LAW COMMISSION FULL CONSULTATION PAPER 259:
EVIDENCE IN SEXUAL OFFENCES PROSCEUTIONS

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My response to the Law Commission's Consultation is provided in this Word document for ease of reference because I have responded to questions in the Summary Consultation, as well as questions on special measures contained in the Full Consultation and cross-reference throughout. I have also submitted my response online. Please note that I have not duplicated my responses, e.g., where I have responded in detail to the Full Consultation on a particular issue, I have left those blank in my response to the Summary Consultation, to avoid double counting.

I have responded to those aspects of the Consultation which most closely align with my doctoral research investigating the operation of the s. 28 pilot and related measures for intimidated complainants in sex offence cases. My fieldwork involved court observation in non-s. 28 and s. 28 and cases, including GRHs, s. 28 hearings and s. 28 trials. Court observation was supplemented with interview data from barristers instructed in cases observed. In the PhD, I deal with themes that form part of the Commission's current Consultation, including how complainants are defined under the YJCEA 1999 for the purpose of accessing special measures and the use of ground rules hearings (GRHs) in sex offence cases.

In this response, I summarise some of my PhD findings and analysis. However, I also refer to specific pages of my doctoral thesis for further data and explanation. The full text of my thesis is available at: https://wrap.warwick.ac.uk/176755/. For a briefing paper summarising my PhD findings and further information about my related postdoctoral research, please visit my project webpage at: The Extension of Pre-recorded Cross-examination and Related Special Measures to Adult 'Intimidated' Complainants in Sex Offence Cases | Faculty of Law (ox.ac.uk).

SUMMARY CONSULTATION

Summary Consultation Q1

We provisionally propose that for sexual offences there should be a bespoke, unified regime governing police and prosecution access to complainants' personal records held by third parties, the disclosure of such records to the defence, and the admissibility of such records at trial. Do you agree?

Agree. Disclosure is profuse, sensitive and complicated in sex offence cases. Presently, disclosure creates chronic delays at the pre-charge stage. Late disclosure in s. 28 cases also affects the cross-examination of complainants at s. 28 hearings and presents problems at trial. See Chapter 6 pp 223-233 of my doctoral thesis on how courts dealt with late disclosure (after the s. 28 hearing) during the s. 28 pilot for intimidated complainants.

Summary Consultation Q2

We provisionally propose that any regime regulating the production, disclosure and admissibility of professional personal records held by third parties should apply to records in which the complainant has a reasonable expectation of privacy. Do you agree?

Agree. In addition, there needs to be clear guidance on what type of documents or records would fall under the definition of private records, e.g., some of these 'records' consist merely of notes or emails. Also the context in which the information was recorded or obtained, or professional capacity of the person recording the information, should also be considered.

Summary Consultation Q3

Our provisional view is that that there should not be a complete prohibition on the access, disclosure or admissibility of pre-trial therapy records in sexual offences cases. Do you agree?

The Commission should consider a complete prohibition on counselling records which are unrelated to the offence/s currently charged. My research suggests that counselling records are used by the defence in cross-examination to undermine complainants' credibility or truthfulness, even where therapy received was for a different issue and appears to be unrelated to the defendant or offence/s charged.

For example, in one s. 28 case observed, the adult complainant was cross-examined about counselling they had received at school regarding their relationship with their parents. The alleged sexual assault (by someone other than the complainant's parents) was never discussed during the counselling. However, the fact that the complainant did not raise or discuss the alleged sexual assault with the therapist at that time was used by defence counsel to suggest that the complainant was being untruthful about the allegation because, if indeed it had happened, they would have mentioned it to the therapist. Though defence counsel suggested they did not want to dwell on the therapy when initially raising it, they referred to the counselling records again towards the end of cross-examination. Though this was a s. 28 case, there was no GRH and no written questions submitted to the judge beforehand. At the commencement of the s. 28 hearing, it became clear (because of conversations in open court), that the judge and prosecution knew that defence counsel was going to discuss the counselling records but neither objected or probed further as to the relevance of the questioning.

As well as lacking probative value, there is a risk that some jurors may draw outdated and unwarranted inferences about the complainant if they are made aware that the complainant has, at previous points, sought therapy in respect of other matters in the past. Complainants should not generally be portrayed as unstable or unreliable for seeking medical attention for unrelated issues. Nor should there be a presumption that complainants seeking therapy for a different issue should necessarily discuss or report the assault.

The Commission should also consider greater restrictions on the admissibility and presentation of pre-trial therapy records which are directly related to the offence. This evidence should only form part of cross-examination where the alleged rape or assault is the primary focus of the therapy or recorded in some depth, or has a significant bearing on the matters in issue.

