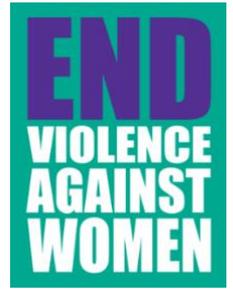


End Violence Against Women Coalition

Submission to House of Commons Justice Select Committee Inquiry into the disclosure of evidence in criminal cases

March 2018



About the End Violence Against Women Coalition

1. The End Violence Against Women Coalition is a UK-wide coalition of more than 70 women's organisations and others working to end violence against women and girls (VAWG) in all its forms, including: sexual violence, domestic violence, forced marriage, sexual exploitation, FGM, stalking and harassment. We campaign for improved national and local government policy and practice in response to all forms of violence against women and girls, and we challenge the wider cultural attitudes that tolerate violence against women and girls and make excuses for it. Our trustees include women who are globally renowned for their pioneering work in setting up the first domestic and sexual violence crisis services, for their academic research in this area, and for having successfully campaigned for considerable legislative and policy change in the UK to end and prevent abuse over the last four decades.

Introduction

2. We welcome this inquiry which we believe is urgent, following the recent media 'furore' concerning the apparent collapse of criminal cases related to poor disclosure practice.
3. It is already established that current concerns around disclosure in criminal cases, in particular of digital evidence, relate to policy, practice and resources across all or most crime types. Despite this the very high profile media attention to the issue in recent months has focused on rape cases, and has strongly implied a connection to "false allegations", which is unevicenced, but has not been dispelled.
4. As workers in the field of abuse of women and girls, our short submission to this inquiry is focused on disclosure related to rape cases and the implications for justice in this area. However, we believe it is critical that policy makers, political leaders and all those charged with guarding our independent and impartial justice system, maintain a clear insistence that rape and sexual offences not be exceptionalised during discussion of evidence gathering, police practice and justice outcomes. The crimes of rape and sexual assault are sadly extremely common, cause enormous harm, and complainants in these cases are as entitled to be treated without prejudice as those in any other crime.

Executive Summary

5. When reviewing core principles, guidelines and practice related to disclosure, the prevalence and individual and social harm of rape should be considered
6. The context for disclosure rules and practice in rape cases is a crime which despite being framed in law as determined by a failure to seek as well a failure to give consent, still often turns mainly on examination of complainant behaviour only (whether or not consent was freely given). Police and prosecution guidelines, in line with the law, advise that cases examine defendant as well as complainant behaviour thoroughly. The reasonable, proportionate consideration of digital evidence should also follow this principle.
7. As advocates for survivors of abuse we are strong supporters of the right to a fair trial and access to justice. Fair, reasonable and proportionate disclosure rules and practices are essential to these. The impact on complainants' privacy, and their need not to have electronic devices removed indefinitely should also be considered.
8. Special consideration is needed to ensure that disclosure rules and practices do not stray into, and do not encourage police or prosecutors to stray into gathering evidence which would be used to relate a complainant's "sexual history", whether or not this is clearly acknowledged, because this is unlawful and is a grave threat to rape justice at a systemic level.
9. We support the thorough examination of disclosure rules and procedure of which this inquiry is part, and hope that in particular any change will have specific regard to impacts on rape complainant, trials and justice outcomes. We also recommend that Government, Parliamentarians and justice system leaders more broadly take the opportunity of this 'moment' to reflect on and then push for a complete review of our justice system's ability to provide justice in rape cases, and the broader questions of what our society should ensure is provided for all rape survivors whether or not they ever report to the police.

Prevalence and harm of rape and sexual assault

10. The ONS annual Crime Survey of England and Wales estimates that around half a million women were sexually assaulted in the year to March 2017, and has previously estimated (2013) that 85,000 women were raped in a one year period. Rape is not an unusual crime, and the ONS estimated in February this year that a fifth of adult women have experienced sexual assault. Men and boys are also sexually assaulted at alarming levels. The focus in public debate on criminal justice in response to rape arguably reduces attention to increasing understanding of the actual harms and impacts of rape (including shame, fear of repeat assault, mental health problems including depression, anxiety and PTSD, and long-term educational and economic impacts) and survivors' broader needs.

11. Detection and prosecution rates remain low however, with some estimates that only around 15% of rapes are ever reported to the police, and convictions at around 3,000 per year (CPS annual report on violence against women and girls, 2017). It could be argued that, cumulatively, the chances of 'getting away with' the crime of rape are high and there is a high level of impunity for this crime in Britain.
12. Relatedly, national surveys of public attitudes towards rape often find "victim-blaming" are common, with around a third of the population inclined to say they believe women are at least partially to blame for "rape" in some contexts ([ONS, 2015](#)). News media reporting and commentary on sexual violence commonly alludes to and sometimes reinforces these prejudices.
13. The potential 'disruption' to the prosecution of rape caused by current uncertainty about disclosure, comes at a time when in fact there is an ongoing year on year rise in reporting of rape to the police across the UK (and even more so to independent support services). Observers have attributed this to the Jimmy Savile revelations, and the following series of high profile trials of multiple well known perpetrators, and a turning point where many victims of 'historic' and recent assault came to think they stood a good chance of being believed if they reported, when previously they thought they would not.
14. In addition, since late 2017 the #MeToo 'movement' of sexual harassment and assault survivors disclosing abuse online, is felt to be a phenomenon caused by a significant new and growing rejection of the shame associated with sexual violence and a determination to seek a kind of social justice and recognition when the legal system is not able to provide this. Parliamentarians and other policy makers should have regard to whether victims of sexual offences feel that their needs will not or cannot be met satisfactorily by the justice system and so resort to other kinds of justice.

