Review of arrangements to deliver justice in serious sexual offence cases


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Review of arrangements to deliver justice in serious sexual offence cases

Submission by Queen’s University Belfast School of Law

This is a submission to The Criminal Justice Board, in order to assist their ‘Review of arrangements to deliver justice in serious sexual offence cases’. The aim of the review is to:

‘investigate the law and procedure covering the prosecution of serious sexual offences in Northern Ireland’ and ‘determine whether current arrangements deliver the best outcomes for victims, defendants and justice, and to make recommendations for improvements’.

This submission will explore the key areas set out in the terms of reference of the review, as well as important issues surrounding rape myths which cut across many of the areas already identified. As such, the submission will investigate the following areas:

1. Rape Myths
2. Restrictions on Public Attendance and Reporting at Court Hearings
3. The Submission of Pre-Recorded Cross-Examination
4. Complainant and Defendant Anonymity
5. Support for complainants, victims and witnesses - from the time of the initial complaint through to post-trial support
6. Disclosure of Evidence
7. The impact of social media on the conduct of court hearings

1. Rape Myths

In this section we will begin by discussing what rape myths are and how they operate, before going on to provide some recommendations on challenging such myths.

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1 This submission was led by students (Allison McAreavey, Rosie Cowan, Victoria Haddock, Carol Phillips, Nadege Lemon, Gillian McKelvey, David McAvoy, Shauna-Lee Warwick, Conor Henry, Emma McMillen, and Cathryn McGarry), supported by Law School staff (Dr Rachel Killean, Professor Anne-Marie McAlinden, Dr Yassin Brunger, Dr Eithne Dowds, Dr Conor McCormick, Dr Amanda Kramer, Dr Kevin Brown).
What are Rape Myths? The Problem

Rape myths are ‘widely held but false beliefs about rape, the nature of it, and the circumstances surrounding it’ and also ‘serve to deny and justify male sexual aggression against women’. An extensive body of research has shown that a variety of extra-legal factors, including stereotypes about victim behaviour, may enter into jury decision-making. Studies have shown that ‘the conceptualisation of jurors as rational decision-makers embarking on a fact-finding mission based on the rules of logic and the principles of law is not a valid representation of what happens in a jury trial’. Research using mock juries in rape trials, for example, has demonstrated that jurors cannot simply leave their personal prejudices and stereotypes ‘behind at the door of the courtroom’.

Indeed, research demonstrates that rape mythology plays a significant role in jury deliberation and decision-making, and that a large number of people hold stereotypical beliefs that may predispose them to acquit in rape trials. A United Kingdom (UK) survey found that 18.3% of those questioned had negative attitudes toward rape victims, while 40.2% of those polled in the Republic of Ireland (ROI) believed rape accusations were often false. In Northern Ireland (NI) a 2008 report by Amnesty International found that 44 per cent of university students believed a woman is responsible (partially or totally) for being raped if she was drunk; 46 per cent of respondents believed that a woman is totally responsible or partially responsible for being raped or sexually assaulted if she has acted in a flirtatious manner; and that 48 per cent of students believe that a woman is partially or totally responsible for being raped if she failed to clearly say no. As jurors are randomly selected members of the general public, the attitudes they bring with them into the courtroom will inevitably reflect the attitudes and beliefs of the society. The issue of concern for criminal justice is the impact on such pre-existing attitudes towards sexual offences? Questions inevitably arise as to the extent to which negative

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6 N. Burrowes, Responding to the challenge of rape myths in court. A guide for prosecutors, (2013) 2 and 8. www.nb-research.co.uk
stereotyping is damaging to the fairness of trials. Rape myths have the propensity to negatively influence a jury’s perception of the credibility of the victim, the culpability of the accused, the inclusion of the facts/information beyond those presented in evidence and ultimately to prejudice their decision-making process. The risk is that jurors interpret a case according to beliefs and attitudes about what an ‘ideal’ or ‘real’ rape case looks like and how a victim of sexual assault would behave, thereby negating the complexities of trauma responses suffered by victims during and after an assault. Instead, jurors may substitute the complexities of victim responses with a reliance on stereotypes about how a rape victim should or ought to behave. In this respect, research has found that jurors were perplexed when complainants presented as emotionally flat and held a calmness about themselves, while a ‘distressed’ complainant was not always seen positively with some jurors suspecting a ‘managed’ performance.

Thus, proposals for jury training about rape myths should be tailored to the particularities within juries themselves. Men are more likely than women to hold rape myths, older people are more likely to agree with rape myths, as are those of lower socio-economic status, and many rape victims also believe rape myths, blaming themselves for their own behaviour before or during an assault or may not see themselves as victims if they are vulnerable and/or coerced. Therefore, any jury training on rape myths would need to be tailored accordingly.

Common Rape Myths

Rape myths can be categorised as ‘blame’ (of the victim), ‘doubt’ (about the victim’s story and motives), ‘excuse’ (related to the perpetrator) and ‘assumption’ (general beliefs about men, women, sexual relations and society). Further to this, rape myths can be divided in to those which affect beliefs about what happened before, during and after the rape: Before – the victim dressed provocatively, drank alcohol and/or took drugs with the perpetrator, flirted with or kissed him, went to a private place with him, or had a ‘sexual history’ with other men; during – the victim did not resist in the form of screaming or fighting back and, in consequence, was

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9 Sanders et al n 5 above, 601.
11 McGee et al n 7 above.
13 Z. Peterson and C. Muehlenhard, ‘Was it rape? The function of women’s rape myth acceptance and definitions of sex in labelling their own experiences’ (2011) 51(3-4) Sex Roles, 129-144.
not injured or did not have their clothes or underwear torn; after – the victim did not run away or report the rape immediately, or does not seem ‘appropriately’ distressed, or cries rape out of revenge or regret. In fact, studies across Europe and the United States demonstrate that false reporting occurs in only 2-6% of cases.15

Rape myths also include false beliefs about the perpetrator – he was aroused or ‘led on’ by the victim, he could not just switch off, rapists are ‘different’ from ordinary people; and society – prostitutes cannot be raped, male rape only occurs between gay men, you cannot be raped by your partner, husband or by someone with whom you have previously had consensual sex. Thus, rape mythology impacts on the crucial questions of victim consent or the defendant’s reasonable belief in that consent.

The Impact of Rape Myths on Trials
A recent study of eight rape trials in England has highlighted that rape myths were used in three principal ways: to distance the case from the “real rape” stereotype, to discredit the complainant, and to reinforce aspects of the case that were consistent with rape myths.16 Cultural rape myths are reinforced by the legal context of trials,17 their frequent use by defence counsel and the criminal justice system’s focus on rationality - for example, a ‘rational’ person would have fought back, a ‘rational’ person would not have stayed in the room with the perpetrator - and use of minor inconsistencies to discredit victims’ accounts.18

The literature has highlighted the traditionally aggressive stance of defence lawyers in cases of rape or sexual assault where victims who are not perceived as entirely ‘respectable’ are blamed or seen as ‘asking for it’.19 Defence barristers also use the fact that someone does not conform to the ‘ideal rape victim’ stereotype against victims, for example, questioning if a woman who is articulate and assertive in the witness box would have put up with rape and domestic abuse without fighting back.20 Defence lawyers who strive to have cases dismissed by using

16 Temkin et al n 2 above.
18 Smith and Skinner n 14 above 457 and 458.
21 Smith and Skinner n 14 above 452-3.
invasive, bullying tactics against victims in an effort to confuse, embarrass, and demoralise them and, ideally, have the jury’s mind prejudiced against the victim, need to be controlled by the judge. Otherwise, the risk is that the treatment of victims in the legal process becomes condescending, humiliating and disrespectful. This defence tactic of repeatedly asking purposely embarrassing questions, rooted in highly charged stereotypes of sexual-assault victims, is deeply problematic and requires judicial mitigation in the courtroom. Judges must ensure that vulnerable witnesses are protected and treated with humanity and respect in order to bring integrity into sexual assault trials. Where defence barristers rely on discredited myths and stereotypes about victims and perpetuate victim-blaming during the trial judicial action would be warranted. Conversely, prosecution counsel are often ineffective at challenging rape myths. They tend to focus on the complainant’s behaviour, rather than the defendants, and sometimes inadvertently reinforce such myths by emphasising those which support the prosecution case, such as when a victim did fight back or is very distressed while testifying.\textsuperscript{22} Equally, judicial challenges to counter rape myths are also infrequent.\textsuperscript{23}

\textit{Misuse of Social Media to Perpetuate Rape Myths}

The proliferation and increased use of social media have a major impact on the public and their opinions specifically in terms of influencing attitude formation and attitude changes. While the social media can be an important source of information sharing, the misuse of social media may encourage rape myths, and be used as a tool to disseminate false information and perpetuate victim-blaming. During rape trials, social media can act as an engine to perpetuate and spread rape myths extremely quickly and widely, and then as an ‘echo chamber’ for cultural rape myths, where those who hold rape myths reinforce each other’s views. High profile rape cases in particular attract an additional level of attention and a higher risk of social media being misused to perpetuate rape myths. The risk that jurors will be tainted by such misinformation is of serious concern to the fairness of the criminal justice process and the well-being of the victim. There have been examples of court ordered victim anonymity being contravened and the identity of victims being revealed and circulated on social media. Such actions risk causing harm to the safety and wellbeing of victims and create barriers to reporting of rape and other serious offences for complainants. Victims have a real fear of the ease at which the disclosure of their identities can occur. People utilise social media to find out about

\textsuperscript{22} Smith and Skinner n\textsuperscript{14} above, 455; Temkin \textit{et al} n\textsuperscript{2} above, 207.
\textsuperscript{23} Temkin \textit{et al} n\textsuperscript{2} above.
rape complainants, they may also form false impressions of others and judge them from their social media profile – e.g. photographs of a woman wearing short skirts, low cut dresses, holding drinks and being embraced by different men may lead to her being labelled a ‘slut.’

**Recommendations**

- **Social Media** – requires a rapid legal response against posted comments which could be construed as ‘contempt of court’ and directly threaten trial proceedings.

- **Barrister training** – while testing the evidence, including that of complainants, is a core part of the adversarial system and the role of the defence, prosecution barristers in particular could be trained to resist and combat rape myths more effectively. There is still far too much focus on what the complainant did or did not do to withdraw consent, and not enough on what the defendant did to ensure he had consent.24

- **‘Myth Buster’ jury directions from judge** – Judicial directions on ‘rape myths’ could be given to the jury at the outset of the trial to dispel some of the common rape myths highlighted above. The aims of such a direction would be to educate jurors about the complexities around victim responses to rape and sexual violence and to dispel myths and stereotypes concerning how a victim should behave. These would enable the judge to highlight the diversity of different victim and survivor reactions to rape and sexual assault and caution the jury on assumptions about so called ‘normal’ victim behaviour. Alternatively, at the end of the trial, judges could take the opportunity to address specific rape myths that are relevant to the case in question, and more generic yet prevalent ones in relation to the need for victims to be visibly distressed and report to police immediately. There may be a disadvantage, however, if they are given at the end of the trial when jurors may have already been heavily influenced by the defence. Resistance to these rape myths would be a positive step towards a fairer deliberation process by jurors in rape cases. The aim of myth-busting directions is to foster deliberations that focus on relevant issues rather than misleading assumptions about rape. Such a direction would have the weight of judicial authority and increases the likelihood that the jury defer to such authority and guidance during their decision-making process. While judicial directions to the jury to disregard rape myths may not ultimately be effective in influencing the fairness of individual trials, they nonetheless send an important public message about the dangers of false assumptions.25

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24 Burrowes n 6 above.
25 Temkin et al n 4 221.
• **Jury Training** – there is also a need to engage the jury before the commencement of the trial around common rape myths. This could take the form of a talk from an expert, and/or video, such as the police ‘only yes means yes’ DVD, and short document outlining the major rape myths which could be given to jurors at the start of a trial.

2. **Restrictions on Public Attendance and Reporting at Court Hearings**

This section sets out the issues surrounding reporting restrictions and public attendance at court hearings and their relationship with the fundamental constitutional and human rights principle of open justice. Following this we express our view on the merits of recommending a more restrictive set of provisions for NI akin to those in the ROI by way of conclusion.

*The Principle of Open Justice*

The principle of open justice is a foundational tenet of the UK justice system which finds recognition and protection both at common law and under the European Convention on Human Rights (ECHR) to the extent given effect by the Human Rights Act 1998. At common law, the words of Lord Hewart CJ are so familiar to us that they are at risk of sounding like a cliché: ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’. We must therefore guard against the anaesthetic of familiarity and remain mindful of the underlying idea evoked by his words. As Lord Dyson put it more recently, the open justice principle is more than ‘a mere procedural rule’, it is ‘a fundamental common law principle’ that operates alongside the principle of natural justice. Its considerable societal importance must be emphasised in the face of other important interests, including those which have given rise to this review. Open justice is partially expressed by Article 6(1) of the ECHR as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

26 Smith and Skinner n 14 above, 460
27 Burrowes n 6 above.
Jurisprudence emanating from Strasbourg further recognises that the generally public character of legal proceedings protects the individual against secretive and unaccountable justice, which in turn operates as a means of maintaining confidence in the legal system as a whole. By rendering the administration of justice visible, publicity contributes to the aim of a fair trial, which the European Court of Human Rights (ECtHR) regards as one of the fundamental principles of any democratic society.\(^\text{30}\) Both the text of Article 6(1) and judicial interpretations of it make clear that the obligation to hold a hearing which is open to both the press and the public is not absolute.\(^\text{31}\) At the same time, however, it is clear that proceedings which are held either wholly or partly in camera must be strictly required by the circumstances of the case in order to remain compliant with Article 6(1).\(^\text{32}\)

Although in criminal proceedings there is a particularly high expectation of openness, the ECtHR recognises that it may be necessary to limit the open and public nature of proceedings in order to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice, for example.\(^\text{33}\) Whether there are grounds to apply one or more of these limitations on Article 6(1) will normally require an assessment of necessity in the individual circumstances of a case, however the ECtHR has also ruled – albeit in a civil law context – that designating an ‘entire class of case as an exception to the general rule where considered necessary’ need not be inconsistent with Article 6(1) provided that ‘the need for such a measure must always be subject to the Court’s control’.

