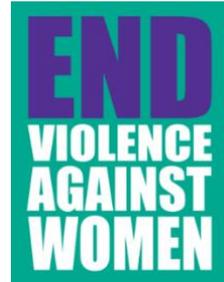


## End Violence Against Women Coalition

### Response to HMCPsi rape inspection report, December 2019; expression of serious concerns



### The significance of the HMCPsi rape inspection report 2019

Recognising dramatically changing experiences and justice outcomes for women and men reporting rape, in March 2019 the Government [announced](#) an 'end to end review' of the criminal justice system's handling of rape allegations from police report to court verdict, under the auspices of the Criminal Justice Board (CJB). The first activity of this 'Rape Review' was the compiling of a confidential and as yet unpublished analysis of all the available rape data in April 2019 (reviewing data on rape police reports, charging decisions, prosecution volumes and justice outcomes). This analysis highlighted significant areas of concern at particular points in the system, and identified four priorities which required in depth scrutiny.

Priority three was "Changes in CPS charging outcomes, particularly the decline in charge rate, for rape only flagged offences". It set out that "*CPS decisions to prosecute have declined at a faster rate (-44%) than the decline in referrals for a charging decision (FY14 RYTD September 2018). The overall charging rate for rape has fallen by -21% pts (from 62% to 41%) over this period. There has been a concomitant rise in administrative finalisation and the decline excluding these cases is less steep (-13% pts).*" This trend is visible across CPS regions, case types and defendant age groups and has occurred at the same time as marked increases in administratively finalised case outcomes."

The HMCPsi December 2019 rape inspection [report](#) was commissioned under priority three to try to answer questions including "what is driving the changes in the make up of different charging outcomes for rape only cases?"

The EAW Coalition has serious concerns about the HMCPsi report which we set out here below (from p3). We are worried that the report both fails to answer the questions set out by the CJB Rape Review (set out below in Background), and has serious methodological problems. Compiling a response such as this document is an unusual step for us to take, and we do not question a HM Inspectorate report lightly. We do however encourage all those involved and interested in the CJB Rape Review to read the HMCPsi report very closely and to consider it alongside our rebuttals below.

Disclosure of related interest: The EAW Coalition is currently bringing a judicial review against the CPS alleging that there has been a change of policy and practice at the CPS in the way it makes decisions about rape cases which amount to discrimination against and an abuse of women's human rights. Our interest in the

Rape Review, in which we are VCS stakeholders, and in its scrutiny of CPS decision-making on rape, is of course related to the same human rights based interest. Details of our case can be read [here](#).

## Background

After some discussion and some querying by women's organisations of how and by whom CPS case files and practices should be further inspected under priority three, HMCPST was commissioned by the Attorney General's Office to look at this issue. The inspection question was "What level of confidence can the public have in the CPS to deliver fair and successful outcomes in the most efficient and effective way through the provision of high-quality decision-making by specially trained and experienced prosecutors in rape cases?" There were also 9 sub-questions relating to decision making, timeliness, trends, and CPS action plans.

1. Has there been a change in approach in the CPS to the provision of rape charging and decision-making which is impacting the numbers of cases charged?
2. What is driving the change in the balance of decisions between those cases charged, recommended for no further action or administratively finalised (awaiting a response from the police)?
3. Does the timeliness of the decision to charge have an impact on the overall levels of cases progressing and cases charged?
4. Are there any trends in numbers of consultation per case that are driving a change in charge rate? Are consultations appropriate?
5. Are cases received from the police by the CPS for a charging decision or advice of such a quality to allow for efficient and effective case handling?
6. Are CPS action plans proportionate and are the requests being made of the police for any additional material proportionate?
7. Was the request for digital evidence prior to charge proportionate? Was any request specific to the facts of the case and a reasonable line of enquiry?
8. Is the police response to CPS action plans timely and appropriate?
9. Has the CPS Code compliance rate improved since the findings of the 2016 thematic review? Has the issue with the "merits based test" been addressed since the 2016 report?

In December 2019 The HMCPST published a 193pp report.

