End Violence against Women Coalition & Centre for Women's Justice

JOINT MEDIA BRIEFING – 'Q&A' on the court's decision

What was this case about, in a nutshell? Key facts:

- The EVAW Coalition applied to the court for a **judicial review** of decisions made by senior staff at the Crown Prosecution Service from 2016 onwards, which, women's groups believe, precipitated the **catastrophic decline in rape prosecutions** that we have witnessed over the last five years.

- The context to this claim is a shocking and unprecedented collapse in the volume and percentage of rape allegations resulting in a prosecution between 2016 and 2020. Between 2009/10 and 2016/17, an average of 3,446 rape allegations were charged per year. In 2017/18, the annual volume of prosecutions had fallen by **almost a quarter**. By 2018/19, it had dropped by **over a half -** with only 1,758 prosecutions being pursued by the CPS, despite a total of **55,000** allegations being reported that year to the police.

- That judicial review hearing took place on the **26th and 27th January 2021** in the Court of Appeal, and the judgment that has been handed down today represents the court's full and final decision. The Director of Public Prosecutions was the 'Defendant' in the case, as he is answerable for any decisions made by the CPS. He contested EVAW's case.

- EVAW argued, essentially, that the CPS was reckless in making the policy decisions that it made, knowing that it might well result in fewer cases being prosecuted. During the hearing on the 26th and 27th January 2021. EVAW pointed to material that the CPS itself had disclosed in the course of the proceedings, from which it was clear that the CPS was entirely aware of the risks that prosecutors might interpret the policy measures to mean that they should be more risk-averse in their approach to cases.

- EVAW also raised concerns that the CPS had failed to make the public aware of any of the decisions it had taken – either by consulting publicly or even just by announcing the changes – knowing full well that they would likely be criticised.

What is a judicial review, and what does it mean that EVAW were given permission by the court for a hearing of their judicial review claim?

- Judicial review is a legal procedure which allows a court to intervene in circumstances where a public authority's decision-making has been tainted by an error of law, or by procedural unfairness, or it has made a decision that is wholly irrational.

- The court does not have the power to dictate to public authorities, in any detail, how they should approach matters of public policy, but it can quash a public authority decision that has been made unlawfully or unfairly.

- In a judicial review, the court will not usually engage in detailed assessments of factual disputes. Its role, instead, is limited to considering whether – on the agreed facts – the public authority's decision-making can be characterised as lawful or unlawful. Where there is a factual dispute between a Claimant and a public authority in a judicial review, the Court will usually – as a matter of principle – give the public authority the benefit of the doubt over the Claimant. There are however certain limited circumstances when it can depart from this principle, particularly when the areas of factual dispute are relatively narrow, and where there is overwhelming evidence available which undermines the factual point the Claimant is making.

- **This has proved a key difficulty for EVAW, as the DPP has persistently sought to characterise this case as a factual dispute and therefore asked the court to find in its favour.** EVAW does not agree with this characterisation, since many of the allegations that it has been raising for several years about the way in which the CPS appeared to have gone about its decision-making in 2016 **have in fact been borne out by material that the CPS itself disclosed to EVAW ahead of the hearing,** meaning that there is much that is factually undisputed.

- A judicial review hearing will only be permitted if it is considered that the claimant who is seeking to challenge the public authority's decision-making has an 'arguable' case.

- In EVAW's case, the High Court *initially* concluded, in March 2020, that there was no arguable case for judicial review and so refused EVAW permission to take the case any further. This was primarily because the Court was concerned that this case boiled down to a factual dispute and concluded that in these circumstances it was bound to accept the DPP's evidence at face value without scrutinising EVAW's evidence further. The High Court's decision was subsequently overturned by the Court of Appeal in July 2020, who emphatically

agreed with EVAW that the High Court's approach had been wrong, and that its evidence *did* warrant further scrutiny.

What were the policy decisions that EVAW was asking the court to review?

- In 2016, senior figures at the CPS decided on a package of policy and training measures designed to reduce the proportion of rape cases that resulted in acquittal – or, putting it another way, to improve its' conviction rate'.

