SUPPORTING VICTIMS OF UNFOUNDED ALLEGATIONS OF ABUSE
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EVIDENCE IN SEXUAL OFFENCES PROSECUTIONS - Law Commission Consultation

FACT - our position

At FACT, we have been supporting victims of unfounded allegations of abuse for over 20 years. We do, of course, have every sympathy for genuine victims of sexual assaults of all types and understand the motives behind those trying to help such victims in their search for justice.

However, as this review derives from a recommendation made in the Government's "End-to-End Rape Review" which, in turn, has clearly been in response to complaints from 'victims groups' about a claimed decrease in prosecutions and convictions in sexual offence cases and the desire amongst politicians to be seen to be addressing the issue, that perspective will be more than well represented. We will, therefore, unapologetically, gear our comments to protecting the rights of the accused.

Sex offences are rightly considered to be serious crimes, often carrying long sentences and, potentially, the rest of the defendant's life on the sex offenders register if convicted, but they also carry a particularly harsh judgment from the public, including irrevocable damage to their reputation. Even within a prison, those convicted of sex offences are treated very badly by other prisoners - in many cases, worse than murderers or violent criminals. Because of this, and the severe limitations imposed by the sex offenders register, unlike most other crimes, a convicted sex offender cannot simply do their time and then continue to live a fairly normal life.

Furthermore, amongst the many insidious effects of wrongful allegations, and especially wrongful convictions, is the dreadful effect on the families of the accused. The life, career and reputation of the spouse can also be badly affected and, if they have children, their lives are also very badly affected, whether it is being taunted and bullied at school, having to move, or even, if the spouse supports the accused in maintaining their innocence, the children can be taken away from their parents. In other words, there is usually a significant ripple effect which spreads to other innocent people.

For these reasons, all of the usual arguments for safeguarding the innocent from wrongful conviction are even more important for alleged sex offences. However, some of the safeguards which apply to most other crimes have already been removed for sex offences; e.g. the requirement for corroboration or independent evidence. We are

therefore extremely wary of further inroads into the right of the accused to a fair trial and into ways in which a defendant may offer a defence.

We have looked at both the full consultation paper and the summary. However, we have limited our responses to the questions on the summary document as we were able to make the points with which we are most concerned adequately enough.

RAPE MYTHS

There are a number of supposed myths listed and we would agree with most but there is just one point with which we would most take issue - False Allegations.

MYTH #33 (CPS Legal guidance) - False Allegations

"misconceptions are beliefs which, although genuinely and sincerely held, are factually incorrect…"

Unfortunately, it seems that this also applies to the government (and to the author of the Consultation paper.)

Your Consultation paper states:

What the evidence shows: False allegations are very uncommon. The evidence does not support a generalised suspicion of rape complainants.

With over 20 years experience of dealing with this subject on a day to day basis, we believe categorically that this is untrue.

Contrary to the document's claim, the evidence does NOT support such a view and there is absolutely no justification for stating it.

It seems ironic, then, that a review which sets out to correct myths starts by stating a truth as a myth and a myth as a truth.

"There are three kinds of lies: Lies, Damned Lies, and Statistics"

A few sources regarding numbers of false allegations have been quoted, but these are from a tiny proportion of the research conducted and are ones which err on the very cautious side. Many other studies from the UK and overseas conclude much higher figures, including some in the USA which put the figure at over 50%, though it is unlikely that this and higher percentages are reflected in the views of the general population in England and Wales, even amongst those who believe that false allegations are common.

Of the studies quoted, the first "A Gap or a chasm - Attrition in reported rape cases" is stated to be compiled by: Liz Kelly, Jo Lovett and Linda Regan - Child and Woman Abuse Studies Unit, London Metropolitan University. This department can hardly be claimed to be an independent, unbiased research group. Relying on their conclusions is rather like relying on those of a partisan pharmaceuticals company on the effectiveness of a drug.

Despite that, most of the figures mentioned in that source are much higher, between 8 - 12%, but are then massaged downwards by every means possible, relying largely on dismissing the beliefs of experienced police officers, and discounting unknown factors, and it is the lowest of these massaged figures which is quoted in your paper.

Lisak et al. *seems* to have a more balanced view:
Of the 136 cases of sexual assault reported over the 10-year period, 8 (5.9%) are coded as false allegations. These results, taken in the context of an examination of previous research, indicate that the prevalence of false allegations is between 2% and 10%.

However, as Rick Bradford (*False allegations of rape: the true extent remains unknown - The Centre for Male Psychology*) points out:

> *But this is incorrect…These figures are all lower bounds. If they were all applicable to the same population … then 10.9% would be the final lower bound – which still might be far lower than the correct value.*

Another far more trustworthy source than Kelly, Lovett and Regan is Rumney & McCartan, whom you also quote, but looking at what they actually say is illuminating:

p11: Reviews of the more rigorous international studies suggest a false allegation rate of 2-8% and 2-10% of rape offences initially recorded as crimes by the police.