The principle of open justice is also underpinned by the right to freedom of expression under Article 10 of the ECHR. The public dissemination of judgments and knowledge about the evidence presented to a court is achieved by both press reporting and word of mouth on the part of public attendees. With respect to press reporting, the ECtHR has recognised in particular that:

> whilst the media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas

\(^\text{30}\) Krestovskiy v Russia App no 14040/03 (ECtHR, 28 October 2010), para 24.
\(^\text{31}\) De Tommaso v Italy (2017) 65 EHRR 10, para 163.
\(^\text{32}\) Welke & Białek v Poland App no 15924/05 (ECtHR 1 March 2011), para 74.
\(^\text{33}\) B & P v the United Kingdom (2002) 34 EHRR 19, para 37.
\(^\text{34}\) Ibid., para 39, citing Riepan v Austria App no 35115/97 (ECtHR, 14 November 2000).
of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.\footnote{Sunday Times v the United Kingdom (1979-80) 2 EHRR 245, para 65.}

In this way, the right of the public to know about state actions is often parasitic on the right of the press to freely report on legal proceedings from the perspective of the ECHR.

**Open Justice and the Rule of Law**

The principle of open justice also lies at the heart of the rule of law. Lord Steyn once forcefully explained the relationship between these two concepts as follows:

A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of the contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.\footnote{In Re S (FC) (A Child) [2004] UKHL 47, [2005] 1 AC 593, [30].}

We therefore urge members of this review to be especially mindful of the rule of law at a more general level when contemplating an increase in existing powers to restrict reporting and public attendance in serious sexual offence cases. Given that publicity – whether direct or indirect – is essential in order to educate NI citizens seeking to understand how the law is applied in serious sexual offence cases, any further constraints on that publicity may have the effect of creating or emboldening doubt and mistrust about the operation of the law. Moreover, further restrictions on publicity in the criminal law context run a hazardous risk of preventing revelation on the part of individuals who are exposed to information about individual cases. In this regard we are sympathetic to concerns that where parties to a criminal case are not named publicly then justice may be inhibited by the subjugation of new or further evidence about the individuals involved. The arguments surrounding anonymity will however be addressed in more detail in section 5.

**The Dangers of Exceptionalism**

We noted above that the principle of open justice is not absolute and may be restricted even in respect of an entire class of case where it is considered necessary to do so. However, we wish to emphasise some of the dangers involved in adding to the existing exceptions. Lord Shaw once encapsulated the point by warning that ‘there is no greater danger of usurpation than that
which proceeds little by little’.\textsuperscript{37} We further commend the following thought-provoking review on the importance of guarding against gradual incursions upon the principle of open justice:

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.” “The security of securities is publicity.” But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: “Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.” I myself should be very slow indeed … to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary – and they appear to me still to demand of it – a constant and most watchful respect.\textsuperscript{38}

We respectfully urge members of this review to exercise a most careful consideration of the dangers highlighted from these varied perspectives.

\textit{Existing Exceptions}

Against this backdrop, we turn now to note some existing rules which can be used to restrict the principle of open justice under the law of NI. Provisions which regulate the availability of special measures are perhaps most relevant. They provide that if a court considers that the quality of the evidence given by a witness is likely to be diminished by reason of any circumstances falling within articles 4 or 5 of the Criminal Evidence (Northern Ireland) Order 1999 (CENIO), such witnesses may be eligible for a special measures direction under article 7 of that Order. Under article 5(4), there is a presumption that a sexual complainant is an eligible witness, unless the witness expresses the wish not to be treated as such, although the defence may attempt to rebut this presumption. In effect, these provisions mean that a court does not have to be satisfied that the quality of witness evidence will be diminished by reason of fear or distress for the purposes of establishing eligibility under article 5 in so far as sexual

\textsuperscript{37} Scott v Scott [1913] AC 417, 477.

\textsuperscript{38} Ibid.
complainants are concerned. Nevertheless, a court will still have to determine whether any of the special measures available will, in fact, improve the quality of the witness evidence and consider whether any such measure(s) might inhibit the evidence being effectively tested. In deciding which measure(s) would be likely to optimise the quality of the witness evidence, a court must have regard to all the circumstances of the case, including, in particular, any views expressed by the witness and whether the measure(s) might tend to inhibit such evidence being effectively tested by a party to the proceedings. While a variety of special measures are provided for in articles 11 to 18 of the Order, the power under article 13 is of particular significance for present purposes. Article 13 of the Order empowers a judge to order the courtroom to be cleared of people who do not need to be present while a witness gives evidence. The direction will apply to individuals or groups of people, rather than areas of the court. If used, it is most likely to affect people in the public gallery. The court must allow at least one member of the press to remain if a representative has been nominated by one or more relevant organisations.

A short law report on the English case of Richards, moreover, suggests that a court may go beyond that which is permitted by the statutory framework above if it believes that clearing the court is ‘strictly necessary’ to ensure justice is done. In Richards, the court held that when deciding whether it was strictly necessary to order the clearing of the press or the public so that a witness could give evidence, the broad principle was that a criminal trial should be held without the exclusion of any member of the public who chose to attend. However, the court also ruled that if justice could not be achieved by faithful adherence to that broad principle then a more fundamental principle, that justice had to be done, should prevail. The court noted that although Article 6 of the ECHR was concerned with the avoidance of secret justice and with the requirement that justice had to be seen to be done, it expressly recognises that in certain circumstances it may be legitimate for the press and/or the public to be excluded from all or part of a trial where publicity would prejudice the interests of justice. While this English precedent is not strictly binding in the courts of NI, of course, it hints toward the existence of a somewhat wide (and commensurately vague) power at common law for the courts to hold a human rights compliant hearing in camera should the interests of justice demand it in a

40 Ibid, art 13(3).
particular case. While the general principle which appears to have been formulated in Richards stands to reason, obvious concerns arise about the level of judicial discretion it involves.

**Comparable Provisions**
Article 34.1 of the Irish Constitution provides that the law should be administered in public except in special and limited cases prescribed by law:

> Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

However, there are numerous statutory exceptions to the principle of open justice in the ROI. In so far as sexual offences are concerned, the law provides for the exclusion of the public and the press in certain circumstances in cases involving rape, aggravated sexual assault and incest.\(^{42}\) The law provides for the exclusion from court of all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press and other persons at the discretion of the judge or the court. Such statutes recognise the right of a parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court. The provisions also provide that, in the proceedings concerned, the verdict and sentence (if any) shall be announced in public. In the case of an application to introduce evidence or to cross-examine a complainant about his or her previous sexual experience, all persons are excluded from the court except officers of the court and persons concerned in the proceedings.

**Recommendations**
- **Uphold the principle of open justice** - The utmost importance attached to the principle of open justice is explicable by reference to its relationship with a broad range of constitutional concepts which have force through both domestic and international law. Although some modern jurisprudence suggests that it may be lawful to limit the principle of open justice with respect to an entire class of cases such as those involving serious sexual offences, and laws in the ROI demonstrate how some safeguards might be incorporated into any such restriction, we are not convinced that this approach is preferable to a case-by-case approach to the strict necessity of excluding the press and/or the public from criminal trials.

\(^{42}\) See, for example, the Criminal Law (Rape) Act 1981, s 6, as substituted by the Criminal Law (Rape) (Amendment) Act 1990, s 11, and the Criminal Law (Incest Proceedings) Act 1995, s 11.
Towards a discretionary approach - We believe that confirmation of a discretionary judicial power to exclude the press and/or the public from a serious sexual offence trial where it is strictly necessary to do so in order to ensure that justice is done – as suggested by the Richards case – poses much less danger to the general principle of open justice and all that it represents than a wholesale restriction on publicity in an entire class of criminal cases.

Guidance on necessity - We reserve some doubts, however, about how to ensure that the judicial discretion involved in this arrangement is applied appropriately. We would therefore recommend that guidance on the type of factual scenarios which would satisfy a strict necessity test be developed to assist in this regard.

3. The Submission of Pre-Recorded Cross-Examination

In this section we will begin by explaining what pre-recorded cross-examination is, followed by a discussion of the absence of this measure in NI and the potential benefits of introducing it into this jurisdiction.

What is Pre-Recorded Cross-Examination?

Cross-examination is the procedure in the trial that takes place after examination-in-chief, whereby the lawyer representing one side can question the witnesses on the other side on any relevant issue or matter concerning a witnesses’ credibility. The main purpose of cross-examination is therefore to weaken the case of the other side, and to establish facts that are favourable to the case for the cross-examiner. However, rather than discrediting the evidence, the main practice that takes place is to discredit the witness so that the jury will not believe, or give little credence, to their testimony.43 Given the confrontational nature of cross-examination,44 a number of special measures, alluded to above, have been brought into place to safeguard witnesses through the CENIO. Article 16 of this Order, which has yet to be brought into force, provides that where a special measures direction has been given cross-examination or re-examination can be admitted by means of video recording. This would take place in advance of the trial in the presence of a judge or magistrates as well as the defence and legal representatives. The judge or magistrates must be in control of this procedure, preferably the trial judge, and all of the aforementioned individuals must be able to see and hear the

44 Ibid, 137.
The recorded cross-examination is then played at an appropriate time during the trial so the witness does not need to be present. The purpose of this special measures is to make it easier for vulnerable or intimidated witnesses to recall/recant events and to improve the experience of witnesses by ensuring that the processes is less stressful and traumatic.46

**Failure to Use Pre-Recorded Cross-Examination in NI**

While pre-recorded cross-examination of witnesses, was introduced alongside the Youth Justice and Criminal Evidence Act (YJCEA) 1999 in England and Wales, it was not used in either of these jurisdictions, until a recent pilot took place in England.47 In NI, The reasons for Article 16 of the CENIO not being put into practice is due to concerns about procedural changes taking place, the lack of available IT at the time and the costs involved in implementation,48 as well as concerns for the defendants right to a fair trial.49 There has also been additional political complications in NI. Justice Minster Clare Sugden announced in January 2017 that a similar pilot to England would be taking place in NI to assess the effectiveness and benefits of pre-recorded cross-examination on victims and intimidated witnesses experiences and protection.50 However, this has not transpired to date due to the breakdown of the NI Assembly in January 2017.

**Benefits to delivering Pre-Recorded Cross-Examination in NI**

The piloting of pre-recorded evidence has already been successful in England and Wales. And a Multi-Agency group of experts, convened by Rape Crisis Network Ireland (RCNI),51 has also recommended a similar pilot in Irish courts. Given that this is the road of travel for UK and

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46 J. Baverstock, Process Evolution of Pre-Recorded Cross-Examination Pilot (Section 28) (Ministry of Justice, OGL, 2016) 14-15.
47 Ibid.
48 Ibid, 1.
ROI, and that NI courts already have the technical infrastructure in place, NI should follow suit.

The largest beneficiary of pre-recorded cross-examination is the victim themselves and by safeguarding them and reducing the likelihood of re-trauma. The experience of reporting sexual offences to the police and the emphasis placed on cross-examination within our criminal justice system has created a process that carries high risks of secondary victimisation and traumatisation for complainants. Secondary victimisation has been associated with post-traumatic stress disorder; physical, mental and sexual health issues; and negative impacts on self-esteem and trust in the legal system. The negative impacts of secondary victimisation can also impact on the legitimacy of the criminal justice system. Fear of trauma may contribute to the underreporting, high attrition and low convictions rates which currently bring into question the ability of the criminal justice system to respond to sexual offences. As such, the introduction of pre-recorded cross-examination may help to create a more victim-friendly environment and reduce feelings of secondary victimisation.

From pilots and implementation of pre-recorded evidence in England, Australia and Norway, there are convincing benefits from a systematic and structured approach to the use of audio-visually recorded forensic interviews as a witness’ principal evidence, and from the recording of cross-examination. Pre-recording a statement soon after a complaint has been made maximises the potential of the witness to recall fully and accurately what happened to give his or her best evidence and to help minimise the risk of secondary traumatisation by

reducing exposure to the accused. By giving the best evidence, this only benefits the criminal justice system as a whole. Furthermore, by enabling the victim to give their best evidence through pre-recorded evidence is beneficial to the accused. Expediting the trial process more efficiently reduces the length of time that the accused has to wait for the hearing and will reduce the stress experienced during the time that they await trial.

_Procedural Issues_

During the pilot study of section 28 of the YJCEA 1999 in England, and in publications elsewhere, there are a number of concerns regarding the implementation of pre-recorded cross-examination from the perspective of defence counsel. The main concern around the implementation of pre-recorded cross-examination is the right to a fair trial. It is therefore necessary to address these concerns and look at how they can be resolved, ensuring a fair and balanced trial for both the defendants and witnesses.

