The Gillen Report

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

Part 2

Sir John Gillen
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Chapter 10

Disclosure
A review of the law and procedures in serious sexual offences in Northern Ireland
An accused’s right to a fair disclosure is an inseparable part of his right to a fair trial.

Lord Justice Steyn, 1994

Issue
Do the law and procedures dealing with disclosure require revision, and is disclosure within the criminal justice system in the context of serious sexual offences fit for purpose?

Current law
10.1 Disclosure is governed by the Criminal Procedure and Investigations Act 1996 (CPIA). It provides a test for prosecution disclosure requiring the disclosure of material that might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

10.2 The initial duty is supplemented by a duty under section 7A of a continuing disclosure. This duty arises irrespective of whether the defence has complied with its own duty under section 5(5) to give a defence statement to the court and the prosecutor.

10.3 Two implications should be noted. First, where the prosecution knows what the defence is likely to be — for example, from the police interview or a prepared statement — any unused material tending to support the defence is disclosable in advance of the defence statement, even if it does not undermine the prosecution case.

10.4 Secondly, any material that could reasonably be considered capable of undermining the prosecution case must be disclosed, even if the prosecutor thinks it does not. It will not matter at this stage that the defence case may be unknown or is not apparent from the prosecution papers.

10.5 There is an exception from the duty of disclosure for material that is not in the public interest to disclose. Section 8 of the CPIA allows the defendant to make an application for a specific disclosure of any material that there is reasonable cause to believe should have been disclosed under section 3.

Background
10.6 Prosecution disclosure has been problematic for many years. In 2018, in England, prosecutions have attracted extensive publicity, including the case of

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Liam Allan in which disclosure failings led to a public apology from the Director of Public Prosecutions.

10.7 Difficulties with disclosure have, therefore, been at the core of a number of miscarriages of justice and criminal justice crises. There been not only a collapse of a number of cases but the significant effort and investment wasted due to late disclosure has had substantial cost implications and will cause significant stress and anxiety to complainants, defendants and witnesses alike.

10.8 There has been no shortage of reviews on the topic of dealing with disclosure. It has generated more official reviews than virtually any other issue in the law of criminal process.

10.9 Lord Justice Gross’s *Review of Disclosure in Criminal Proceedings* was published in 2011. He noted the importance of recognising that it will be ‘physically impossible or wholly impractical to read every document on every computer seized’. At that time he emphasised that the process must be prosecution-led, requires engagement with the defence and involves robust judicial case management. The review made the following key points:

- a proportionality test is unsuitable since it would require improved confidence in the prosecution’s performance of its disclosure obligations;
- there is considerable scope for greater common sense in the scheduling of unused material;
- proper training is an essential part of the professional development of a police investigator;
- the defence’s role in improving disclosure is reactive; it is unacceptable for the defence to refuse to engage and assist in identifying key issues at an early stage;
- robust judicial case management with early guidance on the prosecution approach to disclosure and an insistence on responsible engagement from the defence with early identification of issues is crucial; and
- full use to be made of sampling, key words or other search tools.

10.10 Subsequent to the recommendations of Lord Justice Gross, there was a further review by himself and Lord Justice Treacy, *Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure*, in 2012.


- larger and more complex cases demand a scrupulous approach by the parties and robust judicial case management;
- early judicial guidance and ensuring early defence engagement is vital; and
• where a judge doubts the good faith of the investigation, the judge will insist on an independent and effective appraisal of the documents contained in the disclosure schedule.

10.12 In 2013 the Attorney General for England and Wales published Guidelines on Disclosure, again emphasising the importance of prosecution-led disclosure and tailored thinking. In particular, the guidelines note that, in deciding whether material satisfies the disclosure test, consideration should be given, amongst other things, to:

• the use that might be made of it in cross-examination;
• its capacity to support submissions that could lead to the exclusion of evidence, a stay of proceedings or a finding that a public authority had acted contrary to the accused’s rights under the European Convention on Human Rights (ECHR);
• its capacity to suggest an explanation or partial explanation of the accused’s actions;
• the capacity of the material to have a bearing on scientific or medical evidence in the case;
• the importance of the defence statement in identifying the issues in the case;
• a person accessing original data must be competent to do so and able to give the evidence, explaining the relevance and implications of their actions;
• investigators should ensure an audit trail or other record of process applied to computer-based electronic evidence, which an independent third person should be able to examine;
• the person in charge of the investigation has overall responsibility for ensuring that the law and these principles are followed; and
• in cases with large quantities of data, the investigator may search by sample, key word or other tools and techniques, and the defence should receive a copy of the search terms.


10.14 That case, in which there were 77 seized electronic devices and 600 million pages of data, provided the following guidelines:

• The prosecution must be in the driving seat at the stage of initial disclosure, acting within a disclosure strategy, identifying and isolating material subject to legal professional privilege and, if necessary, proposing search terms to be applied.

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2 R v R and others (2015) EWCA CRIM 1941
• Their approach must be explained, ideally through a disclosure management document.
• The defence must engage with the prosecution. Compliance with the test for initial disclosure calls for analysis of the likely cases of both prosecution and defence.
• Where vast volumes of electronic material are in play, common sense must be applied and the prosecution may use appropriate sampling and search terms. The law is prescriptive of the result, not the method.
• The process of disclosure must be subject to robust case management, with the judge holding the prosecution to its duty of giving initial disclosure and insisting on defence engagement.
• The judge must drive the case to the point where a defence statement is required, the issues can be clarified and disclosure questions dealt with on a reasoned and informed basis.
• The judge must devise a tailored or bespoke approach eschewing a box-ticking exercise.

10.15 In July 2017, Richard Horwell QC published a report into a trial that had collapsed as a result of human errors by the police and the Crown Prosecution Service (CPS), making 17 recommendations to improve the disclosure process.

10.16 In January 2018 the CPS published a national disclosure improvement plan, aiming to represent a shared commitment between the CPS and the National Police Chiefs’ Council to change how the bodies fulfil their disclosure obligations.

10.17 That plan highlights the duty of police to pursue all lines of inquiry and the necessity of disclosure to ensure a fair trial. Key elements of the plan include:
• extending disclosure management documents (which were used to outline the prosecution approach to disclosure and ensure issues are dealt with early) to all complex Crown Court cases;
• introducing the concept of disclosure champions to provide training and support in all Crown Court teams;
• providing for new police training, taking into account the ongoing and significant changes to disclosure practice;
• introducing a new procedure for officers to identify reasonable lines of inquiry when submitting a charging decision request to the CPS; and
• implementing a new protocol between the CPS and the police on the use of third-party material.
10.18 In 2018 the Attorney General instigated yet a further review of disclosure, this time considering:

- processes within volume cases and complex cases, including economic crime;
- guidance, including any codes of practice, protocols or guidelines and legislation;
- case management; and
- capabilities across the criminal justice system, including staffing, training, existing tools and digital technology.

10.19 The House of Commons Justice Committee conducted an inquiry into the disclosure of unused material in criminal cases, which was published in July 2018.

10.20 That inquiry found that disclosure failures had been widely acknowledged for many years but have gone unresolved, in part due to insufficient focus and leadership by ministers and senior officials. It noted that while coverage of disclosure failures focused on serious sexual offences, all types of cases have experienced disclosure errors.

10.21 The committee stated that the government must consider whether funding is adequate to support a strong disclosure regime. It noted the strain delayed and collapsed trials place on already constrained criminal justice resources. It concluded that there needs to be:

- a shift in culture towards the viewing of disclosure as a core justice duty rather than an administrative add-on;
- appropriate skills and technology to review large volumes of material; and
- clear guidelines on handling sensitive material.

Developments in Northern Ireland

10.22 Following this myriad of reviews, guidelines and recent collapsed trials in England, the Public Prosecution Service (PPS) in Northern Ireland has taken a number of steps to address the disclosure problem. These include:

- The PPS does provide expert disclosure training to its officers.
- The Police Service of Northern Ireland (PSNI) does appoint a designated disclosure officer in complex cases although this is usually the chief investigating officer.
- Schedules of unused material are prepared by the PSNI and submitted with the file to the PPS. However, this exercise is not employed by the PSNI consistently. If no prosecution is recommended, no such schedule is passed. But even in cases where a prosecution is recommended, that schedule is
often not included. This produces a real gap in the process and needs to be corrected. It has to be recognised that this is central to decision-making.

- Similarly, there is an obligation on the PSNI to provide third-party material at an early stage. Once again this is not being done consistently.

- The concept of disclosure champions used to prevail in the PPS. These were found in regional offices. That practice seems to have fallen into desuetude and needs to be corrected.

- The concept of a disclosure management document that records all the materials to be disclosed, a note of the decision taken and affording easy access to everything in the one place concerning disclosure has not been invoked in Northern Ireland.

- Over recent months, the PSNI and the PPS have carried out a general review of disclosure in the wake of inquiries into cases collapsing in England. It is right to say that to date there is no evidence that Northern Ireland has fallen into the same trap as England. Of 50 to 60 live rape cases which were examined where no decision had yet been taken in Northern Ireland, there was not a single instance where discovery had been flawed. The PPS considers that the risk of such trial collapses in Northern Ireland is low simply because there is an emphasis in this jurisdiction on providing complete disclosure in every case. That process, however, is painstaking and is a contributory factor to delay.

- Northern Ireland does subscribe to the national standards on disclosure.

- Although we do not have the same protocol as in England and Wales, Northern Ireland does rely on the third-party practice direction on disclosure handed down by the Lord Chief Justice. However, the PPS asserts that there is inconsistent application of it judicially. An example given is that, when the defence makes applications for material under section 8 of the CPIA, too lax an approach is adopted with the extra material invariably being granted, which in turn causes substantial extra work for the PPS.

- There is a multi-agency national disclosure forum in the UK, which Northern Ireland has now joined. This forum is made up of senior police officers, senior CPS personnel, the National Crime Agency etc. The aim is to ensure consistency in practice and reflects the national disclosure improvement plan.

- Northern Ireland does have a disclosure improvement plan.

10.23 Technology is sadly lacking in Northern Ireland in the criminal justice system. We are very far off developments in the rest of the UK, with inadequate resources and infrastructure. As indicated in other chapters, the achieving best evidence (ABE) interviews are woefully inadequate at times due to the complete lack of consistency between IT systems.
10.24 We have considered approaches to dealing with disclosure challenges in Australia, Canada, England and Wales, France, Germany, Ireland, the Netherlands, New Zealand, Scotland, South Africa and the United States.

10.25 We found little of assistance in France, Germany, the Netherlands, South Africa and the United States. This was largely because, in France, disclosure is not a key feature of the pretrial stage of the inquisitorial system, with no statutory provisions regulating the disclosure of information. In Germany, criminal trials are often excessively long and involve many adjournments, with disclosure problems at the heart of the challenges again, with no requirement to deal with disclosure issues at the pretrial stage. The Netherlands has nothing to add to what we currently do. South Africa affords the prosecution an opportunity to refuse disclosure access if it convinces the trial court that access is not justified for the purpose of a fair trial, which is a different test to that which we apply. In the US, there is no duty on the prosecution to search for possible exculpatory materials and the disclosure of unused material is not part of US terminology.

10.26 In the US, the federal system does have a seamless integration. Investigators and prosecutors work together, with the former working under the guidance and direction of the latter, who have overall case ownership and deal with cases from investigation through to and including the trial conduct. There is also an emphasis on outsourcing.

10.27 In some jurisdictions, which are akin to our own, our research reveals a remarkable similarity in the problems and attempted solutions with those that arise in our jurisdiction. The problems and solutions which are common are as follows.

Resourcing

10.28 Research across the jurisdiction shows that resourcing issues are highly problematic in cases involving large amounts of electronic evidence. This relates to ensuring that there is an adequate number of staff to carry out disclosure and that such staff are suitably qualified to perform effectively.

10.29 There must also be appropriate technology to keep pace with the evolving pace of digital media.

10.30 There is no doubt that the recent chaos in England and Wales caused by the collapse of trials arising out of late disclosure was contributed to by an inappropriate mindset on the part of police investigators. The potential problem arises with evidence emerging that may help the defence. Undoubtedly, where it eliminates the suspect altogether, we can safely assume that the police will abandon that line of inquiry. Absent malpractice, it is in no one’s interest to pursue a person known to be innocent.
10.31 The problem arises when the evidence does not go that far and then there is a danger that it may be ignored or marginalised if it does not fit the police case or even tends to undermine it.3

10.32 An additional problem may well be that police officers are not evidence lawyers and may not be aware of the complexity of the legal rules governing cross-examination of witnesses and, therefore, be unaware of the potential serious nature of some discoverable documents. The task, therefore, simply cannot be delegated to police officers with little or no legal training. Hence, the crucial importance of designated disclosure officers dealing with these serious crimes and the need for schedules of unused material being supplied with the case file to the PPS at an early stage.

10.33 Fortunately, the question on non-disclosure has not yet surfaced in Northern Ireland and, indeed, an inquiry carried out by the PPS on 50 to 60 live rape cases where no decision had been made did not provide any instances of flawed disclosure. Nonetheless, the risk is there and needs to be addressed.

10.34 The question of outsourcing this disclosure exercise has been raised by certain academics in the UK,4 and outsourcing is used elsewhere. For my part, I do not favour outsourcing because the duty is tasked to the PPS to effect this process and outsourcing can lead to some measure of loss of control.

10.35 Resourcing presents one of the key disclosure challenges, ensuring there are suitably qualified personnel with adequate time to review the material generated by investigations.

10.36 Challenges relating to digital disclosure begin at the very start of an investigation for serious sexual offences. Digital devices must be forensically imaged prior to inspection so that the reviewing officer does not alter any data. A lack of resources to carry out this function can lead to delays. Suspects in England and Wales, and, indeed, in Northern Ireland, are often told that images from their seized device will be available for the investigator to view between a few weeks’ time or in more than six months’ time.

10.37 In order to avoid this, police in England and Wales do not always retain phones and other electronic devices belonging to suspects and complainants. As such, this may disregard potentially exculpatory evidence.

10.38 Where devices are obtained, there are challenges around meaningful disclosure. Resourcing issues mean that much relevant material may be left undisclosed or remain hidden in unused materials. Where unused materials are later provided to the defence, they often lack the requisite time or resources to search for a particular piece of evidence.

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3 “Prosecution disclosure: are the problems insoluble?” Professor Ian Dennis Criminal Law Review at P829 (2018)
4 See Article by Professor Dennis
10.39 As set out earlier in this chapter, the House of Commons Justice Committee has recently asserted that the government must consider whether current funding is adequate to support a strong disclosure regime, noting the cost implications of delayed and collapsed trials.

Early engagement

10.40 Ensuring early and effective communication between, first, police and prosecutors and, secondly, the defence and prosecution is essential. While the defence’s role in disclosure is largely reactive, it must engage and insist on identifying key issues at an early stage.

10.41 The Canadian Steering Committee on Justice Efficiencies and Access to Justice in 2011 suggested that professional participants in the criminal justice system must recognise that they are interdependent and need to work collaboratively in relation to disclosure, and that such a culture change needs to take place, which will enhance the administration of justice.

10.42 The national disclosure improvement plan in England and Wales introduces disclosure champions to provide training and support in all Crown Court teams.

10.43 In British Columbia and Ontario, prosecutors are co-located at police stations or with specific police units so that they can provide timely advice in a variety of cases.

10.44 Alberta, Canada, has established disclosure centres, where police and prosecutors work together to ensure initial disclosure packages are quickly and efficiently prepared between police and prosecutors.

10.45 It is absolutely clear, therefore, that in most jurisdictions a key element of disclosure management includes ensuring that the police organise evidence with disclosure in mind from the outset. It cannot be regarded as simply an administrative add-on at the end of the investigation.

Technology

10.46 All the jurisdictions are seeking to find appropriate technology to keep up with the evolving pace of digital media. Police technology needs to be developed throughout the world involving a strategy with prosecution in mind.

10.47 The report by the Canadian government Steering Committee on Justice Efficiencies and Access to Justice stated that disclosure issues may be understood as failures of the criminal justice system to effectively use modern information management technology and procedures.

10.48 Lord Justice Gross and the Court of Appeal in England and Wales have highlighted the importance of making full use of sampling, key words and other search tools.
10.49 Disclosure centres in Alberta, Canada, provide most of the disclosure electronically, which has significantly improved the process and led to cost savings. Disclosure provided electronically is searchable and may be linked to the trial brief.

10.50 In the US there is an emphasis on using technology to support disclosure in order to reduce cost and improve efficiency. Outsourcing is often employed to support this.

Training and police mindset

10.51 Evidence from England and Wales points to a policing culture of pursuing a conviction against the suspect rather than an approach of pursing all reasonable lines of inquiry.

10.52 The literature suggests that across many countries the police mindset needs to be changed. It has to be predicated on the need to organise evidence with disclosure in mind from the outset. It highlights the crucial importance of training for police officers in disclosure. Disclosure is only as good as the person doing it.

10.53 A number of witnesses to the House of Commons Justice Committee inquiry noted a culture within policing that encourages the pursuit of a conviction against a suspect rather than employing an approach giving sufficient weight to the investigation.

10.54 The Canadian Steering Committee on Justice Efficiencies and Access to Justice strongly recommended that police and prosecution should jointly develop and implement a standard checklist for Crown brief and disclosure packages. It emphasised the crucial importance of training for those involved in such tasks.

10.55 A 2017 report by HM Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) – presciently stated:

The Inspection found that police scheduling ... is routinely poor, while revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence is rare. Prosecutors fail the challenge for quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and are failing to manage ongoing disclosure. To compound matters, the auditing process surrounding disclosure decision making falls far below any acceptable standard of performance. The failure to grip disclosure issues early often leads to chaotic scenes later outside the court room, where last minute and often unauthorised disclosure between counsel unnecessary adjournments and – ultimately – discontinued cases are common occurrences. This is likely to reflect badly on the criminal justice system in the eyes of victims and witnesses.
Vast amount of information

10.56 Lord Justice Gross noted in his 2011 review the importance of recognising that in some cases it is simply not possible or practicable to read every document gathered.

10.57 However, he specifically did not recommend a proportionality test, stating that such a legislative change would require increased confidence in the prosecution’s performance of its disclosure obligations.

10.58 The former Attorney General of England and Wales highlighted the importance of the defence statement identifying the key issues in the case in this regard.

10.59 The Canadian Government Steering Committee on Justice Efficiencies and Access to Justice notes that in unusually larger, complex investigations where the conventional approach to disclosure is not feasible, the prosecution may discharge its duties by providing the defence with a description or index of the material and an opportunity to inspect it.

10.60 Canada, England and Wales, Australia and New Zealand invoke a staged approach to disclosure, as time and effort in preparing and disclosing information of no interest to the defence waste resources. The Steering Committee also notes the importance of using practical procedural tools for the early resolution of disclosure dispute for materials outside the investigative file. Thus at the beginning, the defence requires sufficient evidence in order to provide comprehensive advice to the accused on the ability of the prosecution to prove its case on the consequences of entering a guilty plea. If the case goes to trial, the prosecution can provide additional disclosure.

Case management

10.61 Research across the jurisdictions highlights the importance of effective case management in disclosure — for example, setting time limits to shape expectations and allow for measurement and evaluation of progress.

10.62 Recommendations from other jurisdictions include ensuring that judges provide early guidance on the prosecution’s approach and insist on early defence engagement, providing them both with the authority to make binding rulings and directions and to manage the case at the pretrial stage.

10.63 It is vital to obtain early and binding resolution of disclosure disputes at the judicial case management stage.

A cultural shift

10.64 The House of Commons Justice Committee found that there needed to be a shift in culture so that disclosure is viewed as a core justice duty rather than an administrative add-on.
10.65 With regard to perceived pro-prosecution bias on the part of the police, the national disclosure improvement plan in England and Wales will introduce a new procedure for officers to identify reasonable lines of inquiry when submitting a charging decision request to the CPS.

Arguments for and against the status quo
10.66 The need for change is simply irresistible, and I do not intend to weary those reading this view with hopeless arguments for the status quo.

Discussion
10.67 I agree with virtually all commentators on the existing system in Northern Ireland, and England and Wales, who say that, although the CPIA regime predates the enormous expansion in electronic communication in social media, it is still fit for purpose. It would be a distraction to reinvent the wheel and there is no need to do so. The test is clear and sensible. It is the application of the law that is inadequate and unsatisfactory.

10.68 Disclosure must be seen as integral to the criminal justice process and not a tiresome add-on. This is a message that I do not believe the PSNI has yet fully implemented, and it needs to change. The service needs to address issues of disclosure from the very outset and recognise that disclosure is central not only to decision-making in serious sexual offences but a vital ingredient of the whole process from beginning to end.

10.69 Thus, I consider that the often repeated failure to submit a schedule of unused material to the PPS is indicative of how PSNI officers have relegated the importance of disclosure as a key ingredient at operational level.

10.70 Similarly, third-party disclosure must be addressed from a very early stage. There is no reason why an experienced PSNI investigator should not recognise at an early stage the need for third-party disclosure and to set in motion that process.

10.71 The PPS needs to provide assistance and guidance to the PSNI and to that end I recommend that the PPS invoke again the principle of disclosure champions who would be responsible not only for oversight of disclosure in the PPS but the supervision of trends in disclosure with the PSNI. I understand that an Assistant Chief Constable in the PSNI plays that role, but in truth, in every serious sexual offence investigation, the designated disclosure officer should be a specialist, having had specialised training in the art of disclosure rather than relying on the officer in charge, who may not have such expertise. It is not enough to persist with the current practice of merely appointing whoever is the chief investigating officer to head up disclosure. Disclosure has to become an absolute priority in all serious sexual offence investigations.
10.72 The PSNI should also provide an audit trail of all work done by its officers in this regard during the course of serious sexual investigations so that transparency is obvious not only to the defence but to the court in terms of what is being done.

Resources
10.73 Frankly, unless appropriate resources are put into ensuring there are sufficiently suitably qualified personnel and adequate technology available to assist digital disclosure delays, the risk of injustice will continue. The fact of the matter is that resourcing issues may mean that the dangers of relevant material being left undisclosed or remaining hidden in unused materials that have emerged in England could well surface in Northern Ireland. The Department of Justice (DoJ) has to appreciate that the colossal waste of public money involved in the current delayed system, and the dangers of trials being aborted at a late stage, outweigh the cost of putting additional resources into the system.

Early engagement
10.74 Early engagement is the key to reducing delay and bringing about timely and efficient disclosure. This includes early engagement between police and prosecutors and, equally and perhaps even more importantly, between defence and prosecution. The defence must engage and assist on identifying key issues at an early stage. Collaborative working is the only solution to the current unconscionable delay in the system in relation to disclosure.

10.75 I do not favour the Canadian and US system of seamless integration of investigators and prosecutors. Our own model of institutional separation has strengths that cannot be ignored. Nonetheless, that should preclude extensive guidance by the PPS to properly trained designated disclosure officers within the PSNI at the commencement of serious sexual offence investigations.

10.76 As indicated in chapter 9, ‘Delay’, the stages of the case management now being directed by Crown Court judges must include early involvement of the defence making a positive contribution to the disclosure system.

10.77 Early engagement of the PSNI must involve early preparation of schedules of unused material, which are given a much higher priority than they are at the moment, and the PSNI should at the earliest possible stage commence the process of third-party disclosure.

10.78 The CPS in England has provided specimen letters to me — for example, dealing with early approaches for third-party material — for guidance for the PSNI to use. These can be readily made available to the PSNI by this Review.

Dealing with vast amounts of information
10.79 Whatever the extent of the information that has to be processed, disclosure should not involve an open-ended trawl of unused material. There are reports in
England of unfettered access to highly personal records and data being sought by the police from complainants under threat of the case being dropped. There is no need for a trawl through everything in the life of the complainant. As Dame Vera Baird QC said recently, ‘A criminal case is about what happened, not whether the complainant qualifies for sainthood.’

10.80 The importance of the defence statement cannot be overestimated in identifying the key issues in the case in this regard. Common sense has to prevail in carrying out disclosure. The staged approach to disclosure in the early processing of the case should be enough to provide the defence with sufficient evidence to allow them to deliver comprehensive advice to the accused and to seek out any additional disclosure if it is merited.

10.81 I strongly urge the development of electronic disclosure when the appropriate technology has been developed, which will allow information to be searched and electronically linked to the trial papers.

Case management

10.82 The role of effective case management in disclosure cannot be overestimated. As already indicated in chapter 9, ‘Delay’, the judiciary must grip this concept of disclosure at the earliest possible moment, setting time limits to shape expectations and allow for measurement and evaluation of progress.

10.83 Judges must be proactive in insisting on early defence engagement and making binding rulings in terms of disclosure at early stages.

Technology

10.84 Lord Justice Gross highlighted the importance of making full use of technology in lengthy and complex cases. We must learn to make use of sampling, key words, artificial intelligence, computer learning, word searches, algorithms etc. and feedback in order to make accurate decisions in the future.

10.85 In particular, the most urgent of steps must be taken to investigate the IT problems that beset the current ABE system. It is simply unacceptable that the IT systems used by agencies such as the police appear incompatible with the court systems, leading to delay and colossal waste of public money.

10.86 The digital strategy group in Northern Ireland needs to invest its time and experience in the criminal justice system to bring about technological advances. At the moment Northern Ireland is far behind advances currently being introduced in England.

10.87 I conclude by saying that I recognise that the disclosure exercise is not performed in timeless academia. It is performed often in police stations under significant pressures of time, resources and the weight of work.
10.88 It is this that has led in some circles to a suggestion that the police might be able to call on the services of an experienced lawyer independent of both prosecution and defence — for example, a retired county court judge with the seniority and requisite skills to deliver an authoritative opinion on the application of a disclosure test. An independent and partial reviewer of unused material would not be subject to the risk of confirmation bias. Whilst there would a cost involved, the time of such reviewers would amount to a savings against the risk of trials collapsing.

10.89 For my part, until the recommendations I have made have been implemented and given an opportunity to correct the present situation, the need for an outside independent source does not seem to me to be merited at this stage. However, I do not dismiss the possibility of it if delay in the process and continuing flaws in the system persist.
Proposed recommendations

134. A recognition that disclosure is a specialism. Minimum standards and accreditation are necessary in the appointment process of designated disclosure officers in the PSNI.

135. In all training delivered to the PSNI and the PPS, the potential significance of failures in disclosure should be underscored by using appropriate examples from actual cases.

136. Disclosure training should emphasise the continuing obligation on designated disclosure officers throughout an investigation to seek to ensure that all relevant information has been identified, is recorded and submitted to the PPS. The PSNI should provide an audit trail of work done by the police in the course of the disclosure exercise.

137. The PSNI must give a higher priority to schedules of unused material to be, without exception, submitted with the police file to the PPS.

138. The duty of the designated disclosure police officer must include flagging up what is relevant when submitting unused material and third-party material to the PPS.

139. The PSNI should address third-party disclosure issues at the outset of the investigation.

140. In training, the investigative mindset necessary for the PSNI must be highlighted, indicating the need to identify evidence that would be helpful not only to the prosecution but potentially to the defence.

141. The police must be trained to see disclosure as a core justice duty rather than an administrative add-on.

142. The PPS should introduce forthwith a disclosure management document.

143. The PPS should reintroduce disclosure champions throughout the system.

144. Robust judicial case management must be introduced at an early stage, highlighting the importance of a defence statement identifying the key issues in the case and setting time limits to shape expectations.

145. Resources must be invested in technology. The digital strategy group in Northern Ireland should lead the process of technological advance in serious sexual offences.

146. In all serious sexual offences where disclosure has been substantial, the PPS should forward to the relevant Disclosure Champion in the PSNI, at the termination of the case, a brief report on how disclosure was handled in the case, highlighting any defects and suggested improvements.
Chapter 11

Consent
Consent is a philosophical, psychological, and legal quagmire.

Aya Gruber
‘Consent Confusion’

Issues
• Is the current definition of legal consent inadequate?
• Is our understanding of what evidence constitutes reasonable belief on the part of an accused person confused and unclear?
• Should Northern Ireland introduce the concept of gross negligent rape?

Current law
11.1 The current law on sexual offences in Northern Ireland is governed by The Sexual Offences (Northern Ireland) Order 2008 (2008 Order). The Order sought to consolidate the law on sexual offences in Northern Ireland into one statute and to modernise, strengthen and harmonise the body of offences and penalties in line with England and Wales. The provisions in the 2008 Order place the law on sexual offences in Northern Ireland on a par with part 1 of the Sexual Offences Act 2003.

11.2 The Order provides a general definition of consent in Article 3 as follows: ‘A person consents if he agrees by choice, and has the freedom and capacity to make that choice.’

11.3 The definition is relevant to a number of offences in the Order that require that the complainant (C) must consent to sexual activity (in the case of rape, to any penetration of the vagina, anus or mouth of C).

11.4 In proving the absence of consent, the Order sets out limited circumstances that would amount to a conclusive (irrebuttable) presumption of absence of consent (Article 9) and other circumstances that would amount to a rebuttable presumption of the absence of consent (Article 10). Where the facts do not fall squarely within any of these irrebuttable or rebuttable presumptions, the prosecution must prove the absence of consent in accordance with the general definition — that is, that the complainant did not agree by choice, or lacked the freedom or capacity to make that choice.

11.5 Article 9 provides that there will be an evidential presumption against consent where the victim has, for example, been subject to violence (may be rebutted by the defence).

11.6 Article 10 provides for a conclusive presumption (cannot be rebutted) where, for example, it is established that the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act.
11.7 As well as proving an absence of consent to, in the case of rape, intentional penetration, the prosecution must also prove an absence of reasonable belief in consent on the part of the defendant (D).

11.8 Article 5(2) of the 2008 Order provides that whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps D has taken to ascertain whether C consents.

11.9 This formula is repeated in the 2003 Act for other sexual offences where C must consent to sexual activity (see Articles 6(2), 7(2) and 8(2)). An honest but mistaken belief in consent may not be reasonable.

11.10 The irrebuttable and rebuttable presumptions apply equally to the issue of absence of reasonable belief: where the relevant circumstances and the defendant’s knowledge of those facts are established by the prosecution, it is presumed that the complainant did not consent and the defendant did not reasonably believe that she (or he) was consenting.

11.11 There is, therefore, a threefold test in cases of rape.

- Did the complainant consent?
- Did the accused believe the complainant consented?
- If the accused did, was that belief reasonable?

Background

11.12 The present law was designed to centre sexual offence law upon respect for individual sexual autonomy and freedom of choice. The new definition was meant to offer more clarity than the previous law’s rudimentary distinction between consent, however reluctant, and mere ‘submission’ falling short of consent.

11.13 The difficulty is that the definition is vague, with the result that juries and, for that matter, defence counsel may bring sexual stereotypes into play in determining whether there was consent. If we permit criminal justice actors to draw on rape myths, this may attach a sense of legitimacy to them and lead to their reinforcement in the minds of jurors.

11.14 The review of sexual offences, which preceded the legislation that recommended the new definition, also recommended that there should be a standard direction that, depending on the circumstances of the case, juries should be told not to assume that the complainant did freely agree just because C did not say or do anything, protest or resist, or was not physically injured. No such standard direction is given.

11.15 The 2008 Order for Northern Ireland follows the approach in England and Wales by replacing the previous requirement of knowledge or reckless knowledge
of the absence of consent with a need to prove that the defendant does not reasonably believe that C consents.

11.16 This was hailed as an important step forward in respecting the principle of sexual autonomy as it put the onus on D to be clear that C does consent.

11.17 But there has been criticism that the test as to whether a belief is reasonable, requiring regard to be had to all the circumstances, does not clearly delineate what should and should not be considered reasonable, leaving the door open for stereotypes to determine assessments of reasonableness. Moreover, what circumstances are to be considered? Those surrounding the immediate interaction or broader background circumstances?

11.18 The judicial directions in the England and Wales Crown Court Compendium stress that the test is whether an ordinary, reasonable person, in the same circumstances as D, would have believed C was consenting, not whether D thought it was reasonable. But it has been suggested that it is not difficult for D to establish that his belief in consent was reasonable based on the complainant’s behaviour, such as flirting or failing to actively demonstrate a lack of consent through protest. Additionally, does this include certain characteristics of the defendant and thus be more subjective than objective?

11.19 There are various ways in which steps could be taken to shift the focus of attention away from C’s behaviour toward D’s conduct in deciding whether D has a reasonable belief in consent. The present Order does factor into consideration ‘any steps D has taken to ascertain whether C consents’. This appears to draw the jury’s attention to the importance of examining D’s conduct and not just C’s behaviour, but the present Crown Court directions in England and Wales state that there is no obligation on D to have taken any specific steps to ascertain consent.

Other jurisdictions

11.20 The core concept of consent in criminality presents lawmakers internationally with significant challenges. This is particularly marked in the sphere of sexual relations, where communication is often characterised by subtle suggestion and tacit understanding. As consent can be understood and interpreted in different ways, providing appropriate criteria in relation to consent is a key challenge.

11.21 Internationally, a wide range of approaches are in place to defining rape, which may or may not include defining consent. There are five key approaches.

11.22 (I) Rape defined by force or resistance

- It derives from historical ideas about female chastity. Force and resistance remain highly significant evidentially in criminal justice, even in jurisdictions that have moved to consent-based models.
• France, which refers to ‘violence, constraint, threat or surprise’; 
• the Netherlands, which discusses compelling a person to submit to acts; 
• Norway, which refers to violence, threats or where a person is incapable of resisting; and 
• a number of US states, including Pennsylvania and New York, which use a formula of ‘forcible compulsion’.

11.23 (ii) Veto model: no means no

• The complainant must actively express rejection of an act in order for it to become criminal conduct. 
• Legislation enacted in Germany in 2016 shifted the definition of rape from one requiring coercion to a veto model. Within this model, the complainant must express rejection in order for the act to become criminal conduct.

11.24 (iii) Consent-based models

• various descriptions of consent are in place, including wanted or agreed-to sex; 
• criticisms include a failure to take into account concepts of freedom, capacity and choice in light of societal norms and stereotypes; and 
• may allow silent acquiescence through fear to be construed as consent.

11.25 Approaches to defining consent are broadly similar in a number of jurisdictions where the actus reus of rape requires proof that the complainant did not consent. Consent is defined slightly differently across the jurisdictions, as follows:

• Australian territories often refer to ‘free and voluntary agreement’; 
• the Canadian Criminal Code defines consent as ‘voluntary agreement’, and notes that it is not a defence if the accused failed to take reasonable steps to ascertain consent; 
• in England and Wales, consent is defined as where a person ‘agrees by choice, and has the freedom and capacity to make that choice’; 
• New Zealand legislation notes that ‘a person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity’; 
• Ireland defined consent in 2017 as where a person ‘freely and voluntarily agrees to engage in that act’, and notes that any failure to offer resistance does not of itself constitute consent; 
• Scotland defines consent as ‘free agreement’; 
• South Africa defines consent as ‘voluntary or un-coerced agreement’; and
• Sweden notes that a person commits rape if they have sex with ‘a person who is not participating freely’. I pause to observe that this is an interesting description as it moves from a sole focus on the context within which consent is given to a conception of consent as something that requires participation.

• Case law in Canada has shown inconsistent interpretations of consent, and research indicates that the positive consent model had not increased reporting, reduced attrition or improved complainants’ experiences of criminal justice.

• The jurisdictions cited above also provide a list of circumstances in which consent is not present (such as where the complainant is asleep). This may be exhaustive (England and Wales) or non-exhaustive (such as Ireland). There have been criticisms of the exhaustive approach taken in England and Wales, with suggestions that it omits certain circumstances and leaves no scope for further situations to be added through the common law.

11.26 In regard to the mens rea of rape in the following jurisdictions, the prosecution must prove that the defendant knew that the complainant was not, or might not be, consenting, and/or that the accused did not consider whether the complainant was consenting or was reckless in this regard.

• in Australia, honest but mistaken belief in consent is a defence to rape: in most territories this belief must be held on ‘reasonable grounds’, although some place the onus on the defendant to prove that they took ‘reasonable steps’ to ascertain consent;

• in Canada, the Criminal Code places an onus on the defendant to introduce evidence as to what reasonable steps they took to ascertain consent;

• in England and Wales, the defendant’s belief must have been ‘reasonable’;

• in New Zealand, the accused’s belief in consent must be held ‘on reasonable grounds’;

• in Ireland, the defendant’s belief must have been ‘honest’; and

• in Scotland, rape is committed ‘without any reasonable belief that B consents’, and notes that regard must be had to whether the person took steps to ascertain consent.

11.27 In a number of these jurisdictions, there are concerns that the ‘reasonable belief’ test is too subjective and does not allow the defendant’s belief to be tested against the standard of a reasonable man. There may also be scope for jurors and other criminal justice actors to scrutinise the complainant’s behaviour and sexual history and to apply inappropriate questions about reasonable steps to ascertain consent.

11.28 Ireland is examining the ‘honest belief’ element of rape. Potential advantages include that it is unfair to convict someone where they could not foresee
the risk of harm. Disadvantages include that it allows defendants to rely on unreasonable beliefs as a defence and that it may reinforce rape myths and stereotypes.

11.29 (iv) Affirmative consent: only yes means yes

- There are differing interpretations. Broadly, a person should demonstrate free and positive consent through conduct and/or words.
- Criticisms include that the standard is too rigorous in light of the spontaneous nature of sexual relations; may be better suited to first-time sexual encounters.
- It has been argued that, due to gender inequalities within society, not even yes reliably means yes.

11.30 An affirmative consent model is in place in the US states of Wisconsin and Minnesota, which note that consent requires words or overt acts indicating informed and freely given agreement. A small number of US states have enacted affirmative consent laws and policies for colleges and universities, requiring them to set an affirmative consent standard meaning ‘affirmative, conscious, and voluntary agreement to engage in sexual activity’.

11.31 In California consent is defined as a ‘positive cooperation in act or attitude pursuant to an act of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.’

11.32 In 2004, Tasmania introduced an affirmative consent model, which was perceived as one of the most progressive in the world. A person does not freely agree (consent) to an act if they do not say or do anything to communicate consent. Following an acquittal in a high-profile rape case in New South Wales, the government there is reviewing the law on consent, including considering an affirmative consent model.

11.33 A pivotal Canadian Supreme Court judgement (R v Ewanchuk) in 1999 described an affirmative standard for consent approaching ‘only yes means yes’.

11.34 In 2017, Canada introduced a Bill reflecting Supreme Court decisions and stating that it is not a defence where there is no evidence that the complainant’s agreement was ‘affirmatively expressed by words, or actively expressed by conduct’. There are concerns that this will shift the burden of proof to the defence.

11.35 The Irish Supreme Court, in the People (DPP) v C O’R, recently defined consent as active communication through words or physical gestures. The Irish Law Reform Commission has considered that these definitions arguably imply that consent in sexual circumstances is no longer purely about an internal mental attitude and more about performance and signals that the person has the requisite willing mental state.
11.36 Sweden has recently changed its law, and it would seem that under the new law whether there was, in fact, agreement is to be viewed objectively and not subjectively. Factfinders should consider the complainant’s acts — their words — and not their ‘internal attitude’. Likewise in Iceland, under the new law, consent is present when it is ‘voluntarily expressed’. The new Spanish government is reported to be intending a law on consent aimed at removing ambiguity by requiring that consent will have to be explicit.

11.37 The New South Wales Minister for the Prevention of Domestic Violence and Sexual Assault and Minister for Family and the Community Services is reported to favour a requirement for audible consent by which, if you want to have sex, you have to ask for it, and if you want that sex, you have to say yes. I pause to note my concerns about such an exclusionary concept since it does not seem to consider the experience and reality of those who cannot express themselves verbally.

11.38 (v) A conceptual approach

• International criminal law introduced a new approach based on the aggressive and coercive nature of rape rather than on body parts (undermined somewhat by later case law).

• Some suggest that this approach is uniquely suited to sexual violence under international law, while others argue that it provides a model between the use of force and consent-based models that could be used in domestic law.

