteristics of rape stereotypes significantly influenced whether the case was continued for prosecution.

6.30 Rape myths typically apply to adults but not typically to offences involving children. Research suggests that aspects of a child’s moral character, reputation or risk-taking are irrelevant in seeking justice.

6.31 While rape myths are often rooted in traditional gender norms, there is also evidence of their use by defence counsel in sexual offence trials involving male complainants.
In summary two points have to be made. First, a note of caution. Most of the relevant research comes from work with mock juries in England and Wales, and some caution is required in extrapolating from this experimental context to a real courtroom. Secondly, substantial cross-jurisdictional research literature on the topic, including a recent doctoral thesis\(^3\) that has been released to the Gillen Review, reveals that although a range of factors contribute to challenges in obtaining convictions in sexual offence cases, such as the burden of proof, the complexity of cases and a frequent lack of corroborating evidence, rape myths and stereotypes have great potential to influence jurors in their determinations.

In short, those who endorse rape myths tend to judge complainants harshly and defendants leniently.

Other jurisdictions

We have considered practice in relation to rape myths in two Australian states, Canada, England and Wales, New Zealand, Norway, Ireland and Scotland.

Presence of jury myths

Our researches reveal that within the courtroom judicial directions and expert testimony are the main approaches to dispelling rape myths in the jurisdictions considered.

A further approach relates to education and awareness raising in wider society.

A very troubling finding emerged to the effect that there is substantial evidence suggesting that many jurors struggle to understand and apply judicial directions.

Much of the research suggests that even when judges employ specific legislative language with the aim of dispelling rape myths within trials, such myths and stereotypes continue.

For example, in Victoria, Australia, changes to jury directions on consent introduced in 2006/07, which included provisions to dispel myths around lack of resistance or injury, or previous consensual sexual activity, appear to have had very little effect on the running and outcomes of rape trials, with conviction rates at historical lows.

Court observations in England and Wales found no link between the use of myth-busters and conviction rates, although the evidence was limited to 28 trials.

The observations found that the defence strongly undermined any challenge to rape myths by the judge or prosecution and that the myths remained relevant to juries through a focus on identifying inconsistencies and discussions around rationality and normality.

6.42 These issues were further complicated by the use of rape myths by the prosecution when they supported the complainant’s evidence — for example, where the complainant reported immediately and displayed distress when giving evidence. Such use could be viewed as legitimising the use of rape myths by the defence.

6.43 Nonetheless, mock jury research in England and Wales suggests that directions at least have the potential to help to educate jurors about rape myths.

6.44 In Ireland, research has shown that rape myths are prevalent among the public and that consequently there is significant potential for juries to include those influenced by rape stereotypes.

Expert evidence

6.45 Expert testimony as part of the court procedural attack on rape myths has been the subject of many research papers. Literature consistently suggests that the role of expert testimony should be, where it is permitted, to provide a neutral summary of relevant research and to leave it to the jury to determine whether an adverse inference is justified given the facts of the individual case.

6.46 Concerns around expert testimony include that it could lead to a lengthy and costly ‘battle of experts’. The counterargument is that if the expert limits their testimony to minimal claims for which there is consensus in the scientific literature, this is unlikely to lead to such a battle.

6.47 A leading academic report asserts that, provided the expert does not meet the complainant and that their testimony is not case-specific, there would not be a question of the expert encroaching on the jury’s role by appearing to vouch for the complainant.

6.48 Jury research in England and Wales found that the mock jurors responded in broadly similar ways regardless of whether an expert or the judge presented educational guidance. Although caution is required in interpreting the findings in relation to a real trial, the authors note that the research findings ‘give cause for optimism’ regarding the ability of general expert testimony and/or extended judicial direction.

6.49 In New Zealand, section 25 of the Evidence Act 2006 provides for expert evidence to be given in court. The Supreme Court in that country has confirmed the legitimacy of using expert evidence to address mistaken beliefs and assumptions in sexual violence cases. The court held that there should be a focus on the live issues at trial, it should not be unduly lengthy and it should be ‘expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial’.

6.50 However, by 2015 this had been provided only in cases involving children. Such is the approach encouraged by Sir Brian Leveson in his recent Review of
Efficiency in Criminal Proceedings. He encourages identification for the jury of the issues in the case by both defence and prosecution before the evidence is called and the giving of directions at points in the trial when they are of most use to the jury.4

6.51 The Law Commission in New Zealand has proposed that expert evidence to address misconceptions about sexual offences should be considered on a case-by-case basis, in light of whether there is an appropriate person to give the evidence and whether the prosecution considers it necessary.

6.52 It also notes ‘a government-level initiative to undertake an expert evidence programme including resourcing, monitoring and staffing is worthy of consideration to deal with the shortage of experts willing to provide such evidence given the time commitment’.

6.53 The New Zealand Law Commission noted that it required further research into the misconceptions that affect jurors in sexual offence cases and how they may be addressed through judicial direction prior to making such a recommendation.

6.54 The New Zealand Court of Appeal has suggested that admitting an agreed statement would counteract the need for an expert.

6.55 In the US, the prosecution in rape cases occasionally offers a psychological expert to provide evidence on general rape myths or the victim’s state of mind following the alleged offence.

6.56 This testimony is admissible in light of the evidence that most jurors accept rape myths and because judges often believe it is relevant and helpful to jurors in their deliberations.

6.57 Nonetheless, testimony involving general or generic rape myths is usually ruled inadmissible. The exception to this is most often found, for example, in the states of New York and Massachusetts where in children’s cases expert testimony is regularly called to explain why children often do not complain etc.

Statutory directions

6.58 Across the jurisdictions the status of judicial directions used to address rape myths varies, ranging from statutory directions to illustrative guidance.

6.59 In New South Wales and Scotland, legislation imposing statutory direction (which is currently being proposed by the Department of Justice in Northern Ireland) requires judges to give specific directions in these cases.

6.60 The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 requires the judge to give jury directions in trials on indictment for sexual offences where certain conditions apply (section 6 of the Act). The directions form part of the judge’s

4 An approach now formally adopted in the Criminal Procedure Rules at 25.14
charge to the jury, and there is no discretion for earlier implementation. The wording of the directions remains a matter for the particular judge.

6.61 Certain exceptions apply to these provisions where the directions are not relevant to the facts of the case.

6.62 A number of concerns about this legislation in Scotland surfaced in parliamentary consultations on the Bill and currently amongst senior judiciary. The suggestion is that these provisions eroded the separation of powers and would set a precedent in terms of parliament informing judges how to direct juries.

6.63 There were also concerns around the timing of directions (during the charge after all the evidence has been heard) and their wording. The legislation provides no discretion for the judge regarding when to give the relevant direction.

6.64 Some research suggests that directions issued at the end of the trial may be ineffective in overcoming suspicion and mistrust built up during the trial’s evidence.

6.65 These directions are similar to those in New South Wales where the Criminal Procedure Act 1986 requires judges to give a warning to the jury in certain sexual offence proceedings where evidence is given or a question asked of a witness that tends to suggest a delay in or a lack of a complaint.

6.66 The wording of the directions remains a matter for the judge.

6.67 In Victoria, the Jury Directions Act 2015 simply provides for jury directions on the grounds it promotes shorter and more tailored directions than those on a mandated basis.

6.68 In regard to sexual offences, the prosecution or defence counsel may request that the trial judge warns the jury that evidence of any of the following alone does not amount to consent:

- the person did not protest or physically resist;
- the person did not sustain physical injury; and
- on any particular occasion the person consented to another sexual act with the accused or someone else.

6.69 Interestingly, in addition, the Jury Directions Act 2015 in Victoria:

- Precludes the judge, prosecution or defence counsel from saying or suggesting that complainants in sexual offence cases are unreliable witnesses or that complainants who delay or do not make a complaint are less credible than other complainants, or that they should be scrutinised more carefully. It abolished common-law rules previously established that allowed juries to doubt complainant credibility due to delays in reporting.
• Provides for a balanced direction, stating that in a particular case the counsel or the judge may say or suggest that the complainant’s delay or lack of reporting may affect their credibility provided there is an evidential basis.
• Provides for the judge to direct the jury in this regard accordingly before any evidence about delay is adduced, if they believe that there is likely to be evidence in the trial that suggests that the complainant delayed or did not make a complaint (and after hearing submissions from prosecution and defence counsel).

Discretionary directions

6.70 In Ireland and New Zealand, directions are also at the judge’s discretion without any legislative compulsion.

6.71 In Canada the Supreme Court (but not the legislature) has held that the judge should inform the jury about rape myths such as the timing or lack of a complaint of rape. Nonetheless, rape myths and stereotypes persist in Canada according to research in that country.

6.72 There is also evidence in Canadian research that victim-blaming misconceptions about rape influence the justice system, including the police, the defence, prosecutors and the courts.

6.73 Provisions for directions in sexual offence trials are not statutory in England and Wales.

6.74 However, The Crown Court Compendium (last updated in June 2018) highlights a ‘real danger’ that juries will make and/or be invited by advocates to make unwarranted assumptions and emphasises the importance of a judge alerting the jury to guard against this.

Timing of directions

6.75 Our research suggests that timing is an important factor in the delivery of directions.

6.76 In most jurisdictions, including Northern Ireland, directions are conventionally given following the evidence and immediately prior to deliberation of the jury, which may result in jurors forming an opinion on the case prior to the judicial instruction in the applicable law.

6.77 In addition, there is a widely held belief that juror reaction to the opening statements of the case is a key determinant in juror attitudes. Some authors suggest that pretrial directions may, therefore, be more effective.

6.78 A study in Victoria, for example, found that where the judge gave direction-influenced decisions about key pieces of evidence discussed at the pretrial
hearing that were then excluded, this inhibited the use of many of the rape myths that may have overwhelmed the trial.

6.79 The trial then had less of a focus on negative narratives, meaning that directions given at the end ‘had much less work to do’. It concluded that the end of the trial is too late to disrupt problematic narratives applicable in law.

6.80 In England and Wales, *The Crown Court Compendium* states that relevant directions may be given at the beginning of the case or as part of the charge to the jury and notes that it is advisable to discuss the proposed direction.

6.81 Training is an important concept. An interesting proposal, albeit not a recommendation, emanating from the Law Commission in New Zealand (and which quite independently was proposed by a number of consultees in Northern Ireland) was to provide training sessions to educate jurors after they have been empanelled using information packs covering the problematic features that sometimes arise in sexual offence cases and noting what is or is not relevant to the fact-finding exercise.

6.82 It also highlights a potential challenge around how best to frame such information at the beginning of the trial to avoid reinforcing false information or causing jurors to become biased against the defendant.

**Awareness Raising**

6.83 Public education in other jurisdictions is another potential approach to addressing rape myths and misconceptions.

6.84 Amnesty International notes that it is the voluntary sector organisations that mainly conduct education and awareness-raising regarding sexual violence, and that this is not a priority in schools. While the curriculum of primary and post-primary schools includes the right to bodily integrity and freedom from sexual violence, research has shown that the majority of students do not receive such education in practice.

6.85 A programme of public awareness of sexual violence has been introduced in Ireland. The National Office for the Prevention of Domestic, Sexual and Gender-based Violence is conducting a six-year awareness campaign through television, radio, outdoor and internet advertising. The campaign aims to change societal behaviours and attitudes, and to ‘activate bystanders with the aim of decreasing and preventing this violence’.

6.86 Relationships and sexuality education (RSE) within schools provides an avenue for raising awareness, and research suggests that in order to be effective, this should provide an evidence-based narrative that counters traditional gender norms.
6.87 The Minister for Education and Skills in Ireland announced on 3 April 2018 this a major review of relationships and sexuality education in schools.

6.88 The minister has asked that the review specifically consider a number of areas including:

- consent, what it means and its importance;
- developments in contraception;
- healthy, positive sexual expression and relationships;
- safe use of the Internet;
- social media and its effects on relationships and self-esteem; and
- LGBT+ matters.

6.89 In Scotland, shortly before the introduction of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, a public awareness campaign was launched to raise awareness of responses to rape: I Just Froze. It seeks to challenge and change myths and stereotypes about the ‘normal’ way in which people react to rape.

6.90 I halt this analysis of other jurisdictions to record that Northern Ireland is as adept as anyone at setting up public campaigns on social issues to change societal attitudes, and there exists ample positive blueprints for how I believe a similar public campaign can be launched in a timely fashion in Northern Ireland on the subject of rape myths, consent and the reality of serious sexual offences.

6.91 There is a history of successful public social education being conducted by the government in a wide variety of areas — for example, drink-driving, use of seat belts etc.

6.92 The Department of Justice is running a three-year promotional campaign on domestic violence and abuse to change societal attitudes and behaviours. It aims to encourage potential victims, or other members of the public, to come forward to report incidents of domestic violence and abuse. It also proposes to provide information on how to report incidents and the various ways they can seek help and support from within the criminal justice system.

6.93 In the US, there is evidence of persistent beliefs in rape myths, which may be held by police, judges, juries, counsel, the media and victims themselves.

6.94 The US operates a jury selection process whereby the prosecutor, defence attorney and judge question each potential juror about whether they or someone close to them have been victims of a crime similar to that alleged in the case. In addition, they ask questions in relation to the case in question.

6.95 In discussing this issue with judges in New York and Boston, I found that they regard the rigour with which they select jurors as a useful antidote to jurors with rape myths serving on the cases in hand.
However, research in the US indicates that rape myths continue to influence juries, suggesting that forming an unbiased jury in sexual offence cases is extremely challenging. Issues include untrained prosecutors who do not know how to conduct the selection process and judges allowing insufficient time for questioning to identify juror bias.

Researching with real jurors

However, I complete this section of research into other jurisdictions with reference to very important and relevant current research that is taking place in England and Wales with Professor Cheryl Thomas, a leading academic expert on juries and jury research.

This research is in the course of being extended to Northern Ireland, where we are not alone in being bereft of empirical evidence with real jurors’ attitudes to rape, whether these attitudes have any bearing on actual verdicts in rape cases and how jurors may best be informed in rape cases.

Research with actual jurors is not easy and is time-consuming, so researchers often try to replicate the jury experience with proxies or volunteers, but there are fundamental flaws with this approach. Jurors are drawn randomly from members of the public on the electoral roll — and jury service is not voluntary. Research has shown that many (if not most) people who do jury service would not do so if it was voluntary (although they have a positive experience once they do it).

Therefore, research that attempts to simulate jury trials with volunteers, not real jurors, cannot provide reliable evidence of what real jurors’ attitudes to rape are or how real juries decide rape cases.

This concept of real jury research is often misunderstood. Whilst it is illegal under section 8 of the Contempt of Court Act 1981 to speak to jurors about what was said in the jury room about the case under consideration, there is no prohibition on learning how a decision was made by speaking to actual jurors.

The government response to a recent petition to parliament — ‘All jurors in rape trials to complete compulsory training about rape myths’ — has coincided with Professor Thomas’s research.

Ensuring that the balance is struck between jurors understanding rape myths, without encroaching on the rights to a fair trial of the defendant, is not a straightforward task. The President of the Queen’s Bench Division in England and Wales, Sir Brian Leveson, in his capacity as head of criminal justice, is working with other senior criminal judges to consider the most effective way of providing sufficient information to jurors sitting on a rape trial.

This research has never been undertaken before and is a complex task, which hopefully will be completed at the end of this year. Professor Thomas will gather
data from actual jurors at a range of courts around the country. This will give the senior judiciary a detailed insight into how jurors may best be informed in rape cases.

6.105 Finally, as part of her research in England and Wales, Professor Thomas has led a project to create a film made with judges in England and Wales called *Avoiding Rape Myths and Stereotypes: A Guide for Jurors*. It will be tested with real juries over the next few months at the request of Sir Brian Leveson.

Arguments against change

6.106 There is no research or empirical evidence in Northern Ireland to date that the present approach of Crown Court judges in dealing with rape myths is proving inadequate and, in particular, that juries are not being guided by the directions given.

6.107 Giving such directions at the start of the trial may be difficult in the absence of the evidence as it unfolds in the trial. In any event a simple amendment to The Crown Court (Amendment) Rules (Northern Ireland) 2016 could solidify the right of a judge to decide when to give such directions insofar as there has been perceived to be a problem with the timing of any stereotypical thinking-type direction.

6.108 The introduction of expert evidence or video evidence with experts on film will lead to demands by the defence to call competing evidence, which in turn will be more costly, will delay and elongate the trial, and will introduce even more complexity into the situation.

6.109 Video evidence may be seen as judges introducing evidence of a generic nature, even of a kind that is assessed to be neutral and fair.

6.110 So-called neutral expert or video evidence will be seen as leaning against the defence case from an early stage. Other research has identified scepticism among barristers around increasing the number of judicial directions, suggesting that they unduly complicate trials and push jurors down a path to conviction.

6.111 In any event, do juries not prefer theatre to film? Is the spoken word of the judge as currently exists not more forceful than a film?

Is there compelling evidence for change?

6.112 This chapter has highlighted the prevalence of rape myths and misconceptions internationally and their influence on jury decision-making. It has identified a range of approaches to addressing such myths in courts in the jurisdictions considered, with jury directions the most commonly used approach. These findings emphasise the challenges that lie in attempting to address and mitigate myths and misconceptions around sexual offences that are deeply rooted in society and widely used in the courtroom.
6.113 Whilst I am convinced that we need research in Northern Ireland of the sort being carried out by Professor Thomas, research worldwide has established what in any event our own experience of people readily reveals: namely that these myths exist and may well be influencing verdicts, and jurors need concrete information if they are to dispel them. Radical steps must be introduced to counter this danger, which in itself could serve to undermine and pollute the purity of the jury system.

6.114 Common sense perhaps suggests that scientific information is liable to be more forceful than a judge simply saying ‘experience shows’. The use of a video film featuring a psychologist presenting a peer-reviewed message might well carry greater authority than the comment of a judge.

6.115 Video evidence would ensure a uniformity of approach in all such cases as to that which juries are told about the relevant issue in the case they are trying. A video shown at the outset would be short, thus not representing an unwarranted increase or costly intrusion in the length of the trial process. Presented to the jury at the start of the trial process, a video would allow for an informed and fair assessment of the evidence and would guide the approach of counsel in the case. It would represent a further confidence-building factor for complainants and encourage public confidence in the criminal justice system.

Discussion

6.116 The fact of the matter is that there is no empirical evidence to say whether actual individual jurors or jury verdicts in serious sexual offences in Northern Ireland are or are not affected by misconceptions in light of judicial directions to ignore them.

6.117 Whilst undoubtedly concerns continue to be expressed as to the potential for misleading stereotypical thinking on the part of jurors to have an impact on the decisions they make, the need for research in Northern Ireland is crucial to underline and confirm these concerns. Public discussion and policy should be based only on research that has the highest level of credibility, which can arguably come only from systematic research with actual juries at court.

6.118 Moreover, even if the mythology abounds, is our current approach — namely to judicially direct juries to shed these myths — insufficient to meet the danger?

6.119 Are directions as being given by the judiciary generally understood by juries in Northern Ireland? Do we need to produce more simple, clearer and written information couched in everyday language than is the current position?

6.120 Is our oral tradition adequate for that purpose? Are we invoking all the possibilities that technology and digital presentation now has to offer?
6.121 Once again I consider it imperative that research on these concerns with actual juries locally should occur. Anecdotal evidence in Northern Ireland cannot be substituted for research.

6.122 Pending such research locally, I believe it is reasonable to posit that, in light of the international research available, there is sufficient validity in the suggestion that at least some jurors and jury verdicts may be influenced by wrongful thinking on the part of a number of jurors. This justifies an attempt to bridge the gap as between the sort of directions routinely given at trial in Northern Ireland and the receipt of expert evidence designed to dispel rape myths.

6.123 The three main approaches to addressing rape myths in the Northern Ireland courtroom may thus be the use of judicial directions, educative videos or literature for jurors, and expert testimony. A further option relates to educating the public at large about rape myths and stereotypes.

6.124 If there is evidence emerging in Northern Ireland that some jurors experience difficulties in understanding and applying judicial directions, which would illustrate what some mock jury research elsewhere has suggested, there must be a greater emphasis on the wording and timing of such directions.

