

The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16

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Seeing is Believing

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Section 1

1.1 Introduction

The Police Service, the Crown Prosecutors and all the other criminal justice agencies are inspected by professional inspectorates on behalf of the public, but there is no courts inspectorate nor anything equivalent to it. This is despite the fact that the court process is at the very centre of the criminal justice system.

The Judiciary preside over trials, over sentencing and preparatory hearings and they determine points of law. In proceedings they also exercise influence or control over how other agents in the process such as police officers, Crown Prosecution Service (CPS) and barristers conduct themselves. Her Majesty's Courts and Tribunal Service, an executive agency of the Ministry of Justice is responsible for courts administration, including the listing of cases under the supervision of judges. Together their impact on justice is immense and their impact on the public involved in court proceedings is also considerable.

Elected Police and Crime Commissioners have twin local duties under the Police Reform and Social Responsibility Act 2011 to ensure an efficient and effective police service and to work with criminal justice agencies to ensure an efficient and effective criminal justice system. To enable the former duty they hold the police budget, have the power to appoint and dismiss the chief constable, possess a right to scrutinise the force and will produce a Police and Crime Plan which the police must deliver. However, for the latter duty, Commissioners have no similar powers or leverage in respect of the other agencies, including the courts, who comprise the local criminal justice system. That duty therefore lacks any concrete means of realisation and that, in turn, limits how Commissioners can fulfil their additional obligation to be local victims champions.

In 2015, Police and Crime Commissioners were given responsibility for the provision of support services for victims of crime in accordance with the Victims Code and they were asked to become local victims' champions. They have established various kinds of victims care hubs and have developed mechanisms for ascertaining both victims needs and victims concerns. It is the local experience in Northumbria, reflected elsewhere, that many victims of crime being supported to cope and recover from what has happened to them, are impacted negatively if they choose to engage with the criminal justice process and in particular, through involvement with a criminal trial.

A Police and Crime Commissioner, charged with the responsibility of victims champion as well as with that of promoting a good criminal justice process may have no real power but there is still a presence and the ability to observe and comment. It was from that perspective that we decided to carry out an exercise of simply watching a series of cases at our local Crown Court.

We needed to focus on a number of trials in one specific type of case in order to get a realistic understanding of how those trials worked and we decided to focus on rape. Rape cases are an area where Victims First Northumbria, our care hub, finds a high level of victim concern. Nationally, it is clear that still only about 15% of people who have been sexually assaulted ever report to police and it is believed by rape support services nationwide that the reputation of the courts for 'putting the victim on trial' plays a role in deterring complaints.

We were not sure whether that reputation was still justified because there is no doubt that all the criminal justice agencies have made huge efforts over the last two decades, both to support complainants better and to improve outcomes. The list of changes made is very long and cannot be done justice here. By example, the CPS have specialist lawyers (RASSOs –

rape and serious sexual offence lawyers) who are the only lawyers to deal with such cases. CPS require appropriate training for the independent Bar who wish to prosecute in rape. The judges have a portfolio of directions with which to dispel the rape stereotypes and assumptions which their long experience of presiding over rape cases has shown may wrongly influence jury decision-making. Section 41 of the Youth Justice and Criminal Evidence Act 1999 strictly limited cross examination of the complainant about previous sexual history. Prior to that legislation, rape complainants were frequently prey to evidence directed towards 'the twin myths' namely that a woman who has had sex with other men is likelier to have consented to the defendant and by her nature is not worthy of belief. The police have similarly taken strides to improve how they deal with complainants and work well with local support agencies. That seems to have improved confidence since the number of complainants who were able to report what happened to the police has increased by 123% since 2012. However the conviction rate, over the same period went up by just 11%. The charge to conviction rate, which is the part of the process in which the courts play a significant role, was precisely 1% higher in 2016 than in 2015, moving from 56.9% to 57.9%. Yet statistics show that approximately 85,000 adult women and 12,000 adult men are raped in England and Wales every year.

1.2 The Northumbria Court Observers Panel

The best people to observe the courts on behalf of the public, under the auspices of an elected Police and Crime Commissioner, are the public themselves.

The Office of the Police and Crime Commissioner (OPCC) advertised in the press and on social media for volunteers and were pleased by the good numbers of well-qualified citizens who came forward. They were interviewed by a panel, as if applying for employment and twelve people were recruited and then trained by the regional CPS in order to follow the essentials of the trial process and the specific provisions around rape cases.

CPS and OPCC staff assembled, with the observers, a matrix of questions¹ which followed the course of a rape trial and focussed on key stages and likely key issues. Panel members worked, on a rota basis, almost always in pairs but very occasionally on their own, sitting in the public gallery which is separated from the body of the court by a slightly darkened perspex screen. They took care not to draw attention to themselves so as to avoid any risk of affecting the parties in the trials. They watched the whole of each trial from beginning to end, except in two cases, (Trials 3 and 16) when domestic issues intervened. Some observers wrote contemporaneous notes whilst others wrote up what they saw during gaps and adjournments or at the end of the court day. In the early stages, a member of OPCC staff attended at the rising of the court to assist in transferring notes onto the questionnaire in order to establish consistent practice.

The project was greatly assisted by the former Resident Judge, whom we consulted at the outset, including by sending him the questionnaire. We were equally supported by his successor and by all the local Judiciary concerned in these cases. They readily gave permission for the note-taking and were considerate in every way to our observers. Our sincere thanks are due to the judges, to officers in the list office, to many staff at the Crown Court and to the police and CPS.

We would also like to thank Dr Olivia Smith, whose research suggested the advantages of scrutiny and gave us experience which helped us to ground this project.

¹ Set out at Appendix 1

The observers watched 30 rape trials at Newcastle Crown Court between January 2015 and June 2016. That was almost all the rape trials at that court during that time, in which the complainant was an adult. So far as we are aware, this is the first time that a group of members of the public have carried out such a task and they are owed a specific, significant debt of gratitude. After a few months, we reported some early findings to the Judiciary and to the CPS who both responded positively and at about the same stage the OPCC ran a mock trial session to refresh the observers' training. To set the process away, the Police and Crime Commissioner observed the first trial in company with a member of the panel.

This report attempts to collect together and to analyse what the observers saw and heard and how they commented on those observations. There are recommendations flowing from those observations and a short conclusions/commentary section at the end.

Definition of rape

S (1) Sexual Offences Act 2003

A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person
- (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

S (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

S 74 - "Consent" - For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.



Section 2 Observations and Analysis

2.1 Applications to admit previous sexual conduct of the complainant

a. Background

Fear of being accused of sexual conduct with other men was historically a deterrent to women in reporting rape. Defendants would call other men to court to say that the complainant had had consensual sex with them to support a defence that s/he consented with him. Lord Slynn of Hadley, in the case of *R v A* (No 2) 2001 UKHL 25, said:

'In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.'²

Such questions/evidence played into what were described, in the same case, by Lord Steyn as:

'the discredited "twin myths", viz "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief"

'Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases..... Questioning and evidence about the complainant's sexual experience with other men ... are almost always irrelevant to the issue whether the complainant consented to sexual intercourse on the occasion alleged in the indictment or to her credibility.'³

In 1976 judges were given powers to limit the use of previous sexual conduct but the discretion was widely drawn and rarely used effectively. Lord Steyn said:

'The legislation did not achieve its object of preventing the illegitimate use of prior sexual experience in rape trials.'⁴

Rape allegations judged strong enough to take to court by the CPS were often lost. Jurors fell prey to the twin myths. The work of a Canadian academic Catton showed that the chances of a conviction in a rape trial were in inverse proportion to the extent of sexual allegations made against a complainant. The more that was alleged, even if it was all denied, the less the chance of a conviction. (K Catton:1975 33UTFac LRev 165) Thus questioning women about irrelevant previous sexual behaviour acted as a deterrent to complaints and when complaints were made and prosecutions brought, may well have contributed to wrong acquittals.

² *R v A* (No2) 2001 UKHL 25 paragraph 1

³ Paras 27, 28

⁴ *R v A* *ibid* para 28

b. The change to the law in 1999

In 1999, Section 41 of the Youth Justice and Criminal Evidence Act sought strictly to limit the use of complainants' sexual behaviour with other men as evidence of consent. It is noteworthy, however that seven years later a review of the legislation showed that fear of cross examination about previous sexual history was still a key factor in low reporting of rape.⁵ That the 'twin myths' are still influential in public views of rape complainants may be self-evident but was reinforced by the attitudes widely shown to the woman complainants in recent rape cases against footballers.

Section 41 of the Youth Justice and Criminal Evidence Act 1999⁶ restricts the use, in rape trials, of evidence or questions about any previous sexual conduct of the complainant. Except with the leave of the court there can be no evidence and no questions about any sexual behaviour of the complainant unless it relates to a relevant issue in the case and excluding it might make a conclusion of the jury on a relevant issue unsafe AND that issue is NOT consent. If the relevant issue IS consent, the material may be admissible if the conduct occurred at or about the same time as the rape or is so similar to any conduct of the complainant at the time of the alleged rape that it cannot reasonably be explained as a coincidence. The 4th possible route to admission is that it is to rebut or explain evidence of sexual conduct of the complainant already called by the prosecution. Additionally, the evidence/questions do not relate to a relevant issue if it is reasonable to assume that the principal purpose is to impugn the credibility of the complainant.

The admissibility of previous sexual conduct with the defendant was not regulated at all until 1999 but this legislation does not distinguish between that and the admission of previous conduct with other men. However, in *R v A* the Law Lords widened the rule for admitting previous sexual conduct with the defendant (which they thought far more likely to be relevant to consent than that with other men)⁷ but that rule does not seem to have played a role in any of these trials and is mentioned just for completeness.

The 'twin myths' do not apply to previous sexual conduct with the defendant but, as Lord Slynn said in *R v A*:

'Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent. That is far from necessarily true'

Part 36 Criminal Procedure Rules⁸ requires that the defence apply for the court's leave within 28 days of the case going to the Crown Court, setting out a summary of the proposed evidence and a full explanation of how it is said it comes within Section 41. The prosecution must reply at least 14 days before trial and though the application is heard in private the judge must state in open court, without the jury, his/her reasons for the decision and, if leave is given the extent of the questions/evidence allowed. Following this prescribed procedure also means that the complainant can be told that such evidence is part of the defence case so that s/he may consider their own position and perhaps give a further statement or suggest evidence in rebuttal.

⁵ Home Office online report 20/06 Kelly, Temkin & Griffiths

⁶ Set out at Appendix 2

⁷ *R v A* *ibid*

⁸ Set out in Appendix 3

c. Observations: Section 41 – The Process

In a total of 11 trials (11/30 = 36%) there was questioning/evidence about previous sexual conduct of the complainant. In 4 of those trials, since the material was allowed in, there appeared to have been an application prior to trial (the observers did not see those applications). In 3 trials, in disregard of the Rules, a Section 41 application was only made on the morning of the trial or after it had commenced. In 4 trials there seemed to be no application at all.

Specifically, in one trial (T14) the observer noted that a 'bad character' application (made under the Criminal Justice Act 2003) seemed to be used to allow '*repeated mention... by the defendant's barrister of an incident of adultery committed by the complainant*' an area of questioning clearly intended to fall within the Section 41 provisions.

In T4 the judge intervened to stop further questioning when there had been no application made. In another trial (T9) the judge halted cross examination when inappropriate questions were asked without a Section 41 application and considered stopping the trial and discharging the jury. However, the trial continued with a direction to the jury to disregard that episode.

In one trial (T19) the Section 41 application was made on day 3 of the trial.

Totalling up the 3 applications made after the start of the trial and the 4 where no application was seen, (T14 the 'bad character' case and T4, 9, and 22) in 7 of the 11 cases where there was questioning or evidence about Section 41 material the correct rules of procedure were not followed.

The impact of a late application under Section 41 was noted by a number of observers. For example, the first trial (T1) involved an application made on the morning of the trial, merely on the basis that the barrister had not had time to see his client earlier. Observers were concerned that prosecuting counsel (a) did not object to this extremely late submission and (b) did not apply for time to prepare for the issues that might be raised but conceded the application immediately. (The observers comment that they could not see its relevance – see later) They were, further, concerned that the complainant was not informed of the application and had no opportunity to prepare for the line of questioning (she was already in the live link room and her Achieving Best Evidence (ABE) tape was played immediately). Nor could she or the officer (who spoke with one of the observers) locate, in time, the two former work colleagues she denied having sex with.

Another trial (T29), was observed to involve an 11am start followed by an extended lunch to enable the drafting of the Section 41 application to be completed. At this point '*It was drawn to the Judge's attention that some of the jury members were second week attendees*' and '*It was agreed to check their ability to sit should the case run into the next week*'; the first jury was discharged, a second jury empanelled and then sent home overnight, whilst the Section 41 application was heard in chambers and the complainant was sent home to return the following day.

Recommendations

- **CPS** - Should ask in open court at the pre-trial case management hearing whether the defence intend a Section 41 application and get a clear note of the response.
- **CPS** - Should remind barristers that they are required to challenge all late Section 41 applications and to challenge any 'bad character' applications which seek to include previous sexual conduct by the complainant.
- **Judges** - Judges are believed to be understandably reluctant to refuse to consider a late Section 41 application in case it concerns material relevant to the defence case. Where the defence are challenged at the case management hearing and say that they do not intend to apply but still make a late application, Judges are requested to take full account of that earlier opportunity, the requirements of the Criminal Procedure Rules, the potential impact on the complainants' resilience of a sudden application 'at the door of the court' and on police resource availability at short notice and to consider taking a more robust approach.
- **Judges** - If a late application is to be heard, they are asked pro-actively to invite prosecuting counsel to consider taking time to prepare a response and consider the impact of the application on the course of the trial including on the complainant's position and any witness issues.

d. Observations Section 41 - How previous sexual conduct was used: the 11 cases

In T1 - a marital rape, in which she said the marriage was over and she wanted him to leave but he repeatedly forced himself on her. Questioning was about two alleged affairs which she denied, describing him as jealous. His case was that despite marital disagreements, especially her affairs, the couple still had consensual sex. Defence referred to it as '*bad character*' evidence – '*she is an adulteress*'. The observers commented '*how was it relevant that she had affairs if he said they had sex because they still loved each other?*' (Application on first day of trial conceded by Crown).

In T4 – put that she was flirting and had put her hand on another man's leg earlier that evening. The judge intervened to prevent further questions and told the jury that the issue was between the complainant and the defendant and not about others (No application).

In T7 – there was an earlier consensual sexual relationship. Following complaint of rapes, police found 40 videos on defendant's phone of them having sex, many/all of which were shown to the jury. Complainant says she was unaware she was being videoed. She says she is asleep on a video which shows the alleged rape as shown by him calling softly to her with no response before assaulting her. It is put to her that she was pretending to be asleep in 'role play' typical of their sex life (Observers assume pre trial application).

In T9 - cross examination that she had instigated consensual sex with the defendant the night before. Crown objects, no s41 application and seeks retrial. Judge continues trial directing jury to disregard those questions and answers (No application).

In T12 - the observer noted that the defence had sought to undermine the complainant by linking her allegations to her previous behaviour which included '*violence, anger, alcohol and drugs, having sex with two different men around the same time and shoplifting*' (Observers assume pre-trial application).

In T14 - the case seen as relating only to a 'bad character' application, noted to be against a nurse who had been suspended from registration for issues concerning alcohol at work and whose partner had petitioned for divorce on the basis of her adultery. The observer noted that '*the defence frequently mentioned, even if only in passing on unrelated issues, the*

matter of the complainant's incident of infidelity, as well as mentioning her drinking problems and previous arrest'.

In T19 - a marital rape, the judge appeared to prompt defence counsel during legal discussions on day 3 that a Section 41 application may be required, there having been reference on the video and by the prosecution to earlier consensual sex between the parties. The application was granted but the jury were later discharged for other reasons.

In T20 - the prosecution appeared to attempt to anticipate and use S41 information that a teenage complainant had a history of familial abuse and, having run away from home had taken shelter from adult males in return for sex to show her vulnerability. The defence denied sexual contact. She stayed at his home and he found her in his bed when he woke. (Observer notes legal matters for first 2 days of trial and presumes Section 41 included)

In T22 - no Section 41 application made. The observer noted: *"I think the defendant had wanted to but his barrister had decided not to go through with it". However the defendant ended up bringing her sexual history anyway. He told the jury she had 'undiagnosed mental health problems, he had witnesses that she has given him oral sex previously and that she had "cried rape" 3 times before' 'here was no intervention, including from the judge or the prosecution".* The judge told the jury in summing up to disregard these comments.

In T23 - an allegation of partner rape containing much evidence of sexual behaviour: the observer noted that *'the defence seemed to focus a lot on the sexual nature of the couple in a negative way'*. (Observer believes application on first day of trial)

In T26 - a 2 year relationship *'there was consensual sex during it'* then allegations of controlling behaviour and rape. Leave granted to ask about consensual sex and alleged anal intercourse which she denied. He alleged that a text to him from her about *'Your dirty little secret'* which she said was about the rape, referred to his preference for anal rape (Application on first day of trial).

In a further trial, in addition to the 11(T29) there was an earlier relationship with the parties in dispute over contact to two children. She had said the second child might not be his but DNA showed it was. Application to put that before the jury was made in chambers and it is unclear whether allowed – the point was not clearly taken in cross-examination. (Added for completeness - Application on first day of trial).

Comments and Recommendations

The observers were not asked to make recommendations about the decisions which were made on Section 41 applications by the Judiciary. They observed Section 41 material being used in 11 trials and commented if/as they wished.

In 6 cases the material concerned previous sexual conduct with other men (T1,4,12,14,20 and 22)

- T1 - The application was made in the trial but conceded by the defence and the judge merely delivered a formal judgment allowing the material in without full argument. Both observers thought the material irrelevant to the defence 'how was it relevant that she had affairs if he said they had sex because they still loved each other?' That it was being used to suggest that she was very sexual and therefore more likely to have had sex with him despite marriage problems and was being used to impugn her credit contrary to the statute. Defence: 'She is an adulteress'

Contd

- T4 - Counsel, who questioned her without a Section 41 application was trying to discredit her with 'the twin myths' and the Judge rightly intervened.
- T12 and T14 - The Section 41 material was irrelevant but was used to add to discreditable non-Section 41 material in an attack on her character. Isn't suggesting previous sexual conduct with other men is discreditable what Section 41 was intended to prohibit?
- T20 - Used with non S41 material to discredit a 15 year old complainant, presented as vulnerable by the Prosecution. Unclear why previous sexual conduct was relevant to the defence that no sexual activity took place.
- T22 - Defendant, on his own initiative, using S41 material to assert that she is unchaste and unreliable 'the twin myths' banned by the legislation. Observers express shock that neither the prosecution or the judge intervened to stop him and felt it insufficient to tell the jury to disregard it.

In 5 cases (T7,9,19,23 & 26) the Section 41 material concerned previous sexual conduct with the defendant

- T7 - Up to forty videos of the parties having sex played to jury, believed graphic by observers, and said to be filmed without her consent. The relevance of those which did not show the alleged rapes is guessed as being to show that there was 'role play' on other occasions, as he alleged there was on the occasion of the alleged rape. Could there have been agreement/fewer films/editing to avoid potential trauma and prejudice from such a huge amount of consensual previous sexual conduct?
- T9 - Observers were impressed that the judge intervened quickly but disappointed with the refusal of re-trial given the potential impact on the jury.
- T19 - (A trial which did not conclude). The judge prompted the need for an application when ABE/prosecution had mentioned a previous consensual relationship, seemingly limited to confirming the relationship.
- T23 - Observers comment that S41 material brought disproportionate focus on previous sexual activity. Concern, as with T7, that admitting a large quantity of S41 material about previous consensual sex is prejudicial to the complainant.
- T26 - The application was to confirm a previous consensual relationship and to support his denial that a text from her referred to the alleged rape.

Recommendations

- **CPS** - Ensure that prosecuting counsel robustly oppose all applications for the admission of Section 41 material and if an application succeeds, further seek to limit the ambit and quantity of such material to the minimum.
- **Judges** - If an application to admit S41 material is allowed, actively to limit questions and evidence to the minimum required for the purpose for which it was admitted.
- **Judges** - If Section 41 material is put in, without consent by counsel, the defendant or any witness, immediately to intervene to stop it and consider whether the impact on the complainant and/or the prosecution case may require a re-trial to be ordered.
- **Judges** - If Section 41 material is put in without consent and the trial is to continue, to direct the jury that previous sexual conduct with other men is not relevant to whether she consented with the defendant nor to her credibility.

2.2 Rape Stereotypes

a. Background

In R v D (2008) EWCA Crim 2557 the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In that case, specific directions were offered for the position where a rape complainant does not make a complaint immediately. The court said that a jury should be advised that people react differently to the trauma of a serious sexual assault, there is no one classic response. Some may complain immediately whilst others feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint.