It identifies 'Issues To Address', namely:

- The CPS policy document should be updated to reflect removal of mandatory second opinion (a policy change that dated back to 2015 but remains a point of confusion among prosecutors)
- CPS and police should develop a National File Standard for submission of rape cases
- Counsel should only be instructed to give advice before charge where justified by complexity or severity of the case

It set out strengths:

- CPS lawyers are achieving a high level of Code compliance and high-quality casework with heavier caseloads
- CPS are correctly applying the revised threshold test for charging

Its recommendations were:

- A further joint inspection by HMCPSI and HMICFRS of the CPS and Police response to rape that considers “area of potential concern”
- CPS should consider the variations in Area conviction rates
- CPS should work with the police to develop a better system for monitoring cases returned to the police pre-charge with particular regard to communication of timescales
- CPS areas should work with the police to improve communication and reinforce ‘the need for appropriate challenge by both parties’ to improve case progression
- The revised Director’s Guidance on Charging should be updated with focus on Early Investigative Advice and timescales
- CPS should give guidance on what data can be obtained from social media platforms, with information on what methods are used by local forces and in what timeframe
- CPS and police should make better use of feedback avenues between them
- CPS Areas should engage with police forces to identify priorities for improvement activity
- CPS Areas should take steps to ensure compliance with timescales in Victim Communication and Liaison Scheme and that standard of letters sent improve.

### **EVAW Coalition key concerns about the HMCPSI report:**

#### **Entire matter of “Admin Finalised” cases in no way adequately examined**

1. The examination of “Admin Finalised” cases in the HMCPSI report – which is both a relatively new designation, and which is also already a very significant proportion of all cases which come into the CPS but are not charged – is arguably incomplete. The CPS VAWG report 18/19 describes admin finalised as “Administratively finalised decisions are not legal decisions and may not be the end of the case. CPS may ask the police to provide further information where there is insufficient evidence to make a charging decision, or the police are requesting early investigative advice. If the police do not respond within three months, following reminders, the case is closed on CMS. This is known as an ‘administrative finalisation’.” The report does not offer the reader a clear explanation of how these cases end up assigned ‘AF’, and how it can be known whether this assignation is fair.
2. The convention in rape cases is for police and CPS to work closely from early on in an investigation, including the giving of “early investigative advice” (EIA) by CPS to police as to evidence and the law. The chronology and connection between EIA and designating a case AF needs particular scrutiny, but the HMCPSI report does not try to look at this. If a change in approach at the CPS, including increased ‘risk aversion’, has taken place, it *may* be detectable in decision-making in these AF cases. In 2018-19, AF cases accounted for 28.6% of outcomes of cases that the CPS reviewed pre-charge. In order to examine whether the assignation ‘AF’ is appropriate, it is clearly necessary to look at the matching police file and what action was taken between the two

agencies and how and when the case was then designated AF. The HMCPSI report looks at 200 AF cases but only looked at the police side of the case progression in one single police force via the HMICFRS inspectors. A reader familiar with rape cases will find this totally inadequate, because analysis based on this set of files can only make assumptions about the actual nature of police-CPS interaction, formal and informal advice, and how comparable their designations are, so as to ascertain whether AF is truly appropriate.

3. Table 9 on p50 of the HMCPSI report seeks to set out some of the reasons that cases are categorised as Admin Finalised. This analysis designates 23.9% of reasons as “other”. This “other” includes scenarios where the lawyer administratively finalised the case at the same time as setting an action plan (12 cases) and where the lawyer suggested the police ought to make the decision to take NFA (nine cases). The CPS definition of AF as above therefore appears slightly disingenuous and it is clear that this issue requires much more rigorous scrutiny to understand whose authority was used to make what decision. Particularly when we consider that in 26.9% (the second largest proportion listed) the Police notified the CPS that the police had decided to take no further action. There needs to be clear interrogation as to why this is occurring and the use of Admin Finalised, and the proportionality and quality of the requests made as part of the CPS action plans.