6.125 The public should be reassured that we have in Northern Ireland Crown Court judges of enormous experience and distinction in the field of criminal justice. Hence my recommendations on this issue do no more than remind these judges of the overwhelming need to ensure their directions to the jury are couched in simple terms without jargon or unnecessary legalese.

6.126 There is no reason why the law governing such cases — for example, what amounts to consent etc. — should not be explained by the judge to the jury at the outset rather than leaving juries at times in blissful ignorance of what the guiding legal principles are until the end of the trial, when views may already have been formed. Professor Thomas has carried out research on juries in England and Wales which led her to conclude that directions given at any early stage — for example, before the prosecution opening — are likely to have a greater impact.

6.127 The timing of those directions should, of course, be influenced by the length of the trial and its complexity but I firmly encourage strong consideration be given to the literature that extols the virtues of early invocation of the concept of dispelling rape myths at the commencement stage of such trials.

6.128 Research by Professor Thomas has also revealed a strong jury preference for written directions. Therefore, there is also a legitimate case to be made that more written directions should be given by the judiciary in these serious sexual offences. They should include a route to verdict, the legal ingredients of the offences and even directions to prevent false assumptions. These should be
tailored to the complexity of the case.\textsuperscript{5} There is no reason why these should not be given before the closing speeches of counsel.

6.129 It is my faith in our judiciary that persuades me that it is quite unnecessary to recommend we follow the example of Scotland and other jurisdictions in introducing mandatory statutory provisions as to the content of such directions.

6.130 Mandatory directions produce a judicial straitjacket that may not fit the facts of a particular case and can highlight factors that may have no relevance to the case in hand. If certain myths are not included in the statutory directions they may be considered less important in the context of the case in question. Judicial flexibility is crucial on a case-by-case basis.

6.131 I am also concerned about legislative intrusion into the independence of the judiciary and the precedent this may set for any incoming Executive dictating how experienced judges should direct juries.

6.132 If, despite my reservations about the utility of statutory directions, they are to be introduced, I believe there is much to be said for the approach adopted in Victoria under the Jury Directions Act 2015, which simply provides for jury directions to be given on request of counsel without being prescriptive about their contents. This will promote shorter and more tailored directions, improving clarity for the jury.

6.133 Interestingly, in addition, the Jury Directions Act 2015 precludes the judge, prosecution or defence counsel from saying or suggesting that complainants in sexual offence cases are unreliable witnesses or that complainants who delay or do not make a complaint are less credible than other complainants, or that they should be scrutinised more carefully. This should be included in any statutory directions.

6.134 I consider that the option of a pre-trial video of the type being tested by Professor Thomas for a jury is usually preferable to other methods of educating a jury.

6.135 There is, in my view, a strong argument in favour of juries being given more than what at times may amount to a somewhat bland judicial assurance that ‘experience has shown’ the validity of a direction provided. This may be inadequate to address what may be deeply-held perceptions of a misguided nature.

6.136 Jurors want the ‘how’ and the ‘why’ in respect of such matters. It is potentially unwise to take it on trust that they will be prepared to act upon the experience of the judge without being given the capacity to understand the basis for that.

6.137 A prescribed film from an authoritative source at the outset of the trial would have the benefit of uniformity in the sense that cases would not depend upon

\textsuperscript{5} R v Alta – Dankeva [2018] EWCA 320; R v K [2017] EWCA Crim 2214
the capacity of individual judges to sell the concept of that which ‘experience has shown’ to the jury. There can be little doubt that some may be better at doing so than others or that there may even be some variation in enthusiasm for the content of a particular direction.

6.138 Importantly, the advocates would have a firm foundation upon which they could seek to craft their own comments and cross-examination. The judge could swiftly intervene, either at the Ground Rules Hearing or at trial, in the event of counsel, unwittingly or otherwise, attempting to unjustifiably invoke rape myths in the course of the case. In the event that counsel wished to challenge any of these assertions given the particular facts of the case, the matter could first be dealt with pre-trial or, in the absence of the jury, during the hearing.

6.139 Consideration is required on:

- how one would ensure a proper balance and avoid inadvertently creating unfair influence on the fine balance of the trial process;
- the potential for expert presentation to equate to an expression of opinion on the ultimate issue; and
- the need for input from practitioners and judges in Northern Ireland — for example, through the Crown Court Rules Committee/the Lord Chief Justice/Crown Court judges/practitioners — on the video proposed by Professor Thomas in light of her research.

6.140 Evidence from New Zealand about the use of expert witnesses as another alternative highlights concerns around the availability of such witnesses, the effectiveness of their testimony and the potential cost burden.

6.141 The calling of expert witnesses may not only be time-consuming and costly but may trigger expert ‘battles’ with the defence wishing to call contradictory evidence.

6.142 In any event, there is a prohibition at common law on introducing generic expert evidence on the range of known reactions to non-consensual offences. The exception is where this kind of evidence is directed to something quite outside both the experience of the jury and the ability of the judge to explain common understanding and common patterns of behaviour.

6.143 Accordingly, the calling of expert witnesses may still be an option only in rare cases in which the scientific evidence is uncontroversial but outside the common experience of the jury or the ability of the judge to explain a common pattern— for example, in cases of children, as regularly occurs in the US —and where it may even be possible for defence and prosecution to agree written expert statements — as occurs in New Zealand — long term the use of jury videos is preferable.

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6 R v Turner [1975] QB 834
6.144 A further useful suggestion emerged during our discussions to the effect that jurors should be given training exercises once they have been empanelled and before the trial commences. Once again, however, I consider that the video option is less time-consuming, cheaper, less open to controversy and results in a more consistent approach.

6.145 In order to change societal attitudes on the subject of serious sexual offences and to awaken a new realisation of the presence of widespread and ingrained myths on the issue, a preventative approach needs to be taken that emphasises the need for education of the public at large from which juries are drawn.

6.146 The Council of Europe Istanbul Convention, which came into force in August 2014, continues to have a strong focus on the prevention of all forms of violence against women. The convention calls on all members of society, in particular men and boys, to help reach its goal of creating a Europe free from all forms of violence against women and domestic violence. Article 14 states that Parties to the Convention should take the necessary steps to include teaching material in formal curricula at all educational levels on issues including non-stereotyped gender roles, gender-based violence and the right to personal integrity.

6.147 I recommend that the Department of Justice and the Department of Education, using the precedents to which I have adverted in detail in Northern Ireland, Ireland and Scotland conduct a public awareness campaign with an evidence-based narrative through press, television, radio, outdoor and Internet advertising specifically on the myths surrounding serious sexual offences.

6.148 I record that my conversations with all the main local press and all the political parties revealed a strong enthusiasm for such a campaign.

6.149 Schools should also provide a rich vein of exploration by our Department of Education on this same issue.

6.150 In Ireland, RSE is a mandatory subject throughout compulsory education, primarily within social, personal and health education (SPHE).

6.151 In Northern Ireland all publicly funded schools must cover RSE under the Personal Development and Mutual Understanding (PDMU) area of learning at primary level and the Learning For Life and Work (LLW) area of learning at post-primary level.

6.152 Whilst RSE is mandatory for all pupils of compulsory school age (four to 16) from foundation stage to key stage 4, it is the responsibility of the board of governors of each school to ensure that a comprehensive programme is delivered.

6.153 The key difference, therefore, between Northern Ireland and Ireland is in the extent and detail of the prescribed content. As is the case for all areas of learning within the Northern Ireland statutory curriculum, the prescribed
content for PDMU and LLW is high level and has been kept to a minimum to provide teachers with the flexibility to decide which specific topics are most appropriate to meet the needs of their pupils and to update their resources in line with the fast pace of societal change. Teaching and learning are further supported by curricular guidance.

6.154 By contrast, the statutory content for SPHE in Ireland is more detailed, in keeping with the more prescriptive and subject-based nature of the curriculum.

6.155 The argument made is that national curriculum changes introduced in response to contemporary issues, and which are based on detailed subject content, often suffer from time lag between recognition, decision-making, implementation and impact. The Northern Ireland curriculum has been specifically designed to prevent such a problem.

6.156 My firm conviction is that it is crucial that the RSE curriculum includes the very areas of which this chapter and this report speak. It is not enough to leave boards of governors to pick up these points. The state — and in this case the Department of Education — has a duty to play a positive role in addressing the justice gap that exists in our approach to serious sexual offences.

6.157 I strongly recommend that the Department of Education draw up a plan to exhort all schools to include these matters within their curriculum and, if that proves ineffective, to be the subject of legislation mandating such education.

6.158 Under our law it is rare for the courts to ask prospective jurors any questions to assess their suitability to make decisions in a case. In fact, jurors are allocated to cases by a process of random selection from the local electoral register.

6.159 Whilst jury selection in Northern Ireland is thus now a random selection unless there is good cause to deselect, nonetheless there is generally discussion between counsel and the judge as to questions that should be put to jurors to ensure there is no risk of unintended bias. In serious sexual offence cases, it seems that greater care should be given to enquiries that should be made — for example, as to whether any juror or a close friend or relative has had experience of a serious sexual offence etc.

6.160 Finally, training is a vital ingredient if the procedures are to work fairly. It is crucial to the process that the judiciary and the legal profession be aware of the issues of rape mythology and that there are consistent approaches to the issue. The Judicial Studies Board, the Bar Council and the Law Society should set up regular training sessions on these matters with participants from the voluntary services and psychologists.
Proposed recommendations

50. The Northern Ireland Courts and Tribunals Service, in consultation with the Lord Chief Justice’s Office, should promote research with actual jurors in Northern Ireland as to:
   - the extent to which jury myths influences jury verdicts here;
   - how widespread the problem is;
   - the understanding of judicial directions on the subject and the ability of jurors to apply them;
   - the desire for expert evidence on the subject;
   - the effect that current judicial direction has on the issue;
   - the effect that the playing of a video pretrial would have on jurors; and
   - the extent to which such myths can be removed.

51. A prescribed video film, similar or identical to that being produced in England if the research is favourable, from an authoritative source should be presented to the jury at the outset of the trial in all serious sexual offences.

52. The judiciary should in the interim consider providing appropriate written directions to the jury on the subject at the outset of the trial.

53. The judiciary should in the interim revisit the directions that are given to non-lawyer jury members, to ensure they are clear, simple and not too complex, with appropriate focus on comprehensibility, avoiding standardised or ‘pattern’ judicial instructions.

54. The judiciary should give strong consideration to a greater emphasis on written directions to the jury including the route to verdict, legal definitions and even directions to prevent false assumptions.

55. The Public Prosecution Service, on a case-by-case basis, to invoke the use of expert testimony providing a neutral summary of relevant research on rape myths where there is a consensus in the scientific literature, leaving it to the jury to determine whether an adverse inference is justified given the facts of the individual case.

56. Parties should be encouraged to agree the content of any expert evidence on this issue and, where possible, admit it.

57. The Department of Justice and the Department of Education should speedily draw up plans for an awareness campaign through schools, television, radio, outdoor and Internet advertising specifically on the myths surrounding serious sexual offences.

58. The Director of Public Prosecutions should record any case in which a person is said to have made a false complaint of rape and/or serious sexual offences and was being considered for prosecution.
59. Judges should carefully consider appropriate questions on a case-by-case basis for jurors to disclose signs of rape myths before they are empanelled.

60. Judges should robustly intervene when defence or prosecution counsel seek to invoke complainant myths in serious sexual offence cases.

61. There should be extensive training provided to the judiciary and the professions by their respective bodies, calling on the assistance of expert evidence on these issues of rape mythology.
Appendix B

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<th>Application received between 01/04/10 - 31/03/11</th>
<th>Claims highlighted by staff as relating to a sexual offence</th>
<th>Claimants under 18 at Date of Incident</th>
<th>Claimants awarded compensation</th>
<th>Claimants denied compensation</th>
<th>Claims with no decision</th>
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A review of the law and procedures in serious sexual offences in Northern Ireland
Chapter 7

Social media
I do believe that if it is not addressed, the misuse of the internet represents a threat to the jury system, which depends, and rightly depends, on evidence provided in court which the defendant can hear and if necessary challenge.

Lord Judge, former Lord Chief Justice of England and Wales

Issues

- Is the use of social media having an adverse impact in trials for serious sexual offences to the extent that it is destroying the right to anonymity, nullifying the integrity of judicial orders, potentially rendering jury trials unfair and impairing the administration of justice overall?
- In 2005 Lord Chief Justice Judge summarised the issue as follows:
  
  If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and, in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial.

What is social media?

7.1 Social media is an umbrella term that incorporates the use of or interaction with various devices, websites, applications and online tools by the user in order to generate and share content either in words or pictures with others or to participate in social networking. Material on the Internet is in a continuous state of publication. What is more, information available on the Internet is borderless.

7.2 Social media platforms allow individuals to reach thousands of people via a single post, enabling them to reach a potentially vast audience. Recently reported figures indicate that there are 2.196 billion Facebook users, 1.8 billion YouTube users, 1 billion Instagram users and 330 million Twitter users. Social media is characterised by its participatory culture, which is interactive. It can be either two-way (allowing conversations characterised by varying degrees of publicity, depending on the privacy settings selected) or one-way (publication without comment). Social media is also borderless. The ease of access to technology and the Internet has made it easy for jurors to immediately access a range of information about the case they may be involved with.

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1 Judicial Studies Board lecture, Belfast, November 2010.
Challenge of juror social media use

7.3 The traditional concept of a jury and its ability to remain completely closed off from extraneous sources and to remain impartial is being challenged by society's increased use of technology and access to information. Now juries and individual jurors have the ability to access and share information related to the case with a few taps on their smartphone screens.

7.4 Our explorations have shown that there is a limited body of research examining jurors' Internet use. Even fewer studies have focused specifically on social media.

7.5 Nonetheless, there is evidence that there are two broad categories of improper juror social media use: namely use of the Internet to conduct research, and investigating facts or the use of social media to communicate with others or post/publish information.

7.6 It appears that increased access to information and use of social media in various jurisdictions has negatively impacted juries in some instances and resulted in a number of mistrials and overturned verdicts, with attendant wasted costs associated with failed trials, delays, witnesses who may be unwilling or even unable to give evidence again, and the additional unwarranted stress imposed on the parties.

7.7 Hence courts and legislatures need to maintain the search for solutions so that the institutions of trial by jury can be preserved in a time of unprecedented communication and social change.

7.8 Research by Professor Cheryl Thomas, a distinguished academic who is a leading expert on juries, found that, whilst most people were aware of the dangers of social media and the Internet for a criminal trial, a significant number either did not understand this danger or were confused as to the nature of the prohibition. Hence the recent document now made available (see later in this chapter and appendix C) to all jurors in England and Wales is couched in simple terms that members of juries can readily understand.

Current law

7.9 The current law aims to prevent trial by media. The Contempt of Court Act 1981 provides the framework for what can be published in order to ensure that legal proceedings are fair and that the rights of those involved in them are properly protected.

7.10 Sections 1 and 2 create the strict liability rule, which makes it a contempt of court to publish anything that creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice.
7.11 The strict liability rule applies to all publications. It is defined very widely as including ‘any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large’.

7.12 Contempt is either civil or criminal, but the burden of proof for both is to the criminal standard. Contempt is a strict liability offence.

7.13 Civil contempt of court refers to behaviour that disobeys the authority of a court in a civil proceeding. Most often, civil contempt of court involves failure to satisfy a court order. Generally, sanctions for civil contempt end when the party in contempt complies with the court order, or the underlying case resolves. Civil contempt can result in punishment including a term of imprisonment and/or a fine.

7.14 Criminal contempt is a common-law offence punishable on indictment to an unlimited sentence, albeit more commonly considered as punishable following proceedings in the High Court. It is arguable that the proper punishment ‘ceiling’ ought not to be higher than under the 1981 Act.

7.15 Section 8 of the 1981 Act provides for the confidentiality of jury deliberations in Northern Ireland. It states:

It is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

7.16 Judges verbally warn jurors throughout the trial of the need to rely purely on the evidence heard in the trial and not to consult the Internet.

7.17 The Justice Act (Northern Ireland) 2015 did not make provision in relation to jurors conducting research in relation to a trial.

7.18 The Northern Ireland Department of Justice has no current plans to amend the legislation on contempt of court.

7.19 In jurisdictions compliant with the European Convention on Human Rights, (ECHR), the right to a fair trial is enshrined in Article 6. It requires that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

7.20 The independence and impartiality of the jury is required not just as a matter of fact but as a matter of appearance. If there is a risk that the jury will see prejudicial media coverage (regardless of whether jurors have in fact seen it), this could give rise to the perception that the jury has or will become biased.

7.21 While Article 10 of the ECHR protects freedom of speech, it is not an unfettered right. Article 10(2) provides that the right may be subject to such formalities,

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2 Dean v Dean [1987] 1 FLR 517 CA.
conditions, restrictions or penalties as prescribed by law and are necessary in a
democratic society in respect of a number of interests including the authority
and impartiality of the judiciary.

Background

7.22 Social media platforms allow individuals to reach thousands of people via a
single post, making their views readily accessible to a potentially vast audience.
This information often incidentally finds its way to jurors through automatic
news feeds or through accessing social media platforms. Emerging technologies
such as Apple Watch and Google Glass are likely to add further pressure as the
ease of access to the Internet increases. In short, there is no editorial filter to
prevent instant communication.

7.23 Anyone posting a comment on a publicly available website that creates a
substantial risk of causing serious prejudice in active proceedings faces the
potential prospect of proceedings for contempt of court.

7.24 In short, our former critical eye has been replaced by an even more terrifying
observer: the relentless, ever-curious gaze of social media, which demands
intimate knowledge of each user’s immediate environment. An active digital
identity has become just as essential as paying your taxes. The distinctions
between public and private space has evaporated.

7.25 Whilst the traditional mainstream media are well aware of the boundaries set
out in the 1981 Act and the consequences of stepping outside them, social
media presents new challenges to these fair trial protections. The challenge to
the criminal justice system is how to keep pace with the information age.

7.26 There are a number of high-profile instances in all the jurisdictions in the UK
that highlight the increasing problems faced by courts and law enforcement
officers in upholding traditional strict contempt laws designed to ensure
defendants and complainants receive a fair trial. The fact of the matter is that in
high-profile cases, a strong community reaction may be inevitable and actions
to moderate or control content becomes all the more formidable.

7.27 In February 2016 the Court of Appeal in England heard the case of R v F and
D concerning two teenage girls aged 13 and 14 charged with a murder that
provoked outrage. As a result of a torrent of comments and abuses posted on
Facebook and social media, the trial judge felt constrained to discharge the
jury and order a retrial at a different venue, creating considerable stress for the
family of the victim, the witnesses, the defendants and their families and all
those involved in the trial.

7.28 In our own jurisdiction in a recent high-profile trial of R v Jackson and others,
the intervention was manifest, albeit insufficiently prejudicial to impede the trial.
Not only was the complainant the subject of identification, but online abusive
comments about both her and the accused proliferated throughout. At several points during the hearing, lawyers had drawn to the trial judge’s attention online comments, the resolution of which was time-consuming and costly. A defence solicitor was quoted after the trial as saying that several days of the trial had been lost due to issues thrown up by online material, and he claimed that lawyers had been distracted by having to monitor online content. At the time of writing, a prosecution has ensued arising out of an allegation that the lifetime ban on reporting the identity of the complainant had occurred.

7.29 However, we should be aware that social media is coming under strong challenge worldwide. The recent public outcry over Cambridge Analytica acquiring and mining millions of Facebook users’ information to help the President Trump campaign has illustrated that the public are stirring.

7.30 Inauthentic accounts, violations of website terms, techniques for measuring the content on social media, misinformation usage and algorithm identifiers are but some of the issues being raised to challenge Facebook, Twitter, Snapchat and other social media platforms. The moment may now have arrived to impose more controls so long as we realise the extent and complexity of the problem.

Other jurisdictions

7.31 We have considered the law and practice in the various Australian jurisdictions, Canada, England and Wales, Scotland, New Zealand, Ireland and the US in relation to controlling the juror use of social media. Our researches revealed that in jurisdictions such as the Netherlands, Germany, Iceland, Sweden and South Africa, the problems are not nearly so acute because these offences are tried other than by a full jury system.

England and Wales

7.32 A 2010 study3 conducted for the Ministry of Justice (MoJ) by Professor Cheryl Thomas examined how fair the jury decision-making process is by questioning 668 actual jurors in high-profile and standard cases with little media coverage. It considered whether jurors are aware of media coverage of their cases and how the Internet affects jury trials.

