End Violence Against Women Coalition

Response to Home Affairs Select Committee's Call for Evidence on Investigation and Prosecution of Rape

June 2021

About the End Violence Against Women Coalition
The End Violence Against Women Coalition is a UK-wide coalition of over 100 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.

1. Introduction

Rape and sexual abuse have been effectively decriminalised. Despite the high prevalence of rape and sexual abuse and the increase in reporting in recent years, prosecutions and convictions have dropped to the lowest since records began. Latest figures suggest that rape complainants now have a 1 in 60 chance that a complaint made to the police will even result in a charge, let alone a conviction. This is a truly unprecedented crisis in rape prosecutions.

Rape and sexual abuse are commonplace: around 6.5% of adult women and 0.3% of adult men have experienced rape during their lives (ONS, 2018). These figures however do not include institutional sexual violence and abuse experienced by disabled and/or older people in care homes is not captured, which makes their experiences invisible.

Victim/survivors, who are overwhelmingly women and girls, will experience the criminal justice system (CJS) in ways that will be shaped by their sex, gender and other intersecting inequalities including race/ethnicity, age, faith, class, migrant status, socio-economic background, and sexuality.

In recognition of the high prevalence and harms to victim/survivors of rape and sexual abuse and the exceptional difficulties in prosecuting these crimes, there should be visible political leadership driving improved justice outcomes. This is in addition to far-reaching, whole-system reforms to all CJS agencies and long-term, sustainable funding for specialist VAWG support services.

In addition to our submission, we ask that the Committee reads our report, "The Decriminalisation of Rape", co-authored by Imkaan, Rape Crisis England and Wales, and the Centre for Women's Justice. This report examines the dire state of rape investigations and

prosecutions in England and Wales calls for radical changes relating to police and prosecutor working practices, and the evidence and jury systems in court.

Additionally, we would encourage the Committee to read the bundle of evidence from EVAW's judicial review against the CPS which was made public last year and which we submitted to the Justice Secretary. This includes:

- The detailed statement of a CPS whistle-blower which sets out how the CPS secretly chose to change their policy on charging rape cases, with the catastrophic collapse in charging that resulted.
- A dossier of 20 women's rape cases which the CPS decided not to charge, including a woman held at knifepoint, a woman whose rape was filmed and video found on suspects phone, multiple cases involving mobile phone messages where the suspect admitted to the offence and another where CPS gave the fact that the survivor had "enjoyed an adventurous sex life" as a reason not to charge.
- A detailed ten-year statistical analysis of police and CPS official performance statistics on rape which finds the data entirely consistent with a change in approach, and cannot be explained by the reasons offered in the CPS defence of the case
- A legal Facts and Grounds of the JR complaint against the CPS
- A statement from the End Violence Against Women Coalition dealing with the lack of transparency and consultation in the change of approach

2. Executive Summary

The following recommendations relate to addressing the problems with how rape cases are handled in the criminal justice system. These are not exhaustive but highlight some key points for criminal justice agencies and beyond:

- **Wraparound survivor support** and advocacy services that centre the needs of those who have experienced rape including **specialist services for minoritised women** and **girls,** not a 'one size fits all approach.
- **Radical workforce changes throughout the police and CPS**, with rape investigation and case-building made a clear and rewarded career specialism, with much stronger leadership and management, and specialist clinical supervision to try to prevent burn-out.
- **An updated ban on the use of 'sexual history evidence'** in rape trials which is fit for the digital age.
- **Expansion of the testing of legal advocates for victim**s in rape trials, which has shown promising results so far.
- **A Special Commission on Juries** to examine how the use of juries does and does not service justice for trying the offence of rape.
- **Examination of whether a more inquisitorial approach** might be more suitable in rape trials (as has been suggested for some family court proceedings).
- **Urgently needed research** on (1) who does and does not report rape currently so we can understand better what the barriers to justice for different women are; (2) what rape survivors' actually want from the justice system and for recovery more broadly; (3) what

actually works as interventions to prevent rape, including public attitudes campaigns, work with perpetrators, and work on key settings where rape is common.
- **New Principles and a Policy and Practice Agreement on disclosure** of material to the defence in RASSO cases and changes to make therapy and counselling notes should be non-disclosable.
- **Significant political leadership and accountability through a new Ministerial lead** on rape holding Chief Constables and CPS leadership to account.

3. Main response to Inquiry questions

Do victims have access to justice, whether witnesses are sufficiently supported, and are there sufficient safeguards for those who are accused of rape and sexual offences to ensure that they receive a fair trial?

Re-traumatising impact of the criminal justice system

The impact of the criminal justice system (CJS) from the perspective of victims/survivors is rarely heard despite being critical in understanding why there is little confidence in the CJS as a route to justice for victims/survivors of rape. It is widely accepted by criminal justice agencies that victims/survivors accessing the CJS should be treated with dignity and respect. However, the hallmarks of the CJS for many victims/survivors, their supporters, and specialist frontline sexual violence and abuse practitioners are the perpetuation of intersectional myths and stereotypes, re-traumatisation, and demoralisation.

The implicit and explicit victim-blaming in all areas of the CJS creates harm, distress, and re-traumatisation. Recent initiatives by the CPS and the Courts and Tribunals Service have attempted to adopt a more trauma-informed approach. Although this is welcome, there remains a large gap between policy and practice, and these improvements can only marginally address the fundamental and systemic issues that cause harm to victims/survivors. These issues include the adversarial nature of a system where victim/survivors are often subject to ruthless cross-examinations in the courtroom, CPS discontinuation of cases citing lack of credibility, and the lack of accountability and transparency in both police and CPS decision-making and appeals processes, all of which leave victims/survivors feeling disempowered and disillusioned.