Prior to the use of that direction, defendants would commonly describe a 'late' complaint as inevitably false, implying to the jury that the normal response would be to complain of rape immediately. Without any experience themselves and in the absence of judicial guidance jurors may have accepted the assumption that this was the normal response. That assumption could lead to them not considering the evidence as openly and fairly as they would wish to do and perhaps to go on to delivering injustice. The judicial guidance is to counter that wrong assumption and leave the jury better informed in order to give fair consideration.

This approach of giving guidance to counter stereotypes and assumption has been endorsed on numerous occasions by the courts. The most important, commonly known stereotypes and assumptions about rape and sexual offences have been, in essence, drawn out and have been matched with 13 model directions which are set out in the Crown Court Compendium 2016⁹ which can be used to dispel those stereotypes/assumptions. A trial judge may draw on directions from the Compendium which s/he can tailor to the facts of a particular case to dispel the most frequent assumptions. The directions are not intended to be used only for a situation in which the defence deploys one or more of the assumptions, but are intended to be an antidote to common prejudices likely to be found as much in juries as elsewhere in the understanding that these assumptions are common in the population and may be evoked by counsel or simply be present.

In Miller (2010) EWCA Crim 1578 the court said:

'The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual sexual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges expert in the field presiding over many such trials during which guilt has been established, but in which the behaviour and demeanour of complainants and defendants both during the incident giving rise to the charge and in evidence has been widely variable. Judges have as a result of their experience in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time or ought to appear while giving evidence and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice'.

⁹ Set out in Appendix 4

Summary Versions of the model directions

1. Delay making the allegation: avoid assuming that because a rape complaint was not made immediately it is untrue. Some people may tell someone immediately, others may not be able to do so whether out of shame, shock, confusion, fear of getting into trouble or of not being believed.
2. Complaint made for the first time when giving evidence: the fact that someone doesn't mention something at the outset but only at a late stage does not mean s/he is not telling the truth. Memory may be affected in many different ways by an experience of the kind the complainant alleges.
3. Inconsistent accounts: if there is a difference between earlier accounts and the complainant's evidence, don't assume it is or is not untrue, consider that memory may be affected in many different ways by an experience of the kind the complainant alleges.
4. A consistent account: does not mean it is true any more than the fact that someone who gives an inconsistent account is not telling the truth. Look at all the evidence.
5. Lack of emotion/distress when giving evidence: experience has shown that people react to situations and cope with them in different ways, some show obvious signs of emotion and some show none at all.
6. Show of emotion/distress when making a complaint and/or giving evidence: presence or absence of a show of emotion is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.
7. Clothing worn by the complainant said to be revealing or provocative: (the Compendium says that questioning on this issue should be restricted) the defence suggest her/his dress shows that s/he was looking for sex. People dress in a variety of ways for a variety of reasons and dressing in revealing clothes does not mean that the person is inviting/willing to have sex, nor that any other person there could reasonably believe that s/he would consent to sex.
8. Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others: s/he was very drunk but it is important that you do not assume that because s/he got into that state s/he was looking for/willing to have sex nor that someone engaging with her could reasonably believe that s/he would consent to it.
9. Previous sexual activity between the complainant and the defendant: mere fact they have had sex on another/other occasions does not mean s/he consented on this occasion. Each occasion is specific. Nor does that fact give him grounds for reasonably believing that s/he had consented on this occasion.
10. Some consensual sexual activity on the occasion of the alleged offence: mere fact that s/he went home and engaged in kissing does not mean that s/he wanted him to go on to have sexual intercourse and must have consented to it, nor does it mean that the kissing gave him grounds for believing that s/he consented to sex with him.
11. Fear; although no use or threat of force, physical struggle and/or injury: not suggested that he threatened her or used force and s/he did not struggle and has no injuries but people respond differently to unwanted sexual activity. Some protest and physically resist whilst others through fear or personality whilst they did not consent, are unable to do that. Difference between consent and submission. When a person is so overcome by fear that s/he lacks any capacity either to give consent or to resist, that person does not consent but submit.
12. Defendant is in an established sexual relationship with another person: do not assume that someone who has a fulfilling sex life cannot resort to sexual activity with any other person.
13. Defendant is a homosexual man: it is no more likely that a man who lives with another man has a sexual interest in young boys than it is that a man who lives with a woman

will have an interest in young girls. The fact that the defendant is gay is of no significance at all.

Since the purpose of these model directions is to dispel stereotypes and assumptions regarded as commonly held by the public, their use by the judiciary is available for every trial where they may be in play and not only for cases in which one of the parties specifically deploys or seeks to reinforce them. The Compendium provides that directions may be given at the outset of the trial. The Director of Public Prosecutions (DPP) has said that it is vital that judges do so, to exclude stereotypes from the start rather than to allow their use perhaps to good effect, with the concern that they are then difficult to dispel by the time of the summing up.¹⁰

The independent Bar will be aware that the model directions list stereotypes and assumptions which ought not to be deployed in rape cases lest they contribute to injustice in the way set out in R v Miller (above)

b. Observations: the use of rape ‘stereotypes and assumptions’ as recognised in the model directions

Trial by trial observations on this topic are collated onto a schedule¹¹ with the model directions in a column to the left and the trial number across the top, showing which stereotypes were used by reference to the corresponding model direction. The last entry on each trial is the observer’s note/comment about how/whether the judge drew on the directions to deal with the stereotypes.

Below are a range of further/some examples of what observers saw as the use of stereotypes collected from a selection of cases in which they were used by the defence. At the end of this section is a numerical summary of the cases in which stereotypes were used and in which judges did/did not use directions in summing up to dispel them, with the addition of a list of cases in which the judge spoke to the jury about rape stereotypes at the very start of the trial.

- *‘Because the victim had stayed in marriage, it could not have been rape, but consensual sex’ (T1).*
- *‘He said she could have left the house, phoned the police or a friend, but instead you went to sleep ‘like a married couple’ (T3).*
- *‘Given your state of mind could you have mixed up events? i.e. been raped by someone else another time and confused it’ (T6).*
- *‘She didn’t report at the time, not recognising that rape could happen in a relationship until told so by a mental health worker, claimed as if it was rape she would have reported it straight away’ (T9).*
- *‘But you are a very violent person, you have hit someone with a bottle before, so why didn’t you fight when defendant was raping you’ (T12).*
- *‘Victim not presenting as a ‘victim’ as she raised her voice in court and leant around the screen when she got frustrated’ (T15).*
- *‘Defence ask 15 year old complainant why no reports of signs of injury at school and asked if she had discussed compensation’ (T20).*
- *‘Defence also asked her about her alcohol dependency, is she still dependent and how does this affect her. Symptoms can include memory loss, hallucinations and she denies experiencing any of these?’ (T22).*

¹⁰ The Independent May 5th 2014

¹¹ Set out at Appendix 5

- *'Defence suggested that the alleged vaginal rape which happened in the morning was just a usual ritual that happened before the defendant left for work' (T23).*
- *'Defence stated that she was wearing matching underwear, and suggests that this shows she had put some thought into this before going to the defendant's house' (T22).*
- *'Did the complainant consent when she was in drink and look at why she has kept this to herself for years' (T27).*

c. Summary of Use of Stereotypes and Assumptions and Judges use of Model Directions in 30 trials

In 26 of the 30 trials observed rape stereotypes, as recognised in the model directions, were deployed in the course of the trial by defence counsel in cross examination, during the defence case in closing speech or at all/any of these stages.

In 2 of the remaining 4 trials, the observers note that no stereotypes which they recognised were used at all (T13,24).

In one of the remaining 2 trials, the observer was called away from T16 and cannot comment and T19 was curtailed at an early stage.

In 15 of 30 trials, the judge drew on model directions to dispel a range of stereotypes to the jury right at the start of the case. These were T6,7,8,11,13,14,17,18,20,22,23,24,26,27,28.

In 13 of the remaining 16 trials the judge did not use stereotype-busting directions at the start of the case. In 12 of these 13 trials stereotypes were used.

In 2 trials (T10,16) the observer was delayed and did not see the earliest minutes of the trial.

In 19 of the 26 trials in which the observers noted stereotypes and assumptions in use, directions, similar to the model directions were used by the judge in summing up.

In 6 of the 26 trials in which stereotypes were deployed the observers noted that the judge did not use any directions in the summing up in order to address them.

These trials are: T2,5,6,8,12 and 18.

In the other trial (T3) in which stereotypes were deployed the observer left before the summing up and cannot comment.

Oddly, in three trials (T6,8 and 18) the Judge used stereotype busting directions at the start, but not in the summing up despite their use in these trials.

Recommendations

- **CPS** - Work with prosecuting counsel to anticipate rape stereotypes which may come into cases, whether or not introduced by the defence, and use the model directions to dispel them in outlining the case at the start of the trial.
- **CPS** - Require prosecuting counsel to challenge any stereotypes if they are deployed by the defence, in order to ensure that they are not accepted as correct by the jury. The list is 13 in number and it has been in play for almost a decade.
- **Judges** - Observers praised highly the judges who explained and dispel rape stereotypes and would support the recommendation of the DPP.



2.3 Special Measures: (1) Complainant pre-trial meeting with prosecution barrister

CPS may request a pre-trial interview with a complainant if it might help their decision-making. If they discuss special measures with the complainant, the actual prosecutor should be present if possible. Their guidance requires the CPS caseworker to introduce themselves at court, and the prosecution barrister to speak to victims and witnesses to put them at ease before testifying.¹²

From May 2016 CPS new guidance “Speaking to Witnesses at Court”¹³ strengthens the obligation on prosecutors, stating that meeting the witnesses (including the complainant) is ‘a core part of the prosecutor’s job’. If done properly, it will impact positively on the quality of the witness’s evidence and is especially important where the witness is vulnerable. Prosecutors should be aware of the potential for a witness to be re-traumatised and should ensure they feel valued in the court process to minimise that. They are to provide information about process, giving evidence and cross examination and to explain the nature of the defence case and alert the complainant if medical or other sensitive documents about him/her have been disclosed and may be used. (The new guidance was in force from just before the date of Trial 20)

Observations

In 10 out of 30 cases (33%) the Observers were not able to confirm that the prosecution barrister spoke to the complainant at the court prior to trial at all.

¹² CPS Policy on Rape Trials

¹³ Set out at Appendix 6

In one case the prosecutor appears to have simply informed the court that such contact had not taken place *'due to other work commitments'* (T2).

In two further trials there are notes:

'After the case... [was] postponed there was a request to speak to her the next morning before the proceeding' (T12).

'The commencement of the trial was delayed as the prosecutor was involved in another court. He did go and speak to her with the leave of the court before the start of the case' (T11).

The impact of a failure to meet can be significant, for the court as well as the complainant. During Trial 21, delay in contact between the prosecuting barrister and the complainant until after she had given her evidence led to the late identification that she was undergoing therapy which, in turn:

'...led to the prosecutor asking the Judge for an adjournment ... in order that both the defence and the prosecution be given the opportunity to consider this information ... [which then] led to the vacation of the third day of the trial [and]... the possibility that the complainant would be recalled to give evidence' (T21).

Further, observers expressed concern that meetings which took place only because delay permitted it or which were not by pre-arrangement meant that a complainant might attend court without knowing whether s/he would meet counsel, potentially adding to stress or uncertainty.

However, it is positive that in 20 (66%) of the 30 cases observed, the requirement of talking to the complainant at court was known to have been followed.

In three cases (T6,7,20) the prosecution barrister was noted to have met the complainant on an occasion prior to trial and observers commented favourably. For example:

'Before the trial and throughout the process the Prosecutor was in contact with the complainant. Prosecutor showed a lot of concern and interest in the victim and her wellbeing' (T7).

In one case the victim had a meeting, pre-trial, with both defence and prosecution barristers.

Recommendations

- **CPS** - Should ensure that all prosecuting counsel are aware that, whilst at the very least, they should be meeting the complainant in good time on the morning of the trial, a pre-arranged meeting ahead of the trial date will give better reassurance and is considered better practice.
- **Judges** - To support good practice by asking, as a matter of routine, whether prosecuting counsel have met with the complainant and facilitating a meeting/further meeting if advisable.

2.4 Special Measures: (2) Court Facilities

The Youth Justice and Criminal Evidence Act (1999) introduced a range of 'special measures'¹⁴ which can be used to help vulnerable and intimidated witnesses to give their evidence at court and are available to rape complainants, though which measures are to be used in any given case is subject to the discretion of the court.

Of the 30 trials observed:

- 20 involved the use of the separate witness suite in the court building for the complainant to review the pre-recorded video of their evidence in chief, when it was being watched by the jury.
- 17 involved the use of court screens, particularly during cross-examination in open court.
- 8 utilised a live video link to a separate location (inside or outside the court building) for all the complainant's evidence.
- In 3 further cases the offer of using a live-video link was either declined in advance (T20) or accepted and then declined on the day of the trial (T24,28).

There was therefore a good range of measures available and it is clear that some complainants felt able to exercise personal choice as to how they testified.

In one trial involving a complainant with learning and communication difficulties, numerous, over-lapping measures were used to ensure she was supported to give her best evidence:

'She was cross-examined in a different room... and had support from an independent intermediary... the complainant was also allowed to use an iPad to type out her answers to the questions which the intermediary then read out. The judge and barristers removed their wigs for the purpose of cross examination. The language used was modified [and] the cross examination was very short' (T13).

In two further trials observers praised the removal of wigs by judge and barristers (T13,17). However, observers noted with concern the frequent practice of the complainant reviewing their evidence in chief from a witness suite and then going into the courtroom (with or without screening) for cross examination.

In three trials, observers noted that the complainant appeared to have been informed of the availability of special measures at very short notice. For example:

'...the complainant was informed [of the use of screening] through the video link...minutes before walking inside the court' (T2)

In six trials, they commented on difficulties and sometimes significant delays caused by ineffective court equipment. For example:

'The video equipment was not working and had a missing cable which led to the majority of day one being held up... Complainant had been due in court at 12 noon coming from home with support. This was changed to 14.00 but ... at 15.30 it was decided that it was not fair for the complainant to attend, so agreed she would appear at 10.00 on day two' (T7).

'There were some minor issue with [the live video link] such as the camera ...being quite high up, with her in the very bottom part of the screen. The judge tried to get the camera moved to have her more central but the usher couldn't get it right' (T22).

¹⁴ Set out in Appendix 7

And in two further trials, they commented on the inadequacies of court screening. For example:

‘...the screen was pulled up to the entrance door [but there was]... a gap of about 12 inches or more between the door and screen. This made her briefly visible to us and we were sitting next to the defendant’s family... I overheard the defendant’s family say they don’t even know what she looks like, and so were focussed on looking at the gap as she entered the court room’ (T3).

On a separate but critical issue, observers noted that counsel raised the question that transport arrangements for some complainants involved waiting in an area that was neither private, nor secure. Although judges habitually told defendants to remain behind for 15 minutes at the end of the day to permit the dispersal of witnesses, there has nonetheless been incidents.

In addition, the Judiciary raised the issue that there was no discreet/safe location for those complainants who wished to observe the remainder of the trial after they had given evidence.

In regard to the potential impact on the jury view of the defendant of the presence of special measures, observers commented positively in 4 trials (T2,4,7 and 10) on the way in which the judge explained the commonplace nature of special measures to the jury and made clear that their use did not reflect on the defendant.

Recommendations

- **Police** - To ensure that the arrival and departure of the complainant, in cases in which the complainant wishes to/is required to give evidence at court rather than at a remote evidence suite, never involves the risk of contact with other parties.
- **CPS** - To ensure that the complainant is made aware of what special measures have been granted at the earliest opportunity and well before the day of the trial, for reassurance.
- **Court** - To ensure/check that all technology and equipment (including screening) are working and sufficient.
- **Judges** - Urgently to re-consider the practice of the complainant leaving the witness suite to come into court for cross examination. It is understood that some complainants have chosen to testify from behind a physical screen in the courtroom to avoid being visible to the defendant via live-link into court. In such cases, it is recommended that arrangements be made to screen the live-link monitor from the defendant. However it is not believed that all complainants who have been cross examined in that way have made that choice and it is recommended that the practice be reviewed with a view to its discontinuance.
- **Judges** - Where there are remote evidence suites available (there are 4 in Northumbria, mostly only on stream after these observations) it should be considered best practice to allow their use as a special measure where the complainant wishes it to avoid contact with other parties at court.
- **Judges** - To request staff to ask the complainant at the end of her evidence if s/he wishes to watch the rest of the case and if so to request access to a remote evidence centre for that purpose.

2.5 Special Measures: (3) Use of trained specialist supporters

18/30 trials (60%) were noted to include the presence of a female supporter for the complainant. In some cases this was a member of the court-based witness service, in others

a court usher, and whilst having someone present to support the complainant was generally seen to be helpful:

‘...she was sat next to a female court usher. I think this really helped’ (T15).

The reliance on ushers was sometimes seen as inadequate:

‘...she was supported by a female court usher ... [and]... it was perhaps surprising that there was no other planned support, given she was only 19 and aged 17 when the alleged rape was committed. The complainant was obviously very upset during her evidence and at one point left the Court in tears, so additional support would have been helpful’ (T6).

Having a familiar supporter has been acknowledged to be helpful in reducing complainants’ overall anxiety and increasing their ability to give best evidence. In rape and sexual assault cases this supporter can be a trained professional – an Independent Sexual Violence Adviser (ISVA) who will usually have been in frequent contact with the complainant during the months which will have passed prior to trial and after their initial report to the police. However, ISVAs were observed to be present in only 5 trials and were, in each case seen to be watching the proceedings in the public gallery and not playing a role. In one trial:

‘The ISVA was in the public gallery [whilst] ... the court usher was in the (live-link) room with the victim. This did not seem right; the usher was male and this could have been an issue for the victim... I think she would have benefitted from... having the ISVA in the room’ (T1).

The usual practice at Newcastle Crown Court appears to be for a court based witness service representative or an usher to take charge of a complainant either on their arrival at court or prior to the commencement of their evidence, irrespective of the presence of an ISVA. However well intentioned this is, separating a vulnerable complainant from their key worker at this critical time is likely to be unsettling and may undermine his/her ability to give their best evidence. Observers ascertained that the role of the ISVA seemed to be relatively little understood by Crown Court staff, criminal justice agencies and arguably the court-based witness service, leading to the frequent assumption that a professional ISVA was a friend or informal supporter inappropriate to accompany the complainant when giving evidence. These ISVAs did not seem able to overturn that assumption and the usual court practice in order to fulfil their professional support role.

Recommendations

- **CPS** - To ensure that prosecution barristers understand the professional nature and the scope of the ISVA role.
- **CPS** - To ask all complainants whether there is an ISVA or other trained supporter who they wish to accompany them when giving evidence and to request consent for this from the judge.
- **Judges** - To ask whether the complainant has been asked and where possible to permit applications for an ISVA or other trained supporter to accompany complainants when giving evidence.

2.6 The Trial Process

a. Opening information for the jury

Opening statements made by prosecuting counsel were positively commented on in most cases, with prosecutors being seen to both set out the case for the complainant and to describe what they, as the prosecutor, needed to achieve in a clear and succinct manner.

However, only two trials (6%) were observed to involve a prosecutor who had both anticipated and prepared for the rape myths likely to affect their case. For example:

‘Short and clear opening statement... She remarked on how consistent the victim’s story had been and also tackled some rape myths, like lack of physical injuries, stranger rape and use of drugs’ (T15)

This level of preparation and performance therefore appears to remain exceptional yet as earlier sections of this report have set out, rape stereotypes and assumptions continue to endure in many rape trials with the recognised impact they may have on the jury approach.

In 14 of the 30 cases (46%) the judge was noted to go beyond standard directions to address the issue of rape myths at the outset of the trial. However just one judge was observed to have done so *‘in a meaningful way, giving examples etc.’* (T15) with one other being observed to reinforce these key messages throughout the proceedings:

‘The judge was so good throughout the proceedings in reminding about stereotyping behaviour, myth, how people react differently in trauma situations etc’ (T17).

Recommendations

- **CPS** - see earlier section.
- **Judges** - see earlier section.



b. Prosecution and the complainant’s evidence in chief

The trials observed contained a mixture of pre-recorded evidence in chief and evidence in chief given live, in which an earlier witness statement, rather than a pre-recorded statement (called an ABE - achieving best evidence video) had been taken by officers.

In just under half (43%) of the trials the prosecuting counsel was observed to have supported the complainant to provide a coherent version of events and to present themselves as credible. For example:

‘Gentle, clear and concise line of questioning, which put victim at ease. It made a coherent and clear story’ (T15).

There were, however, six trials where the prosecuting counsel were seen to either mis-handle the complainant:

'[The prosecutor] asked a lot of leading questions. He did not steer the victim most of the time... [He] appeared to be in a negative mood and giving up spirit before the case started' (T2).

'At one point he asked 'Why are you crying?' which I imagine was to highlight to the jury why she was upset but [which] ...sounded a bit flippant' (T22).