They explain more clearly the differing methods of calculation, stating:

Domestic research has used a range of measures when determining the rate of false allegations of rape. Some studies use the Home Office Counting Rules (HOCR) criteria which stipulate that when the police are determining whether to 'cancel' a recorded offence of rape (that is, to remove it as a recorded offence) they may do so inter alia where 'additional verifiable information [AVI] determines that no notifiable crime occurred'.

Essentially, this is a proxy measure for false allegations, and is arguably the best means by which to measure falsity.
Two domestic studies using the AVI standard have found false allegation rates of 7.9% and 7.7%.

Perhaps more important than the quoted figures is the warning given by Rumney & McCartan:
Despite scholarly claims that the rate of false allegations is 'extremely rare', the limitations inherent within the existing research literature mean that it is impossible to know the accuracy of this assertion.

and furthermore:
There is a risk that the uncertainties around the lower end estimates will be ignored and the interests of the accused side-lined to focus primarily on the interests of rape victims. [FACT's emphasis]

*A Ministry of Justice report, (MOJ, 2010), states that "Various studies have estimated that 8–11% of rape allegations in England and Wales are false", but it notes that "**lack of a***

consistent definition of what constitutes a false rape allegation, as well as variations in recording practices by police and others in the CJS, make accurate assessment of the true extent of such allegations very difficult". [FACT's emphasis]

The oft-missed point about such figures is that, as they only include *verifiable* or *very likely* false allegations, they represent the lower limit of the true number for the following reasons:

I. An unknown number of the dropped cases which are not definitively ascertained to be false will undoubtedly have been so;
II. There will have been false allegation cases where the defendant was found not guilty but the fact that the allegations were false cannot be proven;
III. Cases where an innocent defendant was wrongly convicted - which we believe is higher than most in the criminal justice system would care to accept - will be recorded as genuine.

These figures are among the unmeasurable figures but still count towards the true, unknowable number of false allegations.
Because of this, organisations like ours who deal day to day with such cases remain convinced that the real numbers are much higher than the quoted figures.

The Effect of false allegation numbers on Juries

It is not specified what the supposed myth is in terms of numbers - merely that "they are commonly false". What does "commonly false" mean?

Even if the lowest figures of 2 or 3% were accepted, the sheer numbers of reported offences would mean that in absolute terms, they are still not uncommon. But in percentage terms, is it thought that juries believe that the majority of reported rapes are false? That seems highly unlikely, even for the most cynical.

For anything below 50%, any sensible juror would still realise that, purely on a statistical basis, without any regard to evidence, the chances would be in favour of guilt, and this belief would have to be mirrored amongst the jury as a whole, so it seems highly unlikely that a jury would acquit on the basis of numbers.

On the other hand, if a jury is told that false allegations are rare, or given a figure such as 3%, it is quite possible that a jury would consider that a 97% chance of guilt is "sure" enough, irrespective of the evidence. So if there is any danger of a misguided verdict due to statistics and misconceptions, it is the defendant who should be concerned.

Perhaps the most important point, however, is to quote Rumney and McCartan again:
The interests of accuser and accused are better served by a careful reading of evidence and the avoidance of claims that false allegations are a 'fiction', 'extremely rare' or an 'epidemic'.

In other words, the true number of false allegations is not and cannot be known, so stating that they are rare or very uncommon is, at best, misleading and, at worst, untrue.

We would therefore strongly recommend that this supposed myth should be removed from the list. If any reference is made to figures, it should be far more cautious in its claims, emphasising that true figures cannot be known.

The effects of myths and misconceptions

We have some concern regarding the evidence used to assert that myths are believed by juries. It is based entirely on the 'mock jury' results, and the valuable work of Prof. Cheryl Thomas whose research itself cast doubt on the value of mock jury research has been completely and unfairly disregarded.

While a balance may be called for, the dismissal of one source and complete acceptance of another in favour of the government's evident agenda is not a legitimate position for an independent review to take.

We understand taking a cautious approach 'just in case' such myths are believed, not just by juries but by police and others along the way and, because most of the 'myths' are not, as far as we are concerned, contentious, that approach is acceptable up to a point.

However, where the myth to be 'corrected' is one which is disputed (such as numbers of false allegations), there is a danger that 'educating' those people may have just as damaging an effect but in the opposite direction. For example, if police officers are led to believe that false allegations are rare, there is a likelihood that they will forego the presumption of innocence and 'build a case' without due process and full investigation. Indeed, Sir Richard Henriques remarked that, following former DPP, Keir Starmer's assertion that complainants should be believed, such due process was absent in Operation Midland, leading to believing the claims of Carl Beech and wrecking the reputations of a number of eminent and entirely innocent people.