Timeframes for sexual violence and abuse cases in the CJS are lengthy, with the average time for the police and CPS to charge being 145 days.[1] Long waiting periods, the lack of transparency and accountability in the process for victims/survivors, the constant delivering of bad news for specialist sexual violence and abuse specialist practitioners all result in the system becoming a source of demoralisation. With the increasing backlog in the crown courts, in part due to the Covid-19 virus and due to the Ministry of Justice making substantial cuts on judicial sitting dates, waiting times for trials have increased significantly. The average crown court case now takes 525 days to go from offence to completion, up 34% from 392 days in 2010.[2]

[1] CPS Quarter 4 data, 2019-20, https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2019-2020
[2] Serious crime victims wait longer for justice after court days cut, Guardian, 13 January 2020 https://www.theguardian.com/law/2020/jan/13/serious-victims-wait-longer-justice-court-days-cut

An understanding of the impact of multiple, intersecting forms of structural oppression and violence is crucial to understanding victim/survivor pathways to justice. Institutional racism has a significant influence on whether the CJS is seen as a route to justice for Black and minoritised victims/survivors. In Imkaan's "Reclaiming Voice" report[3] victims/survivors spoke of protecting others in their families /communities and feelings of betrayal, strongly connected to women and their families being subjected to over-policing, disproportionate arrest, criminalization and surveillance by the CJS.

Black and minoritised women and girls experience greater barriers at every step towards getting justice. This dehumanisation can have a severe impact on victims/survivors who are subject to racist assumptions, kept out of the loop during the investigation and court proceedings, and possibly re-traumatised during the process (Imkaan, forthcoming).

In "Reclaiming Voice", a young, Black woman ('Sophie') reported the rape to the police, but the CPS dropped the case because of a lack of evidence. She spoke about how the trauma of rape had been compounded by the dual and intersecting impact of racism and sexism from the perpetrator during the relationship, and by the response of criminal justice agencies. The response to Sophie marked by the racialised perceptions/stereotypes that pathologised her as an angry Black woman who brought the violence on herself:

"I think for me being a black woman who was raped by a white man, I kind of think had there been a different racial dynamic in that situation the CPS would have been keen to prosecute. I feel like he has basically got away with no consequences whatsoever, whereas for the last how many years I have struggled to maintain a sense of internal justice cos I believe the police failed me" (Victim/survivor in Thiara and Roy 2020)

Greater analysis of the reasons behind victims/survivors withdrawal from the CJS is needed across the UK, but regional data from Rape Crisis Centres in Essex that shows that victims/survivors withdraw from the system because of the negative mental health implications, and the potential for re-traumatisation. 26% of victims/survivors felt that the CJS process would be too distressing and 13% expressed fear that the criminal justice process would have a negative impact on their mental health and well-being.[4] Although a greater equalities analysis of victim/survivor attrition is needed, it is clear that victims/survivors make choices not to report in order to protect themselves from distress.

The ordeal of cross-examinations for victims/survivors have been widely accepted as problematic, with Codes of Conduct[5] in place that are supposed to prevent improper questioning. Despite this, damaging cross-examinations continue to take place, with academics arguing that cross-examination is used to humiliate and intimidate witnesses.[6]

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[3] Thiara and Roy, Reclaiming Voice: Minoritised Women and Sexual Violence Key Findings (2020) https://f98049e5-3f78-4cfd-9805-8cbec35802a7.usrfiles.com/ugd/f98049_a0f11db6395a48fbbac0e40da899dcb8.pdf

[4] Victim's Commissioner, (15 August 2019) "Analysis of victims' reasons for withdrawing sexual offence complaints."

[5] APPG Adult Survivors of CSA, February 2020 "Can Adult Survivors of Child Sexual Abuse Access Justice and Support?" Bar Council. (2004). Code of conduct of the bar of England and Wales (8th ed.).

[6] Smith, O and Skinner, T 2017, 'How rape myths are used and challenged in rape and sexual assault trials', Social and Legal Studies, vol. 26, no 4, p441-466

One victim/ survivor describes her experience of her cross-examination "*as traumatic as the rape, except with the added humiliation of a jury and a public gallery."*[7]

Jury disbelief continues to be a major source of re-traumatisation for victims/survivors, as it invalidates their lived truth and experience. The trauma of the rape itself, the re-trauma of the trial and the devastating acquittal is life altering, influencing day-to-day choices of victims/survivors and severely affecting their mental health. Feeling disbelieved following a process of interviews and questioning compounds the trauma of the sexual violence and abuse for victims/survivors and can have dire mental health repercussion.

Specialist VAWG support services for victims/survivors

Given the levels of institutional discrimination some survivors are exposed to within the CJS, and that mental health interventions can be experienced as both pathologising and punitive by all victims/survivors, but especially Black and minoritised victims/survivors, there should be greater recognition of non-clinical forms of holistic therapeutic support or programmes specifically designed and delivered by specialist 'by and for' organisations. As highlighted earlier, this type of support helps to counter the re-traumatisation of victims/survivors through the CJS process.

Access to pre-trial therapy from independent specialist sexual violence and abuse services is vitally important and should be supported by criminal justice agencies, who too often advise victims/survivors that they cannot access support whilst they have an open case. The role that specialist sexual violence and abuse counsellors and therapists provide is often invisible and undervalued in how it supports victims/survivors yet specialist services often play a central part in mitigating in part for the trauma reproduced by the criminal justice system.