_The right to a fair trial._ The right to a fair trial is embedded in our legal system under Article 6 of the Human Rights Act 1998, and often paramount to this is that the defence has the opportunity to cross-examine any witnesses. The process of pre-recording cross-examination does not interfere with the accused person’s right to a trial, providing that defence lawyers have been given sufficient time to prepare for such examinations, and provided that resources are allocated to ensure good quality sound and picture during the trial, so this does not diminish the effective cross-examination in Court. Furthermore, it was also found in the section 28 YJCEA pilot that juries were used to watching evidence on TV screens and, rather than diminishing the effectiveness of defence cross-examination, it found that this could be a disadvantage to prosecution as the evidence may appear too remote. Furthermore, it was held in _Dinc_ that the measures under the pilot scheme implementing pre-recorded cross-examination did not undermine the defendants’ right to a fair trial, and stated that:

There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance… it is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant.

59 Rape Crisis Network n 49 above, 30 and 43.
61 Ibid, 30.
62 Baverstock, n 46 above, 38.
63 _R v Dinc (Zafer)_[2017] EWCA Crim 1026 (CA (Crim Div)).
64 Ibid, 263.
65 Ibid, 264.
**Time frames and additional workload.** Linked to the fundamental right to a fair trial is that defence lawyers have sufficient time to prepare for a case and are allocated sufficient resources.66 This was a concern from defence lawyers that pre-recorded cross-examinations would require dedicated additional time up-front as there is less time to initially agree to a guilty plea with defendants, as once cross-examination begins defendants will lose credit for such a plea. It was also expressed by defence lawyers that the requirement to prepare for and attend a pre-recorded cross-examination hearing and a trial added to the workload that was required, and essentially needed to prepare for the trial twice due to the length of time between each hearing – once for a section 28 (or section 16) cross-examination and then for the subsequent trial.67 These accelerated hearings could thus impact on the rapport that defence lawyers have with their clients and gives them less time to prepare overall. There is also a concern that submitting questions to the judge for cross-examination in advance for his/her approval could make it difficult to react properly to unexpected answers to their questions,68 read the body language of witnesses and explore lines of enquiry that would be of potential benefit to the interests of justice.69 However, as noted earlier, often the tactic of the defence is not to discredit the evidence, but rather to discredit the witness themselves. The measures involved in pre-recorded cross-examination could help to ensure that the only questions asked are those which are relevant to the trial, safeguarding the witnesses and ensuring a level playing field.70 Furthermore, it has been noted by a defence lawyer that a judge taking a pragmatic approach would still allow advocates to ask appropriate and sensitively worded follow-up questions. There has also been a suggestion by a defence lawyer in an Australian study that there should still be a discount for pleading guilty after pre-recorded cross-examination but before trial,71 a compromise that would give defence lawyers more time to build a rapport with their client and consider all the options open to them. Additionally, in a guidance published on the use of section 28 of the YJCEA 1999, states that it is up to the Resident Judge of the Court to ensure that section 28 applications take priority and that he/she must resolve any conflicts of advocates to ensure they can attend such hearings.72

66 Rape Crisis Network n 49 above, 30.
67 Baverstock, n 46 above, 31-33.
68 Rape Crisis Network n 49 above, 16-17.
69 Baverstock n 46 above 38.
70 J. Kennedy et al. ‘How Protected is She? “Fairness” and the Rape Victim Witness in Australia’ (2012) 35 Women’s Studies International Form, 336.
71 Ibid, 297.
72 The Right Honourable Lord Thomas, Guidance on the Use of S.28 Youth Justice and Criminal Evidence Act 1999; Pre-Recording of Cross-Examination and Re-Examination for Witnesses Captured by S.17(4) YJCEA 1999 (Judiciary of England and Wales, 27 September 2017) para 37 at https://www.judiciary.uk/wp-
**Opportunity for defence to test evidence in a meaningful way.** As defence will get an opportunity to submit their questions and participate in the pre-recorded interview, this arguably gives defence a better opportunity to prepare their case in a more meaningful way. The judge held in *Dinc* that where a defence lawyer was unable to question a witness because of the restrictions imposed on pre-recorded cross-examinations, these behaviours or previous inconsistencies could be put before the jury and that a “combination of admissions and focussed cross-examination could produce a powerful defence case; more powerful than a defence advocate putting to a witness a whole series of propositions only to be met with the answers: "No", "I don’t understand" or "I don’t remember."”73 Furthermore, in a study regarding pre-recorded cross-examination in the Republic of Ireland has been suggested that the accused should be given the opportunity to see the video-recorded interview, further ensuring that defence is given the opportunity to prepare fully for the trial.74 Guidance issued on the use of pre-recorded cross-examinations also suggests that any material needed by defence must be disclosed by all parties, and that a timetable must be drawn to take account for the extra time needed by defence to obtain such evidence75, so there is no evidence ‘sprung’ on defence. Finally, in the pilot of section 28 YJCEA 1999, there was little difference in the rates of conviction between the current practice of giving video recorded evidence in chief (section 15 of the CENIO) and giving pre-recorded cross-examination, with conviction rates at 46% and 54% respectively. This suggest that any concerns, both by prosecution and defence, that pre-recorded cross-examination would disadvantage their case may not be supported.76

**Speed.** Linked to the right to a fair trial is that of speed, so memories are not eroded, and it has been shown that pre-recorded cross-examination results in a speedier process, resulting in more efficient trials.77 Following a study in New Zealand on video-recorded cross-examinations, it found that such trials helped lawyers prepare earlier and clarified core issues earlier in the process, thereby encouraging early resolutions of cases or more efficient trials. While there is the concern that pre-recorded cross-examinations are unfair to the accused as it over-
accommodates the needs of the complainant, the New Zealand study found that there was consensus among both prosecutors and defence that this could be beneficial to everyone, including defendants. This is advantageous to defendants as they can see the evidence that has been made against them at an earlier stage, giving them more time to consider whether to make a plea deal or give their own evidence. Additionally, defence lawyers have more time to prepare for their evidence as a result of something that came out of the cross-examination and they could, for instance, call a witness of their own to rebut something that was said by the witness. This study also found that there was an increase in the changes of a guilty plea – in which there would be a reduced sentence – as well as charges being dropped or indictments being changed after the pre-recorded hearing, showing how this can be beneficial to both prosecution and defence.

**Risks to the Victim** There are perceived risks to pursuing pre-recorded cross-examination for the victim, that the use of display equipment is less impactful in telling the version of events from their perspective. An evidence review was carried out in Scotland on the impact of pre-recorded evidence in juror-decision making as well as evidence from robustly designed studies in Australia and England indicating that the use of pre-recorded evidence or link-links, at least by female rape complainers, does not significantly affect juror evaluations. While jurors may be distracted by the poor audio and visual quality of live-links and pre-recorded evidence, this factor is easily overcome with considerate selection of technology that considers previous research. Further to this, the use of pre-recorded cross-examination enables the jury to see and hear a rape victim being interviewed at the time of the complaint which is more compelling and coherent evidence than that of traumatic live evidence given in court several months later.

**Experiences of Pre-Recorded Cross-Examinations in Other Jurisdictions**

While there may be many jurisdictions that have incorporated the use the pre-recorded cross-examinations, the most commonly cited ones are from New Zealand and Australia. It is therefore apt to look at the success of such cross-examinations in both these jurisdictions.

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79 Ibid. p. 293.
**Australia:** In 1992 Western Australia became the first common law jurisdiction to implement what has become to be known as the “Full Pigot,” that is, the pre-recording of both evidence-in-chief and of cross-examination of the witness and has been introduced in all other Australian states. A Judge may order a pre-recorded cross-examination of a child who has alleged that an offence has been committed that is either a sexual offence, in the nature of procuring a child to act as a prostitute or involves violence against a child by a close relative or a person acting in loco parentis.\(^8^1\) Furthermore, the Sexual and Violent Offences Legislation Amendment Act 2008 amended the Evidence (Miscellaneous Provisions) Act 1991 to allow for a pre-trial hearing for adult victims of sexual offences if the complainant will suffer trauma, intimidation or distress, thus reducing the amount of cross-examination.\(^8^2\) Those practicing in this jurisdiction are unanimous that pre-recorded cross-examination removes much of the stress experienced by children. A second major advantage in Australia found that this improves the quality of the evidence, as a child’s memory can deteriorate more rapidly than adults, especially where peripheral details are concerned, and as children are more susceptible to suggestibility, this can contaminate the evidence by any leading or suggestive interviewing techniques during cross-examination. Finally, pre-recorded cross-examination has resulted in cost savings in Australia, as prosecution can withdraw or refine the charges, and defence counsel can better advise the defendants to change his or her plea if necessary.\(^8^3\) This shows that pre-recorded cross-examination can, and does, work in practice, while still upholding the defendant’s right to a fair trial, as well as protecting the rights of vulnerable witnesses.

**New Zealand:** The approach in New Zealand is not as advanced as the approach taken in Australia, however, it is nonetheless worthy to note the experience of pre-recorded cross-examination in this jurisdiction. New Zealand provides for both pre-recorded video and live-link evidence for victims and other witnesses in sexual offence cases\(^8^4\) under sections 103-107 of The Evidence Act 2006. However, in 2011 in a joint ruling it was held that while The Evidence Act 2011 provides for pre-recorded cross-examination of witnesses, it was decided that this will be used in “rare circumstances”.\(^8^5\) Since then, pre-recorded cross-examination of

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82 J. Kennedy *et al.* n 70 above 337.
84 Rape Crisis Network n 49 above, 27.
85 Scottish Court Service n 81 above, 15
witnesses has been frozen. However, a study conducted in New Zealand of the trials that included pre-recorded cross-examination found a number of advantages of such special measures. These findings are largely similar to those found in the section 28 pilot study in England, namely – earlier capture of evidence, it is less stressful for witnesses, core issues are identified at an earlier stage, there is more time for defence to prepare their case, among many advantages. While this was a small-scale study, it was found that pre-recorded cross-examination makes a positive contribution to the criminal justice system.

**Recommendations**

- **Introduce this measure for victims of sexual offences** - While pre-recorded cross-examination has been mainly conducted in cases with child witnesses, it should also be available for those who have been victims of sexual offences, as it can be a traumatic experience for such victims to be cross-examined at a live trial. At present the current criminal justice system is shaped on “boy’s rules” in a “boy’s fight” which is imposed on rape trials. By allowing such victims to have their cross-examination pre-recorded this would balance an approach that is skewed in favour of the defendant.

- **Education around introduction of measure**: From the studies above it is clear that defendants can still have their right to a fair trial protected while balancing the rights of child and vulnerable witnesses, as well as those of sexual offences. As such, this should be emphasised in education and training around the introduction of the measure to prevent ill-informed explanations of the measure being reinforced in the media or judicial arenas. It is therefore time that this special measure is rolled out across NI to finally protect both parties.

4. **Complainant and Defendant Anonymity**

In this section we will begin by providing a brief overview of the current position in N.I. regarding complainant and defendant anonymity in sexual offence cases, before going on to consider measures surrounding complainant anonymity and the question of whether they could be improved, as well as arguments for defendant anonymity.

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86 Davis and Hanna, n 78 above, 293.
87 Ibid. p. 304.
89 Ibid.
Complainants of serious sex offences in NI have been afforded anonymity since the introduction of the Sexual Offences (NI) Order 1978.\textsuperscript{90} While this may seem in tension with the longstanding and integral principle of open justice, requiring that criminal proceedings be conducted in open court,\textsuperscript{91} with fair and accurate reports of proceedings and \textit{publicly identifiable} parties,\textsuperscript{92} it was introduced as a means to encourage victims to report by removing the fear of humiliating media coverage encompassing victim-blaming prejudices.\textsuperscript{93} While the Order legislated for defendant anonymity on the grounds of equality with the complainant and to protect potentially innocent men from false allegations,\textsuperscript{94} the Criminal Justice (NI) Order 1994 (CJNIO)\textsuperscript{95} repealed defendant anonymity to equalise rape defendants with those accused of any other crime. As such the media continues to publicise identities of those charged with sex offences.\textsuperscript{96}

\textbf{A. Measures to ensure the anonymity of the complainant}

As noted above, complainants of serious sexual offences are granted anonymity due to an understanding that ‘one of the greatest causes of distress to complainants in rape cases is the publicity which they sometimes suffer when their names and personal details of their life are revealed in the Press’ and that a ‘victim can never be sure that a conviction will follow her complaint. If the accused is acquitted the distress and harm caused to the victim can be further aggravated, and the danger of publicity following an acquittal can be a risk a victim is not prepared, understandably, to take’.\textsuperscript{97} Under the CJNIO anonymity covers any means that might lead to identification of the complainant, through publication or programme for reception in NI.\textsuperscript{98} However, it is not absolute given that the name of the complainant is given in open court, their right to anonymity may be waived or removed should the complainant have criminal proceedings brought against them outside of the case.\textsuperscript{99} A judge may also remove anonymity

\begin{itemize}
  \item \textsuperscript{90} Sexual Offences (NI) Order 1978, article 6
  \item \textsuperscript{91} \textit{S (A Child), Re} \[2004\] UKHL 47; \[2005\] 1 AC 593 \[30\].
  \item \textsuperscript{92} \textit{Attorney-General v Leveller Magazine Ltd} \[1979\] AC 440 (HL) 450 (Lord Diplock).
  \item \textsuperscript{94} Sexual Offences (NI) Order 1978, article 8.
  \item \textsuperscript{95} Criminal Justice (NI) Order 1994, section 18(4).
  \item \textsuperscript{96} Note restrictions on reporting of defendants under 18 in the Criminal Justice (Children) (Northern Ireland) Order 1998.
  \item \textsuperscript{98} Criminal Justice (NI) Order 1994, section 18 (1) (a) (I and ii).
  \item \textsuperscript{99} Appendix 21 https://publications.parliament.uk/pa/cm200203/cmselect/cmhaff/639/639ap22.htm; \textit{R V Jemma Beale} \[2017\] EWCA 1012.
\end{itemize}
in order to persuade other complainants or even witnesses for defence to come forward if it is deemed necessary,\textsuperscript{100} though it has been argued that this should not be necessary save in high profile cases.\textsuperscript{101} The below will explore current measures that may aid the protection of anonymity and put forward some recommendations for improvement.