- These measures were essentially threefold:

  1) **Face-to-face training 'roadshows' were delivered to all Rape and Serious Sexual Offences ('RASSO') prosecutors in 2016 and 2017, by the two most senior members of legal staff at the CPS (the Director of Legal Services and the Principal Legal Adviser). At these trainings, prosecutors were told to stop applying the so-called 'merits-based' approach' to prosecutions (an approach that, up to that point, had consistently been endorsed by the CPS since 2009)**.

     In 2018, the *Guardian* newspaper featured comments from an anonymous prosecutor who had attended one of these sessions and disclosed his concerns about the key messages of the training. In particular, the *Guardian* reported that prosecutors were encouraged **to take a proportion of "weak cases out of the system"** as this would improve the CPS' rape conviction rate. In terms, prosecutors were told: "If we took 350 weak cases out of the system, our conviction rate goes up to 61%". The prosecutor in question described this messaging as a dramatic shift in CPS policy.

     EVAW subsequently obtained a more detailed witness statement from an anonymous whistle-blower within the CPS, confirming the above.

     The CPS has never disputed the wording used during the trainings. It disputes however that it was intended to indicate an institutional change in approach to decision-making in RASSO cases. In advance of the judicial review hearing, however, the CPS disclosed material to EVAW indicating that the Principal Legal Adviser had specifically advised prosecutors to *"tack a slightly different course"* in future when it came to making RASSO charging decisions, and that the merits-based approach should be *"consigned to history".*

2) **A rape' conviction rate' target of 60% was introduced and CPS units were made aware that their performance was being assessed against that target.**

   The CPS has called this target a 'level of ambition'. Around two years later, the target was abandoned, as it was recognised that it was inappropriate. In a statement to the Law Gazette in 2019, the CPS admitted that the conviction rate targets were not appropriate because they provided prosecutors with a *'perverse incentive'* to charge fewer cases, on the basis that picking and choosing their cases more carefully will have the result of driving up conviction rates.

3) **Legally binding guidance for prosecutors (including all explanatory guidance on the 'merits-based approach' to RASSO prosecutors, and other relevant guidance on decision-making) was removed – in a piecemeal fashion, between 2017 and 2018 – from the CPS' internal and external webpages.**

   This was done without any public consultation and without notifying any of the stakeholders – including women's organisations – who, up to that point, had regularly been invited by the CPS to contribute to discussions with regard to any material changes to the CPS' internal or external RASSO guidance.

What *is* the 'merits-based approach' to prosecution decisions?

- In 2009 following the judgment in *R (B) v DPP (EHRC intervening)* [2009] 1 EWHC 106 (Admin); [2009] 1 WLR 2072, the DPP introduced new training and guidance to prosecutors requiring them to follow a **"merits based**" approach to prosecution decisions in sexual offences.

- Training and guidance was implemented in the years that followed which was designed to ensure that 'myths and stereotypes' about rape played no role in prosecutors' decision-making. In particular, it was designed to ensure that prosecutors avoided taking what has been described as a **'bookmakers'** approach' to prosecuting cases, where prosecutors would base their charging decisions not an objective assessment of the evidence, but on their experiences of jury prejudices in past cases, and the kinds of factors that (rightly or wrongly) may influence a jury's decision.

- Over the following years up until 2017, the CPS continued to re-enforce the 'merits-based approach' to prosecutions of sex offences through training, legal guidance for prosecutors, and policy statements. As a consequence of this

positive policy, more rape victims gained confidence in the criminal justice system with more reporting. In the ten years between 2007 and 2017 there was a 48.8% rise in prosecutions and a corresponding 62.7% increase in convictions.

- Guidance on the merits-based approach was never designed to be stand-alone guidance on how to prosecute cases. EVAW and the CPS are in agreement on this fact. It was designed to support prosecutors in understanding how to apply the 'Code for Crown Prosecutors', which is the over-arching code of practice that prosecutors have to apply when making charging decisions in all areas of crime. In defending itself against accusations of a change of approach, the CPS has often sought to rely on the fact that the wording of the 'Full Code Test' within the Code for Crown Prosecutors, which defines the evidential and public interest tests for prosecution, has not materially changed in the relevant period.

