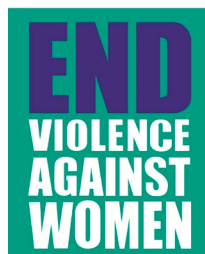


November 2020

# THE DECRIMINALISATION OF RAPE:

## Why the justice system is failing rape survivors and what needs to change

A report by the Centre for Women's Justice, End Violence Against Women coalition, Imkaan, and Rape Crisis England & Wales in response to the England & Wales Government's 'End to End' Review of the Criminal Justice System's Response to Rape



*imkaan*



Each circle represents one of the 100,000 women and girls who experience rape each year in the UK.

# DEDICATION

This report is dedicated to all the women and girls who have sought justice and all the women and girls who have not. We hear you, we see you, we believe you. Together we will build a society that does not tolerate rape.



## Acknowledgements

The authors wish to thank Ruth Bashall at Stay Safe East, Dr Jahnine Davies, Professor Liz Kelly, Rosie Lewis at the Angelou Centre, Professor Vanessa Munro, Dr Olivia Smith, Professor Betsy Stanko OBE, Dr Ravi Thiara, Professor Nicole Westmarland and the many other women who have provided advice, input and support for this report.

This report has been supported by a wide range of our core funders and especially the Isla Foundation.

# ABOUT THE AUTHORS

## **The Centre for Women's Justice (CWJ)**

Centre for Women's Justice is a legal charity which seeks to hold the state to account for violence against women and girls and challenge discrimination within the criminal justice system. We provide training, legal support and referrals for frontline women's sector organisations and bring strategic litigation challenges, as well as drawing on case work to provide an evidence base to influence change in laws, policy and practice of criminal justice agencies. Centre for Women's Justice is a charitable incorporated organisation: Charity Number: 1169213.

## **The End Violence Against Women Coalition (EVAW)**

The End Violence Against Women Coalition (EVAW) is a leading coalition of specialist women's support services, researchers, activists, survivors and NGOs working to end violence against women and girls in all its forms. Established in 2005, we campaign for every level of government to adopt better, more joined up approaches to ending and preventing violence against women and girls, and we challenge the wider cultural attitudes that tolerate and condone this abuse. The EVAW Coalition is a company limited by guarantee (no. 7317881) and a registered charity (no. 1161132).

## **Imkaan**

Imkaan is a second-tier support organisation for the Black and minoritised women and girls ending VAWG sector in the UK. We have 43 members in England, Scotland and Wales.

We provide capacity building and sustainability support to member organisations. We also undertake research, strategic advocacy and policy work from a Black feminist intersectional perspective. Imkaan works in a way to achieve systemic change through the ongoing inclusion of BME women and girls in all aspects of society including by promoting their participation, representation and involvement. Imkaan works around human rights, social justice and equalities frameworks.

## **Rape Crisis England & Wales (RCEW)**

Rape Crisis England & Wales (RCEW) is the national membership body for a network of 40 autonomous member Rape Crisis Centres across England and Wales. RCEW exists to raise awareness and understanding of sexual violence and abuse in all its forms, improve services and promote the needs and rights of women and girls who have experienced sexual abuse, rape and all forms of sexual violence. We also work towards the elimination of sexual violence and abuse, raising awareness in the wider community and with government. Rape Crisis England & Wales (RCEW) is a Charitable Incorporated Organisation (CIO), charity number: 1155140.

**CJS** – Criminal Justice System

**CPS** – Crown Prosecution Service

**CWJ** – Centre for Women’s Justice

**EIA** – Early Investigative Advice (given by CPS to Police at early rape investigation stage)

**EVAW** – End Violence Against Women Coalition

**IICSA** – the Independent Inquiry into Child Sexual Abuse

**ISVA** – Independent Sexual Violence Advisor

**NFA** – No Further Action (criminal justice system decision to discontinue a case)

**ONS** – Office for National Statistics

**PCC** – Police and Crime Commissioner

**RCEW** – Rape Crisis England & Wales

**RASSO** – Rape and serious sexual offences (criminal justice system term for multiple sex offences)

**VAWG** – Violence Against Women and Girls

**VRR** – Victim’s Right to Review (the entitlement of rape victims to ask for their case to be reconsidered by the CPS after it has been discontinued)

### **Victim/survivor**

The authors of this report describe individuals who have experienced rape and sexual abuse as ‘victim/survivor’, in acknowledgement of the different ways individuals define what they have been subjected to, and how this shapes their identities and lives.

### **Rape and Sexual Abuse**

This report often refers to “rape and sexual abuse” together. This is because child sexual abuse as a form of sexual violence is too often forgotten in policy-making, or is perceived as separate when they are not mutually exclusive. Therefore the term “rape and sexual abuse” reminds readers that victims/survivors experience rape in childhood, as well as in adulthood.

### **Specialist Sexual Violence and Abuse Services**

This report refers to specialist rape and sexual abuse services, such as Rape Crisis Centres. A specialist service is one whose primary organisational purpose is to address, prevent and tackle sexual violence and abuse, and support victims/survivors as the primary purpose of the service, and is independent from statutory services.

### **Specialist ‘By and For’ Services**

This report refers to specialist led ‘by and for’ services. A specialist led ‘by and for’ service is one that is led by the same communities that it seeks to serve. e.g. A service for Black, minoritised women affected by gender based violence which is staffed by a board, Director and frontline staff who are themselves representative of Black, minoritised groups. We are aware that the term Black, minoritised is itself a broad term encompassing diverse groups/ identities.

### **Why we refer mainly to women and girls**

In this report we talk mainly about women and girls who are victims/survivors of rape and their experiences. For the authors, women’s and girls’ experiences are where our expertise lies and what we are best placed to analyse and report on. Although the large majority of victims/survivors of sexual violence and abuse are women and girls, we are in no denial that men and boys are also raped and sexually abused. We believe that much of our analysis and our recommendations are very relevant to all victims/survivors and should lead to better access to justice for all victims/survivors. We hope those with expertise on men’s victimisation will comment on our recommendations and talk directly with Government about the ‘end to end’ Rape Review.

# EXECUTIVE SUMMARY

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. Home Office figures suggest that rape complainants now have a 1 in 70 chance that a complaint made to the police will even result in a charge, let alone a conviction. This represents a truly unprecedented crisis in rape prosecutions.

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.

For many victims/survivors, the criminal justice system is therefore not experienced as a site of protection, but as a site of harm that compounds the trauma of rape and sexual abuse. The system is often re-traumatising, and for specialist sexual violence and abuse practitioners who support victims/survivors, profoundly demoralising.

Victim/survivors, overwhelmingly women and girls, will experience the criminal justice system in ways that will be shaped by race, age, faith, gender identity, migrant status, class and socio-economic background, disability, and sexuality. Addressing the challenges posed by gender-based violence for the criminal justice system and society more widely, requires a deeper understanding of the wide-ranging and intersecting and structural inequalities that drive it.

## 1

### LEADERSHIP AND ACCOUNTABILITY

- A new designated 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
- An in-depth review of CPS governance
- An ongoing and Government backed public awareness campaign about consent and rape myths

## 2

## ACCESS TO JUSTICE FOR ALL

- We recommend 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
  - We recommend that 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
- 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

## 3

## VICTIM/SURVIVOR ADVOCACY AND WRAP- AROUND SPECIALIST SERVICES

## 4

## POLICE, CPS, COURTS, JURIES

- 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’.
- We recommend 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.
- We recommend that the ‘admin finalised’ category of rape casefiles at the CPS is abolished and replaced with a clearer categorisation.
- We recommend formalisation of the process of seeking ‘early investigative advice’ (EIA) by police from CPS.
- We recommend that all cases which are discontinued, whether at police or CPS stage, be reviewed by gender/race/class/age/disability and results analysed and reviewed annually
- We recommend 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
- We recommend a review of the courtroom cross-examination rules.
- We recommend 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
- We recommend that legal profession leaders 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.



# How prospects of going to trial diminish dramatically at every stage of the criminal justice process

**100,000** adults are raped every year, 85,000 women 12,000 men

### Most women never report rape to the police

- Fear of the perpetrator
- Fear of not being believed
- More urgent basic survival needs
- Worry about impact on family & friends

**20%**

Only 2 in 10 women who have been raped report to police

### Police investigation and CPS charging decision

- Offence is recorded
- Detective is assigned to investigate
- Victim becomes a "witness", with less rights than the defendant
- Police and CPS liaise on evidence gathering
- CPS make charging decision

**Only 3%**

of reported cases see a suspect charged

**42%**

of trials result in guilty verdicts

### In court

- Delays in getting to court can run over two years
- Cross-examination can be extremely traumatic
- Rape myths are commonly used to attack victim credibility
- Unanimous jury verdict needed for conviction

**58%**

of trials are acquittals

### Aftermath

- Living with the consequences:
- Long-term flashbacks, depression/anxiety and PTSD
  - Lost employment and education chances
  - Difficulty trusting others and forming relationships
  - 8,000 rape survivors are on waiting lists for Rape Crisis counselling

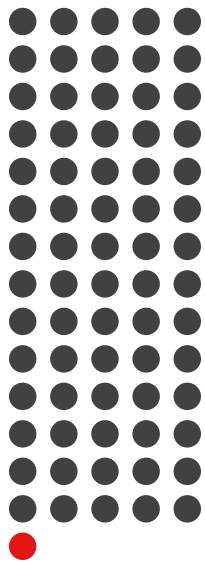




# TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>1</b>
<b>INTRODUCTION</b>	<b>7</b>
<b>THE LAW OF RAPE AND WHAT VICTIMS SHOULD EXPERIENCE IF THEY REPORT RAPE</b>	<b>11</b>
<b>WHAT IS GOING WRONG AND WHY ARE WOMEN BEING FAILED?</b>	<b>19</b>
<b>WHAT THE STATISTICS SHOW</b>	<b>43</b>
<b>RAPE SURVIVORS ON THEIR EXPERIENCES OF SEEKING JUSTICE</b>	<b>49</b>
<b>OUR RECOMMENDATIONS TO THE GOVERNMENT'S RAPE REVIEW</b>	<b>67</b>
<b>CONCLUSIONS</b>	<b>80</b>

# INTRODUCTION



## 1 in 70

In July 2020 official figures showed that a victim/survivor reporting rape had around a one in 70 chance of the case being charged

Around

## 100,000

adults are raped every year  
85,000 women  
12,000 men  
ONS 2013

Rape and sexual abuse is a common experience

## 6.5%

of women and

## 0.3%

of men experienced rape during their lives  
(ONS, 2018)

## Context

There is something extremely wrong with the investigation and prosecution of rape as a crime in England and Wales. At the very point when more victim/survivors than ever are reporting rape to the police, the number of cases proceeding through the system and into the courtroom has collapsed. In July 2020 official figures showed that a victim/survivor reporting rape had around a one in 70 chance of the case being charged, and because of the diminished volumes of prosecutions, actual convictions are at their lowest numbers on record. Rape and sexual abuse have been effectively decriminalised.

Rape and sexual abuse is a common experience: around 6.5% of adult women and 0.3% of adult men have experienced rape during their lives (ONS, 2018). These crimes are common, not exceptional, and are a cause and consequence of gender inequality; the authors of this report assert that rape and sexual abuse is situated within societal norms that hyper-sexualise women and girls, and perpetuate harmful ideas around men's sexualities and entitlement. The ONS figures are however limited, as institutional sexual violence and abuse experienced by disabled and/or older people in care homes is not captured, which makes their experiences invisible and therefore ignored. Victim/survivors frequently experience more than one type of gender-based violence, which often intersect and overlap. These include - but are not limited to - child sexual abuse, rape, sexual exploitation and trafficking, sexual assault, forced marriage, domestic abuse, so-called "honour" based abuse, and female genital mutilation.

In response to the state of affairs in the criminal justice system, the Government announced in March 2019 a comprehensive 'end to end Rape Review' to examine what is happening at each stage of a rape investigation, from the point of report, to courtroom verdict.

the 'demand' for  
justice is at a critical  
point

#MeToo

#Ibelieveher

The Rape Review has been conducted under the auspices of the Criminal Justice Board with participation from the relevant Government departments, Police and CPS, and has taken some evidence from voluntary sector stakeholders. The authors understand that it plans to report on its first stage in late 2020, with findings and an action plan, and then to continue looking into attrition rates and courtroom decision-making into 2021.

This report arrives at a time when the 'demand' for justice has been increasing as never before; the system has buckled at a critical point. Reports of rape to the police nearly tripled between 2014 and 2018. Attitudes to sexual consent and believing women who report are changing for many, and have been under a major spotlight across news, entertainment and social media with #Ibelieveher and #MeToo. Due to the considerable public and media interest in cases of child sexual exploitation in many English towns, the Jimmy Savile sexual abuse scandal, and the trials of multiple high profile men for sexual offences from 2012/13, more victims/survivors came forward to report both recent and non-recent incidents of rape and sexual abuse. A wide-ranging public inquiry into child abuse, IICSA, was also established as a way of recognising the scale of desertion of our collective duty to protect children from sexual abuse, and making commitments to never allowing this to happen again.

Despite these considerable social flashpoints and changes, rape and sexual abuse is still treated with a worrying form of exceptionalism in the justice system; in no other crime type are prejudices about a victim centred in the investigation and prosecution. Society, including our justice system and the media, remains more focused on the potential damage to an accused man's reputation than to systemically tackling the severity of rape and sexual abuse, which can devastate lives.

The authors of this report acknowledge the inherent injustices of rape and sexual abuse on a victim/survivor's life, beyond the harms often perpetrated by the criminal justice system. Although victims/survivors experience rape and sexual abuse in numerous and different ways, there are common experiences that arise from the harm and trauma. These can include (but are not limited to): physical and mental health issues including depression, anxiety, PTSD, substance misuse, fertility, eating disorders, and chronic pain; breakdowns in personal, family, and community relationships which further impact wellbeing; disruption of educational attainment and career opportunities.



## Intersectional analysis

Four independent organisations specialising in sexual violence and abuse service provision and women’s rights have come together to write this report in order to present an analysis of what is going wrong in the criminal justice system’s response to rape, and to set out our recommendations for change. The authors also set out to centre the experiences of victims/survivors within this report. This means we both set out how the criminal justice response to rape could be improved, but we also problematise the inherent problems within the system, which are what lead to only a minority of victim/survivors of rape and sexual abuse ever accessing it.

In advocating for the transformation of the criminal justice system, the authors of this report do not prescribe access to it as a means for victims/survivors to cope and recover. We recognise that the concept of “justice” is not the same for all victims/survivors and will not always reflect conventional notions of justice. The criminal justice system is not always seen as a site of protection, but sometimes a site of harm because of existing inequalities, which adds to the trauma of rape and sexual abuse. Victim/survivors, overwhelmingly women and girls, will experience the criminal justice system in ways that will be shaped by race, age, faith, class, gender identity, migrant status, socio-economic background, disability, and sexuality (Combahee River Collective, 1979, Crenshaw, 1990, Collins, 1990). Addressing the challenges posed by gender-based violence for the criminal justice system and society more widely, requires a deeper understanding of the wide-ranging and intersecting and structural inequalities that drive it.

The theme of rape myths and stereotypes is woven throughout this report and provides the foundation to what is going wrong in the criminal justice system, as well as the ways in which victims/survivors experience it. The extent to which victims/survivors are being failed is drastic, and the purpose of this report is to outline the ways it is doing so, and set out recommendations for change. Although the authors recognise that the criminal justice system largely allows perpetrators to commit rape and sexual abuse with impunity, it is important to acknowledge the structural inequalities that lead to the conviction and incarceration of certain perpetrators over others. In sexual violence cases, white suspects are significantly more likely to avoid further investigation, especially if the victim is from a minoritised group, whilst offenders are more likely to be prosecuted if they are from a minoritised group (Hohl and Stanko, 2015). The Guardian also revealed that younger adult male defendants are significantly more likely to be found not guilty than older men in similar scenario rape cases (Guardian FOI investigation, September 2018).

“Victim/survivors, overwhelmingly women and girls, will experience the criminal justice system in ways that will be shaped by race, age, faith, class, gender identity, migrant status, socio-economic background, disability, and sexuality”

# REPORT STRUCTURE

## 2. Law of rape

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We assess the law on rape and what victims should expect when they report; this section comprehensively outlines laws, and how it is implemented in rape cases

## 3. What's going wrong

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We consider in length the different components contributing to what is going wrong and how women and girls are being failed

It is incumbent on all those who hold responsibility for the effective detection, sanctioning and deterrence of crime to make the highest priority of changing the response to rape.

## 4. What the statistics say

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We set out the data on rape prosecutions

## 5. Victim/ Survivor Experiences

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Looks into victim/survivors' experiences of the criminal justice system, which should lead all policy and procedural processes

## 6. Recommendations

---

We provide recommendations to the Government and other system leaders for change

## 7. Conclusions

---

Outlines our vision for women and girls, and for all survivors of sexual violence and abuse. These relate to the criminal justice system, but speak to wider society

The situation cannot stay as it is, with women and girls being seriously harmed and systematically discriminated against in the failure to respond.

THE LAW OF RAPE AND WHAT VICTIMS SHOULD EXPERIENCE IF THEY REPORT RAPE







## CHAPTER 2:

### LAW OF RAPE AND WHAT VICTIMS SHOULD EXPERIENCE IF THEY REPORT RAPE

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Definition of Rape	13
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---

Myths and Stereotypes	16
-----------------------	----

---

The Duty to Investigate (and Prosecute)	17
---	----

---

Victims Right to Review	18
-------------------------	----

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The Equality Act and Public Sector Equality Duty	18
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# THE LAW OF RAPE AND WHAT VICTIMS **SHOULD** EXPERIENCE IF THEY REPORT RAPE

## DEFINITION

In the modern age rape became defined as a crime against the person, although it continues to be blighted by ancient patriarchal attitudes which pervade the criminal justice system



Historically, the offence of rape was concerned particularly with the “theft of virginity, abduction, and forced marriage” and was essentially a crime against the property of men. As we have entered the modern age rape became defined as a crime against the person, although it continues to be blighted by ancient patriarchal attitudes which pervade the criminal justice system and are perhaps largely responsible for the level of impunity, even today, associated with the crime of rape.