Anecdotally, FACT has had a large number of reports from those we have helped who have stated that the police obviously followed the "believe the victim" instruction and the investigation was far less thorough than it should have been.

Personal records held by third parties

The paper suggests that

"Where a defendant's right to a fair trial and a complainant's right to respect for their private life conflict then courts will undertake a balancing exercise."

…and this is as it should be.

Summary Consultation Question 1

We provisionally propose that for sexual offences there should be a bespoke, unified regime governing police and prosecution access to complainants' personal records held by third parties, the disclosure of such records to the defence, and the admissibility of such records at trial. Do you agree?

No comments to make on this question

Summary Consultation Question 2

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

We respect the privacy of complainants, and can understand that there are measures to ensure that *irrelevant* medical or counselling material is not disclosed. Nor is it in the interests of the defendant to be inundated with lots of disclosed material which is obviously irrelevant.
However, any safeguards should be framed in such a way that do not restrict material which may be relevant to the defence, even if the material is said to be sensitive. The question becomes how that decision is taken. It is preferable that the decision does not lie only with the prosecution.
"A reasonable expectation of privacy" seems somewhat vague. Who is to decide what that is?

Although it was stated that this review does not cover the topic of mobile phone data, it is not difficult to foresee that any recommendations in this area could very well be expanded to include such first or second party data. Then the question arises of what would have happened to Liam Allan if these criteria had been applied to his case. Therefore, any recommendations concerning such third party records should apply only to third party evidence and explicitly exclude direct application to evidence held by the complainant.

Summary Consultation Question 3

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

We agree that there should not be a complete prohibition on the access, disclosure or admissibility of pre-trial therapy records in sexual offences cases as there are circumstances in which such material is highly relevant.
e.g. There are those (including some law enforcers) who believe that false accusers should not be prosecuted because they might have mental issues - a view with which we strongly disagree.
If mental issues can be thought to mitigate the making of false allegations (because they were partly responsible for the accuser making them), then the complainant's mental health records are certainly something which should be accessible to the defence, where appropriate.
Further, if such mental health issues are said to be irrelevant to the making of allegations, then they cannot be used as an excuse not to prosecute if the allegations are later discovered to be false.

Summary Consultation Question 4

Providing that the record holder also consents to access, if protective measures are to be put in place for complainants who consent to access, what should those measures be?

We do not see the need for further protective measures if both the record holder and the complainant have consented to access.

Summary Consultation Question 5

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

We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent to access or to disclosure. Do you agree?

Where the evidence has probative value and normal rules would require disclosure - i.e. where such material could harm the prosecution's case or help the defendant's - such disclosure should take place without judicial permission. Where it is in doubt, we agree that judicial permission may be required.

However, we do not see the need for judicial permission where the complainant has agreed to access or disclosure.

Summary Consultation Question 6

For **compelled production** to police or prosecutors (or for **disclosure to the defence**), we provisionally propose an enhanced relevance test such that personal records held by third parties:

• must be likely relevant to an issue at trial or to the competence of a witness to testify; and

• compelled production to police or prosecutors (or disclosure to the defence) must be necessary in the interests of justice.

Do you agree?

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

- a) the extent to which the record is necessary for the accused to make a full answer and defence;
- b) the probative value of the record;
- c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- d) whether production of the record is based on a discriminatory belief or bias;

- e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- f) society's interest in encouraging the reporting of sexual offences;
- g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- h) the effect of the determination on the integrity of the trial process.

Do you agree? Are there factors we should remove, modify or add?

We agree, but the weighting of such factors must be foremost in the interests of protecting the innocent from wrongful conviction and the bar must not be so high that it prevents a defendant from accessing viable information - this overrides privacy concerns.

Summary Consultation Question 7

For **admissibility** as evidence, we provisionally propose an enhanced relevance test such that material in personal records held by third parties is admissible if:

• the evidence is relevant to an issue at trial or to the competence of a witness to testify; and

• it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Do you agree?

We provisionally propose setting out the Canadian list of factors to be considered when the court decides whether the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. These factors are:

- a) the interests of justice, including the right of the accused to make a full answer and defence;
- b) society's interest in encouraging the reporting of sexual assault offences;
- c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
- d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- e) the need to remove from the fact-finding process any discriminatory belief or bias;
- f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

- g) the potential prejudice to the complainant's personal dignity and right of privacy;
- h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- i) any other factor that the judge considers relevant.

Do you agree? Are there factors we should remove, modify or add?

We would remove the word "significant" in the second bullet point.
Its inclusion implies that evidence which did have probative value would not be admitted, even if it was not substantially outweighed by the danger of prejudice, if it was deemed not significant enough.
It should therefore read:

- *it has probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.*

Sexual Behaviour Evidence

Summary Consultation Question 8

We provisionally propose that sexual behaviour evidence should only be admissible if:

1. the evidence has substantial probative value; and its admission would not significantly prejudice the proper administration of justice. Do you agree?