The CJS is disempowering for victims/survivors, as it posits them as a "witness" to the rape against them, which is being prosecuted on behalf of the Crown. The system further disempowers anyone with vulnerabilities, such as mental health issues or learning difficulties. Despite evidence that shows how perpetrators seek out those who are vulnerable, vulnerabilities rarely support the case of victims/survivors.

Victims/survivors value and need access to wraparound holistic specialist support and intersectional advocacy through 'by and for' Black and minoritised, disabled, LBGT+ VAWG organisations and those providing specialist advocacy to young women. Having an advocate through the CJS has been found to be crucial to women's sense of safety and support.

The ISVA (Independent Sexual Violence Advisor) should consistently be based within specialist sexual violence and abuse services (including 'by and for' providers for Black and minoritised communities and disability organisations, although currently they are very few that receive any dedicated funding to provide ISVAs). The independence of the ISVA is then not compromised by being situated in a police station or within a SARC, which in some areas create hierarchies of care for victims/survivors by seeing penetrative rape cases only. We also maintain that the most effective support for victim/survivors is trauma-informed,

[7] Smith and Daly (December 2020) Evaluation of the Sexual Violence Complainants' Advocate Scheme, Loughborough University

survivor-led, holistic and available to all victim/survivors, not be predicated on their engagement with the CJS.

Efforts to consolidate services into 'one hub' models where social services, police, ISVA and counselling services operate together, should be resisted, as not only will this kind of service response act as a barrier to women and girls with insecure immigration status, and women and girls involved in prostitution/sex work, but specialisation and independence will be lost. Independence is critical to victims/survivors who find themselves subject to agency scrutiny and harm during their interactions with the CJS.

The obstacles outlined above have always made it particularly difficult for victims/survivors who are already vulnerable or disadvantaged to receive the support of the police and/or CPS in proceeding with a complaint. When a victim/survivor's credibility is considered so fundamental to winning a rape or serious sexual offences trial, victims/survivors who do not fit the 'mould' of a credible victim – because of their age, their outward presentation, their social skills, a disadvantaged background, or a learning/ mental health disability – are the least likely to see justice served.

Safeguards for those accused of rape and sexual offences

An independent review by retired High Court Judge Sir Richard Henriques into the Metropolitan Police Service's handling of investigations into non-recent sexual offences alleged against persons of public prominence was conducted following high-profile cases involving celebrities and the collapse of Operation Midland. The potential impact of the Henriques Report's recommendations – particularly that police forces abandon the presumption of belief in victims/survivors of serious sexual offences, and abolish the use of the term 'victim' when dealing with such complaints – pose significant cause for concern.

It is our assertion that the presumption of belief in the first instance – in other words, at the point of reporting – and thereby encouraging victims/ survivors and witnesses to come forward cannot possibly in itself cause harm. A presumption of belief does not mean failing to investigate the facts, fairly and diligently, after that crime has been recorded. Instead, abolishing the presumption of belief is likely to result in some genuine rape allegations not even being recorded, let alone prosecuted. It is also likely to send a clear message to the police that they should approach complaints of rape and other sexual offences with scepticism which – as history tells us – leads to a high attrition rate and fewer complaints being properly investigated or prosecuted.

Recommendations

- A sustainable funding model for the provision of specialist Rape Crisis services and specialist 'by and for' services which are independent, trauma-informed and offer advocacy and 'wraparound' support for all victims/survivors of rape and sexual abuse.
- A duty for PCCs to recognise their role in providing tailored independent sexual violence advocacy; they should receive recognition and support for doing so.
- Access to specialist, high quality, non-medicalised counselling and therapy as and when victim/survivors need it, including pre-trial therapy
- The commissioning of rape and sexual abuse services should be underpinned with a thorough equalities analysis.

- Victims/survivors who do report to the Police should in the first instance have the choice of a specialist female officer for the purposes of safe disclosure.

The role of the police, Crown Prosecution Service (CPS) and the courts in reporting, prosecuting and convicting in cases of rape and sexual assault, including the advice and guidance that is used to train, educate and support those involved in the disclosure, charging and prosecution of rape

While there may be work that could be done to improve the support that is provided to such victims in court, and to tackle jury prejudice, the problems often begin for such victims at a much earlier stage, when the police or the CPS are considering if and how to proceed with their complaint.

The Police

There also overwhelming capacity issues for the police, CPS and courts, which undoubtedly poses additional challenges to progressing rape cases. The numbers of rapes recorded by the police have grown steadily over the past three decades, and indeed increased exponentially since 2017, reaching their highest ever volume. Meanwhile, police forces, the CPS, Prosecuting Counsel and courts have had to manage caseloads with increasingly limited resources, in the aftermath of public sector cuts that have taken effect since 2010. The effects of reduced resources can be seen at a number of levels, including:

- Police forces in some areas closing down specialist sexual offences units, leaving a mix of specialist and non-specialist officers to work on rape cases without sufficient experience;
- Basic policing errors and investigative steps being missed;
- Negative charging decisions being made prematurely, and cases 'prioritised' or 'de-prioritised' as a means of coping with overwhelming volumes;
- Extraordinary delays;
- A large, and indeed increasing, proportion of victims/survivors withdrawing their complaints because they cannot face persisting in these circumstances when they feel so let down by the police process; and
- Cases being lost in the system – closed or 'administratively finalised' for reasons of delay – and no effort being made to monitor why this has happened.