There have however, over the last few decades, been a number of very significant improvements to the law aimed at addressing the range of difficulties faced by victims of rape from securing justice against perpetrators. These include:

**1956**

Sexual Offences Act which first created a statutory offence of rape defined as ‘unlawful sexual intercourse with a woman without her consent’

**1992**

Sexual Offences Act (Amendment) – which introduced lifelong anonymity for victims of rape and serious sexual assault

**1956**

Section 142 Criminal Justice and Public Order Act (CJPOA) removed the provision of unlawfulness, there by enacting the decision of the House of Lords in *R v R* [1991] 4 All ER 481, which held that rape could take place within marriage. It also extended the crime definition to male victims of rape and included anal as well as vaginal intercourse.

**1999**

Youth and Criminal Evidence Act introduced the use of special measures for vulnerable witnesses including those giving evidence in rape trials which included the use of screens and video link evidence. It also crucially prohibited cross examination of the complainant about her previous sexual history unless a formal application is made to the judge as to its direct relevance to the question of consent.



The modern law of rape is set out in the Sexual Offences Act 2003 which succeeded and sought to improve previous legislation as set out in the Sexual Offences Act 1956, following a lengthy public consultation. The key defining clause of the 2003 is s1 which states:

#### Definition of Rape:

(1) A person (A) commits an offence if:

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

The **Sexual Offences Act** additionally incorporates other offences including:

- >> S.2 Assault by Penetration
- >> S.3 Sexual Assault
- >> S.4 Causing a person to engage in sexual activity without consent
- >> Ss.5-8 Offences against a child under 13
- >> Ss 9 – 13 Offences against children under 16

With respect to **children**, the age of consent is 16 and there is no defence to sex with a child under 16, although if a defendant argues they believed the victim was 16 or over, this defence can be used but not if the child was younger than 13

S 74 SOA provides the statutory definition of rape

“...a person consents if he agrees by choice, and has the freedom and capacity to make that choice”

## s.75 Evidential Presumptions

If these are present, a presumption is raised that there is no consent, which can be rebutted by evidence. These include:

- (a) Violence against the complainant;
- (b) Complainant made to fear violence;
- (c) Complainant falsely imprisoned;
- (d) Complainant asleep or unconscious;
- (e) Complainant has a physical disability affecting communication;
- (f) Complainant stupefied by drugs administered by D or another

## s.76 Conclusive Presumptions

If these are present, consent is presumed absent. These include:

- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
- (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

The test as to the defendant's reasonable belief in consent was a crucial reform designed to overcome the so called 'rapist's charter' enshrined in DPP vs. Morgan ([1976] AC 182), a judgment of the House of Lords. In that case, a man brought three friends back to his home to have sex with his wife, telling them she was up for it and if she resisted that would not mean she was not consenting because that's how she liked it. The court held that the test for the jury was whether the defendants honestly believed she was consenting even if that belief was unreasonable in the circumstances.

The amendments made in the 2003 Act were intended to allow a more objective assessment as to whether the belief of the defendant was reasonable in the circumstances.



Rape Occurs Between Strangers in Dark Alleys

**MYTH 1**



Women Provoke Rape By The Way They Dress or Act

**MYTH 2**



Women Who Drink Alcohol or Use Drugs Are Asking to Be Raped

**MYTH 3**



Rape is a Crime of Passion

**MYTH 4**



If She Didn't Scream, Fight or Get Injured, It Wasn't Rape

**MYTH 5**



You Can Tell if She's 'Really' Been Raped by How She Acts

**MYTH 6**



Women Cry Rape When They Regret Having Sex or Want Revenge

**MYTH 7**



Only Gay Men Get Raped/Only Gay Men Rape Men

**MYTH 8**



Prostitute/Sex workers Cannot be Raped

**MYTH 9**



If the victim didn't complain immediately it wasn't rape

**MYTH 10**

## Myths and stereotypes

In addition to the change in statutory definition, a range of measures have been introduced to address the presence of commonly held myths and stereotypes. Guidance and training on rape myths and stereotypes are provided to all specialist prosecutors and police officers, as well as judges and they have been incorporated into incorporated into the Crown Court Bench book in 2010 with the aim that judges can direct the jury away from reliance on any such myths and stereotypes.

In addition to the presence of these important guidelines, all criminal justice agencies have over the last two decades introduced mandatory training, policies and additional guidance on the proper approach to the investigation, prosecution and trial of rape to ensure that complainants are treated appropriately by the police, that investigations are thorough, that appropriate disclosure is provided to defendants, that charging and prosecution decisions are made according to the appropriate tests and standards, and that both defendants and complainants receive a fair trial where justice can be delivered.

For example, police training and guidance incorporated a 'pro-belief' approach which was designed in recognition of the fact that only a very small proportion of women who are raped decide to report primarily due to the fear of being disbelieved. The pro-belief approach instructed officers to start with the presumption that a woman who reports rape is telling the truth (much as this is taken for granted with other crimes reported), and guard against stereotypical beliefs, such as that a woman only reports rape as she regrets having sex or wants revenge.

Under the Prosecution of Offenders Act 1985, the Director of Public Prosecutions must introduce a Code for Crown Prosecutors to provide guidance on decision making in respect of the charging and prosecution crimes. The Code provides a two stage test for prosecution decision:

- > the 'evidential stage' – prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction
- > the 'public interest stage' – where the evidential test is passed, prosecutors must consider whether a prosecution is required in the public interest

Following the 2003 Act, the CPS introduced specific policy on the investigation of rape and created specialist prosecutors in Rape and Serious Sexual Offences (RASSOs) units. Following a Divisional Court decision in *R(B) v DPP* [2009] EWHC 106 (Admin) which concerned the proper application of the evidential test, the DPP introduced merits based approach to ensure rape and child sexual abuse prosecution decisions were made by way of an objective analysis of the evidence and not with reference to likely jury decision making. The latter approach, referred to as the 'bookmaker's approach, would be more prone to the influence of myths and stereotypes.

### The duty to investigate (and prosecute)

Despite the presence of some excellent policies and guidance within the police and CPS, unsurprisingly these are not always adhered to, and failures can lead to the collapse of investigations and prosecutions with the ultimate consequence that victims don't get justice and sexual predators are free to attack again. Up until recently, it was not possible to hold the police accountable in law for failures in the investigation of serious crimes, as the courts have consistently held (since the House of Lords judgment in the 'Yorkshire Ripper' case, *Hill v Chief Constable of West Yorkshire Police* [1988] 1 AC 53) ) that the police should be immune from claims in negligence with respect to the investigation of crime.

However, the Human Rights Act has provided another avenue for holding state bodies to account for failures to protect and investigate.

In 2018, the Supreme Court upheld the decisions of the lower courts in their findings on a case involving two victims of the notorious serial rapist black taxi driver, John Worboys, that the police do have a duty to conduct an effective investigation. In *Commissioner of Police of the Metropolis v DSD and Anor* [2018] UKSC 11 it was held that substantial failures may, and did in this case, amount to a violation of the two claimants' human rights as enshrined in Article 3 of the European Convention of Human Rights. Article 3 ECHR provides that all member states have a duty to ensure that no one shall be subject to torture or inhuman and degrading treatment. The courts accepted that rape and serious sexual assault amount to inhuman and degrading treatment. They held that the duty under the HRA on the state was not limited to acts performed or omitted by state agents but included a positive obligation to protect citizens. This positive obligation included both

- (i) A duty to have system of laws and procedures in place aimed at protection the 'systems duty' - and
- (ii) A duty to effectively investigate crimes committed by third parties where the Article 3 threshold was reached – the 'operational duty'.

In the Worboys case, the Supreme Court upheld the lower courts' rulings that there were a series of serious flaws in the investigation which, taken together, amounted to a breach of operational duty. This led to a declaration that the Claimants' human rights had been violated and an award of compensation.

This principle can also potentially be extended to other state actors and, for example, established that there is a duty to prosecute such cases effectively.

In addition to the European Convention on Human Rights, EU law has provided a series of helpful directives in respect of the rights of victims and additionally the UK has ratified the UN Convention on the Elimination of All Forms of Discrimination (CEDAW) and is committed to ratifying the Istanbul Convention, which both enshrine additional rights which impact on the way rape is investigated, prosecuted and tried.

## Victims Right to Review

Following the Court of Appeal decision in *R v Christopher Killick* [2011] EWCA Crim 1608, the CPS introduced the Victims' Right to Review Scheme in 2013. This gave all victims of crime a right to request that a decision made not to charge or a decision to discontinue proceedings should be reviewed. Police forces also instituted Victims' Right to Review schemes in April 2015 enabling all victims of crime, where a suspect had been identified and interviewed under caution, to ask for a review of a decision not to charge or not to refer a crime to the CPS for charging. The CPS has a two stage process for VRRs: First it will be considered by the local team, and subsequently can be referred to an independent appeals panel. There is only one stage for the police.

The Director's Guidance on Charging provides that the police, after concluding their investigation, must apply the Full Code Test, and only refer cases to the CPS where they believe the Full Code Test is met. However, in cases that are factually or legally complex, the police should refer the case to the CPS. The test for decision-making in the VRR process is whether the original decision not to prosecute was "wrong". If a decision not to prosecute is confirmed, the only remedy available to challenge the decision in the High Court by way of judicial review.

The Equality Act 2010 legally protects people from discrimination in the workplace and in wider society. Anyone with a protected characteristic (which includes sex, race, disability, age, gender identity, sexual orientation, religion or belief, marriage or civil partnership), is entitled to equal treatment before the law.

## The Equality Act and Public Sector Equality Duty

The Act introduced the Public Sector Equality Duty which requires all public authorities to have regard in the exercise of its functions to the need to eliminate discrimination, foster good relations and promote equality of opportunity. This duty thus applies to the actions and decision making of all criminal justice agencies including the police, CPS and the Courts.

Women are the majority of rape victims/survivors and therefore any disparity in the approach taken in the investigation and prosecution of rape as compared with more gender neutral crimes could fall within the definition of indirect discrimination. Disabled women and in particular women with mental health problems and learning difficulties are statistically less likely to have their cases charged or prosecuted. Black and minoritized women face additional hurdles in accessing justice, as recently evidenced in Imkaan's research, 'Reclaiming Voice', which demonstrated the many different ways minoritized women are forced into silence at personal, family, community and societal levels, thus inhibiting the reporting of rape.

"Disabled women and in particular women with mental health problems and learning difficulties are statistically less likely to have their cases charged or prosecuted."



WHAT IS GOING WRONG, AND WHY ARE WOMEN BEING FAILED?







## CHAPTER 3:

### WHAT IS GOING WRONG, AND WHY ARE WOMEN BEING FAILED?

---

Obstacles to conviction 22

---

Policy of 'belief' vs policy of disbelief: impact of the Henriques report and the 'falsely accused' 24

---

Austerity - and policing 'short-cuts' 27

---

Recurring issues at the level of police decision-making 28

---

Disproportionate demands for evidence - particularly when it comes to victims' personal data 29

---

# WHAT IS GOING WRONG, AND WHY ARE WOMEN BEING FAILED?

## Introduction

As we have outlined in the previous section of the report, the law has – in principle – tended to evolve, along with social norms and understanding, to better recognise the rights of victim/survivors who speak out about sexual abuse, and drive better criminal justice outcomes.

Despite all this, only a minute proportion of complaints made to the police now result in a conviction. As has now been widely reported, since 2017 we have witnessed a record slump in the rate and indeed volume of complaints progressing through the criminal justice system. Home Office figures suggest that rape complainants now have a 1 in 70 chance that a complaint made to the police will even result in a charge, let alone a conviction. This represents a truly unprecedented crisis in rape prosecutions.

Even in ‘better’ periods, rape cases have always posed very significant challenges for prosecutors. While volumes of convictions have fluctuated over the years, the rate of convictions for rape has invariably been lower than in most other areas of crime.



Even in ‘better’ periods, rape cases have always posed very significant challenges for prosecutors. While volumes of convictions have fluctuated over the years, the rate of convictions for rape has invariably been lower than in most other areas of crime.

To consider why this is so, we have to take into account how inherently ill-suited our adversarial system is to proving allegations of this nature, and the obstacles that must be overcome in the courtroom before a defendant accused of rape can be convicted:

## 1. Obstacles to conviction

In the vast majority of (adult) rape cases, the defendant will accept that sexual intercourse took place, and it is only the element of 'consent' that is in dispute, or – put another way – whether a reasonable person would characterise what happened as consensual or non-consensual.

Given the sexual nature of the offence, it will often take place in private, the complainant and defendant (or defendants) being the only persons present.

There are very rarely any eye-witnesses to the offence itself, able to corroborate either the complainant or the defendant's account as to what has unfolded. Indeed, there will more often be no independent evidence at all which corroborates the complainant's account as to the circumstances of the sexual encounter. At best, there may be circumstantial evidence which supports what the complainant is saying: evidence which, for example, provides a picture of the complainant's physical or mental state before and/or after the attack; or there may be evidence which is broadly supportive of her credibility, or undermines the suspect's credibility.

In this jurisdiction, we have an adversarial system for adjudicating criminal allegations, no matter what the crime.

This means that before a jury can reach a verdict, it will hear from two advocates – an advocate for the prosecution, and an advocate for the defence – who will present two alternative versions of events, using the evidence available in the way that best assists the case that each, respectively, wants to make. At the heart of an adversarial trial, therefore, is a competition between two advocates, each seeking to convince a jury that they have 'won their case'.

The jury's role is then to assess the evidence it has heard, which may be limited, and decide whether the prosecution has proven its case. It cannot compel further evidence or in any way investigate deeper.

Jurisdictions which have an inquisitorial system approach criminal cases differently: the court, or a part of the court, will be actively involved in investigating the facts of the case. Once the court believes that it has investigated fully, it will decide on its own version of events, and reach a verdict accordingly.

It should be remembered, too, that in our adversarial system the defence does not have the same duty of candour as the prosecution. Although the prosecution will always be arguing just one side of the case at trial – advocating that the defendant is guilty – both the police and the prosecution are actually required by law to ensure that the facts of the case are extensively, and fairly, investigated, and that any evidence available which might assist as well as undermine the defence case is disclosed to the defendant, who may choose to rely on that evidence in court.

The defendant's legal team does not have the same responsibility. While the defendant's lawyers have a duty not to positively mislead the court by advocating that any evidence is true which they know categorically to be false, they do not have an active duty to investigate whether their client is telling the truth, or make known to the prosecution or the court anything which might undermine the defendant's account.

What is more, the guilt or innocence of a defendant in a rape case within our adversarial system is only ever decided by a lay jury rather than by a magistrates' bench, a judge, or any other specialist assessors.

This is because rape – being one of the most serious offences with which a person can be charged – is classed as an 'indictable only' offence, and so can only be tried in the Crown Court, where all cases are determined by a jury of 12 lay members of the public. The role of the presiding judge in a Crown Court trial is limited to resolving issues of law that may arise before or during the trial (in the absence of the jury); to guide the jury on the matters that it must take into account, as a matter of law, when reaching its decision; and to determine the appropriate sanction in the event that a defendant is convicted. The trial judge does not play a role in assessing a defendant's guilt.

We do not 'vet' potential jurors in this jurisdiction, nor is any specialist expertise or understanding required to serve on a jury, no matter what the nature of the case. This, too, is a long-standing tradition. As highlighted in the previous section of this report however, it has been widely accepted by criminal justice bodies that many members of the public continue to believe in long-standing 'myths and stereotypes' relating to rape, which do not correspond with reality, result in disbelief of victims/survivors, and are now out-dated in the eyes of the law. One very significant obstacle for the prosecution when seeking to prove its case is therefore that juries may arrive at court with preconceptions – about how a 'true' victim will behave in the aftermath of a rape, for example – which may be based on stereotype rather than evidence.

### The burden and standard of proof.

For a verdict of 'guilty' to be reached in any criminal case, it is the prosecution which bears the burden of proof, and not the defence.

“it has been widely accepted by criminal justice bodies that many members of the public continue to believe in long-standing 'myths and stereotypes' relating to rape, which do not correspond with reality, result in disbelief of victims/survivors, and are now outdated in the eyes of the law.”

The standard of proof is a high one. Whereas in some other types of legal cases, a court must only be convinced on the 'balance of probabilities', the jury in a criminal case must be satisfied that it is sure of the defendant's guilt. In guidance formerly provided to juries, it was said that they should be sure beyond any reasonable doubt. Taken literally therefore, this test means that it is not sufficient for a jury of 12 decision-makers to believe that the complainant is more likely than not telling the truth and the sexual encounter was non-consensual: they must be convinced.

Taken together, these elements of our criminal justice system as we know pose significant challenges for prosecutors in achieving convictions. There is often not a clear correlation between the merits of a case, and a jury's verdict. What is more, our traditional adversarial system of jury trials effectively requires or at least incentivises Defence advocates to approach rape cases by seeking to destroy a complainant's credibility in as many ways as possible after she has given evidence in the stand. Our system leaves advocates very little choice but to do so, if they are to represent what they believe are their clients' best interests. In some trials, a defendant may not even be called to give evidence, which is his right, in which case it may only be the complainant's account which is subjected to this degree of scrutiny.

## 2. Policy of 'belief' vs policy of disbelief: impact of the Henriques report and the 'falsely accused'

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.

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. To quote Baroness Stern in her 2010 Review, any policy-makers seeking to reform and improve the policing of rape must remember there is *'a long history of disbelief, disrespect, blaming the victim, not seeing rape as a serious violation, and therefore deciding not to record it as a crime.'*

A considerable amount of work has taken place, in previous decades, to tackle that culture. The development – particularly since 2002 – of specialist sexual offences units, staffed by officers trained to respond to complaints of rape appropriately, has helped in that regard. In the years 2011 to 2014, moreover, a series of controversies caused policy-makers to take stock of the way in which the criminal justice system responds to the most vulnerable victims/survivors complaining of serious sexual abuse.