• In this context I am indebted to Dr Eithne Dowds of Queen’s University Belfast, who expanded on this conceptual approach. She pointed out that there is also literature that seeks to explore how the conceptual or ‘coercive circumstances’ approach under international criminal law might supplement rather than supplant domestic consent approaches.¹ This introduces the notion of moving beyond what could be perceived as the ‘real rape’ stereotype and incorporating some notion of coercion/coercive circumstances into our definition of rape. All of this could be viewed in the context of and aligned with legislation on domestic and coercive control that may be developed in Northern Ireland.

Arguments in favour of the status quo in Northern Ireland

11.39 The current law works well and there has been no real movement demanding change.

11.40 In particular, it may be said that requiring express consent (only yes means yes) for every sexual encounter is too far removed from the way in which sexual

¹ Munro “ReThinking Rape Law:International and Comparative Perspectives and Dr Dowds “Conceptualising the role of consent in the definition of rape at the International criminal Court; a norm transfer perspective “2018 International Feminist Journal of Politics.
relationships develop and sets an unrealistic threshold that would be difficult to apply in practice.

11.41 Moreover, the requirement that consent be expressed suggests that the presence or absence of consent must be determined objectively with the result that the protection offered to the complainant may be less generous than under the present law where consent is subjectively determined: it is a state of mind.

11.42 A further question is whether an affirmative consent standard should apply only to rape offences or to all sexual offences that require the absence of consent to sexual activity, including sexual assault.

11.43 If it is to apply only to rape offences, then D is being required to establish that C consents to different sexual acts within the same sexual encounter in different ways. If it is to apply to all sexual acts requiring consent, D will have to establish C’s affirmative consent to each sexual act within the same sexual encounter.

Are there compelling arguments for change?

11.44 The ‘yes means yes’ approach has much to recommend it. To require a person who wants to engage in sexual activity with another person to take the opportunity to be clear that that person truly consents and to require express consent is in line with the shift in the present legislation towards stressing the importance of sexual autonomy and, as illustrated above, by the direction of travel in a number of countries.

11.45 A further step in line with the shift taking place in certain jurisdictions towards requiring express consent before any sexual activity takes place would be to require D to obtain express consent before it could be said that he had a reasonable belief in consent.

11.46 An interesting variation on such a requirement is that put forward by Dr Dowds, who favours an emphasis on the concept of participation in sexual relations (as opposed to communication) so that, if someone is not actively participating, it is questionable whether they are consenting. This would be true of sexual relations beyond the first encounter.

11.47 The Irish Law Reform Commission is at present consulting on whether there should be a ‘reasonable steps’ requirement to ascertain consent on the part of D as a restriction on what qualifies as a reasonable belief in consent, if the law is changed to require reasonable belief in consent (at present, an honest belief in consent suffices to exonerate D from liability).

11.48 A further question on which it is consulting is whether it should be a defence to be raised by the accused that D took reasonable steps to ascertain consent and, if so, whether D should have to meet an evidential burden on this issue or whether it has to be proved on the balance of probabilities.
11.49 If it is determined that the affirmative consent model is impractical, consideration needs to be given to the criticism that the test as to whether a belief is reasonable, requiring ‘regard to be had to all the circumstances’, is too vague, does not clearly delineate what should and should not be considered reasonable or how far the analysis should extend — that is, what circumstances. This leaves the door open for stereotypes to determine assessments of reasonableness. The list needs to be more specific and expanded.

11.50 Finally, there is merit in the argument that too wide a discretion is given to jurors to decide whether there was agreement by choice, thus once more allowing rape myths to creep in. There should be express reference in the legislation stating 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.

Discussion

11.51 I recognise immediately the attractions of a ‘yes means yes’ approach in a changing era where the emphasis on sexual autonomy has hopefully never been higher.

11.52 Hence the possibility of requiring an affirmative consent standard is worthy of careful consideration and exploration. It would stipulate that unless C’s voluntary agreement is affirmatively expressed, C does not consent and there can be no reasonable belief that C consents.

11.53 Arguably, it would herald a societal change in the attitude adopted to sexual relations.

11.54 However, I am not currently persuaded of its validity for the following reasons. Professor Dave Archard of Queen’s University Belfast summed up the position extremely well when he recently wrote:

As in our relationships with the state or with government, much remains tacit and too much may be taken for granted. Words often disappear in the act of sex. People respond or fail to respond to physical cues. The fact of the matter is that women know when their will is being over borne but too often men fail to recognise they are abusing their power.

It may be of course that that the legal system is ill constructed for the stuff of such intimate interactions and the courts are poor places for a resolution that satisfies the warring sides. People want their voices to be heard and women are saying it more clearly than ever before. The challenge is to find a practical way to translate this into reality.

11.55 The difficulty thus lies in finding a formula that is workable and effective. A requirement that D seeks affirmative communication of consent (particularly one in the form of an explicit yes) raises the problem that this is not the way in which sexual relationships actually operate and, once qualifications are
admitted, it is difficult to draw the line as to when affirmative communicative consent is to be required and when not. Something that might apply happily to the earliest stages of a relationship does not apply to a long-lasting relationship over many years, albeit that sexual interaction may not always involve verbal communication and there are other forms of communication that may be present.

11.56 The proposal put forward by the Irish Law Reform Commission for consultation that there be a requirement that D takes reasonable steps to ascertain consent seems more workable. The commission raises the objection, particularly where an onus lies on D to prove reasonable belief, that it would be too difficult and onerous on D to prove agreement where communication in sexual encounters is often implicit. As it puts it, a standard that requires reasonable steps may be too easily, too commonly and too innocently contravened in ordinary relationships.

11.57 A further objection is that requiring D to take reasonable steps to ascertain consent means that those who fail to do so, despite having an honest and reasonable belief that there was consent, are rapists who are subject to the same potential life sentence as those who commit intentional or reckless rape.

11.58 The key component of the current law is that, rightly, it focuses on consent as agreement by choice as the fundamental principle that must be safeguarded in sexual offence law.

11.59 I consider further legislative steps could be taken to underpin this key principle. I am particularly attracted by the proposals submitted to the advisory panel by Professor John Jackson from Nottingham University. They are set out in the following paragraphs.

11.60 First, in order to restrict the wide discretion that jurors have to determine whether there was agreement by choice, insert in the legislation a clause that states 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. This is already contained in legislation in section 128 of the Criminal Act 1961 in New Zealand. In Ireland, the Criminal Law (Sexual Offences) Act 2017 amended the Criminal Law (Rape) (Amendment) Act, 1990, providing the following definition of consent: ‘A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act’ and specifies: ‘Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act’.

11.61 I favour this development because it shifts the focus away from resistance as a means to prove absence of consent and on to some affirmative expression of consent.
However, it can be effective only if the judiciary robustly prevents such evidence being brought in in practice by addressing the issue at both pretrial preliminary hearings and during the course of the trial.

Secondly, we could follow the approach adopted in Scotland and Ireland, and expand on the list of situations where it may be said that C did not consent.

At present, the 2008 Order for Northern Ireland lists a number of circumstances that give rise to a rebuttable presumption of a lack of consent — for example, where C was asleep or otherwise unconscious or fears the use of immediate violence.

Scotland and Ireland have gone further and asserted that in these circumstances the presumption is irrebuttable that C does not consent and has also expanded on the circumstances mentioned in the 2008 Order to include: the threat of any violence (not necessarily immediate); where C is incapable of consent because of the effect of alcohol or some other drug; and where the only expression or indication of consent or agreement comes from a third party.

The list of circumstances as to when there is an absence of consent could be expanded to include, for example:

- Where C submits to the act because of a threat or fear of violence or other serious detriment to C or to others. Thus, for example, high levels of psychological coercion in the context of the encounter would fall outside the definition of consent.
- Where the only expression of consent or agreement to the act comes from a third party.
- Where C is overcome, voluntarily or not, by the effect of alcohol or drugs. Moreover, courts must not allow it to follow that, merely because a person may be behaving irresponsibly or exposing themselves to a high-risk situation, there is necessarily a genuine consent to sexual activity.

Rather than imposing any burden of proof on D to prove consent or a reasonable belief in consent, which could raise European Convention on Human Rights issues, where any of these circumstances exist, it could simply be stipulated that C does not consent to any sexual act and that if D was aware of these circumstances, D did not reasonably believe that C was consenting.

I am particularly interested in the reference to alcohol because all too often we seem to think that it is only when someone is incapacitated by alcohol that we recognise rape whereas that in-between stage of total sobriety and complete drunken incapacity needs to be addressed.

Thirdly, there are various ways in which steps could be taken to shift the focus of attention away from C's behaviour toward D's conduct in deciding whether D has a reasonable belief in consent. The present Order does factor into
consideration ‘any steps D has taken to ascertain whether C consents’. This
appears to draw the jury’s attention to the importance of examining D’s conduct
and not just C’s behaviour, but the present Crown Court directions in England
and Wales state that there is no obligation on D to have taken any specific steps
to ascertain consent.

11.70 The current definition as to what constitutes a reasonable belief in consent
could either be qualified by adding that there can be no reasonable belief in
consent unless the defendant has taken reasonable steps to ascertain whether
the complainant consents or be amended by adding that, in determining
whether there was a reasonable belief in consent, the jury should take account
of all the circumstances, including a failure to take any steps to ascertain
whether the complainant consented.

11.71 The latter would take the legislation beyond its present remit, which simply
refers to whether a belief is reasonable is to be determined having regard to
all the circumstances, including any steps D has taken to ascertain whether C
consents. Our proposal is that specific reference be made to the failure to take
any steps to ascertain if the complainant consented.

11.72 The attraction of the latter is that it shifts the focus on to the defendant and
what actions were/were not taken to ascertain consent, and thus may change
the narrative in a positive way. It may also serve to reduce the impact of rape
myths, thus allowing a clearer picture of the events in question to develop.

11.73 The potential weakness in my proposal may be that it does not tell the jurors
what weight they should place on this aspect but I believe that, if we are to
retain a jury system, we have to re pose confidence in jurors to apply their own
common sense and logic to the evidence as it emerges on a case-by-case basis.

Gross negligence rape

11.74 A wholly discrete issue that demands our attention is the developments in
Sweden and Iceland, now being contemplated in Ireland, introducing the
concept of gross negligence rape.

11.75 Both Sweden and Iceland in 2018 have introduced a separate offence, with
a lower sentence, of negligent rape. The Swedish Bill describes the test for
negligent rape as ‘whether the person could and did do all the things necessary
to determine whether consent was actually received’.

11.76 The Irish Law Reform Commission has put out for consultation the proposal
that there be a new offence of gross negligence rape, carrying lower penalties
than for rape, to address circumstances where D honestly but mistakenly
believed there was consent. The law could also state that a belief will not be
reasonable if no reasonable steps were taken and could also exclude grounds
for consideration of what is reasonable.
11.77 The difference between rape and gross negligence rape is described as akin to the difference between murder and manslaughter, in that they share the same actus reus but the accused’s mens rea differs. The maximum sentence for the second offence is four years.

Arguments in favour

11.78 The main advantage in creating a separate offence of this kind is that it criminalises non-consensual sex where the accused’s belief in consent was unreasonable but also recognises that there is a lower degree of moral culpability in these cases than with intentional or reckless rape. It may lead to greater consistency in sentencing.

11.79 This proposal has also much to commend it, given the reluctance of juries to convict a man who may have an honest if unreasonable belief in consent — if the sentence for rape is as currently.

11.80 Recent figures from the Crown Prosecution Service (CPS) in England illustrate the reluctance of juries to convict young men of rape (albeit as set out in chapter 2, on much smaller figures, the position is not replicated in Northern Ireland). According to 2018 statistics, men aged 18–24 in England and Wales are consistently less likely to be found guilty than older men on trial. Young men accounted for more than a quarter of defendants in rape-only cases in the five years to 2017/18.

11.81 Senior CPS staff are reported to believe that the failure to secure convictions reflects a desperate need to educate jurors, who appear particularly reluctant to punish young men at the start of their adult life for serious sexual assaults. They cover a five-year period and highlight how difficult it is to secure successful prosecutions of men under the age of 25.

11.82 According to the figures, 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%.

11.83 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%.

11.84 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 at 49%.

11.85 Accordingly, the invocation of a lesser charge where sentences imposed are likely to be much lighter than those currently imposed for rape could well lead to more just and fair convictions and reverse the figures currently presented.
11.86 Would not conviction for rape, albeit negligent rape, be immeasurably better than no conviction? Does it still not effectively publicly communicate that the man is a rapist (someone who is prepared to have non-consensual sex), and that the woman did not consent? Acquittal of a man of rape, under current law, may be because the jury believes the woman did not consent but also believes the man had some reason to believe she did and should not be subject to the sentence that follows conviction. His conviction for negligent rape confirms their belief that she did not consent.

Arguments against

11.87 In the UK, negligent rape is already rape, and there have been few calls for a lesser offence of negligent rape to be enacted.

11.88 The main disadvantage in creating such an offence is that it sends out the message that only intentional or reckless rapes are serious and risks undermining the need to respect autonomy in sexual relations. There should be no hierarchy of rape or serious sexual offence.

11.89 A further question, if a lesser offence of negligent rape were enacted, is whether a similar lesser offence would have to be enacted for other sexual offences where non-consent is an element.

11.90 Other potential disadvantages include making it more difficult to prosecute cases of rape as prosecutors or juries may opt for the lesser charge if there is insufficient proof or as a compromise, even in cases where the correct verdict would be rape or an acquittal. The outcome of such a situation would be that only the ‘clearest’ cases of rape are prosecuted as such, signalling a return to older definitions requiring force and resistance.

Discussion

11.91 I understand the concerns that abound about the low conviction rates for young men accused of rape. It is certainly arguable that the introduction of a somewhat lesser offence with a commensurately lesser sentence might recognise the realities of jury trials for these offences and bring about more convictions based on the lesser charge in cases where there was a genuine belief, albeit mistaken, that consent had been given.

11.92 Nonetheless, my abiding concern remains that convicting for negligent rape (and the lesser sentence that follows) does not fully acknowledge the egregious harm done to the victim (who is raped even if negligently). These offences are so heinous that any such change risks undermining the true seriousness of rape and the destruction of the sexual autonomy that forms the cornerstone of our legislation.
11.93 I believe there is much to be said for the concerns raised in the report of the Irish Law Reform Commission that this offence could make prosecutions for the offence of rape more difficult. Prosecutors may choose the lesser charge where there is insufficient proof of knowledge and through concerns that the jury would not accept a rape charge. In addition, jurors might opt for the lesser offence as a compromise where they cannot agree whether there was sexual intercourse or consent, where the correct verdict would actually be rape or an acquittal.

11.94 This could result in a situation where only the ‘clearest’ rape cases are thus prosecuted, while those in which there is little evidence of non-consent would be prosecuted as gross negligence rape. The Irish Law Reform Commission notes that such a situation could signal a return to older definitions of consent requiring force and resistance, rather than recognising it in terms of the right to bodily autonomy.

11.95 The key to the inexplicably low conviction rate of young men for these offences is twofold. First, better public and jury education about jury myths and the serious consequences of serious sexual offences. Secondly, considerations of the culpability of offenders should be taken into account at the sentencing stage and maximum flexibility should be afforded to judges at that part of the process.

11.96 I therefore do not recommend the introduction of this lesser offence at this time.
Proposed recommendations

147. The Sexual Offences (Northern Ireland) Order 2008 should be amended 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;
- for the expansion of the list of circumstances as to when there is an absence of consent to include, for example (i) where C submits to the act because of a threat or fear of violence or other serious detriment to C or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where C is overcome, voluntarily or not, by the effect of alcohol or drugs;
- that where any of these circumstances exist, the complainant does not consent to any sexual act, and if the defendant was aware of these circumstances, the defendant did not reasonably believe that C was consenting; and
- that the definition as to what constitutes a reasonable belief in consent be amended by adding that, in determining whether there was a reasonable belief in consent, the jury should take account of all the circumstances, including a failure to take any steps to ascertain whether C consented.

148. The offence of gross negligence rape be not introduced.
Chapter 12

Voice of the accused
A review of the law and procedures in serious sexual offences in Northern Ireland
When criminal justice does not perform effectively it can have a significant impact upon the lives of those involved: victims, defendants, witnesses and their families.

_Speeding up Justice: Avoidable Delay in the Criminal Justice System_¹

**Issue**

12.1 In the context of serious sexual offences, should the law permit publication of a person’s identity:

- pre charge whilst that person is suspected or being investigated by police;
- post charge but pre conviction;
- who is a witness in the trial?

**Current law**

12.2 The principle of open justice provides that, unless there is compelling reason, nothing should be done to prevent the publication of reports of court proceedings. This means that all proceedings and written judgments of the court are to be held in open court and be freely reported unless the judge otherwise determines.

12.3 The exceptions to this general rule include the Sexual Offences (Amendment) Act 1992, which provides that where there is an allegation that a sexual offence has been committed against a person, that person’s name or image shall not be published if it is likely to identify them.

12.4 Where a defendant is related to the complainant or there is a link between them that could lead to identification of the complainant, it is the duty of the media to ensure that nothing is reported that would lead to such identification.

12.5 A court does not, however, have the power to prohibit the media from identifying a defendant in a sexual offence case, save that the defence may make representations seeking anonymity for a defendant in a sexual offence case if it is established that the defendant’s human rights are substantially at risk.

12.6 Those human rights, which are potentially engaged when a defendant’s name is published, may include where publication:

- would create a real risk to the person’s life;
- would create a risk of the person being subjected to inhuman or degrading treatment; or
- would disproportionately infringe upon the person’s private or family life.

¹ Northern Ireland Audit Office, March 2018.
12.7 On the issue of the right to privacy where there has been no charge by the police, the recent case of Sir Cliff Richard v The British Broadcasting Corporation (BBC) and Anor in 2018 is an important development. Sir Cliff Richard won his privacy case against the BBC over its coverage of a police search on his home. The raid, which took place four years ago, was part of an investigation into an historical child sex allegation. Sir Cliff was neither arrested nor charged.

12.8 The court determined at first instance that the plaintiff in these circumstances had a legitimate expectation of privacy under Article 8 of the European Convention on Human Rights (ECHR), albeit this might not invariably be the position. The corporation’s reporting had infringed Sir Cliff Richard’s rights in a serious and sensationalist manner.

12.9 It is worth recording, however, that there are numerous other examples where anonymity for individuals accused of sexual offences is granted in particular circumstances. Illustrations include:

- The Education Act 2011, section 13, prohibits the publication of matters leading to the discovery of the identity of schoolteachers accused of sexually assaulting a child at their school. Teachers are deemed especially vulnerable to false allegations. This legislation applies to England and Wales. While the Education Act 2011 does not apply to Northern Ireland and there is no statutory basis for reporting restrictions/confidentiality in allegations of child abuse against a member of staff, legal advice is that the restrictions outlined in part 3 of the Education Act 2011 (‘School workforce: reporting restrictions’) should be applied as best practice in Northern Ireland.

- Paragraphs 49 and 59 of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 provide for the omission from the register of the name of anyone alleged to be guilty of sexual misconduct and includes the power to order reporting restrictions in any case that involves allegations of sexual misconduct. Similar legislation applies in England.

- Article 170(2) of The Children (Northern Ireland) Order 1995 ensures privacy for children involved in proceedings under the Order by prohibiting publication of any material that is ‘intended, or likely, to identify any child as being involved in any such proceedings, or an address or school as being that of a child involved in any such proceedings’.

12.10 The concept of the anonymity of defendants has been considered in a number of significant cases in both the House of Lords and the Supreme Court in different contexts.

12.11 The trend in these cases has been for Article 8 rights of privacy under the ECHR to be trumped by the Article 10 freedom of expressions and the right of a free
press, save in those cases where there is clear evidence that publication would infringe an individual’s Article 2 right to life or Article 3 rights guaranteeing freedom from torture etc.³

12.12 Examples of where anonymity has been refused to a defendant in favour of the right to freedom of expression and the concept of open justice include:

- Where the identity of the eight-year-old son of a mother on trial for his brother’s murder would be revealed.⁴ Lord Steyn in that case referred specifically to the issue of the anonymity of defendants and said that a requirement to report trials without revealing the identity of defendants would be ‘very much a disembodied trial’ and that, if reporting restrictions continue to increase, ‘informed debate about criminal justice will suffer’.

- Where the identity of children who were indirectly involved in child pornography offences by their father would be revealed,⁵ Sir Igor Judge said: ‘In our judgement it is impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms, this represents the embodiment of the principle of open justice in a free country.’

- The Supreme Court⁶ refused anonymity orders to individuals subject to asset-freezing orders on the basis that the Treasury had reasonable grounds to suspect their involvement in terrorism. The Supreme Court considered the argument that, in cases involving suspected terrorism (similar to serious sexual offences), an acquittal will not undo the damage to an individual’s reputation and that there will be a public assumption that there is no smoke without fire, thus justifying anonymity. Lord Rodger commented that such an argument is tantamount to saying that the ‘press must be prevented from printing what is true as a matter of fact, for fear that some of those reading the reports may misinterpret them and act inappropriately’. He added that members of the public ‘are more than capable of drawing the distinction from mere suspicion and sufficient evidence to prove guilt’, and the rationale behind the public naming of defendants is that ‘most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law’. Lord Rodger explained:⁷

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³ For example the Supreme Court decision in Secretary of State for the Home Department v AP (2010) UKSC 26, where if the defendant’s identity was revealed, “he would be at real risk, not only of racist, and other extremist abuse, but of physical violence” and in light of the risk of infringement of his Article 3 rights. Also, with regard to the potential impact on the defendant’s private life, in Venables v News Groups Papers LTD [unreported 2010], which concerned the anonymity of the child murderer of Jamie Bulger following his conviction for child pornography, the court maintained the order on the basis of the threat to Venables’ life if his new identity were to be revealed.

⁴ Re S (A Child) [2005] 1 A.C. 593.


⁷ at para 63.
Stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature … a requirement to report [news] in some austere, abstract form, devoid of much of its human interest could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

- The most recent Supreme Court ruling relating to the balance to be struck between Article 10 and Article 8 concerned a prominent figure who had been arrested, bailed and subsequently rearrested in relation to offences alleging organised grooming and prostitution of teenage girls. Nine men eventually faced trial and seven were convicted. The appellant, arguing that his identification in the course of the trial was unjustified, unsuccessfully applied to the High Court for an interim injunction to protect his privacy and reputation.

- The majority of the Supreme Court9 held that, while the presumption of innocence served as a starting point, and experience suggested that the public understood the ‘difference between allegation and proof’, it was wrong to treat Lord Rodger’s observation as a legal presumption ‘let alone a conclusive one’. In delivering the leading judgment, Lord Sumption said:

The conclusions that the public may draw from evidence and submissions at a criminal trial in open court will differ from case to case, depending on, among other things, the gravity of the allegations, the character of the evidence and the extent of the publicity surrounding the trial. It would be foolish for any court to ignore the extreme sensitivity of public opinion in current circumstances to allegations of the sexual abuse of children.

Lord Sumption added:

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, which would be absolutely entitled to attend, but for purely practical reasons cannot do so … for this reason restrictions on the reporting of what has happened in court give rise to additional considerations over use of pseudonyms or initials in the course of an open trial.

Interestingly, he went on to say that, while he questioned whether the public interest ‘extended to include the appellant’s identity’, he concluded that it did because the appellant’s identity was neither ‘peripheral or irrelevant’

9 Lord Sumption, Neuberger, Clarke, Reed and Lady Hale.
10 www.newlawjournal.co.uk 8 September 2017.
and increased the story’s interest ‘by giving it a human face’, which is a ‘legitimate consideration’.

Current practice

12.13 The Police Service of Northern Ireland (PSNI) asserts that, whilst it does not follow the 2013 guidance from the College of Policing (and most UK police forces do name upon charge), it claims to have a unique media policy, which states that it will not name those arrested or suspected of a crime unless in exceptional circumstances and where there is a legitimate policing purpose for doing so.

12.14 This, they assert, is in accordance with the recommendations and findings of the Leveson inquiry, the Information Commissioner and the Home Affairs Committee.

12.15 The exceptional circumstances may be a threat to life, prevention or detection of crime or where police are making a public warning about a wanted individual.

12.16 They do, however, release some details about the person, such as their gender, age, area they live in, date of arrest, if they are in custody or on bail, or how they were disposed of following custody.

12.17 If the decision is made to release a name, it must be rationalised and authorised by a chief officer and logged by the corporate communications department.

12.18 The PSNI says that there has been interest from other UK forces, which was discussed at a recent UK police press officers’ course, in the approach taken by the PSNI. This was fuelled by a number of high-profile cases in England, where the name of the suspect was released.

Background

12.19 I have read and heard personally in the course of this Review extremely depressing accounts as to the consequences of the absence of anonymity from a number of accused persons who had been subsequently acquitted of serious sexual offences, including rape, and also from the family members of such persons. I was left in no doubt of what they have suffered on mainstream media, social media and elsewhere before they were charged, post charge, during their trial and long after their acquittal.

12.20 These consequences included:

- loss of employment;
- the perceived need to leave Northern Ireland;
- verbal abuse in the public street;
- vile, unsavoury and untruthful attacks on social media, including Twitter and Facebook;
• time-consuming and largely unsuccessful attempts to have the offending material taken down;
• inaccurate and distorted mainstream media reporting, with members of the family of the accused being regularly photographed outside the court arena;
• elderly relatives and close relations suffering ill health as a result;
• children at school being taunted in the wake of graphic reporting on news bulletins and newspapers;
• members of the wider family circle suffering grievously in the wake of the rumours circulating;
• irreparable damage to their often hard-won reputation and standing in the community in circumstances where the presumption of innocence has been cast aside; and
• severe psychological distress.

12.21 I also heard from and about witnesses, other than the complainant in high-profile cases, who have been subjected to not dissimilar vile abuse and wounding accusations on social media, which has been long-lasting and has profoundly affected them. In their case, the assertion made was that inadequate steps had been taken to protect their identity.

12.22 The issue of anonymity for accused persons has long been on the legal menu. It was first introduced in the case of complainants by the Heilbron report in 1975.

12.23 The report accepted that there should be lifetime anonymity for complainants but not for defendants, on the basis that publicity may be ‘extremely distressing, and even positively harmful’ and result in an unwillingness on the part of complainants to access justice. The report concluded that those arguments did not apply to defendants.

12.24 Nevertheless, the Sexual Offences (Amendment) Act 1976 introduced anonymity for defendants in England and Wales, following a concessionary amendment during the passage of the Bill. Anonymity related only to offences of rape, and the complainant was expressly referred to as a woman. In Northern Ireland, Article 8 of The Sexual Offences (Northern Ireland) Order 1978 introduced a similar provision.

12.25 In 1988, however, the law was reversed in England and Wales following a Criminal Law Revision Committee report, which concluded that there was no justification for the principle of equality between a complainant and a defendant and, in particular, there was no reason to differentiate defendants in sexual offence cases from other criminal cases.

12.26 The 1978 Northern Ireland legislation was repealed by The Criminal Justice (Northern Ireland) Order 1994 on the basis that it was a discouragement to victims from coming forward.
12.27 The Home Affairs Committee Fifth Report 2002–03 identified four arguments against the introduction of anonymity for the accused:\footnote{11}{https://publications.parliament.uk/pa/cm200203/cmhaff/639/63902.htm and see paragraphs 72-80 of the report}

1. The open justice principle, ‘with free and full reporting of what happens in our criminal courts’.
2. The acceptance of strong public policy reasons for granting anonymity to complainants in sexual offence cases, but this reasoning did not extend to the accused.
3. There was no reason to treat those accused of sexual offences differently from those accused of other serious crimes.
4. Anonymity would undermine the ability of the police to investigate crimes.

12.28 Four arguments in favour of extending anonymity to the accused were also identified in that report:

1. The equality argument.
2. The prejudicial nature of sex offences: publicity can be ‘ruinous to the individual, even though he may be acquitted of the charges’. The committee noted that the Metropolitan Police position that publicity is particularly damaging in sex cases involving children and their claim that between 5% and 7% of those arrested for such crimes commit suicide.
3. Publicity can inflame public outrage and disorder, which sometimes leads to threats or attacks.
4. Anonymity for the complainant increases the risk of false allegations.

12.29 Committee members were in favour of granting anonymity to the accused for a limited period between allegation and charge.

12.30 This was rejected by the government in 2003 when the Sexual Offences Act was introduced. It was not accepted that those accused of sexual offences should be treated any differently than those accused of other serious crimes: ‘Is it really more shameful to be accused of committing a sexual offence than to be accused of murder?’

12.31 During the passage of the Sexual Offences Act 2003, the House of Lords moved a motion to extend anonymity to defendants, in line with the Home Affairs Committee report, which proposed:

- anonymity for defendants up until charge to protect ‘potentially innocent suspects from damaging publicity’, while ensuring that the ‘public interest in full and free reporting of criminal proceedings, was safeguarded.

12.32 In 2010, the coalition government announced in its programme for government its intention to extend anonymity in rape cases to defendants.
12.33 The subsequent Ministry of Justice (MoJ) report, *Providing Anonymity to Those Accused of Rape: An Assessment of Evidence*, in November 2010 concluded:

Overall, little or no direct empirical evidence of the impact of providing anonymity to those accused of rape could be identified. Evidence is lacking in a number of key areas and this report highlighted a range of issues on which clarity and/or more robust evidence is needed.

12.34 Accordingly, the government concluded in 2010 that there was insufficient evidence to justify a change in the law.

12.35 In 2015, a Home Affairs Committee report on police bail made a similar proposal to that of the Home Affairs Committee Fifth Report 2002–03, but no further change in the law has been made since the right to anonymity was removed in 1988.

12.36 Hence the question of anonymity for defendants accused of rape and other serious sexual offences, has been repeatedly raised in parliamentary debates over several decades and has also received frequent attention in newspapers and, to a lesser extent, in academic and professional literature. The debate includes an array of factual claims and arguments that rest on weak empirical foundations.

12.37 A much more effective case has been made in a series of reports about the appropriateness of pre-charge anonymity and an investigation being treated as something that would attract privacy rights under Article 8 of the ECHR.

12.38 First, Sir Brian Leveson’s *Report into the Culture, Practices and Ethics of the Press* concluded at paragraph 2.39:

I would endorse the general views of Commissioner Hogan-Howe and Mr Trotter on this issue [viz. the police briefing the press on suspects]. Police forces must weigh very carefully the public interest considerations of taking the media on police operations against Article 8 and Article 6 rights of the individuals who are the subject of such an operation. Forces must also have directly in mind any potential consequential impact on the victims in such cases. More generally, I think that the current guidance in this area needs to be strengthened. For example, I think that it should be made abundantly clear that, save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.

12.39 Secondly, the judicial response to the Law Commission’s ‘Contempt of Court: A Consultation Paper’ (4 March 2013, Lord Justice Treacy and Mr Justice Tugendhat), in paragraph 5, agreed with and adopted the words of Sir Brian Leveson.

12.40 Thirdly, there is the College of Policing’s *Guidance on Relationships with the Media* (May 2013), paragraph 3.5.2, which states:
Save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence. This approach aims to support consistency and avoid undesirable variance which can confuse press and public.

12.41 Fourthly, there is Sir Richard Henriques’s *Independent Review of the Metropolitan Police Service’s Handling of Non-recent Sexual Offence Investigations Alleged Against Persons of Public Prominence*. This report was not intended to deal with privacy rights and reporting as such, but it does contain valuable material that goes to show the dire consequences that often occur when accusations are made against a prominent person, notwithstanding that they turn out to be false and not pursued by the police (but after investigation).

**Other jurisdictions**

12.42 Apart from Ireland, we are unaware from our researches of any jurisdiction where the accused is given blanket anonymity in rape and incest. All common-law countries seem to adopt the same approach as that currently followed in the United Kingdom, where the general principle of publication of the accused’s name, at least after charge, is adopted, albeit with some exceptions.

**Ireland**

12.43 In Ireland, the name of the defendant is anonymised (unless convicted) in a number of serious sexual offences: namely rape and incest.

12.44 The Office of the Director of Public Prosecutions in Dublin, who were extremely helpful to our Review, were unaware of any analysis of what might be termed the negative effects of the anonymity rule — that is, whether it had impeded other victims coming forward.

12.45 Furthermore, the rule does not apply to all sexual offences. Thus an accused charged with sexual assault can be named unless the naming of the accused might identify the victim. Arguably, this different treatment is anomalous.

12.46 According to an article in the *Irish Times* (3 March 2014), the Irish system, whereby those accused of rape can be identified only if convicted, has been relatively uncontroversial and the various arguments against anonymity are ‘curiously absent from the Irish debate; in fact, there is little debate at all’.

12.47 It states that one reason for this could be the size of the population and its composition from small rural communities. Caroline Counihan of the Rape Crisis Network Ireland (RCNI) has echoed this, indicating that it can be difficult enough for the complainant, who finally plucks up enough courage to go to the
guards. It is potentially a nightmare if their rapist is named and shamed in the local or national press.

12.48 The written Constitution may also be a factor. The right to a citizen’s good name means that stripping anonymity pre conviction is unacceptable.

12.49 It is to be noted, however, that 59% of those convicted in Ireland are never named in the media because the offender was either a relative or could be easily linked to the victim. The comparable figure for Northern Ireland is unavailable.

England and Wales

12.50 Section 13 of part 3 of the Education Act 2011 prohibits the publication of matters relating to the discovery of the identity of schoolteachers accused of sexually assaulting a child at their school.

Arguments in favour of the status quo

12.51 Naming defendants can enable other potential victims and witnesses to come forward to report offences where these are of a serial nature, as has been evidenced in England in the high-profile instances of Savile, Worboys, Clifford and Harris. Serious sexual offences very often present as a one against one credibility test where the high burden of proof often results in acquittal. If, however, other persons have come forward to give evidence of similar behaviour, the prosecution will undoubtedly have a stronger case.

12.52 Every prosecution and law enforcement agency, both in the UK and the US, to whom I have personally spoken cited cases where the naming of an accused post charge had brought forward other witnesses describing similar behaviour.

12.53 In Northern Ireland, I have received a personal assurance from both a senior official in the Public Prosecution Service (PPS) and from a senior officer in the PSNI that they are personally aware of a number of cases processed by these bodies where the publication of the name of the accused after charge in a serious sexual offence investigation had triggered another witness or other witnesses to come forward with similar allegations against the same accused. As appears in chapter 2, approximately 83% of those crimes go unreported, therefore any step which brings such men and women forward into the criminal justice system needs to be encouraged.

12.54 Victims’ groups to whom I have spoken express the view that granting anonymity only to those accused of serious sexual offences is liable to perpetuate the patently erroneous myth that a large proportion of rape allegations are false and all complainants are therefore to be treated with suspicion. There appears to be no empirical evidence or conclusive research findings to justify that myth. Nothing should be done to encourage it.
12.55 Many other very serious charges of a non-sexual nature — for example, murder, child abuse, assaults on and robberies of elderly people, people trafficking, serious drug dealing etc. — carry an opprobrium for an accused person that may lead not only to social media vilification of the accused and his family but to real risks to safety at the hands of self-styled vigilantes and organised crime gangs. There is no empirical evidence to provide an answer, but there is anecdotal testimony to suggest that a strong social stigma can attach to non-sexual crimes. The case of Colin Stagg, who was acquitted of the murder of a mother out walking with her child but suffered enormous stigma and became a ‘national hate figure’ (another man was convicted of the crime years later), and the case of Christopher Jefferies (allegedly involved in the murder of a young woman), which featured as a case study in the Leveson inquiry, all illustrate the public opprobrium visited on non-sexual crimes at times. Why should those charged with serious sexual offences be singled out for special treatment?

12.56 There is the danger that, whilst a prohibition of publication of the accused’s name would be effective against the main media, with an attendant dampening on press freedom and on the public’s right to know, it would not affect social media, especially in high-profile cases.

12.57 The argument that the parties in a rape trial should be on an equal footing — the complainant is not identified so the defendant should have the benefit of anonymity — is flawed. The Criminal Law Revision Committee rejected this argument despite its superficial attractiveness, saying:

The equality argument perhaps stems from a failure to appreciate that the complainant is a witness in the trial — although often rape trials rest upon the evidence of one person against the other, that does not equate their role in the process.

12.58 The comparator should be those accused of other crimes, not the complainant. As the Heilbron committee stated:

The reason why we are recommending anonymity for the complainant is not only to protect victims from hurtful publicity for their sake alone, but in order to encourage them to report crimes of rape so as to ensure that rapists do not escape prosecution. Such reasoning cannot apply to the accused. The only reason for giving him anonymity is the argument that he should be treated on an equal basis. We think it erroneous to suppose that the equality should be with her — it should be with other accused persons and an acquittal will give him public vindication.12

12.59 There are strong public interest reasons to support anonymity, not least because it is a necessary measure to promote the complainant’s participation in the process. No such argument applies to the accused. However, the identity of the

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12 Paragraph 177 of The Helibron Report. Available at: https://www.ncjrs.gov/pdffiles1/Digitization/37318NCJRS.pdf
accused is neither peripheral nor irrelevant and increases the press interest by giving it a human face.

12.60 It is a legitimate consideration that, without either the identity of the complainant or the accused being disclosed, the case becomes so anodyne in factual content that it loses interest for the press. The presence of the press retains public accountability as it provides for public access through contemporaneous reporting and dissemination of information, preventing encroachment on the principle of open justice, particularly if the public presence is to be restricted.

12.61 In any event, at present, some of the accused benefit from anonymity in our jurisdiction precisely to prevent identification of the complainant.

12.62 Pre-charge anonymity raises the spectre of police investigations and searches of people’s homes going unreported. Does it make it more difficult to scrutinise the conduct of the police, puts decision-making more in the hands of the police and undermines the wider principle of the public’s right to know?

Are there compelling arguments for change?

12.63 Proponents of anonymity for those accused of rape and serious sexual offences argue that, even when acquitted, people suffer long-term stigma — uniquely in serious sexual offences — because of the nature of these offences. Our researches found a series of cases as reported in either the Daily Mail or the Daily Telegraph where the trial collapsed, or acquittals were recorded, and the fallout for those involved. They support introducing anonymity on that basis, so that only those convicted of crimes are identified, provided, of course, that that would not lead to the identification of the complainant.

12.64 In small jurisdictions such as Northern Ireland, like the rest of Ireland, in small local towns everyone knows everyone, so naming the accused is tantamount to naming the complainant in the context of crimes where 90%13 (and in England and Wales, reportedly 88%14) of serious sexual offences are acquaintance attacks. For some complainants, including some to whom we spoke, anonymity for the accused may generate greater confidence in the process as they may believe that there is less likelihood of their identity becoming public through jigsaw identification. It may also help to minimise public interest in the case if their alleged perpetrator is well known in the public arena.

12.65 Exceptions could be made in the public interest where the prosecution could satisfy the court that, for example, there were reasonable grounds for suspecting the accused was a serial rapist or was fleeing justice.

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12.66 There should be a clear obligation at least to preserve anonymity pre-charge. Pre-charge anonymity can provide a measure of public reassurance that, until there is sufficient evidence, a person will not be identified. The Home Affairs Committee recommended this approach on the basis that it struck the ‘appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings’. Pre-charge anonymity thus accords with current police practice and the system appears to function relatively well save in the rare high-profile case where social media intrudes.

12.67 The provisions of part 3 of the Education Act 2011 in England and Wales protects the identity of schoolteachers accused of sexually assaulting children in their school. This does not apply in Northern Ireland. There is no reason why similar statutory protection should not be given here.

Discussion

12.68 This matter generated more controversy and division of opinion than any other issue in this Review. The arguments on each side are extremely strong and persuasive.

12.69 However, I consider it would be wrong to assume that, because anonymity for complainants is well established and generally accepted, it is a small step to introduce a general provision for anonymity in all rape or serious sexual offence trials rather than on a case-by-case basis.

12.70 Apart from the clear admonition of the Supreme Court against anonymity in the absence of risk to life etc., I am currently unable to counter the compelling public interest argument that naming an accused after charge in some instances leads other witnesses and complainants to come forward into the criminal justice system. This has sowed the seeds of my subsequent conviction that there should not be anonymity for accused persons after charge save in the circumstances that presently operate.