For example, in another s. 28 case observed, the intimidated complainant had briefly mentioned the allegations to her therapist but was also cross-examined about the primary reason for the counselling, i.e., revealing the breakdown of her relationship with her partner and family proceedings relating to the custody of her children, though the defendant and the offences alleged were unrelated. However, this line of questioning inadvertently prompted the complainant to reveal that she had been raped by her former partner because she had also discussed this with her counsellor. The trial judge wanted the reference to the rape by her former partner removed before the s. 28 video was played to the jury but,

due to failures with editing the s. 28 video, this was not possible and the jury were made aware of the inadmissible material concerning the complainant's previous sexual history in this case.

Therefore, similar to the requirement in respect of applications to adduce s. 41, questioning on directly relevant counselling records could be written out prior to cross-examination to ensure that questioning is precise and unlikely to reveal other sensitive or personal information.

(For further information, please see Chapter 5, p 203 of my thesis, where these examples are discussed in the context of the impact of the s. 28 process on cross-examination at s. 28 hearings in sex offence cases.)

Where the complainant's account recorded in the therapy records is unclear or contested, the court should also consider whether the therapist or healthcare professional is available to give evidence in the proceedings. If, in s. 28 cases, counselling records were disclosed late (i.e., after the s. 28 hearing), the court should also determine whether it would be appropriate under the rule in *Browne v Dunn* (1893) 6 R. 67 (HL) to admit the material, i.e., insert the material in the agreed facts, if the complainant has not had an opportunity to comment on the evidence. Please see Chapter 6, pp 233-239 of the thesis for further explanation.

Summary Consultation Q4

Providing that the record holder also consents to access, if protective measures are to be put in place for complainants who consent to access, what should those measures be?

As above.

Where the counselling is judged to be directly related to the current offence/s charged, care should still be taken regarding the scope of the disclosure and admissibility of those records, even where the record holder consents to access, e.g., by not revealing other/unrelated confidential matters discussed in counselling. Any proposed cross-examination questions concerning the material should be adduced in writing, prior to cross-examination. Interviews with barristers as part of my research suggests that writing out questions tends to make the cross-examination more focused on the issues in the case and avoids reinforcing stereotypes. See the discussion in my doctoral thesis about the use of written questions in s. 28 sex offence cases involving intimidated complainants at Chapter 4, pp 150-156.

Summary Consultation Q5

We provisionally propose that disclosure of personal records held by third parties should require judicial permission. Do you agree?

1. Disclosure of personal records by third parties to the police and prosecution

At this stage it may be too onerous to require judicial oversight over documents obtained by the police and the prosecution. Police and prosecutors would be better equipped to complete this stage if there was a bespoke regime for disclosure in sex offence cases, as proposed.

2. Disclosure of personal records by the CPS to the defence

This is more difficult. It is apparent from court observation in s. 28 cases that judges need better oversight over unused material disclosed to the defence, particularly when it forms the basis of cross-

examination questions to the complainant. Judges are not always aware of the extent of the unused materials. Though it would be helpful for third party materials that attract a reasonable expectation of privacy to be reviewed by a judge prior to disclosure, this may not be feasible in every case and cases may not always proceed to trial. However, judges should have sight of the full scope of unused material disclosed to the defence once the case is brought to court and judicial permission should be formally obtained before complainants are cross-examined on third party records or records are re-produced in the agreed facts. Rather than a brief or informal discussion with judges about the relevance of the material and topics proposed, the Commission may propose that a formal application, including proposed written questions, could be used for this purpose. See further my response to Q 44 in the Full Consultation.

We provisionally propose that the requirement for judicial permission should not be removed by the complainant's consent to access or to disclosure. Do you agree?

If the complainant is to be granted independent legal representation, the legal representative could always make representations to the judge on this issue on the complainant's behalf.

Summary Consultation Q19

Should practitioners have to be trained on myths and misconceptions before they can work on sexual offences cases?

Defence barristers need better training on the treatment and questioning of intimidated complainants in sex offence cases. Currently, there is disparity in the training and experience required to be a CPS RASSO prosecutor compared to a defence advocate in the same case. See further, my response to the Full Consultation Q 44.

Summary Consultation Q20

Do you agree that barristers should be allowed to ask questions which might relate to myths and misconceptions if they are relevant, rather than using a higher threshold as we propose for sexual behaviour evidence or compensation claims? How do you think the application of the relevance standard could be improved?

Myths about the nature of 'real rape' are damaging and self-perpetuating and should not be used by the prosecution or the defence to suggest *either* that the complainant is reliable or unworthy of belief. Facts which are behind or relate to myths could still be reported to jurors but need to be dealt with carefully. For example, the jury might be told that the complainant reported the offence immediately afterwards or two years after the incident, but the prosecution or defence should not be able, in the tone of their questioning or closing speeches, to suggest that they are more likely to be telling the truth or lying as a result. Where the complainant delays reporting, this might be explored in the ABE interview/examination in chief (as it sometimes is) so that the jury are aware of what prompted the complainant to go to the police. The defence could also cross-examine the complainant on what prompted her to make her delayed complaint, *if there was some actual evidential basis to suggest that there was an alternative reason other than the one given*, but not to imply that the delay, in and of itself, undermines her credibility.