\textit{Special Measures}

As noted in section 2, a complainant in a sexual offence case is automatically eligible for special measures under the CENIO. Some measures contained within sections 10-15 that may help to reduce the difficulties associated with giving evidence are the use of screens; live video link to allowing a witness to give evidence from a remote location, while remaining visible to those in court; evidence in private; or video recorded evidence in chief.\textsuperscript{102} Holding private sessions or using screens to shield the complainant from view are particularly noteworthy in terms of their effect on ensuring the anonymity of the complainant. Although, as noted earlier, the special measures must be assessed by the court to be in the interest of justice and more importantly if the quality of evidence will benefit by any special measure, should the court allow special measures the judge must determine which special measure maximises the evidence and give a direction as to this determination.\textsuperscript{103} In general, however, evidence suggests that victims and witnesses respond positively to special measures. In one survey, for example, one third of participants indicated that they had been able to give evidence that they would not otherwise have been willing or able to give due to special measures with this figure rising to 44 per cent for sexual offence complainants.\textsuperscript{104} This is supported by the statement of one victim who contributed to a report on the effectiveness of special measures: ‘I had Special Measures so I didn’t have to look at him [the offender]... and it made giving my evidence a lot easier not having to see him’.\textsuperscript{105}

However, on the practical side the special measures contained within CENIO s10-15 may hold some draw backs. Indeed, even with the use of screens and live link those in the public gallery

\textsuperscript{100} The Criminal Justice (Northern Ireland) Order 1994.
\textsuperscript{101} R. v Worboys (John Derek) [2010] EWCA Crim 1986.
\textsuperscript{102} The Criminal Evidence (Northern Ireland) Order 1999.
\textsuperscript{103} Ibid s 7(2).
\textsuperscript{105} Victim Support, Victim of the System: The experiences, interests and rights of victims of crime in the criminal justice process, April 2017, 39.
may still see the complainant. See e.g., O. Smith and T. Skinner, Court responses to rape and sexual assault in the UK, University of Bath Institute for Policy Research Policy Brief, February 2015 https://www.bath.ac.uk/publications/court-responses-to-rape-and-sexual-assault-in-the-uk/attachments/court-responses-to-rape.pdf accessed August 2018. Further to this, with open courts the name of the complainant is given, so unless the evidence is given in private there is the potential for this information to be used by the public. Research also suggests that the ‘special delivery’ allowed by special measures can have a negative impact on both the defendant and the complainant. It has been argued, for instance, that the use of screens or live links may unfairly prejudice the defence and attribute an ‘underserved level of credibility’ on the complainant. Conversely, it has been suggested that these measures result in the complainant becoming distanced from the jury which may make it more difficult for the jury to sympathise with or believe her.

Effects of Social Media

Rape is considered one of the most under-reported crimes, with victims silenced for fear of unwarranted disbelief or the subjection of ‘secondary victimisation’ by way of treatment in the criminal justice system. Due to the rape myths which surround the crime, women are implied to be untrustworthy and their allegations are predisposed to dismissal. It was for these very reasons complainant anonymity was introduced by the 1978 Order to encourage reporting, and it is plausible that the rise in recorded rapes since then is attributable to this concession.

Challenges still remain and social media engagement has been identified as a new element in the victimisation that complainants encounter, adding rape myth commentary to the discussion and exacerbating the trauma they experience. The Belfast rugby rape trial

110 See Ibid 5; Burton et al, n 104 above.
demonstrated these concerns explicitly through arduous attacks on the complainant’s behaviour and credibility by social media commentary.\textsuperscript{116} Further to this, as the complainants name was used in open court in this case, her identity was known to those in the court room and exposed on social media by a member of the public at the trial.\textsuperscript{117} Allowing an open court in sexual offence cases and the risks that flow therein have the potential to negate the privacy rights of the complainant under Article 8 of the ECHR.\textsuperscript{118} It also serves as a further deterrent to reporting if a complainant fears that their right to lifelong anonymity may be breached and cannot be relied upon. It is therefore in no way a surprise that victims may believe it is less of an emotional risk to stay silent.\textsuperscript{119}

\textit{Anonymity in Comparative Contexts}

While anonymity for complainants in NI is granted automatically when the complaint is made, it is not always the case in other jurisdictions. In Canada, for instance, the complainant needs to make an application to the court for anonymity setting out the grounds for the request or the court can allow anonymity if it feels it is necessary for the administration of justice.\textsuperscript{120} Nevertheless in the case \textit{Canadian Newspapers Co. v. Canada (AG)} a mandatory ban on publication of a victims’ identity was issued.\textsuperscript{121} In the United States the first Amendment of the Constitution protects the freedom of speech and the press from any Act that might limit or suppress information above the right to privacy. However, should the information be gained dishonestly and not through public record sanctions could be applied.\textsuperscript{122} New Zealand and Australia are similar to the NI in that they protect the identity of complainant through anonymity laws, though the laws in Australia differ in relation to each of its territories. In New Zealand, the court can make an order to allow publication if the complainant is fully aware of

\begin{footnotesize}
\begin{enumerate}
  \item Examples of tweets: \<https://twitter.com/ryanmccool8/status/978961362683678721>;
  \<https://twitter.com/AlanRuschitzko/status/979271530340323328>;
  \item Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5,
  \item Bostick, ‘Twitter is a more comfortable place for perpetrators than it is for sexual violence survivors’ (2017) \<https://www.huffingtonpost.com/entry/twitter-is-a-more-comfortable-place-for-perpetrators_us_59ee7f10e4b08bbe72fe032d> accessed August 2018.
  \item Canadian Criminal Code section 486 (4).
  \item \textit{Canadian Newspapers Co. v. Canada (A.G.)}, [1988] 2 S.C.R. 122
  \item \textit{Cox Broadcasting v. Cohn} 420 U.S. 469 (1975)
\end{enumerate}
\end{footnotesize}
the consequences,\textsuperscript{123} and in Australia this may be done if it is deemed to be in the publics’ interest.\textsuperscript{124}

In the ROI the complainant not only has anonymity but also enjoys a closed court as explained above.\textsuperscript{125} While in Germany, the complainant does not have anonymity per se, she is allowed active participation in the criminal proceedings, even the investigation and can request a closed court if she desires.\textsuperscript{126} As such NI could learn from the practice in these two jurisdictions.

\textit{Recommendations}

- \textbf{Educate the media on the law regarding anonymity} - It is necessary that clear laws are set down for media to ensure that complainant identification does not occur. Legal training for anyone reporting sexual offence cases should be also be mandatory, with clear parameters on what should and should not be published especially around the internet and social media.\textsuperscript{127}

- \textbf{Educate the media on sexual offences more generally} - This training should also extend to educating journalists on the nature, extent and causes of rape, with an emphasis on myths and stereotypes surrounding the subject and how to report in a non-sensational and undistorted manner.

- \textbf{Measures to ensure privacy of complainant} - Alternative entrances and corridors for complainants should be provided alongside measures such as screens, to ensure their privacy when moving around the court building and into the court room.

- \textbf{Mandatory closed sessions} - While private sessions are an option in NI, closed court for serious sexual offences with only a limited number of press should also be considered as mandatory, similar to the provisions in the ROI.\textsuperscript{128} While section 2 expressed some concern in relation to a blanket rule on closed courts, this recommendation would allow some media representation so as to satisfy the principle of open justice. Although, as noted in section 2 a discretionary power to completely clear the court could be operationalised if the necessity threshold was reached. Further,

\begin{itemize}
\item \textsuperscript{123}Criminal Procedure Act 2011 (NZ) section 203.
\item \textsuperscript{124}Crimes Act 1900 (New South Wales) section 578 (a).
\item \textsuperscript{125}n 42 above, section 6.
\item \textsuperscript{126}J. Cameron ‘Victim Privacy and the Open Court Principle’ (2013) Osgoode Hall Law School of York University 42.
\item \textsuperscript{128}n 42 above.
\end{itemize}
to this, limiting those present in court may help to address the challenge the pervasiveness of social media now.

B. Arguments for defendant anonymity

This section considers the suggested extension of anonymity to defendants in serious sexual offence cases, concluding that such a measure should be implemented in NI to further protect the anonymity of complainants.

Stigma in Northern Ireland

Sex crimes have been described as especially squalid and noxious in a way that offences of dishonesty and violence are not, creating a unique stigma more severe than other categories of offending.129 This stigma is argued to be so pervasive that it extends even to individuals only suspected of having committed a sexual offence, resulting in a pre-emptive vilification.130 A defendant in NI, with its many socially conservative laws, often impacted by religion and reflected in the beliefs of many,131 may face greater public disdain attached to sex offence allegations.132 Coupled with the fact that this is a very small jurisdiction, a heightened stigma may exist compared with that which is found in the rest of the UK, thus justifying, in the minds of some, the extension of anonymity to defendants in cases of sexual offences. However, there are many crimes which attract a stigma of this sort in NI, for example, domestic violence or animal abuse, therefore the anonymity argument should not be limited to serious sex offences.

Second, a look at PSNI figures for the year 2016/17 show that of the 820 reported rapes, only 15 people were convicted – a percentage of 1.8%.133 It is therefore difficult to see how sex offence defendants are especially disadvantaged by media identification and alleged pre-emptive vilification.

131 BBC Newsnight, Northern Ireland’s social conservatism, 26 February 2018 https://www.bbc.co.uk/programmes/p05zf2f4 accessed August 2018.
132 A. McAlinden, The Shaming of Sexual Offenders: Risk, Retribution and Reintegration (2007 Hart)
Further, the argument that the public proceeds on the basis there is ‘no smoke without fire’, and thus defendants are not vindicated by an acquittal resulting in a lingering stigma, is not limited to sex offences. A defendant of a sex offence is in the same position as any other defendant who has faced trial with extensive publicity of the facts, and thus, perceptions of unfairness unique to the former are misconceived. In any event, a defendant’s right to a fair trial under article 6(2) of the ECHR protects the presumption of innocence, and we should do better than to assume the public are incapable of distinguishing between mere suspicion and guilt.

Nonetheless, vigilantism, particularly in relation to alleged sexual offenders, is certainly an issue from which defendants require protection from in this country, including paramilitary extra-judicial ‘justice’ and vigilante groups such as ‘Paedophile Hunters’. Where there is a ‘real and immediate threat’ to life or limb, a defendant’s right to be free from torture, and inhuman or degrading treatment or punishment is protected under article 3 of the ECHR, from which there can be no derogation, and may result in an anonymity order being granted. Such threats can be dealt with on a case by case basis, rather than requiring blanket anonymity.

In NI it still remains predominantly the case that stigma associated with sex offences resides with complainants rather than defendants, the accused are often viewed in a more sympathetic light as is reflected in the above PSNI statistics. To extend anonymity to defendants on the basis of stigma is to imply that women fabricate rape allegations and that men require special protection. With no evidence to substantiate such claims as noted in section 1, and rather, evidence to show that the prevalence of false and malicious allegations of rape

136 R (on the application of AR) v Chief Constable of Greater Manchester Police & another [2018] UKSC 47 [16].
141 See e.g., Amnesty International n 8 above.
are no more than that of any other crime, defendant anonymity on this basis runs the risk of deterring victims further from reporting crimes when their credibility is increasingly undermined.\textsuperscript{142}

\textit{Press, Social Media and High Profile Defendants}

The highest courts in the UK have time again emphasised the importance of the media in reporting identities of parties to a case, justifying identification as a valid journalistic judgment\textsuperscript{143} in the public interest.\textsuperscript{144} However, it is frequently argued that sex crime attracts a disproportionate degree of media attention, encompassing gratuitously salacious coverage, even when only a mere allegation. At times, media reporting portrays sex offenders as incurable predators and outcasts of society,\textsuperscript{145} focusing on extraordinary cases to enhance sales instead of exploring the normality of sex crime. The over-reporting of cases if sensational or unusual, particularly when involving a false allegation or a high profile defendant, not only encourages falsities and myths associated with sex crime to flourish,\textsuperscript{146} but also becomes a form of entertainment to the prurient public.

However, the House of Lords has ruled that just because a particular type of crime is subject to intense media interest, does not of itself undermine the argument for media identification of defendants.\textsuperscript{147} With regard to a defendant’s right to privacy under article 8 of the ECHR, an order cannot be made for the benefit of comfort or feelings of defendants but, where publishing material could lead to a defendant suffering substantial harm, reporting restrictions may be imposed.\textsuperscript{148} That is, harm more severe than that experienced by defendants of other offences.\textsuperscript{149} Thus, just because sex offence defendants may attract considerable media attention does not mean they should be treated differently to defendants of other crimes. It is a by-product of the


\textsuperscript{143} Attorney-Generals Reference (No.3 of 1999) [2009] UKHL 34; [2010] 1 AC 145 [25].

\textsuperscript{144} \textit{Khuja v Times Newspapers Ltd} [2017] UKSC 49; [2017] 3 WLR 351 [29].


\textsuperscript{147} In re BBC [2009] UKHL 34.