12.71 Research indicates that only a small percentage of sexual crime gets reported to the police and rape specifically has high attrition rates, with a lack of supporting evidence being cited as a reason for no prosecution in many cases. For some individuals, the arrest or charging of a suspect may embolden them to come forward and report their experience — for example, the Stuart Hall and John Worboys cases — thereby assisting the police in exhausting all reasonable lines of inquiry.

12.72 A recent example in Northern Ireland of the potential impact of naming the accused can be seen in the R v Malachy Finnegan case, which, following press coverage, led to a profusion of sexual and physical abuse complaints being reported.
12.73 This has been most commonly seen in cases where the accused has a high public standing or holds a position of trust in the community, such as a sports coach, a member of the clergy etc. In such cases, victims may feel (and are often told so by an abuser) that no one will believe them or people will ‘turn on them’ if they report. This changes when others have the courage to stand up and come forward.

12.74 Given the very nature of this type of crime, it is particularly important that the prosecution is aware of all potentially corroborating evidence when reviewing the case.

12.75 Research conducted by the Ministry of Justice in 2010 noted that evidence that establishes a link between one rape and another can increase the likelihood of a conviction, albeit at that stage no systemic evidence could be found that established the extent to which further evidence has been found when identities of suspects have been released.

12.76 That situation has now changed and there clearly is evidence of this phenomenon, including instances in Northern Ireland.

12.77 A second reason for withholding anonymity after charge is that it is difficult to justify anonymity in serious sexual offences and yet not extend this to accused in other heinous offences such as murder, extreme but non-sexual child abuse, domestic abuse and violent offences against older people etc. These offences also inevitably mark the accused with indelible stains notwithstanding acquittal.

12.78 I take a different view in relation to pre-charge publicity. As a general rule, it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. The hurdle of sufficient evidence to charge will not have been crossed at this stage.

12.79 Those who have not been charged have no opportunity to address in public the offences of which at one time the police suspected them to be guilty. They must be accorded a legitimate expectation of privacy, save in exceptional circumstances.

12.80 I echo the sentiments expressed in the Home Affairs Committee report at paragraph 76: ‘If the accused is never charged, there is no possibility of the individual being publicly vindicated by an acquittal.’

12.81 It seems from the case of Sir Cliff Richard that until now journalists had felt that there was no reason why they should not report a police investigation, a search of a house etc.

12.82 The judge in that case, having balanced the rights of the individual to privacy against the rights of press and media freedom of expression, determined that this person under investigation by the police had a reasonable expectation of privacy.
12.83 It is thus a question of balance. The press must show that the public interest in the broadcast or the report the journalist is imparting contains information that outweighs the right to privacy of the suspect.

12.84 This will also apply to individuals on their iPhone or other smartphone or who then puts it on to social media, even if they have correctly identified that person and got it right, because that person has a right to respect for privacy.

12.85 The difference is that some members of the public may not have the resources, which makes seeking compensation worthwhile and so be worth suing, so they may act illegally with impunity. The danger is that there may be reporting on Twitter and Facebook that mainstream media then report.

12.86 Arguably, therefore, strong consideration should be given to introducing more robust protection by way of statutory regulation to offer reassurance to the public that, until such times as there are sufficient grounds upon which to charge, their identity will not be published.

12.87 Comprehensive investigation protocols/procedures and the early involvement of prosecutors could also ameliorate the risk that a false allegation proceeds to charge and act as a further safeguard/contribute to increased public confidence.

12.88 In the context of witnesses other than complainants, who are liable to be vilified on social media, especially in high-profile trials, judges should be clear that the principle of open justice has never been absolute, and they have power to permit evidence to be given in a way that does not identify witnesses, or other matters in the interests of justice, and to make ancillary orders under the Contempt of Court Act 1981; otherwise, we will create a position where witnesses, like complainants, will be increasingly unwilling to come forward.

12.89 Finally, I see no logic in schoolteachers in Northern Ireland being denied the statutory protection of anonymity given to those in England and Wales when pupils make allegations of a sexual nature against them. Schoolteachers are uniquely vulnerable to such allegations and therefore merit statutory protection. It is right to say that the Department of Education in Northern Ireland has issued a circular addressing the issue to the effect that ‘Legal advice is that the restrictions outlined in [the English legislation] should be applied as best practice in Northern Ireland’. That does not deflect me from recommending that this protection be placed on a statutory footing.

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15 Circular 2015/13 “Dealing with Allegations of Abuse against a Member of Staff”.
Proposed recommendations

149. There should be no change in the current practice of naming accused persons after they have been charged, save that legislation should be introduced to protect the identity of schoolteachers accused of sexually assaulting a child at their school.

150. The introduction of statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged.

151. The judiciary should more readily exercise their discretion to prohibit publication of the identity of witnesses in cases of serious sexual assault.
Appendix E
Appendix E which chronicles merely two of a series of cases as reported in either the
Daily Mail and Daily Telegraph where the trial collapsed, or acquittals were recorded,
and the fall out for those involved.

DAILY MAIL (London) June 6, 2018 Wednesday
47 SEX TRIALS COLLAPSED IN JUST 6 WEEKS OVER ERRORS IN EVIDENCE
BYLINE: BY REBECCA CAMBER CRIME CORRESPONDENT

BRITAIN’S top prosecutor apologised yesterday after it was revealed that 47 rape and sex
attack cases were dropped because evidence had been withheld from defence lawyers.

Alison Saunders, the outgoing head of the Crown Prosecution Service, told MPs that
disclosure errors were a long-standing systemic issue’ that prosecutors and police had
failed to tackle.

She said victims and those wrongly accused deserved an apology after a review of
suspects charged with rape and sexual offences found failings in a string of cases which
were halted because evidence was missed or not shown to defence lawyers.

In some instances the accused were just days from trial when they were told that texts,
emails or messages on social media had been uncovered that proved their innocence.

The review was launched in January after the collapse of a series of trials because police
and prosecutors did not share key information which proved the defendants’ innocence.
MailOnline May 17, 2018 Thursday 3:24 PM GMT

Damning report condemns police and prosecutors over Oxford University student who spent two years on bail accused of house party rape only for the case to be dropped just days before trial

BYLINE: LAURA FORSYTH FOR MAILONLINE

Oliver Mears, 19, was charged with the rape and sexual assault of woman at a house party in 2015.

In a Freedom of Information Act request, the Crown Prosecution Service admitted they had not properly handled the entire case.

His case was dropped just days before the trial was due to begin on January 19 this year.
Chapter 13

The voice of marginalised communities
A review of the law and procedures in serious sexual offences in Northern Ireland
Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.

Mogoeng Mogoeng
Chief Justice of South Africa

Issue
What can victims and accused persons in marginalised communities reasonably expect from the laws and procedures set up by the state in dealing with serious sexual offences?

Current law and practices
13.1 It is a matter of procedural fairness that witnesses and parties may participate effectively in the justice system. There is an onus on all those who work within the justice system to take steps to remove barriers that create disadvantage and discrimination.

13.2 In 2016 the Court of Appeal in Northern Ireland noted:

For many years now the courts in Northern Ireland have recognised the particular need to ensure fairness in hearings where one or more parties suffers from a disability and there is an increased emphasis on fairness.

13.3 Who is ‘vulnerable’? Article 4 of The Criminal Evidence (Northern Ireland) Order 1999 sets out which vulnerable witnesses are ‘eligible for assistance on the grounds of age or incapacity’.

13.4 These vulnerable witnesses must, at the time of the hearing, be either under 18 or suffering ‘from mental disorder within the meaning of The Mental Health (Northern Ireland) Order 1986’ or have a ‘significant impairment of intelligence and social functioning’ or have a ‘physical disability or is suffering from a physical disorder’ that is likely to diminish the quality of their evidence.

13.5 Article 5 sets out those ‘intimidated’ witnesses who are eligible ‘for assistance on grounds of fear or distress about testifying’.

13.6 ‘Special measures’ is the assistance that the Order speaks of and can be summarised as the legal rules allowing witnesses to give evidence in a criminal court in a manner that is different to the more traditional giving of evidence from a witness stand in the courtroom. The principal provisions are contained in the 1999 Order.

13.7 Research into special measures in Northern Ireland concluded that:

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1 Galo v Bombardier Aerospace UK (2016/NICA)
The identification of vulnerable witnesses, especially vulnerable adults, remains problematic with conservative estimates indicating that the police identify only one quarter of witnesses who are potentially vulnerable or intimidated. Findings from a number of research studies highlight a ‘hierarchy of identification’ with children and victims of sexual crime being more likely to be identified as vulnerable or intimidated compared to vulnerable adults with mental, learning and physical disorders or disabilities.²

13.8 In fact, there is a general lack of information and data in relation to the number of vulnerable or intimidated witnesses who are in contact with criminal justice systems in the UK.

13.9 In 2010 a further report noted:

In the majority of cases vulnerabilities [of witnesses and suspects who are interviewed at police stations] are not identified, and even if identified, this information is not always acted upon in terms of service provisions.³

13.10 In the wake of this, Professor Penny Cooper created a toolkit on the Advocate’s Gateway in England that would set out guidance on identifying vulnerability.⁴

Background

Disability

13.11 The level of reported sexual offences is at its highest in Northern Ireland since recording started. National and international studies reveal that people with disabilities are more likely to be victims of crime than other groups in the general population.⁵ The term ‘disability’, as used by the US Department of Justice in the National Crime Victimization Survey (NCVS), includes a wide range of limitations such as sensory (vision, hearing), cognitive, self-care, and ambulatory or mobility limitations.

13.12 A growing body of evidence also finds that crime towards people with disabilities starts early. The experience of crime is particularly acute for women with disabilities and people with cognitive impairments.

13.13 Police Service of Northern Ireland (PSNI) figures on victims of sexual offences with a disability for 2017/18 simply do not reflect this and this points to under-reporting in our community. The figures reveal as follows:

- Of the 3,317 available PSNI records for victims of sexual offences in 2017/18, there were 300 where there was at least one disability input and

³ Gudjonsson, G. ‘Psychological vulnerabilities during police interviews. Why are they important?’ Legal and Criminological Psychology (2010), 15, 161–175, 170
⁴ "What is procedural fairness for vulnerable victims and witnesses and how do I go about it? Victim Support NI, Thursday 24 November 2016 :Professor Penny Cooper, Barrister, Professor of law
⁵ For example US Department of Justice National Crime Victimisation Survey(NCVS) in 2011
59 of these records had more than one disability input. The table below shows the number of times each type of disability has been input and therefore adds to more than the 300 records.

- 9% of sexual offence victims in 2017/18 had a disability.

<table>
<thead>
<tr>
<th>Victim disability</th>
<th>2017/18</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning</td>
<td>74</td>
</tr>
<tr>
<td>Long-term illness</td>
<td>38</td>
</tr>
<tr>
<td>Mental health</td>
<td>192</td>
</tr>
<tr>
<td>Physical</td>
<td>58</td>
</tr>
<tr>
<td>Sensory</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>373</td>
</tr>
</tbody>
</table>

13.14 The PSNI has informed the Review that steps are being taken to address those with a disability in the following manner:

- In respect of victims, witnesses or suspects who have a communication difficulty, Registered Intermediaries (RIs) are used. A communication difficulty could arise due to a learning disability, a child who is very young, on the autistic spectrum, or someone with a physical disability that creates a difficulty with communication. This list is not exhaustive.

- Registered Intermediaries are communication specialists such as speech therapists and are assigned dependent on the person’s needs. The criminal justice system uses RIs for children under the age of 18 and, over that age, it is dependent on any other communication needs they may have.

- The RI carries out an assessment with the person and then provides guidance — for example, to the police officer interviewing them — as to how that interview should be structured.

- Such advice could include the length of time they can be spoken to; for young children, that they need to sit at a small table instead of the armchairs in the achieving best evidence (ABE) suite; not to ask tag questions —for example, ‘I am wearing a red dress today, isn’t that correct?’

- RIs also can provide information on whether a person can tell the time, focus on dates, would understand a week ago or a year ago, or how long something went on for. They may also suggest the best time of day for the person to be interviewed.

- For all witnesses and victims, the police officer is present during this assessment. For suspects, their solicitor is present and the police officer is not. The RI would often be present during the interview but not always.

- The RI would then also provide a report to the court for any needs the person may have and would be present with the individual during cross-examination.
The use of RIs is a special measure for which the Public Prosecution Service (PPS) would apply to the court.

In relation to attending court, RIs would liaise with the victim and witness care unit (VWCU) in relation to any needs that the person may have.

13.15 The VWCU can arrange for interpreters for language, sign language interpreters and use of the loop system for people who have hearing aids. If a person is blind, the VWCU can assist them in court and if required provide anything they need to read in Braille. This is all explained to victims, witnesses and suspects at the outset of the investigation.

13.16 There are also Hate Incident Minority Liaison Officers (HIMLOs) in the police, who receive training that includes dealing with minority groups as part of their initial training.

13.17 In addition, there is a one-day disability awareness course available and a one-day LGBT+ awareness day open to all response officers.

13.18 On the whole, officers do not receive further training in dealing with minority groups following their foundation training unless they seek it out.

13.19 All genders with differing disabilities may face different challenges and have very different needs. Some disabilities may put people at a higher risk for crimes such as sexual assault or abuse. For example:

- Someone who needs regular assistance may rely on a person who is abusing them for care. The perpetrator may use this power to threaten, coerce or force someone into non-consensual sex or sexual activities.
- An abuser may take away access to the tools a person with a disability uses to communicate, such as a computer or phone.
- People with disabilities may be less likely to be taken seriously when they make a report of sexual assault or abuse. With learning disabilities or dementia, they may not be believed.
- They may also face challenges in accessing services to make a report in the first place. For example, someone who is deaf or deaf-blind may face challenges accessing communication tools such as a phone to report the crime or get help.
- Many people with disabilities may not understand or lack information about healthy sexuality and the types of touching that are appropriate or inappropriate. This can be especially challenging if a person’s disability requires other people to touch them to provide care.
- Consent is crucial when any person engages in sexual activity, but it plays an even bigger, and potentially more complicated, role when someone has a disability. Some disabilities may make it difficult to communicate consent to participate in sexual activity, and perpetrators may take advantage of this.
• People with disabilities may also not be given the same education about sexuality and consent that people without disabilities receive. In addition, someone who has a developmental or intellectual disability may not have the ability to consent to sexual activity.

• An underlying need to be accepted and a perceived powerless position in society.

• Perpetrators may be more confident that their crime will remain hidden.

13.20 None of the statutory agencies involved in the justice system adequately monitors the number of victims with a learning disability.

13.21 *The Rowan Sexual Assault Referral Centre Annual Report 2015-2016* stated that 48% of people referred during the year had complex and additional needs. This included chronic illness, mental health problems, physical disabilities and learning disabilities.

13.22 Some vital work is being carried out to address this issue. In Northern Ireland a two-year pilot project led by Positive Futures working with and for people with a learning disability, those with an acquired brain injury and people with autism is centred on getting the right support within the justice system for victims of sexual violence who have a learning disability. Positive Futures is working in collaboration with Queen’s University Belfast (QUB), the PPS, the PSNI and Nexus NI.

13.23 The project is:

• increasing the knowledge of people with a learning disability about their rights in relation to the justice system process and how to access appropriate support by developing an accessible guide;

• empowering people with a learning disability to influence current support arrangements provided by statutory and voluntary organisations by co-producing a counselling/therapeutic programme for victims of sexual violence; and

• increasing the skills and confidence of the PSNI rape crime unit and PPS staff to support people with a learning disability by the co-production of training and implementation for those who provide services to victims of sexual violence.

13.24 However, criminal justice professionals in general may lack the ability to recognise and respond appropriately if the victim has a learning disability.

13.25 In addition, the person receiving the disclosure may have personal views on the complainant’s mental capacity or base their actions upon stereotypes or myths.

13.26 Other issues include the overprotection of victims; a belief that evidence has been contaminated by a third party (for example, due to manipulation); assumptions about the ability to take the case to court; perceptions about a lack of support for complainants; and resource constraints.
13.27 Research points to a lack of expertise among police officers, doctors, psychologists and psychiatrists equipped to talk to children with a mild learning disability.

13.28 An example is professionals asking a child repeated, focused questions, which may lead to inaccurate responses, rather than open-ended invitations or open directive questions.

13.29 Many authors have identified a need for further research into sexual offences against people with disabilities, noting that reliable estimates of the extent of the problem are essential for developing preventative programmes.

13.30 Areas identified for further research include:
- the types of disability associated with particular sexual offences;
- types of perpetrators (for example, intimate partners, acquaintances and caregivers);
- other characteristics of victimisation; and
- for older complainants, particularly those with a cognitive impairment, there may be difficulties in obtaining an accurate and reliable victim report and in explaining and obtaining consent for a medical examination, as well as challenges in conducting the examination.

Under-reporting of serious sexual offences by those with a disability

13.31 There is no doubt that the under-reporting of serious sexual offences by those with a disability is high. The Equality Commission provided us with a helpful analysis of the reasons for this as a result of its inquiries, and these included:
- emotional toll of making a report;
- fear of retaliation or retribution, particularly if the perpetrator was a family member or support worker;
- fear of the consequences of reporting a crime and fear that this might expose them to further problems;
- issue of credibility and not being believed due to stigma felt by those with mental health issues;
- past negative impacts of dealing with the PSNI and the justice system;
- unclear of their rights and what is involved in taking forward a case;
- barriers to communication;
- shame and embarrassment of crime;
- may need much more support from the public sector and other agencies, which is not currently available; and
- those with mental health issues are more vulnerable to abuse.
13.32 VicHealth in Australia estimates that 90% of Australian women with an intellectual disability have been subjected to sexual abuse, more than two thirds of them before turning 18 years of age.

13.33 Nexus carried out a drill project with children with learning disabilities in special schools. They receive no sex education as society perceives that they will not have sexual feelings; this is not the case. They need sex and boundaries education too.

**Visually impaired (VI) people**

13.34 In one of the few studies addressing the prevalence and associated factors of sexual assaults, by including a probability sample of adults with VI, a recent Norwegian study showed a higher prevalence of people in the VI population being exposed to sexual assaults such as being raped and forced into sexual acts compared with that in the general population, reaching statistical significance for women only.⁶

13.35 In the population of people with VI, the risk of sexual assaults was particularly high among individuals having other impairments in addition to their vision loss.

13.36 Individuals with VI may be at risk of sexual assaults for many reasons, being either specific to VI itself or related to having an impairment in general.

13.37 First, many people with VI are known to have lower socio-economic status and to be more prone to social isolation and dependency. This makes it easier for a perpetrator to assert power and control over the victim.

13.38 Being dependent on other people in care or service situations, which may be the case especially for some of those having additional impairments, may provide for closeness and intimacy. Often, the perpetrator has a close relationship to the victim. It has been found that nine in 10 victims with VI were abused either by an acquaintance or a close relative.

13.39 Important issues related to sexual violence are differences in power and control. Negative social views towards people with impairments, like stigmatisation and discrimination, may be internalised by the individual, leading to low self-esteem and feelings of self-blame.

13.40 Dependency, fear of being left alone and feelings of unworthiness can make people stay in a relationship that is potentially abusive.

13.41 People with congenital blindness are likely to process anatomy information differently and experience attraction and sexual excitement quite differently from sighted people as they have no visual representation of body image. The lack of visual cues around sexual rapport can present a real problem.

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Deaf people

13.42 We have been in contact with the British Deaf Association (BDA) concerning serious sexual assaults on deaf people. That association has registered concern that in England at least:

- juries do not receive sufficient training in how interpreters are used in cases where the victims are deaf;
- jurors do not receive any information concerning deaf children’s attainments, which would enable them to appreciate the impact that a lack of language has;
- it also appears that juries are not provided with any insight into the differences between British and Irish Sign Language and English;
- doubts as to whether the suggestions made in the Equal Treatment Bench Book are adequately conveyed by the court officials to juries; and
- the need to increase the numbers of deaf RIs and, in doing so, improve the choices available for deaf witnesses.

13.43 The evidence is clear from government statistics in England that at key stage 2 (the stage at which children leave primary school for secondary school) the percentage of deaf children achieving the expected standards in reading, writing and mathematics was 39% as opposed to 70% with no identified special educational needs (SEN). In 2017, the proportion of deaf children achieving the required key stage 2 in reading skills alone was 48% against the 80% achieved by children with no identified SEN.

13.44 Without language, deaf children do not develop the ability to read. The impact of this is not only on language levels but also on knowledge levels.

13.45 Much of our society requires the ability to read newspapers, basic documents, leaflets, posters, websites, social media and subtitles on television. When this is allied to the lack of hearing, such as being able to hear conversations, the television, the radio and other forms of sounds, the impact becomes even greater.

13.46 The British Deaf Association has an advocacy project in the east Midlands whereby it has an advocate who works with deaf clients in deciphering documents such as those related to housing, welfare benefits, health appointments and other more complicated issues like divorce proceedings. One hundred per cent of deaf clients attending the BDA require a translation of the documentation that they bring to the service.

13.47 The double lack of language and knowledge leads to a number of issues, one being the difficulty in understanding concepts or systems. Many of the association’s clients do not know how organisations work and how to manage these to achieve what they need. It therefore follows that many are unprepared for what might happen in court.
Learning disability

13.48 Reported incidents of sexual violence by people with learning disabilities (LD) is remarkably low.

13.49 Reasons for non-reporting include:
- lack of understanding of what constitutes sexual violence;
- lack of understanding of criminal justice system or legal processes;
- fear of being blamed or getting in trouble;
- fear of not being believed;
- fear of the abuser;
- disempowerment;
- difficulty in communicating;
- not being specifically asked;
- low conviction rates; and
- disclosure only occurs after a trusting relationship is built.

13.50 Factors limiting formal reporting include:
- Inability to recognise and respond to victims with LD.
- Myths and stereotypes of LD.
- Failure to take accusation seriously.
- Overprotection of victims.
- Assumptions about the ability to take the case to court. In many cases survivors of sexual violence with a learning disability are not permitted to give evidence in court as their capacity is often brought into question. Prosecution rates for sexual violence with victims with a learning disability are also lower.

13.51 An evaluation of the registered intermediary pilot scheme in Northern Ireland found that there is clear evidence that registered intermediary schemes can give vulnerable people a voice, protection and access to the justice to which they are entitled and should be an integral part of the justice process.

13.52 This evaluation was based on the experiences of RIs working with the police but more work needs to be done to establish their role in court proceedings and their role in addressing the particular needs of supporting victims of sexual violence with a LD.

13.53 We spoke to Positive Futures, a charitable body working with people with a learning disability, acquired brain injury or an autistic spectrum condition. They argued that general LD training is needed for all professionals working in the justice system. This should include trainers who have learning disabilities and, where appropriate, can speak directly about their experiences of encountering
professionals or justice-related issues. They recommended procedures in the criminal justice system which:

• provide guidelines for criminal justice professionals on identifying people with a LD;
• identify victims with a LD as early as possible;
• take time to get to know them and their support needs;
• use written and oral communication that is easy to understand;
• make relevant adjustments during trial preparation;
• improve interviewing techniques — for example, designating specialist interviewers for people with a LD;
• provide knowledge in assessing capacity, credibility and biases of witnesses and jurors;
• ensure partnership working with agencies and individuals with particular expertise in supporting people with a LD in accessing justice; and
• identify appropriate court environments for witnesses with autism — free, wherever possible, from distracting noises.

Black, Asian and minority ethnic (BAME) groups

13.54 The PSNI figures on race are set out below. If the information we have received, the literature we have read and the interviews we have conducted are anywhere near accurate, these are a gross underestimate of the crimes committed against the communities listed in the following table:

<table>
<thead>
<tr>
<th>Victim ethnicity</th>
<th>2017/18</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>2,572</td>
<td>77.5</td>
</tr>
<tr>
<td>Irish Traveller community</td>
<td>13</td>
<td>0.4</td>
</tr>
<tr>
<td>Black ethnicity (including Black Caribbean, Black African, Black other)</td>
<td>18</td>
<td>0.5</td>
</tr>
<tr>
<td>Indian/Pakistani/other Asian/Chinese</td>
<td>14</td>
<td>0.4</td>
</tr>
<tr>
<td>Other ethnic groups</td>
<td>9</td>
<td>0.3</td>
</tr>
<tr>
<td>Mixed</td>
<td>12</td>
<td>0.4</td>
</tr>
<tr>
<td>Missing/unknown</td>
<td>679</td>
<td>20.5</td>
</tr>
<tr>
<td>Total</td>
<td>3,317</td>
<td></td>
</tr>
</tbody>
</table>

13.55 Research on reported sex offences indicates that most victims self-identify as white, with very few victims or perpetrators from black or minority ethnic groups. This may point to barriers to reporting for minority ethnic groups.

13.56 There is a real dearth of research on the degree of under-reporting in the black, Asian and ethnic minority communities in Northern Ireland, as evidenced by the discussion I had with two members of that community in Northern Ireland who
advised me that information regarding victims from their communities is not collected.

13.57 However, we did have the invaluable benefit of a joint submission from the Northern Ireland Council for Racial Equality, the Black and Minority Ethnic Women’s Network and the Migrant Centre NI, who confirmed the lack of research on under-reporting.

13.58 The previous Northern Ireland Council for Ethnic Minorities (NICEM) had conducted two pieces of evidence-based research. The first report was conducted by Professor Monica McWilliams and Priyamvada Yarnell, and the second report was conducted by the former deputy director of the Runnymede Trust, the race think tank in the UK, in June 2013 as part of the submission to the Committee on the Elimination of Discrimination against Women (CEDAW).

13.59 From all of this the following points emerged:

- There are broad issues of violence affecting BAME women in NI, including and interlinked to issues of trafficking, sexual violence, forced marriage and harmful cultural practices. Such issues are under-researched in the Northern Ireland context and many statutory agencies are unaware of their existence.

- BAME victims of domestic violence are particularly vulnerable and as such require special protection to enable them to come forward to disclose details of their abusive partners in a safe environment.

- For that reason, data needs to be collected on BAME victims engaging with, or providing evidence to, the criminal justice system so that the various agencies know the extent to which they need to direct their resources towards those who are particularly vulnerable.

- Increasing victim confidence in the criminal justice system generally, and more specifically in the Public Prosecution Service, remains a challenge for service providers everywhere. This may be accentuated in the context of Northern Ireland, given the legacy of the conflict and the reluctance of some communities to seek help from ‘outsiders’. For this reason, systematic and consistent data collection for equality monitoring and for other purposes needs to be in place.

- There is a very robust monitoring system across the criminal justice system for hate crime but, extraordinarily, we do not have one on domestic, sexual or other violence against women. Why does the equality monitoring not apply to domestic and sexual violence in the criminal justice system as well as related service providers if we are to fulfil the UK government obligation under the EU victims’ rights directive?

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7 On “The Protection and Rights of Black and Minority Ethnic Women Experiencing Domestic Violence in Northern Ireland” and “The Experiences of Ethnic Minority Women in Northern Ireland”.
Unfortunately, neither the PPS nor the PSNI publish adequate or truly useful information on the characteristics of those who have reported sexual offences. Consequently, it is difficult to determine what the attrition rate is for crimes reported by BAME individuals specifically. But this is not the case in hate crime, which has a full data set.

13.60 According to census data, around 1.72% of the usually resident Northern Ireland population is of a BAME background. This includes the 1.1% of the population born outside the British Isles and a further 0.62% of the population who were born within the British Isles and who identified themselves as having a minority ethnic background in the 2011 census. That ethnic minority population is increasing in Northern Ireland so it is all the more important to record data on the occurrence of serious sexual offences in these communities.

13.61 The reasons for under-reporting of serious sexual offences in these communities have been put forward by the Equality Commission’s inquiries and bear a striking resemblance to the research on BAME women’s experience of domestic violence in Northern Ireland and why they do not report. The reasons were as follows:

- Language barriers for those whose first language is not English.
- Lack of knowledge/understanding of the legal system.
- Previous experience of the judicial systems in their own country.
- Community/family pressures and fear of children being taken into care.
- Reluctance to seek help from public authorities or outside support agencies due to a perceived lack of cultural sensitivity.
- Financial dependency on the perpetrator.
- Religious and cultural beliefs.
- Fear of retaliation or retribution.
- Immigration status/ fear of deportation.
- Financial dependence on partner and no recourse to public funds.
- Stigma and shame attached to crime.
- Previous negative experiences dealing with the police. At times a feeling that the police will not take them seriously.
- People from BAME communities and members of the Traveller community may have experienced racism or prejudice and fear that they will not be believed or 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.
Traveller community

13.62 At a QUB seminar in 2018 that dealt, inter alia, with the topic of under-reporting of serious sexual offences, it was noted that reporting by people from the Traveller community is minuscule and this has a ripple effect in their community.

13.63 This reflects the view expressed by a member of the Traveller community to whom I spoke in the course of this Review. The following points were made at that meeting relevant to our enquiries:

- perhaps 80% of serious sexual crimes go unreported to the police;
- many of these allegations are dealt with internally by the community;
- rape myths abound;
- strong patriarchal culture;
- fear of social services taking children away;
- financial dependency on the perpetrator;
- measure of familial pressure to withdraw allegations; and
- the PSNI needs to improve its cultural awareness of the Traveller community; they only meet such members in a criminal law setting.

13.64 An Munia Tober is a Traveller support organisation dedicated to the reduction of inequalities that affect the Traveller population in greater Belfast through improvements in health, housing, economic, young people’s outcomes and integration activities.

13.65 Since An Munia Tober became part of the Bryson Charitable Group in April 2012, the charity has developed and implemented a range of programmes for Travellers that respond to the identified needs of this indigenous ethnically marginalised group as identified in The Race Relations (Northern Ireland) Order 1997. The Belfast Health and Social Care Trust provides the funding for this project.

13.66 We spoke with Bryson House, which provides the link between the health trusts and An Munia Tober.

13.67 To date, little has been done on sexual abuse as there is a reluctance by the Traveller community to come forward and report these kinds of crimes. The trusts attempted to address this issue in the past, but it is claimed there was no interest.

13.68 The trusts are attempting to raise awareness of the issue by incorporating it into one-to-one meetings and as part of other group sessions, signposting the women to Nexus and Women’s Aid should they ever need to avail themselves of that type of support.
13.69 That said, it has been noticed that Traveller women are asking more and more about this subject at Traveller reference group meetings, possibly because of the recent high-profile rape case in Belfast.

13.70 A strong gender culture is, therefore, inherent within the Traveller community, with patriarchal dominance apparent. Men are viewed as responsible for the family, while women are expected to be loyal to their father and obey men within the family, avoiding shame at all costs.

13.71 There is a lack of information about Travellers’ sexual health and sex education needs. In addition, the community is reticent to discuss such matters, with much individual knowledge gained through word of mouth or their GP. In many cases, sex and sexuality remain taboo subjects.

13.72 Prevalence figures for violence against minority ethnic groups, including Irish Travellers, vary. Research notes a perception that Irish Travellers are among the groups more likely to experience domestic violence, although evidence for this is lacking.

13.73 Other research with Travellers in Ireland has identified concern among Traveller parents about the level of acceptance in relation to violence within marriage. Professionals interviewed as part of a recent study also raised concerns about rape and incest within Traveller communities.

13.74 In addition to factors that may discourage reporting of serious sexual offences among the majority population, Traveller victims face additional challenges in disclosing and reporting abuse. Young women tend to live within and in close proximity to their husband’s extended family.

13.75 Research suggests that, in cases of abuse within these close-knit family structures, the emphasis tends to be on the victim’s duty to the family system as a whole, and they may come under pressure to remain married due to cultural and religious norms. Outside the community, Traveller women may face discrimination from police officers, with reports of police refusing to respond to call-outs to halting sites.

13.76 Poorer education outcomes for Travellers may mean that the victim is unable to complete the necessary forms for a barring or protection order. A further challenge is a fear of social workers due to an emphasis on child protection.

13.77 Indeed, Bryson Intercultural in Northern Ireland, which aims to work with and empower minority ethnic families and their communities in Northern Ireland, including Irish Travellers through An Munia Tober, notes that a key factor preventing Traveller women from coming forward is a fear of losing their children if they report a sexual offence.

13.78 A 2010 University College Dublin study by Dr Mary Allen and Pauline Forster posits that the issue of domestic violence within Traveller communities is unlikely to be resolved without taking account of cultural norms that begin in childhood,
where boys and girls experience different rules and levels of supervision. Traveller participants in the research noted this part of Traveller culture as important in conserving the reputation of girls.

13.79 Nonetheless, research has suggested that an interventionist approach, teaching men how to control anger and improve relationships through expressing feelings and removing frustrations and anger, could help to reduce gender-based violence within these (and other) communities.

13.80 Effective relationships and sexuality education can play an important role in sex that is free from coercion or violence. Research highlights a need to ensure mainstream sex education classes are culturally appropriate for Travellers. It also suggests that in order to tackle domestic violence, Travellers and Traveller organisations need to discuss aspects of Traveller culture that may disempower women.

**Older people**

13.81 PSNI figures for the age of victims in 2017/18 were as follows:8

<table>
<thead>
<tr>
<th>Victim age</th>
<th>2017/18</th>
<th>2017/18 %</th>
<th>2016/17</th>
<th>2016/17 %</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;18</td>
<td>1,936</td>
<td>58.4%</td>
<td>1,868</td>
<td>60.1%</td>
</tr>
<tr>
<td>18–19</td>
<td>174</td>
<td>5.2%</td>
<td>141</td>
<td>4.5%</td>
</tr>
<tr>
<td>20–24</td>
<td>251</td>
<td>7.6%</td>
<td>245</td>
<td>7.9%</td>
</tr>
<tr>
<td>25–29</td>
<td>215</td>
<td>6.5%</td>
<td>183</td>
<td>5.9%</td>
</tr>
<tr>
<td>30–34</td>
<td>166</td>
<td>5.0%</td>
<td>136</td>
<td>4.4%</td>
</tr>
<tr>
<td>35–39</td>
<td>157</td>
<td>4.7%</td>
<td>123</td>
<td>4.0%</td>
</tr>
<tr>
<td>40–44</td>
<td>99</td>
<td>3.0%</td>
<td>104</td>
<td>3.3%</td>
</tr>
<tr>
<td>45–49</td>
<td>105</td>
<td>3.2%</td>
<td>110</td>
<td>3.5%</td>
</tr>
<tr>
<td>50–54</td>
<td>69</td>
<td>2.1%</td>
<td>73</td>
<td>2.3%</td>
</tr>
<tr>
<td>55–59</td>
<td>47</td>
<td>1.4%</td>
<td>43</td>
<td>1.4%</td>
</tr>
<tr>
<td>60–64</td>
<td>34</td>
<td>1.0%</td>
<td>15</td>
<td>0.5%</td>
</tr>
<tr>
<td>65+</td>
<td>59</td>
<td>1.8%</td>
<td>62</td>
<td>2.0%</td>
</tr>
<tr>
<td>Age unknown</td>
<td>5</td>
<td>0.2%</td>
<td>6</td>
<td>0.2%</td>
</tr>
<tr>
<td>Total</td>
<td>3,317</td>
<td></td>
<td>3,109</td>
<td></td>
</tr>
</tbody>
</table>

13.82 The sexual abuse of older people is a subject that is rarely discussed but is nevertheless a reality.

13.83 In a small number of cases, it is the result of opportunism — for example, a care worker seeing a chance to assault a dependent person — but more often it is planned by someone known to the older person. Sometimes it is the continuation of domestic violence into old age, in some cases it is about exercising power and control, and in some cases it is associated with an

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incestuous relationship. Some studies suggest adult children or grandchildren to be common perpetrators.9

13.84 The most common location is in the family home, and the second most common location of the sexual assault is care homes.

13.85 There are, therefore, particular issues for older people that do not exist in other groups.

13.86 Perpetrators of abuse or neglect are often people who are trusted and relied on by an older person, such as family members or care staff.

13.87 There are also reported cases of older women from minority communities being targeted because of their ethnic origins.

13.88 One of the challenges of elder sexual abuse, therefore, is the perpetuation of the myth that it is predominantly perpetrated by strangers and is often a secondary crime — for example, a man who is burgling a property takes the opportunity to sexually assault or rape an older woman. This myth is sustained by a societal attitude that does not accept the concept of sexuality in older age and, therefore, the idea that an older woman can be targeted because she is a woman.

13.89 Another challenge of elder sexual abuse is that, because it is often denied, the opportunity to protect forensic evidence can be lost by the kindness or embarrassment of others who desire to make the older person comfortable instead of calling the police.

13.90 There is a paucity of research that has been conducted into sexual violence against older women, with the result that our knowledge and understanding of the prevalence, characteristics and impacts is extremely limited.

13.91 The existing academic literature suffers from conceptual, operational and methodological weaknesses that have been recognised by a number of researchers.10 Sexuality in old age continues to be a taboo subject in society, and the existing academic literature has predominantly focused on sexual health and physiological issues in older age (Kleinplatz 2008).

13.92 The ‘typical’ rape victim is still positioned as a young attractive female who is attacked by a stranger, motivated by sexual desire (Lea et al. 2011). Some scholars in this area have gone so far as arguing that this exclusion of older women equates to a form of rape denial.11 Society tends to view older people as asexual, largely based on ageist attitudes that view old age as a process of decay, decline and deterioration.12
13.93 The Director of Action on Elder Abuse to whom I spoke made a crucial point. The media and, for that matter, the judiciary fuel this myth by referring to perpetrators in this type of crime against older people as being particularly ‘sick’ and ‘depraved’, attacking people ‘at the end of their lives’.

13.94 Law enforcement agencies have to appreciate that the ageing society is a primarily female society, and sexual violence is an overwhelmingly female experience. An analysis of sexual violence against older women must, therefore, take into account the social structural position of older women in society and consider a range of factors, including age and gender, when exploring sexual violence against older people.

13.95 Our research and contact with the Director of Action on Elder Abuse Northern Ireland revealed older people as yet another troubling aspect of massive under-reporting of such crimes with the following reasons being the source of the problem:

- vulnerability because of their current circumstances — for example, age-related illness or fluctuating mental capacity;
- fear of consequences of reporting a crime and of public exposure;
- may think they are deemed to be unreliable witnesses and that they will not be taken seriously;
- victimisation because of their connection to the perpetrator;
- fear that they could lose their independence;
- fear of the judicial system and having to give evidence in court;
- lack of knowledge of the judicial system;
- may require support from others that is not readily available;
- fear, power and loyalty can also prevent cases being reported; and
- an ability to recognise sexual abuse is happening.

13.96 The degree of sexual abuse actually surfacing was chillingly illustrated by the Director when she indicated to me that, between 2012 and 2016, 730 cases of alleged sexual abuse of older people were reported to the Southern Health and Social Care Trust. The number of calls made to her organisation’s helpline fully illustrated the vast under-reporting to the police.

13.97 It was also the experience of the director that all too often, on the few occasions when these crimes are drawn to the attention of the PSNI, those officers take too paternalistic an approach, viewing it as a social worker’s issue, and that victims are actively discouraged from entering the criminal justice system by suggestions that the legal process is too long, they will be publicly identified, their grandchildren will be impacted etc. There is obviously a training gap in the PSNI approach and it needs to be corrected, calling on the services of such groups as Action on Elder Abuse Northern Ireland to effect such training.
13.98 There is a real need to fully recognise sexual attacks on older people as crimes that need to be addressed within the criminal justice system and not merely social problems. Older people are sexually attacked not only because they are vulnerable but because it is part of gender violence. The PSNI must grasp this without further delay.

13.99 There is a complete lack of appropriate research locally on the issue and this needs to be addressed in order to define the true extent of the problem. The Department of Justice must take the lead on this.

13.100 There needs to be a public awareness campaign to highlight these issues.

13.101 The PPS and the PSNI need to develop systems that keep a record of prosecutions arising out of serious sexual offences against older people.

13.102 The judiciary and the legal profession will also benefit from training from organisations such as Action on Elder Abuse.

