Sir John Gillen Review of Sexual Offences in Northern Ireland: Consultation Response of Dame Vera Baird QC, Northumbria PCC

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This response to Sir John Gillen's consultation on sexual offences in Northern Ireland is submitted to the Metropolitan Police, to contribute to their response. I will submit a separate submission to the Gillen Review in addition.

Public access to trials

The Review recommends access to trials involving serious sexual offences to be confined to the press and close family members.

1. To what extent, if at all, do you agree with this recommendation?

AGREE

- The Irish model should be adopted, whereby in trials of rape and sexual offences, all persons are excluded from the court, except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the Press, a parent/relative/friend of the Complainant and, where the Defendant is not of full age, his/her parent/relative/friend and such other persons (if any) that the judge may permit.
- The only reason that I don't 'strongly agree' with this proposal, is due to the potential that key opportunities to observe court proceedings with an analytical eye may be missed. My office launched a Court Observers Panel in 2015, whereby members of the public (following training from the CPS) observed rape trials from the public gallery. They then reported back their findings, which my office noted with some interest and published in a report[1]. With these observations we have been able to evidence some issues, such as aggressive cross-examination of witnesses, the inappropriate introduction of previous sexual history evidence and the use of rape myths and stereotypes.
- The court system and judiciary, are by their very nature, independent, and not subject to scrutiny or oversight. Therefore, there must be some way that interested parties can be assured that justice is being done in the courtroom – central to the principle of open justice. At present, this is by sitting in the public gallery and watching proceedings.
- I would recommend that the Irish system be adopted, with the caveat that those interested in/researching criminal proceedings, should be permitted entrance to trials. There is of course the risk that by alerting the officers of the court that somebody will be observing, practice may change – the Hawthorne effect. However, my office alerted the judiciary in Newcastle Crown Court that observers would be attending rape trials, and the practice observed was not perfect. Some thought should be given to the system of permitting observers in acknowledgement of such issues.
- It is arguably an inappropriate concession to the principle of open justice to permit some people into the court to observe, but not the public in general. However, as noted in Sir John's

[1] Baird et al. (2016). Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-6. http://www.northumbria-pcc.gov.uk/v2/wp-content/uploads/2017/02/Seeing-Is-Believing-Court-Observers-Panel-Report.pdf

preliminary report, it is rare that the public attend sexual offence trials, except where there is voyeuristic and unsavoury interest in high-profile cases. Or perhaps where associates of the defendant want to put pressure on the complainant giving evidence – through intimidation or the added humiliation of relaying details in front of an audience.

- I believe that allowing bona fide members of the press to attend trials and report, the principle of open justice is still done. The public can still be informed about proceedings, in a way which takes accounts of complainant's needs.
- I would suggest that judgments/case summaries of trials are made public accessible online to reinforce this. At present, to obtain judgments, one must pay a subscription to a legal database, which does not promote open justice.
- This can only encourage complainants, who were previously put off of reporting/pursuing criminal charges due to the negative experience of giving evidence in front of people, to come forward. Given then high rate of attrition and non-reporting in Northern Ireland (and indeed England and Wales) this is to be supported.
- There is previous authority supporting the idea of excluding the public from trials, where is is 'strictly necessary' to ensure justice is done[2]. Rape and sexual offence trials fit this scenario better than most – where justice is often not done as complainants refuse to give evidence, due to the humiliation, fear and shame that they can feel.
- In England and Wales, all family proceedings are conducted in private, in recognition of the confidentiality and privacy needed around such personal matters. Although sexual offences are regarded as a crime against the state and a public harm, the reality is that there is also a great private harm done. Added to the taboo our society attaches to any discussion of sexual matters, the evidence given by a complainant in court is a matter which should be heard privately. Therefore the reasons for private family proceedings can be applied to such trials.
- I do not however, believe that there should be a blanket ban on the court being closed, should the complainant disagree. Some complainants may want their 'day in court', standing up and telling people what the defendant has done. To accomplish a truly victim-centered criminal justice system, an open court should be permitted where requested by the complainant.
- Remote evidence suites should be implemented in NI to add to the suite of options for complainants. Some may wish there evidence to be heard by the public, but not to face the Defendant. Some may not want the public in the court and may not want to be in the same court building as the defendant and his associates. Some complainants may wish to exclude the public while they give evidence, but not for the rest of the trial. All of these options should be available, to improve the experience of complainants, reduce any secondary traumatization or victimization and encourage victims to come forward and engage in the CJS.
- Some argue that special measures, such as the use of screens, combat the concerns of complainants who do not want to be seen or identified. However, even if screens are used, there is still a chance that a complainant, or witness, can be identified through voice, jigsaw identification or general evidence given, particularly in a small jurisdiction such as NI.
- Furthermore, if the situation in NI is the same as E&W, whereby courthouses are still not all equipped with separate entrances/exits, waiting rooms and facilities for complainants and

[2] R v Richards (1999) 163 JP 246.

defendants, the option for a complainant not to attend the courthouse must be possible, to reduce the chance of intimidation or identification.