Rape in law and evidence in rape cases

15. The 2003 Sexual Offences Act sets out a clear and succinct definition of rape: consent to sex must be sought and must be freely given. Prosecution guidelines accordingly say that cases should seek to examine steps taken by the defendant to ascertain that there was consent, as well as whether the complainant spoke or behaved in a way that indicated freely given consent. This is different from the law in many other jurisdictions where rape is sometimes still described as needing to include physical resistance by the victim for example, and the defendant acting to ensure he has consent is not regarded as significant.
16. It is absolutely critical that police investigation of rape, the preparation of the prosecution case, the practice of disclosure, and court-room conduct all seek to ensure that seeking as well as giving consent is examined. If disclosure rules and practices tend toward the intensive examination of the complainant's communication and behaviour in multiple online spaces but not the defendant's communications in these spaces, then a case is arguably not fairly and impartially investigated.

17. We are very concerned at the potential link between gathering evidence in the form of online communication and 'sexual history evidence'. There is serious ongoing concern about the use of sexual history evidence in rape trials. There are serious concerns that the current rules ("Section 41") which prohibit use of this evidence in all but exceptional circumstances, don't seem to be effective (see reports in 2017 by Lime Culture and by Northumbria PCC Vera Baird QC). If a very precautionary approach is taken to disclosure of vast amounts of digital communication, it is very possible that some material discovered could be used in court in a way which breaches these fundamental rules on 'sexual history evidence' (for example, the disclosure of private social media communication referring to previous sexual partners, sexual health practices, mental health problems and much more).
18. As further evidence of this we have recently heard criminal justice professionals privately express concern that "certain kinds of rape" are becoming more difficult to prosecute because digital communication evidence can be summoned to imply that rape could not have taken place if there has been previous 'flirtatious' interactions between the parties. These rape myths (eg she flirted with him previously; she sent him apparently friendly messages or was photographed with him after the alleged assault etc) are being used to halt prosecutions. In addition, any information found which could imply the complainant is sexually confident or has an active sex life is currently considered disclosable, and is being used, alongside medical history evidence, to undermine the complainant in the minds of the jury. This is breach of the spirit of Section 41 if not the letter.
19. In short, the possible disclosure of all of the information found on a complainant's phone risks amounting to an extreme invasion of privacy in order to undermine the complainant's character and testimony. This approach relies on myths about how 'real' victims and perpetrators look and behave, which is known to be effective in front of juries. We therefore can't be surprised that this approach makes victims reluctant to seek justice, and may reduce convictions for these very harmful crimes.
20. As a society we expect the criminal justice system to effectively prosecute rape and sexual violence in order to deliver justice and to deter. The progress which has been made in the last ten years in encouraging victims to report, and improving conditions for giving evidence in court, has had a positive impact. But the current situation with regard to disclosure is stirring up 'rape myths' related especially to 'false allegations'. It is regressive and is likely to allow more rapists to act with impunity and reduce access to justice for victims.

Disclosure, principles and practice

21. There appears to be a trend to remove mobile devices from complainants of rape, and routinely download the entire contents. This results in an enormous quantity of potential evidence, which requires time and resources to go through, all of which could be disclosable, whether or not the material is

directly relevant. This inevitably causes delays in the justice process, and a case which may have already taken a 12-24 months to come to trial can take significantly longer if there is a lot of digital evidence to analyse.

22. The rights of the complainant as well as the defendant must be considered in relation to fair disclosure procedures. There is a real risk that complainants' privacy is being severely compromised, and their whole lives subjected to inappropriately intrusive scrutiny, way out of proportion to that which the defendant experiences. The disclosure of sexual history or medical evidence must not be used to prevent prosecution progressing, undermining the strict and necessary restriction of the use of this evidence as it undermines justice. Only evidence which is directly relevant to the allegation should be gathered and included in any disclosure. Police, prosecutors and those who defend may need more instruction on this and may need to be enabled to come to fairer and proportionate agreements about it.
23. On a practical level, complainants often experience the removal of their mobile devices and other electronic equipment for sometimes extended periods. These devices are essential to everyday life, and their removal can cause distress and further victimise complainants. The police should be given detailed guidance on what evidence is relevant, how to recover it from devices and be given an adequate but short window in which to recover it.
24. Evidence suggests that providing expert and timely support to complainants as they go through the criminal justice system can increase their confidence and make it less likely for trials to collapse because a witness pulls out. It is essential that any review of how the system is working for this crime type also includes a review of the availability of Independent Sexual Violence Advocates as they are a vital component of ensuring the system is just.

Conclusion

25. We wish to add that: the possible impact of the media reporting, commentary and public debate related to the high profile rape cases which have collapsed because of disclosure problems may be as serious as a loss of confidence in the justice system's ability to ensure justice in rape cases which are reported. This is a matter of utmost public interest, related to fair trials, access to justice and impunity for a grave crime and as such should merit intervention at the highest level. We are disappointed that, to date, no senior Government or Opposition MP has commented on the matter.

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