7.33 The findings show that in high-profile cases almost three quarters of jurors will be aware of media coverage of their case. In standard cases, 13% said they saw information compared with 5% who said they searched for information on the Internet. In high-profile cases those figures rose to 26% and 12% respectively. As Professor Thomas pointed out, these figures are likely to be underestimates of those who admitted searching on the Internet.

3 Are Juries Fair?
7.34 The study’s findings support the view that, in general, a ‘fade factor’ applies only to pretrial publicity and does not affect the deliberations of the jury.

7.35 The study recommends that, to address both jury impropriety and juror use of the Internet, the judiciary and Her Majesty’s Courts and Tribunals Service (HMCTS) should consider issuing every sworn juror with written guidelines clearly outlining the requirements for serving on a trial, the importance of the juror’s role, and clearly explain what improper behaviour is, why it is wrong and what to do about it.

7.36 The study also suggests that the judge should review the requirements with jurors as soon as they are sworn. This should include a fuller jury direction about why jurors should not use the Internet to look for information or discuss their case. It also recommends that jurors should be required to keep the guidelines with them throughout the trial.

7.37 In light of these recommendations, steps have already been implemented in England and Wales in order to address the crucial questions of whether jurors understand the rules on social media and Internet use and whether breaches of the rules have been due to confusion or wilful disobedience.

7.38 Accordingly, an easy-to-read leaflet, Your Legal Responsibilities as a Juror, has been drawn up and is given only to sworn jurors at the start of each trial (see appendix C).

7.39 Research tested the impact of the document with all juries at the Old Bailey in London over an eight-month period and found the new juror notice also doubled juror understanding of in-trial and post-trial disclosure rules.

7.40 Accordingly, every sworn juror in England and Wales is now given a copy of this document in accordance with new Criminal Practice Direction (2015) 26G (appendix C).

7.41 In England and Wales in December 2013, the Attorney General published advisory notes on the gov.uk4 website and Twitter to help to prevent social media users from committing a contempt of court.

7.42 The advisory notes, which had previously been issued only to print and broadcast media outlets on a ‘not for publication’ basis, were designed to ensure trials were fair, warn people that any comment on a particular case must comply with the 1981 Act, stop people inadvertently breaking the law and ensure that trials were heard on the evidence and not what people had found online.

7.43 The Attorney General’s website also published infographics setting out what might be considered a contempt of court in the context of publishing comments on social media.

4 https://www.gov.uk/
7.44 In the wake of comments by Sir Brian Leveson in the Court of Appeal in R v F and D, the Attorney General has launched a public consultation exercise, *The Impact of Social Media on the Administration of Justice*. A call for evidence has been completed and this report will hopefully emerge early in 2019.

7.45 In March 2014 the Law Commission in England and Wales published its second report on *Contempt of Court*. That report recommended that a new online service be established to help journalists and publishers reporting criminal trials to discover whether reporting restrictions are in force and, if so, why.

7.46 The report recommended that all court postponement orders be posted on a single publicly accessible website. A further restricted service would be available where, for a charge, registered users could sign up for automated email alerts of new orders. This would reduce the risk of contempt proceedings for publishers from large media organisations to individual bloggers and enable them to comply with the court’s restrictions or report proceedings to the public with confidence.

7.47 The government was to consider how an online reporting restriction database could be taken forward as existing technology was replaced.

7.48 The Law Commission’s recommendations are attached at appendix D.

7.49 The Criminal Justice and Courts Act 2015 (2015 Act) in England and Wales brings with it a stringent regime and codification of jurors’ responsibilities. It is a codification of matters that could be considered to have been contempt of court and previously contrary to a judge’s specific instruction.

7.50 However, they are extremely sweeping and probably are not covered by the standard judge’s housekeeping instructions to the jury. Hence judges are advised to adopt the housekeeping directions to the jury to include the wide-ranging prohibitions and consequences.

7.51 Section 71 of the 2015 Act amends the Juries Act 1974 to create a specific offence of a juror who intentionally seeks information relating to the case they are trying. That information includes, but is not limited to, asking a question, searching online, visiting a place, inspecting an object, conducting an experiment or asking someone to do any of the above.

7.52 The 2015 Act provides that ‘information in the case’ includes the person in the case, the judge dealing with the case, any other person in the case (including lawyers or witnesses), and the law relating to the case, the law of evidence or court procedure.

7.53 This legislation also grants a discretionary power to a judge, if they are convinced it is in the full interests of justice, to confiscate a juror’s electronic communication device and search a juror if it is believed they have not been surrendered.
Section 71(8) imposes prison sentences of up to two years for breach.

Finally, in the context of England and Wales, I note that, at the time of writing, a private member’s Bill has been introduced into parliament, apparently with considerable cross-party support, by Lucy Powell MP, making the moderators of online groups — and not just the giant distant companies that own them — responsible for their content.

Ireland

Ireland currently has no legislation to deal with contempt of court (unlike the UK, which has the 1981 legislation). While contempt of court is a common-law offence, there is a growing momentum for relevant legislation to deal with the changing nature of communications technology. In response to an increasing focus in the area, the Minister for Justice and Equality is engaged in an ongoing consideration of matters relating to the law on contempt.

A new Law Reform Commission report, with three modules, on the contempt court issue is expected in 2018.

The first module report is expected to contain a considered analysis on a range of issues relating to contempt of court, including social media-related issues. It has at the time of this consultation document published a paper, ‘Privilege for Reports of Court Proceedings under the Defamation Act 2009’, raising the questions outlined in the Discussion section of this chapter.

The former Chief Justice, Susan Denham, also initiated a consultation with the presidents of the respective courts on the social media issue in light of recent experience and developments. Where recommendations emerge from this process, these will also link in directly with the priority work to be carried out on foot of the forthcoming Law Reform Commission report.

In October 2017 a private member’s Bill was introduced to Dáil Éireann that would provide a court with general powers to place restrictions on publication of material where it appears to be necessary to avoid risk of prejudice to the administration of justice. It provides for:

- Judicial powers to direct removal of material from websites and/or the disabling of public access to websites where it appears to be necessary to avoid risk of prejudice to the administration of justice.
- Novel powers for the courts to order online hosts to our Internet providers to disable specified sections of websites for limited periods.
- A number of specific defences to allegations of contempt of court. They include a defence of innocent publication or distribution available to those who have taken reasonable care in publishing the material, a defence of discussion of public affairs with a risk of impediment or prejudice to particular legal proceedings as merely incidental to the discussion, and
protects reports of public legal proceedings, which are fair and accurate, published contemporaneously and in good faith.

7.61 We understand the Irish government is awaiting the Law Reform Commission report on the matter.

Scotland
7.62 The law in Scotland is also governed by the Contempt of Court Act 1981.
7.63 With the introduction of the Internet, social media and smartphones, the Lord Advocate urged in March 2014 that the time is right to review the legislation.
7.64 His decision to reform the current legislation was supported by the Law Society of Scotland, which had been piloting awareness sessions in schools to raise awareness and understand the consequences of posting on social networks.
7.65 Amended guidelines issued by the Lord Advocate to the police and media in January 2018 advise:

The effect of the strict liability rule is that proceedings for contempt may be taken whether or not the publisher intended to impede or prejudice the criminal proceedings. However the strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings will be seriously impeded or prejudiced.

One other effect of the strict liability rule is that contempt proceedings may be taken even where the publisher was unaware that proceedings were ‘active’. There is however a defence of innocent publication and distribution available to a publisher but only where he has taken all reasonable care and the onus of establishing it lies on the accused. As a result, information regarding whether proceedings are ‘active’ should be given to the media on request.

Prior to proceedings becoming ‘active’ publication of information with the intention of prejudicing the proceedings may render the publisher liable to prosecution for attempting to pervert the course of justice. The charge of attempting to pervert the course of justice could also be brought against the person who gave the prejudicial information to the press for publication. In such a case the prosecution would have to prove criminal intent and this may be contrasted with the position under the strict liability rule.

New Zealand
7.66 The law on contempt in New Zealand is governed by the New Zealand Bill of Rights Act 1990.
7.67 Due to New Zealand finding the Act vague in scope, inaccessible to the public, and having being developed prior to the Internet age, the Law Commission completed its review into the laws of contempt of court in 2017 and recommended a new statute, the Administration of Justice (Reform
A review of the law and procedures in serious sexual offences in Northern Ireland

of Contempt of Court) Act, which will replace the current law with new offences, new enforcement provisions and new processes, and made several recommendations:

- clearer statutory rules governing the publishing of information on an arrested person’s previous convictions and concurrent charges;
- new statutory powers allowing the courts to make temporary suppression orders postponing publication of information that poses a real risk of prejudice to an arrested person’s fair trial;
- a new statutory offence to replace the common-law contempt of publishing information where there is a real risk that the publication could prejudice a fair trial;
- a new offence to replace common-law contempt where a member of a jury investigates or researches information that he or she knows is relevant to the case; and
- a new offence of publishing untrue allegations or accusations against the judiciary when there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or courts.

The government responded to the Law Commission’s review and agreed with its assessment that the law needed to change. Once this consideration is completed, the government will form a final view on the Law Commission’s recommendations.

Canada

Canada is in the process of transforming the criminal justice system, which has been found to be complex: federal, provincial, territorial, and municipal agencies and organisations all play a part and share responsibility for the criminal justice system.

As part of this process, the government is working with partners and identifying changes that can be made now to respond to known problems. Over the longer term, it will identify further reforms that can make the system more just, compassionate, accessible and fair. In May 2018 it was reported that three recent trials in Ontario had been disrupted by juror misconduct connected to the Internet, despite strict instructions from the judge.

Australia — Victoria

The Juries Act 2000 states that a person who is on a panel for a trial or a juror in a trial must not make an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror.
7.72 Making an enquiry includes:
- consulting with another person;
- conducting any research by any means;
- using the Internet to search an electronic database for information;
- viewing or inspecting a place or object that is relevant to the trial;
- conducting an experiment; and
- requesting another person to make an enquiry.

7.73 In Australia there is growing use of suppression orders to prevent the publication of prejudicial material, although some critics have argued that they are proving ineffective. These orders do not bind the world at large but apply only to the parties named in the order, albeit if the media, who are on notice of the orders, deliberately frustrate the terms, this can amount to contempt.

Arguments in favour of the status quo

7.74 There is a paucity of empirical evidence as to the actual effect of social media, if any, on jurors or jury verdicts in Northern Ireland.

7.75 Moreover, insofar as a risk exists, there is no empirical evidence that the current directions given to jurors by the judiciary are inadequate to address that risk.

7.76 Trusting the jury to take their oath responsibly is a cornerstone of our criminal justice system and, until it is proven otherwise, we should proceed cautiously. In short, we should be slow to accept that there is reason to believe that juries will embark on a search for further material contrary to judicial directions.⁵

7.77 It is questionable as to how much of a problem this question of social media really is in the context of juries. Our understanding from English colleagues is that it is extremely rare for trials to be imperilled by its presence and that the case of R v F and D (discussed above) was wholly untypical despite the publicity attending on that trial.

7.78 Nothing should be done until such evidence becomes available.

Is there compelling evidence for change?

7.79 We are undoubtedly short of any empirical surveys in Northern Ireland of the impact social media has on juries here. This is being addressed by the Department of Justice and the recent recruitment of Professor Thomas to look at the experiences of real jurors in Northern Ireland should be a real step forward in this regard.

7.80 However, whilst we do have to trust jurors to honour their oath, we must also be realistic about the proclivities and natural curiosities of human behaviour and

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⁵ See R v Sarker and BBC (2018) EWCA Crim 1341.
alive to the dangers that lie in the wake of social media. It is surely indisputable that, to protect the integrity of a trial, there needs to be effective measures to control exposure to prejudicial material even if this is a rare occurrence in the criminal justice system.

7.81 Moreover, faith in our jurors does not address the problems thrown up by passive receipt of objectionable material with algorithms that often automatically produce online material, particularly in high-profile trials.

7.82 A wealth of research in other jurisdictions (see chapter 6) on the potential effect of rape myths, their presence on social media, our recent experience in Northern Ireland of complainant and defendant exposure and vilification on social media, the recent English experience of R v F and D and the whole drift of steps to control social media in the court process in other jurisdictions simply cannot be ignored.

7.83 The very fact that all judges address jurors on the need to ignore social media together with the steps being taken and contemplated in England and Wales, Ireland, Scotland, Australia, New Zealand and also in Northern Ireland illustrate that a ‘head in the sand’ attitude is no longer tolerable. We must preferably act in a manner that is coordinated and consistent with our close neighbours so that it represents a joint cross-jurisdictional approach.

7.84 The print media are entirely self-regulating in the United Kingdom and operate free of any statutory rules. However, the Independent Press Standards Organisation draws on a code of practice dealing with complaints about issues including accuracy, privacy, harassment and intrusion. This is totally insufficient to meet the current social media problems.

Discussion

7.85 The advent of social media has developed beyond the contemplation of parliament when the 1981 Contempt of Court legislation was enacted.

7.86 In essence, we are trying to preserve a traditional mode of trial procedure in the face of a changing cultural landscape and developing communication information technologies.

7.87 I believe the current law needs to be augmented with new offences, new enforcement provisions and new processes as is occurring elsewhere.

7.88 We should regard the changes in other jurisdictions as a virtue and borrow heavily from what they have done or are about to do because the problems are identical. We can use their head start to iron out any wrinkles that may have emerged about the scope and cross-jurisdictional reach of any such measures.

7.89 Joint exploration by the jurisdictions in the UK and Ireland as to legal methods of holding Internet service providers and Internet content hosts to account for
content hosted or distributed by their services is an imperative. We need to eschew piecemeal approaches and instead to push forward a cohesive national framework to meet a problem that is national in nature and potentially at times, however rare the occurrence, strikes at the heart of our criminal justice system.

7.90 I firmly believe the Department of Justice should already be in contact with its opposite numbers in other jurisdictions in the UK and Ireland, recording our interest in what they are doing, offering any input they request us to make and carefully analysing any procedural or legislative changes they are making to ensure a coordinated joint approach is swiftly implemented. We in Northern Ireland should not be contemplating major changes in the overall law about social media without full consideration of the legislative changes being made in the rest of the United Kingdom.

7.91 The issues are wide-ranging and complex, as doubtless the Attorney General’s project in London will show. Issues that need to be considered will no doubt include:

- Should social media publishers be made liable for legally objectionable material contained on their platforms?
- Can social media reasonably argue that they are merely platforms and not publishers? Legally, should social media not be designated secondary publishers? Just as newspapers become liable for printing letters and comments, should social media outlets also not be liable for material on their platforms? As yet, no test case has emerged on this specific issue in the courts.
- Should liability accrue once notification of the objectionable material has been given of a posting that breaches an injunction or risks prejudice to a trial and that material has not been taken down within, say, 24 hours?
- Should not a legal onus be placed on social media publishers to identify and remove material potentially prejudicial to a trial long before it is drawn to the attention of the courts?
- Algorithms are available and are deployed to identify and remove child sexual abuse images and terrorist material when it is posted. Why should further resources not be deployed to identify, block and remove this offending material and thus protect court proceedings?
- It must, for example, be blindingly obvious that many forthcoming high-profile trials are likely to attract social media attention, and it is difficult to see why appropriate algorithms cannot be established by way of anticipatory action.
- Perhaps law enforcement agencies and the Public Prosecution Service have a role to play in notifying the main social media outlets of such forthcoming proceedings and drawing attention to the legal risks that social media face. That is not to say that, in the absence of court orders, these admonitions
would bind the social media outlets, which would have to make their own decisions consistent with the principle of press freedom. It would, however, serve to put them on notice of potential legal problems that needed to be addressed timeously.

- Mainstream media need to be strongly encouraged to turn off and disable public comment facilities about a trial in the course of live proceedings. We understand this regularly happens with mainstream media in England and Wales and this should be adopted by local media in Northern Ireland.

- This, of course, does not address, for example, Twitter communications if such exchanges have been triggered by the broadcasted content on mainstream media. There is a strong argument for Twitter etc. deploying technology tools to review particular users who have been abusive in the past and steps being taken to block their accounts.

- Should we make the administrators and moderators of online groups responsible for their content?

- Should bloggers outside mainstream journalists have the same defence of fair and accurate reports on court proceedings? Should someone have to prove malice who wishes to sue for defamation over a court report? Should such a plaintiff require the leave of the court before issuing proceedings? Should a new qualified privilege defence be introduced for court proceedings reports that do not meet the fair and accurate requirement but are not the product of malice?

- With the advent of the 2016 General Data Protection Regulation (GDPR), data controllers, including at least some Internet intermediaries, must erase content based on the ‘right to be forgotten’ (RTBF) requests, but are hosting platforms such as Facebook and Twitter controllers with RTBF erasure obligations. Do intermediary liability laws under e-commerce directive Articles 12–15 apply to RTBF erasure requests?

- Enforcement is a major problem with platforms outside our jurisdiction being difficult to capture within our system.

7.92 Whilst publication probably renders all further steps largely superfluous, nonetheless there are measures in Northern Ireland that we can be considering even now.

7.93 There should be specific legislation targeted at jurors’ behaviour in relation to social media during trials as occurs in other jurisdictions.

7.94 Of more immediate need, which requires no further delay, is to consider the introduction of written and or video instructions to jurors at the outset of the trial of the very serious consequences for both the trial process and them personally if they search the Internet for information on the trial before them.
Appendix C contains a copy of the leaflet now given to juries in England and Wales to be retained by them throughout the trial, underlining the consequences. I consider this is a positive step that we should adopt. Arguably, jurors should sign a document confirming they have received this leaflet to remove room for doubt in the event of a later prosecution.

Jurors must be made to understand that failure to adhere to this warning endangers the trial process, can be extremely costly and stressful to all parties if a retrial is ordered, and will have grave personal consequences for those who offend.

Arguably, even earlier notification of these juror responsibilities could be provided. Therefore, when the notice calling for jury service is sent out it should be accompanied by a booklet about juror responsibilities, allowing time to digest the seriousness of the issue and to acclimatise to the concept of curbing their Internet use etc.

Steps should be taken to make it easier for jurors to carry those responsibilities and to come forward when fellow jurors breach them by providing a helpline or email address to enable them to make ready contact with the judge or court authorities in the event of an offence.

The code of practice by the Independent Press Standards Organisation is totally insufficient to meet the current social media problems. Accordingly, courts should have more powers to control the publication of website material during trials.

Already in Northern Ireland, pursuant to a practice note from the Lord Chief Justice in 2016, members of the public are not permitted to take notes on electronic devices such as laptops or tablets and all mobile phones should be switched off in court. Moreover, members of the public are not permitted to use live text-based communication (LTBC) from court and all electronic devices should be switched off on entering court. Thus live tweeting from the court must be prohibited (save perhaps for the press), particularly in light of the permanent presence of those tweets (and the responses thereto) in the event of a retrial.

Mainstream media must be encouraged to be responsible in its invocation and use of newspaper online pages and message boards/ links with all the dangers attendant upon these links.

The judiciary and the Public Prosecution Service should undergo training and refresher training encompassing information technology, awareness of social media platforms, trends, language etc. to enable them to make informed orders and directions and to ensure they are future-proofed.

The Northern Ireland Courts and Tribunals Service (NICTS) should make earnest enquiries as to what steps can be taken to ensure administrative staff can
monitor compliance with court orders in relation to social media and carry out surveillance to reduce the risk of significant breaches during the course of a trial.

7.104 However, I recognise that this would require careful consultation with the NICTS to ascertain the extent of the burden. How time-consuming would this be? The officials are not lawyers. Would this require some legal knowledge as well as knowledge of the case itself to decide what material should be put before the judge? Is this a role for the NICTS or one that should be placed on representatives of the Public Prosecution Service (PPS) and the defence? I am open to further discussion on this.

7.105 Moreover, we should recognise that most of the risk of prejudicing a trial comes from top Google hits and widely used social networking sites. Consequently, a court official should be tasked with searching for such prejudicial material pretrial so that steps can be taken to have it taken down at least temporarily during the progress of the trial.