There has also been serious, chronic under-resourcing of support services – ISVA and therapeutic services, for example – for victims/survivors, due to reduced funding for the women's sector, making it all the more challenging for victims/survivors to report to the police and persist with their complaints. This is particularly true of specialised 'by and for' VAWG services led by Black and minoritised, Deaf and disabled and LGBT+ women. Long wait times for cases to reach courts and lengthy trials also increases the caseload volumes for specialist sexual violence and abuse services, as they retain individual clients over longer periods of time, whilst new victims/survivors come forward needing access to support.

No Further Action (NFA)

NFA is the designation when the criminal justice system decides to discontinue a case. Solicitors at the specialist VAWG legal charity, the Centre for Women's Justice (CWJ), have

identified a number of recurring errors in police decision-making or procedure in rape and serious sexual offence cases they have advised on, which may explain in part why so many rape cases are being 'NFA'd' by the police. In particular, CWJ has noted with concern that the following issues continue to be very common in rape investigations:

- Police not interviewing complainants or suspects before deciding to charge or to 'NFA'.
- Police not informing women of the Victims Right to Review procedure or of the reasons for an NFA decision.
- Police officers failing to follow up on other lines of enquiry.
- Police officers taking a sceptical approach at the point of reporting, dissuading women from pursuing their complaint, and/or contributing to lines of enquiry being missed.
- Police making NFA decisions inappropriately and not referring cases to CPS for charging decisions. Legal guidance issued by the CPS reminds police officers that the CPS, and not the police, should always be making charging decisions in cases which are evidentially or legally complex. This, arguably, encompasses the majority of rape cases, given that they tend to be inherently 'difficult' cases. In practice, however the rate of cases 'NFA'd by the police, without referring to the CPS, remains alarmingly high.
- Police routinely misapplying the law on corroboration when assessing whether the case passes the evidential threshold for charge or referral to the CPS. In Section 32 of the Criminal Justice & Public Order Act 1994, parliament abolished the need for the jury to be given a warning about convicting solely on the basis of uncorroborated evidence in cases involving sexual offences. A credible account from a complainant can and should form the basis of a criminal prosecution. Moreover, in relation to the assessment of credibility the jury is given directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. Therefore, matters such as a delayed report to the police should not be treated by an investigating officer as undermining a complainant's credibility.

The Misapplication of the Law on Corroboration

In 2020 CWJ conducted a review of more than 15 'NFA'd' cases where the law of corroboration had been misapplied. The review found many examples of the police erroneously stating the law on corroboration incorrectly and justifying lack of corroboration as a reason to take no further action. This misapplication of law is linked to a broader over-sensitivity and excessive caution about rape and other sexual offences. It is also likely to prevent too many rape cases, which could be prosecuted, from proceeding to trial, given that the nature of the crime means corroborating evidence is often lacking in rape cases.

Many RASSO cases will feature limited or no corroborative evidence. It is essential that prosecutors do not introduce a requirement for corroboration in their review process or identify the 'one versus one' feature of the case as a negative in their assessment of the evidence. One person's word can be sufficient to provide a realistic prospect of conviction. Where it is one person's word against another's then a jury will look to other factors to help decide whether the prosecution has proved its case. This should not include irrelevant factors or myths and stereotypes, and the jury should be instructed to properly directed about any matters that might give rise to misconceived assumptions such as delayed complaints.

The misapplication of the law highlighted here is linked, we believe, to a broader over-sensitivity and excessive caution about prosecuting rape and other sexual offences. We also fear that the accounts of survivors of sexual violence are assumed to have less weight than those of other victims of crime. Given that the vast majority of those who report sexual offences are women, this systemic misunderstanding of the law amounts to indirect discrimination.

We are aware that CWJ have written about the problems with misapplication of the law on corroboration in more detail in their submission to this inquiry, along with an annex of confidential examples where this misapplication of the law has been applied, and we encourage the Committee to read these thoroughly.

The Crown Prosecution Service (CPS)

Central to the way in which criminal justice agencies manage rape and sexual abuse cases are decisions around how credible a victim/survivor is. At every stage of the process, manifestations and pre-emptions of rape myths and stereotypes play a major role in whether a case is taken forward or not.

In 2018, reports began to emerge in the media of a 'secretive' change in policy within the CPS, with regard to the prosecution of rape. An article revealed that two senior figures within the CPS - the Director of Legal Services Greg McGill and the (then) Principal Legal Adviser Neil Moore - had personally delivered workshops or 'roadshows' to all 14 specialist rape and sexual offences units across England and Wales in which they had advised prosecutors that the CPS "should be winning more trials than we are losing", and that this could be achieved by a change of approach to charging decisions. One prosecutor - who wished to remain anonymous - alleged to the Guardian that staff attending the course were told: "If we took 350 weak cases out of the system, our conviction rate goes up to 61%." This change was characterised as minor, simply a "touch on the tiller". The CPS in response 'confirmed the workshops had taken place and… did not challenge the language used by the senior officials' who delivered the trainings. They disputed, however, that the training provided at the workshops amounted to a change in approach.

In late September 2018 the CPS published its annual Violence against Women and Girls report, which revealed that there had been an alarming, precipitous drop, compared with previous years, in the volumes of rape complaints that had resulted in a charge. EVAW launched judicial review proceedings against the CPS due to our grave concerns about this precipitous drop and longer-term trend down in the charging rate. The focus of EVAW's case was whether there has been a change of approach by the CPS, from the year 2016/17 onwards, to the prosecution of rape and serious sexual offences ('RASSO') cases – effectively a perceived shift away from the 'merits-based approach' to charging decisions – and if so whether that change of approach was brought about unlawfully.