**LGBT+ Community**

13.103 The only PSNI figures for offences against this community for 2017/18 were as follows:

<table>
<thead>
<tr>
<th>Sexual orientation</th>
<th>2017/18</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bisexual/gay/lesbian</td>
<td>4</td>
<td>0.1</td>
</tr>
<tr>
<td>Heterosexual</td>
<td>10</td>
<td>0.3</td>
</tr>
<tr>
<td>Missing/unknown</td>
<td>3,303</td>
<td>99.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,317</strong></td>
<td></td>
</tr>
</tbody>
</table>

13.104 Routinely, police do not ask people what their sexual orientation is unless it is of relevance to what they are reporting: that is, a hate crime due to someone’s sexuality. This makes analysis of the degree of crimes against this community hopeless as the PPS does not collect any data either.

13.105 The literature makes it clear that LGBT+ people’s sexuality is often used to control and manipulate them.

13.106 We had very helpful contact with HERE NI (previously known as LASI), a Belfast-based charity — the only Northern Ireland organisation of its type — that works with lesbian and bisexual (LB) women and their families to help to alleviate the inequalities caused by discrimination and homophobia in our society.¹³

13.107 This organisation noted:

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¹³ Much of their remit involves supporting women in their own area to set up peer groups so that they might have access to their own community, facilitating a range of one off events and one to one support and advice sessions and facilitating a range of social activities to help those that are isolated and working with Government agencies to help formulate policies that are reflective of the needs of LB women and their families. Their biggest project currently is a same sex family support project which is the first funded project of its kind in Northern Ireland (NI). This project engages same sex families and also provides one to one support in the home.
• Homosexuality was decriminalised in Northern Ireland only in 1982, and for many older LB women, this legacy still lives on.
• The impact of this invisibility often presents itself through fear. Older LB women often fear that a service provider may hold prejudiced views against them or that they do not have the knowledge or skills to address their specific needs.
• The result of this is a barrier created for that person when trying to access a facility or service or that the person feels they are unable to disclose their minority sexual orientation.
• Visibility remains of paramount importance. This impacts both directly and indirectly on this group and helps to sustain the homophobic and heterosexist undertones that exist within society (this may include all aspects of society ranging from a local community to large-scale statutory agencies). This invisibility is presented in many forms such as poorer levels of mental health and well-being and high levels of social isolation.

13.108 These issues contribute to differing offences not being reported. Many of this group of women are unsure of the process of how to report an offence, some feel they may not be believed due to their sexual orientation, and many do not have the confidence to speak out.

13.109 Another issue may also be the potential disclosure of their sexual orientation. Many such women are not ‘out’ and they fear their sexual orientation may be made public if they are engaged with a series of agencies.

13.110 Yet again, it emerged that there was a real lack of research carried out around LGBT+ reporting crimes in general, never mind serious sexual offences. This singular lack of data about serious sexual offences against the LGBT+ community is an area that needs to be explored in great detail before the criminal justice system can devise appropriate remedies.

13.111 We have spoken to members of the Rainbow Project (RP).14

13.112 We have also researched the matter broadly and the findings are in line with findings for the other marginalised groups discussed in this preliminary report.

13.113 There is a lack of research evidence on gendered violence and the prevalence of lesbian, gay male and transgender experiences of serious sexual violence; that which exists is mainly from the US. The limited nature of empirical evidence of the prevalence and effects of sexual violence on men is particularly acute in relation to men who have sex with other men or male sexual offence victims. The RP report that there is a failure on the part of government and other agencies such as the PSNI and the PPS to monitor sexual orientation and gender in serious sexual offences. They were dismissive of the excuse that

14 Northern Ireland’s largest support organisation for lesbian, gay, bisexual and transgender people.
such information was a private matter. RP regarded such data as extremely important.

13.114 Research from the UK suggests that gay men are at significantly greater risk of sexual violence, while lesbians are significantly more likely to face emotional and sexual violence.

13.115 Under-reporting of serious sexual offences is again a real problem. Our first-hand evidence from RP and our research suggests that LGBT+ individuals may worry that police and service providers may respond in a homophobic manner, or be concerned that violence within same-sex relationships will not be taken seriously. Concerns about outing, particularly for young people, who often do not have the support of a family who share their sexual identity, can also contribute to reluctance to report, and perpetrators may deliberately target this vulnerability. Concerns may include:

- A myth that sexual violence does not occur in same-sex relationships — for example, due to a view that women are nurturing and never violent and that men are always willing to have sex.
- A desire not to draw negative attention to LGBT+ communities for fear of fuelling homophobic beliefs.
- A perceived lesser sense of legitimacy accorded to same-sex relationships, meaning that it is difficult to obtain recognition of abuse within same-sex relationships.
- Concerns around not being believed or taken seriously. The experience of RP is that on occasions the PSNI discourages the preferment of charges on the basis that, for example, the PPS is unlikely to prosecute or that some form of discussion with the perpetrator may solve the problem rather than prosecution. It is felt that this is a radically different attitude from that which would be adopted in cases of a heterosexual complainant.
- Previous discrimination and historically poor relationships between the police and LGBT+ people may result in a fear or mistrust of the police.
- Internalised homophobia or guilt among some LGBT+ individuals, who in cases of young victims may not even realise they have been sexually abused until they are so informed, which may contribute to rape myths and act as a barrier to reporting.
- Losing the financial or domestic support of the perpetrator if unwelcome sexual advances are rejected. This is not true consent but in terms amounts to sexual coercion.
- Lack of PSNI knowledge at the earliest stages of complaint of the need for a complainant to obtain HIV treatment.
• Exclusion of transgender people from services due to their gender history (for example, being excluded from female-only services due to being assigned male at birth).
• In prison, where there is anecdotal evidence of a high degree of sexual violence, there is no helpline or adequate support available.

13.116 The literature highlights challenges for all male victims, who may be less likely to report for fear of being disbelieved, blamed and exposed to other forms of negative treatment. There is evidence in the UK that gay male victims may experience less sensitive treatment from police officials.

13.117 Indeed, research shows that some specialist police officers in England believed that male survivors received poor treatment. The RP argue that the training of the PSNI in LGBT+ issues is too little (often only in early training), too short and too disparate. There is a lack of an organisational approach, including police officers across the service. For example, in the past there existed LGBT+ liaison officers but these have now disappeared. These should be reinstated.

13.118 There is also a postcode lottery of services for male victims of sexual violence in the UK, with men often placed on waiting lists for services from third-sector organisations. There is a severe lack of adequate support in the criminal justice system for men.

13.119 The RP also asserted that the PPS has no adequate training of its personnel on LGBT+ issues. For example, the RP has not been invited to participate in or contribute to such training. A similar criticism is made of the Judicial Studies Board for Northern Ireland. It is a legitimate argument to make that informed prosecution decisions cannot be made and adequate directions given to juries unless the complexities and the culture of this community are fully understood. An example of this is that whilst members of the gay male community may have had many sexual partners, that in itself should have absolutely no bearing on a decision to prosecute or the possibility of a guilty verdict.

13.120 Potential practices for reducing barriers to support for LGBT+ complainants must include a genuine emphasis on awareness raising, namely:
• awareness raising within LGBT+ communities about serious sexual offences;
• ensuring materials do not assume heterosexuality and clearly stating that agencies serve trans people;
• awareness raising among the judiciary and statutory services, including the PSNI and the PPS;
• specialist services for LGBT+ complainants to encourage those who may not report to mainstream services;
• professionals sensitively enquiring about sexual orientation and gender identity;
• increased education in schools concerning LGBT+ issues, including the concept of consent within that community; and
• the establishment of a helpline in prisons.

Sex workers
13.121 International research finds that sex workers face particularly high levels of sexual and physical violence, with estimates ranging from 45% to 75% of sex workers having experienced violence.\(^\text{15}\)

13.122 The *Irish Times* reported in 2017 that attacks on sex workers have increased dramatically since a change in the law that criminalised the purchase of sex, according to groups supporting people working in the area. They claim that the law change has forced the trade deeper underground and put sex workers under greater pressure to put up with violence.

13.123 Literature from the Australian Institute of Criminology in 2006 found that there is a bias against convicting someone accused of a serious sexual offence against a sex worker.

13.124 Sexual violence against this group is generally accorded a low priority by researchers, policymakers and international bodies.

13.125 In general, there is a lack of evidence on sexual violence against sex workers, with limited evidence on the prevalence and incidence of such violence globally. The illegal nature of sex work in many jurisdictions leaves sex workers particularly vulnerable through a lack of legal protections and monitoring.

13.126 Research reveals barriers to reporting include mistreatment from the police. However, evidence suggests that police engagement with sex workers has been successful in a number of jurisdictions at changing the environment for sex workers, increasing capacity for them to safely participate in sex work and report violence to the authorities. A classic example is here in Northern Ireland. There is a PSNI project in relation to sex workers and the introduction of sex worker liaison officers to build confidence in reporting where sex workers have been victims of crime. This may well be an important step in addressing this problem.

13.127 The existing literature also highlights a need for increased research and interventions in relation to violence against sex workers. Such work should be carried out in conjunction with sex work communities. There is clearly, yet again, a dearth of research in Northern Ireland on this community in terms of serious sexual offences and steps need to be taken to repair this gap and

\(^{15}\) A recent US survey recorded that globally sex workers have a 45% to 75% chance of experiencing sexual violence at some point in their life and a 32% to 55% chance of experiencing sexual violence in a given year.

Huffington Post article orchestrated by Katherine Koster, the Communication Director of the Sex Workers Outreach Project (SWOP)
address what procedures can be adopted to obviate what appears to be serious under-reporting of sexual crimes against them.

Males

13.128 This Review has already dealt with serious sexual offences against men in a number of the chapters — for example, chapter 2, ‘The voice of complainants’, and chapter 6, ‘Myths surrounding serious sexual offences’. However, we revisit them again in this context to emphasise that their plight often leaves them marginalised in similar ways to other groups in the community.

13.129 Yet one more time, we have to record a paucity of research locally on this aspect of our Review. However, a study of the literature worldwide (which, it is fair to say, records that there is limited empirical evidence of the prevalence and effects of sexual violence on men, particularly those who have sex with other men) has asserted the following propositions with regard to male complainants:

- Most men who reported non-consensual experiences with other men defined themselves as primarily heterosexual.
- However, men who had sex with other men were six times more likely to have non-consensual sex as an adult.
- Gay and bisexual men tend to have more sexual partners than heterosexual men, and this may increase the risk of non-consensual sex.
- Women were often involved in non-consensual sexual experiences with adult men, but few women were involved in the sexual abuse of boys (this may depend on the male’s viewpoint).
- Non-consensual sexual experiences were associated with psychological and alcohol problems and self-harm.
- Gross under-reporting of sexual offences generally, but particularly against men.
- Men may be less likely to report for fear of being disbelieved, blamed and exposed to other forms of negative treatment. A 2018 report on UK university students records that around 10% of reported rapes in the UK and 9% of those in the US were carried out on males. It also draws attention to under-reporting, with an estimated 4% of male victims likely to report rape due to the social stigma around male rape.
- Rape myths are rooted in traditional views of masculinity and correlate with traditional gender stereotypes and homophobia.
- Victims’ internalised homophobia, guilt and self-blame can be compounded by the homophobic reactions of others.
- There is a need for implementation of appropriate support for male survivors.
• The destructive effects of sexual violence, with suicidality rates particularly high among men who reported non-consensual sexual experiences.

• Exposure to adult non-consensual sex was associated with the greatest number of psychological consequences, and childhood sexual abuse associated with the least. This may be due to the immediacy of the exposure, or it could relate to the greater availability of support services for victims of childhood abuse in comparison with the services available to adults.

• One report in 2017 from England noted that gay male survivors may experience less sensitive treatment from police officials and highlights research showing that some specialist police officers believed that male survivors received poor treatment. The article also refers to a postcode lottery of services for male victims of sexual violence in the UK, with men often placed on waiting lists for services from third-sector organisations.

• In line with rape myths applying to women, it is argued that those applying to men are often deeply rooted in traditional gender norms and stem from the same patriarchal structure. 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.

• One of the most commonly cited rape myths is that ‘real’ or ‘strong’ men cannot be raped. Research also suggests that men are blamed more when others believe they did not sufficiently resist or fight back. The article identifies a number of rape myths that apply to men, particularly:

  • ‘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 and that female sexually perpetrated abuse is rare or non-existent. Accordingly, rape should be redefined to replace any gender-specific terms — most notably, reference to a penis — with gender-neutral terminology.
  • 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.
  • Male victims sometimes experience physical sexual arousal during non-consensual sex, which may add to the misapprehension that the activity was welcome.
• 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.
• Male victims show lower levels of masculinity.

Other jurisdictions

13.130 Once again, we considered experiences with similar marginalised communities in worldwide literature.

13.131 It was remarkable to discover that precisely the same problems we encounter in Northern Ireland are echoed elsewhere.

13.132 Thus, for example, there is in most cases a paucity of research on serious sex offences in relation to these groups and, in many cases, limitations to the existing literature. Whilst, as I have said, this is particularly the case in Northern Ireland, it also applies internationally. A lack of consistent and effective recording and monitoring of sex offences against these groups impedes robust analysis.

13.133 As a consequence of the limitations to the literature and monitoring of sex offences against these groups, estimates of the prevalence of sex offences vary widely. Nonetheless, the evidence indicates that they are at a significantly higher risk of experiencing sexual abuse.

13.134 Three factors emerged in the international literature. First, research suggests that specialist sexual violence services for minority groups may help to encourage complainants to engage.

13.135 Such services require a clear understanding of the cultural context and specific needs of the minority group(s) it serves.

13.136 Strengthening engagement and partnership work with local grass-roots organisations and ensuring that services are designed with input from the minority groups can be beneficial in this regard. Training for criminal justice professionals and others is crucial.

13.137 A good example of such services is the Abused Deaf Women’s Advocacy Services (ADWAS), which has helped set up satellite agencies in the US by providing training and proposing a strategy to make available accessible services to deaf and deaf-blind women and children who are victims of sexual assault and domestic violence. A key element of this is that deaf individuals develop the programmes, expanding services that meet the needs of members of their community.

13.138 Secondly, effective sex education can promote safe sexual health that is free from coercion and violence, and the research highlights its importance for minority groups who are at an increased risk of sexual violence.
13.139 For example, the evidence suggests that appropriate sex education for young people with learning disabilities can reduce their vulnerability but that many such individuals do not receive relationships and sexuality education.

13.140 The increased vulnerability of BAME people to sexual violence is linked to many factors, including a lack of appropriate sex education and non-attendance at relationships and sexuality education classes.

13.141 Sex education curricula should be designed in a culturally sensitive manner. For example, typical elements of teaching may conflict with Islamic teaching, suggesting that community consultation is of importance in the development of teaching and learning materials.

13.142 Thirdly, the literature on minorities clearly highlights a need for more well-designed research studies on serious sexual offences against minority groups. Reliable estimates of the scale and nature of the issues are required in order to develop effective preventative programmes and, I add, in order to inform the criminal justice actors of the appropriate procedures to be adopted in the criminal process including the education of juries.

Discussion

13.143 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. It is not enough to say that these communities, for a variety of reasons, cannot or do not choose to come within the criminal justice system.

13.144 The state has duties and obligations to them all and cannot ignore serious sexual offences against them. We as a society collectively need to respond to their needs. We need to respond to their needs despite the victims not coming forward and reflect on what the state owes them. It must be patently obvious that the only way we can even begin to bring these marginalised communities more fully within the law and procedures of our criminal justice system is to reach out to them and provide education as to what our justice system can offer to end the misery and shame that these victims unjustifiably bear.

13.145 The differing elements of the interests of victims within these groups require, in the first place, empirical research commissioned by the state. If we are to address the fact that many of these groups are not engaging with the criminal justice system in Northern Ireland, we need first to understand why they remain outside. This requires an evidence-gathering exercise on their experience with, and knowledge of, the current system together with a consideration of what mechanisms, alone or in combination with conventional law and procedures in the legal system, may establish a construct of victim justice for them.

13.146 The Department of Justice should take steps to reach out to these communities and commission individual research projects to gather knowledge in Northern
Ireland of the prevalence, extent, nature and experiences of serious sexual offences among minority ethnic, immigrant, LGBT+ and Traveller communities, those with a disability and men.

13.147 That department must provide specialist sexual violence services, harnessing the assistance of local grass-roots organisations for marginalised communities to encourage engagement with the criminal justice system. It is crucial that individuals in the marginalised communities — for example, deaf people — help to develop the programmes.

13.148 The task of research into these marginalised groups should rest not only with the Department of Justice but also with the wider Northern Ireland Executive, the Equality Commission, the Human Rights Commission, the Northern Ireland Commissioner for Children and Young People, and the Commissioner for Older People, who need to play a role in this task, which should have been performed many years ago.

13.149 These studies could then be drawn on when training professionals, specifically the judiciary, the legal professions, the PSNI and the PPS, so as to strengthen their knowledge of serious sexual violence among these groups, its effects and the most suitable ways of proceeding in such cases.

13.150 The recommendations in this Review place a premium on well-trained professionals case managing and discussing serious sexual offences at the earliest stage possible, with expedition, skill and sensitivity to the justice needs of both complainant and accused so as to ensure fair treatment and effective participation. Part of this task can be done only on an informed basis if the problems surrounding the parties are known so that the process can take account of them wherever possible.

13.151 It is crucial that contact between these communities and the police should be empowering, supportive and proactive. This will not only deliver a better service to them but improve the chances of police gathering the evidence they need to secure a conviction.

13.152 Police decision-making about whether to pursue an investigation where these communities are concerned must not be affected by factors such as lack of understanding about older people, those with a disability, the cultural backgrounds of marginalised communities, a lack of awareness about what supports are available or required, and assumptions about whether or not prosecutions will be successful. Police need to and, I am sure, want to build their ability to understand different forms of disability and cultures and to make reasonable adjustments. These groups require a specialist response and training is the vital ingredient.
Proposed recommendations

152. The Bar Council and the Law Society should cooperate to create a toolkit that would set out guidance on identifying vulnerability, with the assistance of groups in the voluntary sector specialising in these fields.

153. The judiciary, the Bar Council and the Law Society should provide training courses:
   • to help members determine what special adjustments and screening tools may be needed for those with communication needs, with the assistance of groups in the voluntary sector specialising in these fields; and
   • to better understand the LGBT+ community, with all its complexities and particular culture, relevant to serious sexual offences.

154. Both prosecutors and defence representatives should take great care to assess vulnerability, and if practitioners suspect vulnerability in complainants, witnesses or accused persons, they should request the services of registered intermediaries.

155. Registered intermediaries should include members of the deaf and visually impaired communities.

156. The Department of Justice should develop systems and commission individual research projects to gather knowledge and data in Northern Ireland of the prevalence, extent, nature and experiences of serious sexual offences among BAME groups, immigrants, LGBT+, Traveller communities, sex workers, older people and disabled people, both those with physical and mental disabilities.

157. The Department of Justice, the Executive, the Equality Commission, the Human Rights Commission, the Northern Ireland Commissioner for Children and Young People and the Commissioner for Older People should take steps to provide specialist sexual violence services, harnessing the assistance of local grass-roots organisations for marginalised communities to encourage engagement with the criminal justice system.

158. The NICOTS to upgrade its website to include links to various disability support organisations; the Northern Ireland Law Commission recommendations to be adopted; and the relevant department(s) to expedite implementation of The Criminal Evidence (Northern Ireland) Order 1999.

159. The PSNI and the PPS should monitor and collect accessible individual data of all allegations of serious sexual offences against persons who are members of BAME groups, immigrant, LGBT+ and Traveller communities, sex workers, older people and disabled people, both those with physical and mental disabilities.

160. The PSNI should reach out and mount an educational programme amongst marginalised communities to increase knowledge of the criminal justice law and procedures in serious sexual offences.
161. PSNI officers in the public protection unit should undergo obligatory further training in dealing with all marginalised communities, building upon their foundation training, with the assistance of groups in the voluntary sector specialising in these fields. The PSNI should reintroduce LGBT+ liaison officers.

162. PPS officers in the serious crime unit should undergo obligatory training in dealing with marginalised groups, with the assistance of experts in the voluntary sector specialising in these fields.

163. At the commencement of trials involving the deaf as either a complainant or an accused, the trial judge should provide evidence to the jury about the problems of deafness.

164. Advocates for deaf people should be trained and made available to explain documentation to a deaf complainant or accused person.

165. The Law Society to arrange training for solicitors, and the Bar Council to arrange training for barristers, in physical disability, hearing and visual awareness problems and that a list of solicitors and barristers who have undergone such training be made available so that those who are physically, hearing and/or visually impaired can make an informed choice regarding legal representation.

166. The NICTS to liaise with professional technical officers in the Royal National Institute of Blind People (RNIB), Sense and Action on Hearing Loss when considering technology requirements to support visually impaired and deaf persons to participate fully in court proceedings.

167. The Department of Education should address the need to include in the school curriculum for disabled children and those who are members of marginalised communities sex education designed in a culturally sensitive manner on matters such as consent, personal space, boundaries, appropriate behaviour, relationships, fears of homophobia and transphobia, gender identity and sexuality.

168. There must always be a Ground Rules Hearing when a witness is vulnerable, save in very exceptional circumstances.

169. The need for legal representation to obtain advice on the law and procedures in serious sexual offences for those in marginalised communities is particularly pressing.
A review of the law and procedures in serious sexual offences in Northern Ireland
Chapter 14

The voice of the child
A review of the law and procedures in serious sexual offences in Northern Ireland
Children have suffered adult violence unseen and unheard for centuries. Now that the scale and impact of all forms of violence against children is becoming better known, children must be provided with the effective prevention and protection to which they have an unqualified right.


Issues

• Is Northern Ireland ensuring that appropriate procedures are in place in the criminal justice system to realise the rights of children to be supported through the existing adversarial legal process and to be helped in their recovery from abuse?

• Although these issues are raised in the context of children, they also largely apply to all vulnerable adults

• Should the Icelandic model of the Barnahus system be introduced in Northern Ireland?

Current law and practice

14.1 Increasing recognition of the potentially negative impact of criminal proceedings and the stresses experienced by child witnesses in the court environment have led many Western countries to develop legislative and policy initiatives aimed at better protecting child witnesses.

14.2 Child protection and justice processes in Northern Ireland are still based on the adversarial procedure for cases concerning serious sexual offences against children. However, over the past two decades in Northern Ireland, there have been legislative and policy initiatives aimed at ensuring that child witnesses are able to give their best evidence and receive the support they need. It reflects an increasing awareness of the flawed approach of the past in respect of the treatment of children and vulnerable adults in court. This has brought about improvements for child victims and witnesses, who are now able to access support through the young witness service (YWS) and avail themselves of special measures that protect them from giving evidence in open court.

14.3 Encouragingly, children are provided with an assessment by a registered intermediary (RI) (see chapter 1, ‘Background’).

14.4 In these instances, the assessment and subsequent Ground Rules Hearing (GRH) are effective at tuning the court’s attention to the needs of the child giving evidence in most cases.

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14.5 Registered intermediaries can work to encourage the court to step outside its normal mode of function and to adapt practice to meet the individual needs of the child in the court. I strongly commend this approach.

14.6 Developments in Northern Ireland have largely mirrored those in England and Wales, key amongst them being the introduction of The Children’s Evidence (Northern Ireland) Order 1995, which allowed for witness evidence by children to be given via video link and barred defendants from cross-examining child witnesses personally.

14.7 In addition, The Criminal Evidence (Northern Ireland) Order 1999 made provisions for special measures to reduce the stress of children giving evidence at trial.

14.8 These special measures include:

- Screens in the courtroom (Article 11): screens are physically placed around the witness box to prevent the witness from seeing the defendant.
- Evidence by live link (Article 12): the witness will give evidence from a separate room located outside of the courtroom where proceedings are taking place.
- Evidence given in private (Article 13): the judge/magistrate will 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.
- Digitally recorded evidence-in-chief (Article 15): the police interview will be visually recorded and played at the trial as the witness’s main evidence-in-chief.
- Digitally recorded cross-examination or re-examination (Article 16): where any further evidence is recorded in advance of the trial and played on the day of trial.
- Intermediaries (Article 17): people who act as go-betweens to improve the communication and understanding of the witness.
- Aids to communication (Article 18): devices used by the witness to assist them in understanding questions and communicating their answers.

14.9 There is a practice of children being familiarised with courts before the hearing in Northern Ireland.

14.10 In 1999 the Northern Ireland vulnerable or intimidated witnesses working group was set up to consider the recommendations in Speaking up for Justice. Now known as the victim and witness steering group, this subgroup of the Criminal Justice Board has a central role in managing cross-agency issues impacting on victims and witnesses across the criminal justice system and, through a network
of subgroups, is responsible for coordinating key areas of service development and delivery.

14.11 In terms of service development, the *Review of the Criminal Justice System in Northern Ireland* (Criminal Justice Review Group, 2000) also recommended that publicly funded witness support schemes should be made available at all Crown Court and magistrates’ courts venues.\(^2\) This recommendation formed the basis for the roll-out of the National Society for the Prevention of Cruelty to Children (NSPCC) YWS, which currently operates in all Crown Courts across Northern Ireland.

14.12 Since the millennium, there have been further developments in policy and guidance with a number of criminal justice inspections in Northern Ireland\(^3\) identifying a range of problems in relation to delays within the criminal justice system, attrition in the prosecution of sexual offences and general lack of confidence in the system and its processes.

14.13 The Independent Inquiry into Child Sexual Exploitation (CSE) in Northern Ireland was commissioned by the Minister for Health, Social Services and Public Safety and the Minister of Justice. The Minister for Education agreed that the Education and Training Inspectorate would enjoin the inquiry in relation to schools and the effectiveness of the statutory curriculum with respect to CSE. The inquiry published its report in November 2014.\(^4\) Ministers made a commitment to develop action plans in order to implement the inquiry recommendations, which included a number of recommendations specific to strengthening criminal justice arrangements. The departments have produced progress reports following this.

14.14 The Justice Act (Northern Ireland) 2015 (the 2015 Act) has provided, although not yet fully introduced, a number of measures relevant to children.

14.15 The aim was to:

- improve services for victims and witnesses by the creation of new statutory Victim and Witness Charters, the introduction of victim personal statements,\(^5\) information disclosure provisions between criminal justice system service providers,\(^6\) and the expansion of video link powers between courts and a number of new locations; and
- to speed up the system, judges are given new case management powers and responsibilities at section 92, the details of which have not yet been completed.

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\(^5\) Sections 28-33 of the 2015 Act.

\(^6\) Schedule 3 of the 2015 Act.
14.16 The 2015 Act thus introduces a statutory framework for the management of cases. Through regulation, the Department of Justice (DoJ) will be able to impose duties on the prosecution, the defence and the court, which set out what must be completed prior to commencement of court stages. There is also a general duty on the court, the prosecution and the defence to reach a just outcome as swiftly as possible.

14.17 Currently, a bespoke option for case management, rather than a statutory case management, operates for serious cases such as murder and terrorist offences by the High Court judge responsible for those trials. It is triggered once the accused is returned for trial, albeit only for a limited number of cases. It works extremely well, not least because the returns are quality controlled by a court administrator. It is the long-term intention of the Lord Chief Justice to introduce this into all Crown Court cases once there has been made available the administrative staff to support it.

14.18 The United Nations Convention on the Rights of the Child (UNCRC) sets out minimum standards for children’s rights across all areas of their lives, such as civil and personal protection, health, education and welfare. The four guiding principles that flow through the convention are: children’s right to non-discrimination; the right to survival and development to the highest level; their best interests being a primary consideration; and their voice being heard in all matters affecting them.7

14.19 The convention also highlights that, as rights holders, children have special rights to protection from abuse, exploitation and trafficking, and to be supported in their recovery from abuse. The state has an obligation to ensure that appropriate measures and procedures, including court and judicial processes, are in place to realise these rights. The convention affords particular rights to any child in contact with the criminal justice system, including child defendants. The rights of the convention are interdependent and indivisible. Children’s lives cannot be compartmentalised.

14.20 In 2016, following examination of the UK and devolved governments, the UN Committee on the Rights of the Child stated that, in Northern Ireland, the recommendations of the Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry in 2014 must be implemented. It advocated that, across the UK, exploitation cases required a strengthening of effective remedies for victims.

14.21 The committee also recommended that video-recorded interviews with child victims and witnesses be used in court as evidence rather than children attending in person and being subject to cross-examination.

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7 Articles 2, 3, 6 and 12.
14.22 The *Equal Treatment Bench Book* (2018) was drawn up by the Judicial College for judges in England and Wales. It has been adopted by the judiciary in Northern Ireland and is exhibited on the Internet. It recognises the key principles set out in the United Nations Convention on the Rights of the Child, including the application of Article 3 that the best interests of the child must be a top priority in all decisions and actions that affect children. Chapter 2 specifically deals with children, young people and vulnerable adults.

14.23 Finally, whilst there is a statutory umbrella over all measures available for children and other vulnerable or intimidated witnesses, the only statutory special measures are use of live link in limited circumstances, and intermediaries during the course of their evidence, the latter not yet being in force, obliging courts to rely on the common law.

14.24 In relation to child defendants, live links are available in Northern Ireland under Article 21A of The Criminal Evidence (Northern Ireland) Order 1999, as inserted by the Justice Act (Northern Ireland) 2011. The conditions for under-18s are that the person’s ability to communicate effectively in proceedings as a witness giving oral evidence is compromised by their level of intellectual ability or social functioning, and that the use of a live link would enable them to participate more effectively in the proceedings as a witness (whether by improving the quality of their evidence or otherwise). This is exactly the same as the English legislation in section 47 of the Police and Justice Act 2006 (which amended the Youth Justice and Criminal Evidence Act 1999).

14.25 In relation to intermediaries for child defendants in Northern Ireland, the relevant legislation is Article 21BA of The Criminal Evidence (Northern Ireland) Order 1999 (as inserted by the Justice Act (Northern Ireland) 2011). For children, the condition for application is that the accused’s ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused’s level of intellectual ability or social functioning. The English equivalent, section 104 of the Coroners and Justice Act 2009, has not been commenced.

14.26 In England, and hopefully soon in Northern Ireland, there has emerged a redefinition of the conventional rules for cross-examining vulnerable people in criminal trials and delivery of a strong direction to advocates to change and improve their practice.8

Background

14.27 In Northern Ireland in 2011/12, there were 985 sexual offences recorded in relation to children. In 2017/18, this had risen to 1,936.

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14.28 This increase in recorded offences of abuse of children is echoed in similar offences recorded by police in England and Wales, which more than doubled over three years to hit a record 49,330 in 2015/16, some 2,800 of them against children under five and not just because of the tide of historical offences reported in the wake of the Jimmy Savile scandal. The number of under-fives working with registered intermediaries has also soared, from 124 in England and Wales in 2012 to 584 in 2017, according to the National Crime Agency (NCA).

14.29 Children make up the majority of victims of sexual crime reported to the Police Service of Northern Ireland (PSNI) (58%, some 1,936 reports in 2017/18). Over the years, the NSPCC has worked constructively through such measures as the victims and witnesses’ strategy to encourage children and young people to speak out and to help them in the journey through court processes, and this may have contributed to the increased reporting.

14.30 However, the under-reporting and attrition rate of sexual crime against children and young people is very concerning, as is the low conviction rate for rape offences generally. In examining the prevalence of child abuse in the UK, the NSPCC has estimated that, for every child on a child protection plan or register, another eight were experiencing maltreatment or abuse. In assessing the extent of sexual abuse against children within family settings the English Children’s Commissioner found that only one in eight children who are sexually abused were identified by professionals.

14.31 In earlier research, the NSPCC found that only 19% of reported sexual offences against children had been detected or ‘cleared up’. We note that PSNI figures show that the charge or summons rate for rape offences (where the victim was either a child or adult) for 2017/18 was 5.5%.9

14.32 The Northern Ireland Commissioner for Children and Young People (NICCY), in an extremely informative submission to this Review, has also recorded the importance of recognising that the number of cases that are known to statutory agencies are likely to represent only a partial picture of child sexual abuse cases.

14.33 A range of factors can act as barriers to identification and reporting, including the power relationship endemic to abuse, the emotional impact of abuse, which can induce fear, shame and guilt on the part of the victim, and the nature of our child protection and justice systems, which largely rely on the capacity and ability of a child or young person to disclose that they have been abused.

14.34 Delay in the hearing of cases and, in particular, cases involving children has been a continuing problem. A Northern Ireland Audit Office (NIAO) report in March 2018 identifies weakness in the early stages of investigations — namely, when the PSNI compiles evidence and the PPS makes a decision on prosecution as

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9 Relates to the number of crimes detected in 2017/18 as a percentage of the number of crimes recorded in 2017/18.
the most critical cause of delay in criminal justice.\textsuperscript{10} 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.

14.35 A 2015 investigation, An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland determined that the majority of Crown Court case files tested in Northern Ireland 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)’.

14.36 The NSPCC’s YWS produced a submission for this Review. It was informed by its specialist YWS staff and volunteers, who set out their practical experience of child victims involved in criminal cases in Northern Ireland. It set this against key areas of best practice identified in chapter 2, ‘Children, Young People and Vulnerable Adults’, of the Equal Treatment Bench Book.

14.37 What lends weight to the deep concerns expressed by YWS practitioners is that it virtually mirrors the experiences in England, voiced in highly authoritative reports by Joyce Plotnikoff and Richard Woolfson dealing with young witness policy and practice.\textsuperscript{11}

14.38 Generously, they have spent time with me discussing some of the likely themes in their forthcoming report on all levels of the court system, and that allows me to say that nothing in the YWS report surprises me. On the contrary, it serves to convince me there is merit in the criticisms.

14.39 It is the YWS case that the current procedures do not consistently consider and prioritise the needs of the children with whom they are engaged. Moreover, contrary to UNCRC’s Article 12, which asserts that every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously, the YWS found that there is little evidence of consultation with children to hear their views about issues such as special measures or the court environment in any systematic and meaningful way.

14.40 The detailed concerns expressed were as follows:

- Prosecutors may at times arrive to court with limited awareness of case detail and little or no previous engagement with the child or family. I pause to add that, despite the Public Prosecution Service (PPS) policy that all prosecutors should meet complainants in the two weeks prior to trial, this was an assertion that resonated throughout many of my meetings with

\textsuperscript{10} NIAO (2018) Speeding up Justice: avoidable delay in the criminal justice system. Belfast: NIAO.

\textsuperscript{11} Their report for the NSPCC, revisiting ‘Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings’ was published in 2009. That is being followed up with a soon to be published report revisiting these issues “Falling short? A snapshot of young witness policy and practice”
adult complainants and is obviously all the more damaging when applied to children.

- The full range of special measures is not available and applied to children even when it might be in the child’s best interest for them to be applied.
- Digitally recorded cross-examination is not as yet available.
- Closed courts are applied in only a small number of cases. The Criminal Evidence (Northern Ireland) Order 1999 is available to have evidence heard in private for children, but it is rarely applied for. This has been an area of concern reported by YWS staff and my view is that, in cases where there is a child victim of a sexual crime, the default position should be that evidence is heard in private.
- Combined measures, including video link with screens, are rarely used.
- The perception is that there may be a lack of awareness of the range of special measures available, a reluctance to apply for special measures and/or an unwillingness to grant less common special measures.
- The criminal justice system and court processes are often perplexing and traumatising for children and their families. There is a general lack of awareness of how traumatic an experience court can be for a child with little evidence of systemic trauma-informed practice. Training is obviously needed for all involved in the criminal justice system, including court staff, legal professionals and the judiciary.
- Courts often request that children are in attendance from the start of the day even when experience and practice reveals that the child’s case will not start until the afternoon. Lengthy waiting times and delays can be distressing for a child.

14.41 There is no evidence in practice of the advice noted in chapter 2, paragraph 56 of the Equal Treatment Bench Book that there should be systematic scheduling of witness start times for children. Currently, the witness is required to be at court and available when the court is ready for them, with often no indication of when this will be. The needs of child witnesses are very rarely (with some exceptions) factored in to planning. The impact of a long wait before giving evidence may affect schoolchildren most.


14.43 YWS practitioners report that in cases involving children, especially where the child is a victim of a sexual offence, the progress of the case through the courts is too slow. We have also been advised by the Northern Ireland Statistics and Research Agency (NISRA) for the Department of Justice that the time is increasing rather than decreasing for sexual abuse cases involving children. The
subject of delay is dealt with separately in chapter 9 of this Review, but it is a matter of major concern with children.

14.44 There are multiple examples of children being asked to attend courts where the court premises and layout are not fit for purpose with:

- no safe waiting room space for the child;
- children having to share a waiting room with other vulnerable witnesses including adults, where there is the potential breach of anonymity;
- children having to walk through the main waiting room past defendants and the public to use restroom facilities; and
- no requests that a trial be moved when the court is known to be unsuitable for a child.

14.45 There is no consultation with the YWS when it comes to setting dates, meaning that at times cases must be transferred from the original key worker, who has established relationships with the witness and families, to new workers. This can increase anxiety for the witness and may impact on their evidence on the day.

14.46 Cases should be referred to the YWS at the time of arraignment and achieving best evidence (ABE) interview guidelines should be followed. This is not happening in practice. The YWS is tasked by the Department of Justice to work with young witnesses and their families to meet the department’s requirements under the Victim Charter. The time available between referral and trial can be too short to allow for meaningful support to be provided. During 2017/18, 19.2% of referrals to the YWS were with two weeks’ notice or less (7.8% with one week’s notice or less).

14.47 Scheduling a ‘clean start to witness testimony’: practitioners do not see evidence of the courts in Northern Ireland using a clean start when a vulnerable witness is required to give evidence. This would be immensely beneficial to children and their families if it were routine practice.

14.48 Children are at times cross-examined for longer than optimal times, without the principle of regular breaks being consistently applied. There are experiences of cross-examination routinely exceeding that which should be expected of a vulnerable child, with cross-examination at times exceeding two hours without regular breaks.

14.49 Whilst live link is used in most cases involving children, almost all the live link facilities are in court facilities. The expansion of live links into other non-court facilities would greatly improve the experience for children and vulnerable witnesses in general. Options could include locating facilities in NSPCC premises or investment in mobile live link equipment.

14.50 The best interests of the child are not consistently considered when planning a time to allow a child to review an ABE interview. A child may be expected to
review the interview on the day of court when it may be the child’s preference to do so beforehand. At times, investigating officers have not been aware that they have a role in the ABE interview refresh and have had to be prompted by YWS staff.

14.51 It is a regular occurrence that the required equipment is not available to allow the witness to be refreshed on their ABE interview on the day. These issues often cause unnecessary delay and increase the anxiety and distress of witnesses.

14.52 There are also regular problems with ABE interview playback in court where the equipment does not work on the day.

14.53 Children are often expected to watch their ABE interview with the judge and jury, with the child being visible to the court during this time. There appears to be a preference for simultaneous viewing of the ABE by the courts and the child.

14.54 In chapter 2, paragraph 98 of the *Equal Treatment Bench Book* advises that ‘all young witnesses should ideally have an intermediary assessment as, no matter how advanced they appear, their language comprehension is likely to be less than that of an adult witness’. YWS practitioners report that this is not the current practice and that the use of registered intermediaries is relatively rare, inconsistent and at times resisted even when significant vulnerability and need has been identified by qualified social workers within the YWS staff group. This is despite the fact that I am assured by the DoJ that, unlike in England, the supply of intermediaries in Northern Ireland is plentiful.

14.55 There is little evidence of an effective initial needs assessment being undertaken with respect to witnesses and, when they are undertaken, these are not communicated to YWS practitioners. We also find that issues such as ADHD/ASD go unreported prior to the YWS assessment.

14.56 In chapter 2, paragraph 120 of the *Equal Treatment Bench Book* advises that best practice is to hold a GRH where there is a young witness. YWS practitioners report that this is not routinely practised except when an RI is involved.

14.57 When the decision is to be taken as to whether an RI is involved, the decision by the judge to determine this is taking place, in the main, on the day of the hearing itself (paragraph 119 of chapter 2). This causes difficulty as the child and family will not know when arriving to court whether the child will have the support of an RI while giving evidence, which can be anxiety-provoking.