\textsuperscript{148} \textit{Guardian} n 137 above 697, 705.

principle that open justice may be painful or humiliating but should be tolerated, as publicity acts as the best security for the pure, impartial and efficient administration of justice.\footnote{Scott v Scott [1913] AC 417 (HL) 463 (Lord Atkinson).} Looking at the PSNI statistics for 2017/18, 94.5\% of police recorded rapes in that year resulted in no outcome.\footnote{PSNI Figures 2017/18 n 133 above.} It could therefore be said that rape defendants are viewed in a comparatively sympathetic light. While this does not prevent the defendant feeling humiliated during public proceedings, it should mitigate the level of suffering to some degree.\footnote{Taylor n 149 above 83.}

The high profile of the defendants in a trial can also have an impact on the type of coverage it receives. As illustrated most recently in the Belfast rugby rape trial, much of the intense media and public interest in the trial related to the men’s identities,\footnote{Bacik, ‘How rape trials in Republic differ from those in North’ (2018) https://www.irishtimes.com/news/crime-and-law/courts/district-court/how-rape-trials-in-republic-differ-from-those-in-north-1.3443644 accessed August 2018.} the trial becoming a public spectacle with titillating rather than informative media coverage. The trial also generated pervasive social media engagement which went far beyond interpersonal discussions to include damaging commentary.\footnote{Examples of tweets: <https://twitter.com/MacCarronSean/status/979050589383426048>; <https://twitter.com/julienDuncan1/status/978972363025993728> accessed August 2018.} While the majority of cases do not attract the same level of public interest and thus do not require reporting restrictions to protect defendants from ‘substantial harm’, anonymity certainly would have made a huge difference in this case, if not for the defendants, for the complainant. Counter to this however is the argument that publicising the identities of defendants encourages other victims to come forward, which is essential in cases of serial offenders.\footnote{Ministry of Justice, Providing anonymity to those accused of rape: An assessment of evidence, 2010 https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/anonymity-rape-research-report.pdf accessed August 2018.} Indeed, section 2 expressed caution in relation anonymising parties to a case due to the potential for this to create evidential disadvantages: individuals would not know that they possessed important information in relation to a defendant.

**Protection of Complainants**

As noted above, although the complainant is entitled to anonymity, sensationalist reporting and identification of the complainant has occurred as a result of the complainant’s name being used in Court. Additionally, as NI is small jurisdiction identification of the defendant may run the risk of the complainant’s identity being exposed through jigsaw identification.\footnote{Crime Analysis, Should protecting the anonymity of victims of sexual offences be left to}
the fact that sex crimes are often committed by people known by the victim, connections between the defendant and complainant are regularly identifiable. However, the England and Wales Court of Appeal has ruled that the court has no jurisdiction to grant defendants anonymity in order to protect or enforce the anonymity of complainants. Thus, to rely on complainant anonymity alone in encouraging the reporting of sex offences may prove insufficient.

Nonetheless, when all of the arguments i.e., the harmful and pervasive social media engagement in high profile cases; the high risk of jigsaw identification; the exceptionally low rate of reporting, are presented together, extending anonymity to defendants may ultimately serve to enhance the administration of justice in prosecuting offenders by reducing the risk of the aforementioned reporting deterrents. Indeed, the ROI provides restrictions on the publication of any matter likely to lead to the identification of the complainant or the accused, unless or until he is convicted.

Recommendations

- **Extend anonymity to defendants** - Anonymity should be extended to defendants to further protect complainants of serious sex offences. Since protection is required from the initial allegation stage until conviction, it is recommended we adopt the current legislation governing reporting restrictions in the ROI and implement the equivalent. While there may again be concerns in relation to the principle of open justice, in the ROI anonymity can be lifted for either party where there is a substantial and unreasonable restriction on the reporting of proceedings at the trial and is in the public interest. Thus, any concern that publicising a serial offender’s name induces more witnesses to come forward is addressed. Further to this, even where the names remain anonymous, certain distinctive patterns in a case could still be reported by the media which may trigger further revelations from other individuals.

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157 In the United Kingdom, Rape Crisis for England and Wales notes that approximately 90% of those who are raped know the perpetrator prior to the offence, https://rapecrisis.org.uk/statistics.php accessed August 2018.
159 Criminal Law (Rape) Act 1981, s7; s8.
160 Ibid.
• **Educational campaigns** – education sessions should be provided to the media and judicial actors, as well as wider society on the reasons surrounding the introduction of this measure and any suggestions that it is related to false or fabricated claims should be challenged.

5. **Support for complainants, victims and witnesses - from the time of the initial complaint through to post-trial support**

This section will set out some general principles in relation to the rights of victims and witnesses, before exploring how some practical improvements could be made the current NI system.

**General Principles**

Sexual offence trials pose challenges both for those who are victimised by these types of crimes the legitimacy of the criminal justice system itself. Indeed, the secondary victimisation experienced by many victims of sexual offences, as noted in section 3, can impact on the legitimacy of the criminal justice system. Although, the right to fair trial is central tenant of the criminal justice system and contributes to its legitimacy, it should not be interpreted as allowing a ‘no holds barred’ approach to the treatment of complainants. Defendants’ and complainants’ rights do not have to be seen as a zero-sum game. While tensions exist between them, the right to a fair trial should not be used as a tool with which to preclude consideration of extensions to complainants’ rights within a trial. As observed by the Council of Europe and the UN General Assembly, victims and witnesses are entitled to a level of respect and protection in court. Closer to home, the Northern Ireland Law Commission noted in 2011 that:

> The furtherance of the interests of justice must entail the creation of conditions – fair, balanced and proportionate – under which parties and witnesses have the opportunity to give their best evidence.

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161 Garvin and Beloof n 54 above.
The criminal justice system can provide an important response to victims, with research consistently finding that belief, recognition, support, validation, voice and control remain crucial aspects of recovery from sexual violence. Engagement with the criminal justice system can ideally facilitate this recovery, if a victims’ participation within the system is well managed and supported. As noted by the UN:

Victims should be supported in their efforts to participate in the justice system through direct and indirect means; timely notification of critical events and decisions, provision in full of information on the procedures and processes involved; support of the presence of victims at critical events; and assistance when there are opportunities to be heard.

However, the adversarial nature of our criminal justice system arguably makes it ill-fitted to delivering these aspects of recovery. The focus on the guilt or innocence of the accused, and the central role of fair trial rights within the justice process, mean victims’ interests and procedural rights can often be overlooked.

A criminal investigation and prosecution can be a long and difficult process. From a legal point of view, a victim remains only a complainant while this process is ongoing. However, this should not prevent all practitioners who come into contact with victims from treating them with dignity and respect. A case which forms a small part of a practitioner’s workload may be of central importance to the victim, and treating them with respect and dignity can reassure the victim that their community condemns victimisation in general, and is interested in pursuing justice. Such practices are also likely to increase cooperation with the justice system. Respect and dignity can be demonstrated by for example the development of sensitive inter-personal skills, considering victims’ interests when scheduling cases, and keeping victims up-to-date about developments in their case. The provision of information in particular can demonstrate to victims that they are being treated fairly and with respect. This is all the more important given the long delay that can occur between reporting a crime and the beginning of a trial.


168 McGlynn n 166 above.

169 Handbook n 167 above, 42.
Indeed, such delays have been found to represent a source of psychological stress and secondary victimisation for victims.\textsuperscript{170}

Sensitive treatment of complainants can be particularly valuable during the investigation stage, as in addition to enhancing the complainant’s sense of justice, this can assist in the effective building of a case. Gathering more complete information about the complainant’s experience, thoughts and feelings may aid the countering of ‘rape myths’ by making their actions more understandable, and their story more believable.\textsuperscript{171} There is a wide body of literature that explores the problems associated with police attitudes during rape investigations, and highlighting potential ways of addressing those attitudes.\textsuperscript{172} This literature has flagged a number of means through which the police can ensure complainants feel at ease. These might include: signposting medical and support services, establishing rapport, actively listening, asking open questions that allow the complainant to speak freely, and avoiding any language that suggests judgment.\textsuperscript{173} Ensuring an appropriate environment in which to interview the complainant can also be beneficial; ideally police stations should ensure they have quiet, distraction-free, comfortable rooms. Studies have suggested that police officers rarely receive appropriate training in how to effectively and sensitively interview complainants, yet supporting this type of skills development is arguably of critical importance in delivering justice in cases of serious sexual offences.\textsuperscript{174}

Within NI, the Victim Charter refers to these general principles, noting victims’ entitlement to be treated with dignity and respect, to understand and be understood, to be kept informed, to be supported, to be protected and to deal with people who are trained appropriately. Yet secondary victimisation remains a high risk for complainants in sexual offence trials. The


\textsuperscript{173} Wistera \textit{et al}, \textit{ibid}, 1750.

\textsuperscript{174} \textit{Ibid} at 1752.
following sections explore ways in which criminal justice agents can further contribute to minimising these risks, while delivering a sense of justice and fairness of process.

Practical Improvements
Meaningful participation can be a fundamental part of victims’ sense of justice. This section considers the practicalities of a trial that can negatively impact on victims’ experiences of participation and makes some suggestions as to how these negative impacts can be minimised. As argued by Smith, practical considerations are not extraneous to victims’ sense of justice, but are central to enabling meaningful participation. Indeed, Hall has argued that arranging courts around victims’ needs, for example by reducing the time between reporting and trial, or by ensuring buildings are comfortable and safe, can provide another avenue for placing victims ‘at the heart of the criminal justice system’.

The risk of encountering the defendant or their family has been highlighted as being one of the greatest concerns for complainants. Even where there are separate witness waiting areas available, poor witness facilities, insufficient access to toilets or smoking areas, and limited options for entering the building, can all contribute to circumstances in which complainants come face to face with the defendant or their family. One option might be to give pagers to complainants, allowing them to avoid long waits within the court buildings. However, entry into court can often hold a risk of distress if not carefully managed. Similar to the issues raises in relation to ensuring anonymity of the complainant, attention should be given to the way the complainant enters and exits the witness box. While screening may be available as a special measure, this means little if the complainant is forced to walk past the public gallery before and after testimony. As Smith observes, the ‘potential impact of an intimidating walk to the witness box should not be underestimated’. As recommended in section 5, courts should therefore use separate corridors and entrances for complainants and witnesses when available and consider developing alternative entrances where none are available. Alternatives might

176 Smith n 162 above.
178 Baverstock n 46 above; Payne n 110 above.
179 Hamlyn et al n 104 above.
180 Smith n 162 above 11.
include allowing complainants to use judicial corridors, or emptying the gallery when the complainant is entering the courtroom.

As key stakeholders in the trial, thought should also be given as to where complainants can go to watch the trial. If facilities are unavailable, they may be faced with watching from the public gallery, thereby potentially encountering supporters of the defendant. Attention might be given to the Specialist Sexual Violence Courts in South Africa, which give significant thought and care to the layout of witness rooms, and which are designed to create an informal atmosphere that is less intimidating to survivors.

**Advocacy and Assistance Services**

Many victims can find early encounters with the police traumatic. Victims may be asked to recount the details of the rape, as well as details about their own dress, lifestyle, sexual behaviour and relationship with the suspect. Unsurprisingly, studies have shown victims can be reluctant to engage with this process. In response, a number of jurisdictions, including NI, have explored the provision of victim advocates, who can provide support through the process of going to the police and obtaining forensic examinations. This type of assistance has been recommended by the UN Office for Drug Control and Crime Prevention (UNODCCP).

The UNODCCP highlights the importance of emotional support during investigations, and the benefits of providing information about the investigation’s progress, about the criminal justice process and about the complainants’ own rights. It notes that complainants can ‘grow weary of the battles that must be won in order to be treated with dignity and compassion’ and argues that advocates can encourage complainants to advocacy for themselves, but also ‘provide them with another voice when they become too weary to speak’.

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181 Smith n 162 above, 9.
183 Jordan n 172 above; J. Jordan, ‘Here we go round the review-go-round: Rape investigation and prosecution – are things getting worse not better?’ (2011) 17(3) Journal of Sexual Aggression 234–249;
185 Handbook n 167 above, 23.
187 Ibid, 35.
An assessment of the Scottish ‘Support to Report’ advocacy service was conducted in 2014 and provides helpful insights as to how advocacy services can be designed to support victims to the greatest extent possible.\textsuperscript{188} The report found that advocacy support received at an early stage of the criminal justice process bolstered victims’ confidence, helped them give a clearer statement to the policy, and encouraged them to continue engaging in the criminal justice process.\textsuperscript{189} The advocates’ role in following up information with the police was described as particularly valuable, as was their guidance as to how to navigate the criminal justice system more generally. Having a consistent point of contact was considered beneficial due to the lengthy nature of the process and the multiple agencies connected to processing cases.\textsuperscript{190} The non-judgmental support offered by the advocates also assisted victims in being able to cope with the less supportive language used by criminal justice practitioners, such as the police. In this context, the advocates’ independence from the criminal justice agencies was particularly welcomed.\textsuperscript{191} Overall, independent advocacy support was found to improve victims’ experiences of the criminal justice system, increase chances of reporting, and encourage continued engagement in the process. The report highlights the importance of access to an independent advocacy worker when engaging with the investigation and prosecution stages, and the continuity of dedicated support delivered throughout. This has been reflected in other jurisdictions, and such findings make a strong argument for governments ensuring sufficient financial and human resources are made available to organisations offering this type of advocacy.

The possibility of having to appear in court was identified as particularly challenging for victims, and the support offered by advocates in preparing for this was appreciated. However, it should be noted that advocates of the type offered by Victim Support and the Scottish Support to Report organisations are unable to protect victims whose cases come to court from the specific challenges of appearing as a witness. Given that research suggests that much of the secondary victimisation reported by rape victims occurs within the context of the trial, there is a need to develop sensitive proceedings during the later stages of the criminal justice process. The next section argues that the introduction of a legal representative could be of significant benefit in this regard.