7.106 Education about the responsibilities of jury service should start early. I consider this a responsibility resting on the Department of Education to take steps to strongly encourage schools to include in their civics curriculum instruction on juries, jury responsibilities and contempt laws to encourage greater civic responsibilities among Internet natives.

7.107 Other suggested remedies seem to me to be non-starters and require only brief mention. Reverting to sequestration, physical or electronic, of jurors (which is permitted, but very rarely invoked, in some Australian states) is not only financially unattainable and impractical but useless in any event to prevent their use of the Internet. A full voir dire of a jury as occurs in the US can take up many days in an already lengthy process.

7.108 I add a note of caution. I fervently believe that most jurors are thoroughly responsible citizens who at times simply want an accurate understanding of matters such as relevant evidence, legal standards and technical terms. I have come across a number of criticisms, virtually all from non-lawyers, that judicial directions are often too complex, with insufficient focus on comprehensibility. Research from distinguished academics such as Professor Thomas indicate that many jurors struggle to understand standardised or ‘pattern’ judicial instructions.

7.109 As such, any directions should aim to be comprehensible to non-lawyers. It is important that judges obviate the temptation to turn to legitimate channels on social media for these matters by explaining that these channels may not be accurate or reliable and how they can easily seek clarification and guidance during the trial by simply asking.
7.110 I recognise that these are not perfect solutions. Even stiff custodial prison sentences for offenders may not be foolproof. The authors on social media may be difficult to trace and as long as Internet service providers or Internet content hosts are not treated as providing platforms, the process of ordering material to be taken down can be complex and at times impotent, especially if the provider lies outside the jurisdiction.

7.111 Nonetheless, the measures now under consideration are important steps in a cultural change that removes current ignorance about the consequences of lawbreaking in this field. They introduce a radical public rethinking about the nature of the Internet and its connection with the protection that the rule of law affords to us all.

7.112 It should be clear, therefore, that the recommendations made below have to be regarded as preliminary or opening shots in a vitally important area of development.

7.113 Finally, this chapter is not intended to be seen as a long lamentation against social media. Rather it is hoped that it will be treated as a constructive critique cast in the knowledge that social media has the capacity to be of inestimable value if it chooses to do so. It could have a role to play, for example, in highlighting jury responsibilities, pointing out awareness of rape myths, discussing the issue of consent, and highlighting the nature of serious sexual offences with steps to improve online responsibility. I hope that in the months and years ahead, social media will take on that civic responsibility.
Proposed recommendations

62. There should be a fully coordinated cross-jurisdictional consultation and fresh approach to controlling the influence of social media and coordinating enforcement measures across the United Kingdom and Ireland.

63. In the wake of such consultation, the following steps should be jointly considered:
   • Social media publishers should be made liable for legally objectionable material contained on their platforms.
   • Liability should accrue to social media outlets once notification of the objectionable material has been given of a posting that breaches an injunction or risks prejudice to a trial and that material has not been taken down within 24 hours.
   • A legal onus should be placed on social media to identify and remove material potentially prejudicial to a trial in advance of the trial hearing.
   • Law enforcement agencies and the Public Prosecution Service should take steps to notify the main social media outlets in advance of a trial when it is anticipated that adverse social media comments prejudicial to the fairness of a trial may arise.
   • Mainstream media should turn off and disable public comment facilities about a trial in the course of live proceedings.
   • Twitter and similar outlets should deploy technology tools to review and block the accounts of users with a history of abuse.
   • The administrators and moderators of online groups should be made responsible for their content.
   • Bloggers outside mainstream journalists should not have the defence of ‘fair and accurate’ reports on court proceedings. A new qualified privilege defence should be introduced for court proceedings reports that do not meet the fair and accurate requirement but are not the product of malice.
   • With the advent of the 2016 General Data Protection Regulation, data controllers, including Internet intermediaries, must erase content based on ‘right to be forgotten’ requests.

64. Legislation should be introduced in Northern Ireland, similar to The Criminal Justice and Courts Act 2015, bringing with it a stringent regime and codification of jurors’ responsibilities.

65. A specific offence should be introduced of a juror who intentionally seeks information relating to a case before them in the course of the trial. That information includes, but is not limited to, asking a question, searching online, visiting a place, inspecting an object, conducting an experiment or asking someone to do anything of this nature.
66. It should be ensured that information in the case ‘includes the person in the case, the judge dealing with the case, any other person in the case (including lawyers or witnesses), and the law relating to the case, the law of evidence or court procedure’.

67. The new legislation shall grant a power to a judge, if they are convinced it is in the interests of justice, to temporarily confiscate a juror’s electronic devices and search a juror if it is believed they have not been surrendered.

68. Judges should be empowered to order all mobiles etc. be left outside the court if members of the public are to be admitted.

69. Impose prison sentences of up to two years for breach of the juror offences.

70. Monitor compliance with court orders in relation to social media and carry out surveillance of social media to reduce the risk of significant breaches.

71. Provide to jurors a helpline telephone number or email address to enable them to discreetly complain of breaches of which they become aware.

72. Increase the current penalties for breaching the anonymity of complainants.

73. Immediately introduce a written document at least to all sworn jurors in serious sexual offence cases, identical to that in use in England entitled *Your Legal Responsibilities as a Juror*.

74. Our courts should be granted general powers to place restrictions on publication of material where it appears to be necessary to avoid risk of prejudice to the administration of justice.

75. Provide for judicial powers to direct removal of material from websites and/or the disabling of public access to websites where it appears to be necessary to avoid risk of prejudice to the administration of justice.

76. The court to have powers to order online hosts and Internet providers to disable specified sections of websites for limited periods.

77. As part of the overall package of reforms, the Attorney General for Northern Ireland should publish advisory notes on the government website and Twitter to help to prevent social media users from committing a contempt of court.

78. As part of the overall package of reforms, the Attorney General for Northern Ireland’s website should publish infographics setting out what might be considered a contempt of court in the context of publishing comments on social media.

79. A new online service should be established to help journalists and publishers reporting criminal trials to discover whether reporting restrictions are in force and, if so, why.

80. All court postponement orders should be posted on a single publicly accessible website.
81. A further restricted service should be available where, for a charge, registered users could sign up for automated email alerts of new orders to reduce the risk of contempt proceedings for publishers from large media organisations to individual bloggers, and enable them to comply with the court’s restrictions or report proceedings to the public with confidence.

82. The government should consider how an online reporting restriction database could be taken forward as existing technology is replaced and updated.

83. That the findings of the Attorney General’s current review in England and Wales should be carefully monitored for further steps relevant to this jurisdiction.

84. That the current notice in jury rooms that reads ‘Do not put anything on social media’ should be radically revised and replaced with the written document given to each juror.

85. That the introductory jury video should make the same points.

86. Live tweeting from the trial should remain universally banned in criminal trials save where permission is granted to the press.

87. A notice similar to that handed to the jurors be prominently displayed in the public gallery of each courthouse, emphasising that it is unlawful to breach the anonymity of the complainant in any circumstances.

88. The judiciary and the Public Prosecution Service should undergo mandatory training and refresher training encompassing information technology, awareness of social media platforms, trends, language etc.

89. The Department of Education should strongly encourage boards of school governors to introduce awareness sessions to ensure students understand the consequences of posting on social media.

90. The Department of Education, in consultation with the NICTS, should take steps to strongly encourage schools to include in their civics curriculum instruction on juries, jury responsibilities and contempt laws to encourage greater civic responsibilities among Internet natives.
Appendix C

Your Legal Responsibilities as a Juror

By serving on this jury you are fulfilling a very important PUBLIC SERVICE. This means you have some important LEGAL RESPONSIBILITIES.

As a juror you have taken a LEGAL OATH or AFFIRMATION to try the defendant based ONLY on the evidence you hear in court.

This means the FAIRNESS of the trial depends on you following a few very IMPORTANT LEGAL RULES. These rules are explained to you in this Notice.

You need to READ these rules, and make sure you UNDERSTAND and FOLLOW these rules at all times.

You should keep this Notice with your SUMMONS at all times while you are on Jury Service.

What Would Happen If You or Any Juror Did Not Follow These Rules?

If you do not follow the rules in this Notice, you may be in CONTEMPT OF COURT and committing a CRIMINAL OFFENCE. This is because these rules about what you can and cannot do as a juror are ORDERS OF THE COURT and also part of the CRIMINAL LAW. You can be prosecuted for breaking these rules, and if you are found guilty the maximum sentence is two years in PRISON, a FINE or both.

THE RULES

Looking for Information About Your Case

It is ILLEGAL for you to LOOK for any information at all about your case on the INTERNET or ANYWHERE ELSE during the trial.

This means you CANNOT LOOK for any information about:

- Any PERSON involved in the case. This means any DEFENDANT, WITNESS or anyone associated with the case including the JUDGE and LEGAL TEAMS.
- The CRIME or CRIME SCENE.
- The LAW and LEGAL TERMS used in the case.
- COURT PROCEDURES.

It is also ILLEGAL for you to ask ANYONE else to LOOK FOR YOU.
Appendix D

Contempt of Court (2): Court Reporting - Final Recommendations

• Adopt a publicly available online list of existing section 4(2) orders in force in England and Wales similar to that currently in place in Scotland.

• Orders would be communicated to an administrator on being made (as in our pilot scheme) and placed on the online list immediately. They would be removed from the online list on the date of their expiry (though the continued presence of an order on the list after its expiry would of course not itself extend contempt liability).

• An addition to the standard form to make clear that where a section 4(2) order includes a prohibition on reporting the existence of the order or its terms, this does not apply to the order's publication on the official online database.

• Those orders whose expiry is contingent upon another event, such as the conclusion of named legal proceedings, reasonably frequent checks are undertaken by the administrator of the list to ensure that expired orders are removed from the list promptly.

• Regarding concerns expressed about an online list compromising the very confidentiality that section 4(2) orders are designed to protect, our primary response is that this fails to take into account the limited purpose of a section 4(2) order, and has caused no problems in Scotland.

• Limit the information displayed on the publicly available online list to the name of the case in which the order has been made, and the date on which the order expires (or if the order expires on the conclusion of another case, rather than on a fixed date, then a record of this fact, and the name of the linked case).

• Access to the online list should be open to the general public, and therefore to all potential publishers of online and print material, including individual bloggers and other small-scale publishers in addition to the major media organisations.

• Where a potential publisher accessed the list and saw the name of a case about which they wished to publish, the webpage would direct them to telephone the court at which the case was being heard in order to discover further details about the terms of the order.

• To protect anonymity where appropriate, where there are reporting restrictions in place relating to the names of parties to the proceedings, the online list will identify cases by number, with a suitably anonymised case name.

• The online list should carry a warning to potential publishers to the effect that case numbers rather than names are the determinative identifier of a case, and that the mere absence of a case’s name on the list should not be relied upon if the list includes anonymised case numbers. In the event that there is an anonymised case listed at the court centre in which the potential publisher is interested, and if the potential publisher is uncertain whether this number refers to the case about which
they wish to publish, then they should contact the court by telephone to check before publishing.

- Although the content of section 4(2) orders can be discovered by those sitting in the public gallery at court, by this information available to a potentially limitless audience via a public webpage may increase the chance of exactly the prejudice that such orders are designed to prevent.

- On further consultation, however, media representatives stated that proactive distribution of the terms of section 4(2) orders (as is the practice in Scotland, to a limited mailing list of media representatives) would assist them in establishing their legal obligations.

- The publicly accessible list of orders be supplemented by an additional restricted database which would contain the terms of section 4(2) orders themselves. We recommend that the cost of administering this more detailed database be borne by its users, and hence that there would be a subscription charge for access to the fuller list.

- The restricted nature of this additional database would guard against the slim chance of a juror stumbling upon the contents of an order when online.

- Charging for this extended service is justifiable, since those potential publishers who did not wish to pay would still have access to the basic list free of charge and would be able to enquire as to the details of any orders in which they were interested in the usual way, by contacting the relevant court.

- In addition to keeping costs to the public purse down, charging for access to the extended list would have the further advantage of ensuring that users of this extended service were traceable. Paying for access using a bank transfer, debit or credit card would enable users’ identities to be verified and linked to a UK postal billing address (either an individual’s home address, or a media organisation’s business address). This would enable users of this restricted list to be traced.
Chapter 8

Cross-examination on previous sexual history
In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.

Lord Slynn of Hadley, 2001

Issue
Is previous sexual history ever relevant to trials involving sexual offences, and does the current legislative regime in Northern Ireland strike an appropriate balance between an accused’s right to a fair trial and the protection of complainants?

Current law and practice
8.1 In 1976 judges were given powers to limit the use of previous sexual conduct but the discretion was widely drawn and rarely used effectively.

8.2 Article 28 of The Criminal Evidence (Northern Ireland) Order 1999, which mirrors section 41 of the Youth Justice and Criminal Evidence Act 1999, provides restrictions on evidence or questions on the complainant’s sexual history in proceedings for sexual offences.

8.3 Courts may now grant leave to introduce evidence of sexual behaviour only if one of a number of criteria is met and the court is satisfied that if the previous evidence was not heard, an unsafe decision could be made. The evidence or questioning must relate to:

- An issue that must be proved other than the complainant’s consent (a relevant issue would be honest but mistaken belief in consent).
- The issue being argued is whether the complainant consented and the evidence or questioning relates to behaviour that took place as part of the alleged offence, or no more than 24 hours before or after the offence.
- The issue is whether the complainant consented and the evidence or questioning relates to behaviour so similar to the defence’s version of the complainant’s behaviour at the time that it cannot reasonably be explained as a coincidence.
- The evidence or questioning is intended to dispute or explain evidence introduced by the prosecution about the complainant’s behaviour, whether alleged to have taken place at the time of the alleged offence or at a later date. Such evidence must go no further than to directly contradict or explain claims made by or on behalf of the complainant.

1 R v A (No 2) 2001 UKHL 25
• If the defence seek to introduce questioning or evidence by claiming that it relates to an issue that has to be proved, but the court considers that the real or main purpose is to undermine or diminish the complainant’s credibility, the court will not allow it.

8.4 Something of a gloss was put on this by the House of Lords in 2001. In that case the defendant wished to introduce evidence of an alleged previous sexual relationship with the complainant prior to an alleged rape, which was not within the parameters of section 41 of 1999 Act and was therefore not permissible. Lord Steyn stated:

The effect of the decision today is that under s41 (3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under s3 HRA 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention. If this test is satisfied, the evidence should not be excluded.

8.5 In Northern Ireland an application under Article 28(2) of the 1999 Order for leave to adduce evidence of, or ask questions about, any sexual behaviour of a complainant must be made in writing within 28 days from the date of the committal of the defendant, or be accompanied by a full written explanation specifying the reasons why the application could not have been made within the specified period.

8.6 An application to permit the evidence shall contain a summary of the evidence it is proposed to adduce and of the questions it is proposed to put to any witness, and a full explanation of the reasons why it is considered that the evidence and questions fall within Article 28(3) or 28(5) of the 1999 Order.

8.7 However, experience of counsel is that often such applications are made on the day of trial or, indeed, during the trial, fuelled by the contents of late disclosure.

8.8 A theme that emerged in the case of this Review is that applications to cross-examine about previous sexual history are mounted persistently late in the day and despite the rules in too broad a fashion. This often leaves the trial judge having to make such decisions in the midst of a trial.

8.9 The primary cause of this is often that the source of such cross-examination arises from third-party material. Such material is not sought, and the court does not commence a third-party disclosure exercise until then, long after the arraignment. The volume of material can be large in quantity and this contributes to the delays that arise. This stems from an undesirable backloading of this issue, which I have highlighted in chapter 10, ‘Disclosure’.

2 R v A (No 2) 2001 UKHL 25
Background

8.10 Academic criticism of the House of Lords judgment\(^3\) has suggested that this judgment effectively rewrote section 41. It allowed the sexual history evidence between the accused and complainant if its omission could threaten the accused’s right to a fair trial. It also brought elements of confusion and ambiguity into the scope of the law and has been interpreted to include third-party evidence.

8.11 A number of complainants and victims’ groups with whom I have met assert that all too often there is inappropriate admission of previous sexual history either directly or indirectly. It is yet another fear embraced by complainants about the trial itself that contributes to disenchantment with the legal process and fears of what it may hold.

8.12 In a recent report led by Dame Vera Baird,\(^4\) a study observing 30 rape trials between January 2015 and June 2016 found that sexual history evidence was introduced in just over one third of the trials, often in circumvention of the procedural rules. Of the 11 cases where this evidence was introduced, six involved evidence or questioning relating to third parties.

8.13 This echoes findings by LimeCulture in September 2017 following a survey into independent sexual violence advisers (ISVAs) and court cases over the period 2015–17. It was reported that out of a sample of 36 cases, only 25% of ISVAs recorded an absence of questioning about previous sexual history. Often the complainant was not informed before the start of the trial that this questioning was to take place.

8.14 On the other hand, the findings of a Crown Prosecution Service (CPS) audit in England commissioned by the Attorney General’s Office and the Ministry of Justice in December 2017 analysing 309 rape cases, finalised in 2016, recorded that in 92% of cases, the judge did not permit an application to introduce sexual history evidence and such applications were made only in 13% of such cases.

8.15 The conclusion was that the law is operating as parliament intended. A flaw in this report, however, may be that it included cases where there had been pleas of guilty and obviously cross-examination of previous sexual history would be irrelevant in such cases.

8.16 There has been no similar published research on the matter in Northern Ireland. However, in Northern Ireland a court observers’ panel has been established under the leadership of Victim Support NI. They will attend all aspects of

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Crown Court trials of a sexual nature in late 2018 and one of the matters to be observed will be the occasions when previous sexual history is invoked.

8.17 A further source of concern has been the use of third-party evidence in this context. There have been continued calls for (further) legislative reform in this area.

8.18 Most recently, proposals were made in parliament to strengthen the law following the controversial Court of Appeal judgment in R v Chedwyn Evans where it was held that sexual history evidence relating to persons other than the accused was admissible and potentially relevant. Following a retrial, where this evidence was introduced, the defendant was acquitted of rape.

8.19 Nonetheless, more common today are judicial pronouncements disavowing the relevance of third-party evidence to consent, including Lord Clyde in R v A, who clearly stated that while some evidence of previous sexual behaviour with the defendant may be relevant to an issue of consent, he did not ‘consider that evidence of her behaviour with other men should now be accepted as relevant for that purpose’.

Other jurisdictions

8.20 It emerged from our research into this subject in Australia, Canada, England and Wales, New Zealand, Norway, Ireland, Scotland, South Africa, Sweden and the US that, internationally, this issue has been very challenging. It has been grappled with in largely similar ways, all investing courts with a discretion to allow such evidence in various circumstances and with various safeguards.

8.21 Although varying in formulation and scope across jurisdictions, restrictions on sexual history evidence aim to repudiate inferences about women’s sexuality and credibility. They particularly seek to address the ‘twin myths’ that sexually active women are more likely to consent and that they make less credible witnesses. There is greater agreement (but not consensus) that third-party evidence is not relevant.

8.22 What was troubling was that across the globe, the research indicates that the problem is not so much the statutory regime adopted but the failure of the judiciary to apply the provisions correctly. This has led to the admission of previous sexual history evidence inappropriately in many jurisdictions.

8.23 Precisely the same criticisms, justified or not, that have surfaced during my Review have emerged in our international researches, despite the universal insistence on a test of relevance. They include use of previous sexual history:

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6 In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman: it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape. Lord Slynn of Hadley, R v A (No 2) 2001 UKHL 25
• To undermine the complainant’s credibility; this may be introduced subtly or through innuendo. Research indicates that admitting such evidence increases the chance of the factfinder blaming the complainant.

• To support inferences of consent; this undermines the notion that consent is person- and situation-specific. The defence may also use sexual history evidence to liken the events under scrutiny to ‘normal’ sexual behaviour.

8.24 Judicial discretion in relation to sexual history evidence is a key feature of the legislation in every jurisdiction considered. However, across the jurisdictions, research suggests that judges may not adequately scrutinise the evidence at issue where their discretion is broadly framed. This can lead to irrelevant and/or discriminatory evidence being admitted.

8.25 Findings from the Northumbria observers’ panel in England and Wales echo the practice in jurisdictions with similar legislative provisions.

8.26 A New Zealand study found that questioning about the complainant’s prior sexual history (including with third parties) was introduced in 43% of recent cases.