Summary Consultation Q22

Should there be a presumption in favour of judges giving a judicial direction about myths, unless there is a good reason not to do so?

It is contradictory for the prosecution and defence to be able to use and refer to rape myths, while giving jurors judicial directions on the dangers of relying on them. If the use of myths is to continue, judges should give a general direction explaining myths at the outset of the trial, as well as identifying for the jury specific myths used by the defence or prosecution during the trial (who may not have realised the myth for themselves) and give a specific direction on the myth.

Summary Consultation Q24

What are your views on methods for educating jurors including the use of information notices, videos and online interactive tools. In particular, which methods are the most important, or is there a best combination of methods?

Ideally, it would be beneficial to identify jurors in sex offence trials in advance of trial, to ensure proper briefing and training. Presently, jurors are not informed about which type of case they will be involved in until they are brought into court at the opening of the trial, which is too late to provide training and resources. If there was a pool of jurors for sex offence trials, jurors could receive educational videos or online interactive tools as part of their jury service, possibly to be delivered by HMCTS within the court building shortly before listed trials took place (at the start of jury service). These materials could include expert testimony on the existence and range of rape myths etc. which might help jurors understand or augment judicial directions on rape myths delivered during the trial. This 'briefing period' could also allow court staff to identify jurors who might otherwise be unsuitable or find it traumatic to take part in a sex offence trial which could prevent future disruption or delay to the trial.

FULL CONSULTATION: CHAPTER 7: SPECIAL MEASURES

Consultation Question 40 – definition of special measures

We provisionally propose that in sexual offences prosecutions, the term "measures to assist with giving evidence" should be used instead of "special measures". Do consultees agree?

Neutral terminology to describe special measures may be helpful in normalising the use of different modes of testimony in sex offence cases. 'Special measures' implies that the use of these measures is extraordinary when most eligible witnesses make use of special measures in sex offence cases. (Indeed, even friends and family of eligible witnesses are now granted special measures at trial). Existing terminology may also have negative connotations for some witnesses who may associate using 'special measures' with an admission of weakness or vulnerability on their part, e.g., similar to having 'special needs'. Research suggests that some witnesses have declined special measures for fear that they would appear less competent or credible in front of the jury.[1] Therefore, the proposed terminology, "measures to assist with giving evidence", is more accurate as well as more neutral than "special measures". However, measures "*to assist"* with giving evidence may still be perceived as "an advantage given to complainants" (see 7.24 of the Consultation Paper).

The Law Commission notes that New Zealand refers to "alternative ways of giving evidence" and Victoria refers to "alterative arrangements for giving evidence". Although this phrasing is beneficial

[1] See Payne, S (2009) 'Rape: The Victim Experience Review', Home Office: London; Brown, H (2014) ' The Death of Mrs A: A Serious Case Review', Safeguarding Adults Board: Surrey County Council.

because it does not imply any assistance given to the complainant, "alternative" is used here to distinguish special measures from live, in-court testimony, which implies a residual bias towards traditional testimony. The increasing use of new technologies enabling participation across a variety of jurisdictions, courts, and witnesses challenges the assumption that live, in-court testimony from the witness box is the archetypal or optimum mode of testimony. For example, live link is also used outside of the special measures scheme to facilitate the attendance of absent witnesses rather than improving the quality of the evidence provided (see the Criminal Justice Act 2003, s. 51).

In short, the terminology used should not imply a particular advantage, weakness or bias for one mode of testimony over another, particularly if all forms of testimony are to be afforded equal weight. The jury may pick up on these subtleties, despite the directions issued by the judge. The Commission may prefer 'measures for giving evidence', for example.

Consultation Question 41 – defining complainants' eligibility for special measures

We provisionally propose that complainants in sexual offences prosecutions should not be included in the categories of "vulnerable" or "intimidated" witnesses under sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999. Instead they should be automatically entitled to measures to assist them giving evidence solely on the basis that they are complainants in sexual offence prosecutions. Do consultees agree?