- **The particular guidance that was abruptly removed by the CPS in 2016 and 2018** – forming part of the basis of this legal challenge – **included not just an explanation and endorsement of the 'merits-based approach' itself, but several paragraphs of legal/practical decision-making guidance for RASSO prosecutors**. It covered a number of issues that commonly arise for prosecutors in cases involving sexual offences, including decisions relating to the complainant's credibility and the correct approach where a complainant has given 'inconsistent' accounts; the way in which prosecutors should approach corroborating evidence; dealing with risks that evidence might be inadmissible; and properly weighing factors that the defence may say are undermining of a prosecution.

What justification has the CPS given for making these policy decisions?

- The CPS has always maintained, since EVAW first raised these concerns, that the changes to the guidance, and the training sessions delivered by the senior members of legal staff, had been considered necessary as a result of a finding that had been made by the independent inspectorate of the CPS (HMCPSI) in early 2016.

- In an inspection report published in February 2016, HMCPSI had concluded that some prosecutors might not correctly understand existing guidance on the 'merits-based approach' to prosecutions, and therefore be taking some cases forward where the evidence gathered was in fact insufficient to obtain a conviction. **Significantly however, the HMCPSI had also concluded that this 'problem' could be resolved by simply holding a round of 'refresher**

training' that would reinforce the 'merits-based approach' and remind prosecutors of its proper meaning.

- In advance of the judicial review hearing, however, a statement was obtained from Dame Alison Saunders, who had been the Director of Public Prosecutions at the times that the decisions were made. **Dame Alison testified that the controversial training roadshows conceived by her Principal Legal Adviser, Neil Moore and the Director of Legal Services, Gregor McGill, had in fact been decided upon in response to some *"hostile"* media attention that the CPS had received in the spring and summer of 2016, after four sexual offence trials had resulted in acquittals.** She acknowledged in her statement that these four trials represented only a small 'handful' of cases, but indicated that because of the unwelcome publicity they attracted, they were considered cause for concern.

Why does EVAW disagree with these policy decisions?

- **Firstly,** EVAW argued that it was irrational for the CPS to conclude that a sudden shift away from the merits-based approach was actually necessary, or appropriate, in order to improve outcomes.

- Positive trends over the years leading up to 2016 suggested that guidance and training for prosecutors on the merits-based approach had had a **positive** impact. Moreover, EVAW highlighted that the CPS had ignored evidence available in 2016 which indicated that if anything, the merits-based approach was not being applied vigorously *enough,* and that this was resulting in good cases slipping through the net.

- The evidence that the CPS had blatantly disregarded included:

    - **Findings of a detailed independent review published by Dame Elish Angionlini in 2015**, in which she expressed concerns that police and prosecutors – in the London area at least – were still taking 'myths and stereotypes' surrounding rape into account in the way that they approached cases. Her report in fact stated that it was *"especially concerned"* that *policies involving a 'merits-based approach' to decision-making"* were not being applied and *"challenges to myths and stereotypes were not routine."* It specifically emphasised the importance of upholding the merits-based approach in ensuring that prosecutors did not (wrongly) apply a risk averse approach that was overly focused on conviction rates.

- **Internal and external reports produced by the CPS itself, also in 2015** which – far from suggesting that the merits-based approach needed overhauling – concluded that the CPS' existing policies on decision-making were good ones and simply needed further reinforcing. **Significantly too, the CPS' 2015 annual VAWG report had also noted that insofar as the CPS' conviction rates for sexual offences *were* too low, there were <u>other possible causes</u> of that problem,** including the "*quality and expertise of advocates"* representing the CPS at trials, and the significant work that needed to be done to challenge rape myths and stereotypes that could be influencing juries' opinions. No mention was made in that report of misunderstandings surrounding the merits-based approach.

- **In other words:** EVAW's argument was that this was cavalier, 'knee-jerk' policy-making without any proper evidential basis.

- **Secondly,** EVAW argued that the CPS had (recklessly) disregarded legal principles about transparency and due process in the way in which it had gone about the policy measures. Specifically, CPS had not consulted stakeholders about its new strategy or been at all transparent about its new strategy with the public.

- This was particularly shocking given that a memo disclosed by the CPS in the course of the proceedings showed that the decision-makers at the CPS had specifically recognised the danger that the policy measures might cause public concern, and had noted that they would therefore need to be **'properly communicated'** to stakeholders and interested pressure groups**.** Yet despite specifically recognising this, the CPS then decided not to communicate the policy measures to stakeholders or members of the public **at all.** This was despite the CPS having had an established practice, for several years, of consulting organisations working within the field of violence against women (including EVAW, and other stakeholders, on a very regular basis about any important developments in its VAWG strategy.