8.27 The most recent Scottish statistics reveal that applications to admit sexual history evidence have been made in 72% of sexual offence trials (one fifth relating to third parties) and only 7% of the applications were refused. Worryingly, this demonstrated an increase in the use of sexual history evidence following new reforms aiming to restrict this material.

8.28 In Ireland, a study of rape trials during 2003–09 found sexual history evidence was admitted in two thirds of cases (with a 70% success rate for applications), most commonly related to previous sexual activity with the accused, previous alleged false allegations and ‘promiscuity/routinely displays suggestive behaviour’.

8.29 In an effort to prevent this, a number of jurisdictions have enacted legislation that excludes sexual history but defines strict circumstances where such evidence may be admissible. Canada is a good example of this.

8.30 In Canada, the Criminal Code states that it is impermissible to support inferences relating to consent or in order to undermine the complainant’s credibility. Applications to hear sexual history evidence must be made in writing, and the jury and public are excluded from the application hearing.

8.31 The Criminal Code also states that no evidence shall be adduced that the complainant has engaged in sexual activity other than that which forms the subject matter of the charge, with the accused or any other person, unless the judge determines that the evidence:

• is of specific instances of sexual activity;

• is relevant to an issue at trial; and
A review of the law and procedures in serious sexual offences in Northern Ireland

8.32 In determining whether to admit sexual history evidence, the legislation requires the judge to take into account a number of factors. These include the interests of justice; society's interest in encouraging reporting; whether there is a reasonable prospect the evidence will assist in arriving at a just determination; the risk that the evidence may unduly arouse jury sentiments of prejudice, sympathy or hostility; and the complainant's dignity and privacy.

8.33 Canada provides an exception permitting the introduction of sexual history evidence on the basis of similarity of behaviour, albeit this is not allowed to be used to demonstrate consent.

8.34 A leading Supreme Court case in Canada7 provided illustrative examples of admissible evidence, which must be established on a voir dire by affidavit or the testimony of the accused or third parties, showing that the evidence is legitimate. These include the following:

- evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
- evidence of sexual conduct tending to prove bias or motive to fabricate;
- evidence of prior sexual conduct known to the accused at the time, tending to prove that the accused believed that the complainant was consenting;
- evidence of prior sexual conduct meeting the requirements for the reception of similar act evidence; such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness; and
- evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.

8.35 Two leading academics8 have praised the Canadian approach and have suggested that:

- If England and Wales, and, therefore, Northern Ireland, enacted similar provisions to those in place in Canada it would enhance the law and 'restore the notion of consent as being person and situation specific'.
- The Canadian approach has advantages over comparable legislation in England and Wales, and Ireland. In particular, it specifies that the purpose of the restriction is to exclude irrelevant evidence and it offers detailed

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7 R v Seaboyer [1991] 2 SCR 577
guidance around admitting such evidence and the factors to be considered in this regard. Murphy\(^9\) states:

The refinement of the restriction in Canada offers an excellent example to other common law countries. Firstly, the clarity of the provisions makes the law easier for complainants to understand and secondly its precision upholds the fair trial rights of defendants with due regard to the complainant’s right to privacy and respect.

8.36 Having said all that, research in 2016 found that some trial judges in Canada misinterpret or incorrectly apply the Criminal Code provisions in relation to sexual history evidence. This is due to a number of factors, including a misunderstanding among some judges regarding what the legislation requires and the influence of third-party restrictions.

8.37 In New Zealand there are firm third-party restrictions and the judge may allow such evidence to be adduced only where satisfied that it would be contrary to the interests of justice to exclude it.

8.38 In the US there are varying laws across states but Michigan’s law is among the strictest: judges may admit such history only if they find the complainant’s past sexual conduct with the accused or activity explaining physical evidence is material to a fact at issue and that its inflammatory or prejudicial nature does not outweigh its probative value.

8.39 In short, most of the jurisdictions considered within this chapter have faced similar challenges to Northern Ireland in implementing legislation to restrict sexual history. As a consequence, such legislation is generally viewed as having limited effectiveness.

Arguments for change

8.40 In analysing possible arguments for change, I have leaned heavily on an arresting analysis of the issues by Professor Clare McGlynn in a recent paper.\(^{10}\)

8.41 First, the Canadian system has many benefits. It contains a clear statement that sexual history evidence may not be admitted to support inferences supporting the ‘twin myths’ – namely, that by reason of that sexual activity, it is more likely that the complainant consented or is less worthy of belief. This should be introduced into English law and restore the notion of consent as being person- and situation-specific rather than capable of being inferred from previous conduct.

8.42 While such a change should apply equally to evidence with the accused and third parties, a reform in relation to the latter would at least shift current

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understandings. Such a legislative reform, therefore, would exclude any sexual history evidence with third parties that was seeking to infer consent.

8.43 This would bring English law closer to other jurisdictions, such as Michigan, where all third-party sexual history evidence is excluded other than evidence of specific instances to show the source or origin of semen, pregnancy or disease.

8.44 Any amended legislation could also state that, as a matter of principle, evidence should only be admitted in exceptional cases, helping to counter current practice.

8.45 Secondly, decision-making could also be improved by specifying the issues to be considered when determining an application, again following the Canadian practice.

8.46 This approach provides clarity regarding the varied purposes of the legislation and aims to ensure as thorough an examination of the issues as possible. Such a provision is recommended, coupled with a procedural requirement that a written explanation is provided of the grounds adopted, not just a reference to the criteria or, even worse, a citation of the relevant section of the Act.

8.47 As well as clarifying the rationales for restricting sexual history evidence, legislation should raise the threshold of admission before potentially highly prejudicial and distorting material is admitted.

8.48 Section 41 of the English legislation (identical to our legislation) currently requires that evidence is admissible only if the ‘refusal might have the result of rendering unsafe a conclusion of the jury’ or court, on ‘any relevant issue’ (section 41(2)(b)).

8.49 This is a low threshold given the highly prejudicial nature of sexual history evidence compared with alternatives in other jurisdictions — for example, Canada, which provides that evidence may be admitted only if it has ‘significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice’.

8.50 This Canadian provision emphasises that the risk of admitting such evidence imperils the proper administration of justice, and not only the privacy, rights and dignity of the complainant. The inclusion of such a provision, properly recognised and utilised, might go some way towards enabling judges to take a more robust approach without fear of appeals.

8.51 Thirdly, the granting of legal representation to complainants would help judges to arrive at a correct decision.

8.52 Fourthly, the scope of any restrictions is dependent on the definitions used, specifically here the meaning of ‘sexual behaviour’. Currently defined as ‘any sexual behaviour or other sexual experience’ (section 42(1)(c)), this provision is potentially broad. Courts have:
• excluded evidence of the complainant talking to and exchanging phone numbers with a third party where the defence had sought to imply this was preliminary sexual behaviour;

• permitted cross-examination regarding two relationships with third parties, on the basis that these were questions about the ‘relationships’ and not ‘sexual behaviour’; and

• permitted text messages showing a 12-year-old girl participating in ‘risqué conversations’.

8.53 A definition, therefore, which at least included such implied sexual behaviour, may go some way towards strengthening the restrictions on these forms of evidence.

8.54 Fifthly, there is widespread concern that sexual history evidence is permitted to demonstrate reasonable belief in consent, even where excluded on the grounds of actual consent.

8.55 Sixthly, the legislation should remove the current similarity exception on the dual grounds of the irrelevance of this form of evidence and its prejudicial effects. If the evidence is sufficiently probative and germane to a relevant issue in the trial, it will come within one of the other exceptions such as rebuttal evidence.

8.56 The less satisfactory option, but still better than the current position, is to strengthen the current exception, ensuring that only conduct indisputably unusual, and, therefore, highly unlikely to be coincidental, be admitted. Even in such cases, the approach in Canadian law should be taken, such that similarity evidence is not permissible to demonstrate consent (or belief in consent). What should be required is a demonstrable pattern of highly distinctive and unusual sexual behaviour. A pattern requires a significant number of incidents, more than one or two, to be sufficient to demonstrate consistent and characteristic behaviour. The behaviour must be highly distinctive and unusual, and, therefore, closely resembling the activities which form the subject matter of the charge.

8.57 For the pattern to have any relevance or significant probative value, it would need to have a close temporal connection to the incidents alleged. Such an approach would return to the original parliamentary intention of the 1999 Act and should avoid the Evans trap whereby the more ordinary the behaviour, the easier it is to satisfy the similarity condition.

8.58 Finally, while all of the above recommendations would create a significantly fairer and better law than at present, the enforcement of stronger procedural rules may have an even greater impact.

8.59 Indeed, even just requiring the existing rules to be followed would improve considerably the impact and effectiveness of the current law. The current rules do require written applications in advance, together with justifications and specifics of the evidence to be adduced.
8.60 A hearing is required if the prosecution is to challenge an application, where the judge so demands or the application is made less than 14 days before the trial. If there is to be a hearing, it is to be in private. While this sounds sensible, it means excluding the public, and the complainant is also excluded.

8.61 However, there is no requirement that late applications need be in writing, nor the reasons for granting or refusing the application. Nor are there any sanctions laid down for late applications. Kelly et al.’s review of section 41 found that, contrary to the requirements of advance and written notice, the ‘vast majority’ of section 41 applications took place on the first day of the trial.

8.62 This failure to follow the procedures demonstrates a worrying disregard for rules designed to ensure appropriate and effective scrutiny of applications. It suggests that the risks to the administration of justice are not sufficiently recognised, nor is there sufficient respect for the complainant, who deserves advance notice of evidence being adduced about her or his sexual behaviour.

8.63 Suggested reforms, therefore, include an obligation for applications to be made pretrial and in writing, with the prosecution required to respond to each application. A hearing should be mandatory to ensure a careful scrutiny of applications, with the complainant permitted to attend. Such a hearing will help to ensure that the prosecution actively consider (and challenge) the use of sexual history evidence.

8.64 There must be stricter scrutiny of any late applications (which should still be in writing) with them being accepted only where the evidence was demonstrably not available at an earlier stage. Judges should be required to give reasons for their decision in writing, and the prosecution (and complainant if granted additional rights) should have a right to appeal a decision to introduce evidence.

Arguments against change

8.65 Legislation in other jurisdictions has not proved any more effective than our present laws.

8.66 The current statutory regime is fair and does strike an appropriate balance between the competing interests. The paucity of challenges to it in this jurisdiction reflects this.

8.67 The problems do not lie with the legislative framework but rather in its application. If judges are applying the rules incorrectly, they are obviously not being assisted by counsel.

Discussion

8.68 In this context, it is not difficult to understand how research evidence and witness testimony over decades have raised concerns about the extent to which rape complainants are facing humiliating and traumatic trial processes. Phrases such as the ‘second rape’ or ‘judicial rape’ have become common parlance due to the enduring evidence from complainants of their adverse treatment in court.

8.69 As I found in my interviews with complainants, concerns about the trial process are contributed to by fear of their sexual past being publicly explored. These concerns are factors in the under-reporting and high attrition rates.

8.70 Accordingly, restrictions on sexual history evidence, by limiting evidence and cross-examination to only highly probative material, are justified by the need to reduce the humiliating and distressing nature of cross-examination in trials of serious sexual offences as well as protecting a complainant’s right to privacy.

8.71 Nonetheless, there is a general acceptance that there remains some relevance for sexual history evidence, particularly regarding a past relationship with the accused. Striking an appropriate balance between ensuring the defendant’s right to a fair trial and protecting the complainant often proves difficult and contentious.

8.72 Moreover, I remain convinced that judicial discretion in relation to sexual history evidence must be the key feature in determining how best to resolve these difficult issues.

8.73 I have not been persuaded that further legislation in any of the jurisdictions that we have considered has in practice trumped our own system. I see no reason why current concerns in England about such matters as the circumstances in which similarity arises, the appropriate definition of sexual behaviour in the legislation and the circumstances in which relations with a third party can be explored will not receive full clarification and firm judicial guidance from the Court of Appeal in Northern Ireland at the earliest opportunity when they arise.

8.74 I am confident that the procedural and evidential problems surrounding this area of law can be met by a series of robust procedural measures that do not yet require legislative change. These amount to the following.

8.75 First, the highly complex, technical and evolving nature of these issues must be grasped. There should be a recognition generally that these types of trials require particular knowledge, skills and abilities on the part of both the legal profession and the judiciary.

8.76 Secondly, intense training, seminars and workshops should be provided to the judiciary.

8.77 I note with approval that the Judicial Studies Board for Northern Ireland (JSBNI) has prioritised this issue, and I recommend it to provide regular and updated
training in issues relating to sexual offence trials and ensure that all judges presiding over such trials have attended the appropriate training courses and seminars.

8.78 Appropriate resources need to be made available to the JSBNI to ensure that all Crown Court judges attend in England the appropriate prescribed serious sexual offence seminars.

8.79 Thirdly, at the pretrial case management hearing and as part of robust case management of such cases, the defence should be asked to state in open court whether it is intended to make an application under Article 28 of The Criminal Evidence (Northern Ireland) Order 1999.

8.80 Fourthly, in the event of a late application under Article 28 of the 1999 Order, contrary to the time limits set out in rule 44H of The Crown Court Rules (Northern Ireland) 1979, judges should robustly take full account of the earlier opportunity, the requirements of the rules, the potential impact on the complainant of a late application, and on police resource availability at short notice. I recognise that the reason for such late applications are often connected with late disclosure to the defence and this is yet another reason why the whole approach to disclosure needs to be reassessed.

8.81 If such an application is granted, judges should actively limit questions and evidence to the minimum required.

8.82 In the event that cross-examination on previous sexual history occurs without permission, the judge should immediately intervene and consider whether the impact on the complainant and or the prosecution case is such that a retrial should be ordered.

8.83 Fifthly, counsel for the prosecution and for the defence should be required to attend specialist training in all areas pertaining to sexual offence trials. Legal aid should not be granted to counsel or solicitors in such cases unless such specialist training has been certified.

8.84 The Bar Council and the Law Society should insist on attendance at a sufficient number of continuing professional development (CPD) sessions in vital areas of law, practice and procedure before competence can be demonstrated in areas of serious sexual violence.

8.85 Sixthly, the judiciary, in the wake of the fresh emphasis on training, must introduce robust case management from an early stage with a strong emphasis on:

- upholding the statutory time limits for such applications for cross-examination on previous sexual history in the absence of compelling reasons for extension; disregard of the statutory procedure should not be readily overlooked;
• ascertaining from defence counsel at pretrial hearings whether such an application is to be made;
• all late applications need to be in writing, together with the reasons for granting or refusing the application;
• a hearing should be mandatory to ensure a careful scrutiny of applications, with the complainant notified and permitted to attend; and
• wherever possible, judges should give their reasons in writing and the prosecution (and complainant if granted additional rights) should have a right to appeal a decision to introduce evidence.

8.86 Whilst I do not believe a complete prohibition on evidence about a complainant’s sexual behaviour with a third party should be introduced, the judiciary should recognise that there are strong reasons for imposing a narrower prohibition on the complainant’s sexual behaviour with third parties. Evidence or questions about sexual behaviour with third parties should be much harder to justify on grounds of relevancy than evidence about sexual behaviour with the defendant.12

8.87 Lastly, as outlined in chapter 5, separate legal representation should be permitted for complainants when the defence apply to cross-examine about previous sexual history.

12 R v A (2001) UKHL 25
Proposed recommendations

91. The Department of Justice should carry out an exercise to determine the extent of admission of previous sexual experience in trials in Northern Ireland.

92. A greater emphasis on robust judicial case management in this area, with recognition of the statutory time limits for such applications under Article 28 of The Criminal Evidence (Northern Ireland) Order 1999.

93. The need to invite defence to state in open court at a pretrial hearing whether it is intended to make an application under this article.

94. All late applications to be in writing, together with the reasons for granting or refusing the application.

95. Mandatory hearings for such applications, with the complainant notified and permitted to attend.

96. Wherever possible, the need to give reasons in writing and the prosecution (and complainant if granted additional rights) to have a right to appeal a decision to introduce evidence.

97. In the event of a late application under Article 28 of The Criminal Evidence (Northern Ireland) Order 1999, contrary to the time limits set out in rule 44H of the Crown Court Rules to take full account of the earlier opportunity, the requirements of the rules, the potential impact on the complainant of a late application, and on police resource availability at short notice.

98. Actively limiting questions and evidence to the minimum required.

99. The obligation to closely scrutinise questions in cross-examination so as to ensure the legislation is not being subverted.

100. The judiciary should recognise that there are strong reasons for imposing a narrower prohibition on the complainant's sexual behaviour with third parties than with the defendant.

101. Intense training, seminars and workshops should be provided to the judiciary on this area of law.

102. Appropriate resources to be made available to the Judicial Studies Board for Northern Ireland (JSBNI) to ensure that all Crown Court judges attend in England the appropriate prescribed serious sexual offence seminars on a regular basis.

103. Counsel for the prosecution and for the defence be required to attend specialist training in all areas pertaining to sexual offence trials.

104. Legal aid should not be granted to counsel or solicitors in such cases unless such specialist training has been certified.
105. The Bar Council and the Law Society should insist on attendance at a sufficient number of CPD sessions in vital areas of law, practice and procedure before competence can be demonstrated in areas of serious sexual violence.

106. Legal aid for legal representation should be extended to complainants in this area.

107. The Court of Appeal in Northern Ireland should avail itself of the earliest opportunity to address the following issues under the legislation:
   • the circumstances in which similarity arises;
   • the appropriate definition of sexual behaviour; and
   • the circumstances in which relations with a third party can be explored in cross-examination.
A review of the law and procedures in serious sexual offences in Northern Ireland
Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay causes great harm to public confidence in the justice system … It rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system.

R v Jordan (2016)\textsuperscript{1}

Issue
Can the problem of increasing delay in processing serious sexual offences be solved?

Current law and practice
9.1 Article 6 of the European Convention on Human Rights (ECHR) — the right to a fair trial — provides the right to a fair hearing within a reasonable time:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

9.2 The European Court of Human Rights notes that the reasonableness of the duration of proceedings should be determined based on an overall assessment of each case. In cases where certain stages are conducted at an acceptable speed, the total length of proceedings may exceed a ‘reasonable time’.

9.3 The ECHR further observes that a fair balance has to be struck between the various aspects of this requirement in terms of an expeditious trial and the proper administration of justice. In determining cases, the court has had regard to a range of factors, including the case’s complexity (for example, where there are multiple defendants), the applicant’s conduct (such as seeking to delay the investigation) and the conduct of the administrative and judicial authorities.

9.4 Committal proceedings in Northern Ireland were reformed in part by the Justice Act (Northern Ireland) 2015 (the 2015 Act). This Act allowed for the direct transfer of murder and manslaughter cases, bypassing the committal process, together with the associated inchoate offences (section 11(3)).

9.5 The Act also made provision for the direct transfer of other offences; this would be achieved by the Department of Justice (DoJ) making regulations subject to the affirmative resolution procedure (section 11(4)).

9.6 The Assembly’s Committee for Justice in Northern Ireland in December 2016 considered that domestic and sexual violence cases should be high on the list for consideration for direct transfer.

\textsuperscript{1} 1 SCR 631
9.7 The Northern Ireland Department of Justice has prepared a further Bill to complete reform of committal proceedings, which would make provision for the abolition of preliminary investigations (PIs) and mixed committals. At present, written depositions of witnesses, and other evidence, are taken or given in the presence of the accused, and the accused is at liberty to cross-examine any witness for the prosecution before a district judge. Mixed committals are where not all the evidence is called.

9.8 In this jurisdiction, the criminal courts judicial committee had, as its primary focus, the efficient management of cases coming before the criminal courts for the benefit of all participants, thereby ensuring that cases were disposed of fairly, justly and expeditiously. Case management protocols for both the magistrates’ courts and Crown Courts were intended to be more than a vade mecum but rather a minimum standard to which all practitioners would adhere.

9.9 The indictable cases pilot (ICP) scheme, which currently does not include serious sexual offences, has been rolled out across Northern Ireland and is dealt with below.

Background

9.10 Delay in the criminal justice system in Northern Ireland, and in serious sexual offences in particular, has reached a tipping point where not only those inside the system but the general public and the mainstream press are demanding solutions. The injustice of current delay in the system is intolerable. It needs urgent reform and is a key component of this Review.