- The decision whether to exclude the public should not be left to the judge's discretion on a case-by-case basis. The judge is unable to know how the experience will affect the complainant and who will attend, potentially until it is too late.

Anonymity for defendants

Currently those accused of a serious sexual offence can be named after they have been charged with the alleged offence. The Review recommends no change to this so those accused of a serious sexual offence will still be named.

2. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREEE

- The current practice in Northern Ireland, whereby the PSNI will not name those arrested or suspected of a crime until they are charged (save in exceptional circumstances) should remain unchanged.
- Whether this needs to be placed on a statutory footing to ensure it is abided by is a matter for the Department of Justice.
- It is important that the name of person suspected of sexual offences can be released post-charge, to encourage other victims of the same perpetrator to come forward. Given the nature of these crimes, particularly by those in positions of authority, it is common for others to come forward once another victim has, as they will feel there is more chance of being believed if they are not the only person claiming the offence happened.
- For there to be a charge, a certain evidential standard has to be met. This should reassure the public that charges are not simply handed out to everybody suspected of an offence. A good balance is therefore maintained between protecting possibly innocent people from stigma and repercussions and the wider public interest in free and full reporting of criminal proceedings and victims coming forward.
- It is necessary for the principle of open justice that there is free and full reporting of criminal proceedings and those that commit offences.
- I fully agree with Lord Rodger, when he stated that giving defendant's anonymity in order to protect their reputation is tantamount to saying that the '*press must be prevented from printing what is true as a matter of fact, for fear that some of those reading the reports may misinterpret them and act inappropriately*'[3]. Of course properly regulated and self-regulating media is key to this being the case.

[3] Guardian News and Media, [2010] UKSC 1. [para 6]

- The argument that the complainant and defendant should be equal when it comes to anonymity is farcical. Complainants are granted lifetime anonymity to encourage them to speak out without fear of repercussion or scrutiny of their account by the public, which is particularly necessary in cases of intimate crimes. The same reasoning does not apply to defendants.
- There is the chance that a police investigation would be hindered by defendants obtaining anonymity post-charge.
- Arguments of false allegations are often raised in any debate around sexual violence. False allegations are extremely rare.
- There does seem to be merit in the Irish system of only naming defendants if convicted. However, this is not the case in Ireland for all sexual offences where a defendant can be named post-charge, unless his/her naming would lead to the complainant being identified. This is a strong protection in such a small jurisdiction where people are more easily linked and identifiable. 59% of those convicted of sexual offences in Ireland are granted anonymity due to this provision. This could be transplanted in the Northern Ireland context, where the jurisdiction is equally small.
- If the only defendants to be granted anonymity were those in sexual offence cases, this would feed the myth that there is a high rate of false allegations, which is plainly untrue and not to be supported in anyway.
- Defendants of murder and serious assaults can gain the same loss of reputation as defendants of sexual offences. There should be no difference in treatment of defendants with regards to anonymity.
- I am not convinced that schoolteachers accused of sexual offences should be given more anonymity than others. I accept that schoolteachers may be more prone to false allegations by students, however the same rule should apply that they can be named post-charge – where the evidential burden has been met. The public arguably have more of a right to know where people in positions of trust are facing trial for such crimes. To hide those in such positions of power accused of wrongdoing arguably perpetuates the myth that professional people do not commit such crimes, which is of course untrue and likely to promote a false sense of security among the public.

Myths about serious sexual offences

Evidence shows that many myths and stereotypes exist about serious sexual offences e.g.

- Victims are partially responsible due to the way they dress / act / how much alcohol they have consumed;
- Victims will always report the alleged offence immediately and give a very consistent account of events;
- Victims will scream, fight or get injured; and
- False allegations are common.

3. The Review recommends a public campaign to raise awareness of these myths. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREE

- It is pertinent that there is better public awareness on the myths and realities of sexual violence.
- Though there may not be any existing research with real jurors on this subject, there is a wealth of research with mock jurors, court observers, lawyers, survivors, members of the public and others, evidencing the existence of such myths[4].
- For example, in the recent EVAW coalition survey, it was found that:
  - 33% of people in Britain think it isn't usually rape if a woman is pressured into having sex but there is no physical violence;
  - A third of men think if a woman has flirted on a date it generally wouldn't count as rape, even if she hasn't explicitly consented to sex (compared with 21% of women)
  - A third of men also believe a woman can't change her mind after sex has started
  - 24% think that sex without consent in long-term relationships is usually not rape[5]
- In the Northumbria Court Observers project in 2015, the following things were heard in trials:
  - 'Because the victim had stayed in marriage, it could not have been rape, but consensual sex'
  - 'He said she could have left the house, phoned the police or a friend, but instead you went to sleep 'like a married couple''
  - 'But you are a very violent person, you have hit someone with a bottle before, so why didn't you fight when defendant was raping you'
  - 'Defence asked 15 year old complainant why no reports of signs of injury at school and asked if she had discussed compensation'[6]