'Merits-Based' vs. 'Bookmaker's' Approach

It is our belief that this move away from the merits-based approach was implemented through these workshops, as well as through the removal of all primary guidance on the

'merits-based approach' from the CPS' internal and external web resources, and all passing references to the 'merits-based approach' from all of other online legal guidance and training materials.

We are concerned that a change in approach – or even the perception of change in approach – has resulted in prosecutors becoming more 'risk-averse' in their approach to charging decisions. Arguably, the change has increased the risk that prosecutors will instead make charging decisions by reverting to what has sometimes been described as a 'predictive' or 'bookmakers' approach': where a case is only charged if experience suggests that it is the kind of case which will find favour with a jury. The so-called 'bookmakers' approach' was specifically prohibited by the High Court in the landmark case *R(B) v DPP* [2009] EWHC 106 (Admin) – the same case which dictated that the 'merits-based approach' was the correct one. For more information on this case, please read CWJ's submission which goes into this in more detail.

The lawful, 'merits-based approach' requires prosecutors to charge the case if they believed it had merit, on the assumption that the merits of the case would be assessed fairly and objectively by an impartial jury. They should not allow themselves to predict what 'myths and stereotypes' a juror might – wrongly – take into account.

Between 2010 and 2016, references were frequently made to the 'merits-based approach' in the CPS' annual VAWG reports and other public statements and strategy documents, as well as in training materials and guidance. Relatedly, it introduced and updated guidance for prosecutors on recognising and disregarding common societal myths and stereotypes about rape.[8] During the same period, the volumes of prosecutions, and indeed convictions, steadily increased, and these trends were often cited by the CPS as indicators of improved performance.

EVAW's Judicial Review against the CPS

Forming part of the evidence submitted by our judicial review was an anonymous statement by a whistle-blower, an experienced RASSO prosecutor from within the CPS. They stated in their statement that they understood the message of the 'roadshow' trainings for RASSO prosecutors in 2016/17 to represent a clear, intentional and significant change in approach, directing RASSO prosecutors away from 'merits-based approach' that had previously been a central plank of RASSO trainings and guidance. They were concerned that these roadshows would encourage prosecutors to be risk-averse in their approach to prosecutorial decisions. They had discussed the reactions to the roadshows with other RASSO prosecutors who similarly expressed that this represented a change of approach. Furthermore, they considered the change of approach to have been further cemented by the removal of references to the merits-based approach in guidance.

An expert econometrician from Oxford University, Professor Abigail Adams, was instructed by EVAW to provide a statistical analysis, examining patterns in the data. Professor Adams

[8] The latest evolution of the CPS' guidance for prosecutors on tackling societal myths and stereotypes can be found in its 2021 legal guidance, particularly Chapter 4 and Annex A: https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-overview-and-index-2021-updated-guidance.

examined all of the data in the CPS' annual VAWG reports from 2012/13 through to 2018/19, as well as various other published data/analysis available regarding changing CJS outcomes and statements and information disclosed by the CPS during legal proceedings.

Professor Adams concluded that the available evidence was consistent with a change in practice by the CPS following policy decisions taken in 2016/17. This conclusion was based in large part on the fact that none of the alternative explanations that had been provided by the CPS for the drop in volumes were consistent with the data. For example, representatives of the CPS have repeatedly sought to attribute the collapse in rape prosecutions to an increase in cases being closed or 'NFA'd' by the police. Professor Adams however identified that – particularly in recent quarters – there had been a rise in the number and rate of cases where, following a referral by the police, the CPS had declined to bring proceedings. At the very least, the numbers of cases finalised or NFA'd by the police could not explain a drop in prosecution volumes of such 'magnitude'.

This expert analysis was not disputed by the CPS. They simply contended that it was not sufficient to prove that there had been a change of approach, since there could be a myriad of (unidentified) reasons for the drop in prosecutions which could not be uncovered simply by reference to the available data.

EVAW also uncovered from the CPS' disclosure that at least some managerial-level policing and CPS staff have expressed concerns – since the removal of the merits-based approach – about confusion and chaos reigning within RASSO units and police forces about what the proper approach was, in light of the CPS' public-facing position that there had been 'no change in approach' at all. In addition, at time of writing at least three very senior police officers have gone on record to say that there has been a change in CPS approach and that the standard for charging is now higher than it was. EVAW's position is that this total confusion among practitioners is manifestly unlikely to produce good outcomes.

The Lord Chief Justice, who handed down the Court of Appeal's final judgment in this case in March 2021,[9] concluded that none of the matters complained of amounted to illegality on the part of the CPS. The Court of Appeal in exercising its discretion, refused to admit into consideration an independent expert's analysis of the available statistical data, which formed an important part of the EVAW Coalition's case, and crucially cast doubt on the reliability of witness evidence that had been relied upon by the Director of Public Prosecutions.

The Court of Appeal's decision has meant that the CPS has not answered our core concern, that prosecutors have now been incentivised to charge fewer rape cases in order to improve their 'rates' of convictions, and that this has resulted in more prosecutors applying an approach akin to a 'bookmakers' test', placing excessive weight on 'minor' or speculative points that could be raised by the defence, and taking into account myths and stereotypes.

[9] Judgment can be found here: https://www.judiciary.uk/wp-content/uploads/2021/03/EVAW-v-DPP-Final-150321.pdf

We refer the Committee to the extensive evidence obtained and produced for the judicial review as we would like to see a commitment to learning lessons from this material. The purpose of this is to show through evidence, the reasons behind our serious concerns that there is seemingly nothing formally in place in terms of accountability and governance to prevent the CPS from dropping rape cases at the scale and rate that they have been doing so in the past five years.