“When a victim/survivor's credibility is considered so fundamental to winning a rape or serious sexual offences trial, those 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.”

One of the key events to have had such an impact was, of course, the outbreak of the abuse and cover-up scandal surrounding Jimmy Savile in 2012, which in turn set in motion a series of investigations and inquiries aiming to determine whether other powerful perpetrators of abuse had escaped justice. Even earlier, in 2011, accusations emerged that police forces had failed to take any action against gangs known for grooming and sexually exploiting vulnerable children, and remained in the minds of the general public long after the 'success story' of the 2012 Rochdale trial. It became apparent, too, that the CPS had played a role in preventing abuse allegations in Rochdale from being investigated earlier: prosecutors had refused to charge a complaint made by at least one victim (referred to in reports as 'Girl A') for fear that her allegations might not be seen as credible, or she might be seen by a jury as having 'consented' to the abuse.

“Whenever the profile of rape victims/survivors and their poor treatment by the criminal justice system begins to receive the attention it deserves, there comes a backlash and a rise in public concern regarding the fate of the ‘falsely’ accused.”



The then Director of Public Prosecutions, Keir Starmer QC, responded by introducing a series of policy reforms, and new legal guidance, specifically designed to ensure that prejudices relating to the credibility of victims/survivors, and concerns about how they would be perceived by a jury, did not prevent necessary prosecutions. Those reforms will be addressed in more detail elsewhere in this report – and included extensive guidance for prosecutors on the application of the ‘merits-based approach’ in rape and serious sexual offences cases, following the case of R(B). In a March 2013 paper headed ‘The Criminal Justice Response to Child Sexual Abuse: Time for a National Consensus’, Sir Keir argued that *‘if the yardstick traditionally used by prosecutors for evaluating the credibility of a victim in other cases were used without adaptation in cases of sexual exploitation, the outcome would potentially be a category of vulnerable victims left unprotected by the criminal law.’*

In November 2014, meanwhile, Her Majesty’s Inspectorate of Constabulary (‘HMIC’) recommended that: *‘The presumption that the victim should always be believed should be institutionalised.’* The College of Policing, in 2016, introduced a national policy implementing this, which stated: *‘At the point when someone makes an allegation of crime, the police should believe the account given and a crime report should be completed’.* The policy was not, in a sense, particularly radical or novel. In as early as 2002, a Joint Inspection by HMIC and Her Majesty’s Inspectorate of the CPS investigated why attrition rates for rape were so high, and made a number of recommendations for change. A Metropolitan Police Service Special Notice introduced in that year advised officers that, going forward: *‘It is the policy of the MPS to accept allegations made by the victim in the first instance as being truthful. An allegation will only be considered as falling short of a substantiated allegation after a full and thorough investigation.’*

Whenever the profile of rape victims/survivors and their poor treatment by the criminal justice system begins to receive the attention it deserves, comes a backlash with a rise in reporting of sexual offences allegations has come a rise in public concern regarding the fate of the 'falsely' accused. The high-profile cases involving celebrities such as Cliff Richard, Paul Gambaccini, Michael Le Vell – together with the collapse of Operation Midland and the revelations surrounding 'Nick', its key witness – have only served to nurse the anxiety that men (particularly public figures) are targets and that false allegations are rife. The Operation Midland scandal led to 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.

The authors of this report are extremely concerned by the impact that the recommendations in the Henriques report – in particular, Sir Richard's recommendations 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. We strongly disagree with the view that Sir Richard has reached, from his review of the Operation Midland investigation, that: *'It is clearly unacceptable practice to falsely state a belief for the purpose of encouraging witnesses to come forward'*.

It is hard to imagine how asserting a 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 can possibly in itself cause harm. A presumption of belief – in our submission – 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. As one senior police officer quoted in Sir Richard's report noted:

*'If we don't acknowledge a victim as such, it reinforces a system based on distrust and disbelief. The police service is the conduit that links the victim to the rest of the criminal justice system; there is a need to develop a relationship and rapport with a victim (particularly in challenging and complex cases) in order to achieve the best evidence possible. Police officers and police staff investigators through their roles are required to deal with the emotional turmoil often presented by a victim and to determine what is relevant to the complaint that has been made. The term "victim" features in important legislation, statutory guidance, the policies of the police and CPS. To remove this and replace it with the word 'complainant' will have a significant detrimental effect on the trust victims now have in the authorities and fundamentally damage the efforts of many organisations re-built over the years.'*

We believe that Sir Richard's report has already had a damaging impact on the culture within the police, and may explain in part why the rate of referrals by the police in the context of rape and serious sexual offence cases is continuing to decline.

### 3. Austerity – and policing ‘short-cuts’

Even if many individual police officers *do* approach rape complaints with the right attitude, it is currently extremely difficult for them to devote the level of attention and care that is needed to investigations without being properly resourced to do so.

As many working within the criminal justice system will tell you: the police, CPS and courts are currently dealing with an overwhelming capacity problem, which undoubtedly poses *additional* challenges to progress. 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, frontline sexual violence services, and courts alike have all had to manage their caseloads with increasingly limited resources, in the aftermath of public sector cuts that have taken effect since 2010, and increasing demand in this period.

The effects of reduced resources can be seen at a number of levels, including:

- > Serious 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;
- > 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.





#### 4. Recurring issues at the level of police decision-making

As a legal charity specialising in holding the state to account in relation to violence against women and girls, The Centre for Women's Justice ('CWJ') collaborates closely with women's sector organisations to recognise and challenge systemic failures in the investigation and prosecution of sexual violence offences. Since 2018, CWJ has provided over 40 legal trainings to women's services across England and Wales, including ISVAs and other specialist sexual violence support-providers across England and Wales, enabling them to better support their service-users through the criminal justice process. ISVAs and support workers are often very vocal during these trainings about recurring issues that they are seeing on the front-line in their area of the country, and issues raised are recorded by CWJ staff.

In addition to these trainings, CWJ also represents a number of its own clients who have reported sexual violence to the police, and provides a second-tier legal advice service for frontline support workers, enabling ISVAs and women's service-providers from around the country to seek pro bono advice and assistance on cases from CWJ's specialist solicitors, when needed. As a result of this, CWJ has now reviewed several hundred case enquiries, either referred by women's services or following a direct approach from a victim/survivor or someone else representing her. A very significant proportion of these enquiries relate to women pursuing a complaint of rape or other serious sexual offences through the criminal justice system.

This exchange of information with frontline support services, and joint oversight of cases, has provided CWJ with a significant amount of qualitative data for the purpose of monitoring what is happening on the ground, and enabled CWJ's solicitors to identify a number of *recurring* errors in police decision-making or procedure in rape and serious sexual offence cases, 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:

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*Police not interviewing complainants, or suspects before reaching a charge or NFA decision;*

#### ISSUE 1

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*Police officers failing to follow up on other lines of enquiry;*

#### ISSUE 2

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*Police officers taking a sceptical approach at the point of reporting, which dissuades women from pursuing their complaint, and/or contributes to lines of enquiry being missed (see also our analysis of the impact of the 'Henriques report', at section 2 above);*

#### ISSUE 3

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*Police not informing women of the Victims Right to Review procedure or of the reasons for an NFA decision;*

#### ISSUE 4

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*Continued on next page (Issue 5 & 6)*

(Continued) In particular, CWJ has noted with concern that the following issues continue to be very common in rape investigations:

*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 – which, 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;*

#### ISSUE 5

*In particular, police routinely mis-applying the law on corroboration when assessing whether the case passes the evidential threshold for charge or referral to the CPS. The law in relation to the need for corroboration is clear. By virtue of Section 32 Criminal Justice & Public Order Act 1994 Parliament abolished the need for the jury to be given a warning about convicting solely on the basis 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.*

#### ISSUE 6

In 2020 however, CWJ conducted a review of more than 15 ‘NFA’d’ cases where the law of corroboration had been misapplied. The review found a multitude of examples of the police erroneously stating the law on corroboration incorrectly and justifying lack of corroboration as a reason to take no further action.

The mis-application of law highlighted here is linked, CWJ believe, 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 corroborating evidence is so often lacking in rape cases because of the nature of the crime.

“In 2020 however, CWJ conducted a review of more than 15 ‘NFA’d’ cases where the law of corroboration had been misapplied. The review found a multitude of examples of the police erroneously stating the law on corroboration incorrectly and justifying lack of corroboration as a reason to take no further action.”

#### 5. Disproportionate demands for evidence – particularly when it comes to victims’ personal data

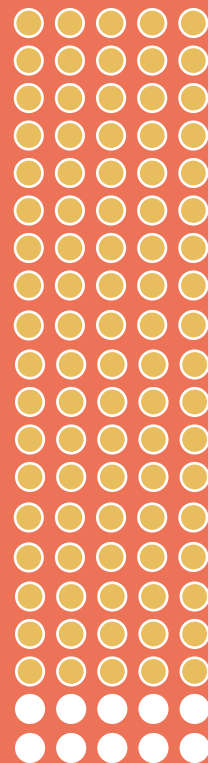
In addition to the issues identified above, a very significant problem in the context of rape investigations is that the police –sometimes on advice from the CPS – are frequently making extremely disproportionate demands in terms of evidence needed from a victim/survivor to proceed with a case. In particular, victims/survivors are frequently asked to provide their consent to alarmingly broad disclosure of their private records.

Disclosure of evidence that may undermine the prosecution case or assist a defendant is required in all forms of criminal cases and concerns have been repeatedly raised by criminal defence lawyers of failures to comply with disclosure obligations which can potentially lead to a miscarriage of justice. The Liam Allen cases from 2018 highlighted this issue in respect of rape cases, but in response the pendulum swung in the reverse direction and led to the normalisation of extremely invasive inquiries which go far beyond what is necessary on the facts of the case.

The authors of this report believe that the cultural impact of the Henriques report – and the high-profile coverage of public figures ‘falsely accused’ of sexual offences that preceded it – which we have already outlined at section 2, above, may explain in part why police and prosecutors now feel under *increased* pressure to search for evidence capable of undermining a victim/survivor’s credibility from the moment that a victim/survivor reports to the police. It is also evident that the widely publicised collapse of a rape trial involving a university student named Liam Allen, in December 2017, following late disclosure of digital evidence from the victim’s mobile phone has sent ‘shock waves’ through the criminal justice system, and has had a very direct and significant impact on the way in which the police and CPS now approach disclosure in rape and serious sexual assault cases.

The particular issue, according to press reports, that resulted in collapse of Mr Allen’s trial was late disclosure of undermining evidence – including communications with third parties about the victim’s sexual relationship with the defendant – from the victim’s mobile phone. The shocking collapse of that case, three days into the trial, was followed by – or perhaps led to – the abrupt collapse of a number of other rape cases in late 2017 and 2018, all allegedly arising from concerns raised around undermining evidence which had not yet been disclosed to the Defence.

Approximately



90%

of those who are raped know the perpetrator prior to the offence. (ONS, 2013)

All of these cases received significant media attention, and prompted an unprecedented set of urgent case reviews by the Metropolitan Police Service, the CPS and the Attorney General's Office over the course of 2018. The then Director of Public Prosecutions, Alison Saunders, issued a press statement in early 2018 indicating in no uncertain terms that all live rape and serious sexual assault cases would be reviewed, and if any concerns were raised those cases would be 'dropped'. It was subsequently reported that at least 47 serious sexual offence cases were indeed dropped by the CPS due to failures to disclose evidence that might assist the defence case at an early stage.

Whether wholly or partially because of the above events, victims/survivors are now frequently asked to consent to police requests for their digital data, and to full or extensive access to confidential records held about them by third parties, which may include records held about them by adult or child social services, by their school or university, their current or former workplaces. Such requests often go far beyond simply seeking *contemporaneous* records, or records known to contain evidence that relates to the incident: indeed, often records are sought which span many years, and in circumstances where the victim/survivor is not aware of any relevant material existing within the records. It is unclear what justification there can be for such requests, beyond mere speculation as to whether a victim/survivor is 'credible' or 'has a past'.

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, the writers of this report are aware that where a victim/survivor has had counselling or therapy subsequent to the alleged rape - or even, in some cases, where she has not - requests are typically made for historic counselling records too, pre-dating the rape itself, and going back a number of years.

This, in itself, 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. Intentional or otherwise, this clearly poses severe danger to the victim/survivors' 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.

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 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.

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 phones so that the police could fully investigate the contents if necessary.

Nonetheless, CWJ has continued to receive referrals of cases as recently as 2020 in which victims/survivors have been asked to agree to surrender their phones for excessive downloads. Even where some effort is made by the investigation team to specify what they are looking for, we 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.

CWJ has noted that some police officers have expressly alluded to the Liam Allen case, or referred in more general terms to fears around the collapse of trials following disclosure issues, when justifying such requests to victims/survivors or their representatives. There is a degree of irony to this, given that according to news reports relating to the Allen case, the issue was not that police officers had failed to obtain extensive digital evidence, including the relevant evidence, from the victim/survivor's phone: it was that the relevant material had ostensibly become lost in a backlog and had only been disclosed to the CPS at a very late stage. The authors of this report would suggest that the lesson to be learned from the Allen case, if anything, is that – as many defence practitioners can confirm – the police and the CPS are not adequately resourced or equipped to meet court deadlines, and backlogs are having an impact on the quality of casework (across all areas of crime). The dominant message arising from the Alen case was that women routinely make false complaints of rape. The immediate consequence was a frequent requirement to allow access to all areas of their private lives in order to prove that they are telling the truth.

The Centre for Women's Justice, with support from the Equality and Human Rights Commission,

commenced judicial review proceedings against the National Police Chiefs Council, the CPS and the College of Policing on behalf of two women impacted by the use of blanket requests for data. In June 2020, both the UK Information Commissioner and the Court of Appeal (Criminal Division) - separately - issued warnings regarding the legality of existing practices, and made a number of recommendations for change. In response to those warnings and the judicial review, the National Police Chiefs' Council has now issued revised 'consent forms', with accompanying guidance for police officers and victims, for use in the context of requests for victims'/witnesses' mobile phone data. It is also understood that the Home Office and the College of Policing will be leading on a series of policy reforms around digital extraction in criminal investigations, in line with advice from the Information Commissioner, and will consult stakeholders from the victims' sector as part of that process. It is understood however that the focus of any development and consultation process will be on procedures around digital extraction process in criminal investigations generally. As far as the writers of this report are aware, there are no plans to examine why victims/survivors in sexual offences investigations in particular are time and again being subjected to disclosure requests that are invasive, offensive, and excessive; and what can be done to address this problem.

In December 2019, Her Majesty's Inspectorate of the CPS published an inspection report following a 'thematic review' of a selection of rape cases in the period of 2016 to 2019. We will refer in more detail to that report, and the problems surrounding its methodology, in section 5 of this chapter. Despite the report's broadly supportive assessment of the CPS's approach to rape prosecutions, the one significant area of criticism that the report does level at the CPS is that prosecutors were in the majority of rape cases assessed making 'disproportionate' evidential demands of the police.

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It seems likely that scrutiny is needed of the training and culture within police forces themselves, bearing in mind that the police are now responsible for about 80% of rape charging decisions. Based on what has now been learned about the CPS' changing approach to investigations and prosecutions since 2016, however, it seems likely that the many of these issues are directly linked to guidance that the police are receiving from prosecutors, and the overall chilling effect in the culture surrounding rape prosecutions arising from policy decisions at a managerial level within the CPS (see further analysis within section 5 below).

“One of the reasons why the CPS' change in approach, in our view, has been so devastating, is that it has had a knock-on effect in the way that the police approach cases too, and on the way in which cases play out in court.”

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## 6. Changes in CPS rape prosecution policy since 2016, and their impact

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. The *Guardian* newspaper, which broke the story as part of a series examining worrying trends in the investigation and prosecution of rape, published an article on the 24th September 2018, titled 'Prosecutors urged to ditch "weak" rape cases to improve figures'.

The 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 *Guardian* reported that CPS representatives, when invited to respond to these allegations, had ‘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.

Also in late September 2018, the CPS published its annual Violence against Women and Girls report, which provides an overview of case volumes and outcomes over the preceding year in areas of violent crime that disproportionately affect women and girls. The underlying data for the year 2017/18 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.

In October 2018, a rape victim/survivor represented by CWJ sought to apply for judicial review of the decision made by the CPS not to prosecute her complaint of rape. Bonny Turner, who brought the claim, has since waived her anonymity in order to speak out about her experiences. She argued that the change in approach that had been described in the *Guardian* appeared, on the face of it, to be unlawful. She invited the CPS, in responding to her claim, to disclose information – in line with its ‘duty of candour’ to the court – to about the alleged workshops and the development of the new policy that had been set out at those workshops.

In response, the CPS denied any change of policy or approach, calling Ms Turner’s claims, which were based on the *Guardian*’s coverage, “inaccurate anonymous multiple hearsay” and contending that “at no stage has the Defendant operated a secret policy in relation to charging decisions for offences of rape”. In light of the CPS’s denials, the High court refused Ms Turner permission to proceed with her judicial review claim and she was forced to abandon any opportunity for further scrutiny of the decision not to prosecute her attacker.

The End Violence against Women Coalition (‘EVAW’), however, continued investigating the alleged internal change in approach – along with their legal representatives at CWJ – and, in September 2019, brought their own judicial review claim against the Director of Public Prosecutions arising from the extensive evidence that they had been able to gather.

The judicial review claim brought by EVAW has yet to be determined by the courts. EVAW and CWJ have however been able to reveal, at this stage, much of the evidence on which it is seeking to rely, and have published that evidence online, [here](#).

The evidence that is published on the web-page cited above contains an enormous amount of detail, which we will not reproduce in full here. For the purposes of this Report however, the authors consider that it will assist readers if we provide a summary breakdown of EVAW’s evidence, and the issues that it reveals with the CPS’ current approach to rape charging decisions.