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[4] Rowson, M. (2014). Corroborating evidence, rape myths and stereotypes: A vicious circle of attrition. Kaleidoscope 6.2.; Seeing is Believing; Ellison, L., and V. Munro. "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation" (2009) 18 Social and Legal Studies 291.; Baird et al. (2016). Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-6; Ellison, L., and V. Munro. "Reacting to Rape: Exploring Mock Juror's Assessments of Complainant Credibility' (2009) 49 (2) British Journal of Criminology 202; Ellison, L., and V. Munro. "A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13 New Criminal Law Review 781; Ellison, L., and V. Munro. "Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial" (2010) 30 Legal Studies 74; Finch, E., and V. Munro. "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16 Social and Legal Studies 591; Temkin, J. "Prosecuting and Defending Rape: Perspectives From the Bar" (2000) 27(2) Journal of Law and Society 219; Torrey, M. "When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions" (1991) 24 U.C. DAVID L. REV. 1013; Westmarland, N. and L. Graham. "The promotion and resistance of rape myths in an internet discussion forum"(2010) 1 (2) Journal of Social Criminology

[5] EVAW Coalition https://www.endviolenceagainstwomen.org.uk/major-new-survey-many-still-unclear-what-rape-is/

[6] Baird et al. (2016). Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-6.

- The law is currently seen as a tertiary response to SV, intervening after an event to sanction the perpetrator. However we also need to look at primary prevention (education) (as well as secondary prevention – intervening with perpetrator programmes etc.).
- The key to achieving gender justice is to change social norms and attitudes through education.
- If a national programme of mandatory school-level education was rolled out to specifically discuss the reality of GBV and gender justice with students, we could have jurors in 10 years who did not hold negative attitudes and falsely held perceptions of SV or DV. In 20 years we could see lawyers who understood the true nature of these crimes; in 50 years judges and legislators who understood the same and would not readily allow sexual history evidence and other damaging information into court and ensure legislation is properly interpreted.
- Education in schools should be compulsory, through PSHE/RSE or the equivalent in each jurisdiction. There should be no possibility for parents or children to opt-out.
- The national curriculum should set out the topics to be explored, rather than allowing each individual school to decide.
- There should also be awareness raising of the general public outside of the education setting

4. The Review also recommends a number of ways of helping jurors in their understanding of serious sexual offences and the myths around them. To what extent, if at all, do you agree with this recommendation for each of the following?

Video – STRONGLY AGREE

- The idea of showing a video about rape myths and stereotypes to a jury pre-trial is an excellent way to educate/alert jurors to the ideas that they may hold, or hear, in the courtroom.
- A video provides a consistent, uniform, cost-effective, time-effective way to ensure all jurors are aware of the prevalence and potential reliance on myths and stereotypes.
- If all jurors across the country see the same video, there is less possibility for controversy.
- As the Gillen Review, notes there is a video to be trialed with jurors at the direction of Sir Brian Leveson in the coming months. The results of this should be taken on board before any video is made and piloted in Northern Ireland.
- Consultation should be had with survivors of sexual violence, organizations such as Rape Crisis, lay members of the public, judges etc., to ensure the video is understandable and covers key aspects.

Directions from the judge – STRONGLY AGREE

- At present, Northern Ireland borrows from England and Wales' Crown Court Compendium, which sets out 14 template judicial directions to common rape myths and stereotypes[7].
- The Compendium came about as a result of the judgment in *R v D (2008) EWCA Crim 2557,* where the Court of Appeal accepted that a judge may give appropriate directions to counter the

[7] Crown Court Compendium 2018 https://www.judiciary.uk/wp-content/uploads/2018/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-june-2018-1.pdf

risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct.