14.58 YWS practitioners report that the tone and manner of questioning can be experienced as authoritarian and frightening to children. It is noteworthy that the Northern Ireland Statistics and Research Agency statisticians working for the Department of Justice found that 56% of witnesses during 2016/17 felt
that the defence was discourteous in its engagement with them. This figure has been consistently high over the five years covered in the research report.

14.59 Children are asked about third-party material without any previous context being provided to the witness.

14.60 Except for cases where an RI has been used, where, as previously stated, the courts are notably more tuned in to the child, YWS staff and volunteers report that courts often do not adapt their language and style to meet the needs of the child with whom they are communicating.

14.61 YWS practitioners report that children are often asked the same questions repeatedly when giving evidence. This has a destabilising and anxiety-provoking impact on children and can lead to inaccurate responses from children with learning disabilities.

14.62 There is no current working mechanism for supporters of victims and witnesses to routinely provide feedback to individual trial judges on the child's experience of their court and the effectiveness of the local systems to support them.

14.63 The criticisms of the law and procedure do not end with the NSPCC. NICCY has also made some trenchant criticism of the procedures.

14.64 In particular, NICCY has closely monitored the implementation process of the recommendations of the Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry in 2014 and continues to have significant concerns about the lack of evidence to demonstrate that implementation has been effective and is improving outcomes for children.

14.65 These concerns and the commissioner's recommendations have been set out in a number of NICCY papers.

14.66 These recommendations need to be implemented in a timely fashion and properly progressed in order to ensure better outcomes are secured for victims of all sexual offences against children and for justice more widely.

14.67 NICCY notes that many of the inquiry recommendations have direct relevance to the Review's terms of reference. These recommendations include:

14.68 Key recommendation 9: the Department of Justice must establish an inter-agency forum drawn across the criminal justice sector and third-sector stakeholders to examine how changes to the criminal justice system can achieve more successful prosecutions of perpetrators of child sexual abuse. This must be informed by the experiences and needs of child victims.

14.69 The department informs me that there have been two reports arising therefrom, together with a workshop in March 2016. However, whilst there has been a draft action plan, no implementation has occurred, despite the passage of time due to resource issues.
14.70 Key recommendation 14: the DoJ should lead on a project to examine legislative issues highlighted in this report and bring forward proposals for change. These include:

a) Ensuring compliance with international standards by extending protection to children up to the age of 18, specifically, the Child Abduction (Northern Ireland) Order 1985 and the Sexual Offences (Northern Ireland) Order 2008.


c) Replacing all references to child ‘prostitution’ with ‘child sexual exploitation’.

d) Extending the offence of ‘grooming’ to include ‘enticing’.

e) Reversing the rebuttable presumption in the Sexual Offences (Northern Ireland) Order 2008 in relation to ‘reasonable belief’ as regards the age of a child.

14.71 The department recognises the strength of many of these points and intends to provide a consultation before the end of 2018. Thus, for example, steps have been taken in some areas to align the 18 age limit, and it is expected this will be completed. Similarly, it is recognised that the changes in nomenclature to ‘child sexual exploitation’ and ‘enticing’ have much to recommend them in line with the aim to modernise the use of language. Consideration is to be given to the rebuttable presumption as regards the age of children.

14.72 The department makes the case that, in the absence of the Executive and Assembly, some of these areas of consideration have been slower than otherwise would have been the case.

14.73 Supporting recommendation 43: the PSNI and criminal justice partners in the PPS and the Northern Ireland Courts and Tribunals Service (NICTS) should continue to develop their approach to responding to victims of child sexual exploitation in a way that treats them fairly and sensitively and avoids blaming them for offending behaviour associated with their abuse. This involves attitude, not just policy or process. The department asserts that this process is ongoing and various steps have been taken — for example, training arranged for all CSE officers in the PSNI.

14.74 Supporting recommendation 44: the Department of Justice should continue to seek to develop and improve the experiences of young witnesses, taking into account research and learning from other countries. This should include consultation with stakeholder groups and young witnesses.

14.75 The department confines its learning to other jurisdictions in the UK. There are traditionally no researchers retained and no research is done into developments outside the UK.
14.76 Supporting recommendation 45: the Public Prosecution Service should ensure that prosecutors dealing with sexual offences against children continue to receive training at regular intervals on the dynamics of child abuse, including CSE.

14.77 It would appear that there is no specialised child unit in either the PPS or the PSNI.

14.78 Supporting recommendation 46: awareness raising about the dynamics of child abuse and CSE in particular should be available for all legal personnel and be mandatory for all legal professionals dealing with child abuse cases. This should be made the responsibility of the PPS for its own legal staff, the Northern Ireland Bar and the Law Society for their members, and the Judicial Studies Board (JSB) for judges.

14.79 Northern Ireland does not have mandatory training in matters for the Bar or the Law Society. In 2015, the authorities in England and Wales stated that it had made it a requirement for publicly funded advocates in serious sexual offence cases to have undertaken approved specialist training. No such requirement has been put in place. In March 2018, the Ministry of Justice described the ‘Advocacy and the vulnerable’ training as ‘on track’ for completion by the end of 2018; target figures have since been revised downwards. Ministry of Justice inaction thus far has been met with dismay by some of the course’s lead facilitators. No steps have been taken to address this in Northern Ireland.

14.80 I found it surprising to learn that there has been a paucity of lectures to date specifically on the needs of children within the criminal justice system from the Northern Ireland JSB. I understand that each new judge meets the JSB to discuss training and reference is made to the presence of the *Equal Treatment Bench Book* prepared by the Judicial College. This is arguably proving inadequate.

14.81 Supporting recommendation 47: NICCY argues that the Department of Justice should ensure that both statutory case management and statutory time limits be introduced in Northern Ireland. Both have already been the subject of clear recommendations by the Criminal Justice Inspection Northern Ireland.

14.82 The department is still consulting on these proposals.

**Barnahus system**

14.83 A wholly separate issue arises from NICCY’s submission that this Review should consider a change in the law and procedures to introduce a less adversarial process for children concerning sexual offences, which is less likely to re-traumatise the child while ensuring that the interests of justice are properly served.
14.84 This would reflect a child-centred approach, which secures child victims’ and witnesses’ best evidence, minimises the need for multiple interviews and examinations, and respects due process.

14.85 Hence, NICCY drew particular attention to the development and adaption of the Barnahus or ‘child house’ system, which is promoted by the Council of Europe. The model was developed in Iceland and is now operating in a number of countries, including a small pool of Home Office-funded pilot projects that has been established in England. The Scottish Courts and Tribunals Service has also recommended that the model be developed in Scotland.

14.86 The Barnahus model seeks to embed the justice process within child protection disclosure procedures and, by ensuring legal, social care and medical professionals work collectively, aims to provide a comprehensive service for children in a single setting.

14.87 The model involves professionals trained in forensic interviewing and, following an exploratory interview and any alleged perpetrator being taken into custody, undertaking an investigative interview with a range of professionals including defence advocates, police, child protection services, the child’s legal representative and a judge observing via video link and communicating with the interviewer to ask any questions.

14.88 The interview provides the child’s testimony in court and the process aims to ensure a minimal time lapse between exploratory and investigative interviews and between investigative interview and trial. The model also allows children to access therapeutic support more quickly.

14.89 In Iceland, a significant increase in investigation and prosecution percentages for sexual offences has been attributed to the implementation of this model:

From the onset of Barnahus twice as many cases of suspected sexual abuse have been investigated, the number of cases prosecuted has tripled and the same applies to the number of sentences passed on a yearly basis. This I believe is largely due to the fact that the evidential quality of children’s disclosure has significantly improved.12

14.90 NICCY notes that the development of a similar model in this jurisdiction would need to take account of a range of factors, including the requirement that evidential and public interest tests are met to inform prosecutorial and charging decisions, and that this may necessitate a further interview stage with the child, as occurs in some other countries that have adapted the model.

14.91 They would highlight that European Barnahus quality standards have now been developed. Such a substantive change to current adversarial arrangements would address not only a number of recommendations of the Independent Inquiry into Child Sexual Exploitation (such as key recommendation 9 and

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supporting recommendations 43 and 44) but a range of other relevant issues including the disclosure of evidence, support for complainants, victims and witnesses, and the use of cross-examination.

14.92 NICCY has proposed a number of other reforms relevant to children as follows:

- First, expert input for all legal personnel and jury members should be provided at the beginning of each trial to address key issues such as the power dynamics of sexual abuse and grooming and to include ‘myth busting’. These matters are addressed in chapter 6 of this Review.
- Secondly, child victims and complainants should have access to a legal representative or advocate whose role is to protect the rights and best interests of the child and who has an authoritative position in proceedings (see chapter 5).

14.93 A further separate issue is that of pre-recorded cross-examination, which is dealt with as a separate topic in chapter 4.

14.94 My discussions with Crown Court judges have highlighted court technology as a significant problem for young witnesses, with difficulties at times having a clear view of the witness’s facial expressions over the live link and hearing the witness clearly. Virtually without exception, Crown Court judges had experience of the technology not working at all, occasioning lengthy delays.

14.95 The quality of the ABE is crucial to its evidential importance as the young witness’s evidence-in-chief. The experience of both judges and legal professionals is that there are many occasions when it has been poorly conducted by PSNI officers, with rambling, repetitive questions, which are often irrelevant and confusing for the complainant and for the jury.

14.96 Moreover, a frequent complaint is that the position of the camera is hopelessly misaligned and the voice is difficult to hear.

14.97 In fairness to the PSNI, it has provided the Review with details of the process it utilises.

14.98 In respect of victims, witnesses or suspects who have a communication difficulty, the PSNI use RIs. A communication difficulty could be anything from a learning disability, a child who is very young, someone who is on the autism spectrum or someone with a physical disability that creates a difficulty with communication. This list is not exhaustive. RIs are usually speech therapists and are matched up dependent on the person’s needs.

14.99 Police use registered intermediaries for all children under the age of eight and, over that age, it is dependent on any other communication need they may have. The RI carries out an assessment with the person and then provides guidance to the police officer interviewing them as to how that should be structured. Such advice could include the length of time they can be spoken to; young children
need to sit at a small table instead of the armchairs in the ABE suite; and not to ask tag questions — for example, ‘I am wearing a red dress today, is that not correct?’

14.100 They can also provide information if a person can tell the time, focus on dates, if they would understand a week ago, a year ago, or how long something went on for. They may also suggest the best time of day for the person to be interviewed. For all witnesses and victims, the police officer is present during this assessment. For suspects, the solicitor is present and the police officer is not. The RI would often be present during the interview.

Other jurisdictions

Iceland

14.101 In Iceland, the Barnahus model has been in place since 1998, using a child-friendly response to child sexual abuse that is multi-agency, interdisciplinary and all under one roof.

14.102 The Icelandic Government Agency for Child Protection recognised that multiple agencies were holding cases of suspected sexual abuse, but information sharing and coordination were poor. Young complainants were required to give multiple interviews to professionals from each agency, diminishing the quality of their evidence and being further traumatised by having to give testimony in court.

14.103 The model recognises the vulnerability of the child victim and the harm caused to the child by multiple interviews.

14.104 The Barnahus in Iceland provides one place in which the child can have forensic interviews and make court statements, have a medical examination and access therapeutic services, which are also available for the victim’s family.

14.105 There is no specific Barnahus law, and Barnahus is not explicitly referred to in any legal provision. There are, however, regulations in both the Child Protection Act, No. 80/2002 and the Law on Criminal Procedure, No. 88/2008 that provide the legal basis for the Barnahus operation.

14.106 The Child Protection Act, No.80/2002 requires the Government Agency for Child Protection in Iceland to run special service centres, with the objective of promoting interdisciplinary collaboration and strengthening the coordination of agencies in handling cases of child protection.

14.107 In 2015, a legal change was made in the Law on Criminal Procedure, No. 88/2008, providing that investigative interviews of child victims up to 15 years of age should be supervised by a judge in a specially designed facility and with the support of a specially trained person.

14.108 In the Barnahus model, there are two types of interview: exploratory and investigative.
14.109 The exploratory interview is a formal process that provides a safe space in which children are supported to disclose abuse in a non-leading manner. Where a child makes a disclosure, the interview is stopped so that the alleged perpetrator can be taken into custody. An investigative interview is held as soon as possible.

14.110 Investigative interviews are watched via video link by a range of professionals, including the police, Government Agency for Child Protection, the prosecutor, the defence attorney, the judge and the child’s state-appointed legal representative. Professionals communicate with the interviewer via an earpiece, and they relay questions in a child-friendly manner consistent with the principles of forensic interviewing.

14.111 The criminal justice process is embedded within the Barnahus. The investigative interview serves as testimony for the court. The court case is usually held six months after the interview. Given that the investigative interview is used as testimony, there is no need for further questioning.

14.112 Since the Barnahus model was established in Iceland, the number of child victims of sexual exploitation coming forward for help has more than doubled per year, indictments have more than tripled and convictions have more than doubled. The Barnahus model has since been exported to Norway, Greenland and Denmark, with pilots planned in Finland and Lithuania.

**Norway**

14.113 The Norwegian approach is based on the Barnahus. It was introduced following widespread criticism of low prosecution and conviction rates in relation to child abuse.

14.114 Criminal Procedure Regulations of 2 October 1998 No. 925 provide for the taking of evidence in a judicial hearing prior to trial for witnesses under 16 years of age or who have a mental health problem in cases where the witness is the alleged victim of a sexual offence.

14.115 The regulations provide that such a hearing should happen as soon as possible after an incident is reported and no more than two weeks later, albeit there is much slippage in practice.

14.116 There are now 11 Barnahus across Norway, which provide customised facilities for the hearings, including dedicated interview rooms featuring high-quality audio and video links to a conference/viewing room for all those entitled to observe the proceedings.

14.117 There are no exploratory interviews in the Norwegian model. This phase is conducted by social workers, who then refer cases for investigative interviews to the Barnahus.
14.118 The investigative interview is conducted in two stages:

- An initial detailed interview, which determines whether there is evidence to charge an alleged perpetrator.
- A supplementary interview, undertaken following an interview with the alleged perpetrator and in which the interviewer does not repeat the same questions but instead focuses on discrepancies in the account and enables elaboration to improve the quality of the evidence. Cross-examination in this model is significantly removed from traditional cross-examination.

14.119 The interview consists only of a structured approach in which the police interviewer, who is a specialist in forensic interviewing, is the only person who questions the witness directly during the evidential hearing. They can take suggestions from the defence lawyer as to lines of questioning. That is deemed sufficient to meet Article 6 of the European Convention on Human Rights (ECHR) requirement allowing the examination of the witness on behalf of the accused.

14.120 The judge is in control of this hearing, which may also be attended by: the interviewer; counsel for the complainant; substitute guardian for the child; defence lawyer; prosecuting lawyer; police investigator; adviser from the Barnahus; and representatives from child welfare services (if necessary).

14.121 There will also be a technician to operate the audio/video viewing and recording. The accused is not usually present, although it is the norm that they are informed that the session will be taking place.

14.122 Given that this hearing takes place as soon as possible after the alleged incident is reported, there may not even be an identified defendant who has been charged. In this case, a lawyer is appointed to represent the defence’s interests in anticipation of a future trial.

**England**

14.123 Children who have been victims of sexual abuse or exploitation will, for the first time in the UK, be able to access a complete range of support services from dedicated experts under one roof in a pioneering project launched in London.

14.124 The UK’s first two Child Houses, funded by £7.2 million secured by the Mayor’s Office for Policing and Crime (MOPAC) and NHS England (London) from the Home Office innovation fund, will offer medical, investigative and emotional support in one place, removing the need for young victims to go through the trauma of repeating their statement several times to different agencies.

14.125 This multi-agency approach will help to gather better evidence and increase the speed of its delivery to court, as well as offering longer-term support to victims of child sexual abuse in the criminal justice system.
Only one in four children and young people reporting sexual abuse is currently referred to local services for medical support. Like children in Northern Ireland, those who do report abuse face multiple interviews with social workers, the police and medical professionals in different settings, and a long wait to go to trial.

Many cases do not have sufficient evidence to reach the prosecution stage and families are often left to navigate the complex health system by themselves in order to seek support from their GP, mental health services or local charities.

The Children and Young Persons’ Havens Service (Haven) in London opened in 2016, providing forensic medical examination and emotional support to children reporting recent sexual abuse.

In 2018, it began piloting video-recorded ABE interviews conducted by a clinical psychologist on one day a week. The protocol between the Metropolitan Police and the Haven for ABE interviews included criteria for requesting registered intermediary assistance.

Open since April 2018, it offers a calm environment for medical examinations, counselling and therapy, with soft coloured chairs and brightly coloured rugs that provide a soothing alternative to plastic clinical furniture, artwork and a 3D technology system providing distraction. Funded by NHS England (London), it expands the services offered to adult sexual victims.

Plans are also under way for a London Child House pilot, due to begin in autumn 2018. This will provide services to young people who had experienced sexual abuse more than a week earlier. Each Child House is expected to be able to provide support to over 200 children and young people each year.

The Child House will also pilot ABE interviews conducted by a clinical psychologist, available six days a week.

Criminal justice aspects of aftercare will thus be embedded in the service, with evidence-gathering interviews led by child psychologists on behalf of the police and social workers, and court evidence provided through video links to aid swifter justice.

Based on the original Icelandic Barnahus model, the houses will gather more effective evidence from interviews and offer faster progress in investigations and court cases.

Some initial teething problems emerged regarding the respective roles of the psychologist/interviewer and the intermediary. Revised guidance will apply to the Haven and the Child House.

Case management in England involving vulnerable adults and children is based on a GRH, which occurs in all but the most exceptional cases pretrial. The Criminal Procedure Rules provide a lengthy list of what must be discussed in
order, for example, to identify the scope and length of cross-examination, following which the judge can manage a timetable that is fair to all parties. Advocates are expected to produce a list of cross-examination questions to the judge at the GRH and these will be shared with the intermediary.

14.137 In terms of training the Bar in England has been proactive. In 2016, the Advocacy Training Council working group on vulnerable witness handling produced a document, *Raising the Bar: Handling of Vulnerable Witnesses, Victims and Defendants in Court*.

14.138 The toolkits available on the Advocate’s Gateway are compulsory reading for any advocate who is to question a vulnerable witness.

14.139 The Advocacy and the Vulnerable Training Programme was launched by the Inns of Court College of Advocacy in 2016 and by all accounts achieved high professional attendance and was well received.

14.140 The Bar Standards Board has recently introduced a new provision for youth court advocacy, consisting of registration for this specialism plus self-certification of competence.

14.141 In 2015, the government stated that it had made it a requirement for publicly funded advocates in serious sexual offence cases to have undertaken approved specialist training. No such requirement has been put in place.

14.142 Lord Judge, the former Lord Chief Justice of England and Wales, has recommended to the government that rules of professional conduct be made, consistent for the purpose of sexual offence cases. Currently, advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a vulnerable person.

14.143 To obtain a ‘ticket’ to try serious sexual offences, judges must attend a two-day induction seminar on serious sexual offences. High Court judges are not required to attend training. Bespoke training on managing vulnerable witness cases was delivered in 2013–14.

14.144 Interestingly, one example of training that is now translated into the Criminal Procedure Rules is that which outlaws requests that a child demonstrate intimate touching on their body or mimic sexual actions. If it is necessary to ask the witness to demonstrate how or where they were touched, the witness should be provided with a gender-neutral diagram or doll.

14.145 Intermediaries in England act flexibly depending on the child’s needs or circumstances, employing an arsenal of toys that children can play with to keep calm and focused. Once the intermediaries know what works, they bring them to trial, where children give evidence via live video link, either from a room elsewhere in the court building or a remote site.
14.146 There may even be larger items that get transferred — special measures that have to be agreed at a GRH before trial. One child is described as giving her evidence from a rocking horse and another with a pet hamster on her lap.

14.147 One registered intermediary was described in a recent Guardian Article as having persuaded two judges that a makeshift den should be constructed from chairs and a blanket, for a child to retreat into. At assessment, she discovered that one boy seemed to be calmed by tidying up, so he took a full-sized and handheld vacuum cleaner to trial. Before he was interviewed, staff would tear paper into hundreds of bits and scatter them on the floor.

Scotland

14.148 Beth Macmaster, the children and gender-based violence lead in the violence against women and girls and Barnahus justice unit in the criminal justice division of the Scottish government, kindly sent us a full account of and information about the development of the Barnahus concept in Scotland. She made the following points:

- This year, the Barnahus project has been included in the programme for government. The current plan is to develop some Scottish-specific standards or principles for Barnahus, which will provide a road map for developing the model in Scotland in the next few months.
- Some early steps in Scotland that have driven action included a visit to the original Barnahus in Iceland in 2017 and a round-table event where representatives from the Icelandic model came to tell stakeholders in Scotland how to implement the model.
- In addition, there are a number of pieces of work under way to develop a Scottish model. First, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill which seeks to support the use of prerecording evidence and avoiding the requirement for children to have to give evidence during trials.
- Secondly, work to improve the quality of joint investigative interviews.
- Thirdly, the Chief Medical Officer’s task force to improve services for adults and children who have experienced rape and sexual assault has agreed standards for examinations and appropriate criminal pathways for children and young people.
- Finally, the national trauma training framework has been invoked.

Arguments in favour of the status quo

14.149 I find the criticisms of the present procedures with children in serious sexual offences so compelling in most instances that I can think of no arguments for the status quo.
14.150 Apart from pretrial cross-examination, which is discussed elsewhere, two other obvious areas of controversy are the invocation of the Barnahus concept and the inquisitorial aspects of the approach to children, both of which do not chime with our adversarial tradition. Moreover, the former is in the very early stages of assessment in the London Child House model and in Scotland and arguably it would be precipitative to introduce it in Northern Ireland.

14.151 The concern with the inquisitorial approach to children is that it again counters our adversarial system, which traditionally has protected the inalienable right of an accused to defend himself/herself according to the rule of law.

Are there compelling arguments for change?

14.152 In my view, one has only to read the criticisms mentioned above to see the need for urgent procedural change in many respects if the interests of children are to be adequately safeguarded. A fresh culture of advocacy for children and vulnerable adults’ needs to be invoked, which will challenge the traditional style of advocacy.

14.153 Rethinking the approach to the need for the presence in court of a child and the nature of the cross-examination does no more than evoke a civilised way to treat vulnerable children and produce an environment where the truth is more likely to emerge and still respects due process.

14.154 The Barnahus project, promoted by the Council of Europe, and its offshoot, the Child Houses in London, is arguably well worthy of consideration. Scotland is also pursuing the concept with some enthusiasm. We must not let our children be left behind. This concept requires our close attention if we are to take seriously the need to protect children from being possibly traumatised a second time by a harrowing procedural process, whilst still protecting the rights of the accused to raise questions, but in a non-traditional setting.

Discussion

14.155 Crucial matters for children involving jury myths, lengthy delays in the process, disclosure, pretrial cross-examination and separate legal representation are the subject of separate chapters in this Review and as such are not replicated in this chapter.

14.156 The weaknesses procedurally in the system with reference to children and, for that matter, vulnerable adults are not only self-evident but in most instances can be altered without a change of law by implementing more robustly the law and procedures that are already in existence. Alongside this, there needs to be adjustment to the Crown Court Rules necessary to implement the new departure from the traditional style of advocacy with children and vulnerable witnesses.
14.157 We need to redefine conventional understanding of the rules for cross-examining vulnerable people in criminal trials coupled with the delivery of a strong direction to advocates to change their current practice. There has to be a real recognition that questions that ignore the principles designed to obtain accurate information from a witness and exploit their developmental limitations are inconsistent with a fair trial and contravene professional codes of conduct.

14.158 I believe it is becoming apparent for all to see that existing special measures designed to help children and vulnerable adults are not matched by appropriate advances in advocacy skills.

14.159 In addition to developing a better understanding of under-reporting and the attrition of reported offences, those participating in the justice system in Northern Ireland, including the judiciary, legal professionals, the PPS and the PSNI should seek to better understand the experiences of children and young people. They all need to recognise the extent of their confidence in the system in order to support and protect them and to deliver justice.

14.160 Accordingly, more mandatory training on such issues needs to be introduced by the Judicial Studies Board, the Law Society, the Bar Council, the PPS and the PSNI, invoking the assistance of the NSPCC’s YWS and NICCY.

Judiciary

14.161 Case management steps must become better informed, more robust and more consistently applied in the case of children and vulnerable adults, permitting the new culture of advocacy to take root. Contrary to the present system that confines obligatory case management hearings to those few cases involving murder and terrorism, all cases involving child complainants or other vulnerable witnesses in serious sexual offences should be afforded such hearings. A recognition by the judiciary of the trauma that such cases can occasion children must inexorably lend weight to that step being taken as a matter of urgency, with appropriate administrative staff being applied to such cases to ensure timely and comprehensive compliance with GRH directions.

14.162 GRHs should address, and the trial itself should implement, such matters as:¹³

- Defining the issues for trial.
- It is eminently reasonable that proposed questions to be asked in cross-examination require written notice in advance to the judge and the intermediary for their approval.
- An emphasis on the need to avoid tag questions, to use short and simple sentences and easy-to-understand language, and to avoid the use of tone of voice to imply an answer.

• Time limits on cross-examination.
• If limitation is to be put on cross-examination, how the jury will be directed.
• The presence of an intermediary and YWS.
• An emphasis on agreed statement of facts in advance to shorten the trial.
• Any legal aid complications arising.
• Disclosure and third-party disclosure, with a firm involvement of the defence and prosecution in presenting a cards-up approach from an early stage as to what disclosure is relevant to the defined issues.
• Venue: live link from a remote location is in many instances the preferred model for all vulnerable witnesses, especially children. This can reduce the trauma of the courtroom and the attendant danger of meeting the accused. It is also likely to provide more attractive facilities, which are lacking in many of our present courtrooms.
• Special measures.
• Timings etc. for the child, including scheduled breaks with a target time of two hours’ maximum waiting time.
• The requirement for an interventionist approach by the judiciary to ensure these matters are rigorously policed.

14.163 Those directions given at the GRH should be committed to written form so there is no room for confusion, and compliance should be monitored by a court officer.

14.164 In short, there must be a much more interventionist approach by the judiciary to ensure that questioning is designed to obtain accurate information without exploiting developmental limitations, unwittingly or otherwise. This new approach by the judiciary will require training. I am encouraged to note that the Northern Ireland Judicial Studies Board has already embarked on this process with a recent workshop for Crown Court judges in October 2018 that addressed these precise issues.

14.165 The JSB should make the needs of the child who is giving evidence and the dynamics of the trauma of child sexual abuse priorities in its training programme. Such an approach seems to be currently lacking. It should invoke the assistance of child psychologists and other outside agencies with expertise in this field. It is not enough to rely on this somehow emerging during the courses attended by our judges in England.

14.166 I understand that each new judge meets the JSB to discuss training, and reference is made to the presence of the Equal Treatment Bench Book on the Internet. This is clearly proving inadequate and specific training through lectures needs to be given to address the very weaknesses in the system contained in this chapter.
The first step may be to furnish each judge with a physical copy of the *Equal Treatment Bench Book* rather than relying on it to be searched online. It should physically sit on every judicial desk during a hearing involving a child.

Familiarity with that book, better training and an increased understanding of the needs of children would represent the most effective way of ensuring the following vital steps:

- Increased use of closed courts and combined measures for the child.
- Pretrial cross-examination of children may not necessarily have to take place in a courthouse at all and, in any event, should, wherever possible, occur well in advance of trial.
- Increased control over the tone and manner of cross-examination.
- Prioritising the attendance of children at a fixed time early in the day, reducing waiting time to an absolute minimum.
- Ensuring the child has adequate breaks during the hearing if it is necessary for them to attend. For most children, these should be regular and frequent.
- Ensuring, wherever possible, hearing dates are suitable for members of the YWS and intermediaries who are familiar to the child.
- Robustly enquiring into reasons for adjournments, which should be granted only exceptionally.
- Insisting technology is tested in advance of the hearing before the child arrives and, if necessary, insisting on the presence of an expert to effect this.
- Where courthouses are unsuitable for children, either considering a change of venue or making such directions as to arrival times of the parties as will ensure the child can arrive at court without meeting the accused or their family/friends. In addition, specifically addressing what can be done with the facilities available at a GRH to reduce the possibility of confrontation.
- Ensuring there is an interim assessment of each child by the intermediary, which should be circulated to the YWS.
- Ensuring there will be familiarisation of the child with the court, the judge and counsel prior to the hearing commencing.
- Discussion with the relevant intermediary as to the needs of the child before the day of hearing.
- Ensuring the child sees the ABE to refresh their memory at the optimum time for that child and not necessarily on the day of the hearing.
- Careful use of and insistence on simple language.
14.169 The Institute of Professional Legal Studies (IPLS), the Bar Council and the Law Society must consider bespoke training and the publication of a manual on advocacy and the handling of child and other vulnerable witnesses in court.

14.170 The starting point in trials dealing with all vulnerable witnesses should be the assumption that the advocate has undergone specific training about dealing with vulnerable witnesses and is able to ask questions in a way that effectively makes it unnecessary to have judicial or intermediary intervention.

14.171 Advocates should not undertake such cases unless they have performed such training. It must be recognised that, where an advocate does not have this professional competence, they are in serious dereliction of the duty to the court and in breach of their professional conduct rules.

14.172 Lord Thomas, former Lord Chief Justice of England and Wales, said recently:

> Such competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences are grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer.14

14.173 We can usefully borrow from England the Advocacy and the Vulnerable Training Programme developed and implemented by the Inns of Court College of Advocacy in late 2013 to ensure that all advocates understand the key principles behind the approach to, and questioning of, vulnerable people in the justice system. A working party should be established to carry out this work.

14.174 All advocates who undertake serious sexual offence cases involving vulnerable witnesses in the Crown Court or Youth Court are expected to participate. It is a pan-profession approach involving both defence and prosecution counsel. The objective is to ensure common ground in principles underpinning best practice.

14.175 The course embraces:

- pre-course online training (including lectures from experts such as legal academics and child psychologists covering child development);
- pre-reading of legal/practical materials;
- ending with watching GRHs in respect of four witnesses;
- interactive advocacy training; and
- each delegate has the opportunity to participate.

14.176 The materials for the course include an Advocate’s Gateway toolkit. These toolkits offer a wide range of good practice guidance for interviewing

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vulnerable witnesses and defendants in an array of circumstances. In addition, there is an advocacy training video.

Department of Justice

14.177 There has been unacceptable delay in taking steps to implement those provisions of the of the 2014 Independent Inquiry into Child Sexual Exploitation.

14.178 These are highly important provisions for the welfare of children and cannot be overlooked. While the absence of a minister is an impediment, steps should be taken to have the implementation ready for action once a legislature is restored. To commence virtually de novo at that stage is far too late.

14.179 Moreover, the Department of Justice must become more creative and broad-based in its thinking about how the plight of children can be improved in this area. I am surprised that there appears to be no research assistance provided to look beyond the confines of Northern Ireland and, indeed, the rest of the UK for developments in child welfare in serious sexual offences.

14.180 Hence it seems to me that no adequate consideration has yet been given to the Barnahus scheme, the pilots now operating in England or the move in Scotland towards adoption. This is a scheme that demands attention in the interests of the welfare of Northern Ireland children. It has on the face of it many attributes that would merit a pilot scheme in Northern Ireland, along the lines of the Child Houses in London or at the very least anxious scrutiny and analysis of how it is progressing there. I understand that, although the DoJ is aware of the Barnahus model, there is no action within the current domestic and sexual violence and abuse action plan, or the victim and witness action plan in relation to this model. I note, however, that the DoJ plans to undertake some exploratory work later this year to gather more information about this model and its effectiveness in other jurisdictions, and I urge that such work be given a high priority.

14.181 I also consider that the Department of Justice should flex its muscle and go one step further than England by actually making it a requirement for publicly funded advocates in serious sexual offence cases to have undertaken approved specialist training. That training should be drawn up and approved by the legal aid authorities in liaison with the Bar Council and the Law Society.

14.182 I observe that Lord Judge, a former Lord Chief Justice, has recommended to the government that rules of professional conduct be made consistent for the purpose of sexual offence cases. Currently, advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a child or other vulnerable person, and the department needs to take this matter up with the Bar Council and the Law Society.

14.183 This would oblige the Bar Council and the Law Society to set up special continuing professional development (CPD) training for those wishing to engage
in cases of serious sexual offences involving children. It would further spur the steps that those bodies are taking to introduce mandatory training for its members.

14.184 I recognise the commitment of the department to statutory case management (section 92 of the Justice Act (Northern Ireland) 2015) and to statutory time limits (The Criminal Justice Order (Northern Ireland) 2003). Although not yet introduced, they are genuine statutory attempts to eradicate delay and introduce consistency into necessary case management.

14.185 I am bound to caution, however, that statutory straitjackets placed on the discretion of highly experienced Crown Court judges with years of experience in the legal profession and in presiding over such trials can be counterproductive and impede the best interests of children in these harrowing cases.

14.186 Each of these cases is unique and is burdened with its own facts. A one size to fit all circumstances will serve only to restrict that vital flexibility that judges require if they are to do justice. In truth, only those who have served at the coalface really know what each case requires.

14.187 I therefore recommend that these statutory provisions be not implemented and, if they are not to be implemented, without the strongest of judicial guidance and the maximum of flexibility accorded to the judiciary.

Police Service of Northern Ireland

14.188 The PSNI, despite the lack of resources, needs to appoint, within the serious crime unit, officers who are trained by outside agencies and who specialise in serious sexual abuse of children.

14.189 ABE interviews need to be revisited. Frankly, such interviews should be conducted by child psychologists or members of the Bar after discussions with the intermediary and child psychologist. Experts should be in attendance to ensure the equipment is working properly.

14.190 Police officer training on ABES in general requires outside guidance and not reliance on internal training. In England, for example, some judges give of their free time to assist in some training sessions and, in addition, the services of the Bar, the Law Society and child psychologists should be invoked.

14.191 I consider that ABES should be conducted by counsel or a child psychologist but, at the very least, PSNI interviewers should be trained.

Public Prosecution Service

14.192 Similarly, the PPS needs to appoint within its ranks officers specially trained in such child matters who will have a general oversight of cases of serious sexual abuse involving children from the outset.
14.193 Such a specialist officer should be offering guidance to the PSNI from the time the crime involving child sexual abuse is reported.

14.194 The PPS also needs to prioritise dealing with cases involving children (see chapter 9, ‘Delay’) in order to reduce delay.

14.195 Victim Support NI indicates that PPS prosecutors often postpone meeting children and vulnerable witnesses until the day of trial, notwithstanding the existing practice advocating early meetings. The PPS should consider the use of live link to enable early meetings with counsel to take place outside the court setting.

14.196 Prosecuting counsel need to be more interventionist during the process to ensure judges are properly managing cases involving vulnerable witnesses. Judges should be invited, for example, to consider whether there should be a GRH. Prosecutors should also be encouraged to bring to a judge’s attention that counsel has departed from appropriate standards in respect of the proper treatment of vulnerable witnesses.

Northern Ireland Courts and Tribunals Service

14.197 The Northern Ireland Courts and Tribunals Service should:

- carry out an audit of facilities suitable for child witnesses in all Crown Courts and draw up a plan to meet deficiencies;
- provide appropriate child furniture and toys in all link rooms from where children are likely to be giving evidence;
- take steps to ensure adjustable camera angles are available in live link rooms;
- draw up a list of non-court venues and make provision for non-court remote live link, such as NSPCC premises or investment in mobile live link equipment; and
- take urgent steps to update and modernise the technology available in courts.

14.198 I understand steps are being taken, namely:

- From 5 March 2018, the NICTS has agreed a new contract for the support and development of NICTS courtroom technology. Under this contract, all NICTS technology currently used in courts will be refreshed and standardised over the lifetime of the contract (five years). This will improve and modernise current court facilities (including that in witness rooms) and will provide a foundation for criminal justice organisations to make it easier to present digital evidence in court.
- In recent months, the NICTS has been working with the supplier to agree the technical architecture of the new solution. It is important to take the
time to get this right, otherwise we may not get a solution that is fit for purpose. However, the first tranche of courtrooms that are to be upgraded has been agreed and we hope that this work will take place before March 2019.

- Meanwhile, the NICTS has established the electronic evidence working group, with representatives across criminal justice organisations (CJOs) and the DoJ. The group meets three times a year and is mainly a communication forum where issues/problems can be discussed. The purpose is to ensure that all CJOs are aware of each other’s future plans, so we do not get into a situation where one CJO takes forward a project without considering the impact on other organisations, which led to the recent difficulties in presenting ABE evidence in court.

- One outcome so far from this working group is that, following the problems displaying body cam evidence, the PSNI has now agreed to provide laptops in designated courtrooms so that this evidence can be displayed.

14.199 Finally, I fail to see the logic in confining the availability of intermediaries to a child defendant to when they are giving evidence. There should be a duty to assist a defendant before the trial to enable that defendant to prepare effectively and understand all aspects of the trial process. I also do not understand why live link should not be available to a child defendant who is suffering fear or distress.
Proposed recommendations

Training

170. Regular mandatory training should be carried out on the issues of children’s rights, child protection, developmentally appropriate questioning and the dynamics of child sexual abuse in serious sexual offences in the court process by the Judicial Studies Board, the Law Society, the Bar Council, the PPS and the PSNI.

171. Publicly funded advocates in serious sexual offence cases must have undertaken approved specialist training in serious sexual offences involving children.

172. Each Crown Court judge, and each Crown Court, to be given a physical copy of the Equal Treatment Bench Book.

Judiciary

173. In every Crown Court case involving sexual offences against a child, Crown Court judges should consider:

- the use of closed courts and combined measures for the child;
- the possibility of alternative court venues or non-court facilities such as non-court remote live link if court facilities are unsuitable for the child;
- prioritising the attendance of children at a fixed time early in the day, with a target maximum waiting time from arrival of two hours;
- making provision at the outset for adequate breaks during the hearing;
- adopting a flexible attitude and seeking the advice of the intermediary as to who should accompany the child giving evidence, the manner in which the child gives evidence and where that evidence should be given;
- ensuring, wherever possible, hearing dates are suitable for members of the YWS and intermediaries who are familiar to the child;
- robustly enquiring into reasons for adjournments, which should be granted only exceptionally;
- insisting technology is tested in advance of the hearing before the child arrives and that a suitable expert is on hand;
- ensuring there is an interim assessment of each child by an intermediary, which should be circulated to the YWS;
- discussion with the relevant intermediary as to the needs of the child before the day of hearing;
- ensuring that there will be familiarisation of the child with the court, the judge and counsel prior to the hearing commencing;
- careful use of and insistence on simple language and control of aggressive cross-examination; and
- ensuring that child witnesses are not cross-examined in an authoritarian or frightening manner.
174. All cases involving child complainants or other vulnerable witnesses in serious sexual offences should be afforded an obligatory case management hearing, with appropriate administrative staff to ensure timely and comprehensive compliance with directions.

175. GRHs should be introduced in all hearings involving child complainants/vulnerable adults or a child/vulnerable adult accused addressing such matters as:

- defining the issues for trial;
- proposed questions to be asked in cross-examination, with written notice in advance to the judge and the intermediary of their content for his/her approval;
- emphasis on the need to avoid tag questions, to use short and simple sentences and easy-to-understand language, and to avoid a tone of voice that implies an answer;
- time limits on cross-examination;
- if limitation is to be put on cross-examination, how the jury will be directed;
- the presence of an intermediary and YWS;
- an emphasis on agreed evidence to shorten the trial;
- any legal aid complications arising;
- disclosure and third-party disclosure, with firm involvement of the defence and prosecution;
- venue including live links;
- special measures;
- timings; and
- the need for a more interventionist judicial approach.

176. Directions given at the ground rule hearing to be committed to written form.

Department of Justice

177. Implement without further delay and to the extent deemed appropriate the provisions of the 2014 Independent Inquiry into Child Sexual Exploitation. Implement fully the recommendations of the Northern Ireland Audit Office report in March 2018.