\textsuperscript{188} A. Brooks and M. Burman ‘Reporting rape: Victim perspectives on advocacy support in the criminal justice process’ (2017) 17(2) Criminology and Criminal Justice 209-225.
\textsuperscript{189} Ibid, 215.
\textsuperscript{190} Ibid, 215-217.
\textsuperscript{191} Ibid, 217-219.
Legal Representatives in the Courtroom

Within the courtroom, sexual assault complainants are particularly vulnerable to secondary victimisation and traumatisation due to the personal nature of the crime; research has consistently highlighted the humiliating and terrifying nature of cross-examination in sexual offence trials. Cross-examination during sexual offence trials can often involve a focus on the complainant’s character, and despite legal limitations on this type of evidence, often involves scrutiny of the complainant’s own sexual history. Research in other jurisdictions has shown that reforms such as restricting the admissibility of evidence on a complainant’s sexual reputation and enabling complainant witnesses to give evidence using video technology or while accompanied by a support person have done little to impact the under-reporting and conviction rates for sexual offences. Nor have they resulted in more positive experiences of the criminal justice system amongst those complainants who do come forward. While NI, similarly to England and Wales, has introduced a range of special measures, research suggests that the use of special measures has done little to prevent inappropriate questioning or intrusive cross-examination. As argued by Burton et al., it seems the adversarial focus on winning leads to traumatic questions being asked regardless of whether or not complainants are in court.

These failings have led some to argue in favour of granting sexual assault complainants access to a legal representative. Traditionally, the notion of a victim-representative has been dismissed within adversarial criminal justice systems, as it has been argued that the two-sided contest between the state and the defence cannot accommodate a third party without violating the rights of the accused. However, we would argue that it is worth reconsidering whether legal representation, within clearly defined and limited parameters, might be introduced in a way that assists complainants without violating fair trial rights. If this could be managed, it might...

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193 See e.g. research conducted in Australia: K. Daly and B. Bouhours ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2010) 39(1) Crime and Justice 556–650

194 H. Clark, ‘“What is the criminal justice system willing to offer?” Understanding sexual assault victim/survivors’ criminal justice needs’ (2010) 58 Family Matters, 28–37


196 Burton et al n 104 above.
offer a way of avoiding the high risks of re-traumatisation for sexual assault complainants, while combatting the low reporting and conviction rates associated with this type of crime. Such an approach may also enable the provision of support during prosecution and trial as advocated by the UN, who has specified the importance of offering personal support to complainants, assistance during participation in the process, and information on victims’ rights, the responsibilities of criminal justice practitioners and the rights of the complainant.\textsuperscript{197}

A study on rape complainants in Europe has shown that legal representation can increase complainant’s levels of confidence when giving evidence.\textsuperscript{198} Legal representatives can ensure that complainant’s interests and procedural rights are safeguarded, and that victims receive appropriate and accurate information about the criminal justice system and their role within it.\textsuperscript{199} Guidance on what to expect from cross-examination may prepare complainants and lessen the shock of unexpected or confrontational questions, while information about legal language can reduce confusion and anxiety.\textsuperscript{200} Legal representation can also help to ensure that cross-examination involves only admissible and appropriate questioning.\textsuperscript{201} Indeed, studies conducted within jurisdictions which have introduced legal representation have suggested that the presence of a legal representative can result in less animosity from defence lawyers, improving complainant’s experiences of cross-examination.\textsuperscript{202}

It has been argued elsewhere that a legal representative is not required, as the interests of complainants can be protected by the court and the public prosecutor.\textsuperscript{203} However, the court and the prosecutor have a number of different interests to consider which prevent them from giving the interests of the complainants priority.\textsuperscript{204} Although courts may be tasked with preventing inappropriate lines of questioning, they can be reluctant to interfere in practice, while prosecutors are required to represent the state and the public interest. While prosecutors

\textsuperscript{197} Handbook n 167 above, 26.
\textsuperscript{199} Garvin and Beloof n 34 above.
\textsuperscript{202} Temkin n 19 above; Bacik et al n 198 above; Raitt n 192 above.
\textsuperscript{203} E. McDonald and Y. Tinsley, From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand, (Victoria University Press, Wellington 2011)
\textsuperscript{204} D. Smythe D, Parliamentary Submissions to the South African Parliament by the University of Cape Town, Sexual Offences Submission Chapter 8: Legal Representation for Victims of Sexual Offences 2002.
may lawfully intervene to protect complainants when to do so is also in the public interest, they are under no obligation to protect the complainant specifically. Furthermore, the public interest may not necessarily align with the rights and interests of complainants. For example, a study in Scotland found that prosecutors were reluctant to shield witnesses from character attacks, as they feared that to do so would convince the jury that the prosecutor was hiding something.\footnote{B. Brown, M. Burman & L. Jamieson, \textit{Sex crimes on trial: The use of sexual evidence in Scottish courts}. (Edinburgh University Press 1993)} Another study found that prosecutors allowed character attacks in the belief that a distressed complainant may invoke greater sympathy from the jury.\footnote{Doak n 52 above, 307.} We would also argue that a legal representative can offer a degree of support currently not offered by other victim advocacy services. While victim advocacy support services such as those discussed above can play an important role, they are unable to combat the vulnerability encountered by complainants while giving testimony.\footnote{Temkin n 19 above, 302.} They are unable to object to questions or the introduction of previous sexual history. Nor is there any evidence to suggest that their presence results in any improvements in the treatment of complainants by other parties to the trial.\footnote{Braun n 201 above, 825.}

The introduction of legal representatives may also be of benefit to the criminal justice system itself. The fear complainants have of their treatment can be linked to the underreporting of sexual offences, and their unwillingness to proceed can result in prosecution services having to withdraw cases.\footnote{D. Lievore, ‘Prosecutorial Decisions in Adult Sexual Assault Cases’, Trends & Issues in Crime and Criminal Justice No 291, Australian Institute of Criminology, Canberra 2005.} Thus, increased confidence through the provision of a legal representative may combat these challenges to the successful prosecution of sexual offence crimes. Legal representation could also assist in the conviction rates for sexual offence trials. Studies have shown that court-related stress can make complainants more forgetful, more susceptible to suggestions by questioning parties, and more likely to deliver incomplete, inconsistent or erroneous descriptions of events.\footnote{Ellison n 192 above.} Thus, increased confidence as a result of legal support could result in complainants feeling better prepared and better able to deliver their testimony.\footnote{Braun n 201 above, 826.} This may also positively impact the length of trials. A study conducted in Denmark, where legal representation of complainants is permitted, found that cross-examination became
significantly shorter as complainants became more willing to testify, leading to less follow up questions.\textsuperscript{212}

Models for legal representation can be found within other jurisdictions. In Germany, complainants have the right to employ a legal representative.\textsuperscript{213} This representative is present during the complainant’s testimony and can make applications on their behalf. These applications can be for the exclusion of the public during examination,\textsuperscript{214} the exclusion of the defendant during examination,\textsuperscript{215} the use of video technology.\textsuperscript{216} During testimony, the representative can object to abusive, compromising, disrespectful, suggestive or leading questions.\textsuperscript{217}

**Recommendations**

- **Ensure the respect and dignity of the complainant** – criminal justice personnel should be sensitive to the needs of the complainant in the everyday management of investigations and cases. Think about the victim’s journey within the court building and how this can be managed more effectively.

- **Introduce legal representation for the complainant** – As well as the advocates available through Victim Support, we argue that a legal representative similar to those discussed above, such as in Germany for example, would not conflict with the adversarial system used in NI. A complainant’s legal representative would not become a part to the court proceedings and would therefore not be in a position to request evidence or cross-examine witnesses. Rather, he or she would be tasked with assisting the court by presenting the victims’ views in an appropriate and effective way. Such a role would avoid infringements of the rights of the accused, who would not be required to confront an additional adversary within the courtroom.\textsuperscript{218} The use of such representation is not unheard of within common law. For example, in 2011 New South Wales introduced a legal representation scheme for complainants when addressing the court in relation to the prevention or restriction of disclosure of sexual assault.

\textsuperscript{212} Temkin n 19 above, 292.
\textsuperscript{213} German Code ss68b, 406f, cited in Braun n 201 above, 828.
\textsuperscript{214} German Courts Constitution Act s171b.
\textsuperscript{215} German Code s247.
\textsuperscript{216} German Code s247a.
\textsuperscript{217} German Code ss68a, 241(2).
\textsuperscript{218} Braun n 201 above, 830.
communications.\textsuperscript{219} Closer to home, submissions by the legal representative of a rape complainant have been possible in the ROI since 2001, in cases where the defendant has applied for the admission of the complainant’s sexual history.\textsuperscript{220} Similar representation is permitted in New Hampshire, Wisconsin and West Virginia, while in South Carolina, a legal representative may act in cases where the defence have claimed improper or illegal conduct of the complainant as a defence.\textsuperscript{221}

- **Provide government funding** - In terms of the practicalities, we would submit that in order to avoid distinctions on the basis of wealth, legal representatives would require government funding. While this would result in additional costs for the state, it might in turn reduce the public health costs of long-term psychological damage caused by the trauma of cross-examination as it is currently conducted.

6. **Disclosure of Evidence**

This section will examine the current challenges to effective disclosure posed by the advancement of technology, cultural stumbling blocks present within agencies of the CJS, namely investigators and prosecutors, and the consequences of austerity measures before suggesting what improvements could be considered to address those difficulties.

*Volume Management*

In recent years, there have been growing concerns that the disclosure process is failing to keep up with the challenges presented by the modern world. Today, the widespread use of mobile phones and other communication devices such as computers and tablets, has become a major issue for those involved in the process of disclosure. The explosion in digital material from both complainants’ and defendants’ phones and other digital devices, coupled with the increased use of social media, has threatened to overwhelm both investigators and prosecutors who are tasked with securing, analysing, evaluating, and selecting which material to disclose to the defence. Consequently, there are concerns that there has been a systematic failure to disclose vital evidence stored on these communication devices.

\textsuperscript{219} Criminal Procedure Act 1986 (NSW) s299A, cited in Braun n 201 above, 829.
\textsuperscript{220} Criminal Law (Rape) Act 1981 (Ireland) s4A(3).
Hubbard acknowledges that while the Criminal Procedure and Investigation Act 1996 (CPIA) instructs investigators and prosecutors that any material which ‘might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused’, must be disclosed to the defence she points out society has changed massively since the CPIA was first enacted. Ephgrave concurs and explains that contemporary investigations often involve the seizure of multiple communication devices which hold a staggering amount of data; the average smartphone contains information equivalent to almost 30,000 pages of A4 paper. Where the prosecution is faced with seized materials of this nature Hughes LJ, cognisant of expert testimony that ‘it would take a lifetime or more’ to read, noted the Court found nothing improper with sample or key word searches. The Court of Appeal has considered the issue of disclosure of unused materials and the management of inestimable data, and concluded:

- The prosecution is and must be in the driving seat at the stage of initial disclosure
- The prosecution must then encourage dialogue and prompt engagement with the defence
- The law is prescriptive of the result, not the method
- The process of disclosure should be subject to robust case management by the judge, utilising the full range of case management powers
- Flexibility is critical

Lack of Compatible, Up to Date Software and User Knowledge

It is worth emphasising the 77 devices seized in the above fraud case contained approximately 600 million pages of data and despite being ongoing for some five years it had not advanced beyond the initial stage of disclosure. While there may be an expectation that financial analysis will go hand in hand with a challenging amount of data, contemporary sexual offences cases also possess considerable amounts of complex data. Parker’s concern is not that the content of devices cannot possibly be completely reviewed, but rather that there is not the compatibility.

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222 Criminal Procedure and Investigation Act 1996, s3(1).
226 R v R and others [2015] EWCA Crim 1941 [45 – 60].
of software between agencies in the CJS to search data consistently and methodically; she questions how these materials can possibly be managed without equipment that is fit for purpose. Gross LJ is aware it has become ‘physically impossible or wholly impractical to read every document on every computer seized’. He highlights the considerable length of time required (630 hours), using current methods and software, to examine the respective mobile phones and Facebook accounts of three complainants; in another rape case where there were only two mobile phones, it still took officers 150 hours to analyse 20,000 items of data.

A Pro-Prosecution Bias Towards Non-Disclosure

The high numbers of sexual offences cases which have collapsed due to disclosure failures have brought the current challenges into sharp focus. The failure by police to disclose information on a computer disc that contained messages in which the complainant had asked the defendant repeatedly for ‘casual sex’, in the Liam Allen case, were discovered by prosecuting counsel. The subsequent review into how the police handled their disclosure duties, more specifically, how they dealt with material recovered from the complainant’s phone, found that had the Detective Inspector been informed of this information ‘she may not have authorised referral to the CPS for a charging decision.’ Ultimately, the review concluded the issues with disclosure were a result of ‘…error, lack of challenge, and lack of knowledge.’ Similarly, the trial of Isaac Itiary collapsed after new evidence emerged the police had failed to disclose messages which showed the complainant, aged 16, told Mr Itiary that she was 19. In an interview with BBC Radio the then Attorney General, Jeremy Wright, stated that the two cases were ‘appalling failures of the criminal justice system,’ and that, ‘We need to understand that the type of evidence being used in criminal trials is changing’.