No. There are many circumstances under which SBE would be highly relevant to a defendant's case without pandering to or promoting any perceived myths.
Similarly to Question 7, we feel the word "substantial" is unnecessary. If it has probative value and would not significantly prejudice the proper administration of justice, then it should be permitted.
An example of this was the Ched Evans case.

> *…the Court of Appeal and, subsequently, the trial judge were perfectly entitled to allow Evans' application under s 41(3)YJCEA 1999 to admit the fresh evidence of the complainant's sexual behaviour.*
> *…Put another way, had the jury not heard the evidence of the two men, they may unfairly have rejected as untrue Evans' case that the complainant was an enthusiastic and entirely consensual sexual partner. The evidence had nothing to do with attacking the complainant's character through her sexual history, and everything to do with establishing matters that were highly relevant to the key issue in the case…*
>
> *Ali Naseem Bajwa QC; Eva Niculiu,*
> *www.counselmagazine.co.uk - Dec. 2016.*

The current legislation already prohibits the use of SBE if it is probative and the "four gateways' give a more structured, specific and logical path to a decision on granting

permission, than the vague suggestion offered which, in our view, could lead to far more confusion and inconsistency.

From the same Counsel Magazine article:

> *….To tip the scales towards an extreme position is a recipe for injustice.Those demanding a change in the law would do better to trust judges and, if an application gets past a judge, juries to recognise an improper attack upon a complainant's character.*
>
> *Ali Naseem Bajwa QC; Eva Niculiu*

Summary Consultation Question 9

When the judge is deciding whether sexual behaviour evidence has substantial probative value, and its admission would not significantly prejudice the proper administration of justice, and therefore can be admitted, which, if any, of the following factors should they consider:

1. protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;
2. the interests of justice including the defendant's right to a fair trial;
3. the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions;
4. the risk of introducing or perpetuating myths or misconceptions; and
5. any other factor that the judge considers to be relevant to the individual case.

Are there any other factors that should be included in the legislation that the judge should consider when deciding whether to admit sexual behaviour evidence?

If the proposals were carried through, we believe the weighting of such factors must, above all, be in the interests of protecting the innocent from wrongful conviction. (point 2)

Bad / Good Character

Summary Consultation Question 10

Our provisional view is that the bad character provisions of the Criminal Justice Act 2003 do not require amendment to accommodate non-conviction evidence of previous sexual violence, non-sexual violence, or controlling or coercive behaviour by the defendant. Do you agree?

Is there a need for guidance about the law to assist prosecutors in case building and making applications, and judges in determining applications regarding the admissibility of non-conviction bad character evidence? If so, which body should publish such guidance?

No comments to make on this question

Summary Consultation Question 11

We provisionally propose that, if the jury has heard no evidence about the complainant's good character and the complainant has no prior convictions then, if the trial judge decides that fairness demands it, the judge should direct the jury explaining why the jury has heard no evidence of the complainant's good character and that the jury should not draw any inference adverse to the complainant from its absence.
Do you agree?

This seems somewhat redundant. If the judge is going to make this direction only in cases where the complainant has no prior convictions, then it has effectively the same effect as openly stating that the complainant has no prior convictions. If it would make any difference, the prosecution would mention it. 'Handholding' by the judge is unnecessary.

Summary Consultation Question 12

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

No. We do not agree.
This question refers not to vague allusions but to actual evidence.
Any evidence that the complainant has made false allegations of sexual assault is extremely valid and any restriction of such evidence would undoubtedly impinge on the defendant's right to a fair trial.

Furthermore, any generalised statistics (even if they could be trusted) would not be relevant if there is evidence, in the specific case, that the complainant had already made previous false allegations. That fact outweighs all considerations about general statistics.

The judge is likely to direct a jury that each case should be considered independently and on its own specific facts. If those facts point to the complainant telling the truth in this case, that would no doubt take precedence, but if the jury is asked whom to believe with little other evidence than their testimonies, previous false allegations would be highly relevant and helpful to the jury in preventing potential miscarriages of justice.

Criminal Injuries Compensation claims

Where claims meet certain criteria, and regardless of whether criminal proceedings take place or the defendant is convicted, the CICA may award compensation to complainants who sustained physical or psychological injury as a direct result of a sexual offence.

How do the CICA know if the complainant has sustained a psychological injury (or even that a physical injury was as a result of an assault? e.g. R v Eleanor Williams) especially if there is no conviction? If the purpose is to fund therapy, the compensation should be directly for that, not for e.g. fancy cars (such as that in which Carl Beech indulged with his payout).
Rather like the false difficult-to-disprove whiplash claims well-known to insurance claim investigators, compensation claims where no conviction is required are an open invitation to false accusers and (with lifelong anonymity and very little chance of being convicted themselves except in extraordinary cases) are much lower risk than, say, committing a robbery, and with often much greater potential pay-offs. These can be so high that it would be more astonishing if some unscrupulous people did NOT do it. Convicted false accuser, Gemma Beale received £15,000. Such sums cannot fail to be an inducement to some unscrupulous people.