Based on EVAW’s findings, the authors of this report consider that it is essential, if we really want to understand what is going wrong and why an overwhelming proportion of rape victims are being failed by the system, to look behind public statements that the CPS has made about its policy of prosecuting rape robustly, and examine what is actually happening in practice. One of the reasons why the CPS’ change in approach, in our view, has been so devastating, is that it has had a knock-on effect in the way that the police approach cases too, and on the way in which cases play out in court. Indeed, the ‘problem trends’ with the investigation and prosecution that we have already identified in this Chapter are likely to be symptomatic, at least in part, of this very change in approach, and the resulting perception of police officers and rape prosecutors that senior management at the CPS simply does not support the prosecution of challenging sexual offence cases.

Women's sector organisations fear that the change in approach that has been encouraged, or is perceived as having been encouraged, by senior management of the CPS, cannot now be easily reversed. It may have been intended as a 'touch on the tiller', but the CPS appears to have had a devastating – even if unforeseen – impact on the culture, as well as the day-to-day practice, of the prosecutors and the police. This change in culture is likely to have long-term implications which the Government and criminal justice system must confront and address if they wish to resolve the present crisis.



### The change in approach to prosecutions: a synopsis of EVAW's evidence

The focus of EVAW's case is, in short, 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. As has already been outlined in Chapter 2 of this Report, the development of the merits-based approach to rape prosecutions follows a decision of the High Court in 2009 – which remains 'good law' – and was heralded by the CPS in the early 2010s as a key element of its strategy in relation to the prosecution of rape and serious sexual offences.

That move away from the merits-based approach, EVAW alleges, was implemented in a number of ways. This included the workshops, personally delivered to all 'RASSO' units by the two most senior legal managers at the CPS in 2016/17, as referred to above. In addition the CPS removed all primary guidance on the 'merits-based approach' from the CPS' internal and external web resources, as well as all passing references to the 'merits-based approach' from all of its other online legal guidance and training materials.

EVAW have raised concerns that as a consequence of the change in approach – or in any event the perceived change in approach – prosecutors have become 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. As readers will recall from Chapter 2 of this Report, the so-called 'bookmakers' approach' was specifically prohibited by the High Court in the landmark 2009 case of B – the same case which dictated that the 'merits-based approach' was the correct one. In that landmark case, the High Court explained the difference between the two approaches by providing the example of a hypothetical 'date rape' case – which no 'bookmaker' would see as a solid 'bet' in terms of the odds of conviction, given how notoriously difficult such cases are to prosecute – but which might well have sufficient 'merit' on its facts to necessitate a prosecution.



The lawful, 'merits-based' approach would require in such circumstances that prosecutors should indeed 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.

EVAW were in fact initially refused permission to proceed with their judicial review claim all the way to trial. This was not because the court fundamentally disagreed with EVAW's evidence, but because it reached the conclusion that this was a complex dispute of fact, and that it was bound to accept the CPS' protestations that it had not changed its approach in good faith.

**In July 2020, however, the Court of Appeal – in a landmark ruling – overturned the decision of the High Court to refuse permission.**

The judges ruled that, on the face of the evidence adduced by both parties, EVAW did have an arguable case, and it was entirely proper for the courts to decide whether what had taken place amounted to a change in approach – and indeed an unlawful one – or not. A full trial of the evidence in respect of the judicial review claim will therefore now take place on the 26th January 2021. At that hearing, the court will consider whether the CPS has indeed materially changed its approach to rape prosecutions, as well as whether that change in approach was lawful.

Given that many of the matters EVAW relied upon in its claim are already in the public domain, we are in a position to summarise some of the evidence that led EVAW to conclude that there had been a significant change in approach in CPS policy and practice, resulting – even if unintentionally – in the catastrophic decline in rape prosecutions over the past 3 years. In light of the CPS' persistent denials of a

in approach, EVAW investigated extensively, and gathered an exceptionally large volume of evidence which appeared to show, categorically, that there had been a significant change.

What EVAW found: EVAW has relied upon FIVE main strands of evidence to mount its judicial review challenge:

### **A. Whistle-blower' evidence – the perceptions of prosecutors within the CPS**

From the very beginning of the case EVAW worked with a whistle-blower – an experienced RASSO prosecutor from within the CPS – who was identified in the proceedings only by the cipher 'XX' as they were afraid that identification would result in victimisation or the loss of their employment.

'XX' provided an anonymous statement in which they explained, in essence, that:

- > As an experienced RASSO prosecutor, 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 about the implications of these roadshows which they thought 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 had also expressed the view that this represented a change of approach;
- > They considered the change of approach to have been further cemented by the removal of references to the merits-based approach in guidance.

EVAW also sought to rely on a second witness statement from XX, and on a witness statement from another RASSO prosecutor who came forward ('YY'), explaining that the current culture within the CPS was likely to discourage RASSO prosecutors from raising or escalating any concerns about a change of approach with their managers. This was important – and may be important to the Rape Review – because the Director of Legal Services, Greg McGill, who had delivered the 2016/17 roadshow trainings, had claimed that if there had been any perception/concern internally that practices were changing, the CPS' management would know about it. XX and YY said that this was inherently unlikely.

## B. Expert evidence – what the data shows

It became clear when the CPS' Violence against Women and Girls report for the year 2017/18 was published that there had been an alarming, precipitous drop in the rate and volume of RASSO prosecutions from the previous year. London-based Rape Crisis centres and others were also reporting that they were seeing hardly any of their service-users' rape complaints resulting in a decision to charge. Volumes continued to fall dramatically, quarter on quarter, over the course of 2018/19, and now appear to have stagnated going into 2019/20.

On the face of it, the very fact that there had been such a sharp decline in the rate and volume of prosecutions – continuing over consecutive years – seemed to be broadly consistent with a relatively radical change in approach. To test that theory, however, EVAW instructed an expert econometrician from Oxford University, Professor Abigail Adams, to provide an expert statistical analysis, examining patterns in the data.

Professor Adams was asked to examine all of the data in the CPS' annual VAWG reports from 2012/13 through to 2018/19, together with (inter alia):

- > Statements made by CPS representatives purporting to explain the fall in rates/volumes of RASSO prosecutions (largely by blaming the police, or attributing it to rising reporting rates, and/or claiming that the fall was due to a rising volume of cases that had been caught in a backlog or administratively finalised, and might still be charged);
- > Information disclosed by the CPS in the course of the legal proceedings, including a confirmed timeline setting out dates and locations of Greg McGill's 'roadshow trainings' and of changes to prosecutorial guidance;
- > Various other published data/analysis available regarding changing CJS outcomes; and
- > Examples of evidence (public or otherwise) obtained by the Claimant suggesting that there had been a change in approach, implemented through the roadshows and the changes to the guidance.

Professor Adams was asked to conclude, if possible, '*whether the available evidence is consistent with a change in CPS ['CPS'] practice toward the charging of rape (and other serious sexual offences); treating as her 'index events' for that change Greg McGill's roadshows (rolled out nationally in Autumn 2016 and across 2017) and the removal of guidance relating to the MBA (effected in a piecemeal fashion in May 2017, November 2017, and Autumn 2018).*

In Chapter 4 of this Report, we will explain in considerably more depth what the statistics show, with reference to the relevant figures, and graphics demonstrating how trends have changed.

To summarise her findings very briefly however, 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*'.

EVAW's expert's analysis was, essentially, 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.

### C. Dossier of case studies – evidence of a 'risk-averse' approach in practice

EVAW also gathered over 20 RASSO case studies (collated by CWJ with the consent of survivors) in which decisions had been made by the CPS not to proceed with a prosecution.

In some cases, a decision had been made not even to charge the perpetrator, following a referral by the police; in others, the perpetrator had initially been charged but the prosecution had then be discontinued before trial. All of the CPS decisions in question had been made since 2016/17 when we say the 'change in approach' was rolled out.

We think that what these case studies show is a disturbingly risk-averse approach in practice. EVAW could not prove, of course, that the prosecutors who had made the decisions in each case had attended one of the 2016/17 roadshows, or that they would have made less risk-averse decisions had this case been referred to them five years previously. EVAW and CWJ firmly believed, however, that the case studies would give the court (and the public, if they were heard in open court) a better understanding of the kind of risk-averse decision-making that we were worried about.



Equally, many of the cases involved particularly compelling prima facie evidence, which made the decision not to proceed seem wilfully or absurdly risk-averse. There were for example cases involving multiple victims/survivors of the same perpetrator; suspects who had been caught out blatantly lying about the events; contemporaneous proof of injuries or damage to clothing; proof of the perpetrator having produced a weapon; self-incriminating apologies from the suspect; and/or multiple consistent disclosures having been made by the victim/survivor to third parties before reporting to the police. There were also cases where, given what was known about the incident, it seemed highly implausible on the facts that the victim/survivor would have consented to what was happening.

The CPS decision letters which had been sent to the victims/survivors by way of explanation – on which EAW relied as evidence, with the victim/survivors’ permission – regularly showed prosecutors taking into account ‘myths and stereotypes’ about how ‘credible’ victims behave, which are specifically prohibited by CPS guidance. Very frequently, the fact of ‘one person’s word against another’ was also relied upon to suggest that a prosecution was impossible in these circumstances, wrongly applying the law on corroboration (see section 4 of this Chapter for further details). Sometimes, victims/survivors were told that their complaint relied on ‘one person’s word against another’ in circumstances where this was an unfair characterisation of the case, in that there was also independent evidence supportive of the complainant’s account.

#### **D. Evidence gathered collectively from the women’s sector – including evidence of the ‘trickle-down’ effect on the police**

In a witness statement provided by CWJ Director Harriet Wistrich in support of EAW’s claim, she provided evidence of some of the recurring issues reported by frontline women’s rape crisis services to CWJ’s legal team since 2018 (many of which have been outlined elsewhere in this Chapter).

Two broader themes identified in Ms Wistrich’s statement, based on CWJ’s collaborative work with frontline women’s sector organisations, are:

- > Unsurprisingly, *universal and very significant concern/lack of confidence* in the CPS across the women’s sector arising about the declining volume in prosecutors. Concerns arose both from the catastrophic drop in charging decisions, and from the CPS’ apparent unwillingness to address the problem;
- > A widely held perception that the CPS’ *more risk-averse approach to decision-making has had major repercussions at the level of police decision-making, too.*

In some cases, police officers themselves have explicitly stated in communications with CWJ, CWJ's clients, or ISVAs with whom CWJ is in contact, that there is a perception amongst the police that the CPS' evidential bar for prosecutions is now extremely high, and that this in turn leaves the police more reluctant to refer cases that they do not think the CPS will charge. Some of these officers had in fact been very frank in private discussions that the CPS were undoubtedly more risk-averse than they were a few years ago, and that most police officers working in this field knew to expect that (even when they thought they had a 'strong' case) the CPS were almost certain to reject it. A further witness statement was provided by CWJ solicitor Kate Ellis, in which she outlined one some particularly explicit admissions that a police officer had made to this effect.

What is also clear from many of the cases in which CWJ have been involved, and from the anecdotal evidence gathered from the frontline women's sector, is that many decisions which are recorded as police 'NFA' decisions are actually made following 'Early Investigative Advice' from the CPS. In recent years, police officers have been encouraged to seek early advice from prosecutors on their cases – often by simply submitting a summary of the key evidence – before they *formally* refer the evidence in the case to the CPS for an official charging decision. This practice was originally introduced with a view to building strong cases at an early stage, and improving the prospects that those cases could be prosecuted.

If as evidence seems to suggest, however, the CPS are now more often than not advising the police negatively at an early stage of investigation, informing the police that they do not have enough evidence to refer the case for a formal CPS decision and should abandon the investigation, this is likely to mean that a large number of cases are being recorded as 'police NFA's, without those negative decisions ever being attributed, as they should be, to the CPS.

In other words, the 'informal' practice of Early Investigative Advice means that the CPS are making even more negative rape charging decisions than is reflected in their annual Violence against Women and Girls data, and evading accountability by attributing responsibility for those decisions on the police.

These kinds of practices may also explain why so many cases which have been opened and closed on the CPS' system are now categorised as having been 'administratively finalised', rather than explicitly characterised as negative charging decisions. The CPS has acknowledged that administratively finalised cases may include cases that have been referred by the CPS back to the police, and then closed or 'NFA'd'. (For more information about the troubling rise in 'administratively finalised' rape cases, we refer you to Chapter 4.)

Meanwhile, Sarah Green, Director of EVAW, provided an extremely detailed statement, and large volume of supporting evidence, in support of the judicial review challenge, explaining why the move away from the merits-based approach – in circumstances where neither the women's sector nor the general public had been informed or consulted on the change – had caused such unprecedented concern. In particular, her statement set out in detail:

**Why the change in direction away from the merits-based approach (or in any event the removal of guidance precipitating that shift) was considered so disastrous by the women's sector - setting out the common problems that guidance on the 'merits-based approach' was originally intended to address, the extensive consultation with experts which precipitated that guidance, the fact that it reflected a wider cultural shift and the steadily positive impact that that shift began to have on outcomes for victims/survivors in the first half of the last decade; and**

That it was unprecedented in recent memory, and highly concerning, for the CPS to have brought about a change in approach as significant as this without first consulting or even informing the women's sector.

Extensive evidence was provided showing that – until recently, at least – the CPS have regularly updated and consulted women's sector stakeholders on all key decisions with regards to developments in policy and guidance, however large and small, relating to the investigation and prosecution of rape. This is because the CPS has explicitly recognised, in the past, that involving the women's sector in this way results in better policy and practice and improved victim confidence in the system.

## E. The position of the CPS itself

Finally, by the end of the case EAW and CWJ had been able to force disclosure from the CPS – to an extent – of:

- > Early internal discussions that took place about the proposed roadshows, removal of the merits-based approach from guidance and training materials;
- > Responses at a high level within the CPS to the news that EAW were bringing a legal challenge against the 'change in approach' to RASSO prosecutions.

EAW cannot publish the evidence that has been disclosed in confidence by the CPS in detail, at least until it is heard in open court in January 2021. In light of the disclosure received, EAW have however been able to demonstrate that there was a degree of express acknowledgment by the CPS, at the time the removal of the merits-based approach was first considered by senior management, that if it were made known,

it would be likely to cause widespread concern amongst external stakeholders. This, in our view, makes it all the more shocking that the change in approach was not communicated to stakeholders at all: there was no consultation and no information provided to external stakeholders about the change either before or after the fact.

EAW have 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. EAW's position is that this total confusion among practitioners is manifestly unlikely to produce good outcomes.

It is also now known that the CPS' evidential basis for the blanket 'purge' of the merits-based approach from all internal and external material was a single HMCPSI report in 2016, based on a relatively small survey of cases, indicating that a handful of prosecutors had been perhaps been applying the merits-based approach overzealously.

In defending the case, the CPS relied heavily on the HMCPSI report published in December 2019 which they said showed definitively that there had been no change of approach on the part of the CPS. Indeed they claimed it represented a 'total answer' to the claim.

EAW, however, relied in the proceedings on – inter alia – a public letter sent by the national Victims' Commissioner Vera Baird QC to HMCPSI in which she set out her concerns about the process of the HMCPSI's review and the report's contents.

The letter pointed to the resistance by the HMCPSI to any independent oversight of the review process, and concerns about the make-up of the review team; significant limitations in the scope/methodology of the review; and factual inaccuracies – as has since been, to an extent – admitted by HMCPSI itself in correspondence with Sarah Green (EVAW) and the Victims' Commissioner. In addition, the purpose of the review was not of course to answer whether the CPS' actions had been lawful.

Many decisions which are recorded as police 'NFA' decisions are actually made following 'Early Investigative Advice' from the CPS."