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228 ibid.
231 Parker n 228 above.
233 ibid.
There are concerns that a pro-prosecution culture within an investigator’s working environment may lead to a unconscious bias towards non-disclosure. Quirk argues that where this exists it leaves officers ‘unsuited’ and ‘ill-equipped’ to perform their disclosure duties.\(^{235}\) When police officers view evidence through the filters of their own profession’s experiences, it can lead to a belief that the defendant has committed the crime.\(^{236}\) For some police officers their disclosure duties may only arise when they charge a suspect and this process can give an apparent certainty to whom they perceive to be guilty.\(^{237}\) According to Parker, given the frailties of human judgment, it is inevitable that ‘some unconscious filtering occurs’ when it comes to determining what evidence should be disclosed.\(^{238}\) Innes agrees, arguing that police officers may allow their ‘potentially misleading assumptions’ to become ‘embedded’ in their decision-making process when it comes to disclosing evidence.\(^{239}\) Thus, a major concern is that investigators are expected to pursue lines of enquiry that both support and undermine a case.

In \(R v\) \(Brown\)^{240}, Steyn LJ explains that while ‘an accused’s right to fair disclosure is an inseparable part of his right to a fair trial’ the current adversarial system places the police and prosecution in control of the investigation and it is their role to make the initial assessment as to what material should be disclosed.\(^{241}\) Viewed in this context it is hardly surprising that many officers perceive themselves as agents for the prosecution, which ultimately conflicts with the need to be impartial investigators. Therefore police investigations, rather than being ‘objective’, are constructed within a pro-prosecution culture so that a case is pursued against those whom the officers believe are guilty.\(^{242}\)

The long-standing policy of police in this jurisdiction is to ‘believe the victim’. On the face of it this can appear supportive yet in truth it is problematic as it does not expressly take cognisance of potential false allegations or the expectation of objective fact-finding.

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\(^{239}\) M Innes, ‘Investigating Murder’ (OUP 2003).


\(^{241}\) ibid, [198].

considerable tension exists where on the one hand, victim support charities such as Nexus and Women’s Aid have championed the policy, arguing that it is a step in the right direction when it comes to supporting victims and encouraging other victims to come forward. Women’s Aid announced, ‘[w]e are delighted, and confident, that the measure … will give greater protection for victims of rape and sexual violence’.243 Yet on the other hand the policy is heavily criticised for having a negative impact on the accused’s right to a fair trial. George argues the culture of ‘believing the victim’ means that it is no longer possible to properly investigate a case, or to do so impartially.244 Hubbard agrees, and views the policy as largely responsible for current disclosure problems as the police do not search for contradictory evidence but rather focus their attention on investigating a ‘target’.245

The policy has also been condemned by Henriques in his report on Operation Yewtree. He states that the imposed ‘obligation to believe the victim’ removes the obligation on the investigator to be impartial and ‘has the hallmark of bias’.246 He points out that ‘believing the complainant’ effectively means ‘not believing the suspect’, and so the police are unlikely to investigate properly.247 Henriques states the policy reverses the presumption of innocence, a common law principle which the UK’s justice system is built upon.248 George does not seek a return to the days when women’s complaints of sexual assault were not taken seriously, but stresses the current policy is ‘equally as bad’ as officers are obliged to believe one party before the investigation begins.249 While it is important that victims of sexual assault feel confident to come forward, officers still need to do their job objectively - investigate all lines of enquiry even if this undermines the allegation. George asserts ‘[n]o decent police officer should have any interest in convicting an innocent person’ 250

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245 Hubbard n 224 above.
247 Ibid.
248 Henriques n 247 above.
249 M George, ‘Why the policy of “believe the complainant” was behind the failure of disclosure in the case of Liam Allan’ (19 December 2018) < https://gcnchambers.co.uk/policy-believe-complainant-behind-failure-disclosure-case-liam-allan/> accessed 8 August 2018.
250 Ibid.
The pressure to achieve set targets places police and prosecutors under pressure to secure convictions and exacerbates the underlying pro-prosecution culture rather than prioritising justice and the presumption of innocence. Innes explains that a ‘one-dimensional focus’ on supporting the victim and obtaining convictions may ‘skew’ the interpretation and selection of evidence when building a case ‘that achieves an organisationally defined outcome’.

While many consider the bias to be unconscious, Niblet is concerned that ‘[p]olice training reinforces the primary focus on attaining a conviction’ rather than preventing miscarriages of justice by looking at why errors are made, and how to prevent them. Rafferty concurs and argues that bias prevents the police and prosecution from being impartial and thorough when it comes to investigating complaints in sexual offence cases. Thus, the question remains as to whether it is realistic to expect the police to deal fairly and objectively with issues of disclosure. There is an urgent need ‘to reconcile the dichotomy between the desire to convict and respect the due process rights of the accused’.

Inappropriate Mindset & Lack of Understanding

There is an apparent lack of priority shared by investigators and prosecutors which manifests itself as a fundamental lack of understanding about the importance of disclosure. Ephgrave explains that police officers often view disclosure as a task to be completed at the very end, ‘becoming subsequent to, rather than an integral part’ of an investigation. Horwell also identifies the need for a change in culture, he concurs that disclosure is an afterthought for police officers and prosecutors, who fail to see the importance of the process. Horwell argues that this mindset must be addressed, emphasising the importance of making disclosure a fundamental and continuing part of all investigations, rather than an additional, administrative responsibility added on at the end.

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255 Ephgrave n 225 above.
256 Horwell n 222 above.
257 ibid.
Inadequate Training

‘Disclosure is only as good as the person doing it’.258 Inadequate training often results in ‘police officers failing to make the correct judgment on whether or not a piece of evidence should be disclosed’ as they struggle to determine whether an item is ‘sensitive’ or ‘simply irrelevant’.259 While the disclosure officer is primarily responsible for making sure all relevant material is disclosed, these officers often work with little training or supervision and in practice ‘the role is often assigned to less experienced and often untrained officers and civilian support staff’.260 It is this inexperience that Horwell identified as being one of the main causes of current disclosure failures, there is often confusion over what constitutes relevant material and a general failure to comply with scheduling.261 For schedules to be completed properly the legal significance of material must be determined, which often involves complex legal arguments and the consideration of possible defences; it is more than a simple administrative task. Thus, by leaving untrained and/or unsupported staff to carry out the task, it is inevitable that errors occur. Unsurprisingly Plotnikoff and Woolfson found that almost half of the officers they questioned felt that better training was required when it came to disclosure, while almost a third of the officers said that better clarification and guidance on how to complete schedules was needed.262

Austerity - Lack of Resources & Personnel

There are growing concerns that the CJS is at breaking point. Far fewer police officers and a lack of prosecutors, defenders and judges added to the chronic lack of resources is making it even more difficult to complete important tasks including disclosure. Parker explains that every part of the Criminal Justice System has been affected by austerity, ‘with resources trimmed back to that of 1985,’ has left fewer investigators and prosecutors to deal with more complex problems than ever before.263 Current workloads are said to be at ‘unsustainable levels’, with HMIC recently warning that a shortage of personnel within the CJS amounts to a national

258 Parker n 228 above.
259 Ephgrave n 225 above.
260 Parker n 228 above.
261 Horwell n 222 above, 292.
There has also been huge cuts in legal aid making it more challenging to prepare and run criminal trials to a high standard. As a result, across the CJS, the additional workload placed on staff is having a significant impact on the standard of work being produced throughout the system. George notes ‘it is not surprising that the old issue of disclosure failures has again reared its head’.

Recommendations

- **Technology** - IT system and software should not only be capable of sample and keyword searches, but be compatible with partner agencies within the CJS. The wider IT question remains unresolved within the CJS; greater liaison between procurement departments of the respective agencies and those personnel who will eventually use the system needs to be prioritised.

- **Balanced approach** - Consider the wording of ‘believe the victim’ policies as an initial step to addressing bias. Recognise the tension between fulfilling a proactive position in dealing with sexual offences and remaining aware of the accused’s right to a fair trial. ‘Provide for the application of pro-arrest and pro-prosecution policies in cases of violence against women where there is probable cause to believe that a crime has occurred.’ Therefore, if ‘… victims can be confident they will be listened to and their crime taken seriously’ without the problematic emphasis of ‘believing the victim’ the balance can begin to be redressed for the fact-finding perspective needed for open-minded investigation.

- **Training** - There are a myriad policies and guidelines available to investigators, prosecutors and the judiciary yet disclosure failures persist. Education is needed on factual and legal issues in a disclosure context, but also raising awareness of unconscious bias to permit the fundamental mindset crucial to appropriate professional development. This was raised back in 2011 by the Gross LJ and reiterated by the

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Training for each agency that takes cognisance of the other CJS actors’ roles would aid greater engagement for those charged with the oversight of case management.

- **Acknowledge contributing factors** - Notwithstanding austerity’s affects upon the CJS’s ability to function, nonetheless the lack of continuity of personnel must, if not resolved, then at least be acknowledged as significantly contributing to disclosure failures. On the face of it the equality of arms concerns have always focused on the state’s resources being all but infinite in comparison to the defence’s. Yet it was the ‘overwhelming’ disclosure failures by the prosecution not the defence which were noted with the utmost concern in the respective above review and report.

- **Feedback** - Meaningful feedback between investigators, prosecutors and, if necessary, the judiciary, to clarify areas of confusion or weakness in communication or the disclosure process by way of a monthly engagement or post prosecution review to proactively seek improvements or agree the need to refer the issues for Departmental consideration and recommendation.

7. **The impact of social media on the conduct of court hearings**

The impact of social media has been a recurrent theme throughout this Submission. As such, this final section will engage in a detailed discussion of these issues and provide some recommendations.

*Victim Identity Disclosures- The Issue*

An overarching issue in relation to social media is that the current law does not reflect the fast-paced developments in this area. As noted in section 4, a sexual offence complainant is automatically given ‘lifetime anonymity’ under the Sexual Offences (NI) Order 1978. This was designed to ensure no publications can publish material which can lead to the identification of the victim. However, in an age where Facebook and Twitter act as news sources (both locally and internationally) it is difficult to contain the anonymity of complainants. The Act however is reflective of traditional publications, where it was more simple to withdraw newspapers from the stands. Now, in the social media age, it is extremely difficult to eradicate such sensitive information from the internet forever. It has generally been noted that the rise of the internet

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268 Lord Justice Gross n 230 above; Horwell n 222 above.
269 Ibid.
has changed ‘media consumers to media producers’. With this in mind, the law should be amended not to only to intimidate publications, but also the new ‘consumers’ i.e. the public. This is exacerbated by the fact that a large proportion of the wider public do not realise the extremity of leaking the identity on social media. This is not helped by the lenient punishments given to those found guilty. Most recently at the beginning of August a man was to be charged a fine of just £5,000 for leaking the identity of the high profile rape case in Belfast. Such punishments are not proportionate to the serious effects which leaking such information has, which will be discussed below. As alluded to earlier in this submission, the current cornerstone of victim anonymity has become extremely fragile in the social media age. The law needs to respond to these developments to restore complainant confidence that their identity will not be leaked.

Underreporting of Rape

With rape crimes being overwhelmingly under reported, it is important to protect victim identity as it encourages more victims to come forward. This was highlighted in the Criminal Survey of England and Wales where it was highlighted 83% of victims chose not to report the crime to the police. The main reason for this figure was that victims fear the psychological impact from public debate and the invasion of privacy which serious sexual offence trials bring into the public sphere. Furthermore, of those who didn’t report to the police but told someone else, 47% stated it was due to embarrassment and 35% lamented the process would be humiliating. These figures show that serious sexual offence cases differ from other criminal cases (such as fraud or assault), clearly embarrassment is a determining factor in choosing not to report to the police. Indeed, these factors were acknowledged in the Heilbron Report on complainant anonymity noted in section 4 above.

While the case for the allowance of commentary on Facebook and Twitter, live text-based forms of communication (LTBC) is in upholding the principle of open justice, the case of, Ahrens denotes that negative reactions to sexual offences’ victims in many cases serves as a silencing function. The case for LTBC therefore in the upkeep of open justice perhaps takes the opposite effect in sexual offences trials, instead deterring victims of sexual offences from coming forward.

270 DE v AB [2014] EWCA Civ 1064 per Ryder L.J.
Despite the fact that focus is now on Achieving Best Evidence under the CCENIO the grounds of fear or distress which give a presumption of eligibility for special measure directions to Achieve Best Evidence may well be undermined by this approach to open justice.\(^\text{272}\) It does not take into consideration the fear and distress which may be caused by social media commentary, particularly in regards calls for sexual offence claimants to be prosecuted if acquittal does occur.\(^\text{273}\) According to statistics, less than 2% of rape cases in NI end in conviction, which may leave many complainants anxious, for example, about calls for prosecution, perhaps leading to relevant information not being given to the court, or indeed, victims choosing not to come forward.\(^\text{274}\)

**Leniency of Punishment**

As previously stated the current law does not reflect the age of social media. However, in many cases publications and individuals who leak the identity of victims are simply punished with what feels like a slap on the wrist. In 2012 in the midst of the Chris Evans’ trial nine defendants were found guilty of leaking the victim’s name and were only charged with a £624 fine. Such fines are simply not proportionate to the impact the leak has on the victim for the rest of their life. District Judge Andrew Shaw stated in the proceedings ‘your actions have re victimised this woman again’. Such re victimisation would prove unbearable for victims when we take account the 63% of rape victims who suffer mental health issues as a result. This which would be exacerbated by the humiliation placed on the victim due to the social stigma of the crime.

In our current system offenders are simply not being punished appropriately, the lenient process of charging those responsible for such re victimisation does not give the victim justice.