- Whilst these model directions are applaudable, there is no statutory duty on judges to give them, nor any direction as to when they should be given (i.e. at the beginning end, or during the trial).
- Northumbria Court Observers found that these directions were not always given consistently in the 30 trials observed in 2015/6[8]:
  - In 26 of the 30 trials rape stereotypes, as recognised in the model directions, were deployed in the course of the trial by defence counsel in cross examination, during the defence case in closing speech or at all/any of these stages.
    - In 2 of the remaining 4 trials, the observers note that no stereotypes which they recognised were used at all
    - In one of the remaining 2 trials, the observer was called away from T16 and cannot comment and T19 was curtailed at an early stage.
  - In 15 of 30 trials, the judge drew on model directions to dispel a range of stereotypes to the jury right at the start of the case.
    - In 13 of the remaining 16 trials the judge did not use stereotype-busting directions at the start of the case.
    - In 12 of these 13 trials stereotypes were used.
    - In 2 trials the observer was delayed and did not see the earliest minutes of the trial.
  - In 19 of the 26 trials in which the observers noted stereotypes and assumptions in use, directions, similar to the model directions were used by the judge in summing up.
    - In 6 of the 26 trials in which stereotypes were deployed the observers noted that the judge did not use any directions in the summing up in order to address them.
    - In the other trial in which stereotypes were deployed the observer left before the summing up and cannot comment.
    - Oddly, in three trials the Judge used stereotype busting directions at the start, but not in the summing up despite their use in these trials.
- It is suggested that best practice is to give directions at the beginning of the trial and the end – reflecting on the specific myths and stereotypes that have arisen during the court of the trial. I would suggest that a juror video could stand in place of judicial directions at the beginning of the trial, so that all jurors receive the same standard information, with a judge picking up on specific myths at the end, and relaying this back to the video shown and the caution jurors must exercise.
- Any directions must be given in simple terms, so that jurors understand them. I would suggest that a written version be provided to jurors also, so they can read again and absorb at their own pace – this could be at the beginning or end of a trial, before deliberation.

Evidence from an expert – NEUTRAL

- If the criminal justice system was not so under-resourced and stretched, the idea of having expert evidence in sexual violence trials would be a good one.

[8] Baird et al. (2016). Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-6

- However, in reality, this will probably lead to a battle of prosecution and defence experts, which will make trials longer and more complex and put more pressure on an already struggling CJS.
- One look at clinical negligence cases and you will find an expert on every aspect of the proposed injury – a psychologist, a cardiologist, a thoracic expert, an occupational health expert, a nursing expert, a care expert, and the list goes on – one for the defence and one for the complainant, arguing most aspects of the case.
- Not only are experts extremely costly, their availability is poor, and given the nature of criminal cases not being fixed and likely to change date, the possibility of finding and keeping an expert, without messing with a trial timetable, is difficult.
- There are already difficulty in finding professionals such as intermediaries for sexual violence trials.
- I am not against the idea of having experts in sexual violence trials, but this should perhaps be in exceptional circumstances only, where there is a specific issue that cannot be adequately explained by a judge or the standard video showed to jurors. And without expert explanation, the complainant would be at a disadvantage.

In summary, it is crucial that there is some way to educate jurors, or at least point out the fallacy of some myths and stereotypes, which are sometimes so embedded in common understanding.
I would recommend that Northern Ireland (and indeed England and Wales) adopt an approach whereby a video about myths and stereotypes is shown to jurors pre-trial, judicial directions are given at the end of the trial which refer back to the video, as well as picking up on specific myths and stereotypes that have been introduced, and also judges give directions throughout trial where an issue arises.
In addition, I would fully support legislation being introduced similar to the Jury Directions Act 2015 in Victoria, which precludes the judge, prosecution or defence from saying or suggesting anything that suggests complainants or witnesses are unreliable or not credible.

Social media

Social media can have a negative impact in trials of serious sexual offences e.g.

- Removing the defendant's right to a fair trial;
- Making trials unfair; and
- Removing the complainant's right to not be named.

5. The Review recommends helping jurors understand the risks associated with social media. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREE

- There are two main concerns around social media in criminal trials:
    1. Jurors’ use of the internet to conduct research about those in the trial

2. Jurors' use of the internet and social media to communicate with others and publish information about the trial

- We are in a digital age where the internet is used for almost everything and most people are on social media, with the ability to post anything they want. Restricting and/or monitoring this is incredibly difficult, if not impossible, especially considering rights to freedom of expression under Article 10 ECHR. There is no way, and should be no way, to censure people on subjects, without entering dangerous territory.
- High profile trials will undoubtedly be reported on in the media and on social media, and those reports may not always be factual. The likelihood of a juror seeing something about a high profile case, even before they are called for jury service, is increasingly likely today.
- A mechanism for asking jurors if they have previous knowledge from anywhere on the particular case seems appropriate.
- In the case of an extremely high profile trial, a jury-free trial may even need to be considered (discussed below).
- Jurors have to be relied upon to be objective and only use the material presented at trial to make a decision. However, as with the discussion around myths and stereotypes above, this is not always the case.
- Therefore jurors must be educated and alerted to the dangers around relying on media/social media, as they may be unreliable or inaccurate.
- The leaflet given to jurors in England and Wales, at appendix C of the review, is a good start, and responsibilities should be reiterated by the judge, as well as the reasons *why* it is important not to use the internet during the trial. Some examples of cases that have had to be retrialled would perhaps be a good illustration of the importance – along with an explanation of the impact on complainants etc.