### **Training courses and chronology of events seriously inaccurate**

4. There is a serious inaccuracy in the representation of exactly what training of prosecutors took place over the critical period when charging rates fell dramatically. The report references an earlier HMCPSI 2016 report on rape charging decisions and the subsequent recommendation for training. 2.41 states “Later that year and in 2017 the Director of Legal Services and the DPP’s legal advisor visited all 14 Areas to deliver that refresher.” This is inaccurate and misleading. Separate, more formal ‘refresher’ training sessions were delivered to RASSO prosecutors earlier in 2016, in the aftermath of the HMCPSI review, and by RASSO specialists. The key aims of these trainings were identified in accompanying materials as “*ensuring an overall consistent approach across the CPS in relation to the handling of rape and serious sexual assault cases and the application of the Code*”. The refresher trainings highlighted the HMCPSI finding that in 10% of cases reviewed the Code test had not been applied correctly, but *repeated* key messages contained within the Merits Based Approach legal guidance, namely that the MBA should be used by prosecutors when applying the Code Test, that it was not a different test to the Code, and did not require prosecutors to suspend judgment but merely to take objective decisions which are fair and reasonable.
5. Subsequent and separate to this refresher training delivered by RASSO specialists, a set of much less formal “roadshows” were delivered in 2016 by Director of Legal Services Greg McGill and the then Principal Legal Advisor. This was independent of the refresher training which followed the HMCPSI 2016 report, and reportedly delivered messages and instructions that prosecutors should veer away from the Merits Based Approach. In Mr McGill’s witness statement to our judicial review he himself sets out that these

roadshows were not formal, that they changed a little over the course of the roadshows, that there was a discursive approach, that they were not designed to be full training programmes, that no training material was provided. They have been described as an opportunity for discussion. No materials, minutes or other records exist to illustrate actual content.

6. The assertions, then, in the HMCPSI December 2019 report about the timing of various developments in the CPS' training and guidance around the merits-based approach are misleading and appear designed to undermine the actual factual narrative, which EAW has relied on in support of its legal challenge. It is very concerning that HMCPSI should misunderstand/misrepresent these roadshows by conflating them, incorrectly, with the formal refresher trainings that took place earlier that year.

### **Cake and eat it: key indicator of risk aversion posited as evidence of better case building (without evidence)**

7. At 1.29 the HMCPSI 2019 report posits a "blunt measure" which could be used to assess whether the CPS has become more risk averse in rape charging - namely the conviction rate after a contested trial. It states "*If the CPS was being risk averse this might show a rise in conviction rate after a contested trial, although there would be other possible reasons too. The conviction rate after contest has risen from 46.3% in 2016-17 to 56.7% in 2018-19.*" The report thus sets out the increase of 10% in the conviction rate – an increase which in historical context is huge and dramatic (the 'CAC' rate only ever hovered below 50%, but has recently now hit 59.6%). It seems unfathomable that the Inspectorate does not choose to explore this striking increase. It is interesting that the HMCPSI report seeks instead to justify this increase in conviction rate by suggesting it *could* have occurred due to weaker cases being made stronger. However, Graph 23 of recent annual CPS VAWG report shows that the rate of cases that are dropped by the CPS *after* charge increased from 12.4% in 15/17 to 14% in 18/19. This makes a suggestion of better case-building doubtful.

### **Methodology**

8. No rape complainant was spoken to in the writing of the HMCPSI report.
9. Annex D of the HMCPSI report includes an extensive survey that was put to CPS lawyers and managers. It is quite striking, given that HMCPSI was commissioned to examine what might be driving change in charging rates, that there are no questions about particular recent training (the RASSO refresher training and the "roadshows" mentioned above), about direction from CPS head office, about what local lawyers and managers believe the messages they receive from CPS leadership are. The questions are mostly about what comes to prosecutors from police, perceived changes in victim conduct especially in relation to digital devices, and the general availability of training and support if needed, and not particular training or direction of travel at CPS in very recent years. There is no question that would allow a

respondent to express a view on any change in approach from CPS. This beggars belief given what has been openly set out as a concern.

10. The AF cases which are reviewed on the report contain a very significant number of child abuse related rape cases, when the report was specifically commissioned to focus on 'rape only' cases where the charging figures are most dramatically changed. There is no good reason for having done this.

### **Misrepresentation of data including charging rates**

11. At 1.17 HMCSI suggests/proposes that active Admin Finalised cases (ie ones which have been returned to the police) should be added to the charged numbers. It proposes the decrease in charge rate should therefore be 38.9% rather than 52.1%. This would be a serious misrepresentation of outcomes and seek to apportion cases which have yet to be charged to the charged figures (which would present a less damning picture of the plummeting charge rate). It is not clear at all why this suggestion is made.
12. At 1.13, HMCSI states that there has been a decrease in the number of cases categorised as NFA – where a CPS lawyer decides that no further action should take place between 2017 and 2019. According to the CPS VAWG report this information is inaccurate – it refers to a 1.3% decrease when in fact there has been a 1.4% increase between 2018 – 2019 (1851 cases to 1876).