- In fact, based on internal communications disclosed in the proceedings and other evidence, the CPS did not even appear to have been transparent *internally* (or consistent) as to what its agreed policy was, which – EVAW argued – gave rise to a risk of widespread confusion among prosecutors as to how they should be approaching decisions.

- Confusingly for example, at around the time these measures – designed to steer RASSO prosecutors *away* from the merits-based approach – were first implemented, prosecutors were also receiving 'refresher training' sessions (recommended by HMCPSI) which still endorsed the merits-based approach as

the correct approach. In other words, it seems that prosecutors were at once being told that they *should* apply the merits-based approach, and that they should *"consign it to history".* One of EVAW's arguments was that, if nothing else, this conflicting messaging was likely to have caused total confusion for prosecutors, leaving them without a clue as to how they should make prosecution decisions in this area of crime.

- The CPS' own Rape and Serious Sexual Offences Policy team was, or appears to have been, blindsided by the policy decisions. Disclosure received from the CPS revealed that at least two members of the specialist RASSO policy team later expressed their doubts about the changes. In particular, one senior RASSO policy adviser expressed concerns that much of the guidance that had been removed had always been 'very helpful' to prosecutors, and that removing it had left behind a 'gap' in prosecutors' understanding of the correct approach to RASSO cases.

- **Thirdly,** the reason why all of this mattered – in EVAW's view – was that the policy decisions had – **foreseeably** – caused prosecutors to become far more cautious about bringing charges against suspects, and caused the prosecution rate to collapse.

- **Crucially for EVAW's case: senior figures at the CPS specifically recognised (as is documented in contemporaneous records disclosed by the CPS) that implementing the above measures carried a risk that prosecutors might start applying the evidential test too cautiously, and prosecuting fewer cases.** This risk was however **dismissed**, and the CPS decided to adopt the measures anyway.

What impact have the policy decisions had over the last years, according to EVAW, and was this accepted by the CPS?

- The statistics indicate that prosecutors **did indeed start prosecuting fewer cases** after the CPS' controversial new strategy was adopted. Over time, too, police officers began referring fewer cases to the CPS. Data published by the CPS shows a steep decline in prosecutions, **and an increase – specifically – in CPS decisions to close cases.**

- The CPS has tried to explain away the decline in prosecutions by reference to other possible factors. However, an expert statistician from Oxford University, who exhaustively analysed the available data, **disagreed with the CPS' explanations and found that none of those other factors could, on their own, account for the trends in the CPS' own statistics.** She found that a decline in prosecutions of that nature and magnitude was consistent with the

change of approach that EVAW had alleged, particularly when it was taken into account that the CPS were increasingly refusing to charge cases referred to them by the police.

- EVAW's instructed expert also noted that the decline in prosecutions was combined with a correlating *increase* in the conviction rate: in other words, fewer cases were being charged, but more of the ones that were being charged were resulting in a conviction. This, again, was consistent with EVAW's contention that prosecutors are now being far more selective about the cases that it takes forward – and have followed the instructions received at the 'roadshow' trainings, about weeding 'weak' cases out of the system, literally.

- Disappointingly, the judges decided not to take this compelling expert analysis into consideration at all when making its decision, ruling that the expert evidence was not 'required' to assist the court in understanding the issues.

- The CPS did not provide its own expert evidence to 'counter' the statistical analysis that EVAW had put forward. Nor did they point to any aspect of her methodology with which they disagreed.

Is there any other evidence of the policy measures having had the negative impact that EVAW allege?

- It is clear that others working within the criminal justice system recognise the nature of the problem. **Experienced and high-ranking police officers have now repeatedly expressed their own concerns – publicly and privately – that the evidential bar for prosecuting a rape case has been raised by the CPS and that this is having a chilling effect.**

- Indeed, EVAW specifically brought to the court's attention that concerns about the CPS' approach have now been raised by: the National Police Lead for Adult Sexual Offences, the National Police Lead for Charging, the Chair of the National Police Chiefs' Council, the Chief Inspector of Constabulary, and a number of concerned detectives working on the frontline.