6. The Review also recommends making new criminal offences for jurors who do not follow Judges' orders on this issue. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREE

- However, I do not think that jurors can be banned from using the internet at all during their period as a juror, as this is impossible in today's age.
- The Contempt of Court Act 1981 is a good starting point, precluding jurors from publishing anything which creates a substantial risk that the course of justice will be impeded or prejudiced.
- However, the world has advanced since the act was created and additional offences around searching for material could also be introduced. How this would be enforced is a matter for the PPNS and Department of Justice.
- A helpline for jurors to share concerns about other jurors using the internet inappropriately is a possibility. However, there is of course the risk that jurors who want the vote to go one way will use this to rid other jurors.

- The removal of jurors' electronic devices during court hours is a possibility. However, they then of course return home for the evening where there can be no monitoring. However, they may more easily forget things they would have shared online, than if they could have done it at the time.
- On a separate, but related point, I agree with the Review's suggestion of an online public list of orders attached to trials, so that journalists and others are able to easily identify if there are any reporting restrictions on a certain trial. I disagree with the idea of a paid subscription.

Separate legal representation

At present complainants in serious sexual offence cases do not have their own lawyer representing them: the prosecution lawyers represent the state and public interest. The Review recommends that complainants receive legal advice and representation. This would include:

- To explain the criminal justice process; and
- To represent their interests where their medical records or previous sexual history experience may be brought up.

7. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREE

- At present, the defendant has his own legal representation in sexual violence trials, the prosecution barrister represented the state and public interest, and the complainant has no legal advocate to voice her rights.
- Numerous other jurisdictions have already made moves to remedy this in key areas, and this should be rolled out across all jurisdictions, in my opinion.
- A complainant's independent legal representative (ILR) is especially important in sexual violence cases, where complainants face much higher levels of personal scrutiny than other types of criminal trials – particularly with regards to sexual history and personal records.
- In Ireland, separate legal representation (SLR) has been permitted for complainants in hearings regarding previous sexual history evidence, since 2001. The recently enacted the Criminal Law (Sexual Offences) Act 2017, will also allow for complainant's to be heard at a hearing regarding disclosure (s39(9)). Ireland also gives complainants free legal advice at the pre-application stage.
- The Canadian legal system has recognised the need for SV complainants to have a right to be heard where they wish to challenge disclosure. Judges in Canada have also to consider 8 separate factors when determining whether disclosure should be made, including "the nature and extent of the reasonable expectation of privacy", "whether production of the record is based on a discriminatory belief or bias", and "society's interest in encouraging the reporting of sexual offences".

- The case for ILR for complainants is being built in Scotland, particularly following the judicial review of the case of WF[9]. Lord Glennie stated that complainants have to be given a right to be heard in order to satisfy their Article 8 rights. He further questioned further how the Court, who are required to be satisfied that the recovery of the documents would serve a proper purpose and that it would be in the interests of justice to grant the relevant order, able to do that effectively, if the sheriff does not know *"whether there were any particular sensitivities within the medical records which would weigh more heavily in the balance in this case as compared with other cases?"*
- In England and Wales, my office is piloting the use of 'Sexual Violence Complainants' Advocates' (SVCAs), using monies granted by the Home Office, as mentioned in the review. These advocates have been in post for 3 months and are taking referrals from complainants of rape who wish to seek legal advice and support around an ABE interview, and the recovery and disclosure of personal third party material. We also hope to start work around applications under s41 Youth Justice and Criminal Evidence Act 1999 to introduced complainants' previous sexual history in Court, which we have found to be working inadequately and unfairly.
- This is crucial given the current situation across the country, where complainants of sexual violence are routinely being asked to sign consent for any and all of their personal records – medical, dental, counselling, school, local authority – to be recovered and shared with the CPS and potentially the defence.
- This issue came to the fore in a large child sexual exploitation trial in Newcastle recently, where one complainant was told that she was a liar and always had been, utilising a note found in her schools records from many years ago, where she had forged her mother's signature on a letter asking for her to be excused from P.E.
- Given the treatment of complainants in sexual violence cases, as compared with other criminal cases, the need for independent legal representation is key. This is particularly so in Northern Ireland, after reading in the review that the country currently has only 2 ISVAs, with a caseload of over 200 complainants each to support; no Rape Crisis centre; one SARC; and not much else in the way of advice and emotional/practical support for complainants.
- There are a number of arguments against separate/independent legal representation, all of which can be countered:

1. **It intrudes on the defendant's Article 6 rights to a fair trial.**
   This is not the case. In *Brown v Stott*[10] it was held that a limited qualification of Article 6 rights is permitted it is reasonably directed by national authorities toward a clear and proper public objective and if representing no greater qualification that the situation calls for. Ensuring a complainant's Article 8 rights and their proper treatment in the legal system would be a reason to qualify Article 6 rights, particularly if directed only towards key stages of the CJS.
2. **ILR is unnecessary as the Crown has responsibility for the complainant's interests.**

[9] Opinion of Lord Glennie: WF for judicial review of a decision of the Scottish Ministers to refuse to make a determination for legal aid under section 4(2)(c) of the Legal Aid (Scotland) Act 1986 (http://www.scotcourts.gov.uk/search-judgments/judgment?id=2af906a7-8980-69d2-b500-ff0000d74aa7)
[10] [2001] 2 WLR 817

The Crown has 'reached its limit as guardian of the public interest'[11]and often faces an irreconcilable conflict between the public interest and complainant's interests, particularly where disclosure is concerned. The Crown is encouraged to seek full disclosure of a complainant's medical records, and this is often at odds with complainant's wishes and needs.

3. **ILR is unnecessary as the judiciary can intervene to protect the complainant's interests.**
   This is not necessarily the case, particularly where s41 applications are concerned, and it is not the role of the judiciary to protect the complainant's interests.
4. **The cost to the public purse, in providing legal aid.**
   There may be increased cost to public funds; however this would prevent the existing cost to the public purse from abandoned prosecutions and the (often long-term) support required by survivors of SV who require health and welfare services[12]. In addition, the costs of provision in Ireland, set out in the Review, show that it is not the case that there is a huge cost for this provision.

Jury trials

In general, all serious sexual offence cases that are tried in the Crown Court are in front of a jury. The Review recommends no change to this, that serious sexual offence trials should still be held in front of a jury, save in exceptional circumstances where a defendant persuades a judge it is in the interest of justice for a judge alone trial.

8. To what extent, if at all, do you agree with this recommendation?

AGREE

- A departure from a jury trial (aside from the existing circumstance where it is necessary in the interest of justice) should not be considered until improvements have been made to the jury system and given time to evaluate.
- I believe that any decision to depart from a jury trial should take into consideration not only the views of the defence, but of the prosecution too, and the complainant (via the complainants separate legal representation perhaps).
- I agree with the Gillen review in the importance of a jury trial in Northern Ireland, to give every citizen an opportunity to be involved in the CJS.
- Given the current demographics of the judiciary (predominantly white, middle class, older men) it would be controversial to leave decision-making to the judiciary alone, despite the arguments against this regarding judges being better informed and trained to make decisions.
- I am pulled in the same way however by the chance to have a reasoned judgment in a sexual violence case, to give explanation to complainants, lawyers and the public at large, as to why the decision was taken to convict/acquit.

[11] Temkin, 2000
[12] Raitt, 2013

Pre-recorded cross examination

The Review recommends allowing children and vulnerable complainants in serious sexual offence cases to have their questioning by defence lawyers recorded on video before the trial. This could happen away from the court and could later be offered to all complainants in serious sexual offence cases.

9. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREE – where the complainant wishes to be cross-examined in this way.

There are several arguments against allowing pre-recorded cross-examination, most of which can be countered or outweighed by the benefits.

<u>It impinges on the accused's right to a fair trial.</u>

- This is not necessarily the case. The right to a fair trial is fundamental, but does not prevent recognition of complainants' rights or the public interest in complainants coming forward – which is more likely should they be comfortable giving evidence.
- The process of pre-recording both direct and cross-examinations does not interfere with the right of an accused person to a fair trial, as long as defence lawyers have sufficient time to prepare for these examinations, and provided also that resources are allocated to ensure good quality sound and picture.
- This is supported by dicta in the House of Lords judgment in the case of *R v Camberwell Youth Court, ex parte D/G [2005]* UKHL – the Court did not see that there is any necessity for the witness to be in the same room as the accused when giving evidence, or for the witness to give his or her evidence at trial - "what matters, as *Kostorski v Netherlands* shows, is that the defence should have a proper opportunity to challenge and question the witness against the accused.
- Additionally, using the approach of Lord Roger in *R v Camberwell Youth Court* and the approach of the European Court in *Kostovski v Netherlands* (1989) 12 EHRR 434, the Irish judiciary have drawn a sharp distinction between the right to cross-examine on the one hand - which is a constituent element of a fair trial under Article 38.1 of Bunreacht na h Éireann - and the opportunity to physically confront a witness on the other which is devoid of any substantive legal character. The unassailability of the former right was confirmed in *State (Healy) v Donoghue* whereas the discretionary nature of the latter was confirmed in the cases of *White v Ireland* and *Donnelly v Ireland*.