Or to mishandle the evidence available:

(Prosecutor) 'Starts with Facebook messages sent one month after event; then goes back to event; then forward to police interview so-middle-start-end; complainant seemed a bit confused at times. Defence went start-middle-end; much clearer' (T6).

'The text part was terrible, only the victim seemed to know which text belonged to which phone. Prosecution seemed unprepared over the text transcript, [with] photocopying completed during trial' (T1).

Where ABE interviews were used by police officers to capture the first account of the complainant there were concerns about the quality of technology:

'The audio quality was at times poor and this made it difficult to follow... She spoke in a very low voice... [and] the video itself showed only part of her face and her body in a sideways position which was probably because of the position of the camera in the interview room' (T19).

And about the quality of the preparation and decision-making in connection with them:

'The complainant was distressed and crying throughout her interview... [While] I can appreciate the police officer's wish to interview as soon as possible I wonder if it would have been better to have waited until she was calmer' (T26).

Recommendations

- **Police & CPS** - To review/address any quality concerns raised by individual ABE interviews and ensure that good equipment is available.
- **CPS** - To ensure that all rape and sexual assault cases are characterised by both clear case ownership and early preparation. The early allocation of a single prosecutor should be considered standard good practice so that cases can be fully prepared
- **CPS** - To ensure that all prosecution barristers working with rape and sexual assault complainants are properly trained (NB Rivlin Report, March 2015, recommendation that all advocates wishing to conduct cases involving children or vulnerable witnesses/defendants must (a) demonstrate that they had completed 'The Specialist Advocacy Training Course' developed by the Advocacy Training Council and (b) be required to attend 'refresher courses' every 4 years).
- **CPS** - To consider requiring a written chronology in all cases involving an extended or complicated sequence of events.
- **Courts** - To review/address the quality of the equipment used to play ABE interviews as a matter of priority.

c. The cross-examination of complainants

Concerns regarding the cross examination of the complainant were raised in two thirds of the cases observed by panel members (20/30). These concerns revolved around the demeanour of the defence barrister and the nature of their questioning.

In at least 7 trials (23%) the defence barrister was described as aggressive in their manner, repetitive in their questioning or belittling in their approach to the complainant. For example:

'The defending barrister was frequently aggressive, as well as snide and sneering in his conduct with the complainant. The defence was based solely on attacking her credibility as a reliable source, frequently asking the same questions in order to frustrate the complainant, and twisting the words of response and asking her to confirm his interpretation so that he could then use his own words to characterise her portrayal of events. His manner, delivery, and strategy seemed explicitly designed to undermine her confidence and discredit her in the eyes of the jury. He offered no specific refutation of the facts of the case, or the allegations made beyond the denials of the defendant' (T14).

'[The defence barrister] found some small discrepancies in her two statements and very much used this to undermine her evidence. At the end of her questioning... the judge had to point out that the defence hadn't actually put the defendant's case forward and had just criticised [the complainant]' (T10).

'The defence used humour that belittled and patronised the complainant as well as mocked her... Some members of the Jury laughed along and I felt that this created a sense of bias amongst some members' (T3).

In 12 trials (40%) the problematic childhood, poor mental health and/or substance misuse of the complainant was seen to have been used in a way that sought to undermine or discredit them – with no regard to the vulnerability that such experiences may have caused:

'There was significant reference to [the complainant's] family history which was suggested as the reason for her escalating behaviour after the alleged rape. The defence barrister brought the defendant to tears when she made reference to her father 'being ill, having troubles'. The complainant could not understand why her father was being brought into the questioning' (T6).

'The complainant said she was generally pleasant and would need provocation to turn violent. The defence [then] went to a violent episode in the Tranwell Unit, where she was restrained, removed and arrested after drinking alcohol... saying she would not have been provoked by nurses, but was violent [towards them]' (T9).

'The defence...asked about her alcohol dependency; is she still dependant and how does this affect her? Symptoms of alcohol dependency can include memory loss, hallucinations ... she denied having experienced any of these' (T22).

In a further 8 trials (27%) the complainant was depicted as someone who was out for revenge or compensation:

'The defence used stereotypes about women who cut up clothes when annoyed at men and mentioned the word "bunny boiler" (which refers to a film where a woman killed her ex partners pet) [thereby suggesting to the jury] ... that women are not allowed to be angry or upset without ... being unstable and out of control' (T3).

'[The defence put it to her] that she had consented and that texts she had sent the defendant provided evidence that she wanted revenge on him because he was in a new relationship' (T6).

'The defence asked about a conversation about compensation. The [school-age] complainant again got agitated and sounded upset saying 'I don't want money and I'll give it to charity as it's not from a good place' (T20).

Despite the use of such strategies however, prosecuting counsel were observed to object to defence questioning in just 3 trials and to re-examine the complainant as a means of addressing the issues raised by the defence in little over half, 17.

That many prosecutors seemed *'content to leave such matters to the judge'* (T14) is unacceptable. It is common practice for the defence in rape trials to attack the complainant using against him/her poor mental health, substance misuse or poor home background which in other contexts would be understood as vulnerability, perhaps explaining why they, may have been targeted. Much of the information from which defence cases are built is supplied by CPS to the defence as part of disclosure and will be well-known to the prosecutor. Case preparation should include anticipating defence strategies, protecting the complainant from unfair cross-examination and characterisation and constructing a strategy which redirects the trial at the defendant.

'His [the defendant's] circumstances were not raked over and scrutinised during the trial in the same way that [the complainant's] were, even when there could have been some bearing [on the matter in hand]' (T6).

In 13 of the 20 cases in which the observers saw problematic conduct by the defence barrister, judges were found to be pro-active in challenging them. The contrasting behaviours of judge and prosecuting counsel was nicely summarised by one of the observers at Trial 14:

'The prosecution was inactive throughout, seeming disinterested in the conduct or questioning of the defence. The judge was far more engaged, frequently interrupting the defence barrister to censure his behaviour, to stop a repetitive line of questioning, and to prevent a brazen mischaracterisation of the evidence' (T14).

Nonetheless such interventions were not noted in the other 7 of the 20 trials that were observed, by panel members, to involve problematic behaviours on the part of the defence barrister.

Recommendations

- **CPS** - To ensure that prosecuting counsel are instructed that the responsibility for challenging inappropriate cross-examination or characterisation of a complainant in a rape or sexual assault case rests principally with them and not solely with the judge.
- **Judges** - To ensure that the above best practice aimed at minimising and controlling for the aggressive or unfair cross-examination of complainants and the use of rape stereotypes by the defence to shape the trial is adopted in all cases.



d. The judges' approach to the complainant

Most judges were described as showing appropriate levels of empathy for the complainant in the trials observed by panel members. In general, they were observed to be calm and reassuring in their manner, to assure the complainant that breaks could be taken as needed and to pro-actively intervene when the complainant appeared distressed:

'He reassured her about giving evidence and explained that she could have a break at any time and that, if she wished, she could be seated. He told her not to worry he would keep an eye on her' (T24).

And this was particularly so where the victim was very young and hence additionally vulnerable:

'The Judge in conducting the evidence was very gentle and sensitive to her needs. He had introduced himself to her earlier, which I felt was really good practice. The judge did not wear his wig and was very friendly and open with the complainant. I noted that he used non-verbal communication very well to support and assure the complainant, he was friendly and smiling. Overall I felt that the Judge was excellent in the way he managed the case and supported the complainant' (T13).

Direct criticism of the judge's handling of complainants was only offered in two of the thirty trials. In one, there was a deficiency in technology in the courtroom which the complainant was expected to overcome:

'The judge ... offered her water and [told her]...she can choose to sit down, but that this can impact on the Jury's ability to hear her and that it is important the Jury can hear her. He explained that when you sit down it can drown and lower your voice. I feel under the circumstances this was leading the complainant to be in a convenient position for the court but not for her. The court should be fitted with adequate means so that whatever the complainant wanted to present her info it would not make any difference' (T3).

And in another, the needs of the court were seen to be placed before the needs of the victim:

'Victim should have been offered a break much sooner. There was a sense of once the trial finally started (after all the delays), the Judge was determined it was going to end in time for his case the following week' (T1).

In this context, however, it is important to note that panel members noted significant delays caused by case listing and case management issues in nearly half (14) of the trials they observed. For example, two cases had been re-listed because a judge was not available to hear the case:

'This was the second time that the case was listed for trial. I have been told that the first trial was ineffective because of the lack of a judge to hear the case' (T21).

Another case was delayed because the *'...prosecution was involved in an urgent matter elsewhere'* (T30) and yet another had to be re-listed because a defence barrister was not available:

'Delays in court make it very frustrating, sometimes it feels like no one can question this. The problem of the Defendant Barrister being ill and the case postponed for a month could be solved' (T12).

Consequently, some cases had taken months, if not years, to come to court:

'The offence happened in March 2015. To have a trial commencing at the end of May 2016 is far too long, especially given the age of the parties; both were 16 at the time of the offence... The re-trial is not to take place until February 2017. Surely no listing system can be so restrictive that another trial may not be moved so as to accommodate this case?' (T24).

With a potential impact on the quality of proceedings, as well as on the complainant:

'This was a referral case. I wonder why it was kept waiting for that long? The loss of the evidence was real, damaging the case, and this happened because of all this waiting' (T2).

Indeed, having reached their listing date at least 8 cases were then further delayed by technology difficulties, by extended legal discussions - some of which, like the Section 41 applications, should have been dealt with at a pre-trial hearing - or by other matters that were simply allowed to take precedence:

'On the first day of the trial other work listed in the court meant a late start to the case. As a result, the complainant had to be sent home and was only called on the second day' (T21).

Appearing empathetic towards individual rape complainants is therefore only part of the story. Delays such as these, whatever their cause, give the damaging impression that the Judiciary will give greater primacy to the needs of the court than to the needs of individual complainants. As one observer noted, when asked if they had any suggestions for change:

'Where possible the complainant's evidence should be heard on day one of the trial. Late starts do not help [them]' (T29).

Recommendations

- **Courts** - To ensure that the equipment available allows the complainant to give their evidence effectively if they wish to sit whilst giving evidence.
- **Judges** - To ensure that whenever possible the needs of the complainant are put before the needs of the court.
- **Judges** - To require that barristers present at case management hearings are asked to

undertake to be available on the trial date fixed, to make clear to court staff that the availability of a specific barrister for a trial is not to given paramountcy in listing arrangements, to challenge any applications to re-list due to barrister availability and to ensure priority re-listing in cases delayed by the availability of counsel.

- **Judges** - To monitor all current listing practices for cases of rape, where the vulnerability of the complainant is likely to amplify the impact of procedural delays.

e. The effective use of crown witnesses & other evidence

If juries are to base their verdicts on more than the successful or unsuccessful demolition of the complainant's credibility, all potential evidence and all known witnesses must be made available.

In 12 trials, the use of crown witnesses was the subject of positive observations, with either multiple witnesses and sources of evidence being used to corroborate or support the complainant's account in an effective way:

'The victim's mother provided corroborative evidence regarding...seeing bruising on her daughter during her relationship with the defendant. The police confirmed that, despite knocking and shouting through her letterbox, they had to force entry....The medical evidence confirmed the injuries (there were a large number). She [the mother] also said that the victim was so upset she would not be examined but returned the next day to do so' (T5).

Or with individual witnesses being seen to provide supporting testimony for the crown that appeared to advance the case very effectively:

'..The mother gave compelling evidence about her daughter's deteriorating behaviour [following the rape]' (T6).

'Her evidence (the police officer) was clear, concise and the prosecution barrister commented afterwards that it was an excellent ABE interview' (T15).

In 15 trials, however, there were negative comments about the construction of the crown's case. In 7 trials, for example, one or more of the witnesses called by the crown were seen to offer testimony that was of questionable value:

'The husband of the complainant was called [but]... had great difficulty in remembering the time-line of his wife's disclosures. He had a long-term misuse of amphetamine and alcohol and his memory seemed very blurred' (T25).

Or which directly undermined the credibility of the complainant:

'[Under cross examination, the complainant's friend] agreed that of the two the complainant was the more violent. She said that she had seen the complainant elbow the defendant in the nose... she also said that the complainant had told her that... she had pushed a hot pizza in his [face] causing a burn' (T26).

In addition, observers commented on the absence of key witnesses in 5 trials:

'At a later point in the trial it became significant that one of the people who was alleged to have been one of the last five people at the party, according to the complainant, left to work in the kebab shop at 12 midnight leaving the complainant and defendant alone. The defendant gave evidence to suggest that this person did not leave for work ... [and therefore]

the rape could not have taken place as the complainant had described. I could not understand why this individual was not called to give evidence...' (T6).

And in a further 8 trials on the apparent failure of the police to capture the evidence required for the prosecution:

'Cannot believe a whole interview (defendant) was conducted but quality so poor it was no good. The delay in the defence statement, No witnesses. One poor quality photograph of victim's injuries. The text transcript not being in correct order or phones identified correctly. I saw this in a case four years ago and had hoped there had been improvements' (T1).

Deficiencies that were sometimes noticed by the jury:

'[Nobody] had questioned the claimant's sister about the photographs of the injuries, so the jury did not see them... [despite] asking the judge for them during their deliberation' (T9).

And which, in some cases, were observed to have a direct impact on the trials' outcome:

'There were a number of issues in relation to the case... Issues of delay due to obtaining medical and counselling records [and] ...failure to call key witnesses... that had a significant bearing on the case' (T6).

'The judge said that he had done everything he could to keep the trial going...but events were such that in order for an investigation of the issues that had arose regarding the notes of the hypnotherapist [and] the information said to be contained in the chat log that the complainant said was not hers... [he] had no option but to discharge the jury' (T19).

Recommendations

- **Police & CPS** - To ensure that all officers and prosecutors understand the need to approach every rape and sexual assault case as an evidence-led prosecution (in which the maximum use of wider sources of evidence, including witness testimony, is standard practice) and to ensure that effort is put into foreseeing the issues likely to be raised by the defence and countering them.
- **Police** - To ensure that the types of evidential failure observed in these trials are not repeated.

f. The case for the defence

Defence strategies were seen to revolve around common stereotypes about rape in 26 out of the 30 cases observed by panel members.

Rape stereotypes were more often found in combination, than used alone, the most common myth utilised by the defence (observed in 10 trials) was that the complainant was making a false allegation motivated by revenge. This alleged desire for revenge was seen, in turn, to be motivated by a range of factors including infidelity, rejection or poor sexual performance on the part of the defendant:

'[The defendant] described being constantly unfaithful with other women... [he] said the complainant was a woman scorned' (T23).

'[The defendant stated] that she made the allegation after being rejected by him' (T6).

'The defendant is saying complainant was content to see him again, but perhaps as the defendant had lost his erection during sex, she was 'disgruntled' with his sexual performance' (T11).

A second defence strategy (observed in 9 trials) was to depict the complainant as someone who, far from being the victim of unwanted sexual behaviour, had initiated the sexual contact, flirted with the defendant or 'led him on' in some other way:

'[The defendant] contended that she had told blatant lies; he said it was him and not her that wanted to bring the evening to an end, as he was tired, and he had only responded to her sexual advances' (T21).

'[The defence said] it was the complainant that had made the running, getting the lift, choosing to stay in the van, able to text friends after the offence' (T11).

'[The defendant said] the girls were following him. They first smiled at him, they asked for a cigarette, they asked for money to buy drink, they asked him if he liked sex, they told him to meet them at the park' (T17).

Focussing on the allegedly provocative behaviour of the complainant was closely linked to a third defence strategy (observed in 7 trials) that also sought to undermine the complainant's credibility by highlighting other behaviours, such as their substance misuse, involvement in petty crime or mental ill-health:

'[The defence implied her] evidence is not credible as victim uses methadone. Victim [also] not presenting as a 'victim' as she raised her voice in court and leant around the screen when she got frustrated' (T15).

'Defence said the complainant ... went to the defendant's house of her own choosing ... she took his phone and did not return it, so in fact had stolen it... [and] she had a consensual sexual relationship... with another adult male and had lied about her age' (T20).

'The defendant said injuries caused to the complainant were...caused when he was defending himself. [He said] the complainant had a long history of mental illness and self-harm [and] had made the allegation of rape when in a psychiatric unit' (T9).

All of which, like the failure to scream or fight back, were depicted as incompatible with 'genuine' victimhood:

'[The defendant] said she did not scream or tell him to get off' (T5).

'[The defence] tried to say that the victim had delayed in reporting by saying she should have used the defendant's phone to call the police before she fled the property. She rang the police as soon as she had let the property, minutes after the attack' (T20).

The use of such common stereotypes to shape the perceptions of jury members wasn't limited to the rape complainant. Such stereotypes were also extended to the rape defendant, with character references and/or witness testimony used to construct the defendant as a 'good man' who couldn't (or wouldn't) have raped anyone:

'The defendant's barrister was trying to portray ... the defendant as a well-mannered boy... a shy boy who could hardly speak' (T4).

'[The defendant] had 8 character references, all of which put importance on [him] being a "family man" etc. as if this means he wouldn't/couldn't commit rape' (T10).

'The defence said prior to the assault on the stepfather [which had preceded and allegedly caused the allegation of rape] the defendant had long-term employment with G4S and, after prison, was employed as a manager in [a supermarket]. So he was reliable' (T27).

In T24, the judge requested a signed defence statement. (Should be signed by the defendant to verify that it properly sets out his defence) there was no signed copy. Problem being that he appeared to change his defence but now there was no evidence of what he had agreed to. His barrister withdrew *'professionally embarrassed'* and the case will be re-tried the observer comments forcefully that this was total incompetence of both barristers, not assuring this vital document. The complainant and defendant are cousins in this case. *'This has torn apart a family and is an absolute disgrace' 'justice has failed completely due to their incompetence'*

Recommendations

- **CPS** - To require prosecuting counsel, in opening speeches, cross-examination of the defendant or closing speeches to consciously address and dispel rape stereotypes relating to both rape complainants and rape defendants.

g. Closing speeches by counsel

Positive comments regarding the prosecutor's closing speech were recorded in 18 of the 30 trials. Some comments focussed on the general clarity of what had been said:

'The closing argument was clear concise and well set out. He drew the Jury back to the words of the complainant "in her own words" and countered some of the statement put by the defence' (T13).

And in 14 trials, the prosecutor was seen to more actively address the specific rape stereotypes that had been introduced by the defence:

'...she guided the jury through the evidence well... The events leading up to the disclosure to the police, 18 months of escalating behaviour and asked if this was the behaviour of a woman rejected by a man she barely knew [revenge for which had been suggested] or a woman struggling to come to terms with a significant traumatic event' (T6).

'The jury were asked to think about the facts... Complainant had a terrible background and had given sexual favours in return for a safe-haven. Complainant accepts she had lied to one man, social services, friends and teacher. She is an intelligent person with no family support... Defendant said he was being kind, but why buy chocolate for girls?' (T20).

'[Prosecuting counsel said it's] not what people think of as a rape – i.e. 'the masked stranger' - it can happen in all situations... The prosecution did not have to prove fighting or screaming. People react in different ways to such an act' (T5).

[Prosecuting counsel] says 'good character is not a defence' and whilst forms of rape are different, they are still the same offence' (T10).

However, the closing speeches of defence barristers were noted, once again, to use and reinforce common rape stereotypes in at least 21 of the 30 cases:

'The defence highlighted] that she was wearing matching underwear, and suggests that this shows... she fancied him for a while and when they finally had sex she was disappointed with him so reported him as having raped her' (T22).

'Defence said the complainant had been 'flirty' in the club... [And] young men sometimes don't think 'with their brain' when presented with a girl touching them' (T4).

'Defence asked the jury to look at the mental health records given of [the complainant] and think 'is complainant reliable?' (T9).

'[Defence focussed on] the fact that she spent a lot of time with the defendant that evening when she had an opportunity to go back to her place. The fact that she delayed to report [the] rape' (T12).

h. Judge's summing up

Whilst the jury must reach a decision on the facts of the case, as they have been presented by the prosecution and the defence, the summary of the evidence and legal directions provided by the Judge is extremely important. In this context, it is important to note that whilst positive observations were recorded for most summing up, only 20 were noted to explicitly address the issue of rape stereotypes.

Most commonly, such stereotypes appeared to be dealt with in a relatively general way:

'The judge went through some rape myths briefly and in a very factual way. I'm not sure the jury would have understood all of them without examples' (T1).

'His summing up was a fair representation of the evidence. He dealt with the issue of rape myths and that these should be put aside' (T13).

Although, in some cases, the judge was seen to address the rape stereotypes introduced by the defence a little more directly:

'The Judge told the jury... they had to put aside any prior assumptions they may have. If a person had been flirting or had drunk lots of alcohol it does not mean rape is likely or that a 'randy' young man would commit rape' (T4).

'The jury were ... told that anyone can be the victim of sexual assault and the complainant was violent but that does not mean she could not be raped' (T9).