178. Engage research assistance to keep abreast of developments in child sexual abuse and draw on research and innovative practice overseas.

179. Give urgent consideration to the advantages of the Barnahus scheme and Child House pilots now operating in England and to consider a similar pilot in Northern Ireland.

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180. Given the unique circumstances that often arise with child complainants and defendants in serious sexual offences, approach with caution the implementation of statutory case management and time limits which do not carry the imprimatur of the judiciary.

181. Provide legal representation for child complainants until the trial commences.

**Institute of Professional Legal Studies and the Legal professions**

182. The Bar Council and the Law Society to set up special CPD training and bespoke manuals for those wishing to engage in cases of serious sexual offences involving children.

183. New barristers should receive training and guidance both whilst at the Institute of Professional Legal Studies and at the Bar about the basic principles of questioning children and vulnerable adults.

184. It should be a matter of specific professional misconduct to inappropriately question a child or vulnerable person.

**Public Prosecution Service**

185. The PPS to take further steps to ensure pretrial engagement with the child or family well in advance of trial and arrive in court with a detailed awareness of the case.

186. The PPS to appoint officers with a special expertise in the dynamics of child sexual offences, who should have exclusive oversight of all such cases from the time of reporting to the PSNI until disposal at trial.

187. The PPS should make it a condition of the retainer for serious sexual offences involving children that counsel have attended a specified awareness course.

188. The PPS should provide appropriate child-sized furniture and toys in all ABE interview rooms from where children are likely to be giving evidence.

**Police Service of Northern Ireland**

189. The PSNI should revisit its training for ABE interviews, invoking the assistance of the judiciary, the legal professions and other outside bodies including child psychologists.

190. Take steps to ensure adjustable camera angles, with the presence of a camera operator, and adequate sound quality are available in rooms where ABEs are occurring.

191. To appoint a specialised child unit that will deal exclusively with child witnesses.

192. Provide appropriate child-sized furniture and toys in all ABE rooms from where children are likely to be giving evidence.
Northern Ireland Courts and Tribunals Service

193. Carry out an audit of facilities suitable for child witnesses in all Crown Courts and draw up a plan to meet deficiencies.

194. Provide appropriate child-sized furniture and toys in all link rooms from where children are likely to be giving evidence.

195. Take steps to ensure adjustable camera angles are available in live link rooms.

196. Draw up a list of non-court venues and make provision for non-court remote live link such as NSPCC premises or investment in mobile live link equipment.

197. Introduce a system that records waiting times at court for child witnesses, commencing from time of arrival.

198. Set up a system of feedback of the experience of children after the case is completed to better inform future changes.

199. Ensure adequate equipment is available to permit a child to act naturally during the ABE experience.

200. Ensure the availability of a registered intermediary at all stages for all child complainants and accused children.

201. Ensure that an initial needs assessment is carried out on all child complainants and accused children.

202. Article 21A of The Criminal Evidence (Northern Ireland) Order 1999 should be amended to extend the availability of live link measures to a child defendant on the basis of fear or distress.

203. Article 21BA of The Criminal Evidence (Northern Ireland) Order 1999 should be amended to extend the provision for intermediaries to a child defendant pretrial.
Appendix F

Statistics

1. Sexual offences recorded crime has been increasing year on year with 3,443 crimes recorded in 2017/18. Of these, 3,317 had a person victim\(^{16}\) with 1,936 of these relating to children. Since 2011/12 the number of child victims of sexual offences recorded crime has almost doubled from 985 to 1,936, an increase of 96.5%.

2. Over the same period there has been a 72.4% increase in sexual offences recorded crime for victims excluding children.

3. The percentage change increases year on year for child victims of sexual offences recorded crime has been declining. There was a high change of 26.7% between 2012/13 and 2013/14 but this has dropped to 3.6% increases between 2015/16 and 2016/17 and also between 2016/17 and 2017/18. The percentage change between 2016/17 and 2017/18 for victims of sexual offences recorded crime excluding children was 11.3%.

4. Children make up the largest proportion of victims of sexual offences recorded crime. In 2013/14, 61.5% of victims of sexual offences recorded crimes were children. This has dropped slightly to 58.4% in 2017/18.

5. Of those under 18, the largest proportion are in the 11-15 age category (51.8% in 2017/18). Those aged 11-15 relate to three-tenths (30.2%) of all victims of sexual offence recorded crimes in 2017/18.

6. In 2017/18, for child victims of sexual offences recorded crime, sexual assault on a female was the highest proportion of offences (29.6%) followed by sexual activity offences (28.7%). Rape (including attempts) makes up 1 in 5 (20.4%) of sexual offences recorded crimes for children in 2017/18.

7. For offences of sexual assault on a female with a child victim, 43.6% relate to children 10 years and under while 42.8% are for 11 – 15 year olds in 2017/18. The number of child victims of sexual assault on a female have increased by 84.2% from 2011/12 (311) to 2017/18 (573).

8. In 2017/18 for offences of sexual assault on a male with a child victim, 65.0% relate to children 10 years and under. Figures for child victims of sexual assault on a male have more than doubled between 2011/12 and 2017/18 from 124 to 257.

9. Rape (including attempts) for child victims have increased by 47.9% between 2011/12 and 2017/18. In 2017/18 around a third (33.1%) of child victims of

\(^{16}\) 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.
rape (including attempts) are 10 years and under and 42.3% relate to 11-15 year olds.

10. Child victims of sexual activity offences have increased from 207 in 2011/12 to more than two and a half times this in 2017/18 (556). The majority of child victims in 2017/18 of sexual activity offences are in the 11-15 year age bracket (77%). This legislation relates to children under 16.

PPS Sexual Offences Relating to Children17 (Excluding Indecent Images)
2012/13 to 2017/18

11. The number of files with sexual offences against children received by the PPS has varied across the last six years with a high of 492 cases in 2012/13. A total of 452 cases with sexual offences against children were received in 2017/18, an increase of 24.2% on 2016/17 which had the lowest number of cases across the six years (364).

12. The number of decisions issued by the PPS for suspects with sexual offences against children varied between 2012/13 and 2017/18 with a high of 627 in 2012/13 and a low of 266 in 2016/17.

13. The majority of decisions issued by PPS for sexual offences against children are for no prosecution. 2016/17 saw the highest proportion of suspects for these offences prosecuted on indictment (30.5%). This dropped to 15.9% in 2017/18.

14. The overall conviction rate for defendants dealt with in the Crown Court for sexual offences against children has varied between 2012/13 and 2017/18. The conviction rate reached a high of 79.0% in 2015/16 but this has dropped to 60.0% in 2017/18.

15. 10.6% of defendants dealt with in the Crown Court for sexual offences against children pled guilty to all offences in 2017/18, a drop from 19.5% in 2016/17.

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17 Relates to sexual offences that specified the victim was a child in the offence description.
Chapter 15

Training
There are many paths that lead us as we muddle through the throng.
There are many roads to follow to avoid the one that’s wrong.

‘A journey’s wish’
Leslie Owen Wilson

Issue
Is sufficient training given to the main participants in the criminal justice system on serious sexual offence issues so as to ensure the law is properly interpreted and procedures are appropriately followed?

Current practices
15.1 Excellent guides to both current practices and opportunities to improve training, and on which I have drawn heavily on in this chapter, are to be found in Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry, initiated by ministers in 2014 (‘the Marshall report’); the current strategy, Stopping Domestic and Sexual Violence and Abuse in Northern Ireland (Department of Justice, 2015); the Department of Justice commissioned ‘Northern Ireland Victim and Witness Survey (NIVWS)’ in 2016, and the response thereto; and a 2017 research report commissioned by the Department of Justice, Addressing Domestic and Sexual Violence and Abuse: Identifying Best Practice Professor Monica McWilliams and Dr Jessica Doyle, Transitional Justice Institute, Ulster University, October 2017 (‘the McWilliams Report’).

15.2 The Marshall report included the following recommendations relevant to training:

- Supporting recommendation 45: the Public Prosecution Service (PPS) should ensure that prosecutors dealing with sexual offences against children continue to receive training at regular intervals on the dynamics of child abuse, including child sexual exploitation (CSE).
- Supporting recommendation 46: awareness raising about the dynamics of child abuse and CSE in particular should be available for all legal personnel and should be mandatory for all legal professionals dealing with child abuse cases. This should be made the responsibility of the PPS for its own legal staff, the Northern Ireland Bar for its staff and the Judicial Studies Board for judges.

Judiciary
15.3 Members of the judiciary are provided with up-to-date inputs either through Judicial Studies Board (JSB) seminars in Northern Ireland, through attendance at the Judicial College or events elsewhere in the UK. Recent examples include
the October 2018 Crown Court workshop on evidence-in-chief and cross-examination of witnesses in serious sexual offences cases.

15.4 Crown Court judiciary are sent to the Judicial College’s training course in England and Wales on serious sexual offences, which is, therefore, essentially responsible for the detailed content of the training.

15.5 Hence, up-to-date training is given a high priority. As an example of a swift response to training needs, upon receipt of the Marshall report in March 2015, the matter was placed before the subsequent meeting of the Judicial Studies Board on 21 April of that year. The board agreed that, in compliance with recommendation 46, the full report (recommending mandatory awareness training about CSE) would be distributed to all courts judiciary under cover of an email specifically advertising that recommendation and the requirement to raise awareness of the matters contained within the report. Accordingly, a circular was issued to judges and deputies on 5 May 2015.

15.6 The JSB and the Office of the Lord Chief Justice (OLCJ) were subsequently represented at a conference, Protecting Children from Sexual Exploitation in Northern Ireland: Learning the Lessons, organised by the Northern Ireland Commissioner for Children and Young People, on 17 September 2015, at which Kathleen Marshall, the report’s author, was the main speaker.

Northern Ireland Bar

15.7 I am satisfied the Bar Council takes very seriously the matter of professional training and offers lectures, seminars and conference attendances on matters of serious sexual offences.

15.8 Thus, for example, in response to the Marshall report in November 2014, the Bar confirmed it would continue to deliver specialist training to publicly funded barristers. The training programme included child abuse and CSE, vulnerable witnesses, violence against women and representation of those with communication needs. The Bar offered this training through continuing professional development (CPD) sessions for practitioners.

15.9 A focal point of the programme was the Bar’s participation in the European training project initiated by the Council of Bars and Law Societies of Europe (CCBE), which focused on the training of lawyers on the law regarding violence against women. The training was delivered by a multidisciplinary panel of presenters including specialists from the Bar and judiciary of Northern Ireland in family and criminal law.

15.10 Barristers are independent practitioners: whilst the Bar considers that this precludes mandatory training in specific areas, the Bar continues to provide opportunities on discrete areas such as child sexual exploitation, vulnerable witnesses and child protection. Such CPD is accredited as an example of the
mandatory advocacy training that all practising barristers are now required to undertake in every CPD year.

15.11 The Bar has provided this training in a range of formats as a support for practitioners. In addition to events, barristers can access resources such as *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court*, which enables practitioners to engage in dedicated CPD on demand. The Bar is committed to expanding the catalogue of such specialist CPD content to ensure those practising in the family and criminal courts have an enhanced awareness of child abuse, child sexual exploitation and domestic violence.

15.12 The Northern Ireland Bar has created a pack that highlights best practice training resources on handling vulnerable witnesses, including papers, presentations and podcasts, which practitioners can use to refine their witness-handling skills.

15.13 The resources to which barristers are signposted include the self-learning materials that practitioners in England and Wales who are seeking specialist accreditation to be briefed in criminal cases involving vulnerable witnesses must undertake to be admitted to the accreditation process.

15.14 The resource was shared with members in March 2018 as part of a series of emails around mandatory CPD advocacy.

15.15 A cross-jurisdictional seminar on the topic of advocacy in sexual offence cases is to be delivered in Northern Ireland in early 2019. The seminar will be led by leading prosecution and defence barristers from the Bar of Northern Ireland and will include contributions from senior colleagues on the Bar of Ireland’s Advanced Advocacy Committee. The Bar of Ireland also plans to include the vulnerable witness handling resource guide, referred to at paragraph 15.11 above, on its practitioner hub, which is currently in development.

**Law Society of Northern Ireland**

15.16 The Law Society (LS) organises a large number of training sessions and seminars for its members on domestic violence and sexual violence.

15.17 Characteristically, when this Review broached with the LS the necessity of raising the profile on issues of rape mythology and stereotypical opinions, it promptly replied that it was in the process of planning its programme for next year and was open to producing a CPD event on such matters.

15.18 Whilst these specific subject areas (including rape mythology) have not appeared in recent years on the programme, the LS has been in discussions with groups such as Women’s Aid around the issue of domestic (including sexual) violence. Partnership and collaboration with other agencies is something the LS has done and will continue to explore in updating and refreshing its CPD programme in the future.
Police Service of Northern Ireland

15.19 There is no doubt that the Police Service of Northern Ireland (PSNI) take training seriously. The assistance that has been given to this Review to understand the training employed has been time-consuming and exemplary.

15.20 My team attended two training courses at Garnerville police training college. The first course was a week-long specialist detective training course on adult safeguarding. This is a specialist sexual assault investigator development programme in which qualified police officer trainers (detectives) with experience of performing duties in a rape crime unit (RCU) deliver this training to detective constables, detective sergeants and detective inspectors with the RCU who investigate serious sexual assaults. The RCU officers in their role are responsible for evaluating and quality assuring the initial response to the rape or serious sexual offence before advancing the investigations. On the day when my team attended this training, the schedule included a course introduction, the role of the specialist sexual assault investigator, investigating rape — identifying an effective first response and identifying rape — and forensic considerations. The course also included a helpful presentation by Nexus chief executive, Cara Cash-Marley.

15.21 Secondly, there was a training foundation course at Garnerville for a group of enthusiastic and well-prepared student police officers, focusing on the role of a constable when responding to reports of rape and other serious sexual offences. This again included a presentation by Nexus highlighting myths about rape. It dealt with:

- how personal attitudes and values may impact on an investigation;
- what is meant by rape trauma and how it may affect how a victim presents;
- what actions should be taken by a first responder to a report of sexual assault;
- relevant legislation;
- the concept of consent;
- The Rowan centre; and
- gathering evidence and crime log keeping.

15.22 A significant element of training within the student officer training programme (carried throughout foundation training, leadership training and development) is to educate and develop officers and staff in respect of diversity, focusing on human rights, section 75 obligations, policing with the community, communication skills, values and ethics. A number of community, charity, voluntary and partner organisations are invited to attend the police college and engage with new students.

15.23 As indicated in chapter 1, ‘Background’, since 2010 the PSNI has introduced a significant programme of change on how services would be delivered to victims,
witnesses and callers. The need for officers to be empathetic and understanding in all incidents is emphasised, particularly in response to the Victim Charter of November 2015.

15.24 The PSNI is now trained on their obligation 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. The duty officers are trained to assist or pass a message on to the appropriate officer. Victims are entitled to receive an update from the police (within 10 days) on what they are doing to investigate the crime. Further updates are to be provided as appropriate, information on what to expect from the criminal justice system in terms of help and support available (including information on specialist support organisations) and decisions not to proceed with or end an investigation.

15.25 In relation to the conduct of investigations, a checklist of what is needed (in terms of evidence provision) is now included in the service level agreement, revised in 2015, between the PSNI and the PPS.

15.26 Training is also provided on special measures and witness classification alongside other courses such as the initial crime investigators’ development programme, investigative supervisors’ development programme, managers of serious and complex investigative programme and other specialist interview courses.

15.27 The PSNI has also been active in training or educating the public at large, and young people in particular, on issues such as consent and aspects of sexual assault. The most recent example was the launch of No Grey Zone, a new multi-agency campaign with a ‘no means no’ message. It was headed by the PSNI and backed by many support agencies, including the Rowan centre and the students’ unions from Ulster University and Queen’s University.

Public Prosecution Service

15.28 The PPS works hard and determinedly on training. It published an updated victim and witness policy in summer 2017. The policy includes details of the service’s approach to meeting the needs of vulnerable and intimidated witnesses and the identification of special measures, including registered intermediaries.

15.29 All prosecutors and panel counsel attend mandatory training on the Victim Charter. Panel counsel attended a masterclass seminar on prosecuting sexual offences delivered by leading UK experts in May 2017. Guidance and training materials are regularly distributed electronically to them. PPS panel counsel must comply with the code of ethics in the PPS code for prosecutors.

15.30 Training about communicating with young people is being delivered by the National Society for the Prevention of Cruelty to Children (NSPCC) and the Voice of Young People in Care (VOYPIC) regarding the needs of children in care.
15.31 The PPS communications team undertook service user research with Fathom between November 2016 and March 2017. The resulting report identified a number of priority audiences, which included victims and witnesses, and set out a series of recommendations to improve delivery using digital channels.

15.32 Policy and operational leads have received training on topics including modern slavery, LGBT+ awareness and equality issues, violence against women and girls, and judicial review.

15.33 Training is pending on the topic of recovered memory, particularly relevant to cases of non-recent sexual violence.

Institute of Professional Legal Studies

15.34 The Institute of Professional Legal Studies (IPLS) provide training on:

- law and procedure, Bar advocacy, evidence, special measures, ethics and etiquette; and
- in criminal litigation, there is an evidence section, which is taught to both Bar and solicitor trainees.

15.35 Rape mythology is not dealt with (that is, by way of formal teaching session) but reference is made to dealing with witnesses/clients, including vulnerable witnesses and clients in advocacy and consultation training. Trainees are referred to websites of organisations such as Rape Crisis. A short chapter on preconceptions is included as part of effective communication in the Bar advocacy file.

Department of Justice

15.36 It is imperative that the DoJ ensures that all personnel dealing with serious sexual offences have training on the very issues that have surfaced in this Review. Informed legislation and procedural adjustments can only emanate from a service that is adequately trained in the kind of issues that permeate this chapter. Hence it is important that the DoJ invokes the assistance of the multiple outside agencies available in training their staff.

Discussion

15.37 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 independent sexual violence advocates (ISVAs) reporting that complainants 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. I deal with this in chapter 2 of the Review.

15.38 I note, for example, in England and Wales, 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 and Wales, there are proposals, still not perfected, that oblige that 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.

15.39 Recognising the modern digital era in which we live, online training on victim and witness awareness issues could be further explored, highlighting the commitments under the EU victims’ directive, the Victim Charter and the Witness Charter.

15.40 As I have learned in this Review, current international best practice is a crucial ingredient in exploring how we should progress in Northern Ireland. I consider that our agencies pay insufficient attention to such practices alongside their own practice and training. This does not require expensive travel or attracting foreign experts. It can be based on a comprehensive desk-based review of global literature and European national action plans (NAPs), as occurred in the McWilliams research.

15.41 Three further key components relevant to training in this area can be derived from the McWilliams research. First, that issues surrounding appropriate procedures do not operate in isolation but rather interact with and compound one another. Interpersonal risk factors act in tandem with community and/or societal factors, and it is this concurrence that is crucial in risk assessment and needs to be to the fore in training exercises.

15.42 Secondly, successful measures of training generally engage multiple stakeholders simultaneously, including not only key service providers but also community leaders, non-governmental organisations (NGOs), and peer groups amongst others. Training programmes should place a great emphasis on the concept of multiple stakeholder engagement rather than the odd engagement of an outside source from time to time.

15.43 Thirdly, 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. I doubt whether the various bodies named in this chapter have much idea of what training the others are currently giving. The Department of Justice should take the lead in coordinating such a training strategy.

15.44 In order for training procedures to be effectively informed, reformed and implemented, it is important that everyone realises what are the root causes of high levels of under-reporting and withdrawal from the process. Such root causes require to be explored in the course of inadequate or absent economic empowerment programmes (with gender training), empowerment training for women and girls, community mobilisation programmes, school/group, training/education-based interventions, public education on rape myths and stereotypes,
and programmes aimed at improving service level responses to sexual violence would all serve to provide a more informed understanding of necessary changes and reforms set out in this Review.

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

15.46 This Review has strongly recommended the adoption of a fresh approach to, and radical departure from, the traditional style of advocacy when questioning vulnerable witnesses. The development of interactive courses for all advocates who participate in such trials is crucial. Advocates need to acquire specialist skills in managing vulnerable witnesses as part of their basic training, which is set out in chapter 14.

Judiciary

15.47 I consider that, as part of the need to educate the public on the dangers of rape mythology, misleading stereotypical characterisation, the problems of under-reporting and dropout, and the devastating traumatic consequences of sexual offending, the judiciary should become more open to multiple stakeholder engagement in training and to the potential offered from training by outside agencies such as Women’s Aid, Nexus, Victim Support and the Mens Advisory Project (MAP), various groups representative of the marginalised communities referred to in chapter 13 in this Review or from expert psychologists in this area.

15.48 If judicial training is to be effective, training has to be regularly given, refreshed and coordinated across all stakeholders in the criminal justice system involving serious sexual offences.

15.49 I found that in London, some Old Bailey judges voluntarily assisted police training in such matters as achieving best evidence (ABE) interviews. The judiciary in Northern Ireland should be open to offering on a voluntary basis similar services.

Bar Council of Northern Ireland

15.50 Notwithstanding the care taken by the Bar Council in training, I consider that much more focus needs to be given to the issues arising in this Review in the sphere of serious sexual offences.

15.51 Only barristers who have undergone approved specialist training in such offences should be publicly funded and be permitted to participate in trials of serious sexual offences.

15.52 Greater use of multiple stakeholder engagement and outside agencies should be invoked in drawing up such a specialised training programme.
15.53 The specialised training set out in chapter 14 of this Review with reference to questioning of vulnerable witnesses needs to be instituted as soon as possible.

Law Society of Northern Ireland
15.54 Much of what I have said about barristers applies to solicitors. The Law Society needs to raise the profile of training with the help of outside agencies and multiple stakeholder engagement on issues set out in this Review.

Police Service of Northern Ireland
15.55 The PSNI are the first and probably the longest line of contact with complainants and accused persons. Officers need renewed training and refresher courses to more fully appreciate that sensitive handling of complainants and those who are accused will almost inevitably assist in the effective building of the case.

15.56 Gathering more complete information about complainants’ experiences, thoughts and feelings may aid in countering the rape myths that exist by making their actions more understandable and their story more believable. Addressing these matters at an early stage may allow the ABE to play an important role effectively in combating such myths.¹

15.57 Despite the training that the PSNI gives to their officers, I still encountered too many instances with complainants where adequate preparation for the ABE at the initial stages was overlooked.

15.58 Police officers need more training in how to sensitively interview complainants, especially children and the vulnerable. They need to recognise the value of establishing rapport, actively listening, asking open questions that allow the complainant to speak freely, avoiding language that suggests judgement and signposting legal advice that should become available.

15.59 I also encourage training to provide a more consistent approach to ABEs so that, 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.

15.60 Not only complainants but members of the legal profession and judiciary record that some ABEs are rambling, discursive and contain too many irrelevancies.

15.61 Complainants assert they can be unduly lengthy, with the complainant detained for several hours before completion.

15.62 Importantly, they fail to address key issues that would perhaps serve at the outset to impede rape myths that might arise.

15.63 Moreover, I was told by complainants of:

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• Meeting different police officers in a genre of crime where consistency is vital and training should emphasise the enormous benefits of personnel consistency wherever possible.

• Being given inadequate or vague information as to the progress of the case during investigations and not properly kept up to date despite the training that is currently given.

• Not being adequately informed as to what had happened after court hearings. It is simply not enough to be told the case is adjourned. A full explanation needs to be given, accompanied by a full account of what has happened at each interlocutory hearing by the officer who was present and not by an officer who is relating what someone else told them.

• Being dealt with at the outset with less than appropriate empathy or understanding. The complainant should be told at the outset the method of making complaints about police treatment or attitude.

15.64 In addition, training needs to emphasise that at the earlier stages locations in police stations should be found to ensure they have quiet, distraction-free, comfortable rooms where reporting by or interview of a complainant can be carried out before they are eventually taken to a centre such as the Rowan in Antrim. Again I was told of initial meetings in cold, comfortless waiting rooms that did little to settle already emotionally disturbed complainants.

15.65 Accused persons reporting to police stations recorded being kept waiting in public areas for lengthy periods before being dealt with. Training must include the fact that it is acutely embarrassing to be exposed to public gaze in this manner. Accused persons are entitled to be dealt with in a dignified and prompt manner wherever possible on an appointment basis.

15.66 The McWilliams report echoed my own experience, with some complainants that not all police officers were familiar with the special measures that may be applicable to vulnerable complainants despite the training that has been given by the PSNI.

15.67 This suggests the current training is insufficiently comprehensive and the need for increased training for all front-line responders on relevant special measures that are available to assist the complainants in relation to support for witnesses in providing evidence at court.

15.68 Finally, complainants need informed general advice at the outset as to how the legal process is likely to unfold. The absence of this was a regular complaint against the PSNI.

15.69 There is a need to explore appropriate methods of delivery of public education to the disadvantaged and marginalised in our society.
Public Prosecution Service

15.70 Once again the contents of the McWilliams report echo precisely my own experience in meeting complainants.

15.71 While, on the one hand, some participants spoke positively about the pre-court contact they had with the PPS, others appeared to have had expectations that there would have been a greater level of contact and were accordingly disappointed to find this did not happen.

15.72 Feedback regarding engagement with PPS legal representation was also mixed (DoJ 20162). Some expressed disappointment with the brevity of the meetings with the PPS legal team. They noted the lack of opportunity to build a rapport with their legal representatives before going into court and the lack of information provided about what would happen in court.

15.73 Participants alluded to 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 and inadequate explanations about what had occurred at the end of the case.

15.74 Some of the concerns raised by complainants related to the time available to discuss the case, and the level of detail and explanation as to what would happen. Concerns were also expressed that the language used by prosecutors, both in written correspondence and at court, was difficult to understand.

Institute of Professional Legal Studies

15.75 Appropriate training at this early stage of legal careers is crucial. Issues arising in this Review should be included in the curriculum. In particular, I strongly recommend the IPLS take urgent steps to liaise with voluntary agencies — for example, Nexus, Women’s Aid and the PSNI — to avail itself of their services to construct appropriate curriculum courses to address these issues. The contents of chapter 14 dealing with the questioning of vulnerable witnesses require urgent inclusion in the curriculum.

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2 DoJ (2016) Initial Findings of Research with Victims of Sexual Abuse and Violence.
Proposed recommendations

204. The Northern Ireland Criminal Justice Board should set up a committee to coordinate subjects for training and multiple stakeholder engagement in the various training programs suggested in this chapter.

Judiciary/Law Society of Northern Ireland/Bar Council of Northern Ireland

205. 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, jury guidance, the reasons for under-reporting of, and withdrawal from, the process of sexual offences, cross-examining children and vulnerable witnesses, the problems of marginalised communities and how these may be best addressed.

206. The Judicial Studies Board, the Bar Council and the Law Society should afford a higher training priority to developments and research in jurisdictions outside Northern Ireland in dealing with serious sexual offences.

207. The training mentioned above may profitably include an online element highlighting, for example, the commitments under the EU victims’ directive, the Victim Charter and the Witness Charter.

208. The Law Society and the Bar Council should produce joint CPD events, with the assistance of relevant outside agencies, specifically dealing with such matters as are set out above.

209. The Judicial Studies Board, the Bar Council and the Law Society should consider offering their services to the PSNI in assisting to train officers involved in serious sexual offences.

210. A judicially led committee should be set up, working to develop specific training aimed at advocates who appear in trials involving serious sexual offences.

Police Service of Northern Ireland

211. Training and, importantly, regular refresher training should emphasise the following:

- a stronger emphasis in training on adequate preparation for the achieving best evidence interview (ABE) at the initial stages, including how to sensitively interview complainants;
- recognition of the potential of assistance from the Bar Council, the Law Society and the judiciary in training officers for ABE interviews;
- exploring a consistent approach to ABEs that establishes, first, a general investigative interview, followed by a second shorter interview, ordered, chronologically presented, directed only to the relevant material and which will be presented as evidence-in-chief;
• recognition of the importance of consistency in the complainant meeting the same police officer during the procedures;
• a greater priority to be given to complainants being provided with comprehensive explanations as to the progress or lack of progress in the case and specifically what has happened at each individual hearing;
• the need, at the earliest stages of reporting, to find quiet, distraction-free, comfortable rooms where a complainant can go before they are eventually taken to a centre such as the Rowan in Antrim;
• the need to positively explain to the complainant what the legal process may involve, including, for example, a full explanation of special measures; and
• the need to deal with visits by the accused to police stations in a private and dignified manner, wherever possible on an appointment basis;
• the need to ensure that when a case is completed, a full explanation is given to the complainant about the outcome; and
• the problems facing marginalised communities in addressing serious sexual offences.

Public Prosecution Service

212. Greater emphasis on specific training of prosecutors on the treatment of complainants, especially concerning:
• engagement with panel counsel;
• interpersonal interaction with complainants;
• the need to meet with them well in advance of trial save in the most exceptional of circumstances;
• the need to be fully knowledgeable of the facts of the case no matter how late counsel has come into the case;
• the need to discuss with the complainant the issues that are likely to arise in the trial, including a detailed analysis of special measures that may be available; and
• the need to vigorously oppose the introduction of previous sexual experience of the complainant at trial, when permission to do so has not been granted;
• marginalised communities and the problems of serious sexual offences; and
• the need to ensure that when a case is completed, a full explanation has been given to the complainant about the outcome.
213. Regular refresher training on:
   • rape mythology and stereotypical responses in the criminal justice system;
   • sensitive examination of children and vulnerable witnesses in serious sexual offences; and
   • the traumatic effects of serious sexual offences

Institute of professional legal studies
214. The IPLS should invoke the services of outside agencies to address such issues as:
   • rape mythology and stereotypical responses in the criminal justice system;
   • sensitive cross-examination of children and vulnerable witnesses in serious sexual offence cases.

Department of Justice
215. The DoJ should invoke the services of outside agencies and multiple stakeholder engagement in training their officials.
Chapter 16

The jury system
A review of the law and procedures in serious sexual offences in Northern Ireland
Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

Lord Devlin
Trial by Jury

Issues

- Should serious sexual offences be tried without a jury?
- Should defendants or the prosecution in serious sexual offences have the right to opt for trial without a jury?
- Should there be a third possible verdict — namely not proven — in serious sexual offences?
- Should juries have a gender quota?

Current law

16.1 Today in Northern Ireland, there is a strong presumption for jury trials in all cases, with less than 2% of all Crown Court cases per year held without a jury in Northern Ireland under the Justice and Security (Northern Ireland) Act 2007, which makes provisions for a trial without a jury. However, the severe threat from Northern Ireland-related terrorism and the presence of violent proscribed organisations continues to pose risks to the criminal justice system, which can necessitate non-jury trials in a small number of cases where such a threat arises.

16.2 Provisions under the 2007 Act are separate from those contained in section 44 of the Criminal Justice Act 2003, which enables trials to be conducted in England and Wales without a jury, where there is evidence of a real and present danger that jury tampering would take place.

Background

16.3 Courts in the UK have maintained a healthy realism about the integrity of jurors, their ability to focus on the evidence and to follow judicial directions.

16.4 In 2006, the Court of Appeal in England said:

There is a feature of our trial system which is sometimes overlooked or taken for granted … juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright … We cannot too strongly emphasise that the jury will follow [the judge’s directions], not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their
own instinctive and fundamental belief in the need for the trial process to be fair.

16.5 This is the theory that juries react well to being given a noble purpose.

16.6 Today, therefore, this system is a cornerstone of our justice system, enshrined in our unwritten constitution and imbued with such unassailable legitimacy that serving on a jury is established as one of the key duties of the citizen. It is many people's only point of contact with the courts and the justice system, even if, paradoxically, it remains shrouded in myth and mystery.

16.7 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 order to guarantee a fair trial.

16.8 It was only in the most pressing of circumstances that the UK government removed juries in Northern Ireland under the Diplock system for those charged with scheduled offences — mainly offences associated with members of proscribed organisations — and such cases are now but a fraction of our criminal trials as our society moves towards normality.

16.9 However, as social media platforms and online news have become ubiquitous, concerns about the impact of prolific and adverse publicity have been accompanied by difficulties in numerous common-law jurisdictions with tweeting jurors, Instagramming jurors, jurors unable to curb their detective impulses and even befriending the accused on Facebook.

16.10 This growing concern is further fuelled by increased awareness of the widely held presence in our society of misconceptions, myths and stereotypes about rape and other sexual offences. (see chapter 6)

Other jurisdictions

16.11 We have examined non-jury/judge-alone trials in the UK, Ireland, Denmark, France, Germany, Iceland, the Netherlands, Sweden, Australia, Canada, New Zealand, South Africa and the US focusing on indictable cases not limited to rape and serious sexual assault cases.

16.12 In most of the common-law jurisdictions examined, there is some scope to have judge-alone trials whereas those countries with inquisitorial systems generally have judges plus assessors or multi-judge panels.

16.13 Where there is an option to have a non-jury trial, the defendant may have the right to elect the mode of trial or it may be the judge who decides if it is in the interests of justice for the case to be heard by judge-alone. This differs from country to country and even from state to state in Australia.

16.14 There are several different models of non-jury trials, including the single professional judge model, multi-judge panels and other models, including using
lay assessors. The different jurisdictions can be broken down as seen in the table below:

<table>
<thead>
<tr>
<th>Judge/s plus lay assessors</th>
<th>Multi-judge panel</th>
<th>Non-jury trial on application (defendants right to elect)</th>
<th>Non-jury trial on application (judge who decides if it is in the interest of justice)</th>
<th>Jury trials only</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>Iceland</td>
<td>Australia (South Australia, Australian Capital Territory [except rape])</td>
<td>UK (only where there is a danger of jury tampering [NI terrorism])</td>
<td>Australia (Victoria, Tasmania, Northern Territory)</td>
</tr>
<tr>
<td>(three judges + six-person jury of lay judges)</td>
<td>(three judges)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iceland</td>
<td>Australia</td>
<td>Australia (Western Australia, New South Wales, Queensland)</td>
<td>New Zealand (only if long and complex or intimidation of jurors [excludes rape])</td>
<td></td>
</tr>
<tr>
<td>(three judges)</td>
<td>(three judges)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Netherlands</td>
<td>US</td>
<td>Ireland (terrorist or organised crime offences)</td>
<td></td>
</tr>
<tr>
<td>(three judges and nine-person jury in the cour d’assises)</td>
<td>(three judges)</td>
<td></td>
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<tr>
<td>Germany</td>
<td></td>
<td></td>
<td>Sweden (excluding murder)</td>
<td></td>
</tr>
<tr>
<td>(judge and two lay assessors)</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td></td>
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<tr>
<td>(judge + two lay assessors)</td>
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<td>Sweden</td>
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<tr>
<td>(judge + two lay assessors)</td>
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</table>

16.15 The role of lay assessors or assessors varies from country to country. They can be constituted from varied backgrounds as advocates or retired magistrates as in South Africa or nominated by social organisations, usually political parties of which they are members, as in Sweden.

16.16 In judge-alone trials the judge takes over the role of factfinder from the jury. If more than one judge or assessor is involved, consideration must be given as to who will act as the factfinder and who will act as the decision-maker or if a majority verdict will be sufficient.

16.17 Judge-alone trials are held in cases of terrorism and state security in Northern Ireland and Ireland. In the UK they are available only where there is a danger of jury tampering, and in New Zealand there is provision for judge-alone trials only in long and complex cases or in cases in danger of jury tampering.

16.18 In relation to rape and serious sexual offence cases, they are generally heard by a jury, where jury trials are available. In New Zealand and the Australian Capital Territory serious cases, except rape and serious sexual assault, can be heard by a judge-alone.
Common-law jurisdictions

England and Wales

16.19 In criminal courts the most serious offences are tried on indictment and are heard in front of a judge and jury. When someone is on trial for a serious crime they have the right to be tried by a jury of peers and they determine whether defendants are guilty of the offences with which they have been charged beyond reasonable doubt or, in other words, where the jury is sure of the defendant’s guilt.

16.20 There are specific situations in England and Wales and in Northern Ireland where a judge-alone trial can take place. As in Northern Ireland, the Criminal Justice Act 2003 provides for non-jury trials in cases where there is danger of jury tampering or where jury tampering has taken place. Where the judge tries a case alone, the judgment must give reasons for a guilty verdict. The non-jury trial provisions do not apply in Scotland, which has no comparable legislation.

16.21 The original section 43 of the 2003 Act would have extended judge-alone trials for fraud cases where the complexity or length of the trial would make the trial so burdensome to members of the jury that, in the interests of justice, serious consideration should be given to conducting the trial without a jury. This power was repealed in 2012.

16.22 Sir Brian Leveson’s Review of Efficiency in Criminal Proceedings (2015) noted that suggestions had been made to the review that trial by jury should remain the primary form of trial for more serious offences triable on indictment subject to two exceptions: defendants in the Crown Court should be entitled with the court’s consent to opt for trial by judge-alone; and in serious and complex frauds the nominated trial judge should have the power to direct trial by judge-alone. Sir Brian also noted the possibility of defendants electing for judge-alone trials as this is a widespread feature of other common-law jurisdictions and whether they should be extended to all indictable cases. He made no final recommendations in relation to judge-alone trials, as this was outside the scope of his review, but he concluded:

If this proposal is worth pursuing, it would be more appropriate to allow the Judge to decide on a case by case basis whether to accede to the defendant’s request for trial without jury, rather than imposing a general statutory limit on offences to which the option could apply. The Judge should decide the matter further to hearing representations from both sides. Further, the Judge should be entitled to override the defendant’s wish for trial by Judge alone if he (the Judge) considers that the public interest requires a jury, for example, in case of certain offences against the State or public order.
Ireland

16.23 In Ireland judge-alone trials are only available for specified terrorist and organised crime offences.

16.24 Part V of the Offences Against the State Act, 1939 provides for the arrangement of the Special Criminal Court to hear indictable cases for scheduled offences — in essence offences concerning the effective administration of justice and the preservation of public peace and order and, since 2009, organised crime — without a jury when ordinary courts are inadequate to secure the effective administration of justice. In the Special Criminal Court three judges are appointed to hear the case without a jury and are empowered to deliver majority verdicts.

16.25 Indictable offences that must be tried before a judge and jury, as listed in the Criminal Procedure Act, 1967 and the Criminal Law (Rape) (Amendment) Act, 1990, include rape and aggravated sexual assault.

Australia

16.26 Australian jurisdictions have increasingly moved to facilitate trial by judge-alone in cases that are the subject of significant prejudicial publicity.

16.27 The right to a judge-alone trial is available to defendants in South Australia and to some degree, not including rape, in Australian Capital Territory.

16.28 While the defendant can apply for a judge-alone trial in Western Australia and Queensland, granting this matter is in the discretion of the judge if it is considered in the interests of justice and not the uncontested right of the accused. In New South Wales, where the defence and the prosecution agree that there should be a judge-alone trial, the judge is obliged to grant this.

16.29 These moves have been predicated upon the assumption that the ordering of a trial by judge-alone is an effective means of reducing the risk of prejudice in serious sexual offences.

16.30 Judge-alone trials are not available to defendants in Victoria, Tasmania and the Northern Territory.

Canada

16.31 Trial by jury is a right available to any person accused of committing an indictable offence that is punishable by five years or more in prison. Indictable offences in Canada are generally more serious offences.

16.32 However, trial by jury is not imposed upon an accused person. Rather, a person accused of certain offences may choose to be tried by a jury but is not required to do so. An accused person charged with an indictable offence can choose to be tried by a judge-alone, or by a judge and jury, save that for certain offences — for example, murder — Crown approval is needed.
16.33 Nevertheless, most accused in Canada select trial by judge-alone. There is a perception that justice may be speedier, cheaper and more lenient in the lower criminal courts, which may try virtually all serious offences.

**New Zealand**

16.34 New Zealand could be the first common-law country to rid sexual crime cases of jurors if one key proposal from a recently published report by its Law Commission is implemented.

16.35 In 2016 the New Zealand Law Commission published a report, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*. The report examined alternatives to juries in sexual offence cases, specifically trial by judge-alone and trial by judge sitting with assessors. The commissioners have suggested that there is a case for having sexual offence trials decided by a judge, either alone or with two expert lay assessors.