- In addition: under pressure from the National Police Lead for Adult Sexual Offences – and just a few weeks before the judicial review trial – the CPS agreed to review 21 cases out of a larger sample of 146 cases that had been dropped in 2018/19 (and had all been flagged as potentially wrong decisions). **Out of the 21 cases reviewed in detail, the CPS admitted to the Court of Appeal that 15 in total had been wrongly dropped. 10 of these 15 cases were cases that also involved a background of domestic abuse.** We have

been informed by the CPS that prosecutors are now having to establish whether the victims of these crimes can still be traced, and the suspects brought to justice, despite the passage of time.

- In addition, EVAW's evidence included over 20 compelling case studies that it had identified, all involving women or children whose complaints of rape had been refused charge by the CPS. A small number of these women have seen their cases eventually reopened after a lengthy review process that established the original decision was wrong – while others may never see their attacker prosecuted.

- In one of these case studies – where it was eventually agreed by the CPS that two previous decisions not to prosecute had been wrong – **the evidence was *so* strong that when it was eventually re-opened and prosecuted by the CPS following an internal review, the defendant pleaded guilty rather than contest the allegations at trial.** The victim in that case was a child.

Why does the CPS say that it has *not* changed its approach while EVAW argues that it has?

- Significantly, the majority of the evidence summarised above was not disputed by the DPP, and in fact some of EVAW's evidence originated from material that had been disclosed by the CPS itself.

- The DPP however simply maintained that none of this amounted to a change in policy, or should cause the court any concern. He submitted that the package of measures pursued from 2016 were essentially just minor corrective action taken by senior CPS officials to address concerns about prosecutors misinterpreting existing guidance on the merits-based approach, and reinforce the 'proper' evidential test to be applied.

- These concerns about prosecutors misunderstanding existing guidance, he submitted, were justified by the findings of the February 2016 inspectorate report, by the four cases that year that had attracted negative publicity, and by concerns that had been raised by the Director of Legal Services – and echoed by others in senior management – about the relatively low conviction rates for rape.

- Central to the DPP's argument that there had been no change in approach was that both before and after the policy measures were offered, **the universal code of practice that prosecutors are required to apply in all areas of crime – the 'Code for Crown Prosecutors' – remained the same**. This meant

that in broad terms the relevant legal test for prosecutors to apply when making charging, decisions in rape and serious sexual offences cases had not changed. The legal test for them to have regard to was still the 'Full Code Test' that is set out in the Code for Crown Prosecutors, which required them to consider 'objectively' whether there was a realistic prospect of conviction (the 'evidential' test) and whether there was public interest in prosecuting.

- EVAW's case was that this is irrelevant. The combined effect of the controversial training roadshows, the removal of guidance on the merits-based approach, and the imposition of an ambitious rape conviction target, was to **change the way in which prosecutors *applied* the 'Full Code Test' to charging decisions in practice.** Clearly, it is possible to have a *more* risk-averse and a *less* risk-averse approach to the question, 'is there a realistic prospect of conviction?'.

- In fact, the whole point of the guidance on the merits-based approach – that had been removed – was that prosecutors might (in this difficult area of crime) easily place too much weight on factors that they thought might weigh against a realistic prospect of conviction: factors like minor inconsistencies in a traumatised complainant's accounts, or the allegation involving 'one person's word against another'. Steering prosecutors not to follow this guidance had therefore, EVAW argued, left prosecutors not knowing how to approach charging decisions where these difficult issues arose, and often erring on the side of refusing charge.

What evidence did the CPS rely on to demonstrate that it had not changed its approach or become more risk-averse to prosecutions?

- The DPP relied heavily on a report published by the inspectorate of the CPS ("HMCPSI") in December 2019, in which it had not found any cause for concern after reviewing a sample of RASSO files. In response, EVAW pointed to concerns that had been raised about the independence of that review (given the involvement of a number of prosecutors or recent ex-prosecutors, and the lack of external stakeholder input), and about the reliability of its methodology. Concerns had also been raised, for example, that the inspectorate review itself had been extremely rushed in order to meet a Government deadline.