'The judge dealt with the issue of rape myths... he covered the issues of consent and submission, her opportunity to leave and reminded them that different people behave differently in some circumstances' (T21).

Recommendations

- **CPS** - To ensure that prosecution closing speeches are always used to tackle rape stereotypes.
- **Judges** - To adopt and maintain the best practice found in these cases, particularly the tackling of rape stereotypes that can influence jury's and be reinforced by defence barristers.



2.7 The role of the police

Observers in a number of cases commented that they felt that the police did not consider, arrange or manage the collection and production of evidence effectively. The impact of this could delay the trial or prevent vital information being presented at the trial. In Trial 1 observers commented on:

'the poor quality of the single photograph taken by the police of the injuries caused to the complainant by the defendant and on the inaudibility of the defendant's police interview. Both were so poor that they could not be used in court'

Transcripts of texts extracted from two mobile phones in use by the parties were made but the calls were listed in reverse order confusing the cross examiner and the complainant and presumably the jury

A Section 41 application was made and conceded on the first day of the trial which alleged adultery with two men who had been former workmates of the complainant. In evidence the complainant denied it yet no witnesses were sought, such as the two alleged partners in adultery. The observers spoke to the officer on charge and asked why not and were told that the defence only having made their case plain that day, she had no time to find the men. The teenage children of the family were not called as witnesses although they witnessed much of the contested areas of the events.

Observer 2 wrote: 'If I had been a relative of the victim sitting in the public gallery I would have had a severe lack of confidence. Cant believe a whole interview was conducted but the quality so poor it was no good'

In further trials observers mentioned issues relating to evidence:

'However, there was an adjournment to the following day so submissions could be made on behalf of the defendant for abuse of process, because of the loss of important evidence by the Police. Delay on part of the prosecution' (T2).

'Police officer in charge of the investigation failed to obtain valuable evidence before it was completely destroyed' (T2).

'It felt as though there was a significant omission in not capturing evidence, whether the Police investigation or preparation for the prosecution played a part in not picking this up was a factor or not is unknown' (T6).

ABE interviews used for evidence in chief cause concern with one being filmed when the complainant was distressed and another in which questions asked by the police officer contributed to the potential use of rape myths and stereotypes in the trial:

'The video was played it had been edited. The complainant was distressed and crying throughout her interview in addition her hand was in front of her mouth. At times it was difficult to follow. Whereas I can appreciate the police officers wish to interview as soon as possible I wonder if it would have been better to have waited until she was calmer' (T26).

'In the video interview ... interviewer asked how much she had drank that evening, what she was wearing' (T10).

It was apparent in one trial other witnesses who may have had information valuable and relevant to the case were not called to give evidence again preventing the presentation of possible vital information or evidence:

Police officer was ok. There should have been other witnesses. (T1).

What was apparent too, was that in some cases the police initial response to the report of rape or to the evidence gathering process was effected by their belief in the victim:

'During the cross examination, Complainant describes not feeling the police/Sexual Offences Liaison Officer believed her or were supportive when she made her statement and that this contributed towards her decision to retract her statement. She described police as "dismissive" of her story' (T9).

Recommendations

- **Police** - To ensure that at the first point of reporting it is made clear to the complainant that the account is believed and that a full investigation takes place and that where appropriate evidence is collated effectively and work with CPS to ensure that file preparation is timely and thorough.
- **Police** - To ensure that cases are pursued with appropriate vigour, equipment is fit for purpose and all witnesses are considered as to their appropriateness and relevance.
- **OPCC** - To continue work with the Rape Scrutiny Panel to identify where improvements can be made to investigations.

Section 3 – Review of Recommendations

The observations of panel members have highlighted a number of issues and resulted in a number of recommendations.

For HMCTS, they include some practical issues about quality of equipment and housekeeping which are relatively straightforward but at the same time capable of are, in the main, relatively straight-forward although the current observations have highlighted significant concerns about the listing process which should be tackled urgently. This is regarded as a judicial function although it is effectively carried out by HMCTS staff and so it is dealt with here under recommendations for the judiciary. HMCTS are recommended:

- To ensure that all technology and equipment (including physical screening of the complainant from the court where applicable) is working and sufficient.
- To review/address the quality of the equipment used to play ABE interviews as a matter of priority.
- To ensure that the equipment available allows the complainant to give their evidence effectively if they wish to sit whilst giving evidence.

For Police, these recommendations include the need to ensure that the arrival and departure of rape complainants does not involve a risk of contact with other parties, and to focus on enhancing the quality of rape investigations by ensuring that:

- To review/address any quality concerns raised by individual ABE interviews and ensure that good equipment is available.
- All officers understand the need to approach every rape and sexual assault case as an evidence-led prosecution (in which the maximum use of wider sources of evidence, including witness testimony, is standard practice) and to ensure every effort is put into foreseeing the issues likely to be raised by the defence and countering them.
- To ensure that the types of evidential failure observed in these 30 trials are not repeated in the future.
- To ensure that at the first point of reporting it is made clear to the complainant that the account is believed and that a full investigation takes place and that where appropriate evidence is collated effectively and work with CPS to ensure that file preparation is timely and thorough.
- To ensure that cases are pursued with appropriate vigour, equipment is fit for purpose and all witnesses are considered as to their appropriateness and relevance.

For the Crown Prosecution Service, these recommendations focus on the role of the prosecuting barrister in supporting witnesses who are often vulnerable and intimidated to give their best evidence by ensuring that the CPS:

- Ask in open court at the pre-trial case management hearing whether the defence intend a Section 41 application and get a clear note of the response.
- Should remind barristers that they are required to challenge all late Section 41 applications and to challenge any 'bad character' applications which seek to include previous sexual conduct by the complainant.
- Ensure that prosecuting counsel robustly opposes all applications for the admission of Section 41 material and if an application succeeds, further seek to limit the ambit and quantity of such material to the minimum.
- Work with prosecuting counsel to anticipate rape stereotypes which may come into cases, whether or not introduced by the defence, and use the model directions to dispel them in outlining the case at the start of the trial.

- Require prosecuting counsel to challenge any stereotypes if they are deployed by the defence, in order to ensure that they are not accepted as correct by the jury. The list is 13 in number and it has been in play for almost a decade
- Should ensure that all prosecuting counsel are aware that, whilst at the very least, they should be meeting the complainant in good time on the morning of the trial, a pre-arranged meeting ahead of the trial date will give better reassurance and is considered better practice.
- Ensure that the complainant is made aware of what special measures have been granted at the earliest opportunity and well before the day of the trial, for reassurance
- Ensure that prosecution barristers understand the professional nature and the scope of the ISVA role
- Ask all complainants whether there is an ISVA or other trained supporter who they wish to accompany them when giving evidence and to request consent for this from the judge.
- Review/address any quality concerns raised by individual ABE interviews and ensure that good equipment is available
- Ensure that all rape and sexual assault cases are characterised by both clear case ownership and early preparation. The early allocation of a single prosecutor should be considered standard good practice so that cases can be fully prepared
- Ensure that all prosecution barristers working with rape and sexual assault complainants are properly trained (NB Rivlin Report, March 2015, recommendation that all advocates wishing to conduct cases involving children or vulnerable witnesses/defendants must (a) demonstrate that they had completed 'The Specialist Advocacy Training Course' developed by ATC and (b) be required to attend 'refresher courses' every 4 years).
- Consider requiring a written chronology in all cases involving an extended or complicated sequence of events.
- Ensure that prosecuting counsel are instructed that the responsibility for challenging inappropriate cross-examination or characterisation of a complainant in a rape or sexual assault case rests principally with them and not solely with the judge.
- All prosecutors understand the need to approach every rape and sexual assault case as an evidence-led prosecution (in which the maximum use of wider sources of evidence, including witness testimony, is standard practice) and that every effort is put into foreseeing the issues likely to be raised by the defence and countering them.
- Require prosecuting counsel, in opening speeches, cross-examination of the defendant or closing speeches to consciously address and dispel rape stereotypes relating to both rape complainants and rape defendants.
- Ensure that prosecution closing speeches are always used to tackle rape stereotypes.

For the Judiciary, these recommendations focus on the central role that judges always play in ensuring a rape defendant is given a fair trial and a rape complainant is given a fair hearing by ensuring that:

- Judges are believed to be understandably reluctant to refuse to consider a late Section 41 application in case it concerns material relevant to the defence case. Where the defence are challenged at the case management hearing and say that they do not intend to apply but still make a late application, Judges are requested to take full account of that earlier opportunity, the requirements of the Criminal Procedure Rules, the potential impact on the complainants' resilience of a sudden application 'at the door of the court' and on police resource availability at short notice and to consider taking a more robust approach.
- If a late application is to be heard, they are asked pro-actively to invite prosecuting counsel to consider taking time to prepare a response and consider the impact of the application on the course of the trial including on the complainant's position and any witness issues.

- If an application to admit S41 material is allowed, actively to limit questions and evidence to the minimum required for the purpose for which it was admitted.
- If Section 41 material is put in, without consent by counsel, the defendant or any witness, immediately to intervene to stop it and consider whether the impact on the complainant and/or the prosecution case may require a re-trial to be ordered.
- If Section 41 material is put in without consent and the trial is to continue, to direct the jury that previous sexual conduct with other men is not relevant to whether s/he consented with the defendant nor to her credibility.
- Observers praised highly the judges who explained and dispel rape stereotypes and would support the recommendation of the DPP.
- To support good practice by asking, as a matter of routine, whether prosecuting counsel have met with the complainant and facilitating a meeting/further meeting if advisable.
- Urgently to re-consider the practice of the complainant leaving the witness suite to come into court for cross examination. It is understood that some complainants have chosen to testify from behind a physical screen in the courtroom to avoid being visible to the defendant via live-link into court. In such cases, it is recommended that arrangements be made to screen the live-link monitor from the defendant. However it is not believed that all complainants who have been cross examined in that way have made that choice and it is recommended that the practice be reviewed with a view to its discontinuance.
- Where there are remote evidence suites available (there are 4 in Northumbria, mostly only on stream after these observations) it should be considered best practice to allow their use as a special measure where the complainant wishes it to avoid contact with other parties at court.
- To request staff to ask the complainant at the end of her evidence if s/he wishes to watch the rest of the case and if so to request access to a remote evidence centre for that purpose.
- To ask whether the complainant has been asked and where possible to permit applications for an ISVA or other trained supporter to accompany complainants when giving evidence.
- To ensure that the above best practice aimed at minimising and controlling for the aggressive or unfair cross-examination of complainants and the use of rape stereotypes by the defence to shape the trial is adopted in all cases.
- To ensure that whenever possible the needs of the complainant are put before the needs of the court.
- To require that barristers present at case management hearings are asked to undertake to be available on the trial date fixed, to make clear to court staff that the availability of a specific barrister for a trial is not to given paramountcy in listing arrangements, to challenge any applications to re-list due to barrister availability and to ensure priority re-listing in cases delayed by the availability of counsel.
- To monitor all current listing practices for cases of rape, where the vulnerability of the complainant is likely to amplify the impact of procedural delays.
- To adopt and maintain the best practice found in these cases, particularly the tackling of rape stereotypes that can influence jury's and be reinforced by defence barristers.

For the OPCC we have identified a recommendation that we will continue work with the Rape Scrutiny Panel to identify where improvements can be made to investigations.

Section 4 – Further Thoughts

In any of these trials a complainant, feeling vulnerable and never having been in a court before, could have been separated from their professional supporter, ignored by prosecution counsel and left alone in the live link room whilst court staff tried to fix the broken video player. S/he could have been cross examined, without any warning, about sexual conduct with other people, which s/he denies but has no chance to rebut. S/he might have faced stereotypical assumptions that a true rape victim would complain immediately, that s/he had worn provocative clothing, flirted a lot, didn't fight him off and is not showing much distress. In a long delay for legal argument, s/he might have been sent home only to be abused by the defendants supporters outside. Next day s/he might, therefore, have resumed their evidence scared of what the same people might do. The defendant might have made dramatic sexual accusations about her /him in his evidence, which the judge simply told the jury to ignore. In summing up, the judge might not have used any of the model directions designed to dispel rape stereotypes and might have failed to tell the jury that previous sexual conduct with one man is not relevant to whether s/he consented with another.

On the other hand, a complainant might have come to Newcastle Crown Court, well - supported by an adviser, to be greeted by friendly prosecution counsel, making her/him feel an important part of the case. The barrister might have explained the whole process, especially what the defence might argue about her/him, but provide reassurance that previous sexual conduct had been ruled irrelevant, some weeks before. Both this counsel and the judge might have told the jury that rape stereotypes are to be ignored. S/he might give evidence comfortably, an adviser beside her/him, from a well-run live link room. An attempt to slip sexual allegations in front of the jury, by the defence would be stopped immediately. Court staff would see her/him safely away through a private entrance. In summing up, the judge might have focussed the jury strictly on the evidence. He might have carefully explained again, that rape stereotypes could influence them unfairly. He would mention each one that had been raised, setting out, in clear languages, why it was incorrect.

We have called this report "Seeing is Believing" because it sets out what 12 members of the public have seen and noted. These individuals have watched 30 rape trials over eighteen months. What they have seen has happened. They had no other purpose but to watch. They have no axe to grind, no partiality, and so far as we know none of them had met any of the other observers before they started their work - a bit like a jury.

We hope that what the observers saw can help our local criminal justice agencies ensure that more trials become like the second example and fewer like the first.

We have already passed on some simple information which has made a difference

The role of the ISVA

The observers saw ISVAs (the professional supporters for people who complain of rape) watching their client give evidence instead of being with her/him. They learnt that this was common practice. We contacted the senior Judge and the CPS, finding that they have never been fully briefed on the ISVA role. Once they appreciated its professional nature and that an ISVA would have been engaged with the complainant from the start, it was agreed that s/he should have their ISVA's help at this most vulnerable time. A system was agreed to let everyone know that if there was an ISVA on the case she should accompany the complainant all through the trial if at all possible.

There was a simple information gap, in which the observers joined up the dots, to the benefit of complainants and the smoother running of trials. CPS guidance says, and we agree: -

‘If a victim expects the ISVA to accompany them in the live link or behind a screen and this does not happen, their experience of court will undoubtedly be affected.’

No meeting with prosecution counsel in one third of cases

Observers noted that, in ten of the thirty cases, the prosecutor did not meet the complainant before trial. CPS were disappointed to hear this and have renewed the instruction to do.

For many years counsel have been expected, at least, to introduce themselves but new CPS guidance ‘Speaking to Witnesses at Court’ 2016 requires much more. It acknowledges that the court process can re-victimise a complainant. To minimise this, prosecution counsel should explain the whole trial and make the complainant feel valued and involved. Complainants need to know that they might be accused of lying and that material such as social services records could be used by the defence to undermine them. They also need to know if any previous sexual conduct is to be brought up.

If this guidance is not followed, complainants are at a considerable disadvantage especially giving evidence in a vacuum of information and understanding. They may feel isolated and wonder whether coming to court was the right thing to do or if anybody cares. It was disappointing that barristers announced in open court that work commitments had prevented a meeting or were seen seizing a delay in the process to have a quick conversation outside. The Guidance says that full pre-trial meetings are now:

‘ a core part of the prosecutor’s job’

We hope that by highlighting this issue we have reminded hard-working lawyers of their own importance in reassuring complainants and in turn assisting their own case.

The process of applying to admit previous sexual conduct of the complainant

Until our observers’ early report, CPS were unaware that there were many late applications to ask questions on previous sexual conduct. By the end of the observations, previous sexual conduct had been used in 11 of the 30 cases. In 7 of those 11 cases, either an application was made during the trial or there was no application at all. Part 36 of the Criminal Procedure Rules requires applications on this sensitive issue to be made well before trial with notice to allow the prosecution to respond. Understandably, judges are reluctant to refuse to hear a late application in case there is material relevant to the defence case. However, Trial 1 shows how unfair a late application can be to the complainant. S/he is ambushed and time pressure can inhibit a proper rebuttal of often highly prejudicial material.

Now that it is clear that this practice is not limited to a few rare cases, CPS will ask the defence outright, at Plea and Trial Preparation Hearings if they intend to apply. They will use the response in any late application to help assure the judge whether this breach of rules is caused by misfortune or error or is an attempt to game the system and undermine the complainant.

In 2 of the 11 cases where previous sexual conduct was put into trials, it was done by defence counsel, well aware that it is wrong (T4,T9). In T22 the defendant (who observers believe had wanted an application to be made) blurted out sexual allegations in his evidence. Those cases together with the number of late applications seem to exemplify the pressure from defendants to discredit complainant using previous sexual conduct. Understandably a rape defendant who claims consent wants to suggest that the complainant is lying and to pour discredit on her/him, however he may and previous sexual conduct is an

obvious area of focus. Many defendants will not understand why it is not material evidence of consent to him, that s/he may have had consensual sex with other men. Barristers are likely to find it problematic to persuade their clients that these are rape myths which cannot be used.

In the following paragraphs we comment on core concerns, demonstrated by the observations, about how rape is tried, the use of myths and stereotypes and the core role still played in trials by previous sexual conduct.

Previous Sexual conduct: how it was used

In 6 of the 11 cases in which sexual conduct was used it related to sexual conduct with other men. In none of the applications seen by the observers and in no defence speech was there an assertion that the complainants previous sexual conduct made it more likely that she had consented to the defendant or made her/him less worthy of belief. However, those 'twin myths' which gave rise to the 1999 legislation are still widely believed. Any residual doubt about that can be dispelled by recalling how the complainant in the recent Ched Evans case was treated online. There is recent research¹⁵, especially with mock juries, to show that jurors are actively keen to know about the complainant's sexual past and judge her/him more harshly the more that is disclosed.

In trial 1 the defence sought expressly to use sexual conduct with other men to discredit the complainant. The defence barrister said that it was to show that: "she is an adulteress".

In trials 12, 14 and 20, previous sexual conduct with other men was used with a catalogue of non-sexual behaviour such as shoplifting, being suspended from the nursing register and taking drugs, all to discredit the complainants. (No observers record any argument that this material was relevant to any other issue in these trials).

Section 41 guidance

Yet, Section 41 (Appendix 2) says that previous sexual conduct should not be considered relevant if its purpose or main purpose is 'to establish or elicit material for impugning the credibility of the complainant as a witness' (subsection 4).

We repeat the observers did not record that this previous sexual conduct was relevant to any issue in the case. Even if it had been, the section is clear. It says that previous sexual conduct may not be used if its purpose/main purpose is to impugn the complainants credibility EVEN if it '*relates to a relevant issue in the case*' (ss3) and EVEN IF the material is such that its exclusion '*might have the result of rendering unsafe a conclusion of the jury*' (ss2b).

That is a very high test and it is extremely hard to square how the previous sexual conduct admitted in trials 1,12,14 and 20 met that high test.

Rather, it seems that previous sexual conduct was used to discredit each complainant, in precisely the way that Section 41 was intended to prevent and that the legislation, at least in these 4 trials, did not work well.

¹⁵ Ellison and Munro 2009abc referred to in Rape: Challenging Contemporary Thinking (2009) Horvath and Brown

Previous sexual conduct with the defendant

Observers made fewer comments on the trials where previous sexual conduct with the defendant was admitted. They focused on two cases:

- In T7 up to 40 videos of previous sex between the parties were shown to the jury.
- They commented on T23 that much of the evidence concerned the parties' sex life which seemed disproportionately featured.

As Lord Slynn of Hadley said in the case of *R v A* (quoted earlier in this report) evidence about previous sexual conduct with the defendant can give rise to the assumption that:

'Consensual sex once means that any future sex was with the woman's consent.'

There is a model direction for dispelling that assumption, which is a recognised rape myth.

Where a relationship was continuing at the date of the alleged rape, evidence about it may necessarily form the background to the case. However, given the concern so well expressed by Lord Slynn every application should be dealt with strictly and we note that in these cases too, the majority (4/5) were subject to a late application or no application at all.

Considering the comments on T7 and T23 we raise the question of limiting to a minimum the quantity of evidence admitted to show an existing relationship in cases where it is relevant background. That would reduce what we see as the enhanced risk that the more sex with the defendant she has consented to in the past, the more likely it is that s/he will be assumed to have consented on this occasion.

Dealing with cases in which previous sexual history was put before the jury without judicial consent.

In 2 of the 3 cases in which this happened, when defence barristers asked improper questions (T4,T9) observers praised the Judges for intervening immediately and firmly. However, they were critical about T22. The defendant, there, told the jury that the complainant had given him oral sex previously and had '*cried rape*' 3 times before, yet neither the prosecutor nor the judge interrupted.

In T9 the prosecution applied to discharge the jury but not in the other 2 cases. The judge refused that application, telling the jury to ignore what they had heard.

Our concern is the heavy disadvantage that the admission of previous sexual conduct imposes on the complainant and prosecution. We doubt that a jury will be persuaded to disregard it by a judicial intervention, however well explained. Indeed the idea that they have heard something they shouldn't have heard probably highlights it. When the material has been put in evidence improperly, we raise whether the prosecution should consider applying for a re-trial as they did in T9. We stopped short of making this a recommendation, understanding the careful judgment which needs to be made.