16.36 Section 24(e) of the New Zealand Bill of Rights Act 1990 provides that a person has the right to a trial by jury if the penalty for the offence is or includes imprisonment for two years or more.

16.37 Section 102 of the Criminal Procedure Act 2011 provides that a judge may order a judge-alone trial if a case is likely to be long and complex or there may be intimidation of jurors but only where the defendant is charged with an offence for which the maximum penalty is imprisonment for life or imprisonment for 14 years or less. This excludes sexual violation (which includes rape and unlawful sexual connection with another person) as it has a maximum sentence of 20 years.

16.38 The Law Commission noted the cost and resource savings in favour of judges sitting alone and the fact that judges could be trained continually rather than training new jurors for each case. Against this the commission noted the removal of juries means the loss of the expression of democratic involvement; the safeguard against arbitrary or oppressive government and the promotion of public confidence in the system.

16.39 In relation to trial by judge sitting with assessors who have some prior knowledge and understanding of sexual violence, the commission noted the situation in Germany. The commissioners concluded that the inclusion of assessors would depend on whether they were there to merely advise or would have a greater role — i.e. voting — and noted that the training and experience of lay assessors would mean they could set aside common misconceptions (rape myths) and the element of collective decision-making model would be retained. They also noted the possibility of using justices of the peace for this purpose.

16.40 The Law Commission noted that there is a case for conferring the decision-making function in sexual offence cases on some entity other than the jury but stopped short of making a recommendation as any alternative would need to
be carefully considered and would need to be justified as a reasonable limit on the right to jury trial in the New Zealand Bill of Rights Act 1990.

16.41 The commission made no recommendations to change the fact-finder in sexual violence cases but simply recommended that the issue should be looked at again as part of the evaluation of a new specialist court grounded in reliable data as to the levels of accuracy achieved in decision-making by different kinds of fact-finding bodies. Sexual violence courts are now being piloted and research into the success of the pilot is just beginning so no conclusion has been reached. The commission’s other conclusions were that an alternative system outside the present criminal justice system is required, the aim of which would not be to displace the criminal justice system, and that better support systems are required for victims (see chapter 17 of this Review).

South Africa

16.42 In South Africa jury trials were abolished by the Abolition of Juries Act, 1969. The South African Law Reform Commission noted that even before the abolition of the system, it had, to a large extent, fallen into disuse due to the fact that members of the public were extremely reluctant to serve on the jury, citing various excuses for not serving on a jury.

16.43 Cases are now heard by a judge and up to two lay assessors at the judge’s discretion.

16.44 For serious cases such as rape or indecent assault a judge must be assisted by two lay assessors. The assessors must have experience in the administration of justice or a special skill in any matter that may call for consideration during the trial. They assist the judge in assessing the facts of the case while the judge is responsible for the determination and application of the law. The judge will confer with the assessors in determining the guilt or otherwise of the defendant.

United States

16.45 The Sixth Amendment to the US Constitution guarantees the rights of criminal defendants, including the right to a public trial, without unnecessary delay by an impartial jury of the state and district wherein the crime shall have been committed.

16.46 In the 1930 case of Patton v United States the Supreme Court established that a defendant has a constitutional right to waive trial by jury. Rule 23 of the Federal Rules of Criminal Procedure allows a defendant to waive the right to a jury but only if the government consents and the court approves.

16.47 In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests it before the finding of guilty or not guilty, the court
must state its specific findings of fact in open court or in a written decision or opinion.

Inquisitorial systems where judges and lay assessors consider cases

**Denmark**
16.48 Sexual offending will be tried in the district court with three judges and a ‘jury’ of six. The jury is drawn from the same call of persons as sit as lay judges in less serious cases. The lay members are nominated by social organisations, usually political parties of which they are members.

**France**
16.49 Sexual offence cases are tried either in the correctionnel which is a criminal court dealing with less serious felonies and misdemeanours (before a panel of three professional judges) or in the higher cour d’assises (consisting of three professional judges and a jury (nine citizens chosen by drawing lots) which deals with the more serious cases such as rape and murder.
16.50 Only certain crimes are tried by a special cour d’assises without a jury, such as certain acts of terrorism or acts connected with drug dealing.

**Germany**
16.51 The Landgericht (District Court) hears serious sexual violence cases in front of a judge and two lay assessors, who all have the same voting power. Lay assessors are drawn from people who self-nominate.

**Iceland**
16.52 There are no jury trials in Iceland. Most cases are heard by one judge. If the accused denies and the question of guilt depends mostly on the testimony of the accused and witnesses, three judges will hear the case. In complex civil and criminal cases there are three judges, two of whom can be specialists — for example, plumbers, engineers or medical doctors. These expert judges are not lawyers.

**Netherlands**
16.53 Cases are heard by a panel of three professional judges. The full-bench panel (three members) deals with more complex cases and all cases in which the prosecution demands a sentence of more than one year’s imprisonment.

**Sweden**
16.54 Sexual offence cases are tried before a tribunal comprising one professional judge and two lay assessors. The lay assessors are nominated by social organisations, usually political parties of which they are members.
Arguments in favour of the status quo retaining jury trials

16.55 The arguments in favour include:

- Jury trial can more accurately reflect the views of the community and society as the jury is taken from a sample of members of the public.
- Most people never become involved in the criminal justice system save on the very rare occasions when they are an accused, a victim or a witness. Jury service affords an opportunity for every citizen to be positively involved in the criminal justice system, a particularly important factor in a fractured society such as Northern Ireland.
- It contributes to openness and transparency of criminal proceedings especially if we are to restrict public attendance in serious sexual offence cases. It guards against secrecy and censorship of criminal proceedings.
- The criminal justice system relies on trusting jurors to be true to their oath and adhere to judicial directions. Removal of that concept, even in limited circumstances of serious sexual offences, risks undermining that faith and loss of public confidence in the system overall.
- Current flaws in the jury concept, if they exist, can be resolved by better education together with clearer written and oral judicial guidance.
- There is a paucity of local empirical evidence that juries cannot be trusted to follow judicial directions in these trials.
- A jury means that the decision-making is being carried out by a group of people fresh to the task and not just in one person’s hands who could become battle hardened hearing numerous cases over the years, out of touch with social mores and whose bias or prejudice could affect the verdict.
- If the Diplock precedent of non-jury trials was followed, a judge alone trial of serious sexual offences would provide an automatic right of appeal which could conceivably lead to greater stress on the complainant and increased delay.

Are there compelling arguments in favour of removing or altering the nature of jury trial?

16.56 The arguments in favour of a judge sitting alone or a judge sitting with two laypersons include:

- Judges have legal training and expertise to analyse evidence whereas it can be difficult for a jury to understand the complexities of challenging criminal matters and complex serious sexual offences.
- A judge could pre-read the details of the case and direct parties to the central issues.
• Judges are trained to be more objective than juries. It is difficult to know whether juries have left their prejudices and stereotypical mythology aside or ignored social media content as no reasoning is required for their verdict, especially where adverse publicity has been available during the course of the trial.

• When giving a verdict a judge would have to give reasons, making the process more transparent and making it easier for a defendant to appeal. It would also provide reassurance to both complainants and accused that the verdict reflected a determination based on logic and law.

• A reduction in the cost of long trials and improved case management by the judge if appointed at an early stage.

• While recognising the ability of jurors to follow directions and robustly resist the impact of prejudicial information, a distinction is clearly maintained between the respective abilities of judges and jurors to disregard prejudicial publicity by the judiciary itself.

• trials would likely be shorter;

• it would reduce the impact of previous sexual history being introduced unwittingly or otherwise; and

• a judge sitting alone with a lay panel of two would mirror youth justice hearings and would still involve the public to some extent in the trial process.

Discussion
16.57 Our researches have illustrated that, worldwide, even in the common-law countries, the purity of trial by jury is conceptually no longer sacrosanct in the modern era.

16.58 For my own part I confess I started out on the journey through this Review with a commitment to the jury system in all serious criminal offences.

16.59 I fear that unflinching commitment may have been partly borne out of a less than full appreciation on my part at that stage of the serious dangers that lie in the wake of the current jury led system in serious sexual offences.

16.60 The emerging evidence during this Review of the presence of jury myths and stereotypes, the menacing potential of social media and the benefits of providing a reasoned transparent judicial judgment to explain to complainants and accused alike why a verdict that may have a permanent and devastating effect on their lives has been determined are all matters that have given me ample reason to pause and reflect.

16.61 Moreover, it has become clear to me in the course of my discussions that many others, including judges, barristers, solicitors, police officers, other stakeholders in the criminal justice system and, most importantly, many thinking members of
the public especially from the younger generation — share the same profound concerns about the suitability of jury trials as opposed to a judge sitting with two assessors in serious sexual offences. This latter approach is that which we adopt in our youth justice courts.

16.62 On the other hand I remain concerned about the dangers of undermining our criminal justice system based, as it is, on faith and trust in the jury system.

16.63 Would the removal of trial by jury from the criminal system in Northern Ireland in these cases, not only eliminate a historic element of the legal system but deny the community here the right to participate in the administration of criminal justice, with an attendant lack of community confidence in their legal system? Would removal of juries in serious sexual offences be the thin end of the wedge, leading to campaigns for its removal overall?

16.64 It cannot pass without comment that, having interviewed representatives from all the political parties represented in the Assembly, with one firm exception — they all strongly supported the retention of juries in these cases, albeit most recognised the attendant dangers of social media and jury myths. I believe a proposal for the removal of jury trial would be a legislative non-starter in this part of the world.

16.65 I recognise that our extensive research has shown that the trend in some jurisdictions in common-law countries is to increasingly open the door to non-jury trials particularly if the defendant opts for it. However, I cannot overlook the unique circumstances that obtain in Northern Ireland where confidence in the administration of justice and the participation of citizens in the criminal justice system carries a particularly important resonance.

16.66 Are cases where often the issue is essentially one word against another not quintessentially more suited for twelve people fresh to the case to determine rather than individual judges who may have become battle hardened with the passage of time and the regularity of the cases?

16.67 Is not the research into actual juries in Northern Ireland justifying their removal too incipient at best, and inadequate at worst, to form an appropriate basis for any particular course of action? We must not base reform on assumption rather than on empirical evidence. Only a slim body of research has examined jurors’ Internet use and even fewer studies have focused specifically on social media. The suggestion to abolish, or fundamentally reform, the jury system in the absence of local empirical evidence that fair juries are no longer possible in the digital age is arguably too far reaching at this stage in Northern Ireland.

16.68 The argument for removal may be particularly hard to sustain where this Review is recommending a number of reforms to confront the flaws attendant on jury presence including steps to address social media exposure and rape mythology and provide more comprehensible judicial directions and explanations. At
the very least would it not be necessary to suspend such precipitative action pending the outcomes of these reforms and perhaps return to the issue once those changes have bedded in and we have observed their effect?

16.69 Whilst, therefore, at the moment I still lean towards maintaining juries even in cases of serious sexual offences it is perhaps the area where I entertain most misgivings about the current law and I remain very much open to dissuasion. I look forward to further views emerging in the consultation process now opening.

16.70 That said, I have no difficulty even at this moment, conceiving of those circumstances where a court might even now be persuaded by an accused or the prosecution that a fair trial was no longer possible with a jury.

16.71 A classic example occurred in England in 2016,1 when the court had to consider the relationship between the right to a fair trial and openly abusive and potentially highly prejudicial communications on social media in a case concerning two teenage girls aged 13 and 14 charged with a horrific murder. As a result of a torrent of comments and abuse posted on Facebook and social media, the trial judge, confronted by a joint application by both prosecution and defence, 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 process.

16.72 If such an extreme set of circumstances with widespread publicity were to occur in a small jurisdiction such as Northern Ireland, it simply might not be possible to address the mischief by a change of venue if the reporting had been province wide.

16.73 In such circumstances I believe there is much to be said for the Australian experience (echoed to a lesser or greater degree in the other jurisdictions we have cited) that where either defence or prosecution has made such an application and the judge decides it is in the interests of justice to do so, the trial should continue with a judge-alone. Such an application could be made and determined at any stage of the process with a right of appeal against the decision of the judge.

16.74 I emphasise, however, that this would only occur where the accused had consented in the first place. For a judge to take away the right of an accused to a jury trial in the interests of justice on an application by the prosecution which is not consented to by the accused would represent a significant departure from the position in common law jurisdictions which have not abolished the jury altogether.

16.75 As mentioned earlier in this Review, there are of course specific conditions which, if satisfied, lead to deprivation of the right to a jury but my suggested

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1 R (on the application of the BBC) v. F and D [2016] EWCA Crim 12,.)
amendment involves the much broader ground of the ‘interests of justice’ or the ‘effective administration of justice’. In those wider circumstances the consent of the accused should be required.

16.76 In the context of jury trial I turn now to two matters that surfaced during my extensive interviews in the course of this Review and which I can address in relatively short order.

Should there be a gender quota in juries?

16.77 In recent years, some campaign groups have called for gender quotas in rape cases, on the assumption that a woman’s perspective on rape and other serious sexual offences is drowned out by the man’s perspective, resulting in unjust acquittals.

16.78 The argument is that men and women, as two distinct groups in society, bring different perspectives to the jury room, and the legal system should account for this fact in its construction of rules about criminal and civil juries. A jury drawn from a fairly representative panel of jurors, however, cannot be truly a jury of one’s peers if the perspective of women is absent or silenced.

16.79 How the profile of a jury can influence the verdict is far from clear-cut. If that were true, one would expect that female-dominated juries would convict more readily than male-dominated ones.

16.80 Attempting to test that hypothesis in 2009, academics Conor Hanly, Deirdre Healy and Stacey Scriver in Ireland analysed the verdicts and gender breakdowns of 108 juries: 64% had more men than women, 17% had more women than men, and 19% were split evenly.

16.81 The analysis, published by the Rape Crisis Network Ireland, found female-dominated juries did not convict of rape in any case, and the male-dominated ones had a higher conviction rate than evenly split juries. The numbers were too small to be definitive, but the researchers concluded there was no evidence that increasing the number of female jurors would lead to more convictions, which is consistent with research in other countries.

16.82 As I say throughout this Review, I cannot recommend reform on anything other than evidence-based research. I reiterate that the concept of juries following judicial directions to put prejudice out of their minds and acting responsibly in compliance with their oath is a principle upon which our criminal justice system is founded. I find no compelling evidence that women or men react differently or less responsibly in light of those directions.

16.83 I therefore find no evidential base for gender quotas in juries in serious sexual offences.
Not proven

Current law
16.84 Only two verdicts are open to a jury in Northern Ireland: guilty or not guilty.

Background
16.85 Scotland has a unique system within the English-speaking common-law world. It is the only country that has 15 jurors, three verdicts — guilty, not guilty and not proven — and where a simple majority of eight out of 15 is sufficient for a guilty verdict.
16.86 The legal implications of a not proven verdict are the same as with a not guilty verdict: the accused is acquitted and is innocent in the eyes of the law.
16.87 Scottish juries were historically able to return only proven or not proven verdicts. A third verdict of not guilty was introduced in the 1700s and became more commonly used than not proven.
16.88 In more recent years, it has been said that the general perception has been that a not proven verdict suggests a sheriff or jury believes the accused is guilty but does not have sufficient evidence to convict.
16.89 Last year, Holyrood’s Justice Committee concluded that Scotland’s not proven verdict was on borrowed time and may not serve any useful purpose. In last year’s programme for government, the Scottish government said it wanted to commission ‘independent jury research to consider the dynamics of decision-making by juries, including the current jury majority and three verdict system, helping to inform future proposals for the reform of the criminal justice system’.
16.90 Consequently, a ground breaking study into how juries come to decisions, including their use of the not proven verdict, is to be carried out in Scotland. The research has been described as the first of its kind in Scotland and will take place over the next two years. It will be led by three academic professors and a market research company.
16.91 The study will involve members of the public sitting on mock juries and will examine the size of juries and their decision-making processes. It will also consider Scottish law’s unusual three-verdict system.
16.92 Responding to the plans, Douglas Thomson of the Law Society of Scotland’s criminal law committee told BBC Scotland that the not proven verdict was the logical one to keep in criminal cases and there was an argument for dropping not guilty. He said that if the Crown failed to prove a case, the logical verdict was not proven rather than not guilty.
16.93 The prospect of introducing this third verdict into the Northern Ireland system has been raised with me in the course of this Review by a disparate collection of individuals including some complainants and politicians.
16.94 The primary argument made for its introduction has been that it is believed that there exists a public perception that if a not guilty verdict is brought in by the jury, this means that the complainant was lying and the allegations were fabricated. A not proven verdict would clarify the issue and make it clear that far from asserting the complainant was lying and that the accused had not committed the offence, the jury had merely concluded that there was not enough evidence to convict the accused.

16.95 The statistics for all three verdicts in Scotland are as follows.

<table>
<thead>
<tr>
<th>Outcome</th>
<th>2011/12</th>
<th>2012/13</th>
<th>2013/14</th>
<th>2014/15</th>
<th>2015/16</th>
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</thead>
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<tr>
<td>PNGA² or deserted ³</td>
<td>10,910</td>
<td>9,975</td>
<td>9,687</td>
<td>9,323</td>
<td>9,044</td>
</tr>
<tr>
<td>Acquitted not guilty</td>
<td>4,517</td>
<td>4,719</td>
<td>5,322</td>
<td>6,275</td>
<td>6,633</td>
</tr>
<tr>
<td>Acquitted not proven</td>
<td>991</td>
<td>972</td>
<td>1,119</td>
<td>1,149</td>
<td>1,173</td>
</tr>
<tr>
<td>Charge proved*</td>
<td>108,424</td>
<td>101,018</td>
<td>105,656</td>
<td>106,622</td>
<td>99,950</td>
</tr>
<tr>
<td>All</td>
<td>124,842</td>
<td>116,684</td>
<td>121,784</td>
<td>123,369</td>
<td>116,800</td>
</tr>
</tbody>
</table>

1 Plea of not guilty accepted.
2 Includes cases where proceedings are dropped after a person has been called to court - for example, if witnesses cannot be traced.
3 Deserted simpliciter: that is, trial is permanently abandoned by the procurator fiscal
* excludes people against whom proceedings are started but which are dropped before they reach court

Source: Scottish Government Criminal Proceedings Database

Arguments for introducing the not proven verdict

16.96 As indicated above, it would more closely reflect the realities from the complainant’s point of view whilst not stating that the accused was guilty. This would make the failure to convict an accused easier for a complainant to accept and accommodate themselves to the finding, thus aiding ultimate recovery from their experience.

16.97 It gives the jury a real choice to reflect their findings without creating misleading impressions for the complainant.

Arguments for maintaining the status quo with simply two verdicts

16.98 The verdict is confusing for juries and the public and fails to provide closure for victims. A not proven verdict risks leaving victims confused and disappointed, or an impression with the public that defendants have escaped punishment.

16.99 It can stigmatise an accused person and undermines the principle of innocent until proven guilty by leaving a stigma on an accused where a jury is not persuaded to convict.
16.100 It is fine for the Scottish justice system to be different from other countries if we are satisfied those differences are worthwhile. Where is the evidence it is better than our system?\textsuperscript{2}

16.101 Why would we introduce a wholly new system when we are awaiting the outcome of the Scottish study which may conceivably result in Scotland abandoning the concept?

16.102 Whilst Scotland has had this system over the centuries, it is entirely foreign to our jurisdiction and there is no empirical evidence or research to justify its introduction.

Discussion

16.103 Any reform I recommend must be evidence-based. I find no evidence or research suggesting that this new concept, which may even be on the cusp of abandonment by its one proponent, could justifiably be introduced in Northern Ireland.

16.104 For centuries our criminal justice system has been founded on the basis that the accused is either guilty or not guilty. To introduce a concept other than this is potentially confusing to the public and unfair to accused persons without offering any real closure to the frustrations of a complainant.

\textsuperscript{2} Read more at: https://www.scotsman.com/news/study-to-evaluate-15-member-jury-and-not-proven-1-4568327
Proposed Recommendations

216. All serious sexual offences should continue to be tried in the Crown Court by a judge and jury.

217. Legislation to be introduced to the effect that where, in a serious sexual offence trial, either the defence or prosecution has made such an application and the judge decides it is in the interests of justice to do so, the trial should continue with a judge-alone.

218. A verdict of not proven should not be introduced in Northern Ireland. There should be no gender quotas in juries in Northern Ireland.
A review of the law and procedures in serious sexual offences in Northern Ireland
Chapter 17

Measures complementing the criminal justice system
It’s time for a drastic overhaul of our justice system’s response to sexual assault. The adversarial system, combined with a reactive political approach, has failed victims of sexual assault on far too many occasions. We need innovative and alternative responses which better address the needs of victims, while also acknowledging the importance of offender rehabilitation.

Rob Hulls, Former Victorian Attorney General and Deputy Premier and Director, Centre for Innovative Justice, RMIT University

Issue
Should Northern Ireland introduce the concept of alternative resolution or restorative justice to complement the law and procedures surrounding serious sexual offences in Northern Ireland?

Current law and practice
17.1 In Northern Ireland, there is no statutory basis for alternative resolution of or restorative justice for serious sexual offences outside the criminal justice system.

Section 5, Criminal Law Act (Northern Ireland) 1967
17.2 The provisions of section 5 of the Criminal Law Act (Northern Ireland) 1967 (provisions that do not apply in England and Wales), requires an individual with knowledge of a relevant offence (which would include rape or serious sexual offence) to report it to the police in the absence of a reasonable excuse.

17.3 The figures for prosecutions and convictions for such offences in Northern Ireland are extremely low. A total of 15 defendants have been dealt with in the Crown Court between 2013/14 and 2017/18, of which seven have been convicted for offences under section 5. During 2016/17, 18 defendants were convicted for offences under section 5 in the magistrates’ court, rising to 26 in 2017/18. This may be because the offence is very effective or, more likely, because it is not enforced in practice. I am led to believe that the Police Service of Northern Ireland (PSNI) adopt a safeguarding approach to such prosecutions and report such matters only if there is a risk to others by not so reporting.

17.4 The Attorney General properly obviated the difficulty of the provisions when he published guidance, providing reassurance that it is highly unlikely that it will be in the public interest to prosecute a person for failure to report information received about a rape to the police where that disclosure of rape is made in the context of the operation of social security and tax credit legislation.

17.5 Interestingly that guidance contained two helpful paragraphs as follows:

This guidance emphasises that, in the vast majority of cases in which disclosures are not drawn to the attention of police, no offence will have
been committed. Even when the section 5 offence can be said to have been committed, the primary public interest in bringing perpetrators of rape to justice and protecting the public means that any penalisation of victims (and those to whom they make disclosures) for failing to come forward with information is likely to create future barriers to victim support, to undermine confidence in the criminal justice system and to damage the willingness of victims and witnesses to cooperate with the criminal justice system.

In summary, even where information about rape is not passed on to the police by a victim or a person to whom she [they] make[s] disclosure, the existence of a reasonable excuse will mean that the section 5 offence has not been committed. Even where no reasonable excuse exists, the public interest points away from prosecuting the victims of rape or those to whom victims make disclosures of rape.

17.6 Understandably, that guidance carried a rider that the situation may be different where the victim of the rape is a child or vulnerable adult, or where failure to report the offence to police is likely to put others at serious risk of harm.

Universities

Queen’s University Belfast

17.7 Queen’s University Belfast (QUB) follows a similar path as other universities in England and Wales. The vital difference from the rest of the United Kingdom is the application of the Criminal Law Act, carrying the obligations referred to in paragraph 17.2 above. This obliges QUB to report to the police serious sexual offences. The university has a Student Sexual Misconduct policy, which applies to all members of the university. The salient points of the policy are as follows:

• Within the policy, sexual misconduct is defined as any unwelcome behaviour of a sexual nature that is committed without consent or by force, intimidation or coercion. Such behaviour will usually also constitute a criminal offence.

• It operates a zero tolerance policy with regard to sexual misconduct.

• If a member of the university has been the victim of sexual misconduct, the university will take all reasonable steps to ensure their physical safety and facilitate their access to appropriate specialist support, while respecting their feelings and decisions.

• If a student is the victim of sexual misconduct, they are advised to consider reporting it to the police and/or the university. The university further advises that the information will be treated in a sensitive, confidential and non-judgemental manner. A range of options can then be explored both inside and outside the University.
• If they choose not to report to the police, they can still seek support services within the university as well as counselling offered by Inspire through the student well-being service.

• The university will cooperate fully with any police investigation and any subsequent legal proceedings.

• The university will at no time undertake any investigations or actions that could compromise a police investigation or criminal proceedings. Where a police investigation is ongoing, the university will normally hold any internal investigation in abeyance, pending the outcome of any such police investigation or criminal proceedings.

• Penalties for the disciplinary offence of sexual misconduct will vary according to the seriousness and circumstances of the offence but include suspension and expulsion from the university.

• The university reserves the right to take disciplinary action against a student or member of staff accused of sexual misconduct of its own volition, even if the reporting student does not wish to make a formal complaint.

• If a student is under investigation for an alleged criminal offence, they have a duty to notify the university.

• The university also have access to specific “Safe and Healthy Relationships” wellbeing advisers who can support students who are reporting or responding to allegations of misconduct by listening to them as well as providing guidance and support around their options.

• Additionally, students have access to advocates for safe and healthy relationships, who are specially trained staff members from across the university who are equipped to deal with any problems a student may encounter, including emotional and specialist support (the latter through signposting to specialised external agencies).

• If a student is accused of misconduct (by another student, the university or the police), the student is advised to share the circumstances with someone they can trust such as a friend, a family member or a member of staff.

**Ulster University**

17.8 The Ulster University has no specific policy on sexual misconduct but there is an overall disciplinary policy. Any allegations of sexual misconduct would be investigated under that policy.

17.9 The university is conscious that it needs to do more in terms of dealing with alleged sexual offences, both in relation to staff and students. To that end, senior management met in the autumn of 2018 with Nexus NI to get advice and explore possible ways forward, particularly over the issue of consent. This will lead to a new policy on sexual misconduct and something more substantive built into the existing disciplinary policy.
Further education colleges
17.10 We have also made contact with further education colleges. From their responses, whilst they do not have a specific sexual misconduct policy, they do have disciplinary and safeguarding policies. They invariably report serious sexual offences to the statutory agencies, including the police and social services.

Communities
17.11 Outside universities, there are a number of accredited community restorative justice organisations. An example is Northern Ireland Alternatives, which has five offices throughout Belfast. These tend to work most closely with vulnerable victims within communities to provide support as opposed to direct contact with the offender.

Restorative justice
17.12 Restorative justice (RJ) is a somewhat different concept. It gives victims the chance to meet or communicate with their offender to explain the real impact of the crime. It empowers victims by giving them a voice.
17.13 It often involves a meeting called a conference, where the victims meet their offender face-to-face.
17.14 Sometimes when a face-to-face meeting is not the best way forward, the victim and offender will communicate through letters, recorded interviews, video or via a facilitator.
17.15 The benefits of restorative justice are that it can help victims to get answers to their questions and to directly tell the person who harmed them how they have been impacted.
17.16 It holds offenders to account and can give them an opportunity to make amends.
17.17 Restorative justice can be used for any type of crime and at any stage of the criminal justice system, including alongside a prison sentence. It does not matter how long ago the crime took place — there is no time limit.
17.18 It is only possible if the offender has admitted to the crime and both victim and offender must be willing to participate. It is an entirely voluntary process. It may be used as part of a court sentence, both a custodial sentence or community-based service, if the victim and perpetrator choose to participate.
17.19 The restorative justice process is led by a facilitator or an accredited practitioner, who supports and prepares the people taking part and makes sure that it is safe. The victim can drop out at any time, including on the day of a conference or even while it is taking place. It is the victims’ process and it will be tailored to meet their needs.
Chapter 17 | Measures complementing the criminal justice system

17.20 Taking part in a restorative justice conference can proceed with the victim alone or with a friend or family member there to support.

17.21 The principles of restorative justice have been successfully placed at the heart of the youth justice system in Northern Ireland as it has evolved since 1998.

17.22 The system of restorative justice that has been established involves the use of youth conferences at which the offender, victim (or victim representative), professionals and others are brought together to discuss the offence and its repercussions and to agree on an action plan for the offender.

17.23 Youth conferences are fully integrated within the criminal justice process. A young person can be referred for a youth conference at one of two stages of the criminal justice process:

- Prior to conviction if, having been charged by the Public Prosecution Service (PPS), the young person admits the offence; in such cases, the referral is undertaken by the PPS, and the conference is known as a diversionary youth conference.
- Following conviction, in which case the conference is known as a court-ordered conference. With certain exceptions, there is a statutory requirement for the court to order a conference for a convicted young person who agrees to participate.

17.24 Youth conferences are organised and facilitated by youth conference coordinators, who are specialist, trained officers of the Youth Justice Agency (YJA).

17.25 At a youth conference, the young person is invited to give an account of the offence, and the victim, if present, is encouraged to ask the young person questions about what has been said and how they have been affected by the crime.

17.26 Others in attendance are also invited to give their views on the crime and its effects. A critical element of the conference is the collaborative development of a youth conference plan, which sets out actions to be taken by the young person to make amends for the offence and reduce the likelihood of further offending.

17.27 Where a youth conference plan is agreed at the conference, the details of the plan are submitted to the PPS (in cases of diversionary conferences) or court (if it was a court-ordered conference).

17.28 If the plan is accepted by the PPS or court, its implementation is thereafter monitored by the youth conference coordinator or another member of YJA staff. If the PPS rejects a plan, the case may proceed to prosecution; if the court rejects a plan, it can pass a different sentence in its place.
17.29 Following consultation with the Department of Justice, the PSNI and the PPS, it was agreed that the Probation Board for Northern Ireland (PBNI) would pilot an intensive community sentence as an option for judges in the Ards, and Armagh and South Down court divisions in low-tariff crime. Termed the ‘enhanced combination order’ (ECO), it was based on existing legislation and offered judges an existing community option in a more intensive format.

17.30 ECOs focused on rehabilitation, victim issues, restorative practice and desistance. They also included a focus on mental health, parenting/family issues and an assessment by PBNI psychologists. The requirements on offenders subject to such orders were to:

- complete unpaid work within local communities at an accelerated pace;
- participate in victim-focused work and, if possible, a restorative intervention;
- undergo assessment and, if appropriate, mental health interventions with PBNI psychology staff, and participate in parenting/family support work if applicable;
- complete an accredited programme, if appropriate, such as Thinking Skills and Personal Capabilities; and
- undertake intensive offending-focused work with their probation officer.

17.31 The DoJ is currently working on an adult restorative justice strategy.1 The Reducing Offending Directorate (ROD) is committed to have this document ready for public consultation by March 2019. I understand that this directorate will be looking at the proposals in this Review, perhaps in the context of a proposed centre of restorative excellence, in line with the recommendation by the Fresh Start panel report on the disbandment of paramilitary groups.

Background

17.32 As I have set out in chapter 2, ‘The voice of complainants’, there is 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. More specifically, it is estimated that only around 17% of women report to police, and men are even less likely to report rape. There is, therefore, a multitude of women and men who bear these crimes in silent shame and misery.

17.33 Whilst there is no agreed definition of restorative justice processes, the concept is internationally both a way of thinking about crime and a process for responding to crime. It provides an alternative framework for thinking about wrongdoing. The European Forum for Restorative Justice uses the following definition of restorative justice:

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Restorative justice is an inclusive approach of addressing harm or the risk of harm through engaging all those affected in a dialogue to seek common understanding and agreement on how the harm or wrongdoing can be repaired, relationships maintained and justice achieved.

Other jurisdictions

England and Wales

17.34 The Restorative Justice Council (RJC) promotes quality restorative practice for everyone. The RJC is the independent third sector membership body for the field of restorative practice. It provides quality assurance and a national voice advocating the widespread use of all forms of restorative practice, including restorative justice. The RJC’s vision is of a society where high-quality restorative practice is available to all.

17.35 There is evidence from the Ministry of Justice in England\(^2\) that ‘85% of victims involved in restorative intervention find it helpful and there can be a 14% reduction in re-offending rates’.

17.36 A further report in 2007 recorded that victims of crime who engage in restorative justice do better on average than victims who do not, across a wide range of outcomes including post-traumatic stress.\(^3\)

17.37 An evaluation of Ministry of Justice (former Home Office) restorative justice schemes in 2008 established that restorative justice provided value for money, with an overall cost to savings ratio of 1:94.

17.38 English universities operate a similar alternative resolution approach to that in QUB. The University of Cambridge offers both formal and informal reporting options for all students who come forward with experiences of sexual misconduct, whether or not they choose to report to the police (the university will support a student to go to the police if they choose to do so but will not put any pressure on them to report to the police).

17.39 The only time the university will report to the police without the explicit consent of the student (although it will inform the student that it is doing so) is if the university considers the student or someone else to be in immediate danger.

17.40 The university reporting options are available for students, regardless of the type of sexual misconduct they have experienced (this could include an accusation of sexual intercourse without consent). The university considers that it would be unfair to give students who have (allegedly) experienced more serious

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sexual misconduct fewer reporting options. That being said, the university is transparent with students about the limited investigation powers and resources available to the university compared with those of the police.

**United States**

17.41 The tension between a university’s responsibility to respond to internal complaints of sexual misconduct and the criminal justice system’s response to the same complaints has been a topic of lively discussion in the US higher education arena for some time.

17.42 Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in any educational programme or activity that receives federal funding. This includes most schools, including private institutions. Schools must ensure that all students have equal access to education, regardless of gender, sexual orientation or gender identity. Sexual harassment and sexual violence are forms of gender discrimination that are prohibited by Title IX, including when the incident(s) occur off-campus or involve people who are not students.

17.43 Accordingly, universities and schools must proactively prevent and respond to claims of sexual harassment, sexual violence and other forms of gender-based violence, retaliation, discrimination, and must have an impartial and prompt process for investigating and adjudicating reported cases.

17.44 An informal process, such as mediation, may be appropriate for some cases of sexual harassment, but in cases involving allegations of sexual assault, mediation is not appropriate, even on a voluntary basis.

17.45 If the complainant is resolving a case informally, they must be notified of the right to end the informal process at any time and begin the formal process. Retaliation from either the school, the faculty or your peers is also prohibited.

17.46 Colleges, universities and school districts are required under Title IX to provide complainants with a prompt, adequate and impartial investigation should they chose to make a report. This includes the following:

- provide a time frame of all important stages of the grievance process;
- allow both parties to adequately present their case with appropriate witnesses and relevant evidence;
- resolve the case based on a preponderance of evidence standard — for example, was it more likely than not that the sexual violence or harassment occurred?
- simultaneously notify both parties in writing of the outcome and any disciplinary sanctions imposed;
- provide the same opportunity to present a case as the other party(ies) — for example, if one person is allowed to appeal the outcome of the
investigation or sanction or is allowed to have a lawyer, the other party(ies) must have the same opportunity;

• in cases involving criminal conduct, school personnel must determine whether appropriate law enforcement or other authorities — for example, child protection authorities — should be notified;

• at a university such as Tufts in Massachusetts, the university will honour a complainant/victim decision either to pursue a law enforcement remedy or to decline to pursue that avenue of remedy; and

• Tufts found that very few students choose to go through the criminal process (for all the daunting reasons set out in this Review about the criminal justice system) and they may prefer the internal university process; they may perceive the internal university process as less adversarial and providing immediate resources and support.

17.47 In relation to investigations, a school’s Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.

17.48 In 2014, the White House published, Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault, and a new set of Q&As on Title IX and sexual violence. The Report noted that while:

some survivors of sexual assault turn to the criminal justice system, others look to their schools for help or recourse. The two systems serve different (though often overlapping) goals. The principle of the criminal system is to adjudicate a defendant’s guilt and serve justice. A school’s responsibility is broader: it is charged with providing a safe learning environment for all its students - and to give survivors the help they need to reclaim their educations.

Ireland

17.49 To obtain the Irish perspective on the concept, we spoke to Dr Marie Keenan (Lecturer at the School of Social Policy, Social Work and Social Justice, University College Dublin) — an acknowledged expert on the subject.

17.50 Dr Keenan does not believe restorative justice should be an alternative to the criminal justice system. Rather it should be promoted and operated by the state as an additional justice mechanism and a supplementary accountability tool for offenders.

17.51 Justice outcomes and best procedure have to be clearer that the context of the sexual violence matters. Responses should be influenced by the context and the victim's justice interests.
17.52 Dr Keenan’s Irish study, which considered the experiences of 23 offenders and 30 victim victims, found that the majority of victims wanted restorative justice. She found there were two cohorts who preferred the idea of restorative justice: interfamilial contexts and situations with very young offenders.

17.53 While, therefore, restorative justice should be provided as an additional avenue, it is understood that for some this will become the primary form of justice.

17.54 It was Dr Keenan’s view that victims may want a voice and participation, the perpetrator may have faced the criminal justice system and been punished accordingly, but the victim, who has simply been a witness in the criminal trial, often remains a passive bystander.

17.55 Restorative justice aims to put the victim at the heart of the justice process. Victims desire a voice which can help them to move on; validation, vindication or offender accountability. Some of these may be more important than others to individual victims.

17.56 A victim’s voice may not be heard much in the criminal justice process but restorative justice can give them a voice. Participation in the criminal justice process may be limited, although if the victim secures a conviction, they may feel validated. Moreover, for some complainants — for example, where the case does not progress beyond the PPS — restorative justice may become an alternative.

17.57 With restorative justice sometimes a defendant’s accountability can be seen to be fulfilled by them turning up and relating their story. This is insufficient in serious sexual offences. They must agree to sexual offender treatment etc.

17.58 In terms of cost-effectiveness, in Ireland, a recent evaluation and social return on investment analysis of restorative justice highlighted a 300% return on investment.6

17.59 Some jurisdictions — Belgium, Denmark and Norway — have legislated for both systems.

Belgium

17.60 In Belgium, there is a firewall between the two systems of criminal justice and restorative justice, which run in parallel. Generally, it is only in cases reported to the police where the complainant will be offered restorative justice.

17.61 Once a report is made, the police will contact the complainant to inform them of the restorative justice (mediation) service.

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17.62 It is at the judge’s discretion if the restorative justice report is used in sentencing the defendant.

17.63 Complainants can access this service at any stage of the criminal justice system.

17.64 This is a state service where in theory facilitators are not able to take self-referrals (where the person has not reported the crime). In Dr Keenan’s experience, it sometimes happens, however, where a case is taken under the radar.

New Zealand

17.65 There is legislation for restorative justice in New Zealand. Section 24A of the Sentencing Act 2002 came into force on 6 December 2014. The provision means a court must adjourn proceedings to enable enquiries to be made by a suitable person whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victim and, if appropriate, for the process to happen.

17.66 It applies if an offender has pleaded guilty, if there are one or more victims of the offence and if no restorative justice process has previously happened in relation to the offending.

17.67 Restorative justice services are run by state-funded community-based groups — for example, Project Restore, which is contracted by the Ministry of Justice.

17.68 Restorative justice providers are approved by the ministry to ensure they have experience and training to guarantee the restorative justice process is safe and supportive for everyone.

17.69 Conventionally, before the restorative justice process can begin, the accused needs to plead guilty or be found guilty. If, thereafter, the offender wishes to take part in restorative justice, their lawyer can ask the judge to consider it.

17.70 If the judge decides that restorative justice should be explored, a trained facilitator will have a pre-conference meeting to see whether restorative justice is appropriate for the victim.

17.71 The facilitator can decide not to go ahead with a conference if they think safety is a concern or that restorative justice will not help, and inform the court accordingly and, in which event, sentence is passed in the normal way.

17.72 The restorative justice conference takes place before the accused is sentenced. The facilitator’s report is furnished to the judge, who decides whether to include any agreements made at the restorative justice conference as part of the sentence.

17.73 It is recognised in New Zealand that the use of restorative justice processes in family violence and sexual violence cases will not always be appropriate. The particular dynamics of family violence and sexual violence, including the power
imbalances inherent in this type of offending, can pose significant risks to the physical and emotional safety of the victim.