<u>Face-to-face live evidence is best.</u>

- However, modern psychological research doesn't support this, especially since the advent of high resolution pre-recorded video and video-link solutions.

<u>The use of special measures and particularly pre-recorded cross-examination, removes the Complainant from courtroom completely, and may unfairly prejudice the defence of imbue the complainer's testimony with an undeserved level of credibility.</u>

- There is no research to support this.
- There is also the belief that using special measures actually creates a distance between the complainant and the jury which will make it less likely that their account will incite sympathy/be believed.
- Neither argument has been proven.

<u>It brings about difficulties for lawyers in meeting tight deadlines for cross-examination and disclosure.</u>

- The findings of the pilot in England and Wales found that this was manageable. Any new pilot will bring new needs to adapt. There may also be knock on benefits in terms of disclosure – discussed more below – in stopping defence 'fishing expeditions' and limiting disclosure to what is reasonable and relevant, as it should be.

<u>Cross-examination loses spontaneity if the questions are pre-approved</u>

- The questions may be pre-approved by a judge, but not by the complainant, so they are still unexpected.
- Cross-examination should not be able trying to shock and dismantle the witness, but about finding the truth. As long as all questions are asked that need to be, this isn't a consideration.
- This argument is also, I believe, outweighed by the benefit of having appropriate and focussed questions.
- A pragmatic approach by judges would mean that advocates can still ask appropriate and sensitively worded follow-up questions.

<u>The witness may be recalled to give evidence if substantial information emerges after the pre-recorded hearing before the trial, making the idea redundant.</u>

- This is a risk in any trial after the complainant has given evidence.
- Admittedly it is more of a risk with pre-recorded cross examination, however research has found this is rare and will have to be an accepted risk by the complainant who opts for pre-recorded cross examination.

In addition, there are other benefits of pre-recorded cross examination:

- Less risk of re-traumatisation for the complainant
- Better memory recall of the complainant, as they are cross-examined closer to the event(s)
- Tighter deadlines may mean that defence 'fishing expeditions' for third party material are curbed and the case is more focussed on the issues.
- More choice for complainants, which may encourage them to come forward.
- Trials will be shorter, if more focussed and preparation done at an earlier stage.
- Questioning will be more appropriate and sensitive, approved by a judge at a ground rules hearing (a key aspect of any pre-recorded cross examination, in my opinion).

In light of the recent pilot in England and Wales and elsewhere, I recommend pre-recorded cross examination is made available as an option to all complainants who would like it. However, the technology needs to be sound before being rolled out and a pilot in NI would be recommended, as in E&W, to test the system and identify any issues.

Duty to report

Currently section 5 of the Criminal Law Act (Northern Ireland) 1967 requires a person with knowledge of an offence to report it to the police. The Review recommends removing this duty to report an offence, except in cases concerning a child or vulnerable adult where the obligation would still exist to report to the police.

10. To what extent, if at all, do you agree with this recommendation?

STRONGLY AGREE

- If a victim of a sexual offence thinks that anybody they speak about the experience with has to report to the police, this has several effects:
  - Victims will not speak out – thereby not receiving and practical, emotional or psychological help that they need to recover.
  - The true extent of sexual abuse will never be known.
  - The threat of prosecution for those who do not report sexual offences can be used by perpetrators as a way to silence victims – e.g. "if you tell anybody about this, they could go to prison".
  - It removes any agency from the complainant with regards to how they want to deal with what's happened. The majority of victims do not wish to report to the police, for various reasons, and prefer to deal with what's happened in other ways.
  - Mandatory reporting risks the identification of the victim in her/his community, which can bring about condemnation from the community and subsequent stigma and shame.
- Despite the Attorney General's reassurance that it is highly unlikely that it will be in the public interest to prosecute a person for failure to report information received about a rape to the police, the fact that the legislation exists is enough. Not every lay member of the public will be familiar with the guidance. The acknowledgement of the AG that this is likely to create future barriers for victims is accepted, but again, the very existence of the legislation is a barrier. If the legislation is unlikely to be used, then it should be immediately abolished to reassure all members of society that they have a choice in who they speak to about sexual assault.
- The situation is of course different where it is believed that somebody is in immediate risk of harm – particularly children or adults that lack the capacity. I am wary of using the term 'vulnerable adult', as all adults are at some points in their lives vulnerable.