With how simple it is currently for tweets or Facebook posts to go ‘viral’, social media sites have become akin to national newspapers. If a tweet goes viral it is difficult to contain its audience, if it gets out of hand it becomes equivalent to having the name of the victim circulated on the front of a national newspaper. This begs the question on why have considerable steps

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\(^{272}\) Criminal Evidence (Northern Ireland) Order 1999, PtII (Art 5.(4))


not been taken in bringing the fines and punishments of individuals into line with those of newspapers.

In a statement a police commissioner stated “previous offending of the suspect and, more importantly, whether a caution is better suited to protecting the victim from further online abuse and breaches of anonymity’ are considered when charging offenders. However, when such sympathy results in individuals in some cases only being charged with a caution shows the lax attitude the criminal justice system has been on victim naming. The idea that victims are being ‘protected’ by cautioning offenders is therefore weak. While they’re arguing that no fuel to the fire would be added if offenders weren’t prosecuted, this gives future offenders the belief that there would be no real consequences for their actions. This, in reality, provides no protection to the victim from the wrath of the public. The law as it stands seems to only apply to large publications who could be properly held accountable for their actions. When the law is applied to individual members of the public however, the police are rather tame in holding them accountable via proportionate charges.

Lack of Public Awareness
What is more worrying however is that a wide proportion of the public are unaware that publishing such material on social media is a crime. This shows the low public awareness of victims’ rights in serious sexual assault cases. Such ignorance however should not be an excuse for the crime. Repeatedly defendants are only charged with fines of up to £5,000, which isn’t enough to grab public attention.

Witnesses and Trial by Social Media
A further implication of trial by social media lays firmly in activity declaring the innocence or guilt of a party to proceedings. Although this has been subject to debate on the impact of jury prejudice much is to be said about how this impacts upon witnesses and potential witnesses. The case of Attorney General v MGN Ltd in its decision considered how the vilification of the defendant may have deterred witnesses on behalf of the defendant coming forward.275 Despite the facts of the case relating instead to murder the consideration by the court offers an insight into how witnesses may be impacted by the media. In considering how this could have

275 Attorney General v (1) MGN Limited (2) News Group Newspapers Ltd [2011] EWHC 2074 (Admin) QBD (Admin)
impacted the Belfast rugby rape trial, the hashtag ‘IBelieveHer’ began, and eventually was trending at number one in the aftermath of the verdict. This was followed with the use of a ‘IBelieveHim’ hashtag by other users.276 Dara Florence, a witness in the trial, was subjected to comments online, attacking her appearance and reliability following her evidence in court.277 While former Attorney General, Dominic Grieve QC MP has made clear that ‘open justice is scrutinised justice,’278 if witnesses are deterred from coming forward open justice is undermined.

Juries

Section 20A(1) of the Juries Act makes it an offence for jurors to research the case which is being tried during the trial period. Researching by means of an electronic database which includes the internet is highlighted in section 20A(3)(b) of the Juries Act, although there is no direct link made to social media. In instances of high profile cases, extraneous information is readily available in comment threads on social media, and the use of popular hashtags make such material readily accessible to jurors involved in such a case. The issue the law presents here is twofold. First, unless the court has access to jurors’ private social media accounts, it is difficult to prosecute and prove juror misconduct. In significant judgments concerning juror misconduct on social media, it is not apparent how the court was made aware of the offence, with the trial judge having to adjourn proceedings and consequently question entire juries to find out the truth.279 It may be presumed that in light of private social media accounts, jurors have access to prejudicial material which is never brought to the attention of the court, thus impacting the fairness of the trial.280 The Juries Act does not adequately cover the impact of social media on jury trials because it does not address the threats posed by jurors with private social media accounts which have access to extraneous and potentially prejudiced material that may enter into the deliberative process.

278 Speech by Dominic Grieve QC MP, ‘Trial by Google? Juries, Social Media and the Internet,’ Attorney Generals Office, 6 February 2013
280 K Braun, ‘Yesterday is History, Tomorrow is a Mystery- The Fate of the Australian Jury System in the Age of Social Media Dependency’ (2017) 40 UNSW Law Journal 1634, 1645.
Section 15A(1) permits a judge to order jurors to surrender electronic devices, but does not oblige such an order to be made. According to section 15A(2) of the Juries Act an order may be made if the judge believes it is in the interest of justice to do so and it is a proportionate means of safeguarding those interests. However, the limitations in section 15A(3) state that the order can only be during specific periods when jurors are in the building where the trial is taking place, in other accommodation provided by the judge’s request, visiting a place arranged by the court or travelling between either of the two aforementioned places. The problem with this legislation is that it does not go far enough to protect the right to a fair trial, firstly by not being obligatory and secondly by ignoring the fact that access to electronic devices is much more prevalent outside the specific trial period. It has been established that no matter where jurors access social media, it has the potential to undermine the right to a fair trial. Although this amendment to the original Juries Act is a step in the right direction in addressing the potential impact that electronic communications have on jury trials, the consistent failure of legislation to acknowledge the proliferation of social media in jurors’ lives means that the right to a fair trial is inadequately protected.

The suggested directions to be given to juries in NI have been updated to include a section on not discussing the case ‘on the internet on a social network site such as Facebook, Twitter or anything else’. Furthermore the instructions underline cases in which jurors have wrongly researched online and thus encountered information which may be prejudiced. It is suggested by way of *R v Oliver* [1996] 2 Cr. App. R. that direction, worded at the discretion of the judge, should be given full to the jury prior to empanelment and before the first dispersal, with brief reminders subsequently. However, the sample directions do not accurately underline the dangers of social media use by jurors. For example, although the potential dangers of social media use is addressed, it is not emphasised that it is actually against the law, especially given that the directions have not been updated since the Juries Act was amended. Furthermore, the fact that only brief reminders are given to jurors at subsequent dispersals may be ineffective in longer trials and those which gain notoriety on social media. It has been informally proven that

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283 Ibid.
frequent instructions telling jurors to avoid social media communication are extremely effective as jurors generally follow judge’s directions. It is possible that the current custom of judge’s directions to juries is not as efficient in light of social media, which is a constant temptation for jurors may not be aware of the impact that using social media may have on a trial, or simply forget that it is of importance if it has not been adequately highlighted.

The above laws and customs deal with jurors who wilfully use social media to research and see information regarding the case which they are trying. However, social media may also impact jurors who do not intentionally seek such information but simply happen upon prejudicial material while browsing their social media for personal entertainment. High profile cases are often the subject of much online discussion therefore it is highly probable that jurors will view comments regarding the trial which may influence their opinion before and during the trial. Currently there is no legislation to stop jurors from browsing social media sites for entertainment for the duration of the trial. Neither do the model judge’s directions discussed above adequately explain the danger of viewing prejudicial material on social media sites to jurors which can influence decisions made during deliberations. As a consequence, extraneous material and prejudice may enter into jurors’ decision-making unintentionally, thus jeopardising the right to a fair trial. While publishers are held to account for content regarding trials by the Contempt of Court Act 1981, they often publish links to high profile legal stories on social media accounts. As a consequence, individuals are free to express opinions in the comments section of such links without repercussions thus blurring the divide between accurate news reporting and social media opinions. The issue is whether jurors can remain impartial having unintentionally viewed extraneous information and opinions on social media when not being implicitly directed to do so by legislation or judge’s orders.

Responsibility of Social Media Companies
What also needs to be considered is the lack of effort put in by social media and internet giants such as Twitter, Facebook and Google in punishing its users who breach these anonymity clauses. In most offensive material, Twitter collaborates with local authorities to bring

285 St Eve and Zuckerman n 281 above, 21.
286 K Braun, ‘Yesterday is History, Tomorrow is a Mystery- The Fate of the Australian Jury System in the Age of Social Media Dependency’ (2017) 40 UNSW Law Journal 1634, 1645.1635.
288 Braun 286 above, 1638.
offenders to justice. In victim identity disclosures however, it appears to be less prevalent. For example, if one googles ‘rugby rape’ into Google search the top two suggested searches include ‘rugby rape victim name’ and ‘rugby rape victim instagram’. Such suggestions should not even be made to the public regardless of whether the material is available or not. This shows a lack of surveillance on the accessibility of such sensitive information on part of these websites. Public commentary and awareness of rape cases are much more widespread due to the expansion of social media in the recent years. This makes the identity of victims much more sensitive, however the law has not kept up with this phenomenon. If the producers of traditional media are well versed in preventing the exposure of victim identities, then so should social media giants such as Twitter and Facebook.

Recommendations

- **Public Awareness Raising Campaign** - the authorities need to implement a plan to promote awareness of sexual offence victim rights to the public. A recurring theme of proceedings for these crimes is that offenders don’t realise leaking a victim’s identity is a crime. Ignorance to a crime however should never be an excuse. Given the leniency of fines given to offenders however make it appear that the public do not actually take the extremity of the crime very seriously, and that the law is afraid to push the boundaries in holding offenders accountable.

- **Introduction of Harsher Punishments** - A common consensus is that offenders believe they do not hold an ‘audience’ like the traditional newspaper. The current law cushions this sentiment, and a way to dismantle this is to incorporate harsher sentences. Such sentences should include prison sentences of up to four years, despite any pledges of ignorance.

- **Social Media Responsibility** - increased surveillance and cooperation of social media companies with local authorities. Currently, the passive attitude social media companies have resulted in victims’ names being on social media for up to two years in some cases. This shows that such companies aren’t active in reporting these users to the police. A solution for this could be for such companies being held accountable for implementing algorithms in their sites for censoring keywords such as the victim’s name. Similar artificial intelligence algorithms are used for terrorism related content, so such tools should be used for removing posts on rape victim identities. To enforce such algorithms would encourage companies to become more proactive in their
approach to protecting the victim’s anonymity. A Twitter representative told the Times newspaper that they would enforce a UK ban on naming sexual offence complainants ‘if required by the British authorities’. This shows that the criminal justice system is majorly at fault in holding social media platforms accountable for the content posted by its users.

- **Laws regulating use of social media**: The prohibition of the media from reporting on Facebook in the *Wrightson* case could provide a possible avenue to go down when dealing with serious sexual offences.\(^{289}\) This of course would also need to include Twitter, and other social media intermediaries. A possible downfall however comes with issues of jurisdiction, as UK court orders are not binding on foreign outlets.\(^{290}\) In combating this lessons from Germany may help if we look towards Germany’s Network Enforcement Act.\(^{291}\) In its aim to combat hate speech online, social media intermediaries must, within statutorily defined deadlines, delete unlawful content or risk substantial fines.\(^{292}\) Debates surrounding the infringement such an act has on free speech and freedom of expression have however not gone unnoticed.\(^{293}\) This is not to say that an act of a similar nature dealing with sexual offence trials, with tweaks, could not be reached in NI. Defined parameters of what ‘unlawful content’ means in the context of sexual offence trials, as well as fines for ‘over deletion’ would deter a “removal in case of doubt” practice which have been the major critics of the German legislation.\(^{294}\)

- **Change the framework of how judges direct jurors** – adopt a hybrid of the New South Wales (NSW) model and instructions proposed by the US Judicial Conference Committee on Court Administration and Case Management (CACM) model. The CACM model provided to federal district judges in the US are more detailed regarding social media than those found in the Northern Ireland Crown Court Bench Book. Before the trial there are extensive instructions not to communicate using ‘cell phones, Blackberries, the internet and other tools of technology’ which includes communication through ‘Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My

\(^{289}\) *R (on the application of) v F & D* [2016] EWCA Crim 12R

\(^{290}\) See: Howard Johnson, ‘Reporting Restrictions: A Losing Battle?’ 2016 Communications Law 53

\(^{291}\) Network Enforcement Act 2017

\(^{292}\) See: Sebastian Schwiddessen *et al*, ‘Germany’s Network Enforcement Act - Closing the Net on Fake News?’ 2018 *European Intellectual Property Law* 539

\(^{293}\) *Ibid*

\(^{294}\) *Ibid*
These instructions are fully reiterated at the close of the case. The NSW model instructions state that, when appropriate, judges should advise the jury to ‘keep away from the internet and the other communication sources which may pass comment upon the issues in this trial’, with the explanation that social media sites and the internet ‘may expose you [juries] to other people’s opinions or views’. This direction highlights the dangers of casual social media use by jurors for entertainment in high profile trials. The solution proposed for NI is to provide more detailed model instructions to jurors which adequately highlight the dangers of browsing social media as well as intentional social media use. The full instructions should be read prior to empanelment, at the close of the case and with consistent reminders during high profile trials and those which last longer. Such a solution is both cost and time effective as relatively little change will have to be made to the current framework of jury trials in Northern Ireland. By emphasising the risk of social media browsing for entertainment in new model directions, the need to legislate on the matter or take drastic steps such as a total electronic device ban is eliminated. The right to a fair trial and the integrity of the justice system is protected as jurors will be educated on why social media is a danger and thus more likely to avoid prejudice material.

- **Consider trial by judge alone** - Based on certain Australian jurisdictions, particularly NSW, which facilitate judge alone trials when cases are of significant prejudicial publicity. Section 132(1) of the Courts and Crime Legislation Further Amendment Act 2010 (NSW) (“NSW Act”) permits the accused or the prosecutor in criminal proceedings to apply for an order so the accused can be tried by judge alone. For this to go ahead, both the prosecutor and the accused must agree; if the accused refuses then no order can be made. If the prosecutor refuses a judge alone trial, section 132(4) of the NSW Act permits the court to make a trial by judge order ‘if it considers it is in the interests of justice to do so’. This is often viewed as a safeguard for those cases which encounter significant bias and prejudice in the media.