### **'Rape is just so difficult' and a lack of professional curiosity**

13. The HMCSI report contains numerous thin remarks about rape being very difficult to prosecute and frequently having no witnesses. The report itself acknowledges that the CPS is charging fewer cases (1.11) but then states that a trend to prosecute fewer cases is not as straightforward as it may appear (1.12). It states that it was "never going to have all the answers" and states that the "relatively narrow scope of the inspection means that a number of assumptions have been made". It does not make clear what these assumptions are. At the same time there is no reference to the known significant differentials in justice outcomes relative to defendant age, which the April 2019 analysis drew attention to, and examination of which may help illuminate what is happening as cases move through the system.
14. The primary recommendation of the report however is a further inspection at a later date, which feels deeply inadequate given the high importance of the current CJB Rape Review. The findings do not adequately address the issues HMCSI was asked to examine.

### **In addition to these 'rebuttals' to the HMCSI report above:**

1. It is essential that readers and all those taking part in the Rape Review keep returning to the data: there is a clear and striking, exponential rise in the number of rape reports to the police (up 173% from 2014 – 2018), while at the same time there has been (i) a decline in the amount of cases referred to the

CPS by police (-19%); and (ii) a huge decline in CPS decisions to prosecute (-44%). Until we have credible explanations for the multiple factors driving these changes – which involve reports of one of the worst things a person can experience, and a form of assault commonly committed by repeat offenders – we cannot begin to address what on any measure is an increased demand for justice.

2. There have been several notable examples of people working in the system referring to a change in approach from those in leadership positions which has ‘raised the bar’ on cases which will reach a charge. See for example the [question raised at highest level](#) between police and CPS, and anonymous workers [claiming](#) that practice has changed.
3. A [Newsnight investigation](#) in November revealed that the CPS were using rape conviction rate targets, and the **CPS themselves admitted** to the targets on staff between 2016 and 2018 that were ‘not appropriate’ and may have acted as a ‘perverse incentive’ on prosecutors, deterring them from charging less straightforward cases. However, in one HMCPSI report, HMCPSI inspectors criticised the Cheshire-Merseyside regional CPS for missing the target in 2017. Their conviction rate was 57.3%, down from 65.4% the previous year, but their actual number of rape convictions had gone up from 100 to 138 in the same period. The HMCPSI rape report states that there is no evidence that targets or level of ambition for conviction affect the quality decision making. It goes so far as to cite an Area where concerns were expressed over the fact their conviction rate had increased. The inclusion of this example is disingenuous given the lack of interrogation into *why* the conviction rates have increased, while seeming to ignore any impact of performance targets. In [other sources](#) the HMCPSI has defended its use of the levels of ambition to assess CPS areas on grounds that it did not set these targets and ‘can only assess the CPS on targets set by the CPS’. This is significant. It shows that HMCPSI are accustomed to assessing the CPS only based on the CPS’s own internal performance measures, and suggest they are inexperienced at being able to enact the more rigorous and holistic scrutiny this Rape Review requires.

## **Conclusion and Recommendation**

We are extremely disappointed that HMCPSI has not produced a more authoritative and credible examination of CPS rape case practice for this critical end to end review. Again, we do not make this criticism lightly and would prefer not to do so.

We recommend that the Criminal Justice Board rejects the HMCPSI report as a satisfactory answer to the Rape Review priority three questions, and that the CJB urgently examine alternative ways of obtaining answers to the critical questions that it set out. The HMCPSI report is not an adequate basis for making credible recommendations at the end of the Rape Review.

## **About the End Violence Against Women Coalition**

The End Violence Against Women Coalition is a UK-wide coalition of more than 80 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.

EVAW is a stakeholder in the ongoing CJB Rape Review, and is separately bringing a judicial review against the CPS in relation to rape case decision making.

## **ENDS**

**Contact:** Sarah Green / Rebecca Hitchen at the EVAW Coalition,  
[admin@evaw.org.uk](mailto:admin@evaw.org.uk) 020 3735 8219.