In total we express concern in these paragraphs about at least 9 of the 11 cases in which previous sexual history was put into these trials.

Judicial directions and rape stereotypes

Legislation was enacted to deal with 'the twin myths', perhaps with mixed success but there are abundant other stereotypes at play in rape cases and many of them came into these 30

trials. Currently the judicial directions set out at appendix 4, are used to curb the impact of these other stereotypes. There is no legislation to do so.

The model judicial directions are not only for use when the defence deploys one of the stereotypes. They are there to explain away stereotypes and assumptions which experience has told the courts are at large in the general population and are likely to be present amongst jurors. If a question or item of evidence engages one of these stereotypes, it will operate over the jury's mind unless and until it is explained away. The concern is that if the directions which explain stereotypes away are not given to the jury until the end of the trial, there will have been a considerable time during which the stereotype will have been operative, shaping their thinking about the case.

The current Director of Public Prosecutions advocates strongly that judges should dispel rape stereotypes at the outset of the trial. They can assess which ones are likely to come up, from the case papers and use the model directions to explain them away. They can follow up with more explanation, if something they didn't foresee comes up in the course of the trial and can give comprehensive directions at the end when summing up.

Stereotypes came up in 26 of these 30 cases, some common ones very frequently. The observers felt that judges who used the model directions to dispel predictable stereotypes at the start of the case will have had a positive impact on the jury by explaining the true position from the beginning. They also felt that those judges were more vigilant for the emergence of stereotypes later in the trial and sent out a signal that none of the stereotypes were to be gratuitously engaged by counsel.

However the directions were only used at the outset of the trial in 14 of the cases where there were stereotypes. We find that disappointing in particular, because the Crown Court Compendium makes clear that they can be used at the start as well as in summing up. We agree with the Director of Public Prosecutions that this is better practice.

Most judges, even those not using the model directions at the start of the trial, did use them to dispel stereotypes when summing up at the end. However in 6 trials, stereotypes were noted, the judge did not use any directions at all to explain and dispel them in summing up. They were simply left to exert whatever influence they may over the jury's deliberations which we raise as a serious concern, bearing in mind that the model directions have been in place for almost a decade, have been repeatedly endorsed by the Court of Appeal and merit a chapter to themselves in the Crown Court Compendium.

It is a further regrettable criticism that the observers saw only 2 trials out of the 30 in which the prosecution barrister tackled rape stereotypes at the start of the trial. It is clearly in the prosecution's interest to challenge stereotypes, since they tilt the trial against their own case. It is unsatisfactory that they "left it to the judge" in all 24 of the other cases in which stereotypes were, in fact, deployed and of course the fact that the judge did not deal with stereotypes in 6 of those cases left the complainant exposed and unprotected from their full effect.

Concluding remarks

The phrase used earlier in this report about this observers project is an important one 'What they have seen has happened'. The observers were able to see what participants in the court process will not have seen. Their overview, as members of the public, outside the local criminal justice culture is an entirely unique perspective on how rape is being tried and how in Newcastle Crown Court these important, difficult and delicate cases are being run.

Although there is criticism in the body of this report and in these further thoughts, there was much in what the observers saw that they applauded. Throughout the report examples of good practice appear and are thoroughly commended.

There was in particular very high praise for a group of judges who were seen to hold the ring sympathetically, fairly and attractively and are likely to have ensured the best of trials. The routine use of direction to dispel rape stereotypes, in most cases, was highly praised as capable of contributing to a sea-change in public attitudes.

We would not pretend that this exercise in observing rape trials by members of the public is a sample of what is happening elsewhere, it is not a survey and it does not qualify as a scientific contribution to academic literature. It is what it is. It is the results of what those members of the public saw and noted. It has supplied useful information which has brought change. We will discuss its later findings with the agencies about whom we make recommendations and have so far found them all extremely keen to do whatever it takes to improve the picture. In addition, it certainly raises issues for consideration by the current review of how rape is tried which the Secretary of State for Justice has commissioned.

The Verdicts

Finally, we note the verdicts. We can draw no causal link between anything observed and the outcomes, although clearly many of the matters raised here are capable of having played a role.

Of the 25 cases which were finally resolved (5 cases were to be re-tried) 6 were guilty verdicts and 19 were acquittals. *6 guilty verdicts from 25 cases* is a charge to conviction rate of just less than 25%.

We will return to our observations next year.

Northumbria Court Observers Panel Members

With thanks to the members of the panel who made this report possible.

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Hannah Bowes

Elaine Carver

Arcelia Cordero

Val Cottier

Alison Jobes

Gloria Mosha

Sue Pearce

Richard Poole

Lisa Pringle

Kathryn Royal

Richard Scott

Keith Younghusband

Verdicts for each trial observed

Trial number	Outcome
1	Not Guilty
2	Not Guilty
3	Not Guilty
4	Not Guilty
5	Not Guilty
6	Retrial
7	Guilty
8	Guilty
9	Guilty
10	Not Guilty
11	Not Guilty
12	Not Guilty
13	Not Guilty
14	Not Guilty
15	Retrial

Trial number	Outcome
16	Not Guilty
17	Guilty
18	Not Guilty
19	Retrial
20	Not Guilty
21	Not Guilty
22	Not Guilty
23	Guilty
24	Retrial
25	Not Guilty
26	Not Guilty
27	Not Guilty
28	Guilty
29	Retrial
30	Not Guilty

Appendix 1

Northumbria Court Observers Panel

Observation Questions

1. Are there special measures in place for the complainant? what are they? When were the measures requested by CPS and when obtained? At what point was the complainant informed that the measures had been granted?
2. Has an application been made, during a pre-trial hearing, to allow questioning of the complainant about her previous sexual history?
3. Does the complainant have an ISVA/other supporter advocate/a Police SOLO officer? Is the ISVA/other support advocate/Police SOLO Officer allowed to sit with the complainant out of court and are they involved in any information/conversations about the case? Is the complainant allowed her supporter in court to be with her during giving evidence?
4. Has the complainant had a Witness Service familiarisation visit pre the trial date?
5. How do any ISVA/ other support advocate/ Police SOLO Officer and the Witness Service representative interact?
6. Has the prosecution Barrister had an interview with the complainant at court pre-trial?
7. What information does the judge give the jury about the nature of the case before it is opened?
8. What is the prosecution's opening statement like? Does it mention any rape myths? Any of the complainant's previous sexual history? Does the opening statement create an opportunity for an application from the defence to cross examine about previous sexual history?
9. What is your opinion on the empathy the Judge demonstrates when asking the complainant to take the stand to give her evidence?
10. Does the prosecution lead the evidence from the complainant well - does it make a coherent story?
11. Comment on cross examination; is it a fair putting of the defendant's case or is it an attempt to undermine the complainant by being aggressive/ demeaning/ undermining her confidence/suggesting things to her discredit?
12. If you observed any of the issues in question 11, did the prosecution barrister or the judge intervene to stop them, if so what happened?
13. How long did the cross examination last?
14. When the prosecution re-examine are the issues challenged effectively?
15. Are there any rape myths used in any of these stages of the case? If so which ones?
16. Did the complainant remain in court to watch the rest of the trial?
17. If there was an early complaint to someone, how was that person's evidence dealt with in leading/cross examination and/re-examination? Were any rape myths used?
18. If appropriate can additional comments be made on any other witnesses for the crown?
19. How strong is the case at this point? Comment on weaknesses and strengths.
20. What are the defence key points?
21. Did the defence open the case? If so were there any rape myths, attacks on the complainant as opposed to reasoned argument about the facts?
22. Comment on the defendant's evidence, were any rape myths used?
23. Any comment on any other witnesses involved in the case?
24. What is the prosecution closing speech like? Does it mention any rape myths/complainant's previous sexual history?
25. What is the defence closing speech like? Does it mention any rape myths/complainant's previous sexual history details?

26. The summing up. Did judge defuse any rape myths that had been raised? Any other comment on what s/he says on the facts or the law.
27. How long did the jury retire for?
28. What was the verdict?
29. Comment overall on the conduct of the case and the treatment of the complainant and all parties. What is your judgment on the strength of the case and the outcome and the performance of all the criminal justice agents and how they contributed positively or negatively?
30. Were there any delays in the proceedings? What was their nature?
31. Suggestions for change?
32. Any other comments or observations?

Section 41 - Youth Justice and Criminal Evidence Act 1999

41. Restriction on evidence or questions about complainant's sexual history.

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

- (a) no evidence may be adduced, and
- (b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

- (a) that subsection (3) or (5) applies, and
- (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

- (a) that issue is not an issue of consent; or
- (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—
 - (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
 - (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
- (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.

The Criminal Procedure Rules Part 36 – as in force on 7 October 2013

PART 36 EVIDENCE OF A COMPLAINANT'S PREVIOUS SEXUAL BEHAVIOUR

Contents of this Part

When this Part applies	rule 36.1
Application for permission to introduce evidence or cross-examine	rule 36.2
Content of application	rule 36.3
Service of application	rule 36.4
Reply to application	rule 36.5
Application for special measures	rule 36.6
Court's power to vary requirements under this Part	rule 36.7

[Note: Section 41 of the Youth Justice and Criminal Evidence Act 1999(**a**) prohibits evidence or cross-examination about the sexual behaviour of a complainant of a sexual offence, subject to exceptions.

See also —

- (a) section 42 of the 1999 Act(**b**) which among other things defines 'sexual behaviour' and 'sexual offence';
- (b) section 43 (**c**) which among other things, requires—
 - (i) an application under section 41 to be heard in private and in the absence of the complainant,
 - (ii) the reasons for the court's decision on an application to be given in open court, and
 - (iii) the court to state in open court the extent to which evidence may be introduced or questions asked; and
- (c) section 34, which prohibits cross-examination by a defendant in person of the complainant of a sexual offence.]

When this Part applies

36.1. This Part applies in magistrates' courts and in the Crown Court where a defendant wants to —

- (d) introduce evidence; or
- (e) cross-examine a witness,

about a complainant's sexual behaviour despite the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999.

(a). 1999 c. 23.

(b) 1999 c. 23; section 42 was amended by paragraph 73 of Schedule 3 and Schedule 37 to the Criminal Justice Act 2003 (c. 44).

(c) 1999 c. 23; section 43(3) was amended by section 109(1) of, and paragraph 384(g) of Schedule 8 to, the Courts Act 2003 (c. 39).

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Application for permission to introduce evidence or cross-examine

36.2. The defendant must apply for permission to do so—

(f) in writing; and

(g) not more than 28 days after the prosecutor has complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996(a) (disclosure by prosecutor).

[Note. See Part 3 for the court's general powers to consider an application with or without a hearing and to give directions.]

At a pre-trial hearing a court may make binding rulings about the admissibility of evidence and about questions of law under section 9 of the Criminal Justice Act 1987(b); sections 31 and 40 of the Criminal Procedure and Investigations Act 1996(c); and section 8A of the Magistrates' Courts Act 1980(d).]

Content of application

36.3. The application must—

(h) identify the issue to which the defendant says the complainant's sexual behaviour is relevant;

(i) give particulars of—

(i) any evidence that the defendant wants to introduce, and

(ii) any questions that the defendant wants to ask;

(j) identify the exception to the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999 on which the defendant relies; and

(k) give the name and date of birth of any witness whose evidence about the complainant's sexual behaviour the defendant wants to introduce.

Service of application

36.4. The defendant must serve the application on the court officer and all other parties.

Reply to application

36.5. A party who wants to make representations about an application under rule 36.2 must—

(l) do so in writing not more than 14 days after receiving it; and

(m) serve those representations on the court officer and all other parties.

(a) 1996 c. 25; section 3 was amended by section 82 of, and paragraph 7 of Schedule 4 to, the Regulation of Investigatory Powers Act 2000 (c. 23) and section 32 and section 331 of, and paragraphs 20 and 21 of Schedule 36 to, the Criminal Justice Act 2003 (c. 44).

(b) 1987 c. 38; section 9 was amended by section 170 of, and Schedule 16 to, the Criminal Justice Act 1988 (c. 33), section 6 of the Criminal Justice Act 1993 (c. 36), sections 72, 74 and 80 of, and paragraph 3 of Schedule 3 and Schedule 5 to, Criminal Procedure and Investigations Act 1996 (c. 25), sections 45 and 310 of, and paragraphs 18, 52 and 54 of Schedule 36 and Part 3 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44), article 3 of, and paragraphs 21 and 23 of S.I. 2004/2035, section 59 of, and paragraph 1 of Schedule 11 to, the Constitutional Reform Act 2005 (c. 4) and Part 10 of Schedule 10 to the Protection of Freedoms Act 2012 (c. 9). The amendment made by section 45 of the Criminal Justice Act 2003 (c. 44) is in force for certain purposes; for remaining purposes it has effect from a date to be appointed.

(c) 1996 c. 25; section 31 was amended by sections 310, 331 and 332 of, and paragraphs 20, 36, 65 and 67 of Schedule 36 and Schedule 37 to, the Criminal Justice Act 2003 (c. 44).

(d) 1980 c. 43; section 8A was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by SI 2006/2493 and paragraphs 12 and 14 of Schedule 5 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10).

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Application for special measures

36.6. If the court allows an application under rule 36.2 then—

- (n) a party may apply not more than 14 days later for a special measures direction or for the variation of an existing special measures direction; and
- (o) the court may shorten the time for opposing that application.

[Note. Special measures to improve the quality of evidence given by certain witnesses may be directed by the court under section 19 of the Youth Justice and Criminal Evidence Act 1999 and varied under section 20(a). An application for a special measures direction may be made by a party under Part 29 or the court may make a direction on its own initiative. Rule 29.13(2) sets the usual time limit (14 days) for opposing a special measures application.]

Court's power to vary requirements under this Part

36.7. The court may shorten or extend (even after it has expired) a time limit under this Part.

The Crown Court Compendium 2016

Section 20-1 Sexual offences – The dangers of assumptions

Legal Summary

1. In D16 the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner.

2. This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in Miller ¹⁷

“In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, R v. MM [2007] EWCA Crim 1558, R v. D [2008] EWCA Crim 2557 and R v. Breeze [2009] EWCA Crim 255).

3. In Miller, the Court of Appeal endorsed the following passage from the 2010 Benchbook “Direction the Jury”

“The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.”

4. The use of such a direction, properly tailored to the case does not offend the common-law principle that judicial notice can be taken only of facts of particular notoriety or common knowledge.¹⁸ Parties are not permitted to adduce generic expert evidence of the range of known reactions to non-consensual sexual offences.

¹⁶ [2008] EWCA Crim 2557. See also Breeze [2009] EWCA Crim 255.

¹⁷ [2010] EWCA Crim 1578.

¹⁸ *Miller*

5. This direction may be given at the outset of the case [see Chapter 1-5] or as part of the summing up. Whenever it is given it is advisable to discuss the proposed direction with counsel.¹⁹ Considerable care is needed to craft the direction to reflect the facts of the case²⁰ and to retain a balanced approach²¹.
6. In GJB22 the CA approved the direction of the trial judge in Miller on the delay issue. “We entirely accept that in a suitable case, and this was one, the judge is entitled to and should comment on the reluctance or difficulty of the victim of sexual abuse to speak about it for long afterwards. In this connection, we refer to the judgments of this Court in D (JA)²³ and in Miller.²⁴ However, it is important that the comment should not assume the guilt of the defendant, and that his case should be made clear. The direction in Miller was a model in this respect. The summing up in that case included the following passage:

“You are entitled to consider why these matters did not come to light sooner. The defence say that it is because they are not true. They say that the allegations are entirely fabricated, untrue and they say that had the allegations been true you would have expected a complaint to be made earlier and certainly once either defendant ... was out of the way ... of the complainant. The defence say that she could have complained to her mother or her grandmother before she left the country or to her mother on the plane, or to the headmaster of the school ... or to the social worker who came on one occasion to speak to her (although again bear in mind there is no evidence that the complainant was ever given any contact details or instructions as to how to make such a complaint, or that she could have complained sooner to a family or extended family member once she was safe in Jamaica. On the other hand the prosecution say that it is not as simple as that. When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out. They may be fearful that they may not be believed, a child's word against a mature adult, or they be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship.”

Directions

7. There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.

¹⁹ *Miller*

²⁰ Smith [2012] EWCA Crim 404.

²¹ CE [2012] EWCA Crim 1324

²² GJB [2011] EWCA Crim 867; F [2011] EWCA Crim 1844

²³ [2008] EWCA Crim 2557

²⁴ [2010] EWCA Crim 1578

8. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant:
- (1) Of untruthfulness:
 - (a) Delay in making a complaint.
 - (b) Complaint made for the first time when giving evidence.
 - (c) Inconsistent accounts given by the complainant. (d) Lack of emotion/distress when giving evidence.
 - (2) Of truthfulness:
 - (a) A consistent account given by the complainant.
 - (b) Emotion/distress when giving evidence.
 - (3) Of consent and/or belief in consent:
 - (a) Clothing worn by the complainant said to be revealing or provocative.
 - (b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.
 - (c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.
 - (d) Some consensual sexual activity on the occasion of the alleged offence.
 - (4) Of consent and/or belief in consent and/or lack of involvement:
 - (a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.
 - (b) A defendant who is in an established sexual relationship.
9. Such directions must be crafted with care and should always be discussed with the advocates. Thought should be given as to when may be the most appropriate time to give such directions: at the outset of the trial or in the course of summing up?
10. It is of particular importance in cases of this nature to listen to the closing speeches of the advocates with care and if necessary review the directions to be given.

Example 1: Delay (in the context of the complainant's allegations)

When you come to consider why this allegation was not made any earlier, you must avoid making an assumption that because it was delayed it must be untrue.

The defence say that the fact that the complaint was not made at the time shows that V is not telling the truth and that she has made up her story. When this was suggested to her in evidence she said {insert e.g. that she was a child aged 12 and afraid to tell anyone because D had told her that if she did so she would not be believed and this was "our little secret"; and that she only overcame her fear when her own daughter was approaching the age that she was when she said D did this to her}.

To decide this point, you should look at all the circumstances including the reason that V gave for not having complained at the time that she says this incident

occurred. Different people react to particular situations in different ways. Some, if they have experienced something of the kind complained of in this case, may tell someone about it straight away, whilst others may not be able to do so, whether out of shame, shock, confusion or fear of getting into trouble, not being believed, or breaking up the family. In this case, if V's complaint is true, she was a child of 12 when it happened and was living in the same family as D, and you should consider whether or not those things would have affected her ability to complain at that time.

The fact that a complaint is not made at the time does not necessarily mean that it must be untrue any more than the fact that a complaint is made immediately means that it must be true. I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true.

Example 2: Complaint made for the first time when giving evidence

It is not in issue that until V gave evidence she had not mentioned {specify} to anyone before. The defence say that this shows that she has invented this allegation: they say that she was "making it up as she went along" [if applicable: and that all of her story is untrue]. The prosecution say that {e.g. it is not surprising that when she was having to think about things which happened a long time ago and answer detailed questions about them this triggered her memory so that she was then able to remember this for the first time}.

No doubt you will want to consider these arguments but you should bear in mind that the fact that someone does not mention something at the outset and only mentions it at a late stage does not mean that she cannot be telling the truth, any more than the fact that someone who consistently makes the same allegation must be doing so.

The memory of someone who has had an experience of the kind about which V complains may be affected in different ways. Such an experience may have a bearing on that person's ability to take in, register and recall it. Also, after such an event, some people may go over and over it in their minds with the result that their memory may become clearer whilst other people may try to avoid thinking about it and consequently, whilst the incident did occur, they may have difficulty in recalling it accurately or, in some cases, at all.

I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true; and when you are considering this you should look at all of the circumstances in which V made her original complaint, the way she gave her account to the police officer in the interview, the way she gave evidence and what she said when it was suggested to her that she had invented this [if applicable: and all of her account.]

If you are sure that V's account is true then you may rely on it in reaching your verdict. If you are not sure that it is true, or sure that it is untrue, then you cannot rely on it.

Example 3: Inconsistent accounts

When you come to consider whether or not this allegation is true, you must avoid making an assumption that because V has said something different to someone else her evidence to you is untrue.

You have heard that when V gave a statement to/was interviewed by the police s/he said {insert} whereas when s/he gave evidence s/he said {insert}.

[Either] There is no issue that these two accounts are inconsistent with one another and you will have to consider why this is so.

[Or] You will have to compare these two accounts and, if you find that they are inconsistent, you will have to consider why this is so.

The mere fact that V has not been consistent in the accounts that s/he has given does not necessarily mean that her/his evidence is not true. Experience has shown that inconsistencies in accounts can arise whether a person is telling the truth or not. This is because the memory of someone who has had an experience of the kind complained of in this case may be affected by it in different ways and this may have a bearing on that person's ability to take in, register and recall it. Also, after such an event, some people may go over and over it in their minds with the result that their memory may become clearer whilst other people may try to avoid thinking about it and consequently, whilst the incident did occur, they may have difficulty in recalling it accurately.