Stakeholders have told us that the existence of a criminal injuries compensation (CIC) claim is used at trial to undermine the complainant's credibility and to suggest that their allegation is false and for the purpose of financial gain during cross-examination

By stakeholders, complainants and victims group are who is meant. This is hardly surprising. In a person v person trial, each side will try to undermine the credibility of the other, and the prosecution will try no less hard to undermine the credibility of the defendant.
The question to be asked is: if the defendant really is innocent, the allegations false and the motive financial, should the defence be prevented from asking genuine questions to elicit the truth?

In many cases, the question has been asked about a complainant: "why would they lie?" The possibility of false accusers doing so for financial gain is a very real possibility and taking away the possible highlighting of one of the potential motives of false accusers severely inhibits the 'fair trial for the defendant'. There is ample evidence to suggest that seeking compensation is a genuine incentive for some false accusers and the possibility of defence to show this should in no way be prevented.

One example is not from a fresh allegation but from prisoners jumping on an existing investigation, but it nonetheless shows the lure of money for unscrupulous people. It also highlights the dangers of police 'trawling' and why the publishing of suspects' identities *"that other victims may come forward"* is fatally flawed.

> *So, I came out with – not a horrific story – it was fairly tame going by comparison with some of the more bizarre allegations I'd heard. And my stuff just got fed into the process. And the man was charged…*
>
> *…So individually and separately, I spoke to these guys*. They said, yeah,* ***it's just a compensation scam****.*
>
> *(The Compensation Carrot and False Allegations, Ben Gunn, FACTion Magazine, Vol4-1, 2013)*
>
> *** [Others who had made false claims]

This is especially the case with famous, and often very wealthy, people who would naturally be an even more attractive target, in many cases leading to a large payment by the celebrity irrespective of guilt or innocence.

Alternatively, they can make their application within the time limit, with the risk that they are cross-examined on it and myths introduced at trial.
This problem is unique to sexual offences cases because CIC claims are frequently used against complainants in these types of cases but not for other offences, and because of their highly prejudicial potential.

This statement again relies on the false premise that real possibilities are myths. In response the comment by Geraldine Hanna (notably a 'victims commissioner'), there simply is no equivalent example in other cases - it is only sexual offence allegations where corroborating evidence is not required.

The very nature of this review shows that Sex offence cases ARE different from other cases. e.g. You have quoted that only 15% of defendants in rape cases plead guilty; this compares to about 70% for other crimes. No-one can say categorically that the difference is not because the many of those allegations are false, nor that the motive may be financial.

Summary Consultation Question 13

We provisionally propose that evidence and cross-examination about criminal injuries compensation claims should require permission from the trial judge and be subject to an enhanced relevance admissibility threshold and structured discretion, similar to sexual behaviour evidence.

This would require that evidence and cross-examination about criminal injuries compensation claims would only be admissible if:

1. the evidence has substantial probative value; and

2. its admission would not significantly prejudice the proper administration of justice.

Do you agree?

No. We very strongly disagree that evidence and cross-examination about criminal injuries compensation claims should require permission from the trial judge and be subject to an enhanced relevance admissibility threshold and structured discretion. We believe the subject of compensation forms a valid and justifiable line of questioning.

Summary Consultation Question 14

When the judge is deciding whether evidence of a criminal injuries compensation claim has substantial probative value, and its admission would not significantly prejudice the proper administration of justice, and therefore can be admitted, which, if any, of the following factors should they consider:

1. protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;
2. the interests of justice including the defendant's right to a fair trial;
3. the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions;
4. the risk of introducing or perpetuating myths or misconceptions; and
5. any other fact or that the judge considers to be relevant to the individual case.

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

If such a policy were to be introduced, we suggest, as before, that the defendant's right to a fair trial must be considered paramount and the threshold for such questions should not be so high as to inhibit questions with probative value. We believe that the risk of introducing myths is exaggerated.

The Question of Compensation

There is an argument that monetary compensation is not appropriate at all, as victims have not generally suffered so much financially as emotionally. Genuine victims claim to be interested in seeking justice and achieving closure so that they can progress from emotional and psychological trauma.

There are other jurisdictions in which monetary compensation has therefore been discontinued in favour of medical and psychological help.
We would wholeheartedly recommend that this should happen in England and Wales.

This would remove the motive of financial gain from the CICA and thereby also subvert any questioning by the defence concerning CIC as a motive for false allegations.