- I suggest that the system in England and Wales is adopted – whereby it is not an offence to report to the police a disclosure of a sexual offence, unless a safeguarding issue is identified. Mainly, but not exclusively, in the following scenarios:
  - Where a child is at risk of harm – e.g. a child has disclosed that their father has sexually abused them, the father is still alive and so the child is at risk of harm.
  - Where a person other than the person who has disclosed the abuse has identified/suggested that somebody else is at risk of immediate harm – e.g. when somebody discloses sexual abuse by their father as a child. That person may not have any contact with the father and so not be risk, but the father may now be caring for other children, putting those children at risk of harm.
  - Where a person discloses sexual abuse by a relative, and it is identified that that relative now cares for a person with disabilities which prevents them from communicating or being otherwise independent.
- There is an incredibly important balance to be struck between protecting those at immediate risk of harm and those that cannot protect themselves, and ensuring victims have agency and control – particularly when sexual offences are rooted in the power of the perpetrator who seeks to strip control from the victim.

Measures complementing the criminal justice system

Only a small number of victims report alleged offences to police. Many later drop out of the criminal justice process. The Review recommends that the Department of Justice consider the idea of victim-led restorative practice. This would take place only when the victim wishes to meet the perpetrator (who must have admitted the offence) with highly skilled facilitators. It would not be available in certain circumstances e.g. child abuse cases, where extreme violence has been used or where there were multiple perpetrators. Depending on the wishes of the victim, this process could be operated within the criminal justice system or outside it.

11. To what extent, if at all, do you agree with restorative practice within the criminal justice system e.g. following sentencing?

AGREE - But only if:

a. The complainant agrees
b. The defendant has been found guilty AND admitted guilt
c. The defendant wants to participate for a genuine reason, not simply to be able to face the complainant again to exercise control/abuse.
d. A practitioner with advanced knowledge of issues such as sexual violence, domestic abuse, coercive control etc. is facilitating.
e. It is not part of a court order – it should be completely voluntary at all times.

- Providing these conditions are met, I believe a form of RJ could be extremely beneficial for some victims who want answers/explanations/acknowledgment from their perpetrators, particularly (as is usually the case), the perpetrator is known to them.
- This is not possible in court, where complainants often want to avoid defendants, particularly when they are claiming they did not commit the offence. And the trial process is focused on the public wrong, not the private element.
- RJ could be used post-conviction, when a defendant is ready to admit their wrong and explain, and when/if a complainant is ready to hear it.
- My biggest concern would be perpetrators who are now out of prison and who committed a sexual offence against their partner in the context of a controlling and coercive relationship.
- I do not think this is a safe context to encourage contact between victim and perpetrator, as the latter may attempt and even succeed, to exert control and re-renter a relationship.
- There are many considerations to be explored and potentially only a small number of cases where RJ would be appropriate and safe.

12. To what extent, if at all, do you agree with restorative practice outside the criminal justice system as an alternative for those who do not wish to report the alleged offence to the police?

DISAGREE

- My main point of disagreement stems from some confusion around how this would work in practice.
- If an RJ process takes place, I believe the defendant should only be participating if he has admitted guilt. What then happens if the complainant decides she would like to pursue criminal justice? Can the fact that RJ took place – and by extension he has admitted guild – stand as evidence in a court? Or will he then be allowed to deny the offence, despite admitting it? Will she be barred from seeking criminal justice once the RJ process has been entered into? I do not agree with any choices of justice being precluded for complainants at any time, as feelings and desires change during recovery and beyond.
- I understand the benefits that may come about for complainants who want answers/explanations but do not want to pursue the CJS route, completely. However practically I cannot see how this can work. Instead we must focus on making the CJS a better arena for victims who may want to come forward, and providing alternative support outside of it for those who do not.

Further comments

13. If there are any other areas of the consultation that you would like to comment on that have not been addressed in this survey please use the box below

- There needs to be a shift in culture when it comes to disclosure, particularly with regards to complainants' Article 8 rights.
- The rules around introducing previous sexual history evidence need to be tightened and monitored.
- Anonymity of complainants should last past death, giving due consideration to the impact on existing family and friends (p85).
- More attention should be given to witnesses – anonymity, privacy rights in disclosure etc. (p296).
- I agree with Sir John that there should not be gender quotas for juries. The dynamics of a jury run deeper than gender and other intersectionalities have just as much/more of an impact – sexuality, religion, race, age, class, education, occupation, background etc. Changing a jury to 50/50 male and female will not necessarily make a difference and also assumes gender to be a binary, rather than a spectrum.
- I think that more consideration should be given to the 'not proven' verdict in Scotland. I think that it should not necessarily be a third verdict, but replace 'not guilty', to make it clear that just because a defendant is found not guilty, does not by any stretch mean they did not commit the crime and the complainant is therefore a liar – as is the hugely common misconception today. There is ongoing campaign and research going on into this in Scotland and I see the points made by both sides. The findings of the research should be awaited before making any decisions on this.
- I disagree with there being any early-guilty plea discount past a certain point post-charge.