I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true. To answer this question you must look at all of the evidence including any inconsistencies which you find exist and decide what effect these have on V's truthfulness. If you are sure that V's account is true then you are entitled to rely on it. If you are not sure that it is true, or sure that it is untrue, then you cannot rely upon it.

Example 4: Consistent account

You have been asked to find that V's account is true because s/he has been consistent in what s/he said to {e.g. her sister/the police} and in her evidence about this [alleged] incident. The mere fact that a person gives a consistent account about an event does not necessarily mean that account must be true, any more than the fact that a person who gives inconsistent accounts must mean that the event did not happen.

In deciding whether or not V's account is true you should look at all of the evidence. If, having done so, you are sure that V's account is true then you are entitled to rely on it. If you are not sure that it is true, or sure that it is untrue, then you cannot rely on it.

Example 5: Lack of emotion/distress when giving evidence

You have been reminded/you will remember that when V gave evidence s/he appeared completely calm and gave his/her account in a matter-of-fact way without showing any emotion. It is entirely for you to decide what you make of V's evidence but it would be wrong to assume that the manner in which he/she appeared to give evidence is an indication of whether or not it is true.

This is because experience has shown that people react to situations and cope with them in different ways. Some people who have experienced an incident of the kind complained of in this case, when they have to speak about it, show obvious signs of emotion and distress, whereas others show no emotion at all. Consequently the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

Example 6: Show of emotion/distress when making a complaint and/or giving evidence

You have been reminded/you will remember that at a number of points in his/her evidence V became distressed and emotional. It is entirely for you to decide whether or not V's evidence is true but you must not simply assume that because V showed distress and emotion it must be true. It is perfectly possible for a witness to become distressed and emotional when describing an incident such as this, whether or not their account is true. The presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

Example 7: Clothing worn by the complainant said to be revealing or provocative

[Questioning on this subject should have been restricted, but there will be occasions where such evidence has emerged.]

You have been reminded of/you will remember the fact that when V went out on the evening of {date} she was dressed in {specify}. The defence suggested to her that this was because she was "out on the pull" and looking for sex and you will remember her response that {insert}. You should consider this evidence and decide what you make of it but you must not assume that because V was dressed in that way that she must have been either looking for or willing, if the opportunity presented itself, to have sex. People may dress in a variety of ways for a variety of reasons and the mere fact that someone dresses in revealing clothing does not necessarily mean that that person is inviting or willing to have sex or that someone else who sees and engages with that person could reasonably believe that that person would consent to it.

Example 8: Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others

V has accepted that she was very drunk on the night of {insert} but it is important that you do not assume that because she got into that state she was either looking for, or willing to have, sex. When it was suggested to her in cross-examination that she was out that night to get drunk and then to have sex she said {insert}. You should consider this evidence and decide what you make of it but you must not assume that because she was drunk she must have wanted sex. People do go out at night and get drunk, sometimes for no apparent reason at all, and it would be wrong to leap to the conclusion that such a person must be out looking for, or willing to have, sex or that someone else who sees and engages with that person could reasonably believe that that person would consent to it.

Example 9: Previous sexual activity between the complainant and the defendant

It is common ground that V and D knew one another and that, whilst they have not been in an established sexual relationship, they have had sexual intercourse on a number of previous occasions. It is important to recognise that the mere fact that V has had consensual sexual intercourse with D on other occasions does not mean that she must have consented to have sexual intercourse with him on this occasion or that this would have given D grounds for reasonably believing that she consented to it. A person who has freely chosen to have sexual activity with another person in the past does not, as a result, give general consent to have sexual intercourse with

that person on any occasion: each occasion is specific and whilst at one time a person may want to have sex, at another time that person may not want it at all and will not consent to it.

Also, if and when you come to consider whether D may reasonably have believed that V consented, you must not assume that because V had had sexual intercourse with him on a number of previous occasions this, in itself, gave him grounds for believing on this occasion. You must resolve this issue by looking at all of the evidence.

Example 10: Some consensual sexual activity on the occasion of the alleged offence

It is common ground that on the night in question V took D back to her home, gave him a cup of coffee and that for a while they engaged in kissing one another, something to which V consented. According to V she then said she had to get up early the next morning and asked D to leave but he refused to go and then forcibly had sexual intercourse with her against her will. D gave evidence that kissing led to further sexual touching and then to sexual intercourse to which V fully consented.

It is for the prosecution to prove that V did not consent to D having sexual intercourse with her and you must decide this issue by looking at all the evidence. When you do so it is important to recognise that the mere fact that V let D into her home and willingly engaged in kissing D does not mean that she must have wanted to go on to have sexual intercourse and must have consented to it. A person who engages in sexual activity is entitled to choose how far that activity goes and is also entitled to say “No” if the other person tries to go further; the fact that V willingly engaged in kissing does not mean that she must have wanted to have sexual intercourse.

If you are sure that V did not consent to having sexual intercourse with D the prosecution must also prove that D did not reasonably believe in V’s consent. This too is an issue which you must resolve by looking at all of the evidence but you must not assume that because V had been kissing him willingly before sexual intercourse took place this in itself gave him grounds for believing that she consented to him having sexual intercourse with her.

Example 11: Fear; although no use or threat of force, physical struggle and/or injury

It is not suggested that, before or at the time that D had sexual intercourse with V he either threatened her with force or that he used any force upon her and V has accepted that she did not put up any struggle. It is also common ground that V did not suffer any injury.

The defence say that this is because V fully consented to what took place. V on the other hand gave evidence that when D started to undo his trousers and then undid her jeans she was so frightened that she could not move: she said she was “petrified with fear”. You will have to resolve this issue by looking at all of the evidence but it is important to recognise that the mere fact that D neither used nor threatened to use any force on V and that she did nothing to prevent D from having sexual intercourse with her and was uninjured does not mean that V consented to what took place or that what V has said about what happened cannot be true.

Experience has shown that different people may respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event whilst

others may, whether through fear or personality, whilst they did not consent, be unable to do so.

It is important to draw a distinction between consent and submission. A person consents to something if, being capable of making a choice and being free to do so, s/he agrees to it. Consent in some situations may be given enthusiastically, whereas in others it is given with reluctance, but nevertheless it is still consent. But when a person is so overcome by fear that she lacks any capacity either to give consent or to resist, that person does not consent but submits to what takes place.

It is for you to say, having considered all of the evidence, what the situation was in this case, bearing in mind that it is for the prosecution to prove that V did not consent to D having sexual intercourse with her and that D did not reasonably believe that she consented. What they do not have to prove is (a) that D used or threatened to use any force or that V put up a struggle or was injured or (b) that V communicated her lack of consent to D.

Example 12: Defendant is in an established sexual relationship with another person

It is not disputed that V was raped: what is in dispute is that it was D who raped her; and the evidence of identification of D as the person responsible is challenged. As part of the evidence you heard from D and also from his wife that they have a mutually fulfilling sex life, and it is D's case that he had no need to have sexual intercourse with a stranger and much to lose by doing so.

You will of course consider this evidence when you are deciding where the truth lies but you must not assume that a man who is married and, if you find that it is or may be the case, who has a fulfilling sex life cannot resort to sexual activity with any other person. In pointing this out I am not suggesting what you should make of the evidence of D or of his wife, but simply alerting you to the danger of making an assumption which, depending on your assessment of their evidence, might flow from it.

Example 13: Defendant is a homosexual man

You have heard that D is gay and lives with/goes out with {specify}. You have heard this as part of the background to the case. It is not relevant to the issue of guilt. It is no more likely that a man who lives with another man has a sexual interest in young boys than it is that a man who lives with a woman will have an interest in young girls. The fact that D is gay is of no significance at all.

Observations: the use of rape ‘stereotypes and assumptions’

Trials 1-8

Directions	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6	Trial 7	Trial 8
(1) Of untruthfulness								
(a) Delay in making a complaint.	Because the victim had stayed in marriage, it could not have been rape, but consensual sex.		He said she could have left the house, phoned the police or a friend, but instead you went to sleep like a ‘married couple’.			‘Suggested delay was because an allegation was to diffuse a situation with her mother at home’.		
(b) Complaint made for the first time when giving evidence.								
(c) Inconsistent accounts given by the complainant.								
(d) Lack of emotion/distress when giving evidence								
2) Of truthfulness:								
(a) A consistent account given by the complainant.								
(b) Emotion/distress when giving evidence.						The defence challenged complaint evidence about the complainant and even speculated whether given her state of mind could she have mixed up events IE been raped on another occasion and by another individual and confused this with the complainant on the night in question.		
3) Of consent and/or belief in consent:								

Directions	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6	Trial 7	Trial 8
(a) Clothing worn by the complainant said to be revealing or provocative.					There were suggestions of revenge put to the victim. Also that “cooperative outfit was used”. Not sure what they mean by it but sounds to me like a myth.			
(b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.			There were elements of trying to discredit by suggesting the victim was drunk, was 'scorned' and so was bringing the complaint out of revenge.	‘Victim was so drunk she was flirting with him all day’.			Mention was made of excessive amounts of alcohol being consumed by both parties and that may have caused the complainant to become unconscious and then unaware of what was being done to her without her consent.	Yes, alcohol was mentioned. Complainant was always drinking.
(c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.	Because the victim had stayed in marriage, it could not have been rape, but consensual sex.	He did not rape her, instead he was doing what they normally do after falling out with each other.			Victim incited the encounter.		<p>The barrister put to the complaint that the sex and videos were consensual.</p> <p>Victim always showed she wanted sexually the defendant.</p> <p>Victim always looks for the opportunity to have sex.</p>	
(d) Some consensual sexual activity on the occasion of the alleged offence.				‘Victim was so drunk she was flirting with him all day’.				
4) Of consent and/or belief in consent and/or lack of								

Directions	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6	Trial 7	Trial 8
involvement								
(a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.								
(b) A defendant who is in an established sexual relationship.								
Miscellaneous <ul style="list-style-type: none"> • Flirting • Jealousy/Rage • Sex with another man • Justification of behaviour • Good character reference for defendant 	Pros Barrister – “she is of bad character, she is an adulteress”.		There were elements of trying to discredit by suggesting the victim was drunk and was 'scorned' and so was bringing the complaint out of revenge.	I have noted that the barrister was at some point trying to suggest that the victim was flirting around with all the men in that party. ‘Trying to suggest that the victim has been flirting with other people around that day so for that reason she was asking for sex’.	Photographs taken from social media showing her exposing her breasts were put to her.		Jealousy of his friendships outside of the relationship.	Her evidence was that she complained to the defendant at the time of the offence that he had raped her. Within in moment she made a complaint to her female partner as to what had happened. Evidence in chief was dealt with well. Under cross examination the issue that she had discovered the victim in bed with the defendant was strongly refuted. No rape myths raised. She is of bad character she is an adulteress.

Directions	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6	Trial 7	Trial 8
<p>Q 27 - Judge Dispelling the myths</p> <ul style="list-style-type: none"> • Not at all • Moderately • Explicitly 	<p>The judge went through some rape myths briefly and in a very factual way. I'm not sure the jury would have understood all of them, without examples. They were given a written copy and told to use this document first.</p> <p>“Wives can’t be raped by husbands – wrong they can,”</p> <p>‘People report rape immediately – wrong fear and shame stops some people for a time’.</p>	<p>The Judge did not dispel any myths or stereotypes</p>	<p>Neither observer was present for the summing up.</p>	<p>The judge told to jury they only had to decide whether this is a case of rape - guilty or not guilty</p> <p>Base the case on evidence they had heard - no more will be given.</p> <p>They had to put aside any prior assumptions they may have.</p> <p>If a person had been flirting or had drunk lots of alcohol it does not mean rape is likely or that a ‘randy’ young man would commit rape. The judge defined what rape is and the jury were given a document to take and read.</p> <p>Observer impressed that the judge intervened to stop allegations of flirting.</p>	<p>It was fair. He put his instructions and made mention of possible issues that the jury need to consider. Were they sure and that his client’s? Evidence was credible and his version should be acceptable.</p> <p>No note of the rape myths being addressed.</p>	<p>Judge said to ignore any emotional response from complainant as she could be "laying it on thick" and informed the jury of the "3 elements of proving rape". Judge says due to time between incident and reporting of it all, allowances should be made for the defendant if there are 'inconsistencies in his recollection' but does not allow the same allowances to the complainant despite the defence focusing on the exact date inconsistencies from the complainant. No mention of racial comments.</p> <p>No comments on rape myths quoted.</p>	<p>The judge gave directions in law, and documents for the jury to read. Also a flow chart was given for them to follow to reach a verdict. The judge said, there is no stereotypical rapist. No assumptions of rapists or victims. It is wrong to think if a woman gets drunk, goes into a bedroom or has provocative clothing she would be up for sex. It is NO. It is wrong to assume rape cannot happen in relationships. Keep an open mind on both sides of this case. There must be freedom or capacity to engage in sexual activity but alcohol can remove inhibition. Look at the issues. Complainant said she had not recollection of the sexual activity or the videos being taken. No role play in relationship. Defendant said this was normal sex and it was role play. Prosecution are saying defendant knew claimant was asleep as gently calling her name before assaulting her, but defence are saying this was a game and she was awake so sex was</p>	<p>NO.</p>

Directions	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6	Trial 7	Trial 8
							consensual. The jury were told that all 3 counts would require a unanimous verdict'	

Trials 9 - 16

Directions	Trial 9	Trial 10	Trial 11	Trial 12	Trial 13	Trial 14	Trial 15	Trial 16
(1) Of untruthfulness								
(a) Delay in making a complaint.	More evidence of rape myths: Discussion around the fact that she didn't report the rape straight away as she didn't identify what had happened as rape at the time (she didn't think rape could happen in a relationship context). She later realised what had happened was rape after speaking to a worker at the mental health unit. Defence tries to claim that if it was rape she would have reported it straight away and that this worker put the idea in the complainant's head.		<p>She didn't leave after the rape despite living few minutes away.</p> <p>The fact that she delayed to report rape until her boyfriend wanted to have sex with her and refused worried about the sexual transmitted disease.</p>			<p>He asked why she had not complained until June, 2014.</p> <p>An earlier complaint to the police had been made, with some details of domestic abuse. However, this was not followed up by the police at the time. It was an email to the PCC, sometime later and prompted by her seeing a television advert, complaining about the failures of the police which reinvigorated this complaint and led to the court case.</p>	He also focussed on why the victim hadn't telephoned the police, whilst in the house with the defendant. The victim was fleeing and phoned the Police as soon as she got to a place of safety.	
(b) Complaint made for the first time when giving evidence.								
(c) Inconsistent accounts given by the complainant.		Tried to undermine complainants' evidence by suggesting she and complainants'2 had colluded. Found some (small) discrepancies in her two statements, and very much used this to undermine her evidence.						
(d) Lack of emotion/distress							Also the defence referred to how she	

Directions	Trial 9	Trial 10	Trial 11	Trial 12	Trial 13	Trial 14	Trial 15	Trial 16
when giving evidence							<p>had got frustrated when giving her evidence, implying someone who had been raped would not be as confident as to do this.</p> <p>Victim not presenting as a 'victim' as she raised her voice in court and leant around the screen when she got frustrated.</p>	
2) Of truthfulness:								
(a) A consistent account given by the complainant.								
(b) Emotion/distress when giving evidence.								
3) Of consent and/or belief in consent:								
(a) Clothing worn by the complainant said to be revealing or provocative.								

Directions	Trial 9	Trial 10	Trial 11	Trial 12	Trial 13	Trial 14	Trial 15	Trial 16
(b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.	Defence went to a violent episode in the Tranwell Unit, where she was restrained, removed and arrested after drinking alcohol, with defence saying she would not have been provoked by nurses but was violent.		Consumption of alcohol was mentioned.			<p>She was asked about her drinking and her conviction for excess alcohol together with loss of her job.</p> <p>The defence frequently mentioned, frequently mentioning her drinking problems and previous arrest. He openly dismissed the truth of the defendant's drinking history and record of misconduct and indiscipline at work.</p>	The defence barrister was clearly trying to paint a picture of an unreliable drug addict.	
(c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.	Evidence of rape myths used against her- Defence saying because she didn't object strongly to sexual intercourse she consented. Defence asks why she didn't just tell him to get off her. Questions her lack of verbal and physical protest.							
(d) Some consensual sexual activity on the occasion of the alleged offence.								
4) Of consent and/or belief in consent and/or lack of involvement								
(a) Lack of any use or threat of force, physical struggle and/or injury. In				"But you are a very violent person, you have hit someone with				

Directions	Trial 9	Trial 10	Trial 11	Trial 12	Trial 13	Trial 14	Trial 15	Trial 16
this regard it will be necessary to alert the jury to the distinction between submission and consent.				a bottle before, so why didn't you fight when defendant was raping you".				
(b) A defendant who is in an established sexual relationship.								
Miscellaneous <ul style="list-style-type: none"> • Flirting • Jealousy/Rage • Sex with another man • Justification of behaviour • Good character reference for defendant 		Had 8 character references, all of which put importance on defendant being a "family man" etc. (as if this means he wouldn't/couldn't commit rape).		Victim previous history of being violent and shoplifting, having sex with two men around the same time was as well used a lot by the defendant barrister.		It was put to her that she was making the allegations to get her own back on him. Her reason for making the allegation was to destroy his reputation and career and his new relationship.		
Q 27 - Judge Dispelling the myths <ul style="list-style-type: none"> a. Not at all b. Moderately c. Explicitly 	The jury were given legal direction and written information, and were told that anyone can be the victim of sexual assault and the complainant was violent but that does not mean she could not be raped. Also some people will complain of rape immediately and some years later, and to disregard sex the night before and focus only on the sexual act in question as consent during an act can be withdrawn and if sex continues that is rape, although defendant states he did believe	Says the jury need to decide if complainants are truthful and accurate (re: the discrepancies in complainants' evidence). Jury should forget any myths they may have (e.g. should fight off the attacker, or getting drunk means consent, that sleeping women can't be raped) and decide on the facts presented Explains legal aspect of consent (e.g. reasonable belief) Good character and victim being drunk/having had a	The judge talked about myths - some people would believe that rape would involve a woman being injured or having torn garments. A woman in drink would probably consent, that a victim would complain immediately but none of that is true. Fear is a powerful emotion so can cause a woman to submit. To accept that people can become disinherited in drink and at times can behave differently but complainant has exhibited distress at various times and jury to look for reason for	The Judge was avoiding myth at this point. He was factual and precise. All of the evidence was kept into consideration again during summing up to bring the whole picture up.	The Judge did give the jury very clear directions about myths and stereotypes in cases concerning child sexual offences this was very clear and well set out directions.	He dealt with the issue of rape myths and that these should be put aside. Rape can occur in a relationship.	Judge's summing up was good. Tackled rape myths and gave examples, also addressed use of drugs and revisited special measures.	

Directions	Trial 9	Trial 10	Trial 11	Trial 12	Trial 13	Trial 14	Trial 15	Trial 16
	she was consenting. Rape is rape: reluctant consent is consent, so to consider this for count 1.	drink are not defences in law.	distress – frightened or ashamed ? The judge said that women and men do have sex with strangers, not always just when in relationships together.					