17.74 Family violence offending, in particular, is often cyclical and reflects deeply entrenched attitudes and beliefs. Offenders may be more manipulative and have offended seriously and repeatedly. A one-off intervention may, therefore, not be effective or safe.

17.75 Where a restorative justice process does take place, providers must ensure that facilitators possess the specialised skills and experience required to facilitate these cases and that additional safety and support measures are in place. Advice from those knowledgeable in responding to family violence and sexual violence should always be sought.

17.76 The age and maturity of a child or young person will often determine the appropriateness of a restorative justice process in a particular case and the extent of their participation — for example, very young victims may not attend the conference. Parents/caregivers should be fully involved in the process, including giving their consent to the process taking place and participating with, or for, the child.

17.77 There will be inevitable power imbalances arising from an adult offender and young victim. Therefore, if a restorative justice process does take place, restorative justice providers and facilitators must take particular care to ensure that the child or young person is safe and supported and understands what is taking place.

17.78 Project Restore helps people affected by sexual harm to restore their lives and relationships by meeting their justice needs and interests through restorative justice processes.

17.79 The New Zealand Law Commission7 examined how this could work safely in a process operating outside the court system. Eligible victims could choose to access an accredited programme provider, who would work with the victim to meet their ‘justice goals’, which may or may not involve meeting with the perpetrator.

17.80 Eligible perpetrators who participated would need to take responsibility for their actions and make a redress agreement. The agreement would be monitored by the provider, who would verify completion to an external body. If the process was successfully completed, a statutory bar would prevent the perpetrator being prosecuted for the same incident of sexual violence.

17.81 The theory is that it is better if the offender is participating in a sexual offender treatment programme than doing nothing.

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Arguments against alternative mechanisms

17.82 Restorative justice reflects a misunderstanding of what victims of serious sexual crime go through. It not only risks re-traumatisation but provides a very dangerous ‘out’ for sex offenders that leaves others in enormous danger of repeat offending.

17.83 In many of these offences, there is a complete imbalance of power and control and this process presents yet another opportunity for somebody who has the pathology of resorting to a sex crime to exert power and control.

17.84 Given that the majority of offenders know their victims beforehand, victims might be vulnerable to emotional manipulation and feel forced to forgive.

17.85 Restorative justice is too focused on private interests at the expense of the public interest. These offences are so heinous and the risk of reoffending so great that only the criminal justice system can meet the public interest need for punishment, retribution and deterrence. A public wrong requires a public response.

17.86 How would a self-referral voluntary justice mechanism, involving a restorative justice element, with built-in confidentiality, accord with Access NI checks/vetting and barring? Would the perpetrator and their crime be entered on a criminal record? Would such a person be identified via an enhanced disclosure check when applying to work with children or vulnerable adults?

Arguments in favour

17.87 The criminal justice system is currently dealing with only a small percentage of these crimes and, of those that are reported, over 40% withdraw\(^8\). These figures may be an underestimate in certain marginalised communities (see chapter 13). The system is proving inadequate to meet the problem of serious sexual crime.

17.88 Alternatives to the criminal justice system have already been deployed in youth justice and creative solutions are being introduced in low-tariff crime. We cannot go on ignoring the possibilities for dealing with these offences with alternative mechanisms when already the universities have recognised the problem and across the world countries are offering alternatives that people regularly availed themselves of.

17.89 If we do not provide victim-focused solutions to those who entirely voluntarily wish to avail themselves of them, those who are committing at least some of these heinous offences will emerge unscathed and perhaps continue to endanger others.

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\(^8\) 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.
Discussion

17.90 I believe we have to recognise that the criminal justice system has a specific set of functions that may limit its ability to meet the justice needs of victims of serious sexual assault. The justice needs of one victim will differ from the justice needs of another. For some victims the negative experiences of the court process and the prescribed rigid consequences for the offender may be reasons for not entering the criminal justice system. For others — for example, in familial contexts or wherever very young offenders are concerned — the complainants may find the embarrassment of public disclosure all too great and will never report the matter to police.

17.91 In short, victims’ needs are complex, individualised and are not necessarily met in all instances within that system. This failure in itself can arguably be said to contribute to inadvertent trauma, distress and secondary victimisation. Might more victims be prepared to come forward and participate in legal proceedings if a suite of complementary potential remedies might make the ordeal worthwhile?

17.92 In articulating such complementary measures, I am particularly anxious not to displace the function of the criminal justice system, which rightly prioritises fair trial protections for accused persons whose liberty is at stake.

17.93 Moreover, there are certain types of sexual offence and offenders for which there is a public interest in dealing with them exclusively in the criminal justice system with condign custodial punishment visited on the offender.

17.94 However, because that system is in many ways offender-focused, it perhaps fails to give effect to the diverse needs of victims and, for that matter, the best manner of dealing with offenders. That is one reason why in Northern Ireland we increasingly invoke innovative means to deal with youth justice and low-tariff offenders outside the conventional court system.

17.95 Accordingly, I consider that as a society we need to be innovative in looking at mechanisms outside the criminal justice system to complement its method of dealing with serious sexual offences so long as fair trial rights are not sacrificed.

17.96 In the context of alternative solutions and restorative justice in dealing with serious sexual offences, one crucial difference from conventional practices has to be made crystal clear. Any new process must be victim-focused and based on the needs of the victim. It must put victims at the heart of the justice process, empowering and helping them to move on. It can be triggered only if the victim genuinely wishes to do it. It must never be allowed to become yet another instance of re-traumatising the victim.

17.97 They must not be forced or pressurised to go down this avenue and, if resolution for complainants means putting the perpetrator in prison for a long time, then so be it. Many victims of sexual violence or abuse undoubtedly may
not want to take part in restorative justice, and many offenders may never admit their guilt let alone show remorse to facilitate such a process.

17.98 But where they do, and where the restorative justice process can be delivered safely, it is possible that it can make a difference, helping victims to put the crime behind them.

17.99 Restorative justice should only happen when there is a facilitator or accredited practitioner with the right skills and experience available who has completed suitable training and has specific expertise in sexual harm. They will decide whether the process is appropriate and, if it goes ahead, the safety and well-being in the process of the complainant is paramount.

17.100 Moreover, there will undoubtedly be some circumstances where, as in the New Zealand system, restorative justice will be wholly unsuitable, and these cases will need to be weeded out from any new process as occurs in that jurisdiction. These would include, for example, where the use of extreme physical violence had been used, (although some such cases have been successfully processed⁹), multiple perpetrators, use of a weapon, where there was obvious evidence of abuse of power and manipulation during the process, and child sexual abuse.

17.101 However, sadly, the unassailable fact is that the vast majority of complainants currently remain outside the criminal justice system, and that in itself presents a public interest danger, with potentially large numbers of offenders remaining unscathed. That circumstance cannot be in the public interest and demands to be addressed.

17.102 I do not see why solutions that are open to students in our universities here and elsewhere, where they voluntarily opt to invoke them, should be denied to the majority of complainants who are not at these institutions.

17.103 I am attracted by the proposals made by the New Zealand Law Commission and the system that is evolving in that jurisdiction. I strongly recommend the Department of Justice to consider the contents of the report of the New Zealand Law Commission of December 2015, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, to map out the details of some of the proposals I have set out.

17.104 In the first place, restorative justice should be invoked as a possibility where the offender has pleaded guilty and the victim has indicated a desire to avail themselves of restorative justice, and the offender agrees also.

17.105 This can be profitably invoked whilst the perpetrator is serving their sentence. It can possibly be invoked before sentencing with the judge taking any agreement arrived at during the subsequent conference into account. My concern here is that the judge would need to be careful to avoid establishing a hierarchy of

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rape with the remorseful rapist somehow receiving a much reduced sentence for what is a heinous offence. I repeat, however, it can only arise if the victim leads the process and the offender acknowledges their wrongdoing.

17.106 The onus is on the Department of Justice to provide state-funded, properly qualified facilitators to operate such a scheme. There already exists in Northern Ireland organisations with restorative justice trained staff, such as the YJA, the Northern Ireland Prison Service, the PBNI as well as community-based restorative justice organisations.

17.107 However, I believe the department should also give careful consideration to similar facilitators available in an alternative process to resolve certain serious sexual offences outside the criminal justice system, where the complainant does not wish to report the matter to the police and the alleged offender agrees to participate.

17.108 The suitability of the case would be determined by those specialist facilitators using a comprehensive risk assessment mechanism, excluding cases set out above. It would include an assessment of risk to the community in consultation with the police or other agencies where appropriate.

17.109 Nothing said by the perpetrator in the course of this alternative process could be used in criminal proceedings, save that, if the information related to other offending, this could trigger further police investigation and could be used in criminal proceedings. I immediately recognise the dangers of such confidentiality. Someone who had admitted serious sexual offences in the process would not therefore have an entry on their criminal record or an appearance on an enhanced disclosure check. However, given the huge amount of under-reporting, many perpetrators are already escaping such protective measures. At least in this process, they may agree to undergo treatment and reverse their deviant behaviour in the future. Presumably, this would include undertakings not to work with children or vulnerable adults. A breach would vitiate the agreement.

17.110 The process would permit the complainant at any time to withdraw and report the alleged offences to the police.

17.111 In making this suggestion, I am acutely aware of the conceptual difficulty in the state lending its approval to, and facilitating a process where, for example, a rapist who will have admitted their guilt is not being processed through the criminal justice system. The distinction from low tariff crime or youth offending, where restorative justice works conventionally, could, arguably, not be stronger. On the other hand, some radical remedy has to be considered for that small proportion of cases where the victim is adamant that the police must not be involved and yet desperately needs to help alleviate their plight and which they feel can best be addressed in this novel manner.
17.112 I add two riders to my views. First, if these recommendations are to be taken up, I consider legislation is required to ensure sustainability. In the United States, New Zealand and European jurisdictions, legislation exists and thus creates a better chance of the process succeeding.

17.113 Secondly, whilst legislation is required, it is not enough. If there is reluctance in the part of members of the public in general, or on the part of facilitators, to embrace this concept the process will fail. There must be public education on the desirability of such mechanisms.

Section 5, Criminal Law Act (Northern Ireland) 1967

17.114 A further impediment to reporting these crimes can also arguably be the provisions of section 5 of the Criminal Law Act (Northern Ireland) 1967 which requires an individual with knowledge of a relevant offence (which would include rape or other serious sexual offences) to report it to the police in the absence of a reasonable excuse.

17.115 This in itself can prevent complainants coming forward when they feel they cannot provide full and frank details to, for example, social workers, doctors, counsellors, nurses etc. if they wish the crime to remain unreported.

17.116 Such impediments cannot be in the public interest if their effect is to prevent effective support being given to victims and impedes eventual prosecution of offenders.

17.117 The figures for prosecutions and convictions for such offences in Northern Ireland are extremely low and the PSNI adopts a safeguarding approach to such prosecutions and only report such matters if there is a risk to others by not so reporting. The Attorney General obviated a similar problem about reporting a rape in exemplary fashion as earlier set out in this chapter.

17.118 Already in most cases, there may well be reasonable excuse for such matters not being reported by third parties where it would hinder the support and therapy being given to the complainant, albeit the situation would be different where the victim of the serious sexual offence is a child or vulnerable adult, or where failure to report the offence to police is likely to put others at serious risk of harm.

17.119 Whilst it is unlikely that prosecutions would ensue where information was given in confidence or to family members, the perception amongst non-lawyer professionals is that prosecution could well flow from non-disclosure. I believe that counselling or medical services such as those provided at the Rowan centre or under the aegis of the various support agencies should have a clear dispensation in all serious sexual offences, either by an amendment to the 1967 Act or by a further guidance statement from the Attorney General, in each instance carrying the same rider where the victim of the serious sexual offence
is a child or vulnerable adult, or where failure to report the offence to police is likely to put others at serious risk.
Proposed recommendations

219. The Department of Justice should give serious consideration to providing state funding for a scheme of accredited practitioners to operate a scheme of restorative justice at any stage in the criminal justice process dealing with serious sexual offences where the offender has admitted his guilt and the victim has requested the scheme be invoked. The scheme must be victim led.

220. The Department of Justice should give consideration to making available to complainants, a self-referral voluntary justice mechanism involving a restorative practice element as an alternative to participation in the criminal justice system in order to resolve certain serious sexual offences, provided it is victim led.

221. Section 5 of the Criminal Law Act (Northern Ireland) 1967 be repealed save in cases where an individual with knowledge of a relevant offence (which would include rape or other serious sexual offence) concerning a child or vulnerable adult would be obliged to report it to the police in the absence of a reasonable excuse.
A review of the law and procedures in serious sexual offences in Northern Ireland
An ounce of prevention is worth a pound of cure.

Benjamin Franklin

Issue
Is the criminal justice system properly resourced for the beginning of the proposed changes to the law and procedure in serious sexual offences?

Current law
18.1 To be eligible for legal aid in Crown Court proceedings, the court must be satisfied that it is in the interests of justice that the applicant should receive full criminal legal aid. The interests of justice criteria were set out by the Widgery Committee as:

(a) That the charge is a grave one in the sense that the accused is in real jeopardy of losing his liberty or livelihood or suffering serious damage to his reputation;

(b) That the charge raises a substantial question of law;

(c) That the accused is unable to follow the proceedings and state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;

(d) That the nature of the defence involves the tracing of witnesses or expert cross-examination of a witness for the prosecution;

(e) That legal representation is desirable in the interest if someone other than the accused, as, for example, in the case of sexual offences against young children when it is undesirable that the accused should cross-examine the witness in person.

18.2 The parent legislation that underpins free legal aid in the Crown Court is The Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Article 29 stipulates that:

any person returned for trial for an indictable offence ... shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by rules, if a criminal aid certificate is granted in respect of him.

18.3 Article 37 of the 1981 Order, as amended, provides:

The Minister of Justice in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give
legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard among other matters which are relevant to:

(a) the time and skill which work of the description to which the rules relate require;
(b) the number and general level of competence of persons undertaking work of that description;
(c) the costs to public funds of any provision made by the rules; and
(d) the need to secure value for money, but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part.

18.4 In setting the legal aid rates and irrespective of the legislative framework, there has always been a focus in particular on the time and skill of the professional, the public expenditure involved and value for money for the taxpayer.

18.5 In 2005 there was a policy shift to introduce a standard fee format for legal aid in the Crown Court. Such standard fees were to operate on a swings-and-roundabouts basis, an idiom that characterises the rationale for setting the rates for fees in almost all legally aided cases.

18.6 The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 has provided the basic structure of the various remuneration schemes since.

18.7 Presently, The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2016 and The Legal Aid for Crown Court Proceedings (Costs) (Amendment No. 2) Rules (Northern Ireland) 2016 prescribe for the determination of costs payable to solicitors and barristers in respect of work done under a criminal aid certificate for all cases tried on indictment since 15 April 2016.

18.8 In respect of serious sexual offences (and also offences against children) these are contained within a table of offences in schedule 3 to The Legal Aid for Crown Court Proceedings (Cost) Rules (Northern Ireland) 2005 Rules as amended. Serious sexual offences are class D offences for the purposes of the rules (there are nine classes of offences from A to I). There are detailed provisions for the fee applicable to solicitor, QC, leading/led/sole junior counsel depending on whether the case is a plea from arraignment, a plea before the trial commences or a trial fee with varying fees depending on the length of trial.

18.9 There is an all-inclusive fee for a case that is characterised by a guilty plea at arraignment regardless of how many times the case is listed in court between arraignment and sentencing.
18.10 A trial preparation fee applies to any case that is characterised by a not guilty plea at arraignment but a guilty plea prior to trial. There are varying fees depending on the page count.

18.11 What is significant in relation to these fees is the definition of the page count or ‘PPE range’ as defined in the 2011 rules. The page count is confined to the number of pages of prosecution evidence served on the court. It includes witness statements/depositions, exhibits and interview transcripts. It does not include disclosure material or third-party disclosure as directed by the court. In fact, there has never been provision for any form of payment for consideration of disclosure material since the introduction of the standard fee regime for Crown Court cases.

18.12 The third type of composite fee is the basic trial fee, which applies to a case that proceeds as a trial. Again, the PPE range is relevant and the actual duration of a trial impacts on the banding of the applicable fees. Again, any disclosure material that falls outside the 700-page count is not specifically remunerated.

18.13 The size and complexity of the case has thus been characterised by the PPE range in cases that are remunerated as trial preparation fees and an additional banding of cases based on the length of the trial for those that are remunerated as basic trial fee cases.

18.14 A series of fixed fees are payable for attendance at arraignment, reviews/mentions, sentencing hearings and refresher fees for cases that continue after the first day of trial. This does not apply to a case that is characterised with a guilty plea at arraignment.

18.15 Arguably, these ancillary fees may not properly remunerate practitioners for the detailed and focused case management hearings, Ground Rules Hearings and/or the pre-recorded cross-examination of witnesses that is envisaged by this Review.

18.16 The Legal Aid for Crown Court Proceedings (Costs) (Amendment No. 2) Rules (Northern Ireland) 2016 does make provision for the payment of additional remuneration in exceptional cases. They provide for an application for a certificate of exceptionality in an individual case, where a representative is required to undertake additional preparation work because the case involves a point of law or factual issue that is very unusual or novel. The rules prescribe hourly rates of payment for the additional work authorised by the Department of Justice.

Economic cost of sexual offences
18.17 In terms of financial impact, the estimated cost of health and social services support in Northern Ireland as a result of domestic violence and abuse

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approximately £50.2 million for 2011/12, with the total estimated economic costs of domestic violence in Northern Ireland for the same year standing at around £674 million.

18.18 The same report calculated that the costs for sexual violence occurring outside 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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18.19 These figures are unsurprising in light of a report from the Home Office for England and Wales in July 2018, *Economic and Social Costs of Crime*. This document recorded the estimated 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 crimes) £7.4 billion.

Discussion

18.20 I recognise that we are in a challenging financial period when many disparate and wide-ranging demands are being made on government. Limited funds are available in every conceivable area of public concern. Difficult choices have to be made.

18.21 However, policymakers have to decide how two fundamental obligations of the state are to be met. 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. Secondly, to those who are accused of these offences so as to ensure a fair trial and the innocent are not convicted. How are these obligations to be met if appropriate resources are not provided? Are we to abandon these people to their fate merely because we do not have the appetite to pay for all our good intentions?

18.22 In this Review, 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.
18.23 In the course of my meetings with over 200 consultees and arising from meetings with my multi-agency advisory group, what has become very clear is that the issue of resourcing is a key component of our system’s ability to deliver these improvements.

18.24 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, a number 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.

18.25 My views apply equally to statutory and voluntary agencies, the judiciary tasked to conduct these cases, the legal profession and even the Department of Justice, which will be responsible for overseeing the delivery of my recommendations.

18.26 The draft Programme for Government adopted an outcomes-based approach and considers what the outcomes for the citizen in Northern Ireland should be and what kind of place we want to live in.

18.27 Of particular note, outcome 7 of the Programme for Government — ‘We have a safe community where we respect the law, and each other’ — includes as indicator 38 of delivery to ‘increase the effectiveness of the justice system’. A lead measure for this indicator is ‘access to justice and speedy resolution for victims’ and while a fleet of measures is being developed to advance this aim, there remains scope to do more, arising from my recommendations.

18.28 Before seeking to implement any of the recommendations, I request that the Department of Justice 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 Police Service of Northern Ireland (PSNI) and Public Prosecution Service (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.

18.29 Failure to properly conduct a resource impact assessment will undermine the fulfilment of my recommendations, risks contributing to increased delay as a result of spreading limited resources even more thinly in an attempt to do so, and loss of confidence of stakeholders, including the victims we serve and the wider public.

Legal profession

18.30 Throughout this Review, significant emphasis has been placed on the inherent difference in these types of offences over all other offences in the criminal code.
The recommendations that are being contemplated are, in some circumstances, potentially ground breaking within this jurisdiction.

18.31 Legal aid funding for these types of cases must also adapt to the cultural changes that are being considered for the presentation of these cases in court.

18.32 For example, preparation for cross-examination of the complainant outside the course of the main trial will require a different approach by the Legal Services Agency to the way the fee structure in these types of cases are currently calculated and calibrated.

18.33 Likewise, the importance of pretrial and Ground Rules Hearings will be underpinned only if they are defined and remunerated in a way that distinguishes them from other routine court mentions/reviews.

18.34 Delay in the system is the worst in the UK and is deteriorating each year to a point where rape cases[^2] are taking, on average,[^3] 943 days from report to conclusion and amounts to a clear denial of access to justice.

18.35 A key ingredient to arresting and reversing this unacceptable trend is earlier active engagement of the defence in the process, including detailed judicial case management, disclosure, crystallising the defence case etc. This is simply not going to be effected and the proposals will founder unless fees are adjusted to pay adequately for this work.

18.36 There is a sense that the defence statement has become perfunctory. In this Review, it is envisaged to become a critical document that should act as a signpost for the defence case and alert the court and the prosecution to significant milestones on the pathway. If so, it needs to be identified as important by the Legal Services Agency, with appropriate remuneration for those who draft it, in much the same way as pleadings are remunerated in civil justice.

18.37 How we currently handle disclosure is one of the major blights on our criminal justice system. It has been identified by virtually everyone in this Review as a major issue in the criminal process, and if poorly handled from the outset, is a contributing factor to a corrosive delay and replete with the potential for injustice within the system for all those involved. There is no provision at present to remunerate practitioners for dealing with this crucial aspect of the whole process.

18.38 The PPE range as described already, recognises the complexity of the case, and the fee relevant to that complexity, by means of a banded page count on the basis of the evidence ‘served on the court’. There should be some form of

[^2]: Based on the principal offence disposed and relate to substantive versions of the offence only.
[^3]: 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.
additional fee for consideration of disclosure material and in particular third-party material.

18.39 A defence statement properly pleaded should identify disclosure material that satisfies the disclosure test.

18.40 Third-party disclosure has already been judicially considered to be both relevant and in the interests of justice to disclose, and if the consideration of such material is properly remunerated, it will behove everyone to address the issue in a timely and comprehensive manner; reduce delay and ensure that the interests of justice are served for all.

18.41 This Review recognises that those involved in these types of trials require particular knowledge, skills and abilities. Indeed, my recommendation is that only those who have demonstrated this should be permitted to be involved in such trials.

18.42 It is also apparent that a fundamental theme throughout the Review is the imperative for engagement from the outset. Any new judicial protocol and/or practice direction to marshal how defence practitioners prepare and defend those charged with serious sexual offences will add to the workload of those engaged in criminal defence work. Whilst practitioners will doubtless rise to meet the challenge that reform will bring, it must be adequately and properly remunerated.

18.43 It is timely to revisit the provisions of articles 37(a) and 37(b) of the 1981 Order and to recognise that those who undertake this type of work must exercise significant skill and competence to ensure that the improvements to the system can achieve the intended results.

18.44 The Review is also recommending that complainants ought to have the funded resource of access to an experienced lawyer to explain the procedures, the law, the trial process and some of the specific areas of concern for complainants — viz., third-party disclosure or health records, cross-examination about previous sexual history etc.

18.45 Criminal solicitors are well placed to provide this advice, subject to suitable funding. This should enable complainants to receive focused but time-limited advice on the actual issues that will arise in the trial from an experienced lawyer who can represent the complainant’s interests exclusively during the period of the retainer/referral/instructions. The lawyers need to be appropriately recompensed if it is to work.

18.46 Criminal defence practitioners are often much maligned for their insistence on an ever-increasing slice of the ever-diminishing cake that is the legal aid budget. However, in this area, the importance of highly skilled lawyers, fully briefed and properly prepared to act on behalf of those accused of serious sexual offences, cannot be overstated.
18.47 I make no apology for repeating what I have said in chapter 9, ‘Delay’. The key to reducing delay, solving the seemingly immutable issue of late and inefficient disclosure, demanding early defence and prosecution engagement, introducing early Ground Rules Hearings, pre-recorded cross-examinations and early firm case management is to introduce a new culture of front-loading the process, in stark contrast to the current system. This will not work and the problems besetting serious sexual offences will remain unless the Legal Services Agency for Northern Ireland creates a bespoke system of payment, fixed or otherwise, for these early steps. The setting-up of this Review is proof positive that serious sexual offences present unique problems in the criminal justice system and they require bespoke solutions if we are really serious about solving them.

Public Prosecution Service

18.48 The resourcing of decisions as to prosecution is labour-intensive: 60% to 65% of the current running costs of the PPS are in respect of staff costs, and it is widely recognised that, in general, cases involving sexual offences are more time-consuming to process than other so-called volume crime.

18.49 The reasons are multifactorial, due in part to the fact that there has been a 21% increase in the number of incoming cases to the PPS over the 2017/18 financial year (a trend that seems set to continue), most allegations are denied by suspects, with the majority of cases contested to trial stage, increased volume of digital and third-party documentation requiring consideration by prosecutors, and the increased level of engagement with victims throughout.

18.50 To increase the demands upon prosecutors will bring contingent costs: in effect, time is money, and intensifying the requirement for new duties has to be matched with equivalent resource.

18.51 This casework also requires specialist prosecution staff who are in limited supply, and building the capacity of the Public Prosecution Service to meet increased demands may have a lead time of up to six months for recruitment and training.

18.52 The PPS also engages independent counsel to prosecute cases in the Crown Courts and higher courts. Additional duties falling to them, derived from a number of my recommendations, will result in additional payments becoming due. Payments to counsel in respect of this work are currently determined in line with costs payable to the defence and will require considered assessment and funding where relevant.

Police Service of Northern Ireland

18.53 The absence of adequate resourcing to provide properly trained officers specialising in investigating serious sexual offences will continue to delay...
justice inordinately for both complainants and accused and potentially cause miscarriages of justice, with the risk of innocent people being imprisoned.

18.54 Specially trained and qualified investigators and interviewers (especially achieving best evidence (ABE) interviews of children and vulnerable witnesses) in serious sexual offences — officers who are also up to the task of organising early third-party disclosure, unused material disclosure, drafting accurate and informed disclosure schedules etc. — require a substantial degree of time-consuming specialised training. It is only with such steps that we in Northern Ireland can cut down the current unconscionable delay and avoid the injustices that have occurred in England. Resources to meet these imperatives have to be found if we are to address the continuing problems.

18.55 My own experience in this Review echoes the conclusion of the House of Commons Justice Committee, who conducted an inquiry into the disclosure of unused material in criminal cases,⁵ published in July 2018, and concluded that government must consider whether funding is adequate to support a strong disclosure.

Judiciary

18.56 Resources must be made available to the Northern Ireland Judicial Studies Board (JSB) to train all judges adequately, with multiple stakeholder involvement and provision made for all Crown Court judges to attend conferences in England on serious sexual crime both on initial appointment and thereafter for refresher courses on a more regular basis than currently occurs.

18.57 In addition, appropriate administrative assistance must be made available to the judiciary to effectively operate the fresh impetus to be given to case management.

Complainants

18.58 The effects of serious sexual offence crimes on victims are devastating in terms of human misery and bring about enormous cost to the National Health Service and the nation at large (see earlier in this chapter).

18.59 Counselling services and support to the voluntary sector are crucial to help victims through the court process and recover and get on with their lives. It is short-term economic illiteracy to fail to invest adequately in these early interventionist services.

18.60 There must also be investment in the court process for complainants to ease the harrowing nature of the court procedures and to take vigorous steps to encourage participation in the process.

18.61 Thus, for example, separate legal representation, early cross-examination, more acceptable court facilities, more training of the professions and the judiciary are but some of the early remedies that have to be paid for and provided.

18.62 If the plight of victims is to be fully comprehended and various societal myths dispelled, there has to be a recognition across government departments that the public in general, and schools in particular, need education programmes. Early and relevant investment in such programs will hasten the long-term dividends.

Children

18.63 Children need to be carefully considered and analysed if we are to arrest the development of overwhelming personal, social and mental health problems into adulthood, with huge costs to our Health Service.

18.64 Only appropriate investment can arrest this. Thus the Department of Justice must take steps to explore such internationally recognised schemes as Barnahus. It is unconscionable that our children should be deprived of what may conceivably prove to be life-changing opportunities in this distressing area of serious sexual crime merely because we are not prepared to invest in appropriate research and analysis as a first step.

Marginalised communities

18.65 There is a paucity of research that we in Northern Ireland — and I include in this concern not only the Department of Justice but the various voluntary and statutory bodies representing these communities — have carried out into the prevalence and extent of serious sexual offences in these communities. It is completely unacceptable if we are to characterise ourselves as a caring, just society.

18.66 Investment has to be made in research as to the extent and nature of this problem locally before we can even begin to provide criminal justice solutions in the law and procedure governing these offences within these communities.

Technology

18.67 If those accused of these crimes are to receive a fair trial and if complainants are to receive justice in timely fashion, more investment has to be made in due process and the technology that makes the criminal justice system work efficiently.
Conclusion

18.68 As a society, we have to decide whether we are serious about addressing the problems that exist in our criminal justice system in dealing with serious sexual crime. Many of the proposals I have made will require some short-term investment, and others long-term financial consideration, but all of these investments have the potential to make massive savings long term if only we have the imagination and determination to pursue them.

18.69 No individual recommendations are made in this chapter simply because the resources required for many of them in all of the previous chapters are self-evident.
A review of the law and procedures in serious sexual offences in Northern Ireland
### Glossary

<table>
<thead>
<tr>
<th>Name</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABE</td>
<td>Achieving Best Evidence</td>
</tr>
<tr>
<td>ADHD/ASD</td>
<td>Attention Deficit Hyperactivity Disorder/Autism Spectrum Disorder</td>
</tr>
<tr>
<td>BBC</td>
<td>British Broadcasting Corporation</td>
</tr>
<tr>
<td>BAME</td>
<td>Black, Asian and Minority Ethnic</td>
</tr>
<tr>
<td>CBA</td>
<td>Criminal Bar Association</td>
</tr>
<tr>
<td>CCBE</td>
<td>Council of Bars and Law Societies of Europe</td>
</tr>
<tr>
<td>CCrt</td>
<td>County Court</td>
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<tr>
<td>CCJ</td>
<td>Crown Court Judge</td>
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<tr>
<td>CCRC</td>
<td>Crown Court Rules Committee</td>
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<tr>
<td>Charge</td>
<td>When a suspect is formally accused of committing a crime</td>
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<tr>
<td>CJB</td>
<td>Criminal Justice Board</td>
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<tr>
<td>CJINI</td>
<td>Criminal Justice Inspection Northern Ireland</td>
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<tr>
<td>CJPDG</td>
<td>Criminal Justice Programme Delivery Group</td>
</tr>
<tr>
<td>CJS</td>
<td>Criminal Justice System</td>
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<tr>
<td>Counselling</td>
<td>Giving help and advice on personal, social or psychological problems</td>
</tr>
<tr>
<td>CPD</td>
<td>Continuing Professional Development</td>
</tr>
<tr>
<td>CPS</td>
<td>Crown Prosecution Service</td>
</tr>
<tr>
<td>Cracked trial</td>
<td>One that’s dropped because a witness doesn’t turn up or withdraws their evidence</td>
</tr>
<tr>
<td>Cross-examination</td>
<td>Challenging the evidence given by a witness in court</td>
</tr>
<tr>
<td>Crown Court or CC</td>
<td>A court where criminal cases are dealt with by a judge and</td>
</tr>
<tr>
<td></td>
<td>jury of 12 members of the public. The Crown Court also deals with appeals</td>
</tr>
<tr>
<td></td>
<td>for cases dealt with by the magistrates’ and youth courts</td>
</tr>
<tr>
<td>CSA</td>
<td>Child Sexual Abuse</td>
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<tr>
<th>Name</th>
<th>Description</th>
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<tbody>
<tr>
<td>CSE</td>
<td>- Child Sexual Exploitation</td>
</tr>
<tr>
<td>DESU</td>
<td>- District Electronic Support Unit</td>
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<tr>
<td>DHSSPS</td>
<td>- Department of Health, Social Services and Public Safety (Former NI Department, now DOH)</td>
</tr>
<tr>
<td>Disclosure</td>
<td>- The evidence that the Crown and Police have collected to prosecute a case and the filling of documents in statements required by law</td>
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<tr>
<td>DE</td>
<td>- Department of Education</td>
</tr>
<tr>
<td>DOH</td>
<td>- Department of Health</td>
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<tr>
<td>DOJ</td>
<td>- Department of Justice</td>
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<tr>
<td>DPP</td>
<td>- Director of Public Prosecutions</td>
</tr>
<tr>
<td>ECHR</td>
<td>- European Convention on Human Rights which is an international treaty to protect human rights and political freedoms in Europe</td>
</tr>
<tr>
<td>ECO</td>
<td>- Enhanced Combination Order</td>
</tr>
<tr>
<td>EU</td>
<td>- European Union</td>
</tr>
<tr>
<td>Examination in chief</td>
<td>- The part of the trial when witnesses tell the court what happened. In many cases involving child prosecution witnesses this is done using a video made at the start of the case by the police.</td>
</tr>
<tr>
<td>FSNI</td>
<td>- Forensic Science Northern Ireland</td>
</tr>
<tr>
<td>GP</td>
<td>- General Practitioner</td>
</tr>
<tr>
<td>GRH</td>
<td>- Ground Rules Hearing</td>
</tr>
<tr>
<td>HMCTS</td>
<td>- HM Courts and Tribunals Service</td>
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<tr>
<td>HO</td>
<td>- Home Office</td>
</tr>
<tr>
<td>ICP</td>
<td>- Indictable Cases Process (or Pilot)</td>
</tr>
<tr>
<td>Intermediary</td>
<td>- An intermediary is a person specially trained to help children and vulnerable adults understand and answer questions.</td>
</tr>
<tr>
<td>Intimidated Witnesses</td>
<td>- This definition includes those subjected to sexual offences, domestic abuse, human trafficking and stalking</td>
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<tr>
<td>IP</td>
<td>- Injured Party</td>
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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>IPSL</td>
<td>Institute for Professional Legal Studies</td>
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<tr>
<td>Istanbul Convention</td>
<td>A Council of Europe Convention on preventing and combatting violence against women and domestic violence open for signature on the 11th May 2011 in Istanbul</td>
</tr>
<tr>
<td>ISVA</td>
<td>Independent Sexual Violence Advocate</td>
</tr>
<tr>
<td>JSB(NI)</td>
<td>Judicial Studies Board Northern Ireland</td>
</tr>
<tr>
<td>Jury</td>
<td>Twelve members of the public who listen to evidence and decide whether the defendant is guilty in Crown Court cases.</td>
</tr>
<tr>
<td>Justice Committee</td>
<td>The Committee for Justice was established in Northern Ireland to advise and assist the Minister of Justice on matters within their responsibility as a Minister</td>
</tr>
<tr>
<td>LCJ (OLCJ)</td>
<td>Lord Chief Justice (Office of the Lord Chief Justice)</td>
</tr>
<tr>
<td>LD</td>
<td>Learning Disability</td>
</tr>
<tr>
<td>LGBT+</td>
<td>Lesbian Gay Bisexual Transgender + Others</td>
</tr>
<tr>
<td>Live Link</td>
<td>A closed circuit television or video link that enables witnesses to give evidence from somewhere away from the court room, but still allows them to be seen and heard and to see and hear what happens in court</td>
</tr>
<tr>
<td>LS</td>
<td>Law Society</td>
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<tr>
<td>MAP</td>
<td>Men's Advisory Project</td>
</tr>
<tr>
<td>MOPAC</td>
<td>Mayors Office for Policing and Crime</td>
</tr>
<tr>
<td>MOJ</td>
<td>Ministry of Justice</td>
</tr>
<tr>
<td>NAO</td>
<td>National Audit Office</td>
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<tr>
<td>NCCA</td>
<td>National Council for Curriculum and Assessment</td>
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<tr>
<td>NI</td>
<td>Northern Ireland</td>
</tr>
<tr>
<td>NIAO</td>
<td>Northern Ireland Audit Office</td>
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<tr>
<td>NICCY</td>
<td>Northern Ireland Commissioner for Children and Young People</td>
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<tr>
<td>NICTS</td>
<td>Northern Ireland Courts and Tribunals Service</td>
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<tr>
<td>NIPS</td>
<td>Northern Ireland Prison Service</td>
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<tr>
<td>Name</td>
<td>Description</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NSPCC</td>
<td>National Society for the Prevention of Cruelty to Children</td>
</tr>
<tr>
<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>PBNI</td>
<td>Probation Board Northern Ireland</td>
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<tr>
<td>PE</td>
<td>Preliminary Inquiry</td>
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<tr>
<td>PFR</td>
<td>Proportionate Forensic Reporting</td>
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<tr>
<td>PPS</td>
<td>Public Prosecution Service</td>
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<tr>
<td>PPSSCU</td>
<td>Public Prosecution Service Serious Crime Unit implemented in 2016</td>
</tr>
<tr>
<td>PSNI</td>
<td>Police Service Northern Ireland</td>
</tr>
<tr>
<td>QC</td>
<td>Queen’s Counsel</td>
</tr>
<tr>
<td>QUB</td>
<td>Queen’s University Belfast</td>
</tr>
<tr>
<td>RCNI</td>
<td>Rape Crisis Network Ireland</td>
</tr>
<tr>
<td>RASSO</td>
<td>Rape and Serious Sexual Offences</td>
</tr>
<tr>
<td>RCC</td>
<td>Rape Crisis Centre</td>
</tr>
<tr>
<td>Restorative Justice</td>
<td>Restorative Justice gives the victims to meet or communicate with their offender to explain the real impact of the crime. It often involves a meeting called a conference where a victim meets the offender face-to-face.</td>
</tr>
<tr>
<td>RI</td>
<td>Registered Intermediary</td>
</tr>
<tr>
<td>Rowan Centre</td>
<td>The Rowan is the regional Sexual Assault Referral Centre (SARC) for Northern Ireland opened in 2013 and jointly funded by the Department of Health Social Services and Public Safety and the Police Service for Northern Ireland</td>
</tr>
<tr>
<td>RTE</td>
<td>Irish National Television</td>
</tr>
<tr>
<td>SBNI</td>
<td>The Safeguarding Board for Northern Ireland</td>
</tr>
<tr>
<td>SCM</td>
<td>Statutory Case Management</td>
</tr>
<tr>
<td>Social Media</td>
<td>These are interactive computer-mediated technologies that facilitate the creation and sharing of information and other forms of expression by a virtual communities and networks</td>
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<td>Name</td>
<td>Description</td>
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<tr>
<td>Special Measures (SMD)</td>
<td>The help for witnesses that a court can offer so that they can give their best evidence in court. They include live video links, video-recorded statements, screens around the witness box and assistance with communication. (Special Measures Direction)</td>
</tr>
<tr>
<td>SSO</td>
<td>Serious Sexual Offences</td>
</tr>
<tr>
<td>The Review</td>
<td>The Gillen Review into the Law and Procedure of Serious Sexual Offences</td>
</tr>
<tr>
<td>TRAVAW</td>
<td>Training of Lawyers on the law regarding violence against women</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>United Nations Convention on the Rights of the Child</td>
<td>Universally agreed basic standards that should be respected by governments. The Convention sets out the basic human rights that children everywhere have. Available from UNICEF at <a href="http://www.unicef.org">www.unicef.org</a></td>
</tr>
<tr>
<td>USA (US)</td>
<td>United States of America (United States)</td>
</tr>
<tr>
<td>Video link</td>
<td>Another way of describing the live link</td>
</tr>
<tr>
<td>VPS</td>
<td>Victim Personal Statements</td>
</tr>
<tr>
<td>Vulnerable Witness</td>
<td>This definition includes children and adults with learning disabilities and mental health problems</td>
</tr>
<tr>
<td>VWCU</td>
<td>Victims and Witness Care Unit</td>
</tr>
<tr>
<td>Witness Charter</td>
<td>This document sets out the standards of service for all prosecution and defence witnesses</td>
</tr>
<tr>
<td>YJA</td>
<td>Youth Justice Agency</td>
</tr>
<tr>
<td>YWS</td>
<td>Young Witness Service</td>
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**Chapter 18: Resources**


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