In his judgment dismissing judicial review, the Lord Chief Justice concluded that in 2016/17 the CPS decided that they should aim to prosecute 350 fewer rape cases each year, or at least that this would be permissible if it increased their conviction rates (see paragraph 56 of the judgment A Director of Legal Services, who had no background in RASSO prosecutions, led this decision, because he felt that dropping this "small" number of cases "could have a big impact on overall performance figures" (quotations are, again, taken from paragraph 56 of the approved judgment. This is a matter of established fact which is contained in the judgment and is undisputed.

The Lord Chief Justice also found, as is noted at paragraph 53 of his judgment, that at around the same time the same Director of Legal Services at the CPS introduced a conviction rate for rape, which – although it was described as an "ambition" rather than a "target" – could hardly be distinguished, in practice, from a target. The Lord Chief Justice also noted in respect of this target that it had not been been helpful in the way that the Director of Legal Services had hoped.

Earlier in the judgment, the Lord Chief Justice notes too (at paragraphs 44 to 46) that one of the triggers for the above policy decisions was a flurry of "negative publicity about the CPS" in 2016 relating to a "handful" of cases – just four in total – that had attracted unwanted media attention. One of these four cases concerned disclosure failures by the CPS; while in the other two cases, the juries had been quick to acquit the defendants. The Lord Chief Justice notes that the genesis of the policy decisions complained of by EVAW was a meeting in August 2016 at which "solutions" were discussed in light of the embarrassment caused by these four specific cases. He quotes the former DPP Alison Saunders as accepting that this adverse publicity formed at least a part of the background to the policy decisions.

Despite these findings that are undisputed by the CPS, the Judicial Review was not successful, and the lack of accountability within the CPS that caused the effective decriminalisation of rape, shows few signs of being effectively dealt with.

The Courts

The distress caused by the courts for victims/survivors of rape and sexual abuse is well-documented and can be attributed to a number of factors including the way cross-examination takes place in an adversarial system which prioritizes winning cases, extreme interpretations of "beyond reasonable doubt", and ideas around what is rational behaviour.[10] Myths and stereotypes are perpetuated in the courtroom, and are

[10] Smith and Skinner, op. cit.

inconsistently challenged by prosecutors.[11] Academics argue that sexual history evidence has been used to support the "twin myths" used against rape victims/survivors in court. Sexual history evidence attempts to imply to the courtroom that the victim/survivor is more likely to have consented to intercourse, and that she is less credible as a witness.[12]

In a recent survey, 77% of victims/survivors stated that they agreed that people who report sexual violence to the police can expect to have their medical and sexual history discussed at court.[13] Legitimate fears around cross-examination at trial present a major barrier to women accessing the justice system, and for survivors with additional vulnerabilities there is the added concern that these will be used to undermine their case.

A fundamental issue for Black and minoritised women and girls relates to their sexual violence and abuse being seen by communities and sometimes by professionals as an extension of their culture and/or religion. This diminishes the experiences of victims/ survivors, delegitimising their trauma.

Recommendations

- Rape investigation and prosecution work should be a clear, named specialism in all forces and CPS areas, with a strong and rewarded career route
- Investigations should explicitly return to a clear examination of the seeking as well as the giving of consent
- All rape investigations should have the oversight of a senior rape and sexual abuse specialist lead
- Rape and sexual abuse investigators and prosecutors should have compulsory clinical supervision on a regular basis; the workforces should be protected from harm, burnout and vicarious trauma.
- We recommend a consideration of reintroducing the 'Merits Based Approach'. Rape and serious sexual offences needs specific guidance in addition to the Code Test, because without there is a clear risk of prosecutors taking 'the bookmaker's approach'.
- A formal second opinion at each No Further Action decision, and a significant review of the Victim's Right to Review process. This data should be disaggregated across all of the protected characteristics.
- The 'admin finalised' category of rape casefiles at the CPS should be abolished and replaced with a clearer categorisation.
- The formalisation of the process of seeking 'early investigative advice' (EIA) by police from CPS.
- All cases which are discontinued, whether at police or CPS stage, should be reviewed by gender/race/class/age/disability and results analysed and reviewed annually
- An amendment of the law on sexual history evidence (SHE) to create an up-to-date, clear, meaningful ban on the use of 'SHE' by the defence in court
- A review of the courtroom cross-examination rules.

[11] Smith, O and Skinner, T 2017, 'How rape myths are used and challenged in rape and sexual assault trials', Social and Legal Studies, vol. 26, no 4, p441-466

[12] McGLynn, C, (2017), Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence, The Journal of Criminal Law, Vol. 81(5) 367–392

[13] Smith and Daly, op. cit.

- A Special Commission on the efficacy of juries in rape trials; and we recommend the judiciary in England and Wales consider how a more inquisitorial judicial approach might be adopted in rape trials
- Legal profession leaders should encourage an urgent, open conversation about how the practice of defence in rape cases may exploit and perpetuate in society harmful prejudices about rape, and how their codes of conduct can be better adhered to.