Statistics

9.11 The statistics on delay are very troubling. The criminal justice system in Northern Ireland is slower than in England and Wales, with cases taking twice as long to complete. The overall time taken\(^2\) for sexual offence cases in the Crown Court in Northern Ireland, based on the principal offence, reveal that the overall average time for dealing with serious sexual offences has been increasing since 2014/15 (708 days) to 859 days in 2017/18—a 21% increase.

9.12 The average time taken for rape cases\(^3\) dealt with in the Crown Court has increased by 14% between 2015/16 and 2017/18, from 827 days to 943 days, according to DoJ figures. The 943 days average in 2017/18 for rape cases is 69% longer than the overall Crown Court average (558 days). The average time taken for sexual offences excluding rape\(^4\) in the Crown Court has increased by 22% since 2015/16 from 687 days to 839 days in 2017/18.

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\(^2\) From offence reported to case dealt with at court.

\(^3\) Based on the principal offence disposed and relate to substantive versions of the offence only.

\(^4\) Based on the principal offence
9.13 The largest percentage increase between 2014/15 and 2017/18 at interim stage for all sexual offence cases in the Crown Court was shown at offence reported to charged/informed date, with average time increasing by 56% to 184 days.

9.14 In 2017/18 the longest average number of days at interim stage for all sexual offence cases in the Crown Court was spent from first court appearance to court disposal date: 292 days.

9.15 The average\(^5\) time taken from offence reported to case dealt with at court, from 2015/16 to 2017/18, in terms of days in Crown Court cases was as follows:

<table>
<thead>
<tr>
<th>Crown Court cases</th>
<th>2014/15</th>
<th>2015/16</th>
<th>2016/17</th>
<th>2017/18</th>
</tr>
</thead>
<tbody>
<tr>
<td>All cases</td>
<td>476</td>
<td>515</td>
<td>584</td>
<td>558</td>
</tr>
<tr>
<td>All sexual offence cases</td>
<td>708</td>
<td>737</td>
<td>775</td>
<td>859</td>
</tr>
<tr>
<td>Sexual offences against children</td>
<td>598</td>
<td>708</td>
<td>730</td>
<td>986</td>
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<tr>
<td>Rape cases</td>
<td>862</td>
<td>827</td>
<td>921</td>
<td>943</td>
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<tr>
<td>Sexual offences excluding rape</td>
<td>686</td>
<td>687</td>
<td>744</td>
<td>839</td>
</tr>
</tbody>
</table>

9.16 For sexual offences involving children\(^6\) in the Crown Court (based on the principal offence), the overall average time has increased by 65% between 2014/15 (598 days) and 2017/18 (986 days).

9.17 For children, the largest percentage increase between 2014/15 and 2017/18 at interim stage was shown at offence reported to charge/informed date, with average time increasing by 60% to 196 days.

9.18 For children in 2017/18, the longest average number of days at interim stage was spent from first court appearance to court disposal date: 292 days.\(^7\)

9.19 The following additional statistics emerged from The Northern Ireland Audit Office Report\(^8\) published in March 2018:

- 12% — proportion of Crown Court cases that took over 1,000 days to complete between 2011/12 and 2015/16;
- 6.5 — average number of adjournments experienced by victims, defendants and witnesses in Crown Court cases; and
- 46% — proportion of victims and witnesses surveyed by the Department of Justice who felt the justice system was effective.

\(^5\) Average is measured as the median number of days taken, i.e. the number of days at which 50% of those cases included under counting rules have been completed.

\(^6\) Relates to cases where the principal offence was a sexual offence that specified the victim was a child in the offence description.

\(^7\) Please note that these figures are based on the principal offence. The number of cases are therefore probably smaller than the overall number of cases of this type that go through the system each year. For those involving children information relates to where the offence description specifies involvement of a child.

\(^8\) Northern Ireland Audit Office (2018) Speeding up justice: avoidable delay in the criminal justice system Belfast: Northern Ireland Audit Office
9.20 The Public Prosecution Service (PPS) informed the Review that during 2017/18 indictable prosecution decisions in respect of sexual offences were issued in an average of 285 calendar days. This compared with 229 days during 2016/17. This inordinate delay, where files can await allocation for 70 days, is entirely a matter of inadequate resources.

9.21 We investigated the portion of time that was taken up by forensic examination (excluding the cybercrime unit) in relation to the forensic biology examination of rape and other sexual offences and their associated ‘priority’.

9.22 This data, for the last three years, shows that for all sexual offence cases the mean turnaround (in calendar days) stands at 77 days and the median at 72 days; 12% of cases had urgent examinations carried out and 5% of cases were priority cases.

9.23 These turnarounds are measured from the date of the first submission of items to Forensic Science Northern Ireland (FSNI) until the case is closed and takes no account of subsequent later submissions, which may delay the production of the final report and closure of the case.

9.24 Our visit to the cybercrime unit revealed that it has a system of prioritising cases that come in and serious sexual offences are high in the list. However, lengthy delays can occur depending on the number of enquiries that have to be made, and at times the fact that encrypted material has to be sent to specialised services in London.

9.25 Committal proceedings are often blamed for unnecessary delay. The number of committal proceedings in which a preliminary investigation (PI) or mixed committal is a feature is very low.

9.26 Northern Ireland Courts and Tribunals Service (NICTS) statisticians provided the following figures:

- in 2015, there were 171 committals for sexual offences; there was a mixed committal in two cases and a PI in three cases;
- in 2016, there were 171 committals for sexual offences; there was a mixed committal in four cases and a PI in six cases; and
- in 2017, there were 127 committals for sexual offences; there was a mixed committal in seven cases and a PI in three cases.

Reports on delay

9.27 The right to a fair trial includes the right to be heard within a reasonable time. Delay in the criminal justice system has been identified as a major problem for many years.

9.28 There have been a number of reports dealing with the delay within the system. Failure on the part of agencies has been regularly identified as a cause of delay by those reports.
9.29 Since 2006 there have been several independent reports, particularly by the Criminal Justice Inspection Northern Ireland (CJINI), which have been critical of overall performance and identified a number of issues. The Criminal Justice Inspection Northern Ireland is an independent inspectorate with responsibility for inspecting all aspects of the criminal justice system in Northern Ireland apart from the judiciary.

9.30 In 2015, CJINI published its report on the quality and timeliness of police files (incorporating disclosure) submitted to the PPS, which called for greater collaboration between the Police Service of Northern Ireland (PSNI) and the PPS to address significant failings in the preparation of case files and the standards applied around disclosure.

9.31 The Chief Inspector of Criminal Justice for Northern Ireland, Brendan McGuigan CBE, said at the time:

When an incomplete file is submitted by the police because evidence has not been recorded or presented in a coherent way to meet the required standard or problems arise when information is electronically transferred to prosecutions, it is the victims of crime and those facing possible prosecution who suffer as a result. Poor quality files lead to increased costs, court adjournments, avoidable delay and in the worst cases, prosecutions being discontinued, all of which weakens public confidence in the justice system.

9.32 The inspection found that one third of case files were either of an unsatisfactory or poor standard. It recommended:

- a prosecution team, made up of representatives from both organisations, should deal with issues such as investigative standards, bail management and forensic strategy, case management and disclosure;
- responsibility for overseeing the work should rest with a PSNI Assistant Chief Constable and a senior PPS director;
- steps to clarify for police officers what information and evidence should be included in a case file and help to set clear standards around file quality;
- to assist this process, prosecutors to develop a consistent proportional approach around the level of detail required to decide whether or not a case should be taken forward for prosecution;
- weaknesses in the supervision of case files with the PSNI and problems in sending electronic files from the PSNI to the PPS needed to be addressed; and;
- a file review carried out as part of this inspection revealed that disclosure was dealt with satisfactorily by police in only a small percentage of cases.

9.33 The report of the most recent CJINI inspection is imminent and will be available for comment by the time of the final Review report.
9.34 Lack of collaboration and the need for all agencies to work in partnership were again the themes of the Northern Ireland Audit Office Report, *Speeding up Justice: Avoidable Delay in the Criminal Justice System*, published in March 2018. This report focused on how effectively the four main justice organisations in Northern Ireland have worked together to deliver criminal justice: namely, the Police Service of Northern Ireland, the Public Prosecution Service, the Northern Ireland Courts and Tribunals Service and the Department of Justice.

9.35 It asserted that a key feature of how the system in Northern Ireland has operated has been a failure to complete cases within reasonable timescales.

9.36 The main findings were as follows:

- First, key causes of delay are weaknesses in the early stages of investigations. The progress of cases through the system is punctuated by practices and processes that are not efficient and work against the timely delivery of justice. The inability of justice organisations to commit fully to a collaborative model of delivery underlies this situation, with no common performance framework.
- Secondly, in addition to the impact upon victims, defendants and witnesses, there is a significant financial cost of avoidable delay. However, justice organisations are not currently able to quantify the financial cost of delay. Attempts to improve performance are not supported by detailed financial analysis to quantify the expected costs and benefits.
- Thirdly, in the last two years, there have been renewed efforts to tackle avoidable delay and improve performance. The indictable cases pilot (see later in this chapter) delivered improvements in investigation and prosecution performance. Its principles are currently being tested on a wider scale.
- Fourthly, successful reform would contribute to:
  - faster end-to-end times for the completion of cases;
  - higher-quality investigation and prosecution files;
  - stronger arrangements governing working practices at key interfaces between organisations;
  - fewer adjourned hearings and trials at court; and
  - earlier guilty pleas by defendants.
- Fifthly, more work is needed to develop a fully functioning partnership throughout the justice system. This will require behavioural change, supported by effective collaboration within the Criminal Justice Board (CJB) and the Criminal Justice Programme Delivery Group (CJPDG). This includes establishing clear lines of accountability, quality information systems and a transparent reporting framework with continuous review occurring.
Sixthly, the criminal justice system in Northern Ireland does not deliver value for money. The cost of criminal justice in Northern Ireland is significantly higher than in England and Wales, with no additional benefit arising. Cases take considerably longer to complete than in England and Wales.

9.37 Six specific recommendations were made:

- the department, in consultation with the Lord Chief Justice, should ensure that adequate administrative support is provided to the judiciary to facilitate more effective management of cases and case progression in the Crown Court;
- the department should establish an effective system for monitoring the implementation of CJINI’s recommendations to support improvement;
- the department should establish an action plan and timetable for the eradication of the committal process;
- the Criminal Justice Board, working with the Criminal Justice Programme Delivery Group, should focus on securing effective collaborative working to reduce avoidable delay in the management of cases;
- the CJB, working with the CJPDG, should take a lead in developing and implementing protocols around the sharing of performance and financial management information between justice organisations; and
- the CJB, working with the CJPDG, should establish processes that ensure that performance is analysed consistently and that lessons that can deliver performance improvements are learned and shared across the system.

Indictable cases pilot scheme

9.38 The indictable cases pilot scheme was designed at the behest of the Criminal Justice Programme Delivery Group in response to a report into delay in Crown Court cases commissioned by the Lord Chief Justice. The pilot was launched on 2 January 2015 and includes all indictable cases arising in the county court division of Ards.

9.39 Key elements of the ICP process included: improved investigative pathways with more structured and proportionate file preparation; clearer file standards and effective management and supervision of processes; a sentencing statement at police interview stage highlighting the benefits of entering a plea at the earliest opportunity; early PPS advice to the PSNI on charging; the provision of a case outline to facilitate earlier disclosure to the defence; narrowing of the issues in contest cases; robust case management; and a more structured approach leading to clearer opportunities to enter a guilty plea.

9.40 Critical success factors identified for the pilot were: more proportionate case preparation; shorter investigations including earlier submission of forensic evidence; a greater number of earlier admissions of guilt/earlier guilty pleas;
robust case management; fewer remand hearings; fewer withdrawals/reduction in the rate of cracked trials; shorter proceedings overall; and improved victim/witness satisfaction.

9.41 There was a general consensus that the pilot principles should be continued in some form or other and specific ideas/areas were highlighted to explore, which could be added to or enhance the pilot’s features, with the possibility of a ‘special discount’ for ‘really early’ pleas as a further possible element to reinforce the ongoing work.

9.42 The indictable cases process (ICP) notes that during the pilot stage, the ICP achieved:

- 67% reduction in combined police investigation and file submission time;
- 89% reduction in PPS decision-making time; and
- 49% reduction from PPS decision to committal date.

9.43 The pilot has now been converted into a complete roll-out across Northern Ireland since May 2017. However, serious sexual offences are not included in the scheme. I have been led to believe that this is because the PPS believes that the problems with disclosure in such cases render them unsuitable.

9.44 In any event, I understand that the scheme is not being taken up in large numbers, with current figures of 200 in the system, with 38 having been completed this year.

9.45 The PPS asserts that additional work is created through the implementation of pilot principles. This includes telephone and face-to-face consultations with the PSNI, court attendance, particularly at the committal stage, engagement with the defence, engagement with other agencies such as the Probation Board for Northern Ireland (PBNI) and drafting statements of facts. This is an area that may require closer examination in light of resource issues within the PPS.

9.46 Additional concerns were reported pertaining to the non-engagement of the defence at an early stage and delays whilst the defence awaited decisions on legal aid entitlements. Also the lack of an agreement to obtain speedy access to medical information did create delays in one case. Such issues, whilst they have the ability to greatly impact on the development of a case, are largely beyond the control of the PPS within the current structures.

9.47 The judiciary expressed the view that early PPS involvement resulted in more accurate charging.

9.48 This in turn should help to avoid cracked trials during later stages of the process. It was also felt that more accurate charging would have a knock-on benefit of reducing PPS time in court.

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9 Based on PPS data for the first 100 cases dealt with under the Pilot.
9.49 The possibility of a ‘special discount’ for ‘really early’ pleas as a further possible element to reinforce the ongoing work has been canvassed.

Other jurisdictions
9.50 Internationally, many jurisdictions are implementing reforms in an effort to reduce inefficiencies and delays. Of all the researches into other jurisdictions in the issues set out in the chapters in this Review, none found such a complete mirror image with Northern Ireland in terms of the problems of delay and failed solutions.

9.51 The research suggests that internationally there are few if any examples of system-wide reforms with measurable and sustainable outcomes. Indeed, some jurisdictions have highlighted the need to persuade stakeholders of the potential benefits of reform, and have considered introducing, or have introduced, formal measures or sanctions to encourage compliance with reforms.

9.52 This Review has looked at this problem of reducing delay in Australia, Canada, England and Wales, Germany, Iceland, Ireland, New Zealand, the Netherlands, Norway, Scotland and South Africa. Information was not found on effective approaches to reducing delay in France, Sweden or the US.

9.53 It may be a helpful guide to what we should do in Northern Ireland to list the common issues that have arisen in these disparate jurisdictions.

Causes of delay
9.54 At the investigation stage, these include the complexity of the case in terms of the number of witnesses to be interviewed; records and CCTV; and forensic and scientific analysis.

9.55 Poor case management by the police, ineffective investigation techniques and poor information management are other key factors. Research highlights the need for improving this stage of the process through timely and successful completion of police investigations and submission of accurate and complete reports to prosecutors.

9.56 Inadequate communication between police and prosecutors, and prosecutors and the defence, can also lead to delay. Better communication between police and prosecutors is considered essential, helping to ensure that the evidence is gathered and available, that witnesses and missing evidence are identified and that charges are formulated appropriately. Clear lines of communication, protocols and training can limit misunderstandings and errors.

9.57 Inefficiencies occur due to the time taken to reach a decision by the prosecution.

9.58 Resource constraints are also an important factor, including limited prosecution or court capacity to deal with multiple cases.
9.59 When the matter reaches court, there are often further delays. Research conducted by the Attorney General of New South Wales in 2009 bore a remarkable resemblance to issues raised with me in this Review and identified a number of areas contributing to inefficiencies in criminal trials. These were:

- juries: including late applications by jurors seeking to be excused after empanelment and barriers to jury understanding of the evidence and legal arguments;
- conduct of counsel: a perception that some counsel engage in overly lengthy and complex cross-examination while being inadequately prepared;
- identification of the issues: inadequate efforts by counsel to narrow the issues for trial prior to jury empanelment, leading to the presentation of unimportant or uncontested evidence and difficulties for the jury in understanding the relevance of evidence;
- presentation of evidence: prosecution calling repetitive evidence or non-contentious witnesses to ‘over-prove’ matters; and an absence of aids to support jury understanding of evidence (such as chronologies);
- technology: issues such as inadequate staff training and in compatibility of varying formats; and
- some defendants may wish for the process to take as long as possible, particularly if they believe that delays provide a greater chance of the case collapsing.

Effects of delays

9.60 Key effects of delay in the system on complainants include the following:

- Impact on personal circumstances, particularly as much sexual violence occurs in a family or intimate relationship context (this can also have an impact on defendants).
- Impact on psychological recovery: retaining facts of the case in preparation for trial for longer periods can have greater effect on their long-term therapeutic recovery.
- Particular difficulties for children, in light of their age and the proportion of their lives spent with criminal proceedings pending. This is especially problematic for cases involving younger children, who are more likely to forget information over time than older children and adults. Child witnesses are more likely to confuse memories from similar sources and are more willing to guess answers to questions when their memory has deteriorated. As such, their testimony is more likely to be undermined by difficult questioning following lengthy delays.
9.61 Delays can also have implications for the administration of justice. Article 6 of the European Convention on Human Rights provides the defendant with the right to a fair hearing within a reasonable time.

9.62 Both the complainant’s and the accused’s ability to recall the alleged offence at trial can be affected by delay. In turn this may influence perceptions of their credibility as a witness, which is particularly important in such cases where there are rarely any other witnesses. The complainant’s testimony is likely to be more detailed and accurate closer in time to the alleged incident and, therefore, higher in quality.

9.63 In addition, the National Audit Office (NAO) notes that delays, along with collapsed trials, damage public confidence in the criminal justice system. It suggests that delays also create extra work and waste criminal justice resources.

Case management

9.64 In a number of jurisdictions, initiatives to reduce delay, including legislation, have included a focus on case management, with strong and proactive early engagement between all parties a crucial element.

9.65 Indeed, the recent Canadian inquiry by the Standing Senate Committee on Legal and Constitutional Affairs suggested that a lack of robust case management may be the most significant factor in delay, leading to the introduction of legislation there aiming to give judges more robust tools to enable effective case management.

9.66 In New Zealand, legislation enacted in 2011 encourages cooperation between all parties and requires counsel to agree which aspects of the case to focus on in court. This process includes a statutory obligation on defence counsel to file a document certifying that a meeting in terms of the management of the case has occurred between prosecutors and the defence.

9.67 Its purpose is to discuss prospects of resolution or, alternatively, evidential issues in preparation for trial. Both parties are obliged to engage in these discussions and the document must be filed within five working days of the case review hearing. If defence counsel cannot obtain instructions, they are obliged to inform the court.

9.68 Further, defence counsel will not get paid by legal aid if the memorandum is not filed on time, and there is an ability for the court to impose costs directly on defence counsel if they do not comply with these procedural requirements.

9.69 In Tasmania, legislation aiming to limit delays provides the Supreme Court with increased case management powers.

9.70 In New South Wales, legislation also requires case conferencing between the prosecution and the defence, with a view to allowing for meaningful discussion
about the case, reducing the issues to be dealt with at trial and maximising opportunities for early guilty pleas.

9.71 Research suggests that effective case management includes:
- identifying the real issues and needs of witnesses at an early stage;
- achieving certainty in regard to what must be done, by whom and when;
- monitoring the case’s progress and compliance with directions;
- ensuring evidence is presented clearly and concisely;
- avoiding unnecessary hearings; and
- making use of technology.

9.72 Most importantly, perhaps from our perspective in Northern Ireland, are the changes that have been made in England and Wales in the wake of Sir Brian Leveson’s *Review of Efficiency in Criminal Proceedings* and Lady Justice Macur’s *Better Case Management (BCM) Handbook* (January 2018).

9.73 In essence, the theme is that there is mandatory early proactive communication and engagement between the parties (see Criminal Procedure Rule 3.3), with each party obliged to nominate a named person responsible for progressing the case.

9.74 The case is listed before the Crown Court judge (CCJ) within 28–35 days of being sent from the magistrate. There the issues to be determined are broadly explored. The Crown Court judge fixes target dates for pre-recorded cross-examination etc. and trial date at an early hearing.