It would also encourage (as referred to in Q7c):
"society's interest in encouraging the obtaining of treatment by complainants of sexual offences;"

Special measures

Summary Consultation Question 15

We provisionally propose that complainants in sexual offence prosecutions should be automatically entitled to the following standard measures to assist them giving evidence, with the ability to apply to the court for additional measures:

1. the use of live link to attend court and give evidence remotely;
2. the use of screens in court;
3. the attendance of a supporter, including while giving evidence whether in person or by live link;
4. the removal of wigs and gowns while they give evidence;
5. separate, accessible entrances and waiting areas;
6. the exclusion of the public from the courtroom while they give evidence, either in person, by live link or the playing of recorded evidence; and
7. the recording of evidence.

Do you agree?

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

No comments to make on this question

Summary Consultation Question 16

We provisionally propose that complainants in sexual offences prosecutions should have access to independent legal advice and assistance in relation to their right to measures to assist them to give evidence. Do you agree?

No comments to make on this question

Summary Consultation Question 17

Should there be specific, or different, provisions for measures to assist defendants in sexual offences prosecutions to give evidence, beyond those currently available for all vulnerable defendants?

Yes. Defendants are often also vulnerable. This is especially so if the case has been widely reported in the press.

1. In such cases, protection from press intrusion should be made available.
2. Names of Defendants prior to conviction should be eligible for the same protection of anonymity as complainants. This would prevent the 'Trial by Media' which has often characterised certain cases and prevent miscarriages of justice when the jury has been unduly influenced by inescapable press coverage.
3. The defendant should be allowed to sit with their lawyer(s) rather than in the dock.

Summary Consultation Question 18

We provisionally propose that complainants in sexual offences proceedings, in respect of applications and requests relating to their personal records and sexual behaviour evidence, should have:

1. access to independent legal advice and assistance;
2. the right to participate in applications to the court relating to the admission of personal records and sexual behaviour evidence; and
3. access to independent legal representation when they have a right to participate in applications whether they arise before the trial, or during the trial in the absence of the jury.

Do you agree?

No comments to make on this question

Summary Consultation Question 19

Should practitioners have to be trained on myths and misconceptions before they can work on sexual offences cases?

We see no benefit from such training. It is surely up to the judge to ensure that barristers do not stray out of line.

We would, however, stress that it is equally important that, as well as defence barristers, prosecution barristers - and indeed Judges - do not prejudice or influence the jury towards conviction by stating their own misconceptions which are not universally accepted (including the notion that false allegations are rare!)

As we have already averred, ignoring other evidential factors, it is more likely that a jury will convict if they are made to believe that false allegations are at 3% of the total, than they are to acquit if they think they are, say, 33% of the total.

Summary Consultation Question 20

Do you agree that barristers should be allowed to ask questions which might relate to myths and misconceptions if they are relevant, rather than using a higher threshold as we propose for sexual behaviour evidence or compensation claims?

Yes, barristers should be able to ask relevant questions as necessary for a fair trial for both parties.

The example is given of an allegation being made due to anger after a fight and it is suggested that the barrister should be allowed to ask why there was a delay. If a question concerning anger as a possible motive for a false allegation is valid, we see no reason why the possible motive of CIC should be any different.

Other examples: In cases of murder, life insurance claims are looked into to see if that could be a possible motive. Or, in alleged murders of spouses, investigations extend to their personal life including whether there were affairs or other issues that could constitute the basis for motive. Where there is a suspicion of these things in a trial, such questions would not be prohibited from being raised. There should be no difference here.

Summary Consultation Question 21

As well as a general direction about not making assumptions, the example directions for adult complainants cover the topics of:

- *delayed reporting;*
- *a complaint made for the first time when giving evidence;*
- *consistency or inconsistency between accounts;*
- *emotion or distress when making a complaint or giving evidence;*
- *clothing;*
- *intoxication;*
- *previous sexual activity with the defendant;*
- *lack of resistance or injury; and*
- *the defendant being in a relationship.*

The specific directions given by the judge will be tailored to the issues raised in the case.

Should any directions (re: judicial directions) be amended or added to the existing example directions to juries?

No. However, the direction regarding inconsistency between accounts should be clarified, if not removed. Inconsistency between accounts is a far more common feature in those telling lies than in those telling the truth.
In a case which revolves around who the jury should believe, if the accounts of one are consistent and the other not so, it can be a valuable criterion to help the jury.

Summary Consultation Question 22

Should there be a presumption in favour of judges giving a judicial direction about myths, unless there is a good reason not to do so?

No. Warnings of certain myths would only be necessary if there was a danger of there being prejudiced beliefs concerning elements of the particular case. e.g. It might be appropriate for the Judge to warn of the myth that only gay men are raped in a case where the alleged victim was not gay, but there would be little point if, in this case, the alleged victim WAS gay.
We believe, therefore, that it should be left to the Judge to decide based on the particular of the case.

Summary Consultation Question 23

Should expert evidence of general behavioural responses to sexual violence be used at sexual offences trials?