- The other main plank of the DPP's defence evidence was witness evidence from those within the CPS, or formerly from the CPS. These included statements provided by the CPS' Director of Legal Services (who had in most respects been the originator of the policy decisions) and former Principal Legal Adviser, by Dame Alison Saunders (the DPP at the time of the policy decisions), and from a number of current staff members involved in RASSO prosecutions

(including Chief Crown Prosecutors responsible for overseeing prosecutions in various areas of the country).

- All of the prosecutors who had been asked to provide evidence in support of the DPP's defence stated, essentially, that insofar as there was a change in messaging within the CPS from 2016/17 onwards about the proper way to approach RASSO decision-making, they considered it to be "helpful".

- It was EVAW's case, in summary, that the witness evidence to this effect that the DPP had provided simply could not be considered credible in light of other overwhelming evidence available to refute it.

- In one witness statement for example, a Chief Crown Prosecutor had claimed that she did not think there had been any change in practice in relation to rape charging decisions in her area of the country whatsoever in the period after prosecutors received training to stop applying the "merits-based approach". Regional data disclosed from the CPS in the weeks before trial showed however that there had been **a sudden drop of over 60**% in the charging rate, in her region specifically, in the period immediately following the controversial trainings. EVAW maintained that this significantly undermined her suggestion that she had not seen any changes of note in her area. Other statements provided by Chief Crown Prosecutors also followed a similar pattern.

- What is more: two whistle-blowers – both prosecutors with a background in RASSO cases – had provided statements to EVAW in which the spoke of a culture of bullying or deference within the CPS which prevented them from speaking publicly about their concerns about policy changes. As we have explained above, concerns had certainly come to light later from within the CPS' specialist RASSO Policy team.

- EVAW sought to highlight too that witness evidence provided specifically by the Director of Legal Services – which was front and centre of the DPP's defence – was not particularly reliable. The Director of Legal Services had a clear interest in defending policy decisions that he himself had (more or less unilaterally) proposed and taken responsibility for implementing. **They also sought to raise the fact that the Director of Legal Services had no background whatsoever in RASSO prosecutions at the time that he made these policy decisions.** In other words, it was questionable whether the justifications he had provided should be given more weight than concerns raised by, for example, specialist organisations working in the field of violence against women for many years, or indeed members of the CPS' own specialist RASSO Policy Team.

What does the judgment conclude, what evidence does it refer to in making its decision – and what do EVAW/CWJ say about this?

- The Court of Appeal has ruled that none of EVAW's grounds of judicial review because it finds the same problem with all of them, namely that they are all premised on the view that the policy measures amount to a change of approach to RASSO decision-making within the CPS (and that the resulting approach that prosecutors are taking is unlawful). The court has concluded that it is bound to accept the DPP's evidence, all of which seeks to assure the court that there has been no change in approach.

- The judgment refers almost exclusively to the DPP's evidence – rather than to EVAW's evidence – in its reasoning. **This is because the Court has essentially taken the view that it cannot, or should not, 'look behind' the evidence that has been provided by the DPP and question its credibility.** As a result, it has accepted the case made by the Director of Public Prosecutions that there had been **no change *'in substance'*** to the policy that the CPS apply when they consider whether or not to prosecute a serious sexual offence.

- The view that these judges have taken of the case is in fact similar to the view that the High Court took in March 2020 at the 'permission' stage – even though the High Court's decision was later found to be flawed, and overturned. **In a nutshell:** the Court of Appeal has cited case-law at the outset of its judgment which suggests that in judicial review proceedings it is the norm for judges to accept evidence that has been advanced by a public authority at face value, assuming that the public authority has provided that evidence in "good faith".

- **The court has therefore refused to examine EVAW's evidence in any detail** (although it says it has 'considered' all material provided) **and to consider whether it outweighs the DPP's evidence in strength.** We believe that it is important that the public understand this. **It means that this judgment is not an indication that there is no factual (or legal) basis for EVAW claim.** Rather, it is an indication that, as a starting point, the Court has decided to prefer the CPS' evidence and base its conclusions more or less exclusively on evidence advanced by the DPP.