Barriers to reporting, charging, prosecuting and convicting rape and sexual assaults

For migrant women, especially those with asylum claims and insecure status there are significant barriers to reporting into the criminal justice system. The systematic exclusion of migrant victims/survivors from protections afforded to other victims/survivors of violence creates one of the most significant barriers to justice. It can also perpetuate trauma. One specialist Black and minoritised practitioner stated:

"I have worked a lot with asylum seekers who are survivors of sexual violence in the past and I believe that their experiences with the Home Office are forgotten. Such individuals are frequently asked to recount in detail their traumatic experiences to a sometimes-hostile officer and asked very intrusive questions. Although a request can be made for a female officer there have been women who have been interviewed by male officers and felt very uncomfortable or found it hard to disclose the sexual violence which might be integral to their case for asylum. After such interviews there does not appear to be any after-care offered for these women. Furthermore, women are frequently refused asylum and in their decision letter they can be told that the Home Office does not believe their account of the sexual violence which can be devastating." (Imkaan, forthcoming)

Barriers to justice also stem from operational issues of access. Lengthy trials and a lack of information are challenging for victims/survivors generally, but particularly for poor and working-class victims/survivors in terms of work and childcare arrangements. Access to good quality interpreting and appropriate arrangements for Deaf and disabled women cannot be guaranteed and places a further burden on victims/survivors to interact with a system that is not designed around their basic fundamental needs and rights. The need for survivors to 'disclose events to a new interpreter each time' can also have re-traumatising effects. Access to good quality interpreting is essential but so is consistency to aid safe and supportive disclosure.

Victims/survivors maintain that the criminal justice process is traumatizing in and of itself, quite apart from the trauma of having experienced sexual violence and abuse. Black and minoritised women and girls experience greater barriers at every step towards getting justice, including reporting, investigation, and court proceedings. This dehumanisation can have a severe impact on victims/survivors who are subject to racist assumptions, kept out of the loop during the investigation and court proceedings, and possibly re-traumatised during the process (Imkaan, forthcoming).

Research further highlights the invisibility of LGBTQ+ victims/survivors within the CJS with both LGBTQ+ and Black, minoritised groups being most likely to be 'lost at the first stage of

attrition'. [14] It has also noted that for LBGTQ+ groups individual/ cultural barriers such as being 'outed', and the overlapping experiences of hate crime contribute to this invisibility.[15]

The barriers to justice are compounded for disabled women. The former UN Special Rapporteur on Violence against Women, Rashida Manjoo highlighted the systemic failure of the court process due to the infantilisation of and discriminatory stereotypes about disabled women which persist and reproduce damaging perceptions about their credibility and competency to give evidence. This is particularly problematic for disabled women in cases of sexual and domestic violence where the system relies on women/girls for key evidence to support prosecution.[16]

Recommendations

- Independent research to be commissioned into the characteristics of those who do and do not report rape to the police, co-produced with specialist 'by and for' services and sexual violence and abuse services
- Parallel research of what rape and sexual abuse victims/survivors actually want from the justice system and more broadly to support their recovery
- Further developing and piloting of legally qualified advocates for victim/complainants in rape and sexual abuse cases
- Further research into and policy development on how to prevent rape and sexual abuse

Challenges around disclosure and whether the current disclosure arrangements affect the reporting, investigation, prosecution and sentencing of rape cases

In addition to our views set out below regarding disclosure we recommend that the Committee reviews the submission by Centre for Women's Justice (CWJ) who have covered the problems with disproportionate data collection and third-party disclosure more detail.

Digital Extraction

There has been a significant positive shift in relation to digital data during 2020 following the decision of the Court of Appeal in R v Bater-James and the adoption by the police of new guidance and consent forms, which involved detailed discussions between CWJ and the National Police Chief's Council (NPCC). However, in relation to digital data we remain concerned that, firstly, the Police, Crime, Sentencing and Courts Bill does not deal adequately with this issue and secondly that the new NPCC guidance is frequently not being followed by officers in practice.

In 2018, organisations supporting victims/survivors began raising concerns that it had become commonplace for rape victims/survivors to be asked to provide blanket consent to downloads of digital data - sometimes the entirety of their digital data - from their mobile

[14] Walker, S.J.L., Hester, M., McPhee, D., Patsios, D., Williams, A., Bates, L. and Rumney, P., 2019. Rape, inequality and the criminal justice response in England: The importance of age and gender. Criminology & Criminal Justice

[15] Ibid.

[16] Manjoo, (2014) 'Report of the Special Rapporteur on violence against women, its causes and consequences' (A/ HRC/26/38)

phones so that the police could fully investigate the contents if necessary. This practice has now been widely criticised, and the CPS has repeatedly asserted that it does not endorse full downloads of mobile phone data. Invasive disclosure practices have a damaging impact and often make victim/survivors feel like they are under investigation:

"my phone documents many of the most personal moments of my life and the thought of strangers combing through it, to try and use it against me, makes me feel like I am being violated once again." (Big Brother Watch, 2019: 48)

Even where some effort is made by the investigation team to specify what they are looking for, VAWG support services are still seeing requests as broad as 'all communications', 'all social media data', or 'all WhatsApp messages'; and/or investigators suggesting that data parameters of 7, 10 or 20 years are appropriate, whether or not the rape reported is historic. When challenged on these requests, police officers in a number of cases have expressed frustration on the basis that the requests have been made by the CPS and they therefore feel they are only following advice.

In a recent report on the experiences of rape victims/survivors in the CJS, 67% of victims/survivors agreed that rape victims are routinely expected to give up phones and personal information (Smith and Daly, 2020). In a separate survey of Rape Crisis ISVAs, 95% of respondents said that police ask for a mobile phone download as a matter of course.

This practice has affected a significant number of rape victims/survivors, and acts as another barrier to reporting, especially for women with insecure immigration status and women in prostitution/sex work who will find it especially difficult to access justice, out of fear of detention, arrest, or even deportation. Disclosure practices have left victims/ survivors feeling vulnerable, not believed, blamed, and often in positions where they have to explain why they do not have their phone or why they have a temporary number.