Yes. We agree that this option should be available to complainants.

However, if expert evidence is allowed from psychologists, supposedly to impugn any myths, but in practice, to support the complainant, it should be permitted for the defence to bring in their own expert psychologist witness to support the position of the defendant. This may also be to impugn any myths which might harm the defence.

Summary Consultation Question 24

What are your views on methods for educating jurors including the use of information notices, videos and online interactive tools. In particular, which methods are the most important, or is there a best combination of methods?

More research needs to be done on this area before an answer could be given. If provided, any such 'education' given to jurors must be uncontroversial. Otherwise, there is a danger that, alongside the discrediting of some myths, a negative element of brainwashing could creep in.

However, we do believe that more 21st century technologies should be used in courtrooms. People learn and understand in different ways, and increasingly so for the computer and YouTube generations, with an acknowledged shortened attention span. Therefore, more use of video, images, diagrams etc. would indicate progress and help prevent contemporary juries falling asleep with tedium!

Summary Consultation Question 25

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

Yes.

Summary Consultation Question 26

We provisionally propose that complainants who have a right to participate in applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as is afforded to the prosecution and defendant from decisions made at a preparatory hearing. Do you agree?

No comments to make on this question

Summary Consultation Question 27

We invite views on the following:

1. Could preparatory hearings be better used to determine applications regarding the admissibility of evidence relating to the complainant's personal records or sexual behaviour?
   This would increase the number of applications regarding complainants' SBE and personal records that would have a right of appeal for the complainant, as well as for the defendant and prosecution.

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

No comments to make on this question

Holistic reform

Negative impact on the defendant's right to a fair trial

For all chapters and measures, we have carefully considered the defendant's right to a fair trial under article 6 of the ECHR and concluded that they do not interfere with this right. We seek your views on whether certain combinations of measures could risk interfering with this right.

Delay

Individually, a single measure which changes procedural and evidential requirements may have limited impact, but cumulatively, several measures may unacceptably increase delays when compared with their potential benefits.

Costs

Cumulatively, additional procedural and evidential requirements will increase costs and these costs may be too great when compared with their potential benefits.

Burdens on the parties (prosecution and defence), court, police, and complainants
Where there is greater use of hearings or additional or elongated hearings, this will inevitably create more work for the prosecution, defence, court, and police. It may also place additional strain on the complainant. Cumulatively, these burdens may be unacceptable relative to their intended benefits.

Unintended consequences or side effects
For each chapter and consultation question, we have analysed and weighed up the likely impact of potential policy changes. However, because the criminal trial process is procedurally, factually and legally complex, when measures are combined, unintended disadvantages may arise.

Other ongoing reform
A range of measures may be used to achieve the same aim, leading to a crowded and over-complicated framework.

Summary Consultation Question 28

Taking account of the above factors, what are your views on how our reform proposals work together? For example: are there particular combinations of measures which are particularly impactful and beneficial? Are there any unintended consequences if more than one reform option is implemented? Are there any options that should only be implemented together rather than separately? Are there any that should take priority if resources are too limited to reform all aspects? Is there any available data which will assist us in measuring impact?

We have expressed reservations about specific proposals which we feel **would** interfere with the defendant's right to a fair trial. The more of those measures which were introduced, the more they would inevitably compound the impact on that right.

Specialist examiners

Also, in an adversarial system like ours, there is a risk that the defendant's lawyer might focus on their client's acquittal, instead of the complainant giving their best evidence to get to the truth of what happened.

Isn't this always the case in all trials as the whole nature of the adversarial system? The reverse is also true:
…there is a risk that the prosecution lawyer might focus on obtaining a conviction, instead of the defendant giving their best evidence to get to the truth of what happened.

Summary Consultation Question 29

Do you think that someone other than the defendant's lawyer should ask the complainant questions? If so, who?

Definitely not. The Defendant (through their lawyer) has a fundamental right to challenge their accuser.

Summary Consultation Question 30

Do you think that sexual offences trials should take place in a specialised court or courtroom?

This may depend on what provisions were made and if they benefitted the defendant equally as much as the complainant and, for that, we would need more specific information. If the implication is only to make things easier for the complainant and, potentially reduce the right of the defendant to a fair trial, then we would be against it.

Juryless trials

Summary Consultation Question 31

Studies with mock jurors have found that levels of "rape myth acceptance" among jurors affect their verdicts. This means that jurors will be more or less likely to convict based on pre-existing ideas about sexual offences, rather than their decision being based on the evidence in the case. This reduces the chance of a fair trial.

To deal with this, juries could be removed for sexual offences cases. Instead, a judge, a panel of judges, or a judge with some lay assessors (non-judges) could hear cases. They would give reasons for their verdicts, which would give clarity to all participants.

As highlighted earlier, studies with real jurors found there was no basis for this conclusion. At best, the research is ambiguous.