Trials 17-23

Directions	Trial 17	Trial 18	Trial 19	Trial 20	Trial 21	Trial 22	Trial 23
(1) Of untruthfulness							
(a) Delay in making a complaint.		'Why did she not disclose the alleged rape at first'?			She had taken time in reporting it. He said that she had gone further than she may have wanted to do and was then embarrassed by what she had done.		
(b) (b) Complaint made for the first time when giving evidence.							
(c) Inconsistent accounts given by the complainant.							
(d) Lack of emotion/distress when giving evidence							
2) Of truthfulness:							
(a) A consistent account given by the complainant.							
(b)							
(c) Emotion/distress when giving evidence.							
(d)							
3) Of consent and/or belief in consent:							
(a) Clothing worn by the complainant said to be revealing or provocative.						Highlights that she was wearing matching underwear, and suggests that this shows she had put some thought into this before going to the defendant's house.	.
(b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of	Attempt to use the victim's Medical record of overdose and relationship breakup against her.			Defence went through various hospital admittances following alleged medication overdoses, and the one		Defence also asked her about her alcohol dependency, is she still dependent and how does this affect her? Symptoms	

Directions	Trial 17	Trial 18	Trial 19	Trial 20	Trial 21	Trial 22	Trial 23
others.				where no drugs were found in the blood.		of alcohol dependency can include memory loss, hallucinations, and she denies having experienced any of these.	
(c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.						Photos of the complainant on his phone, with some of her posing wearing his glasses and messing about. The defence asked her “what impression were you giving him?”	Defence suggested that the alleged vaginal rape which happened in the morning was just a usual ritual that happened before the defendant left for work.
(d) Some consensual sexual activity on the occasion of the alleged offence.							
4) Of consent and/or belief in consent and/or lack of involvement							
(a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.		The fact that she did not wake when one leg of her leggings and knickers were removed, which would mean bending her leg and defendant moving her body and lying on top of her did not wake her and only woke when she felt a penis inside her.		Defence said it was ‘complete nonsense’ that she gave sex for a place of safety.	.		
(b) A defendant who is in an established sexual relationship.							
Miscellaneous		Defence focused on the		Defence asked why no		Defence implies that she	

Directions	Trial 17	Trial 18	Trial 19	Trial 20	Trial 21	Trial 22	Trial 23
a. Flirting b. Jealousy/Rage c. Sex with another man d. Justification of behaviour e. Good character reference for defendant f. Criminal Injuries		<p>change in behaviour of the claimant, which led to her being 'kicked out' of home by her mother because of her drinking and whether she used the allegation of rape as an excuse.</p> <p>It was mentioned that the allegation of rape was possibly used as a weapon against the defendant as he says he rejected her advances.</p>		<p>reports of signs of injury were made at school - the complainant became agitated shouting 'I'm not a pathological liar'. Defence asked about a discussion about compensation - the complainant again agitated and sounded upset saying - 'I don't want money and I'll give it to charity as its not from a good place'</p>		<p>fancied the defendant, kissed him and that these would suggest she consented to sex, but was so disappointed in his performance (especially after fancying him) that she reported it as being rape.</p>	
<p>Q 27 - Judge Dispelling the myths</p> <p>a. Not at all b. Moderately c. Explicitly</p>	<p>Advice around capacity to give consent was given</p> <p>The jury were told that in sexual crimes, victims can react differently as trauma can interfere with recall and memory or the victim can omit information but they need to look at whether differing recollections in this case are true or deliberately untrue.</p> <p>The good character of defendant is that he is a 47 year old man with 7 children and has good employment record with no convictions, cautions or warnings needs to be considered. He admitted lying in interview but said he was not 'sound headed'.</p> <p>Are the complainants truthful (do not use pre-</p>	<p>The judge gave directions in law and summarised the evidence and explained what consent is and if claimant was asleep she could not consent.</p> <p>The jury to look at whether the distress they witnessed from claimant was genuine or faked</p> <p>The delay in reporting the alleged rape means there is no physical evidence as to whether sex took place or not - so that line of enquiry is now lost. I feel that the judge let her opinion show (unintentionally) which could have swayed the jury's decision "complainant got upset whilst giving evidence, the judge did not offer a suggestion (like a drink or a break) until it was too late. 'when the</p>		<p>The jury were told that people who have been raped or sexually assaulted report at different times so not to think about this claimant quickly reporting a rape and taking a while to report this alleged sexual activity.</p>	<p>The judge dealt with the issue of rape myths, that victims all behave differently. They must look at the evidence and decide. He covered the issues of consent and submission, her opportunity to leave and reminded them that different people behave differently in some circumstances.</p>	<p>In his summing up, the judge reads through the directions he gave the jury, reminds that there is no stereotype of rapists or victims and that they should not hold the special measures against the complainant. He says they should "disregard" the defendant's comments on her sexual history and previous allegations of rape as these are irrelevant to the issue of consent here, but this is the only mention of the myths that the defendant referred to.</p>	<p>The judge mentioned the jury to put aside prejudice, sympathy and assumptions.</p> <p>Assumptions about what is rape, what is a victim, what is a rapist or what will a person do or say if they are raped as there are no stereotypes as all react in different ways. The meaning of consent was explored, for freedom and capacity and that submission is not the same as consent. In rape there can be injuries or not as some may fight and some may freeze and some submit so speculation should not be used, as the jury must be sure in all matters.</p>

Directions	Trial 17	Trial 18	Trial 19	Trial 20	Trial 21	Trial 22	Trial 23
	conceived ideas) but any person sexually abused will undergo trauma and nobody can say how they would react – is the distress genuine or not. The complainants may have had the opportunity to tell someone they were under threat.	defendant appeared not to understand the questioning from the prosecution, the judge interrupted to recommend he consulted with his translator which I think means she shows more understanding to him than she does to the complainant'. The judge did not intervene when claimant was getting upset.					

Trials 24-30

Directions	Trial 24	Trial 25	Trial 26	Trial 27	Trial 28	Trial 29	Trial 30
(1) Of untruthfulness							
(a) Delay in making a complaint.	No obvious myths and stereo types.		He raised the issue of why she waited to make the complaint which according to her was in the public domain. She did not want it to be public because it was not true.	Did the complainant consent as she was in drink and to look at why she has kept this to herself for years and 'surprising things happen when inhibitions are loosened by alcohol.			
(b) (b) Complaint made for the first time when giving evidence.							
(c) Inconsistent accounts given by the complainant.		Defence queried why complainant did not report the rape but did report an assault by the same person.	He drew attention to the contradictions in the complainants' evidence.				Defence focused on the huge gaps in recall of the complainant and how she had contradicted herself about leaving the defendants flat by saying she got one key, then went back for another but they were both on the same fob.
(d) Lack of emotion/distress when giving evidence							
2) Of truthfulness:							
(a) A consistent account given by the complainant.							
(b) Emotion/distress when giving evidence.							
3) Of consent and/or belief in consent:							
(a) Clothing worn by the complainant said to be							

Directions	Trial 24	Trial 25	Trial 26	Trial 27	Trial 28	Trial 29	Trial 30
revealing or provocative.							
(b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.		Defence suggested that the long term misuse of drugs could account for the difficulty the complainant had in recalling dates etc., or what had happened between the complainant and the defendant.		Did the complainant consent as she was in drink and to look at why she has kept this to herself for years and 'surprising things happen when inhibitions are loosened by alcohol.			<p>The consumption of alcohol on the night and the complainant saying she had smoked</p> <p>cannabis the previous evening, could have led to her difficulty with recall and defence</p> <p>questioned whether this was recall difficulty or 'selective memory' as she seems to recall fine details of conversation but not what was happening before or after.</p>
(c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.		<p>Defence questioned the complainant as to why she admits to having kept in contact with the defendant after the alleged offences and was using him as her drug dealer.</p> <p>Complainant was asked why she had provided a letter for the defendant, as a character reference when he was involved in a family law case regarding him having custody of his child. Complainant explained she did this as she thought he was a better parent than the mother of that child as that mother was hallucinating because of her drug misuse.</p>				The couple had split following the assault when he bit her. They got back together this showed that she was capable of leaving him. Would she have returned to him to put up with rape? Why should she think he would change?	

Directions	Trial 24	Trial 25	Trial 26	Trial 27	Trial 28	Trial 29	Trial 30
(d) Some consensual sexual activity on the occasion of the alleged offence.							
4) Of consent and/or belief in consent and/or lack of involvement							
(a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.				Did the defendant believe there was consent, as the complainant said she 'just froze and didn't say anything'?			
(b) A defendant who is in an established sexual relationship.							
Miscellaneous a. Flirting b. Jealousy/Rage c. Sex with another man d. Justification of behaviour e. Good character reference for defendant f. Criminal Injuries			She agreed she was annoyed with him for going out with his friend.	Defence asked if the complainant had heard of compensation for this type of case, and she replied she did not want compensation only justice, but then said she had never heard of this type of compensation. The defence said prior to the assault on the step-father the defendant had long employment with G4S and after prison was employed as a wine and spirits department manager in a Supermarket so was reliable	She said that she was not making the allegation to get sympathy.		Character references were read from friends and family of the defendant.

Directions	Trial 24	Trial 25	Trial 26	Trial 27	Trial 28	Trial 29	Trial 30
				<p>It was suggested the complainant was</p> <p>the lead in going to the house of her stepfather prior to the assault, and that she is</p> <p>blaming the defendant after she was in prison and this alleged rape is revenge</p>			
<p>Q 27 - Judge</p> <p>Dispelling the myths</p> <p>a. Not at all</p> <p>b. Moderately</p> <p>c. Explicitly</p>	Jury were discharged before they were asked to deliberate.	The judge explained in detail that people react differently to trauma and there is no classic response some are angry, blame others, blank out memories and the power of recall can be different. In sexual cases the jury should have no preconceived ideas as to how people react, about lack of evidence or about people using drugs and their behaviours around that. Drug uses are no more or less likely to commit sexual offences.	Consensual sexual intercourse. Did not mean that she consented on every occasion. As to trauma he said that it was not possible to predict the effects of distress. The fact that a complaint was made late did not necessarily make it untrue likewise an early complaint may not be true.	<p>To put aside all preconceived ideas of what is a victim or a perpetrator and he explained that all sorts of people may be victims or perpetrators. Explanation was given about the response to rape from a victim, which can be immediate reporting, scream and shout, or to feel ashamed, be frightened and not report the rape. Some victims show strong emotion and some no emotion,</p> <p>The crime of rape was explained in detail and a document given to the jury. Consent was explained and that a person must have freedom and capacity to consent and this complainant is saying she did not consent. The evidence was conflicting around the amount and type of alcohol both</p>		<p>The assumption about reporting was dealt with. It was a fact that victims of sexual abuse and domestic violence may complain of the violence but not the sexual abuse. Shame and embarrassment may be reasons. She said that the complainant was said to have told her mother but mother could not recall it.</p> <p>The complainant had not screamed out but it was not necessary for to do so.</p> <p>People react differently some freeze some fight. It was possible for sexual abuse to take place within a house and others not to be aware of it.</p>	<p>The definition of rape and consent was explained clearly, and the meaning of capacity was described to the jury. Mention of the consumption of alcohol and its effects on a state of drunkenness, which can range from 'wide awake to dim awareness'</p> <p>There must be no misconceptions or assumptions about a woman drinking and going back to a flat and that any sexual activity there would have to be consensual.</p>

Directions	Trial 24	Trial 25	Trial 26	Trial 27	Trial 28	Trial 29	Trial 30
				parties say they consumed and to think about what steps the defendant took to ascertain consent and whether he would have considered consent had he been sober, as he was a regular drinker which may have affected his memory from 7 years ago.			



Speaking to Witnesses at Court

CPS Guidance

March 2016

1. Introduction

- 1.1 The aim of this guidance is to set out the role played by prosecutors at or before court in ensuring that civilian witnesses give their best evidence. This is a core part of the prosecutor's job and will, if done properly, impact positively on both the quality of the witness's evidence in court and the perception of the service they receive from the CPS. Although the Guidance is aimed primarily at civilian witnesses, prosecutors have the discretion to apply the guidance to other witnesses if they feel that it is appropriate to do so.
- 1.2 The guidance emphasises the need to ensure that witnesses are properly assisted and know more about what to expect before they give their evidence. Prosecutors have an important role in reducing a witness's apprehension about going to court, familiarising them with the processes and procedures – which may seem alien and intimidating – and managing their expectations on what will happen whilst they are at court.
- 1.3 Some prosecutors may be uncertain about what they are allowed to say to witnesses. This guidance makes it clear what is expected and permissible and explains the difference between assisting a witness to be better able to deal with the rigors of giving evidence (which is permitted) and witness coaching (which is not permitted).
- 1.4
- 1.5 Prosecutors must apply the principles set out in this guidance irrespective of whether they are from the CPS or from the self-employed Bar or a solicitor being employed as an advocate. The guidance applies to witnesses who are asked to give evidence at any witness related hearing (trials, appeals, Newton Hearings) and to witnesses giving evidence via a remote link as well as to witnesses who are present at court.
- 1.6
- 1.7 Prosecutors should be aware that they are not the only ones offering assistance to witnesses in advance of, and of the day of, their appearance at court. CP S paralegal staff , the police, Witness Care Units, Victim Support (or other local providers), court staff and the Citizens' Advice Court Based Witness Service all have a role to play and it is essential that prosecutors work with these partners to give the best all round support to witnesses throughout their time in the CJS. This will also avoid the witness being given the same information repeatedly by different people at court and enable prosecutors to make best use of the time available to speak with witnesses.

2. Purpose of Assisting the Witness at Court

- 2.1 Meeting the prosecutor in advance or on the day of their appearance and having their questions answered, can help a witness to feel prepared for their court experience and able to give their best evidence. We should seek to

help all witnesses who are called to court in this way, taking into account their needs and the amount of interaction they wish to have.

- 2.2 Providing assistance before and at court is especially important where witnesses are vulnerable and/or intimidated. One measure which should be considered for *all* such witnesses is a pre-trial special measures meeting. This gives the prosecutor an opportunity to introduce him/herself and to help the witness to make a properly informed decision about which special measures might assist them to give best evidence in advance of the day at court. It can also be used to inform the witness about the matters covered in this guidance. Even for those witnesses who are not identified as vulnerable/intimidated and do not have a special measures meeting, it is important that they are aware of what is likely to happen during their time at court.

3. Meeting a Witness at Court

- 3.1 In many cases giving evidence at court forces a witness to focus on a traumatic event that affected them personally or involved a family member or friend. Prosecutors should be aware of the potential for the witness to feel further victimised and/or traumatised and, to minimise this, should ensure that witnesses feel valued and involved in the court process. Particular care needs to be taken to make sure they understand what will happen in court.
- 3.2 Whilst we appreciate that the court room is the place of work for advocates, we would urge you to remember that it is an unfamiliar and unsettling place for witnesses. Prosecutors should therefore exercise discretion and thought, when communicating with other professionals in the presence of others involved in the case and be aware of the impact of thoughtless interaction in and around the courtroom on witnesses, and those supporting them.
- 3.3 [CPS Guidance - Care and treatment of victims and witnesses](#) sets out the CPS commitment to Victim and Witnesses at Court as follows:

“The CPS is committed to treating witnesses at court with respect and sensitivity. Whenever possible we should introduce ourselves and try to put nervous or vulnerable witnesses at ease and explain court procedures. We should keep all victims and witnesses informed about delays and ask for them to be released as soon as possible after giving evidence”.

The following guidance will assist prosecutors to deliver this commitment.

- 3.4 The prosecutor conducting the case should meet all witnesses before they give evidence. In order to avoid duplication, they should check if the Court Based Witness Service or CPS paralegal has informed the

witnesses of the matters in paragraphs (a) to (c) below and if not, should explain those matters. The prosecutor should provide the witness with assistance to prepare them for cross examination, as set out in paragraph (d) below and ensure that they are updated on progress thereafter.

(a) Introductory Matters

- Introduce yourself and explain who you are, giving your name and role.
- Treat witnesses with respect and dignity.
- Be aware of the particular needs and requirements of vulnerable witnesses and those with learning difficulties or mental health issues. If the witness has an intermediary or other supporter then they should be involved when you speak to the witness in order to assist the witness.
- Explain that a note will be taken of the meeting.
- Invite questions from the witness. Do not seek to restrict the range of questions at the start of the interaction but rather explain why you cannot answer a question if one is asked which you are unable to answer.

(b) Providing Assistance about Procedure

- Ask the witness what they have already been told by the Court Based Witness Service and other support services about procedure. This will give them a chance to input and will prevent repetition of information that they've already been given.
- Confirm any special measures arrangements and make sure the witness understands and is content with them and, where applicable, that arrangements are in place for the supporter of their choice to accompany them when giving their evidence.
- Explain the court's procedure (including the roles of the judge / magistrate), oath taking and the order in which questions are asked by the advocates.
- Explain the role of the defence advocate – that it is their job to put their client's case and challenge the prosecution's version of events, including by suggesting the witness is mistaken or lying. The witness should be informed that they should listen carefully to any such suggestion and clearly say whether they agree or disagree with it.
- Witnesses should be told that they should not be afraid to ask for a break if they genuinely need one such as when they feel tired, are losing concentration or if they want to compose themselves emotionally.

(c) Providing Assistance about Giving Evidence

- Explain to the witness the importance of listening to all questions carefully and making sure they understand each one before answering it. Witnesses should be encouraged not to be afraid to ask the advocate asking the question or the judge to repeat or rephrase any question which they do not understand.
- Witnesses must be told to answer all questions truthfully, however difficult they may be. They should be informed that it is not a sign of weakness if they

do not know or do not recall the answer to a particular question and, if this is genuinely the case, they should not be afraid to say so.

- If the witness has provided a witness statement or video testimony, explain the importance of the witness refreshing their memory from such a statement before going into court. Encourage them to do so. However, the witness should also be reassured that giving evidence is not a “memory game” and that in certain circumstances they may be able to refresh their memory from their witness statement whilst giving evidence. A witness should be told that they should not hesitate to ask to see their statement when giving evidence if they think their memory would be assisted by it.

(d) Providing Assistance for Cross-Examination

- Cross examination within the adversarial system is usually designed to cast doubt on the version of events being provided by either the witness or the defendant. This can put pressure on individual witnesses, especially where their character is attacked in order to reduce their credibility.
Questioning may also address deeply personal aspects of the witness’s life, for example in sexual offence cases involving young, vulnerable victims who have been subject to sexual exploitation.
- Although some witnesses will have no problem anticipating the type of cross-examination they will face, others, and particularly those who are vulnerable due to lack of maturity, mental health issues or learning disability, may have little or no idea what to expect. Relying on witnesses to ‘work it out for themselves’ is unfair and unrealistic. To justify this on the basis that giving such information is ‘coaching’ is unhelpful and inaccurate.
- **It is important that prosecutors should not provide the detail of, discuss or speculate upon the specific questions a witness is likely to face or discuss with them how to answer the questions.** However, to enable witnesses to give their best evidence prosecutors should ensure that they are informed of the matters set out below.
- The witness must be told that the purpose of doing so is to provide information to assist them and not to elicit information from them. They should be discouraged from giving a response. Should the witness make any comment which is relevant to the issues in the case then it should be recorded and disclosed, if it may undermine the prosecution case or assist the defence case. **Advocates in the Crown Court should ensure that, during these conversations, they are accompanied by a CPS member of staff based at court to assist with recording the meeting and conversation.**
- If it is possible to do so, vulnerable and intimidated witnesses should be provided with this information in advance of the trial date. This could ideally be done at the same time as a special measures meeting.
- In the case of others, the best time to give this information is when the witness is being referred to his / her witness statement and being reminded that they should tell the truth. They should then additionally be informed that nothing they are told should affect what they say but that they are permitted

to be informed of the following information to assist them:

- (i) The general nature of the defence case where it is known (for example mistaken identification, consent, self-defence, lack of intent). The prosecutor must not, however, enter into any discussion of the factual basis of the defence case.

The nature of the defence case may be obtained from a number of sources including the police interview, the Defence Case Statement (DCS), the Plea and Trial Preparation Hearing form in the Crown Court or the Preparation for Effective Trial form in the magistrates' court.

Prosecutors should outline the defence case based on the most recent information which will typically be the DCS (where there is one).

Prosecutors should not speculate on potential defences and where the general nature of the defence is not clear, the prosecutor should speak to the defence advocate(s) to clarify the defence case before speaking to the witness.

- (ii) Where third party material about a particular witness has been disclosed to the defence as being capable of undermining the prosecution's case or assisting the defence case (such as social services, medical or counselling records) then that particular witness should be informed of the fact of such disclosure. The witness may, in any event, have already consented to the disclosure of some sensitive and / or confidential material that relates to them such as their medical records but even if you believe this to be so, you should check and remind them. The details and the impact on the defence cross-examination should be not be discussed.
- (iii) Where leave has been given for a particular witness to be cross-examined about an aspect of their bad character under section 100 Criminal Justice Act 2003 or their sexual history under section 41 Youth Justice and Criminal Evidence Act 1999 then that particular witness should be informed that such leave has been given.

- Witnesses should be reassured that you can object to intrusive/irrelevant cross-examination and the judge will decide whether the questions need be answered. The witness should be advised that the judge's decision must be followed.
- A note of the fact that the prosecutor has spoken to the witness should be made by the prosecutor or by the CPS paralegal in the Crown Court. If the witness makes any comment that is disclosable to the defence under the

CPIA then a note of the comment must be made immediately and the note disclosed accordingly.

(e) Updating Witnesses on Progress

- Ensure witnesses at court are kept informed about progress and delays with regular updates so that they feel engaged rather than left wondering what is happening. You may wish to use other CPS staff, court ushers or the Court Based Witness Service to help you do this.
- Manage expectations and be realistic (never give information that is likely to be inaccurate for example by providing unrealistic estimates of how long they will need to wait, even with the best of intentions).
- Make sure witnesses are released at the earliest opportunity.
- **Consult with victims when considering changing a charge or dropping a case and similarly, inform them of any changes at the end of a hearing.** If you do this, make sure you inform the Victim Liaison Unit that you have done so.

(f) When the Witness has Completed their Evidence

- Speak to the witness after they have given evidence if this is possible to thank them and answer any questions they may have. If you cannot do this personally, arrange for another member of CPS staff or the Witness Service to do so on your behalf.