# WHAT THE STATISTICS SHOW

Age you want to retire: 25  
Life expectancy: 35

## FINANCIAL INFORMATION

Desired annual income upon retirement: \$30,000  
Annual contribution from other sources: \$20,000  
Current amount of savings: \$200,000  
Rate of return on savings: 4.00%  
Inflation rate: 2.00%

## RETIREMENT GOALS

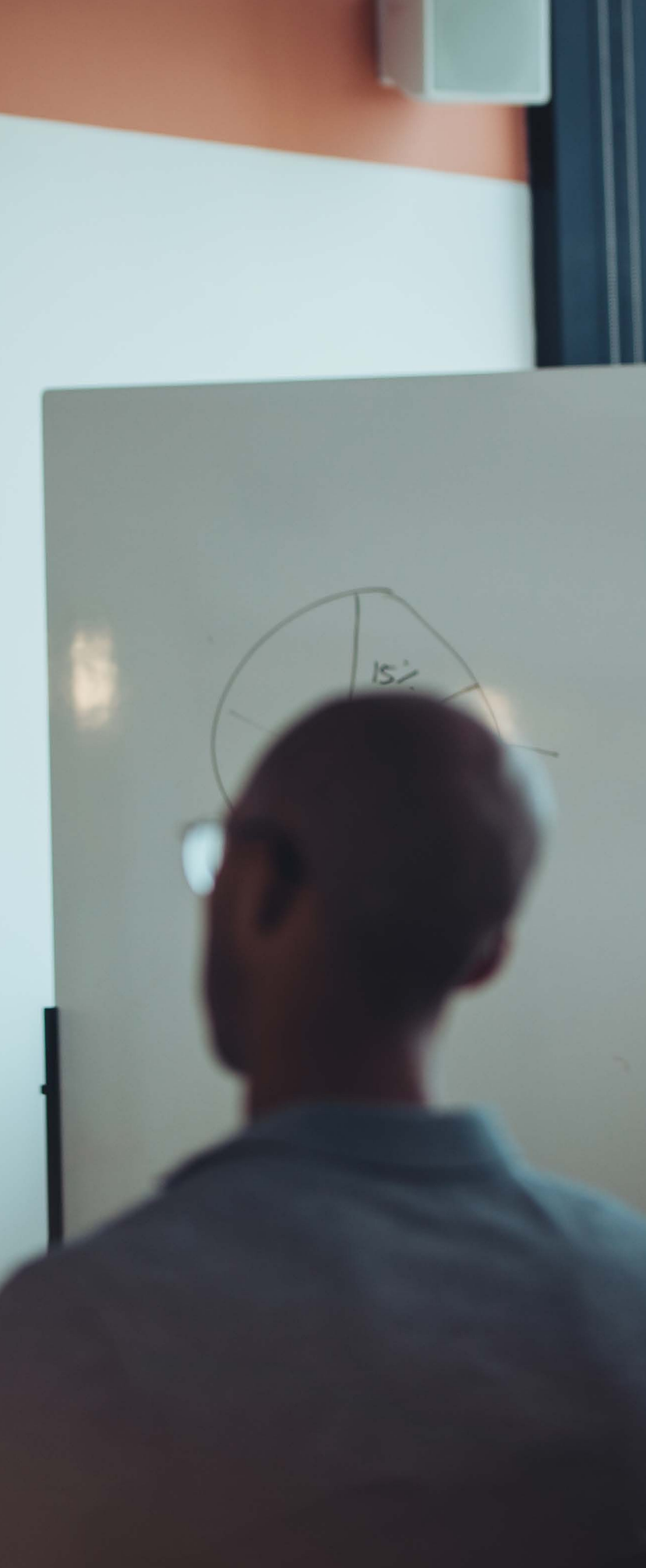
Starting monthly savings goal: \$1,000  
Amount of savings in 2007: \$200,000

## CUMULATIVE RETIREMENT SAVINGS

\$0  
\$50,000  
\$100,000  
\$150,000  
\$200,000  
\$250,000  
\$300,000  
\$350,000  
\$400,000  
\$450,000  
\$500,000





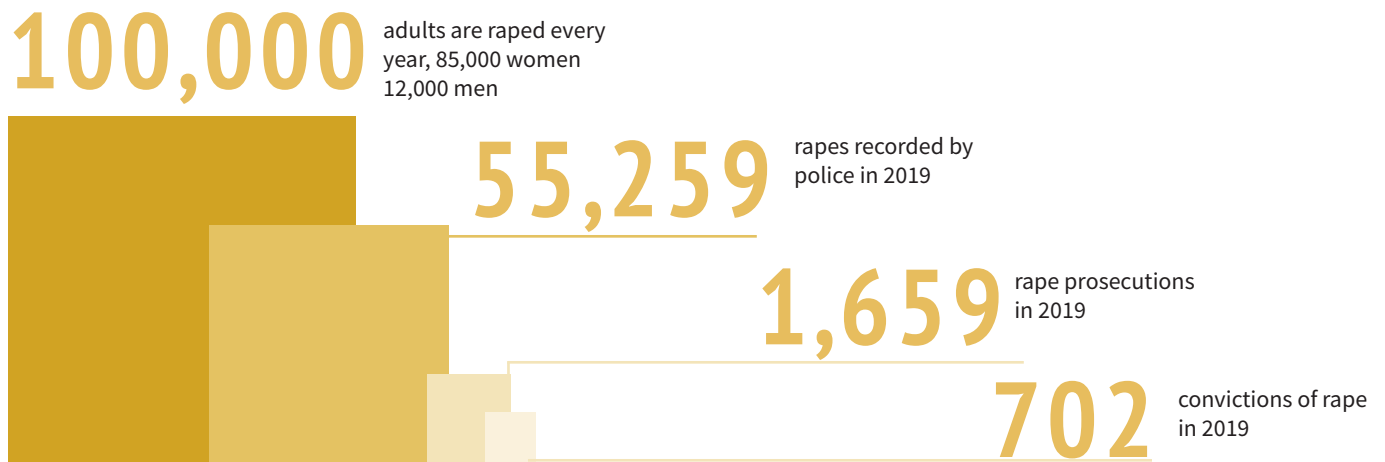


## CHAPTER 4:

### WHAT THE STATISTICS SHOW

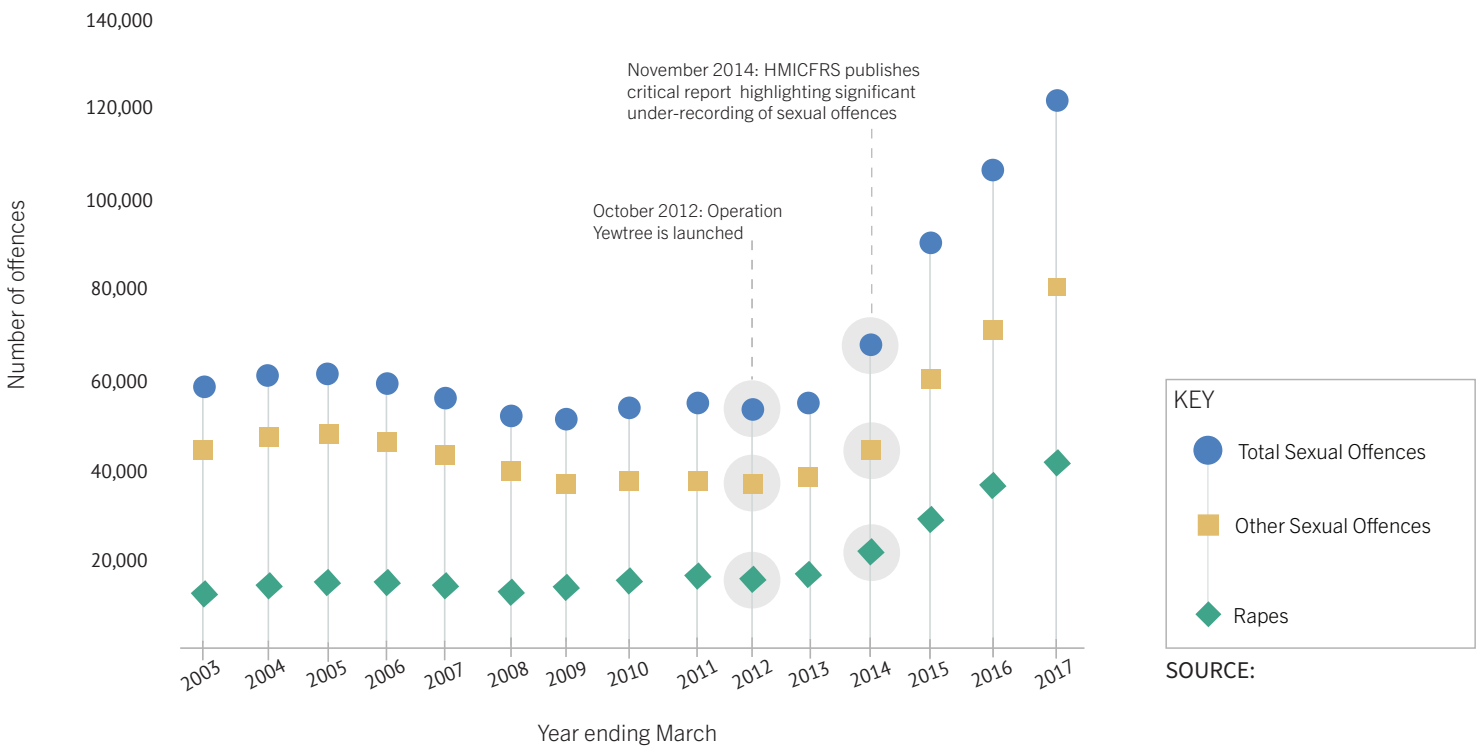
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Around



SOURCE: ONS

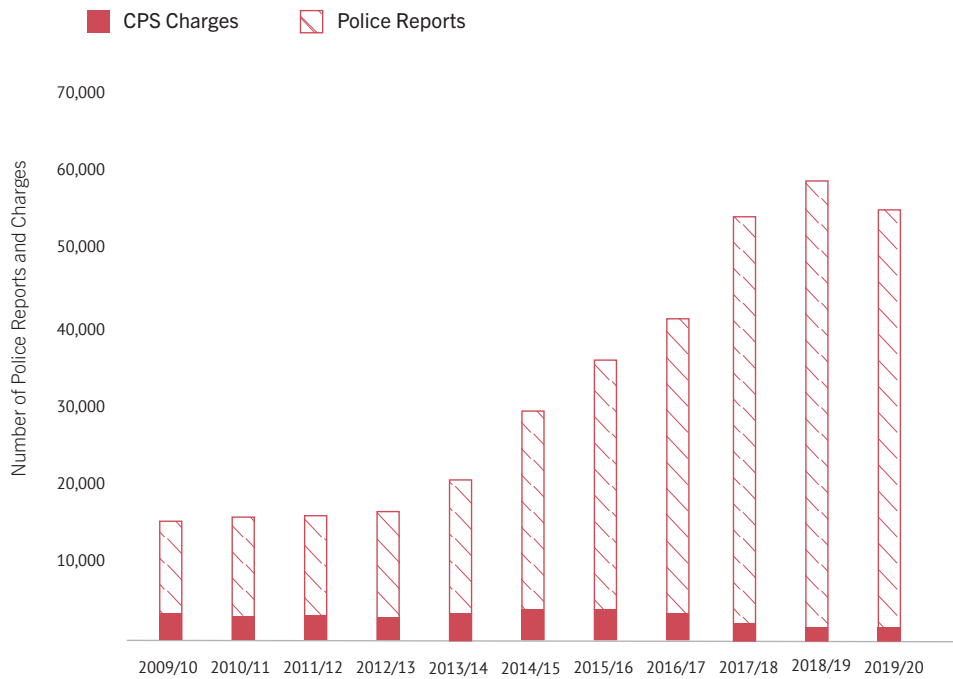
**Police recorded sexual offences, by offence type,**  
year ending March 2003 to year ending March 2017



SOURCE:

Since around 2012 the number of rapes reported to the police has almost tripled. This is a huge social trend which we believe has not been significantly picked up by politicians and commentators. The justice system has its limits; it alone cannot end impunity for this crime. But it must, as a minimum, keep up with the demand from the initial numbers of women and men seeking justice after rape.

### Proportion of rapes reported to the police which go on to be charged by the CPS



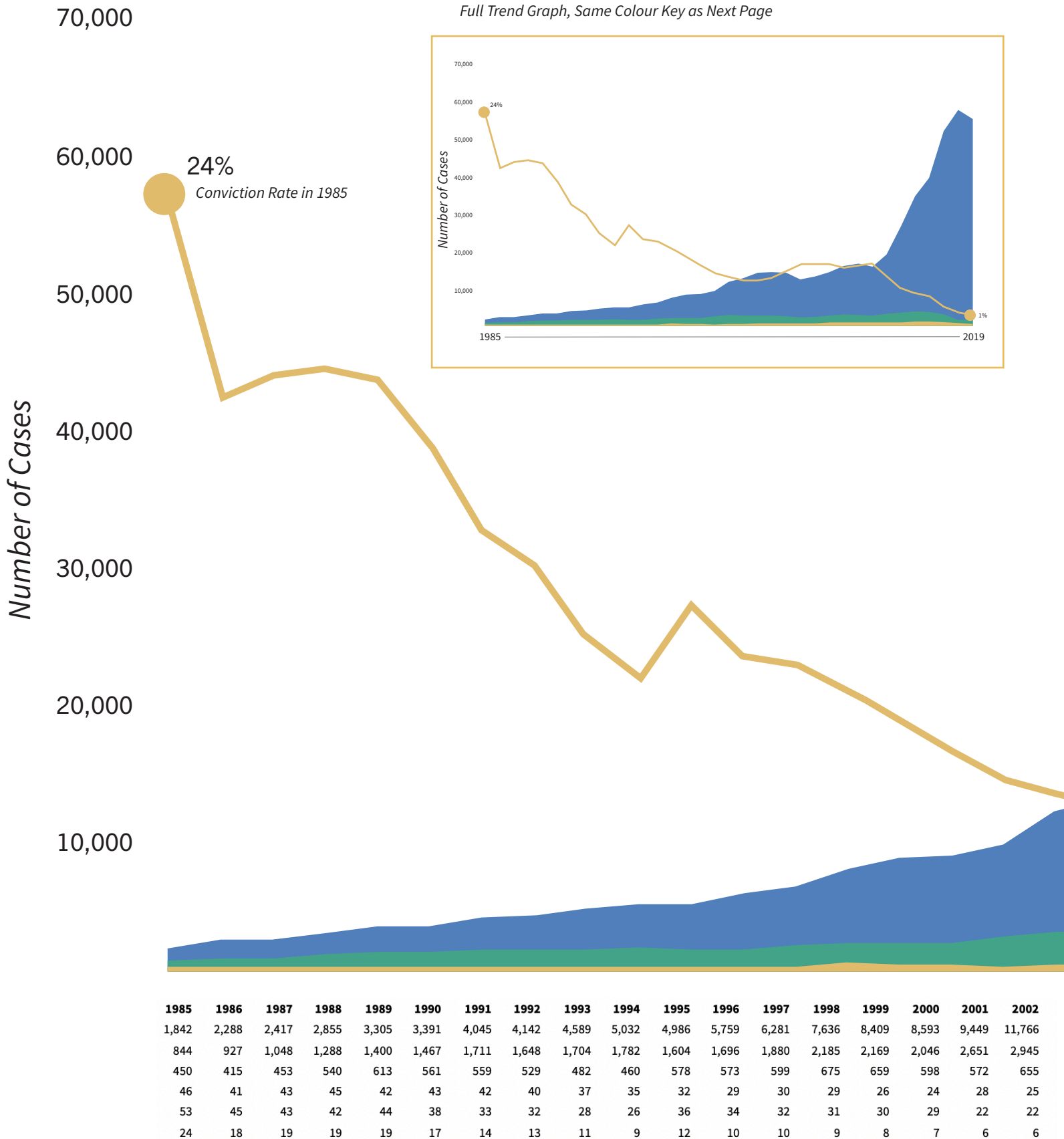
Even though the number of rapes reported to police has massively increased over the last decade, the number of cases being charged so they can proceed to court has actually significantly declined.

### Percentage change in the proportion of rape cases charged by geographic region, with information on how long it is taking to charge cases



This chart reflects the tremendous geographical variation in what is happening with rape cases. While it clearly shows a very disturbing decline in charging rates, it also shows that this is very different by region; and that the time taken to charge a case varies enormously. This speaks to differences in leadership, aims and strategy by police and CPS region, in response to a crime, which should always have the highest quality response.

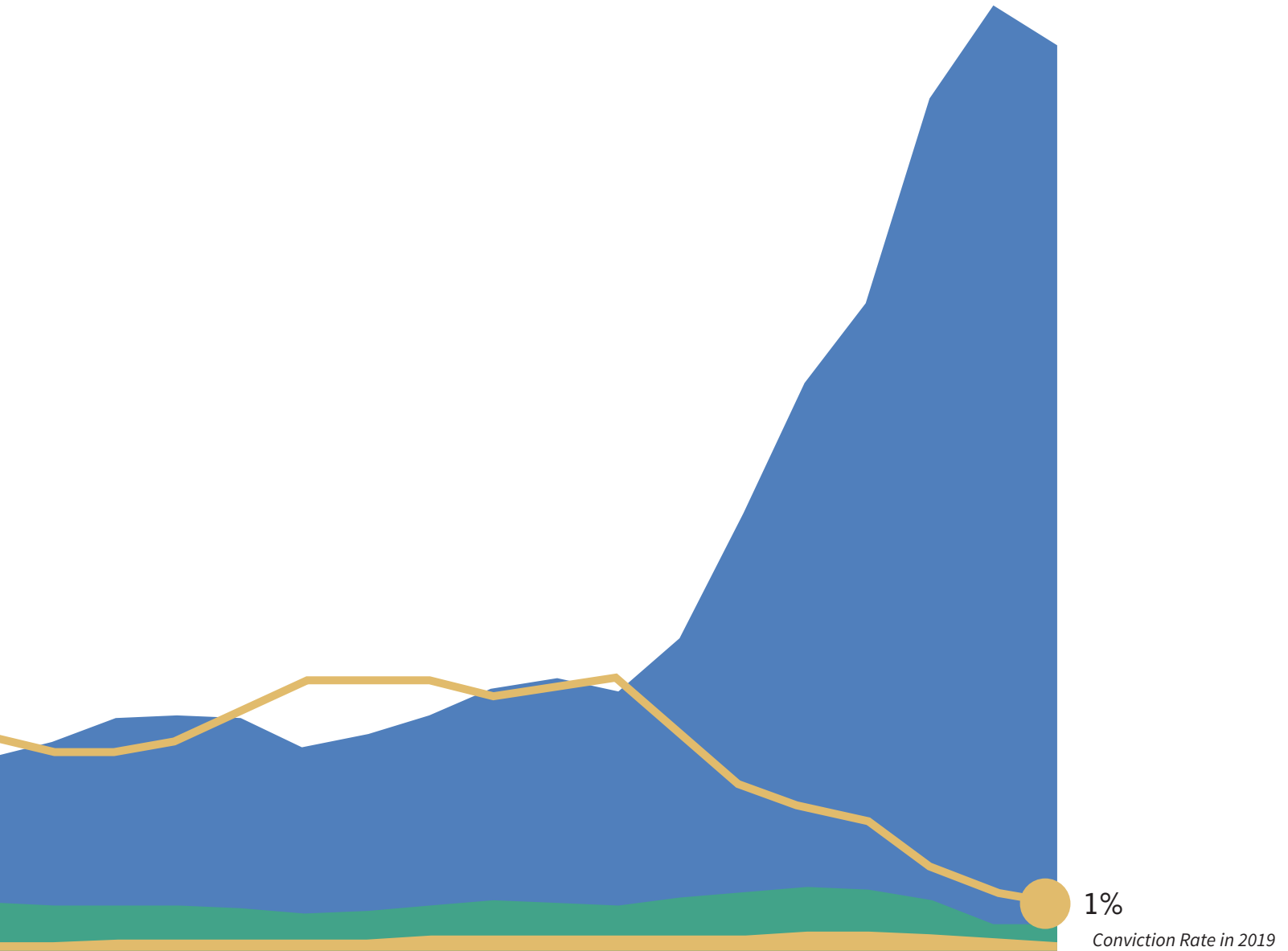
# The long term trend in rape reports, prosecutions and convictions



The long-term trend in exponentially increasing rape reports reflect, we believe, the changing social attitudes around women's equality and around rape. More women recognise that what happened to them is abuse, and more women choose to seek justice. The parallel steady rate followed by a decline in cases going to court, and the parallel absolute decline in convictions, therefore reveal a justice system which is singularly failing to keep up with women's demand for justice. It amounts to systemic discrimination against women as a class.