If the Court of Appeal has been reluctant (which it has, historically), to overturn jury decisions, how would they feel about overturning judges' decisions in such cases?

The suggestion of judges giving reasons is an interesting one.

The proposal begs the question that if experienced judges would have to give reasons "which would give clarity to all participants", is it not even more the case with juries?

The Cheryl Thomas research referred to above with real juries was largely dismissed on the basis that jury reasoning could not be known.

We have long considered that juries SHOULD give reasons. In the case of sex offence cases especially, it would lead to more transparency, greater knowledge of how often misconceptions and prejudices were responsible for a juror's decision, more in depth research into what is needed to improve the system, and another basis for an appeal if the verdict was unjustifiable based on the reasons given.

Do you think we should keep or remove juries in sexual offences cases?

On balance, we should keep juries - with some amendments, however.
Where the complainant and the defendant are of opposite sexes, there should be equal numbers of men and women in the jury. The effects of inherent bias between the sexes are far more likely to tilt the verdict than the supposed effects of prejudice due to the stated myths.
And, of course, juries should definitely also have to provide reasons for their verdicts, in all cases but more especially in sexual evidence cases where the removal of the requirement for corroboration has led to so many"he said/she said" decisions. The lack of independent evidence inevitably leads all involved wondering how the jury came to their decision. The inability to ask them leads not only to lack of accountability, but a huge hole in the research which has to make do, for the most part, with inadequate mock trials.

The Sex Offenders Register

In terms of holistic reform, we cannot let the opportunity pass to highlight the appalling injustice created by the sex offenders register and how it operates. The significant and far-reaching detrimental effects of inclusion are usually little imagined by those who have not been affected - even lawyers are often shocked when they hear the hidden ramifications of it. It obliterates any possibility of a genuine offender, having served their time and been punished for their crime, from moving on and becoming a positive member of society once again, but the same consequences seem all the more harsh if one is innocent.

However, the main problem it that it tars all those on it with the same brush. A good man who may well have made many positive contributions to society but had one momentary lapse of consensual relations with a girl just under the age of consent is branded no better than a serial child-molester with a computer full of shocking images.

It is one thing to have a register which may aim to protect the public from those serious offenders who are considered to pose a significant further threat of re-offending when released from prison and beyond their period of licence - we do appreciate the need to protect the public from that group of offenders - but it does not justify such severe effects on those who most certainly do not pose such a threat.

And, again, it is not only the convicted person who is affected. To use the previous example, how is it fair, or protecting the public that, e.g., a person who had (consensual) sexual relations with a teenager is prevented from seeing their own very young godchild, even with the parents present and at their request? Then the child may also be denied of all the benefits of a loving and caring godparent and against the wishes of those who love and care more for the child than anyone else can possibly do.

It may not be part of this review but we would strongly suggest that the Sex Offenders Register be completely re-written with a graded approach towards constraints and duration depending on the nature of the original offence.

Conclusion & final thoughts

Reason for caution

While sex offences are rightly considered to be serious crimes, carrying potentially long sentences and potentially the rest of the defendant's life on the sex offenders register if convicted, they also carry a particularly harsh judgment from the public, including irrevocable damage to their reputation. Even within prison, they are often treated worse by other prisoners than murderers are. Furthermore, unlike most other crimes, a convicted sex offender cannot simply do their time and then continue to live a fairly normal life.

For these reasons, all of the usual arguments for safeguarding the innocent from wrongful conviction are even more important in alleged sex offences and that should be borne in mind in the clamour for more convictions.

Biased towards complainant

In spite of the assertion in the proposal document that the rights of the defendant have been taken into account, from the point of view of a falsely accused defendant, there still seems to be an imbalance in favour of the complainant which would, in our view, negatively prejudice the right of the defendant to a fair trial.

While we are not suggesting that false allegations form the majority of cases (it is impossible to know the real percentage), the well-evidenced fact that false allegations are not at all uncommon (even amongst your own quoted sources) is wrongly portrayed as a myth.
Furthermore, of the numerous reasons for their existence, the lure of fairly easy, unchallenged and relatively risk-free* acquisition of large sums of compensation is proposed to be prevented from being brought to light by the defence.
(*considering the reluctance of the police and CPS to bring charges against false accusers, and compared to other crimes).

One of the main issues concerning false accusations is that genuine victims think they are being called liars and victims groups tend to underestimate the numbers of false accusers.
However, the real point is that it is not, of course, victims who are the false accusers, but unscrupulous people who are not victims but who ride on the back of the suffering of those who are. Ultimately, genuine victims also suffer from false accusers.

Unfortunately, there is no shortage of unscrupulous people. Individuals who would otherwise very probably be involved in some scam or identity theft. Such people need to be identified and prosecuted and their victims protected at all times from the dreadful consequences of wrongful conviction.

Never was Blackstone's famous quote more apt.