- **EVAW are enormously disappointed that the Court, having taken this view, has therefore chosen not to engage with EVAW's (voluminous) evidence at all.** Consequently, there is **no reference in the judgment whatsoever to:**

    - The concerns raised by police officers on the frontline and senior police officers at a national level about the CPS' approach;

- The detailed evidence provided by the former Director of EVAW as to the importance and impact of the merits-based approach policy; and the CPS' established practice of consulting stakeholders (up until these policy decisions) on any VAWG strategy decisions;
- Evidence provided outlining common trends seen by specialist advocates and other workers supporting victims on the frontline;
- The case studies relied on by EVAW, or the 15 cases that the CPS had recently identified where decisions not to prosecute had been flawed;
- Most of the material disclosed by the CPS in the proceedings which actually supported a number of the contentions that EVAW was making (in relation to the circumstances in which these policy decisions were made)

- **It is perhaps particularly disappointing that the Court has also specifically excluded the entirety of EVAW's expert statistical evidence from consideration**, simply because the Court has formed a view that it is perfectly capable of deciding whether there has been a change in approach without considering the views of experts.

- Indeed, CWJ have expressed their concerns in particular at the way in which the value of the available expert evidence has been characterised – or minimised – in the judgment. Regrettably, the Court has failed to acknowledge that EVAW's instructed expert statistician *not only* found that the data was consistent with the CPS having changed its approach. She also found that none of the alternative explanations provided by the CPS for the decline in prosecutions could fully account for the statistical trends.

- EVAW also consider it remarkable that the Court of Appeal have been satisfied that witness evidence put forward by the DPP, taken at face value, is sufficient to rebut EVAW's case. As we have explained in this briefing, EVAW's view is that witness statements relied on by the DPP to the effect that there had been no intended or actual change in approach are simply not credible when weighed against overwhelming evidence that prosecutors are now more reluctant to charge.

- It is significant too that the Court of Appeal judgment has remarked that "**concerns**" are shared by the CPS and other public bodies regarding the decline in the volume of rape prosecutions. Yet one strand of the CPS' case at the hearing was that it was *necessary* in 2016 to encourage prosecutors to charge more conservatively, as (the CPS felt) some prosecutors might have been overzealous in their approach to prosecuting rape cases up to that point. This, EVAW say, is an extraordinary submission given that *even before* 2016, the vast majority of rape allegations did not make it to trial.

- What is more, EVAW were able to point in their evidence to submissions made by the Director of Legal Services, Gregor McGill, in 2020, to a public inquiry, in which he had stated that the CPS is doing **"better than ever"** at prosecuting sexual offences. This in EVAW's view is an **extraordinary** statement to make at a time when the rate of rape allegations prosecuted is at an all-time low and **would seem to seriously undermine public statements made by the DPP to the effect that they are genuinely concerned about, and anxious to address, the collapse in rape prosecutions.**

In light of today's judgment, have EVAW achieved anything by bringing this challenge?

- Despite their bitter disappointment at the outcome, EVAW and CWJ believe that it was absolutely right to bring this challenge and are proud of what they have achieved by litigating these issues and raising public awareness. In particular, they note that the CPS itself has clearly recognised that mistakes may have been made and that change is needed – albeit that EVAW may question whether it is enough.

- In particular, and significantly:

  - In October 2020, under pressure from the judicial review proceedings, the CPS **did in fact reintroduce the majority of the guidance that they had removed in 2017 and 2018, mostly word for word.** It did so without informing EVAW or the Court of the fact that it planned to do – but nonetheless, EVAW consider this a concession that the guidance in question **should never have been removed in the first place** and is needed to ensure that prosecutors are adopting the right approach. The guidance that has been reinstated no longer includes any explicit reference to 'the merits-based approach', but it does restate the principles that historically underpinned the merits-based approach.

  - At the same time as introducing the above guidance, the CPS also introduced a large volume of new guidance for prosecutors on decision-making in serious sexual offences cases, including new and extensive guidance on 'myths and stereotypes' surrounding rape in the modern age.

  - The Director of Legal Services, we understand, is no longer leading in policy development relating to RASSO.

- The DPP has acknowledged in the *Independent* today that the CPS must take responsibility for driving up VAWG prosecutions in light of the current crisis.

Will EVAW appeal today's judgment?

- EVAW has requested permission from the Court of Appeal to appeal today's decision to the Supreme Court. If granted permission, it will pursue an appeal.