*Credit: Dr Jo Lovett, Child and Woman Abuse Studies Unit (CWASU), London Metropolitan University*

- Recorded
- Prosecuted
- Convicted
- Conviction Rate (Proportion of the recorded)



2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
12,760	14,192	14,350	14,052	12,478	13,209	14,225	15,692	16,350	15,933	19,124	26,703	34,660	39,488	51,833	57,600	55,259
2,790	2,689	2,826	2,567	2,363	2,395	2,797	3,071	2,924	2,822	3,319	3,538	3,851	3,716	3,141	1,588	1,656
673	751	796	863	873	921	997	1,058	1,153	1,145	1,121	1,164	1,297	1,352	1,128	919	702
22	19	20	18	19	18	20	20	18	18	17	13	11	9	6	3	3
24	28	28	34	37	38	36	34	39	41	34	33	34	36	36	58	42
5	5	6	6	7	7	7	7	7	7	6	4	4	3	2	2	1

1%  
Conviction Rate in 2019





## CHAPTER 5:

### RAPE VICTIM/SURVIVORS: THE EXPERIENCE OF SEEKING JUSTICE

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Myths stereotypes and victim-blaming	52
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The criminal justice system: traumatic in and of itself	57
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Demoralisation	63
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# RAPE VICTIM/SURVIVORS: THE EXPERIENCE OF SEEKING JUSTICE

## Introduction

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 victim-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 perpetuation of intersectional myths and stereotypes, re-traumatisation, and demoralisation continue to be the hallmarks of the CJS for many victims/survivors, their supporters, and specialist frontline sexual violence and abuse practitioners.

The vast majority of victim/survivors will never access the CJS; the most recent data from the Office of National Statistics (ONS) shows that only 17% of victims/survivors of sexual violence and abuse report to the police. Even fewer numbers of victim/survivors from Black, minoritised, disabled, older, younger and LGBTQ+ groups will report to the police and are more likely to disengage from the process (Kelly, 2001; Walker et al, 2019; Thiara & Roy, 2020).

This chapter of the report will evidence the experiences of victims/survivors and specialist sexual

violence practitioners working in the CJS, and will draw on themes from a wide range of primary and secondary sources, including surveys, reports and focus groups with Rape Crisis workers and specialist led 'by and for' organisations that offer dedicated sexual violence support to Black, minoritised women/girls. The first part of this section will explore how myths and stereotypes are reproduced by the CJS and underpin the negative experiences and outcomes for many victims/survivors. The second part will consider the traumatic impact of the criminal justice system on victims/survivors, and the third part will highlight how the system demoralises victim/survivors and frontline workers, an issue that is linked to victim-attrition and burnout.

Rape victim/survivors, who are overwhelmingly women and girls, will experience the 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 (Combahee River Collective, 1979, Crenshaw, 1990, Collins, 1990). This section of the report aims to highlight the different experiences of victims/survivors, as well as drawing on shared themes and women's experiences.



## Myths, Stereotypes, and Victim-blaming

Rape myths and stereotypes, definitions of rape, and who perpetrates rape and why, continue to play a key role in how victims/survivors are treated by criminal justice agencies, and have a significant impact on criminal justice outcomes. Despite some recognition of these issues, myths and stereotypes remain deeply entrenched in the system. Frontline specialist sexual violence and abuse workers testify to the poor attitudinal issues of individuals within some forces and prosecutors. Occasionally these stories come to the attention of the press, such as when the four police officers from Bedfordshire police were dismissed for making obscene jokes about a victim/survivor who had reported her rape (Bedford Today, 2017). More recently, Greater Manchester Police had to compensate a victim/survivor, as her allegation of serious sexual assault was not recorded as a crime, and police officers had sent emails to each other claiming her allegation was “b\*\*\*\*\*s” (Shropshire Star, 2020). Her case was re-opened only after the same perpetrator raped a different woman.

Specialist sexual violence and abuse practitioners share concerns about inconsistencies in how individual police officers and forces deal with rape allegations. Properly trained and specialist police officers can play an important role for victims/survivors, through making them feel believed and supported in their criminal justice journey. The victims/survivor below shares her very varied experiences of the police:

“When I reported I was interviewed by a lovely woman at [police force area] she would become my STO and she made me feel believed and as comfortable as I could be in that situation. She was also very helpful in giving me more information but also in a very sensitive way managing my expectations and helping me on my journey. The police investigation itself was done by [neighbouring police force] and they were shockingly bad at communicating anything with me, it left me feeling like they weren’t doing anything or didn’t care and eventually after a year my case was closed with lack of evidence and I felt as though they didn’t even try” – (victim/survivor, in Smith and Daly, forthcoming)

There are committed individuals within the police who have a positive impact on how victims/survivors experience a criminal justice intervention, and over the years, there have been many improvements in how rape victims/survivors are treated since the notorious BBC film, “A Complaint of Rape” was aired in the 1980s. The video, showing how a rape victim/survivor was spoken to by three male detectives in Thames Valley Police, is still used today by police in training around how not to interview a rape victim/survivor. Although since then rape suites were created, and several forces have ‘RASSO’ (rape and serious sexual offences) officers and specialist units, several of these have been dissolved due to cuts in recent years.

According to recent research that surveyed rape and sexual abuse victim/survivors, 31% of respondents agreed that police responses to sexual violence are improving, however only 12% agreed that police investigations of sexual violence are fair and proportionate overall (Smith and Daly, forthcoming).

This perception of unfairness and disproportionality is justified and can be evidenced by cases such as the one below, which outlines the case (Imkaan, forthcoming) of a Black and minoritised victim/survivor who eventually managed to get support through a 'by and for' BME specialist organisation that helped to counteract the negative consequences of being treated with suspicion by the police.

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## CASE STUDY

Z was systematically raped and abused by her husband and reported this to the police. Z sustained a number of long lasting/ permanent injuries, including nerve damage to one of her limbs and side effects from strangulation. Z was called during the investigation by an anonymous number, and after picking up the call, the caller claimed that he had enjoyed raping her and that Z must have loved it too. This call was traced to a former co-worker who is friendly with her husband. The police determined Z must have instigated him to call her, therefore she was not credible. The case was NFA'd by the police.

Victims/survivors will experience myths and stereotypes in a variety of different ways, with Black and minoritised women and girls experiencing them also in relation to their race and gender. It is critical to note that institutional racism within police work means that for many Black and minoritised victims/survivors there is a lack of trust as to how any matter will be dealt with. This is a very significant deterrent to reporting rape and sexual violence and is rarely taken into account by criminal justice agencies, who often ask why someone did not report earlier (Imkaan, 2020). As well as reduced rates of disclosure, racialised and gendered myths also prevent access to justice when Black and minoritised girls come to the attention of professionals with safeguarding responsibilities within the CJS and Social Care. Davis (2019) identifies processes of 'adultification' and racialised forms of hyper-sexualisation (Collins, 1990) which result in Black girls being wrongly perceived to be and are treated as adults and consequently this means they are more likely to receive a punitive service response and decreased protection from sexual abuse.

Another way in which notions of ‘culture’ can be instrumentalised by agencies is highlighted by the case of ‘Mariam’, who was sexually abused by her grandfather. Despite coming to the attention of the police and social care - the association of certain communities with particular forms of violence (forced marriage and so-called ‘honour-based violence’) led to the reframing of her experience of sexual abuse as ‘cultural’ forms of violence, in the response from statutory professionals. This is common especially in cases of South Asian young women.

“The first question they kept asking me was oh are you scared of forced marriage and because they’re white and stuff they just assumed ‘she’s Pakistani, any problem she’s gonna have is a forced marriage’. Even [the specialist BME advocate] was really confused, she was like in the statement we’ve never said anything about forced marriage. That’s the only thing they were looking at.” (Victim/survivor, in Imkaan, 2020)

### Crown Prosecution Service

Victim/survivors of rape are also subject to stereotyping and myths from the CPS, and although specialist guidance was developed to assist prosecutors to identify and challenge myths, the experiences of victim/survivors suggests that application of this guidance continues to be poor and inconsistent. Furthermore, the CPS use the very myths and stereotypes it is expected to challenge, to justify their discontinuation of cases:

“Rape myths and stereotypes are embedded in the process, and the police and CPS all reinforce it in their decision making. Even when we receive a Letter from the CPS, they’re littered with rape myths ...and talking about their behavior, like ‘someone saw you and you didn’t seem upset’ it’s just outrageous.” – (ISVA in RCEW focus group 2019)

Despite CPS letters indicating that they have little faith in the decisions of a jury, the rape myths that are pre-empted by the CPS reify the assumed biases, as cases are discontinued. To illustrate this point, we can consider the case study of Charlotte (Judicial Review, 2020).

## CASE STUDY

Charlotte was raped orally and vaginally without a condom, by a man with whom she had once previously had consensual sex. Charlotte underwent a forensic medical examination on the day of the rape and later reported to the police. Both Charlotte and her rapist gave their phones over to the police for their investigation.

6 months after reporting, the CPS wrote to Charlotte, explaining that they would be taking no further action, as the messages between them would show that the defendant had a “reasonable belief” that Charlotte consented to what had happened.

Charlotte exercised her Victims Right to Review, and just ten days later the CPS wrote back upholding their original decision. This letter cited the original prosecutor’s consideration of medical evidence that showed Charlotte to have sustained injuries to her mouth that were consistent with allegation of rape, but continued to say that the messages undermined the case.



Inherent to the rationale used by the CPS in Charlotte’s case, is the myth that once you have flirted, dated, or married someone, you have signed over all bodily autonomy, because you had agreed to sex at some point previously. According to this rationale, anyone who had previously had consensual sexual relations with an individual prior to a rape, will be inherently undermined by the fact that they were in a relationship, or were dating. This is despite the fact that, as Baroness Hale argues, ‘it is difficult to think of an activity which is more person and situation specific than sexual relations’ (R v Cooper, 2009) where the type of sex, the time and location of sex, and the individual with whom you have sex are all specific and form the basis of consent.

Although the next case study (Judicial Review, 2020) does not explicitly detail a myth or stereotype, the reason given for the discontinuation of the case implies a number of myths.

Without acknowledging the power dynamics of gender and age, this case sets a dangerous precedent for children to be sexually abused. Despite being significantly older and not handing his device over for the police to investigate, the CPS give the impression that they deem it more plausible that the suspect did not know her age and that she had consented to have sex with a much older male, than they consider it plausible that he raped her. These assertions support the myth that males cannot be expected to control their urges and therefore cannot be held accountable for their actions, and that women and girls should ‘gatekeep’ sex, which implies that the victim/survivor is in part or wholly responsible. These decisions by the CPS amount to institutional victim-blaming.

## CASE STUDY

Freya was groomed at the age of 14 by a man ten years older. They began a sexual relationship, where Freya had sometimes “consented” to sex, however on at least one occasion her forced her to have sex with him, and on another occasion, had been physically assaulted by him.

A month after their relationship had ended, Freya reported to the police. The perpetrator was charged with six counts of sexual activity with a child, two counts of rape, and one count of making indecent photographs. The police downloaded and investigated the contents of Freya’s phone. The suspect refused to disclose the passcode of his phone, so his phone was not examined.

The CPS decided to discontinue the prosecution, and following Freya pursuing a Right to Review, upheld that the decision to stop the prosecution was correct, as there was a lack of evidence to “confirm that the defendant was aware of [Freya’s] age”.



## 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 (Smith and Skinner, 2012). Myths and stereotypes are perpetuated in the courtroom, and are inconsistently challenged by prosecutors (Smith and Skinner, 2017). 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 (McGlynn, 2017).

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 (Smith and Daly, forthcoming). 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:

“The court process was what I was very concerned about... I was absolutely terrified of being cross-examined by the defence as their job is to discredit and undermine you. Not every case includes this but it was a possibility. I am a victim who has been through major trauma, I was aware this could be exploited to find perceived inconsistencies or put blame on me...” (Victim/survivor in Smith and Daly, forthcoming)

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:

“The women we have supported through report and court process, have largely had a negative experience. Women have found themselves being told by officers that it must be culturally acceptable in their case to have been raped by their husbands, that if they wanted a baby at some point that they needed to sleep with their husband. Further, women have been asked why there are not witnesses to the marital rape, or CCTV.” (specialist Black and minoritised sexual violence practitioner in: Imkaan, forthcoming)

Although the focus of this report is on the CJS, it is imperative to acknowledge the continuum of sexism and victim-blaming, and the proliferation of rape myths in the parallel family courts system, which is also responsible for perpetrating injustices against rape victims/survivors, including children. In both the CJS and the family courts, the age of the witness/child nearly always goes against their case, as younger children are often treated as inherently unreliable.

One Rape Crisis Centre, the Centre for Action on Rape and Abuse, submitted a series of six case studies into the Family Courts Review. In the case studies they have recorded judgements being handed down that are reflective of assumptions that children who disclosed sexual abuse have been lying, are ‘mistaken’, or that their mothers have ‘coached their children to make up false allegations against their fathers’ (Rape Crisis England & Wales, 2019; Thiara, 2020).

The ‘vindictive mother’ trope, who uses her children to punish the father, is one that is still deemed more plausible than the child having actually disclosed and experienced sexual abuse.

There is widespread concern in the sexual violence sector that this signals to perpetrators that they can rape and sexually abuse young children with impunity, whilst women continue to experience sexist and misogynistic myths and stereotypes, ultimately sanctioned by the courts.

Authors of this report recognize the judicial system as part of wider patriarchal society that frequently perpetuates the hyper-sexualisation of women and girls along with myths about women and girls through misreporting, misrepresentation, and through poor public education. This is compounded by the victim-blaming, gendered and racialised stereotypes that exist when women interact with other support services such as health, social care, mental health. The example below shared by a ‘by and for’ specialist support service reflects the racialised and gendered assumptions which lead to a specific form of institutional scrutiny of Muslim women’s behaviours, assuming that sexual violence in certain communities is only perpetrated within a familial/interpersonal context:

“A young Muslim woman we are supporting disclosed that she had been sexually assaulted at a party by a stranger. When she reported this, they kept questioning the fact that she had gone to a party as a Muslim woman wearing a hijab. She felt that her disclosure was not taken seriously/believed because of the environment in which it took place.” – Specialist Black and minoritised sexual violence practitioner (in Imkaan, forthcoming)

## The criminal justice system: traumatic in and of itself

As outlined so far, the implicit and explicit victim-blaming in all areas of the CJS creates harm, distress, and re-traumatisation. More recent initiatives (at the time of writing) by the CPS and the Courts and Tribunals Service have attempted to adopt a more trauma-informed approach. Although this is a welcome development, 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.

### Invasive police practices

In recent years, police disclosure practices have disproportionately affected victims/survivors of sexual violence and abuse, with the recent ICO report stating that “data extracted and processed from devices appeared excessive in many cases, with little or no justification or demonstration of strict necessity or proportionality” (ICO, 2020). Invasive disclosure practices have a damaging impact and often make victim/survivors feel like they are under investigation. One victim/survivor says:

“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)

In a recent report analyzing 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.

At the time of writing, the authors are looking closely into how changes to disclosure practices are changing, following the successful legal challenge brought on behalf of two victims/survivors of serious sexual offences by the Centre for Women's Justice. They were successful in arguing that consent forms routinely issued to victims were unlawful, in policy and practice, and discriminated against women.

### The impact of rape and intersectionality

An understanding of the impact of multiple, intersecting forms of structural oppression and violence is crucial to understanding victim/survivor pathways to justice (individual, 'cultural' and structural). Women's lived experiences of violence should be seen as a 'continuum of violence' (Kelly, 1988) and a 'continuum of oppression' (Kanyeredzi, 2018). As highlighted earlier, by perpetuating racism, classism, sexism, dis/ablism, homophobia, and transphobia (Collins, 2000, Crenshaw, 1998), the CJS can itself reproduce the very violence it seeks to address.

The institutional racism within the CJS has a significant influence on whether it is viewed as a route to justice for Black and minoritised victims/survivors. In the Imkaan study, "Reclaiming Voice" (Thiara and Roy, 2020) survivors spoke of racial loyalty, protecting others in their families / communities and feelings of betrayal which were strongly connected to women and their families being subjected to historical, punitive and discriminatory impacts of policing and the CJS through over-policing, disproportionate arrest, criminalization and surveillance (Kanyeredzi, 2018; Richie, 1996; Thiara, 2011; Bowling and Phillips, 2007; Lammy 2018).

The 2020 global protests in response to systematic racial injustices and disproportionate police brutality reflect pre-existing levels of distrust borne out of historical, intergenerational harms and trauma as a result of the treatment of Black and minoritised communities by the CJS. The harsh and disproportionate effects of the CJS have understandably led to renewed calls for a social justice, and community based approach to VAWG from Black and minoritised communities (Kim, 2018; Incite!, 2001).

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; 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).

In Imkaan’s study “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)

Research on criminal justice outcomes in sexual violence cases shows that White suspects are significantly more likely to avoid further investigation, especially if a victim/survivor is from a minoritised group, whilst offenders are more likely to be prosecuted if they are from a minoritised group (Hohl and Stanko, 2015), reinforcing systemic racialised disparities within the system to minoritised women.

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’ (Walker et al, 2019, p. 13). It has also noted that for LGBTQ+ groups individual/ cultural barriers such as being ‘outed’, and the overlapping experiences of hate crime contribute to this invisibility (Walker, 2019).

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 (Manjoo, 2014).