(g)) Victim Personal Statements

- The Code of Practice for Victims of Crime (Victims Code) entitles victims of crime to make a Victim Personal Statement (VPS). The VPS gives victims an opportunity to describe the wider effects of the crime upon them, express their concerns and indicate whether or not they need any support.
- In addition, victims are entitled to say whether they would like to read their VPS aloud or whether they would like it to be read by someone else (eg a family member or a prosecutor), or played (where recorded).
- It is a matter for judicial discretion whether or not the victim is allowed to read out the VPS.
- Prosecutors should speak to any victim who attends court to read their VPS. This may be after a case has been adjourned for a victim to attend, or at the first hearing of the case if it is likely to be dealt with to finalisation at the first hearing.
- Prosecutors should deal with introductory matters and assistance with procedural matters as set out in para 3.4 (a) and (b) of this guidance. In addition, the purpose of the VPS should be explained, and you should make the victim aware that the Judge will decide whether or not the victim will be able to read their VPS aloud. The presumption is in favour of the victim being able to read the VPS. You should tell the victim that they may be asked questions

about the content of the VPS, but reassure them that you can object to inappropriate cross-examination, and, if you do, the Judge will decide what questions may be asked.

[Protocol for Reading Victim Personal Statements in Court](#)

Coaching – Case Law

- 3.5 The rule against coaching a witness was explained by the Court of Appeal in *R v Momodou & Limani* [2005] EWCA Crim 177; [2005] 2 All ER 571; [2005] 2 CrApp R 6 when the court considered the impact of training delivered to witnesses that included a case study which strongly resembled the circumstances of the case in which the witnesses were to give evidence. At paragraphs 48 and 49 the Court concluded:

“48. ...Training or coaching for witnesses in criminal proceedings...is not permitted.....The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so.....The risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

49. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants...Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible.....Nevertheless the evidence remains the witness's own uncontaminated evidence.”

- 3.6 Prosecutors can have confidence that providing their discussion with a witness is aimed at assisting the witness to give their best evidence and avoids rehearsing them as to the evidence they should give then there should be no risk that coaching has occurred.

4. Other Court Supporters

- 4.1 A large proportion of witnesses get most of their support at the time of their court appearance from friends or relatives but, in addition to this, there are more formal support mechanisms available to witnesses during the process. This next section describes the most common of these.
- 4.2 The Citizens' Advice Court Based Witness Service is represented in magistrates' and Crown Courts in England and Wales providing pre-trial visits for witnesses, so that they are familiar with the court room and the roles of the people in court, as well as providing practical support and information to both prosecution and defence witnesses and their families and friends on the day of trial. Where the magistrate or judge agrees, the Witness Service volunteer or another person may accompany the witness into the court room or live link room to give their evidence, if the witness wants them to. They will also assist and encourage the witness to make contact with the prosecutor whilst they wait to give their evidence at court. Prosecutors should ensure that they build effective relationships with the Witness Service representatives at the court centres where they appear and provide them with information so that they can assist as effectively as possible.
- 4.3 Independent Sexual Violence Advisors (ISVA) and Independent Domestic Violence Advisors (IDVA) provide invaluable support to victims and may influence a victim's decision whether to support a prosecution. Prosecutors should be familiar with the supporters' role and should actively engage with them.
- 4.4 IDVAs/ISVAs provide an effective channel of communication through which information can both be supplied to, and obtained from, a witness. In addition the prosecutor can ask the IDVA/ISVA for their views about how the witness is coping and other relevant issues.
- 4.5 Because the ISVA role is not always understood the type of support ISVAs are permitted to offer their clients at court can vary considerably. If a victim expects the ISVA to accompany them in the live link or behind a screen and this does not happen, their experience of court will undoubtedly be affected. To avoid this situation prosecutors should always explain the ISVA's role to the defence advocate and the court where necessary.
- 4.6 The role includes:
- Understanding the views, wishes and concerns of the victim
 - Providing support and information through interviews and court hearings, familiarisation with the court and its procedures and guidance on Special Measures

- Accompanying the victim on a pre-trial visit to court and while they give evidence in court or the live link room (where the court approves this)
 - Acting as a key liaison point with family members, friends
 - Liaising with legal, health, education and social work professionals and those offering therapy and counselling prior to a criminal trial
 - Arranging links with experts if there are specific vulnerabilities
- 4.7 When speaking to the victim it is always useful to have the ISVA/IDVA present.

5. Further Information

- 5.1 For more information see [Achieving Best Evidence in Criminal Proceedings](#) Guidance on interviewing victims and witnesses, and guidance on using special measures.

Useful Links:

[The Code of Practice for Victims of Crime 2015](#)

[The Code of Practice for Victims of Crime 2015 \(Welsh version\) The Advocate's Gateway](#)

Section 16-33 (Special Measures) - Youth Justice and Criminal Evidence Act 1999.**16 Witnesses eligible for assistance on grounds of age or incapacity.**

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—

- (a) if under the age of 17 at the time of the hearing; or
- (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are—

- (a) that the witness—
 - (i) suffers from mental disorder within the meaning of the [M1](#) Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
- (b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

(5) In this Chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

17 Witnesses eligible for assistance on grounds of fear or distress about testifying.

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within subsection (1) the court must take into account, in particular—

- (a) the nature and alleged circumstances of the offence to which the proceedings relate;
- (b) the age of the witness;
- (c) such of the following matters as appear to the court to be relevant, namely—

- (i) the social and cultural background and ethnic origins of the witness,
 - (ii) the domestic and employment circumstances of the witness, and
 - (iii) any religious beliefs or political opinions of the witness;
- (d) any behaviour towards the witness on the part of—
- (i) the accused,
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.
- (3) In determining that question the court must in addition consider any views expressed by the witness.
- (4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.

18 Special measures available to eligible witnesses.

- (1) For the purposes of this Chapter—
- (a) the provision which may be made by a special measures direction by virtue of each of sections 23 to 30 is a special measure available in relation to a witness eligible for assistance by virtue of section 16; and
 - (b) the provision which may be made by such a direction by virtue of each of sections 23 to 28 is a special measure available in relation to a witness eligible for assistance by virtue of section 17;
- but this subsection has effect subject to subsection (2).
- (2) Where (apart from this subsection) a special measure would, in accordance with subsection (1)(a) or (b), be available in relation to a witness in any proceedings, it shall not be taken by a court to be available in relation to the witness unless—
- (a) the court has been notified by the Secretary of State that relevant arrangements may be made available in the area in which it appears to the court that the proceedings will take place, and
 - (b) the notice has not been withdrawn.
- (3) In subsection (2) "relevant arrangements" means arrangements for implementing the measure in question which cover the witness and the proceedings in question.
- (4) The withdrawal of a notice under that subsection relating to a special measure shall not affect the availability of that measure in relation to a witness if a special measures direction providing for that measure to apply to the witness's evidence has been made by the court before the notice is withdrawn.

(5) The Secretary of State may by order make such amendments of this Chapter as he considers appropriate for altering the special measures which, in accordance with subsection (1)(a) or (b), are available in relation to a witness eligible for assistance by virtue of section 16 or (as the case may be) section 17, whether—

(a) by modifying the provisions relating to any measure for the time being available in relation to such a witness,

(b) by the addition—

(i) (with or without modifications) of any measure which is for the time being available in relation to a witness eligible for assistance by virtue of the other of those sections, or

(ii) of any new measure, or

(c) by the removal of any measure.

19 Special measures direction relating to eligible witness.

(1) This section applies where in any criminal proceedings—

(a) a party to the proceedings makes an application for the court to give a direction under this section in relation to a witness in the proceedings other than the accused, or

(b) the court of its own motion raises the issue whether such a direction should be given.

(2) Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—

(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and

(b) if so—

(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and

(ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—

(a) any views expressed by the witness; and

(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

(4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.

(5) In this Chapter "special measures direction" means a direction under this section.

(6) Nothing in this Chapter is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)—

(a) in relation to a witness who is not an eligible witness, or

(b) in relation to an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

20 Further provisions about directions: general.

(1) Subject to subsection (221.) and section 21(8), a special measures direction has binding effect from the time it is made until the proceedings for the purposes of which it is made are either—

(a) determined (by acquittal, conviction or otherwise), or

(b) abandoned,

in relation to the accused or (if there is more than one) in relation to each of the accused.

(2) The court may discharge or vary (or further vary) a special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either—

(a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion.

(3) In subsection (2) "the relevant time" means—

(a) the time when the direction was given, or

(b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

(4) Nothing in section 24(2) and (3), 27(4) to (7) or 28(4) to (6) is to be regarded as affecting the power of the court to vary or discharge a special measures direction under subsection (2).

(5) The court must state in open court its reasons for—

(a) giving or varying,

(b) refusing an application for, or for the variation or discharge of, or

(c) discharging,

a special measures direction and, if it is a magistrates' court, must cause them to be entered in the register of its proceedings.

(6) Rules of court may make provision—

- (a) for uncontested applications to be determined by the court without a hearing;
- (b) for preventing the renewal of an unsuccessful application for a special measures direction except where there has been a material change of circumstances;
- (c) for expert evidence to be given in connection with an application for, or for varying or discharging, such a direction;
- (d) for the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to its being disclosed to, or withheld from, a party to the proceedings.

21 Special provisions relating to child witnesses.

(1) For the purposes of this section—

- (a) a witness in criminal proceedings is a “child witness” if he is an eligible witness by reason of section 16(1)(a) (whether or not he is an eligible witness by reason of any other provision of section 16 or 17);
- (b) a child witness is “in need of special protection” if the offence (or any of the offences) to which the proceedings relate is—
 - (i) an offence falling within section 35(3)(a) (sexual offences etc.), or
 - (ii) an offence falling within section 35(3)(b), (c) or (d) (kidnapping, assaults etc.); and
- (c) a “relevant recording”, in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.

(2) Where the court, in making a determination for the purposes of section 19(2), determines that a witness in criminal proceedings is a child witness, the court must—

- (a) first have regard to subsections (3) to (7) below; and
- (b) then have regard to section 19(2);

and for the purposes of section 19(2), as it then applies to the witness, any special measures required to be applied in relation to him by virtue of this section shall be treated as if they were measures determined by the court, pursuant to section 19(2)(a) and (b)(i), to be ones that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of his evidence.

(3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—

(a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and

(b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.

(4) The primary rule is subject to the following limitations—

(a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability (within the meaning of section 18(2)) of the special measure in question in relation to the witness;

(b) the requirement contained in subsection (3)(a) also has effect subject to section 27(2); and

(c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(5) However, subsection (4)(c) does not apply in relation to a child witness in need of special protection.

(6) Where a child witness is in need of special protection by virtue of subsection (1)(b)(i), any special measures direction given by the court which complies with the requirement contained in subsection (3)(a) must in addition provide for the special measure available under section 28 (video recorded cross-examination or re-examination) to apply in relation to—

(a) any cross-examination of the witness otherwise than by the accused in person, and

(b) any subsequent re-examination.

(7) The requirement contained in subsection (6) has effect subject to the following limitations—

(a) it has effect subject to the availability (within the meaning of section 18(2)) of that special measure in relation to the witness; and

(b) it does not apply if the witness has informed the court that he does not want that special measure to apply in relation to him.

(8) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 16(1)(a), then—

(a) subject to subsection (9) below, and

(b) except where the witness has already begun to give evidence in the proceedings,

the direction shall cease to have effect at the time when the witness attains the age of 17.

(9) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 16(1)(a) and—

(a) the direction provides—

(i) for any relevant recording to be admitted under section 27 as evidence in chief of the witness, or

(ii) for the special measure available under section 28 to apply in relation to the witness, and

(b) if it provides for that special measure to so apply, the witness is still under the age of 17 when the video recording is made for the purposes of section 28,

then, so far as it provides as mentioned in paragraph (a)(i) or (ii) above, the direction shall continue to have effect in accordance with section 20(1) even though the witness subsequently attains that age.

22 Extension of provisions of section 21 to certain witnesses over 17.

(1) For the purposes of this section—

(a) a witness in criminal proceedings (other than the accused) is a “qualifying witness” if he—

(i) is not an eligible witness at the time of the hearing (as defined by section 16(3)), but

(ii) was under the age of 17 when a relevant recording was made;

(b) a qualifying witness is “in need of special protection” if the offence (or any of the offences) to which the proceedings relate is—

(i) an offence falling within section 35(3)(a) (sexual offences etc.), or

(ii) an offence falling within section 35(3)(b), (c) or (d) (kidnapping, assaults etc.); and

(c) a “relevant recording”, in relation to a witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.

(2) Subsections (2) to (7) of section 21 shall apply as follows in relation to a qualifying witness—

(a) subsections (2) to (4), so far as relating to the giving of a direction complying with the requirement contained in subsection (3)(a), shall apply to a qualifying witness in respect of the relevant recording as they apply to a child witness (within the meaning of that section);

(b) subsection (5), so far as relating to the giving of such a direction, shall apply to a qualifying witness in need of special protection as it applies to a child witness in need of special protection (within the meaning of that section); and

(c) subsections (6) and (7) shall apply to a qualifying witness in need of special protection by virtue of subsection (1)(b)(i) above as they apply to such a child witness as is mentioned in subsection (6).

23 Screening witness from accused.

(1) A special measures direction may provide for the witness, while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused.

(2) But the screen or other arrangement must not prevent the witness from being able to see, and to be seen by—

(a) the judge or justices (or both) and the jury (if there is one);

(b) legal representatives acting in the proceedings; and

(c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

25 Evidence given in private.

(1) A special measures direction may provide for the exclusion from the court, during the giving of the witness's evidence, of persons of any description specified in the direction.

(2) The persons who may be so excluded do not include—

(a) the accused,

(b) legal representatives acting in the proceedings, or

(c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

(3) A special measures direction providing for representatives of news gathering or reporting organisations to be so excluded shall be expressed not to apply to one named person who—

(a) is a representative of such an organisation, and

(b) has been nominated for the purpose by one or more such organisations,

unless it appears to the court that no such nomination has been made.

(4) A special measures direction may only provide for the exclusion of persons under this section where—

(a) the proceedings relate to a sexual offence; or

(b) it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

(5) Any proceedings from which persons are excluded under this section (whether or not those persons include representatives of news gathering or reporting organisations) shall nevertheless be taken to be held in public for the purposes of any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public.

26 Removal of wigs and gowns.

A special measures direction may provide for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence.

27 Video recorded evidence in chief.

(1) A special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence in chief of the witness.

(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted under this section if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted.

(3) In considering for the purposes of subsection (2) whether any part of a recording should not be admitted under this section, the court must consider whether any prejudice to the accused which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(4) Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if—

(a) it appears to the court that—

(i) the witness will not be available for cross-examination (whether conducted in the ordinary way or in accordance with any such direction), and

(ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available; or

(b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court.

(5) Where a recording is admitted under this section—

(a) the witness must be called by the party tendering it in evidence, unless—

(i) a special measures direction provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court, or

(ii) the parties to the proceedings have agreed as mentioned in subsection (4)(a)(ii); and

(b) the witness may not give evidence in chief otherwise than by means of the recording—

(i) as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded testimony, or

(ii) without the permission of the court, as to any other matter which, in the opinion of the court, is dealt with in that testimony.

(6) Where in accordance with subsection (2) a special measures direction provides for part only of a recording to be admitted under this section, references in subsections (4) and (5) to the recording or to the witness's recorded testimony are references to the part of the recording or testimony which is to be so admitted.

(7) The court may give permission for the purposes of subsection (5)(b)(ii) if it appears to the court to be in the interests of justice to do so, and may do so either—

(a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion.

(8) In subsection (7) "the relevant time" means—

(a) the time when the direction was given, or

(b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

(9) The court may, in giving permission for the purposes of subsection (5)(b)(ii), direct that the evidence in question is to be given by the witness by means of a live link; and, if the court so directs, subsections (5) to (7) of section 24 shall apply in relation to that evidence as they apply in relation to evidence which is to be given in accordance with a special measures direction.

(10) A magistrates' court inquiring into an offence as examining justices under section 6 of the [M1](#) Magistrates' Courts Act 1980 may consider any video recording in relation to which it is proposed to apply for a special measures direction providing for it to be admitted at the trial in accordance with this section.

(11) Nothing in this section affects the admissibility of any video recording which would be admissible apart from this section.

28 Video recorded cross-examination or re-examination.

(1) Where a special measures direction provides for a video recording to be admitted under section 27 as evidence in chief of the witness, the direction may also provide—

(a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and

(b) for such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be.

(2) Such a recording must be made in the presence of such persons as rules of court or the direction may provide and in the absence of the accused, but in circumstances in which—

(a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and

(b) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(a) and (b) are to be regarded as satisfied in relation to those representatives if at all material times they are satisfied in relation to at least one of them.

(4) Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if any requirement of subsection (2) or rules of court or the direction has not been complied with to the satisfaction of the court.

(5) Where in pursuance of subsection (1) a recording has been made of any examination of the witness, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceedings (whether in any recording admissible under section 27 or this section or otherwise than in such a recording) unless the court gives a further special measures direction making such provision as is mentioned in subsection (1)(a) and (b) in relation to any subsequent cross-examination, and re-examination, of the witness.

(6) The court may only give such a further direction if it appears to the court—

(a) that the proposed cross-examination is sought by a party to the proceedings as a result of that party having become aware, since the time when the original recording was made in pursuance of subsection (1), of a matter which that party could not with reasonable diligence have ascertained by then, or

(b) that for any other reason it is in the interests of justice to give the further direction.

(7) Nothing in this section shall be read as applying in relation to any cross-examination of the witness by the accused in person (in a case where the accused is to be able to conduct any such cross-examination).

29 Examination of witness through intermediary.

(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).

(2) The function of an intermediary is to communicate—

(a) to the witness, questions put to the witness, and

(b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—

(a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and

(b)(except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.

(4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(5) A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.

(6) Subsection (1) does not apply to an interview of the witness which is recorded by means of a video recording with a view to its admission as evidence in chief of the witness; but a special measures direction may provide for such a recording to be admitted under section 27 if the interview was conducted through an intermediary and—

(a) that person complied with subsection (5) before the interview began, and

(b) the court's approval for the purposes of this section is given before the direction is given.

(7) Section 1 of the [M1](#) Perjury Act 1911 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that section, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.

30 Aids to communication.

A special measures direction may provide for the witness, while giving evidence (whether by testimony in court or otherwise), to be provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from.

31 Status of evidence given under Chapter I.

(1) Subsections (2) to (4) apply to a statement made by a witness in criminal proceedings which, in accordance with a special measures direction, is not made by the witness in direct oral testimony in court but forms part of the witness's evidence in those proceedings.

(2) The statement shall be treated as if made by the witness in direct oral testimony in court; and accordingly—

(a) it is admissible evidence of any fact of which such testimony from the witness would be admissible;

(b) it is not capable of corroborating any other evidence given by the witness.

(3) Subsection (2) applies to a statement admitted under section 27 or 28 which is not made by the witness on oath even though it would have been required to be made on oath if made by the witness in direct oral testimony in court.

(4) In estimating the weight (if any) to be attached to the statement, the court must have regard to all the circumstances from which an inference can reasonably be drawn (as to the accuracy of the statement or otherwise).

(5) Nothing in this Chapter (apart from subsection (3)) affects the operation of any rule of law relating to evidence in criminal proceedings.

(6) Where any statement made by a person on oath in any proceeding which is not a judicial proceeding for the purposes of section 1 of the [M1](#) Perjury Act 1911 (perjury) is received in evidence in pursuance of a special measures direction, that proceeding shall be taken for the purposes of that section to be part of the judicial proceeding in which the statement is so received in evidence.

(7) Where in any proceeding which is not a judicial proceeding for the purposes of that Act—

(a) a person wilfully makes a false statement otherwise than on oath which is subsequently received in evidence in pursuance of a special measures direction, and

(b) the statement is made in such circumstances that had it been given on oath in any such judicial proceeding that person would have been guilty of perjury,

he shall be guilty of an offence and liable to any punishment which might be imposed on conviction of an offence under section 57(2) (giving of false unsworn evidence in criminal proceedings).

(8) In this section "statement" includes any representation of fact, whether made in words or otherwise.

32 Warning to jury.

Where on a trial on indictment evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

33 Interpretation etc. of Chapter I.

(1) In this Chapter—

- “eligible witness” means a witness eligible for assistance by virtue of section 16 or 17;
- “live link” has the meaning given by section 24(8);
- “quality”, in relation to the evidence of a witness, shall be construed in accordance with section 16(5);
- “special measures direction” means (in accordance with section 19(5)) a direction under section 19.

(2) In this Chapter references to the special measures available in relation to a witness shall be construed in accordance with section 18.

(3) In this Chapter references to a person being able to see or hear, or be seen or heard by, another person are to be read as not applying to the extent that either of them is unable to see or hear by reason of any impairment of eyesight or hearing.

(4) In the case of any proceedings in which there is more than one accused—

(a) any reference to the accused in sections 23 to 28 may be taken by a court, in connection with the giving of a special measures direction, as a reference to all or any of the accused, as the court may determine, and

(b) any such direction may be given on the basis of any such determination.