9.75 Four stages will be robustly set out by the case managing Crown Court judge if the case is to be contested:
- **Stage 1**
  Prosecution to serve the bulk of its material, including what disclosure it proposes to make, with the essential issues in the case within 50–70 days.
- **Stage 2**
  Defence to serve defence statement within 28 days thereafter. At this stage defence must state what disclosure it requires.
- **Stage 3**
  Prosecution must respond within 14–28 days.
- **Stage 4**
  Defence to provide final comments and applications regarding disclosure.

The case is referred back to the judge if any of these deadlines is broken for explanation to the judge.

9.76 Disclosure and, in particular, third-party disclosure is a key ingredient (see paragraph 3.20 of Macur’s *BCM*). There is a judicial protocol on the disclosure
of unused material in criminal cases, dated December 2013, which is worth reading. Early focus on disclosure is crucial. Thus, at stage 2, the defence must come off the fence and engage with the process, make any enquiries for disclosure, specifying the material sought and setting out how such material relates to the issues when providing a defence statement. Prosecution must respond to this at stage 3. If disclosure remains unresolved by stage 4, there must be a written application to the court under section 8 of the Criminal Procedure and Investigations Act 1996 (CPIA) by the defence. Third-party disclosure must also be gripped early on, with appropriate court orders if third parties are not assisting.

9.77 Sir Brian Leveson identified four overarching principles for improving efficiency. The principles were: getting it right first time; case ownership; duty of direct engagement; and consistent judicial case management. He outlined a series of other detailed recommendations, including:

- Enhancing the role of IT: including high-quality equipment for remote hearings and ensuring that digital evidence can be presented easily and without delay.
- Allocation: including ensuring appropriate training for those making charging decisions.
- Listing: Crown Court judges should have discretion to reduce the credit for a guilty plea at the first hearing if there has been a not guilty indication at the magistrates’ court. Steps should be taken to enable courts to move to a single/fixed listing and consideration should be given to increased use of thematic listing.
- Crown Court pretrial: including endorsing the national early guilty plea scheme; providing one case progression officer to ensure all participants have complied with their obligations; and holding the police, the CPS and defence practitioners accountable for repeated default.
- Crown Court trial: the law and provision of facilities should enable expert evidence by video link; there should be a review of training for court staff on video testimony; and consideration should be given to extending the court’s power to prevent repetitious or unnecessary evidence and protracted, oppressive or irrelevant questions.
- Ground rules arrangements should be extended to all vulnerable witnesses. Ground Rules Hearings (GRHs) lay down the ground rules for the trial’s conduct. The judge and counsel discuss matters, including how victims and witnesses will be questioned — for example, agreeing who will lead questioning where there is more than one defendant and the length of time for cross-examination. Current CPS guidelines note that Ground Rules Hearings are good practice in cases with vulnerable witnesses or with
witnesses who have a communication need, and essential in cases involving intermediaries.

- Achieving best evidence (ABE): following a first general investigative interview, there should be a second shorter interview, ordered, chronologically presented and directed only to the relevant material: this should be presented as evidence-in-chief.

9.78 In January 2018, the judiciary of England and Wales published *The Better Case Management (BCM) Handbook*. It highlights proactive communication and engagement between all parties as key to the initiative’s success. One of the most important aims is to ensure that the plea and trial preparation hearing is effective, either through a guilty plea or with the judge progressing the case in a way that will minimise the need for further hearings.

9.79 The handbook notes that the judge should actively and robustly manage every case, identifying guilty pleas or establishing the extant trial issues, and ensuring effective communication between the parties. In the case of guilty pleas, good case management is achieved where the judge sentences the defendant without unnecessary adjournment.

9.80 For not guilty pleas, there is strong case management where the judge:

- makes full enquiries about the case and sets appropriate, realistic and bespoke directions;
- explores the issues so that uncontested evidence can be summarised and agreed; and
- considers witness requirements to avoid unnecessary attendance of witnesses and reduce the trial’s length.

9.81 The better case management initiative introduced the early guilty plea scheme in June 2017 to assist in fulfilling its goals. The CPS has noted the ‘huge advantages’ of a plea at the earliest opportunity. The potential benefits include saving time and resources, reducing the impact of the crime upon victims, and preventing complainants from having to testify.

9.82 The scheme removed judicial discretion concerning reduction in sentences under previous legislation, which required the court to consider the stage in the proceedings where the offender indicated an intention to plead guilty. Instead, the scheme states:

- the maximum reduction in sentence of one third for a guilty plea is available only at the first hearing at which a plea or indication is sought;
- after the first stage, the maximum reduction is one quarter; and
- a sliding scale decreases the available reduction to one tenth on the first day of the trial.
9.83 There has been criticism that the timescales from arrest to attendance at a magistrates’ court may be a matter of hours, and that pretrial disclosures by the CPS are often inadequate, suggesting that the scheme may pressurise defendants into making a guilty plea. Nonetheless, Sir Brian Leveson states that work carried out by the transforming summary justice group means that cases where a plea is anticipated are listed after charge in a 14-day list for guilty pleas and a 28-day list for not guilty pleas. Initial details of the prosecution case must be served before the 28-day first hearing, where a not guilty plea is anticipated, so that the defence has sufficient information to identify the issues.

Listing

9.84 A number of jurisdictions operate a special listing procedure for sexual offence cases.

9.85 In Victoria, special court lists are intensively managed prior to trial, and evaluation has shown that the lists had improved the efficiency of court proceedings.

9.86 However, the New Zealand Law Commission rejected special court lists for sexual offences, suggesting that they could place an excessive burden on the judiciary.

9.87 Sir Brian Leveson identified current listing practices as having a negative impact on efficiency. He recommended that courts should be able to move to a single/fixed listing, that Crown Court judges should have discretion to reduce the credit for a guilty plea where there has been a not guilty plea at the magistrates’ court and that consideration should be given to greater use of thematic listing.

9.88 Research in England has identified a practice in some courts of:

- listing cases to begin at the end of the day so that no witnesses would be called until the following day, allowing for administrative business to be dealt with; and
- piloting the use of pagers and mobiles to allow for witnesses to be released and contacted shortly prior to being called.

Specialist courts

9.89 Specialist sexual violence courts exist in South Africa and on a pilot basis in New Zealand.

9.90 Arguments in support of these courts in the literature include the potential to reduce delay; that judges, counsel and court staff are better equipped to recognise and address rape myths; and that there is an opportunity to develop targeted support services for complainants.

9.91 Arguments against the courts include the risk of burnout, cynicism or trauma for judges and counsel; a perceived loss of impartiality in relation to how the
court deals with different types of criminality; and concerns among defendants that they would not receive a fair trial.

9.92 While the New Zealand pilot is in its infancy, early indications suggest that it has reduced delay.

9.93 In South Africa, specialist sexual violence courts are linked to significant reductions in delays, particularly for cases involving child complainants.

9.94 However, pilot specialist sexual violence courts in New South Wales in 2005 were found to have had little impact upon delay or case management. Evaluators noted that there was little to differentiate the court from other courts, and that issues with the pilot included technological issues; late appointment of prosecutors to some cases; a failure to develop practice directions; and inflexibility among some participants in the process regarding bringing in new measures.

9.95 On the other hand, in Victoria, where sexual offence cases are prioritised, the magistrates’ court, children’s court and county court each have a specialised list for sexual offence proceedings. The cases are intensively managed before trial, and a 2011 evaluation reported that the lists were speeding up preparation of cases and improving the efficiency of court proceedings.

Time limits

9.96 Statutory time limits are applied to cases in a number of jurisdictions. These vary in length: for example, in Victoria sexual offence cases must commence within three months of committal or after the indictment against the person is filed, although three-month extensions may be granted. However, research in Victoria shows that the time limits are rarely met and that extensions are common.

9.97 In Canada the Supreme Court provided that cases in the provincial court must be completed within 18 months, and within 30 months in the superior courts.

9.98 The New Zealand Law Commission recommended introducing a 12-month time limit from charge to setting the case down for hearing for sexual offence cases.

9.99 Scotland has implemented some form of time limits in the pretrial process with a view to reducing the length of the criminal justice process. The Criminal Procedure (Scotland) Act 1995 provides that a preliminary hearing to set the trial date in the High Court of Justiciary must be held within 11 months of the full committal for a defendant on bail, and the trial must take place within 12 months of the full committal. The accused is discharged if these time limits are not met.

9.100 For a defendant held on remand, the time limits are 110 days for the preliminary hearing and 140 days for the trial. If these restrictions are not met, the accused is granted bail. The legislation provides that the time limits may be extended.
However, research suggests that these statutory time limits have had a limited influence on reducing delays or the length of the criminal justice process. Extensions are common, and the key reason often relates to the defence requiring additional preparation time.

**Committal proceedings**

Committal proceedings have been reformed or abolished in a number of the jurisdictions considered.

However, research from some jurisdictions shows that reforms to committal have not significantly reduced delays but rather shifted delays to the superior court.

This has been the case in Tasmania and in England and Wales, where the National Audit Office noted that, while abolishing committal had removed a hearing that added little value, it had instead increased the pressure on Crown Courts. HM Courts and Tribunals Service (HMCTS) did not receive additional resources to deal with the increase in cases and the reforms were not accompanied by consideration of case management to filter out weak cases.

However, in Western Australia replacing committals with a disclosure/committal hearing has helped to speed up the resolution of many cases, although delays remain, mainly due to disclosure issues.

Evidence indicates that there is a need for strong case management to accompany reforms to committal. For example, in April 2018 New South Wales commenced legislation introducing new committal proceedings and a fixed guilty plea discount scheme for indictable offences.

The new process includes a charge certification, whereby a prosecutor reviews the brief of evidence when it is served and certifies that the charges will proceed. This aims to ensure that the accused is charged with the most appropriate offence at the earliest stage.

The legislation also requires case conferencing between the prosecution and defence, with a view to allowing for meaningful discussion about the case, reducing the issues to be dealt with at trial and maximising opportunities for early guilty pleas.

In New Zealand in 2011, the committal procedure was formally abolished. The current process begins with initial disclosure, following which the court may require the defendant to enter a plea; a case review is held if the defendant pleads not guilty. The defence and prosecution must discuss whether the matter will proceed to trial prior to the case review and file a joint case management memorandum. This should deal with issues, including whether:

- the defendant intends to change their plea;
- the prosecutor intends to seek leave to withdraw or change charges;
• the defendant requests a sentence indication;
• the disclosure obligations have been complied with; or
• there are any issues that require judicial intervention.

9.110 In England and Wales, the Crime and Disorder Act 1998 abolished committal proceedings for indictable-only offences with cases instead sent automatically to the Crown Court. The rationale for this was that offences that are indictable-only are expensive and inefficient, and the matter would need to go to the Crown Court in any case.

9.111 In May 2013, England and Wales also abolished committal for triable either way or hybrid offences, with magistrates’ courts now allocating either way offences to be tried in the magistrates’ courts or the Crown Court. This allocation system is attached to the early guilty plea scheme, requiring the prosecution to review the case at an early stage to identify which cases may be unsuitable for summary disposal and which may be appropriate for inclusion in the scheme.

9.112 The National Audit Office found that, while abolishing committal hearings has reduced waste in the system by getting rid of a hearing that added little value, it has instead added to the pressure on Crown Courts and their backlogs as cases arrive more quickly. HM Courts and Tribunals Service and the Crown Prosecution Service (CPS) did not receive additional resources to deal with the increase in cases.

9.113 Scotland has no court-determined committal hearing; instead, the procurator fiscal and a Crown counsel decide whether sufficient evidence exists to pursue a prosecution. If the prosecutor determines that there is adequate evidence and that it is in the public’s interest to commit the accused to stand trial for an indictable offence, they transfer the matter to the High Court of Justiciary for a preliminary hearing.

9.114 This transfer process is known as the full committal, which involves setting a trial date and providing counsel with the opportunity to discuss any issues that could be resolved. Subsequent to the transfer (in all cases with the exception of murder), the prosecutor fiscal prepares the case for trial and forwards all information to the Crown Office. A Crown counsel then determines whether to prosecute.

Technology

9.115 Technology contributes to delays in criminal cases in many of the jurisdictions considered, including in relation to issues with live links and video playback.

9.116 It also relates to inefficient working practices in courts, such as paper-based processes and procedures. Problems with technology can be cultural and include resistance to change among court users or a lack of willingness to support the use of existing technology in courts.
9.117 In England and Wales in 2018, the NAO highlighted delays in the administration of the justice system caused by outdated systems and paper-based processes. Since 2016 the Ministry of Justice has been investing £700 million to modernise courts, particularly in reducing the costs of the estate and using technology to change how justice is administered, with a view to providing a better service at a lower cost.

9.118 The CPS and HMCTS are jointly leading a project to introduce a single online case management system from pre charge to disposal, so that all parties (including complainants and witnesses) can access one digital case file. It also aims to introduce Wi-Fi to all courts, new equipment for presenting digital evidence in court and to roll out video link systems.

9.119 The NAO notes that moving to a mainly digital way of working represents significant cultural change, with many areas of the criminal justice system mostly paper-based. In this regard it highlights the importance of persuading users of the benefits of this approach and notes a lack of effective sanctions, whole-system governance and oversight.

9.120 However, the 2018 NAO evaluation found that delivering the scale of technological and cultural change necessary to modernise the administration of justice is a ‘daunting challenge’ and that the HMCTS was already behind schedule.

Cultural change

9.121 Research suggests that, internationally, reforms aiming to reduce delay will not achieve their stated aim without accompanying reforms and resources, and cultural change is often required to improve long-established practices among counsel and others.

9.122 Some jurisdictions have highlighted the need to persuade stakeholders of the potential benefits of reform and have considered introducing, or have introduced, formal measures or sanctions to encourage compliance with reforms.

Arguments for the status quo

9.123 I have come across a universal recognition that delay is endemic in the processing of serious sexual offences and needs to be urgently changed. The statistics speak for themselves.

9.124 The only issue arises as to what are the appropriate remedies. The one issue of real dispute arises from the proposals for reform of committal proceedings.

9.125 Most, if not all, defence practitioners believe that the committal process is seen as a fundamental procedural safeguard to ensure the fairness of the trial process and is irrelevant to the issue of delay. The points made are these:
• Where the prosecution proceeds by way of an indictable summons, the only delay that inevitably arises is when the committal papers have not been served timeously. Whilst the Magistrates’ Court Rules require service of papers not later than seven days before the date for committal, voluminous papers that have been with the PPS for months cannot be properly read and considered by the defence and the defendant within a seven-day window. An amendment to the rules requiring service of papers within a more practicable timescale would eradicate the need for any perfunctory adjournment purely to consider the committal papers as served.

• Secondly, prosecutions commenced by way of charge sheet/remand, whilst subject to regular judicial supervision/case management, often fall prey to delay, which is occasioned by the manner in which the investigation and prosecution is progressed.

9.126 Defence practitioners do not believe that the abolition of committal proceedings should be masqueraded as a panacea for delay. By and large, the majority of committal proceedings take place as a preliminary enquiry and without any contrary submissions. That should not dilute the importance of subjecting to judicial scrutiny that a case to answer exists.

9.127 Although a return for trial by means of a preliminary investigation or mixed committal is less common, these remain a significant procedural safeguard and something that defence practitioners in this jurisdiction covet in terms of Article 6 protection.

9.128 At mixed committals, in particular, the manner in which the deposition is recorded and produced to the deponent is cumbersome and prone to avoidable delay. There is also the cost in terms of courtroom availability and stenography services. The recent introduction of SightLink stenography has, in the experience of some, fallen victim to the inadequacies of technology and glitches. These procedural idiosyncrasies could be improved without the removal of the process.

Is there a compelling case for change?

9.129 The case for change is overwhelming and the remedies are dealt with below under ‘Discussion’.

9.130 The arguments in favour of committal reform are as follows:

• First, it is already a statutory commitment under the Justice Act (Northern Ireland) 2015 allowing for the direct transfer of murder and manslaughter cases, bypassing the committal process, together with the associated inchoate offences (section 11(3)) and has made provision for the direct transfer of other offences; this would be achieved by the department making regulations subject to the affirmative resolution procedure, (section 11(4)).
• The Assembly’s Committee for Justice considered that domestic and sexual violence cases should be high on the list for consideration for direct transfer.
• It has occurred internationally. Once again, we in Northern Ireland are behind everyone else.
• The judiciary, who process these cases at committal, are virtually unanimously in favour of reform and consider that committal proceedings serve no practical purpose.
• The paucity of numbers where it has resulted in the defendant not being returned for trial do not justify the cost and the delay.
• There is no prejudice to the defendants because all the points they wish to raise can be made before the Crown Court judge. No bill applications already regularly occur.

Discussion

9.131 Delays and inefficiencies in the criminal justice system raise issues around complainants’ access to justice, defendants’ rights and the proper administration of justice. Indeed, delays can damage the credibility of the criminal justice system itself and undermine public confidence in it.

9.132 It is important to offenders as well, as early resolution of their case can help with their understanding of the implications of their actions. The timely completion of cases contributes to confidence in the criminal justice system.

9.133 More importantly, the reduction in time may lead to a safer community and increase confidence in the justice system, whereby offenders are prosecuted and held responsible for their crimes in the fastest time possible, commensurate with the principles of a fair and just process.

9.134 Changes aiming to reduce delay will not achieve their stated aim without accompanying reforms and resources, and often cultural change to improve long-established and prevalent practices.

Reports

9.135 No purpose will be served by me retreading ground already covered in the reports adverted to above from CJINI and the Northern Ireland Audit Office. Suffice to say, I fully endorse all their recommendations and urge that their recommendations be carefully analysed and implemented without further delay.

Indictable cases process (ICP) roll-out

9.136 The ICP scheme is working well. It is difficult to justify the ICP scheme excluding all serious sexual offence cases. This is the very area where the delays are the greatest. It is here where the delay is causing potentially irreparable damage to complainants and where the current delays are contributing both to the under-
reporting and the high attrition rate, with complainants dropping out of the process. Every opportunity to reduce delay has to be seized in this genre.

9.137 I appreciate that ICP may work most effectively where there are simple cases without disclosure problems, which can take up much time, and where pleas of guilty are more likely than in serious sexual offences.

9.138 Nonetheless, I regard this ICP exercise as brimming with potential and, with the advent of Case Progression Officers in the NICTS from January 2019, the opportunity to process serious sexual offences in a timely and firm fashion, with an emphasis on deadlines for proportionate disclosure etc., should not be ignored.

9.139 The PPS problems with the scheme need to be addressed:

- Solutions to these issues may lie simply in more clarity regarding ICP principles and further engagement with key stakeholders.
- Agreements may also need to be sought from the health and social care trusts regarding medical information, and this work has commenced throughout the life of the pilot.
- Resources need to be made available to accommodate full PPS participation. If serious sexual offences are to be included in the ICP, there should be the possibility of a ‘special discount’ for ‘really early’ pleas as a further encouragement to reverse the trend of such cases being contested. I recommend this is considered further by the Department of Justice.

9.140 For the rest of this chapter, I shall follow the list of issues identified in the research and which almost perfectly mirror our own problems of delay.

Investigation and prosecution stage

9.141 This is an area that contributes substantially to delay.

9.142 The Northern Ireland Audit Office report identifies weaknesses in the early stages of investigations, when the PSNI compiles evidence and the PPS makes a decision on prosecution, as the most critical cause of delay in criminal justice.

9.143 Progress towards the 2006 objective for the PSNI to ‘get it right first time’ has been lethargic, and just over half of trials proceed on the date initially listed (57% in 2016), although this is an improvement on 43% in 2011.

9.144 The 2015 CJINI report determined that 10 of the 17 Crown Court case files tested were either ‘unsatisfactory (contained errors or omissions meaning the PPS were unable to make a prosecutorial decision) or poor (contained significant omissions in the core evidence provided)’, albeit the figure for the overall inspection of all files which were quality assessed was 67% for files assessed as satisfactory or good.
9.145 I suspect from my discussions with the PPS that this may well remain a problem and I await the most recent CJINI report dealing with this.

9.146 It is revealing that the ICP scheme saw improvements in this area and this is yet another reason why serious sexual offences should be included within its ambit.