For migrant women, especially those with asylum claims and insecure status, their experiences of sexual violence, the barriers to accessing the CJS, and a hostile immigration system perpetuate trauma. 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. 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 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. A respondent to the Imkaan survey (forthcoming) comments on the fact that survivors have to ‘disclose events to a new interpreter each time’ which can feel re-traumatising. Access to good quality interpreting is essential but so is consistency to aid safe and supportive disclosure.

These findings should be alarming for policy makers and the judiciary, requiring more research to understand the ways in which systematic inequalities impact victim/survivor pathways to justice to inform a long-term action plan which seeks to create longer-term meaningful systemic change. To be effective, this must be co-produced with the ‘by and for’ equalities groups and specialist sexual violence and abuse services.



*Overarching chapter theme*

# BARRIERS TO JUSTICE

## Victim/survivor engagement and withdrawal discrimination

The traumatic processes inherent to the CJS means that it is not fit for serving justice in rape cases; it is therefore unsurprising that so few victims/survivors access it.

“I was equally as traumatised by the police, it took me longer to overcome that trauma before I could even explore the rape trauma.” – (Victim/survivor in Smith and Daly, forthcoming)

Greater analysis of the reasons behind victim/survivors withdrawal from the CJS is needed across the UK, but there is some 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. In the data set of 26% of complaints, victims/survivors felt that the CJS process would be too distressing, and in 13% of complaints, victims/survivors expressed fear that the criminal justice process would have a negative impact on their mental health and well-being (Victims Commissioner, 2019). 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

“I often wonder “what if” and am deeply upset that the perpetrator is still out there. However, without getting any assurances on the possibility of success in a court case... I wonder that by not going through the legal process I was able to protect myself from the life shattering re-trauma an unsuccessful case would have put me through and I could begin my healing process sooner.” (Victim/survivor in Smith and Daly, forthcoming)

The ordeal of cross-examinations for victims/survivors have been widely accepted as problematic, with Codes of Conduct (Bar Council, 2004) 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 (Smith and Skinner, 2012). One victim/survivor describes her experience of her cross-examination:

“Being cross examined was as traumatic as the rape, except with the added humiliation of a jury and a public gallery.” (Victim/survivor, in Smith and Daly, forthcoming)



Jury disbelief continues to be a major source of re-traumatization 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:

“I’ve been struggling a lot with PTSD. Bad anxiety, I can’t sleep, I get flashbacks. I don’t get in taxis, ever. And I don’t go to that part of town. But it’s actually the trial I think about more than what he did to me. At every stage of everything I said, there was evidence...there’s the CCTV showing me not able to stand, the barmaid, my friends, my neighbours, the man who heard my screams, all witnesses. My torn dress, the fact that his story kept on changing. All the forensics, the injuries...I don’t know how you can see all of that and think ‘yeah, she was up for it’” – (Victim/survivor in BBC, 2020)

Feeling disbelieved following a process of interviews and questioning compounds the trauma of the sexual violence and abuse for victims/survivors, and can have mental health repercussions with dire and sometimes fatal consequences:

“After going through intense questioning they advised me there wasn’t enough evidence. I tried to kill myself a week later.” (Victim/survivor in Smith and Daly, forthcoming)

In the case of Frances Andrade, a victim/survivor of non-recent child sexual abuse, the cross-examination proved too much to bear. Just days after testifying, she took her own life. She described to her friend that the cross-examination was like “being raped all over again” (Ministry of Justice, 2014). It should be unacceptable that the process of pursuing justice further traumatises victims/survivors. Attempts to encourage victims/survivors to report to the police and “come forward” can only be carried out alongside radical structural changes to the system.

Given the levels of institutional discrimination 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 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 tell 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 victim/survivors before, during and after a criminal justice case, yet specialist services often play a central part in mitigating in part for the trauma reproduced by the criminal justice system.

## Demoralisation

It is perhaps unsurprising that given the low numbers of cases going to court, the trauma perpetrated by the system, and the myths and stereotypes that underpin criminal justice processes, that victims/survivors, specialist sexual violence and abuse workers, and in some cases, the police, are demoralised from the lack of justice for victims/survivors. The 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 are all factors that lead the system to become a source of demoralisation.

### Un/timeliness

Time-frames 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 (CPS Quarter 4 data, 2019-20). Victims/survivors frequently describe the long waiting periods as a time of being in limbo, with normal life suspended:

“our experience of the justice system is that it was a very long process in which there were long periods of time where it seemed that nothing was happening and no information was being fed back to us” (APPG Adult Survivors of CSA, 2020)

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 (Guardian, January 2020). One of the consequences of this, is that it 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.

On top of managing demanding caseloads, ISVAs and specialist advocacy workers in led ‘by and for’ organisations are under increased pressure by having to relay disappointing information to survivors, often many times a day to different women. The long and often indefinite time-frames, and the traumatic nature of the system can mean that supporting victims/survivors remain engaged in the CJS presents significant difficulties for ISVAs. One ISVA describes, how they are often at the sharp end of the system having to explain poor practice and outcomes:

“it concerns me and my integrity as an ISVA, that I am sitting in the sessions ...trying to be this buffer in a really fraught system and having to explain why the police aren’t doing their job properly, why the CPS are taking so long only to come back with an NFA decision...”  
– (ISVA in RCEW focus group 2019)

Black and minoritised practitioners also spoke about the daily challenge and burden of having to support and prepare victim/survivors for the institutional racism and intersectional discrimination they are likely to encounter within the CJS. This is often an unrecognised yet essential component of their safety/risk assessment planning and support approach to mitigate against the traumatic impacts of the CJS.

“We worked with several women, Black women who have gone through the criminal justice system and got a not guilty verdict...you just think that absolutely this is a no brainer, this woman is going to make it to the end line and the kind of things that those women would say is that ‘I got how people saw me’, ‘I got how that jury saw me’ you know.” - (Victim/survivor, in Thiara and Roy, 2020)

This is exacerbated by the racism and micro-aggressions that Black and minoritised practitioners find themselves subjected to in their day-to-day interactions with the CJS which lead to systematic isolation and exclusion. This is not recognized and has a damaging impact on the wellbeing of advocates whilst creating further obstacles to providing effective protection and support to victims/survivors. In an Imkaan survey (forthcoming), practitioners spoke about being ‘tone’ policed, having their credentials questioned, and being excluded and isolated. A specialist, Black and, minoritised practitioner comments:

“There have definitely been times during my practice as an ISVA that I have felt silenced, chosen not to speak out, because of ‘tone policing’, for fear that I will be positioned as the “angry black woman” and therefore not meaningfully be heard.” (Imkaan, forthcoming)

The dearth of cases being taken forward by the CPS is also demoralising to the police. As outlined in previous chapters of this report, this has an inevitable effect on how the police investigate cases. In an episode of Channel 4’s series “Crime and Punishment” police officers show their dismay at how fairly strong cases with CCTV evidence are not being accepted by the CPS, with their Deputy Chief Constable Sara Glenn stating:

“this standard is too high and we really do need to push back on CPS as unless that changes round here...you’re not going to see a shift. We are failing victims about not getting enough cases through court. These attrition rates are horrendous and it’s not through lack of effort from police”. (Crime and Punishment, 2020)

### Challenging decisions

A part of what makes the process demoralising is that the processes in place to challenge NFA decisions are opaque, and when the original decision is upheld, this leaves the victim/survivor with a lack of alternative routes for pursuing justice through the CJS. There is very little accountability with police decision-makers, as they ultimately do not have contact with the victim/survivor to see the impact of the decision. Victims/survivors should as a minimum, know the name who signed off the NFA.

NFA decisions are typically carried out verbally, although under the Victim’s Code, victims/survivors have the right to have the NFA decision made in writing with sufficient detail outlining the reasoning behind it. One Rape Crisis ISVA from London said that she has become “unpopular” with the police because she requests that a face to face meeting take place and for the decision to be made in writing, so that it can be challenged if the grounds for the NFA are problematic. There is a concern that ISVAs, whose role it is to advocate and support their client are perceived to be causing trouble simply for insisting that the victims/survivors’ rights are adhered to.

Where a VRR has taken place, in the DCI letters to the survivors informing them of the VRR decision not being overturned, Rape Crisis ISVAs have cited a number of issues. These include basic issues such as spelling the victim/survivor’s name incorrectly, generic and vague cut and pasting from templates, not referencing the case, and a general lack of any care or compassion towards the recipient. One ISVA described the quality of these letters as “appalling”.

## Inherently disempowering CJS vs empowering specialist services

The CJS is an inherently disempowering process for victims/survivors, as it posits the victim/survivor as a “witness” to the rape against them, which is being prosecuted on behalf of the Crown. As outlined throughout this chapter, it is a system where the victim/survivor -- who has already been disempowered through their rape and sexual abuse-- waits long periods to be told what is happening with their case. A lack of sufficient case building from the CPS, frequently leaves them with extremely limited control over the outcome of the case:

“I still have flashbacks to the whole process and ask myself what I could have done differently. The defendant had help on what to expect in court, but all I had was someone saying ‘if you tell the truth then that’s enough’ - well I did tell the truth but it wasn’t enough.” – (Victim/survivor in Smith and Daly, forthcoming)

As highlighted earlier, 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. Additionally, as mentioned above, criminal justice outcomes are affected by racial biases, relating to both defendants and witnesses. One Rape Crisis ISVA stated:

“Been working as an ISVA for 4 years, and not a single case has gone to court... because either my client was drinking, or in a relationship with the person. If there’s any enhanced vulnerability, that’s it”. (ISVA in RCEW focus group 2019)

The disempowering structure of the system is contrary to the ethos of specialist sexual violence and abuse services, which are developed to empower and support victims/survivors. These services are often life-changing, and in a recent IICSA report on support services, the findings concluded that “across all support services, the most highly rated by survey respondents were counselling provided by a charity/voluntary organisation specialising in child sexual abuse and sexual abuse and/or rape support services provided by a specialist charity/voluntary organisation”(IICSA, 2020a: 12).

As stated earlier, specialist sexual violence and abuse services mitigate against the traumatising and disempowering impacts of the CJS, allowing victims/survivors to make an informed choice in whether to access it, and offering specialist counselling and advocacy services regardless of this choice.

“We see women as agents of their own healing and transformation – we recognise their courage, strength and resistance to system of oppression. We provide opportunities to demonstrate and have their voice heard as part of a collective. We do not focus on victimhood.” – (Black and minoritised sexual violence practitioner, Imkaan, forthcoming)

Victims/survivors value and need access to wrap-around holistic specialist support and intersectional advocacy through ‘by and for’ BME VAWG organisations and those providing specialist advocacy to disabled, LBGTQ+, and young women.

Having someone who understands, stands alongside and advocate through the CJS, whilst being ‘cushioned’ from racism and other forms of discrimination has been highlighted to be crucial to women’s sense of safety and support. This support can remove much anxiety for victims/survivors. Support and intersectional advocacy from ‘BME’ organisations can lead to qualitatively different experiences for women and sometimes more positive and proactive responses from the police and other agencies (Thiara and Roy, 2020).

This report maintains therefore that the position of the ISVA should consistently be based within specialist sexual violence and abuse services (including ‘by and for’ providers for Black and minoritised communities and disability organisations). In these settings, the independence of the ISVA is 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 holistic and consisting of independent, advocacy, advice, therapeutic, outreach and accommodation-based support and should be available to all victim/survivors and should not be predicated on their engagement with the CJS. The ethos of the trauma-informed, survivor-led, specialist Rape Crisis Centres and led ‘by and for’ services remains critical in providing the best possible support for victims/survivors who choose to access 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 damaging effects of a ‘one size fits all approach’ to commissioning can already be seen through the systemic defunding of the led ‘by and for’ sector for Black and minoritised women/girls, a sector which is already managing a large funding deficit (Imkaan, 2018). In many areas of the country, Black and minoritised victims/survivors are unable to access dedicated support because of a lack of equitable access to resources within the existing frameworks for funding VAWG provision. Added to this there are also significant gaps in provision for specific populations across the protected characteristics and intersecting needs, and gaps in access to specialist sexual support for specific communities that require attention. These gaps in provision require an urgent review of commissioning approaches in line with obligations set out in the Public Sector Equality Duty.

Although commissioners prefer to have a large single commissioned provider, this could ultimately be disastrous for victims/survivors of sexual violence and abuse, the majority of which never report to the police. They deserve a choice of service, and can decide how, when and if they access the CJS.

OUR RECOMMENDATIONS TO THE GOVERNMENT'S RAPE REVIEW







## CHAPTER 6:

### OUR RECOMMENDATIONS TO THE GOVERNMENT'S RAPE REVIEW

---

Leadership and accountability 71

---

Access to justice for all 73

---

Victim/survivor advocacy  
and wrap-around specialist  
services 74

---

Police, CPS, courts, juries 76

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# Our Recommendations to the Government's Rape Review

## Introduction

The information presented in this report provides substantial evidence of the unjust treatment and re-traumatisation of victim/survivors of rape and sexual abuse, and the poor criminal justice outcomes reproduced by an adversarial legal system that has effectively decriminalised rape.

We need to recognise the lack of faith in the criminal justice system, and those who are responsible for leadership on rape and sexual abuse need to reckon with whether there is enough professional curiosity among those in key roles as to why rape is seemingly so difficult to prosecute. At the point when the Government commissioned the 'end to end Rape Review' in March 2019, justice system leaders had still not taken appropriate action despite the disastrously plummeting data. There is very urgent need for change throughout the whole system.

Below are our recommendations for meaningful change in the criminal justice system's response to rape. These are addressed to the ongoing (England and Wales) Government Rape Review, which started examining the rape justice problem in March 2019, and is set to report its findings before the end of 2020.

We make specific recommendations for change within the 'police front door to courtroom verdict' stages of a rape investigation and prosecution, as well as recommendations around leadership and accountability, protection and justice for all victims/survivors, and the steps that should be taken to better understand who accesses justice in the first place.

# Our recommendations fall under these four broad themes:



## Leadership and accountability

Visible political leadership on rape and sexual abuse, with commensurate responsibility to improve justice outcomes



## Access to justice for all

Victims/survivors want and need to be believed, and treated with dignity and respect.



## Victim/survivor advocacy and wrap-around specialist services

Ensure that victims are able to access the services that they need, when they need them



## Police, CPS, courts, juries

The adversarial legal system is not working for rape and sexual abuse cases, there needs to be a different and fairer whole-system approach.



At the point when the Government commissioned the 'end to end Rape Review' in March 2019,

justice system leaders had still not taken appropriate action despite the disastrously plummeting data. There is very urgent need for change throughout the whole system.

## LEADERSHIP AND ACCOUNTABILITY

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 needs to be visible political leadership on rape and sexual abuse, with commensurate responsibility to improve justice outcomes.

The Home Secretary oversees a National oversight group to drive change in the policing and community response to domestic abuse. There needs to be this level of Ministerial attention to rape and serious sexual offences, as a long-term criminal and social problem that requires proactive policies to prevent it. In short, rape should be an active area of public policy making; currently it is not.

### 1 Leadership:

Cabinet members and the Prime Minister should **speak out about rape and sexual abuse, and improving access to justice and ensuring victim/survivor protection and recovery** as a public policy priority. Due to the scale and severity of harm caused by rape and sexual abuse to individuals and communities, it needs to be discussed publicly and frequently, requiring a high level of political will.

**A senior, elected and accountable person should have oversight of rape and sexual abuse, which must be considered a high priority.** Named Ministerial oversight and scrutiny of CJS performance would inform better policymaking, and these public leads should also become public champions in this area, speaking frequently about the issues, the actual data and what is being done to improve justice in rape cases.

We recommend improved policy join up between departmental teams and strategies, including the VAWG Strategy, Child Sexual Abuse and Exploitation Strategy, and the NHS Sexual Assault and Abuse Strategy. This needs a truly **cross-government approach**, as envisioned by the last VAWG Strategy. We would expect a policy approach that offers protection to all, including migrant women. This recommendation requires leadership and ownership over issues pertaining to sexual violence and abuse.

### 2 Performance:

Senior public officials including Police Chief Constables, Chief Crown Prosecutors, the Director of Public Prosecutions and leaders within the College of Policing and National Police Chief's Council (and those they are accountable to) should have improving rape justice as a specific part of their performance reviews.

Public servants charged with achieving the best outcomes in rape investigations and prosecutions, should have rape recognised as an unequivocal and significant part of their role and highest level aims.

Chief constables and Chief Crown Prosecutors should have their understanding, experience and aptitude for rape justice improvements feature during their recruitment and appointment.

Measuring victim/survivor satisfaction not only in terms of the CJS outcomes, but the quality of interactions with criminal justice agencies, is a critical part of measuring performance which does not currently take place. A Ministerial lead and system leaders should work with independent specialist sexual violence and abuse services to establish consistent and effective approaches to measuring victim-survivor satisfaction of those who report rape.

This should include a strong equalities analysis, to identify outcomes for those reporting rape according to sex, gender, sexual orientation, race, disability, social background and age. An external panel including voluntary sector experts should input into this work.

We recommend that PCCs proactively reach out to specialist sexual violence and abuse organisations, and develop more ambitious plans to prevent rape. Many PCCs, despite being required to identify significant crime types, conduct local needs assessments to understand prevalence and the impact of rape and serious sexual offences, but then these offences are not sufficiently addressed within their Police and Crime Plans. There needs to be much more transparency around how Chief Constables and police forces are held to account specifically on rape justice (see EAW Coalition survey of PCC Police and Crime Plans, 2019).

### 3 Review of current statutory agency governance arrangements:

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There is a strong case for an in-depth review of some of the current statutory agency governance arrangements in this area. The CPS, for example, is primarily overlooked by the Attorney General's office to protect independent prosecution decision-making. This means that the CPS has an exceptional level of executive authority for setting priorities and practice in crime types like rape. It is not always clear how this can be scrutinised and held to account.

There should be an in-depth government review of CPS governance that goes beyond the current government Rape Review, in order to achieve clarity and recommendations on how CPS leaders can be held to account for good decision-making and performance on justice in relation to rape.