Disclosure of Confidential Third-Party Records

As well as requests for digital data, victims/survivors are now frequently asked to consent to police requests for full or extensive access to confidential records held about them by third parties, such as records held about them by adult or child social services, by their school or university, their current or former workplaces. Often records are sought which span many years, and where the victim/survivor is not aware of any relevant material existing within the records. It is unclear therefore what justification there can be for such requests, beyond mere speculation as to whether a victim/survivor is 'credible' or 'has a past'.

Police should only make requests for third party disclosure where there is a reasonable line of enquiry.[17] Blanket requests, where there is no specific reason arising from the facts of the individual case, do not meet this test and amount to a speculative request, or 'fishing expedition'.

[17] The Court of Appeal established in *R v Alibhai and others* [2004] EWCA Crim 681 that for a reasonable line of enquiry *"it must be shown that there was not only a suspicion that the third party had relevant material but also a suspicion that the material held by the third party was likely to satisfy the disclosure test."*

Victims/survivors are also very commonly asked to agree to allow the police to obtain their full medical records, and - more controversially - records of any counselling or therapy that they may have had; the contents of which may then fall to be disclosed, with appropriate redactions, to the defence, if relevant. Again, requests are typically made for historic counselling records too, pre-dating the rape itself, and going back a number of years.

Although prompt and appropriate disclosure to the defence is important, since the high-profile case of Liam Allan, the pendulum has swung so far that disclosure requests in rape cases have extended beyond the bounds of what is proportionate or lawful and now trample on the Article 8 rights of victims. ISVAs are told by officers that certain requests are made because the defence has asked or will ask for them. However, the defence is not entitled to pursue fishing expeditions and is free to make an application to the court if they see fit. It is not the role of the police to follow up every request by the defence, or to try to pre-empt defence requests, but rather to apply a lawful approach to their own duties.

This practice risks deterring many victims/survivors from pursuing complaints, for fear that intimate disclosures they have made in confidence over a number of years in professional therapy will be scrutinised by the investigation team and - if any of it is considered relevant to her credibility - by the man who raped her and his legal team, too. What is worse, victims/survivors are often advised - either by the police, or by SARC staff - that they may wish to avoid counselling/therapy, seek limited forms of therapy which do not involve 'talking therapy', or avoid discussing the rape in therapy sessions, until criminal proceedings have concluded, to avoid any risk that their notes are disclosed and are capable of undermining the prosecution. This poses severe danger to the victim/survivor's mental health, by asking them (implicitly) to choose between getting the help that they need and supporting the prosecution's efforts to convict their attacker.

There are also dangers in placing too great a reliance on the correctness of third-party records that are entirely unconnected with the rape case. We note that CWJ's submission includes an example of a woman was given reasons for NFA of a rape by the police, including that her credibility was undermined by the fact that she had lied to a social worker about whether a previous partner (not the alleged rapist) had been in her house. However, the victim stated that the social worker had misunderstood the events and there had not been any dishonesty on her part. When third parties such as social workers or counsellors make inaccurate records, the victim is sometimes accused of inconsistencies that she cannot explain.

Recommendations

- Multiple government departments working on disclosure issues must work in a joined-up way with sexual violence and abuse organisations and legal experts to look at the specifics and prejudices in RASSO cases, key legal issues and technological possibilities.
- New Principles and a Policy and Practice Agreement on the disclosure of material to the defence in RASSO cases. The disclosure of digital evidence in particular, has enabled practice that already saw unnecessary and gratuitous, sometimes discriminatory, disclosure of materials including medical and school records to the defence in rape cases, which influenced the reintroduction of deeply sexist myths and stereotypes into evidence gathering process. The new Principles must significantly consider (1) victims'

privacy rights; (2) what are reasonable lines of enquiry and then what is truly proportionate and reasonable as a disclosure request (3) the specific myths and stereotypes prevalent around RASSO and how the request and use of particular kinds of evidence is relevant to these. Attention should be given to exactly how and when disclosure requests are made, and legal representation and judicial oversight should be considered an option.

- Therapy and counselling notes should be non-disclosable (akin to legal professional privilege), as firstly therapy and counselling deal with feeling not facts, and secondly it dissuades victims/survivors from accessing the support they need.

The success of organisational strategies and plans, for example the Joint National Disclosure Improvement Plan and the CPS' RASSO 2025 strategy

It is important to note that plans and strategies such as the Joint National Disclosure Improvement Plan and the CPS' RASSO 2025 Strategy have only been introduced relatively recently. It is therefore difficult to assess their successes.

While the sudden activity across the criminal justice system to improve how rape and sexual offences are treated and the Government's concern regarding the falling rape prosecution rates is of course welcome, we do have concerns as to whether these discrete pieces of work are sufficiently joined up. We have been asked to feed into several different strategies, projects and reviews that examine how rape is handled across the criminal justice system, including but not limited to:

- The 'end to end' Rape Review
- The joint HMCPSI-HMICFRS inspection
- The HMICFRS Thematic Review into the police's engagement with women and girls
- Project Bluestone
- The development of a pilot online reporting form for rape and sexual offences
- The cross-Government VAWG Strategy

The sheer extent of work focused on this necessitates strong leadership and accountability to ensure that across the criminal justice system and in Government to ensure work is joined up and delivers better outcomes for women and girls.

Recommendations:

- Ministerial lead on rape who will hold chief constables and CPS leaders to account and champion all issues pertaining to rape and sexual abuse.
- High-level awareness of rape and sexual abuse, and political will to appropriately address and prevent rape and sexual abuse.
- Improved policy join-up between Government departmental teams and strategies.

ENDS

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