9.147 I am not blind to the fact that police investigations are now often complex, including issues such as where the allegations relate to long-standing, non-recent abuse, there are multiple suspects, and there is significant digital product to examine etc. Inevitably, this takes more time to examine.

9.148 Moreover, an investigator must pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. The collapse of a number of cases in England and Wales, and the various reviews undertaken by the CPS, demonstrate the consequences for inadequate and/or incomplete pretrial investigation.

9.149 I also understand that there are close relationships between the PPS and the PSNI in regard to file preparation, and the PPS provides training and guidance at a strategic level. At case level, where a file does not meet the required standard, a decision information request will issue, seeking the material required for a decision. The PSNI and the PPS have taken forward a joint project of work based on the recommendations put forward by CJINI in 2015. The key objectives of the project include improved quality of case files, improved effectiveness of decision-making and reduced delay within the criminal justice system. Following a pilot in 2017, a proof of concept phase commenced to focus on proportionate file build, early submission of 28-day charge files and early service of documents on the defence prior to first court appearance.

9.150 The PPS and the PSNI have also set up sexual assault advice clinics in 2017. The aim of these clinics is to enhance expeditious collaborative working relationships and practices between the PPS and the PSNI in relation to investigations which are likely to result in a no prosecution decision. The aim of the clinic is to assist in bringing about speedier outcomes for complainants of sexual violence and abuse and, in the case of children, their family or carer(s); it assists in bringing a more responsive service to complainants, with greater focus on those who need our service most; it means a reduction in the resource requirement for police investigations in cases that are unlikely to meet the tests for prosecution; it helps in bringing about speedier outcomes for suspects, including those who have been suspended from their employment pending the outcome of a police investigation; it allows for a greater focus to be placed on high risk/serious harm cases that meet the evidential and public interest test, with the result that offenders may be brought to justice; it aims to improve confidence levels in both the PSNI and the PPS by enhancing our service to those most vulnerable by adopting a more victim-centred approach.
9.151 Files brought before the clinic have fulfilled the following criteria:

- having followed reasonable lines of inquiry, corroborating evidence is deemed absent or weak;
- in the case of child sexual abuse, social services have confirmed that they are taking no further action and that no child has been placed on the child protection register as a consequence; or
- it is deemed not in the complainant's best interest or in the public interest to pursue a public prosecution.

9.152 Nonetheless, poor case management and ineffective investigation, together with the problems set out above, remain and need to be changed. It can be at least partially addressed by making a priority of improving communications between the PPS and the PSNI in all cases.

9.153 Some steps have been taken recently to address this. The introduction of a ‘Service Level Agreement between the PSNI and the PPS for the Investigation, Prosecution and Management of cases of rape and serious sexual assault’ together with the PSNI being committed to the location of an officer embedded into the PPS are steps in the right direction.

9.154 One key to this is for PPS officers to be involved from the outset in serious sexual offence investigations, thus enabling a firm check to be kept on charges being contemplated, delayed investigations, files and disclosure, offering guidance on what needs to be done. Whilst this does undoubtedly occur in some instances, it should become a general practice overall in the most serious of sexual offences.

9.155 The current process is that the PSNI charge an individual, but the PPS has to screen and approve all charges before their first appearance in court. Where it is an ‘overnight’ charge involving a serious offence, generally the PSNI will revert to the PPS before charging, and the PPS will approve the charging decision in advance of the first appearance at court the next day. On other occasions, the PPS will not know about the charging decision until they are actually in court. (The PSNI can also charge and release an accused person for a period of up to 28 days before first appearance.) Once someone is charged, they are remanded in custody or on bail. The PPS then ask the police to submit a full file, comprising all the evidence in order that a decision as to prosecution can be taken. There are also cases where a suspect is not charged but rather reported to the PPS by way of sending an investigation file, and the PPS then takes a decision.

9.156 I do not believe that leaving it up to the PSNI to seek investigative guidance and prosecutorial advice from the PPS is working. A fixed, inflexible scheme of early PPS involvement is needed in all of the most serious sexual offences.
In saying this, I recognise that there has to be a proportionate response and there may be resource constraints on the part of the PPS. Nonetheless, much of this guidance and advice can be given by telephone or email correspondence by one PPS officer dealing in a purely supervisory role with a number of cases, much in the way barristers control a large practice.

However, if government is serious about reducing delay, as I believe it is, it has to be recognised that long-term savings on the cost of delay will be made by making more resources available to the PSNI and the PPS.

A further solution is for the PSNI to recognise that, with delay throughout the criminal justice system in serious sexual offences being amongst the worst in the system and conviction rates so low, a very senior officer should supervise and review each file in this genre of cases before submission to the PPS.

We are in the digital era. The processes involving police and prosecution must become digitised. The PSNI and the PPS should engage in the NICTS digital strategy and collaborate when developing and maintaining their own technology in order to ensure systems for the transfer of digital information across the justice system that are fit for purpose.

I note with approval that the PSNI is currently represented at the Digital Criminal Justice Strategy meetings along with partners from the PPS, the NICTS and the Forensic Science Northern Ireland. This project is working towards a single vision for improved digital exchange of information and evidence across the Northern Ireland criminal justice sector. I hope that this is a harbinger of a new digital strategy.

To ensure all the parties have access to the progress of the case, we desperately need a single online case management system from pre charge to disposal, from which all parties can assess the progress of their case.

The current delay in decision-making in the PPS has to change. Due to resource pressures, some files involving serious sexual offences are currently unallocated to a senior prosecutor for up to 70 days, until very recently this had been 150 days. This delay is completely unacceptable. The aim must be that upon submission of an investigation file by police to the PPS, it will be allocated to a prosecutor upon receipt. While there exists a flagging system to ensure that serious sexual offences, particularly those involving children and vulnerable adults, are fast-tracked for allocation, this inevitably means that cases which do not attract this level of prioritisation do not receive the prompt allocation they require.

The number of prosecutors in the serious crime unit has risen from 10 full-time equivalent staff to 16.7 as at August 2018. I recognise that resources present a problem and this must be addressed by the Executive and the Northern Ireland
Assembly under devolution; at present, this responsibility would fall to the Secretary of State for Northern Ireland.

Committal proceedings

9.165 I am in favour of the present steps already enshrined in statute to reform the committal system. The paucity of cases where any material benefit is achieved for the defendant is completely outweighed by the disproportionate cost of such hearings and, more importantly, the fact that precisely the same question of liability can be dealt with by the Crown Court judge at an equally early stage. I can see no justification, therefore, for continuing with the present system, which is wasteful of time, costs and resources.

9.166 I am bewildered as to why serious sexual offences are not part of the committal reform and why it is currently confined to murder and manslaughter. I can think of no other area of crime, where the stress caused by adjournments when the case is ready for hearing, the prospect of, and the giving of, evidence is more daunting than in crimes of this genre. Yet a step that could serve to reduce that stress is unaccountably not invoked for these crimes. I am encouraged to observe that the Assembly's Committee for Justice shared my view that the current provisions should be extended. In doing so, yet another step to reduce the overall fears that contribute to mass under-reporting and high rates of attrition could be taken.

Case management

9.167 Focus on case management, with strong and proactive early engagement between all parties, is one of the most important elements in reducing delay in the system. It is pivotal to dealing with these cases with the utmost dispatch.

9.168 A key component internationally is encouraging cooperation between all parties and requiring counsel to agree which aspects of the case to focus on in court.

9.169 I believe we should adopt the New Zealand approach and robustly impose an obligation on defence counsel and prosecution counsel to file a document within a specified time from the case having been returned to the Crown Court, certifying that a meeting in terms of the management of the case has occurred dealing with:

- prospects of resolution;
- evidential issues in preparation for trial; and
- disclosure, including third-party disclosure.

9.170 We should broadly adopt the approach to case management advocated in England by Sir Brian Leveson, who generously spent a great deal of time discussing it with me and set out in his *Review of Efficiency in Criminal*

9.171 For ease of reference, I shall again outline the main tenets. At the first hearing before the Crown Court judge, steps should be taken by the judge toward:

• identifying the real issues and needs of witnesses at an early stage;
• achieving certainty in regard to what must be done, by whom and when;
• monitoring the case’s progress and ensuring compliance with directions;
• ensuring evidence is presented clearly and concisely;
• avoiding unnecessary hearings; and
• making use of technology.

9.172 For my part, I consider that the time limits set out for compliance within the court rules for England and Wales, whilst commendable, may not be achievable. In reality, if they are frequently broken or even frequently judicially extended, they become superfluous. Nonetheless, for the sake of consistency across all Crown Courts, some time limits should be fixed and I urge that the Crown Court Rules Committee (CCRC) should consider realistic time frames for compliance.

9.173 To that end we should amend the Crown Court Rules for Northern Ireland to ensure:

• Mandatory early proactive communication and engagement between the parties.10
• The case to be listed before the Crown Court judge within whatever time the CCRC deems appropriate after being sent from the magistrate. That court will conduct a plea and trial preparation hearing with case management, either through a guilty plea or with the judge progressing the case in a way that will minimise the need for further hearings. There the issues to be determined are to be broadly explored. The judge will fix target dates for pre-recorded cross-examination etc. and the trial date, and ensure that the parties have engaged at this early hearing.

9.174 Four stages will be robustly followed by the case managing Crown Court judge if the case is to be contested:

• Stage 1
  Prosecution to serve the bulk of its material including what disclosure it proposes to make, with the essential issues in the case within whatever period is determined by the CCRC as appropriate.

10 see Crim PR 3.3 as indicated above
• Stage 2
Defence to serve defence statement within whatever period is determined by the CCRC as appropriate thereafter. At this stage defence must state what disclosure it requires. The defence must cease to equivocate and engage with the process, make any enquiries for disclosure, specifying the material sought and setting out how such material relates to the issues when providing a defence statement. Defence practitioners in Northern Ireland accept that if the disclosure test is to be fairly applied by prosecutors, a properly drafted and particularised defence statement is a prerequisite.

• Stage 3
Prosecution respond within whatever period is determined by the CCRC as appropriate.

• Stage 4
Defence to provide final comments and applications regarding disclosure. If disclosure remains unresolved by stage 4, there must be a written application to the court under section 8 of the Criminal Procedure and Investigations Act 1996 by the defence. Third-party disclosure must also be gripped early on at this stage with appropriate court orders if third parties are not assisting.

9.175 The case is then referred back to the judge for explanation if, having been apprised of the matter by the Case Progression Officer, the judge is aware of any of these deadlines having been broken.

9.176 Disclosure and, in particular, third-party disclosure is a key ingredient in delay (see paragraph 3.20 of Macur’s BCM). I have dealt, in chapter 10, ‘Disclosure’, with the problems of disclosure and, therefore, its impact on delay will await that chapter. Suffice to say, at this juncture, there must be a judicial protocol on the disclosure of unused material along the lines of that set out in England and Wales in criminal cases in December 2013.

9.177 Sir Brian Leveson also identified principles for improving efficiency with which I am also in complete agreement and which we should invoke as follows:

• enhancing the role of IT: including high-quality equipment for remote hearings and ensuring that digital evidence can be presented easily and without delay;
• allocation: including ensuring appropriate training for those making charging decisions;
• listing: Crown Court judges should have discretion to reduce the credit for a guilty plea at the first hearing if there has been a not guilty indication at the magistrates’ court; steps should be taken to enable courts to move to a single/fixed listing and consideration should be given to increased use of thematic listing;
• Crown Court pretrial: providing one case progression officer to ensure all participants have complied with their obligations; and holding the police, the PPS and defence practitioners accountable for repeated default; and
• Crown Court trial: the law and provision of facilities should enable expert evidence by video link; there should be a review of training for court staff on video testimony; consideration should be given to extending the court’s power to prevent repetitious or unnecessary evidence and protracted, oppressive or irrelevant questions.

9.178 Ground Rules Hearing arrangements in Northern Ireland (which currently rarely occur unless there is a registered intermediary involved in the case) should be extended to all vulnerable witnesses. Ground Rules Hearings are crucial, at least for all cases involving children and vulnerable adults, but they should eventually be extended to all cases involving serious sexual offences.

9.179 GRHs lay down the ground rules for the trial’s conduct. The judge and counsel discuss matters including how victims and witnesses will be questioned, how uncontested evidence can be summarised and agreed unnecessary attendance of witnesses, agreeing who will lead the questioning where there is more than one defendant and the length of time for cross-examination. Current CPS guidelines note that Ground Rules Hearings are good practice in cases with vulnerable witnesses or with witnesses who have a communication need, and essential in cases involving intermediaries.

9.180 Achieving best evidence: following a first general investigative interview, there should be a second shorter interview, ordered, chronologically presented and directed only to the relevant material. This should be presented as evidence-in-chief.

9.181 In January 2018, the judiciary of England and Wales published The Better Case Management (BCM) Handbook setting out, for example, the matters mentioned above. This is an excellent guide and Northern Ireland should have a similar handbook catering to our case management circumstances. Its very presence, given to all Crown Court judges, would crystallise the new approach and the need for consistent robust case management.

9.182 The English system sets out a fairly prescriptive approach to the discounting of sentencing at various stages thereafter. I do not favour this level of prescription. The principle that a sliding level of discount should apply from the earliest moment is sound and operates in Northern Ireland, but the stress of trial is such for complainants in serious sexual offences that judges should maintain some flexibility for appropriate discount even in the event of a late plea, depending on the individual circumstances.

9.183 I believe there is an argument for thematic listing of serious sexual offence cases so that a number of serious sexual offences are listed on the same occasion.
to promote consistency of directions and to spread the word to all present in various similar cases in court that a new culture has arrived.

9.184 This is not that I favour either special lists or special sexual offence courts. Experience internationally — for example, New South Wales — has not convinced me that these are a success and in any event the number of such cases in current Crown Court lists is such that it would be very little different from the situation that presently obtains. All our Crown Court judges are extremely well experienced in trying these cases because of their sheer volume.

9.185 There are too many trial adjournments in these cases, with an average of between six and seven in each case. This has a significant impact on criminal justice agencies. In 2012, PSNI officers were required to attend court in excess of 23,000 occasions, with an average attendance time of five hours. On 75% of these occasions, equating to 11,000 front-line shifts, the officers were not required to give evidence.

9.186 The judiciary has to be aware of this issue and adopt a very robust attitude to such applications. All applications for adjournments in serious sexual offence cases must be made in writing and, save in exceptional circumstances, should be served not less than 72 hours in advance of the hearing.

9.187 One particular cause of aborted hearings and adjournments that surfaced with a complainant I met arose when, in her first trial, a juror belatedly asserted she knew the defendant and, in the second trial, a juror indicated at a very late stage that she had been subjected to a previous sexual assault and was not emotionally equipped to deal with the case.

9.188 This serves to emphasise the importance of ensuring that in cases of serious sexual offences the jury panel should be carefully questioned about their experience before commencing to sit in these very stressful trials.

9.189 I add three riders to my comments on case management. First, whilst a number of our international colleagues have statutory case management, I do not favour it simply because it lacks the flexibility of bespoke directions. Our judges have a great deal of experience now of case management and the straitjacket of statutory obligation is not to be welcomed.

9.190 Secondly, I see no benefit in statutory time limits for precisely the same reasons. The experience in Scotland and Victoria illustrates that they have little or no impact other than to show their impotence.

9.191 Thirdly, what sanctions are available for noncompliance? The judiciary is reluctant to impose legal aid sanctions and there is no current provision for a wasted costs order in the criminal justice system. In criminal trials the concept of ‘strike out’ against a defendant for non-compliance is a non-starter. Public condemnation by the judiciary for non-compliance or, in the last analysis,
referral to the professional bodies of the lawyers in face of defiant non-compliance perhaps are the only effective components of a compliance system.

Resources

9.192 I deal with Resources in chapter 18 of this Review. Two comments fall for mention here. First, the Department of Justice should carry out a financial costing of delay. I am certain that such an exercise would provide yet a further incentive, if it was needed, to tackle this major impediment to justice in dealing with serious sexual offences.

9.193 Secondly, there can be little doubt that these proposals front-load the legal system in a manner that has not hither to occurred. It requires a fresh mindset from both the lawyers and the judiciary. Equally importantly, it needs a new structure of payment by the Legal Services Agency Northern Ireland (LSANI). These steps to remedy delay simply will not work unless they are reflected in this new bespoke method of payment in serious sexual offences. The fact of the matter is that the law and procedures in these offences present unique problems. It is because of this that my Review has been instituted. Unique problems require bespoke solutions and the LSANI must take this on board.
Proposed recommendations

108. Recommendations by the Criminal Justice Inspection Northern Ireland and Northern Ireland Audit Office reports should be analysed, implemented and monitored by the Department of Justice as a matter of urgency.

109. The commitment to provide Case Progression Officers in January 2019 should be fully implemented in all Crown Courts.

110. The indictable cases process pilot (ICP) scheme should be extended to all serious sexual offence cases.

111. A special discount for ‘really early’ guilty pleas should be granted in serious sexual offences.

112. PPS officers must be sufficiently resourced to become involved in a supervisory role at the outset of PSNI investigations into serious sexual offences.

113. The PPS must be sufficiently resourced to speed up unacceptable delays in decision-making, with the introduction of a fast-track system for serious sexual offences, especially those involving children and vulnerable witnesses.

114. The Department of Justice should make provision for the direct transfer of serious sexual offences to the Crown Court, bypassing the committal process pursuant to the affirmative resolution procedure under section 11(4) of the Justice Act (Northern Ireland) 2015.

115. Mandatory early proactive communication and engagement between the parties in serious sexual offences to be inserted into the Crown Court Rules.

116. Counsel to certify such engagement has occurred in compliance with a time limit fixed by the district judge or Crown Court judge at first hearing.

117. The Legal Services Agency Northern Ireland should institute a bespoke legal aid fee structure for serious sexual offences.

118. The case to be listed before the Crown Court judge within 28–35 days (or whatever time the Crown Court Rules Committee deems appropriate) from being sent from the district judge.

119. At the first hearing before the Crown Court judge, target dates for the processing of the case shall be fixed given the circumstances of the particular case.

120. Thereafter, a four-stage process will follow if the case is to be contested:

- Stage 1
  Prosecution to serve the bulk of its material (including what disclosure it proposes to make) with the essential issues in the case within whatever period is determined by the Crown Court Rules Committee as appropriate.
• Stage 2
  Defence to serve defence statement within whatever period is determined by the Crown Court Rules Committee as appropriate thereafter. At this stage defence must state what disclosure it requires, setting out how such material relates to the issues when providing a defence statement.

• Stage 3
  Prosecution respond within whatever period is determined by the Crown Court Rules Committee as appropriate.

• Stage 4
  Defence to provide final comments and applications dealing with disclosure.

121. If disclosure remains unresolved by stage 4, there must be a written application to the court under section 8 of the Criminal Procedure and Investigations Act 1996 by the defence.

122. Third-party disclosure shall be timetabled and appropriate orders granted against the third parties at this hearing.

123. The case is referred back to the judge for explanation if non-compliance has occurred.

124. Fast-tracking and priority listing to be afforded to serious sexual offences involving children and vulnerable adults.

125. Case Progression Officers to be appointed (as is intended from January 2019) to ensure all participants have complied with their obligations; and holding the police, the PPS and defence practitioners accountable for repeated default.

126. The PSNI and the PPS should take steps to engage in the NICTS digital strategy and collaborate when developing and maintaining their own technology in order to ensure systems for the transfer of digital information across the justice system that are fit for purpose.

127. The NICTS to pursue urgently the current steps being taken to ensure high-quality equipment for remote hearings and digital evidence can be presented easily and without delay.

128. Wi-Fi and equipment for presenting digital evidence to be available in all Crown Court hearings.

129. A properly qualified and experienced IT member of court staff to be present in every Crown Court hearing where remote hearings and digital evidence are being presented.

130. Ground Rules Hearings should initially be held in every case involving a child or vulnerable witness, leading to a stage where a Ground Rules Hearing will be held in every case of a serious sexual offence.
131. A case management handbook for serious sexual offences should be commissioned by the Judicial Studies Board.

132. Applications for adjournment require special scrutiny. All applications for adjournments in serious sexual offence cases must be made in writing and, save in exceptional circumstances, should be served not less than 72 hours in advance of the hearing.

133. In serious sexual offence cases, issues of previous personal experience should be raised with potential jurors.