### 4 Public attitudes:

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A Government Minister, supported by an oversight group, should be responsible for commissioning permanent public awareness campaigns about the law on rape, challenging key myths around it. The Home Office previously ran a time limited campaign of this nature targeted at teenagers, and other crime and public health campaigns are believed to have influenced public attitudes and behaviours. When it is clear that attitudes to rape and sexual abuse are influencing justice outcomes, we need active interventions to support changing public attitudes.

The commissioning of an ongoing public awareness campaign about consent and rape myths, to challenge and prevent rape, aimed at the adult as well as young adult and teenage population.

### 5 Private sector:

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Those who are not public servants but work in private practice as lawyers/advocates, or in the education or regulation of lawyers, should look at their role in terms of how they influence professional and public opinion in this area.

Those who shape opinion and careers in law should talk openly about rape, to demonstrate understanding of its social impact and scale, to recognise that it has been treated as exceptional as a subject of prosecution, and to lead conversations about courtroom ethics. Lawyers should be active in discussion of whether their codes of conduct and professional ethics can be detrimental to the whole community's perception of and response to rape, and therefore also contribute to discrimination against women as a group.

## ACCESS TO JUSTICE FOR ALL

Victims/survivors want and need to be believed, and treated with dignity and respect. Specialist sexual violence and abuse services consistently report that victims/survivors who access the CJS want to have basic needs met, such as having a choice in regards to the sex of the police officer, and being kept informed of case developments.

Victims/survivors are not a homogenous group, and will have a diverse range of priorities when it comes to how they want to address their sexual violence and abuse. For most, they will never access the CJS. Some victims/survivors will have reduced expectations of being believed and being protected because of a justice system which can mirror the racism, homophobia, ableism and other forms of discrimination that victim/survivors face in their daily lives.

As well as negative experiences and perceptions of the CJS, there are often other pressing issues in the lives of victims/survivors that can take precedent over reporting. These can include securing basic material security based on housing and income or immigration status, seeking safety from reprisals by the perpetrator(s), maintaining family and community relationships, and prioritising mental and physical wellbeing.

Victims/survivors may seek out and benefit from specialist therapeutic wraparound support, peer-support through survivor networks, support with talking to family or others about what happened, 'transformative' justice resolution, instead of or in addition to criminal justice. Taking an approach which is centred on victim/survivors' needs starts to create a different vision which is critical to understanding how to respond effectively.

> Understanding who does and does not report is a vital first step. We therefore recommend an in-depth piece and independent research to be commissioned immediately into the characteristics of those who do and do not report rape to the police.

> We recommend a parallel investigation of what rape and sexual abuse victims/survivors actually want from the justice system, from other agencies, and their communities. This is vital to assisting public policy development in this area.

> Research should include meaningful engagement with rape survivors and would require resourced co-production with specialist 'by and for' services and sexual violence and abuse services. It should get advice from the expert women's and sexual violence support sector, including those with expertise supporting minoritised women and girls. The research with victim-survivors should seek diverse voices and include an equalities impact assessment of the CJS itself asking critical questions on the accessibility of the process from reporting to court for victim-survivors across the different protected characteristics. We strongly recommend the recruitment of independent, credible, academic and voluntary sector experts to design and oversee the work.

> We recommend the further piloting of legally qualified advocates for victim/complainants in rape and sexual abuse cases, in consultation with the specialist sexual violence and abuse sector as well as academics who are already working in this field, and have experience from piloting a particular model of independent legal advocacy in the North East of England.

# 3

## Deterring and preventing rape and sexual abuse

Policy making on rape and sexual abuse should aim to understand what measures could actually reduce and prevent offending in the first place. It is hard to overstate how absent this question and approach is in current public policy making. Victims/survivors' experiences are key to understanding this, especially when what we have at present - a supposed criminal deterrent - cannot be said to be working.

> We recommend that once quality in-depth research has already been commissioned on who is and is not reporting rape, and on survivors' priorities (see recommendations above), the Government then commission specific investigations and policy development on how to prevent rape. This is likely to encompass whole system approaches, from school curriculum and practices, through to public health work, community work, DCMS priorities and law/policy/regulations, and offender programmes and management.

A meaningful analysis of sexual violence and abuse prevention would consider women and girls' positions in society and the need for wide-ranging policy and cultural changes. It is paramount to understand the context of why rape and sexual abuse happens, why sex offenders perpetrate, and how care settings, mental health facilities, immigration enforcement, social work, the night-time economy and the pornography industry all have played a role in facilitating or overlooking rape and sexual abuse. It would also heighten the seriousness with which image-based abuse is treated, from child sexual abuse to the sharing of images without consent.

## VICTIM/SURVIVOR ADVOCACY AND WRAP- AROUND SPECIALIST SERVICES

The Government's Violence Against Women and Girls Strategy includes a commitment to "ensure that victims are able to access the services that they need, when they need them." We urge the Government to go further, and to say that victims/survivors want and deserve to have a choice of appropriate services available to them, as and when they need them.

The provision of Independent Sexual Violence Advisors (ISVAs) was piloted in England and Wales from around 2000 and research and evaluations have shown that victim-centred advocacy in rape trials is both highly valued by victims/survivors as well as helping to reduce attrition and improve justice outcomes. The most successful ISVA services are those that are situated in independent and specialist sexual violence and abuse organisations, as they work along specialist counsellors, therapists, and support workers offering survivors holistic, wraparound, and specialist support. Independent specialist services are critical to building trust and supporting survivors to disclose safely. However, the provision of specialist advocacy is still subject to a postcode lottery, with many commissioners not recognising the value of this work.

The ISVA model is not the only way of providing ongoing support to a survivor through the period of a criminal justice process, and many women are supported by specialist advocacy and wrap-around specialist services tailored to their needs within 'by and for' support services for Black, minoritised and disabled women's support groups for example. This work is seldom resourced or understood by commissioners.

However, those reporting rape and sexual abuse are more likely not to receive this support than receive it.

## Independent, specialist, tailored advocacy

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- > We recommend a national government level commitment to the creation of 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.
- > We recommend that national government, PCCs, health commissioners and local authorities, ensure they understand the value of independent specialist sexual violence and abuse services and their duty to support it. The ongoing serious under-funding of Rape Crisis services and specialist BME and disabled women’s support services and identifying other gaps in provision is critical. There should be a duty to recognise their role in providing tailored independent sexual violence advocacy and receive recognition and support for doing so.
- > Victim/survivors need access to specialist non-medicalised counselling and therapy as and when they need it, including pre-trial therapy. Recovery is not linear, and victim/survivors may require access to specialist sexual violence and abuse services before, during and after accessing the criminal justice, if indeed they choose to report their sexual violence and abuse. Criminal justice agencies need to know of the victim/survivor’s right to access pre-trial therapy, and be cognisant of the range of services that are both available and appropriate for victim/survivors. At the time of writing, the CPS are consulting with the public on pre-trial therapy guidance. We have recommended that therapy and counselling notes are 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.
- > We recommend that the commissioning of rape and sexual abuse victim/survivor advocacy/wrap-around provision is underpinned with a thorough equalities analysis, in order that we do not reproduce ‘one size fits all’ generic forms of support, but rather recognise the wide-ranging and intersecting needs of different rape survivors and the importance of community engagement and outreach work. This should draw on existing models of good practice within the ‘by and for’ sector (see Reclaiming Voice, Imkaan, 2020).
- > Victim/survivors should have the choice to access therapeutic approaches that are tailored to the needs of young, disabled, LGBT+ and Black and minoritised women and girls and may not always fit western models of recovery, including access to therapists that reflect the victim survivor’s social, identities.
- > 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.



## POLICE, CPS, COURTS, JURIES

The adversarial legal system is not working for rape and sexual abuse cases, and in recognition of the exceptional problems in evidencing and testing this crime, there needs to be a different and fairer whole-system approach.

While recommendations can be made for each separate institution here, it is essential to recognise that when dealing with rape and sexual abuse, the police, the CPS and the courts are a whole system where the decisions and actions of each are being anticipated by others. Police and prosecutors are strongly influenced by what they think defence lawyers and juries will behave, while juries and courtroom advocates can only construe truth from what is present and absent before them. As such, the recommendations here treat the agencies both separately and as a whole.

### For the police:

- > We recommend that rape investigation is a clear, named specialism in all forces, with a strong and rewarded career route, and recruitment to the specialism is based on the specific knowledge and skills needed for rape and sexual abuse in addition to broader investigative ability. If rape and serious sexual offences were a rewarded career specialism, police forces would not have such high turnover of trained police leaving the specialism.
- > We recommend that training and professional development in rape investigations should be highly specialised and trauma-informed, and it should include criminological research on offenders, why and how they offend, in addition to law and evidence rules.
- > Police training must include more in-depth equalities work, addressing unconscious bias, myths and stereotypes related to sex, race/ethnicity, social class, disability and other protected characteristics, concerning victims/survivors and offenders. This should be delivered by experts who can explain how inequalities manifest through the CJS (and across other institutions and society) in relation to rape and sexual abuse. CJS leaders need to be committed to investing in workforce development that is embedded as part of a wider system of cultural, change within the CJS and its effectiveness evaluated.
- > We recommend that rape and sexual abuse investigators should have compulsory clinical supervision on a regular basis similar to other professionals working regularly with rape victims/survivors. The workforce should be protected from harm and burnout including vicarious trauma, cynicism and frustration.
- > We recommend that investigations should explicitly return to a clear examination of the seeking as well as the giving of consent (this recommendation is made for CPS as well, and as such the seeking of consent should feature prominently in the advisory conversations between police and CPS in live investigations).
- > We recommend that all rape investigations should have the oversight of a senior rape and sexual abuse specialist lead. These leaders, and overall police force senior leaders and chief constables, should be performance managed, and highlight the importance of continuous improvement in this area within staff and external meetings. Rape should become a much more visible part of policing.

> We recommend that every level of frontline police worker; non-police call handlers, community police, Safer Neighbourhood Teams, front desk workers and all police constables, undergo a specific training modules on sexual violence and abuse, including its prevalence, what is known about offenders, the myths and stereotypes, impacts, the perspectives of victim/survivors, and specialist voluntary sector sexual violence support and referral pathways. Equalities training as highlighted above should be a core strand of this.

> We recommend that the Government should consider setting out expectations for PCCs on their responsibility in relation to improving policing on rape as well as access to victims/survivors specialist services through the National Statement of Expectations. PCCs are in a position to shape public opinion as well as Chief Constables' management plans.

### For the CPS

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> We recommend that RASSO prosecution work is made a clear, named permanent specialism in the CPS, with a strong and rewarded career route, and recruitment in based on the specific knowledge and skills needed, along with professional curiosity and interest to do this work.

> We recommend that prosecutors should have training on the criminological research on offenders, and on equalities and the specific myths and stereotypes related to women and girls, race/ethnicity, social class, disability and other protected characteristics, concerning victims and offenders, in relation to rape and sexual abuse.

> We recommend that prosecutors should have compulsory clinical supervision on a regular basis, for the same reasons outlined above for the police.

> We recommend a consideration of reintroducing the Merits Based Approach. RASSO needs specific guidance in addition to the Code Test, because without there is a clear risk of prosecutors taking 'the bookmaker's approach'. Looking at the merits in a rape case means looking at the seeking as well as giving of consent, the strengths in evidence and testimony, and the counters to what the defence may offer.

> We recommend 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.

> We recommend that the 'admin finalised' category of rape casefiles at the CPS is abolished and replaced with a clearer categorisation. Stakeholders should be consulted with on this.

> We recommend that leadership is strengthened in order to improve rape justice outcomes at every level of the CPS. Senior leadership need to demonstrate professional curiosity about the specific context of rape offences, which are difficult to prosecute in the adversarial system but severe in harm caused, because otherwise rape is vulnerable to being perceived as an area of failure of rule of law.

### Between police and CPS, including disclosure of digital evidence

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> We recommend formalisation of the process of seeking 'early investigative advice' (EIA) by police from CPS. These interactions are difficult to monitor and evaluate, but are often key in decisions made about whether to discontinue a case. The details of these interactions should be clearly recorded. Managers should take an interest in 'EIA' volumes, recording and outcomes. External scrutiny panels should be able to review them.

> We recommend that all cases which are discontinued, whether at police or CPS stage, be reviewed by gender/race/class/age/disability and results analysed and reviewed annually.

## On disclosure of evidence to the defence during the investigation

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> We recommend that the multiple government departments working on disclosure issues 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.

> We recommend that new Principles and a Policy and Practice Agreement are developed 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.

## In the courts

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> We recommend 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, which is fit for the digital age. This should explicitly refer to attempts to relate sexual history invoking race/class/disability and sexual orientation prejudices as well as sex. The law on 'SHE' has long been queried by victims/survivors' organisations, and the volumes of new digital evidence have made review more urgent and relevant than ever.

The effectiveness of this ban should be reviewed regularly, because it is such a pivotal area of entry for harmful myths and prejudices, which deters police and prosecutors from good case-building. Political will is required to review and achieve the critical change needed here.

> We recommend a review of the courtroom cross-examination rules. Victims/survivors are too often subjected to what amounts to "inhuman and degrading treatment" in the witness box. The re-traumatisation of victims/survivors in the witness box is not an acceptable 'cost' of justice. The impact of this experience should be surveyed and recommendations for change discussed with legal experts and victim/survivors' groups.

> We recommend the judiciary in England and Wales to bring their unique expertise to the conversation about the extreme challenge rape cases present in the adversarial system, because courtroom practice in rape trials is the overall key driver of decision-making at all the preceding stages of a rape investigation. We note the June 2020 MoJ consultation and report on harm to children and parents in private family law cases, and its recommendation of extending a more inquisitorial judicial approach in some family court proceedings. This approach should be on the table as a comparison and opportunity for moderate change.

> We recommend a Special Commission on the efficacy of juries in rape trials, because perceived or real jury prejudice acts as a driver of injustice at every stage, with the pre-emption of juries at both CPS and police level. This Special Commission should look at the available evidence on juries, moderated juries, juror education/instruction, jury screening, the use of expert witnesses, local and international evidence in relation to using a judge with experienced lay magistrates instead of juries, models that are not based on a single specialist judge but allow for experts similar to discrimination tribunals. At time of writing the public health crisis has created a large backlog of cases in the criminal courts, and there is a need to consider the temporary use of judge-only trials.

## Outside the courts: the legal profession

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- > We recommend that legal profession leaders encourage an urgent, open conversation about how the practice of defence on rape cases may exploit and perpetuate in society harmful prejudices about rape, and how ethics, training and codes of conduct can be better implemented and adhered to.
- > We recommend that the Bar Standards Board institute a review of the Code of Conduct for Barristers with attention to how acting in the best interests of a client, being part of public trust and confidence in the profession and not discriminating against anyone can be seen to conflict as duties in rape cases. We recommend that this review include an examination of how defence lawyers promote their work when sexual offences are their specialism.

# CONCLUSION SUMMARY

## A society committed to....

### Addressing sexual violence

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A society that is fully committed to addressing sexual violence and abuse will recognise it as a cause and consequence of gender inequality and patriarchy.

### Equality of women and girls

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A society truly committed to the equality of women and girls will also go well beyond criminal justice reform in responding to rape and sexual abuse, and provide the best wraparound care and support for survivors of rape whenever they seek it.

### Stop the drivers and the excuses

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A society committed to addressing sexual violence and abuse will stop making commercial entertainment out of rape and sexual abuse, and it will end the proliferation of violent pornography.

### Women's human rights

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A society that is fully committed to women's human rights and citizenship on an equal basis with men, where bodily autonomy is not negotiable, will deal with rape and sexual abuse.

### Preventing sexual violence

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A society committed to addressing sexual violence and abuse will systematically consider all the contexts that have been conducive for rape and sexual abuse or have overlooked it.

## CONCLUSIONS

The issues we raise in this report are not new; there have been numerous previous inquiries, reviews and inspections, many of which contained similar recommendations across the years, and many of which have yet to be implemented. It is for this reason that the Government Rape Review must not re-publish proposals that have been in the public domain for a long time.

What is striking in reading through the most significant of these previous reports, is the high level of consensus across them on key themes and recommendations. They tend to broadly approve of existing policy relating to the investigation and prosecution of rape, and then identify that this policy is not properly implemented. These kinds of failures are longstanding. It can feel as though the repeated commissioning of these reviews and inspections is a way for Government and other authorities to indicate concern, while never following through with the action and resources needed to make change. We therefore conclude by outlining our vision for women and girls, and for all survivors of sexual violence and abuse. These relate to the criminal justice system, but speak to wider society, in which criminal justice systems operate.

A society that is fully committed to addressing sexual violence and abuse will recognise it as a cause and consequence of gender inequality and patriarchy. It will recognise patriarchy as a system that overwhelmingly oppresses women and girls, but one that can also deeply harm men and boys.

A society that is fully committed to women's human rights and citizenship on an equal basis with men, where bodily autonomy is not negotiable, will deal with rape and sexual abuse. It will not ignore it, and it will stop treating it as inevitable. It will demonstrate it understands the severity of the harm caused by sexual violence and abuse, and that it cares enough to try to prevent rape, and to guarantee support to victim/survivors when they have been subjected to it.

A society truly committed to the equality of women and girls will also go well beyond criminal justice reform in responding to rape and sexual abuse, and provide the best wraparound care and support for survivors of rape whenever they seek it. It will respond to what victims/survivors need and make provision for holistic wraparound specialist services. It will understand and respond to the inequalities that have led to some victims/survivors having less access to protection and support due to sexism, racism, classism and ableism.

A society committed to addressing sexual violence and abuse will systematically consider all the contexts that have been conducive for rape and sexual abuse or have overlooked it. It will consider care settings, mental health facilities, institutions which require close relationships with a power differential such as schools, sports groups, faith institutions, and universities, and it will put in conventions and protections that deter rape and sexual abuse.

A society committed to addressing sexual violence and abuse will stop making commercial entertainment out of rape and sexual abuse, and it will end the proliferation of violent pornography. It will no longer see community leaders and commentators minimising and diminishing rape and sexual abuse. Victims/survivors of rape will not feel shame: the shame will belong to the perpetrators.

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