My research suggests that the statutory scheme categorising adult complainants' access to special measures is not widely understood or referred to by practitioners in practice. Though the barristers I interviewed as part of my doctoral study specialised in sex offence cases, they did not recognise the term "intimidated complainant" under the YJCEA 1999, s. 17(4), or appreciate that adult complainants are a sub-group of intimidated witness. In contrast, the category "vulnerable witness" under s. 16 was widely acknowledged and referred to by practitioners, largely because of the focus on vulnerable witnesses and best practice on cross-examining vulnerable witnesses in case law, toolkits and Advocacy and the Vulnerable Training. Consequently, practitioners referred to intimidated complainants as "ordinary", "robust" or "non-vulnerable" when distinguishing between types of complainant in sex offence cases (see further Chapter 3 pp 94-102 of my doctoral thesis). How complainants are perceived is significant in this context because it underpins the rationale or basis for their eligibility. For example, some barristers suggested that intimidated complainants were less deserving of s. 28 and related measures than 'vulnerable' witnesses and did not understand why complainants in sex offence cases were granted access to s. 28 ahead of other intimidated witnesses under s. 17.

Under the existing system, complainants fall under either "vulnerable" or "intimidated" categories of eligibility, rather than a category of their own, which creates confusion and discrepancies between the treatment and questioning of complainants in practice. There appeared to be a two-tier system for the treatment and questioning of complainants in s. 28 cases observed according to whether complainants were deemed "intimidated' or 'vulnerable". For example, observation at a Pilot Crown Court during the s. 28 pilot for intimidated complainants revealed that GRHs were regarded as unnecessary in every s. 28 case involving an intimidated complainant, and that written questions were not required from defence counsel in advance of the s. 28 hearing. Some judges and barristers also declined to go down to the witness suite to meet intimidated complainants in person prior to the s. 28 hearing, though this was considered good practice in cases involving vulnerable witnesses. Barristers interviewed did not consider that principles of best practice on cross-examining 'vulnerable' witnesses applied to the

questioning of intimidated complainants. The disparity between the treatment and questioning of complainants was particularly acute in cases where the complainant was 18 years old (and therefore was no longer vulnerable due to age), or in cases involving both vulnerable and intimidated complainants. See further Chapter 4, pp 156-158 of my thesis.

The Commission suggests that "it is not necessary for… complainants… to be defined as either vulnerable or intimidated". This is true in respect of the automatic entitlement to the "standard measures" that the Commission proposes. However, how complainants are defined is complicated by the fact that a number of related measures have evolved specifically for "vulnerable witnesses" since the YJCEA 1999 was passed and now form part of the special measures scheme. These include GRHs; case management powers to require defence counsel to submit cross-examination questions in writing prior to GRHs for judicial scrutiny; and the development of best practice on cross-examining vulnerable witness, related training and toolkits. These related measures were originally developed for witnesses with specific cognitive or communication difficulties and to incorporate the role of the intermediary. However, commentators have observed how they may be used more widely, including to improve the experience of all complainants in sex offence cases, i.e., not just for those deemed 'vulnerable' complainants.[2] The extent to which GRHs, written questions on cross-examination, and best practice on cross-examining vulnerable witnesses apply in sex offence cases is presently unclear in law and guidance (see further Chapter 1, pp 19-28 and pp 37-49 of my thesis).

Creating a separate category of witness that is automatically entitled for special measures by virtue of the offence provides a clearer legal basis for eligibility and access to "standard measures" for adult complainants in sex offence cases. Like the Scottish model, it could also be extended to other categories of offence, including domestic violence. However, it does not deal with the application of the related measures discussed above, which originated in respect of 'vulnerable' witnesses. The creation of a third category of automatic entitlement for complainants in sex offence cases, in addition to vulnerable (s. 16) and intimidated witnesses (s. 17), may not resolve the confusion between different types of complainants in sex offence cases for the purpose of accessing the application of related measures discussed above. This is because some complainants in sex offence cases would still be classed as 'vulnerable' (i.e. if they qualified under s. 16), in addition to being automatically entitled to "standard measures" under the new category proposed. Therefore, the two-tier system which we have currently and the ensuing discrepancies in the treatment and questioning of complainants may remain unless the issue of how GRHs, written questions on cross-examination, and best practice on cross-examination applies to those currently labelled 'intimidated' complainants is resolved in sex offence cases. The Commission may also wish to consider whether GRHs, written questions, and best practice on cross-examination should be included within the purview of the statutory scheme as "standard measures" – see my response to Q62.

In summary, defining adult complainants as "intimidated" is unsatisfactory for three reasons. Firstly, it is misleading because, as the Commission observes and my research suggests, practitioners associate intimidation with witness interference, blackmail or pressure to dissuade witnesses from testifying, rather than complainants in sex offence cases. Secondly, labelling adult complainants as "intimidated witnesses" or witnesses who are "in distress" minimises the gravity and complexity of sex offence cases, including trauma associated with the initial assault and the process of testifying. Thirdly,

[2] See Henderson, E (2015) 'Bigger Fish to Fry: Should the Reform of Cross Examination Be Expanded Beyond Vulnerable Witnesses', *International Journal of Evidence and Proof*, 19(2): 83-99; MOJ (2014) 'Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence', MOJ: London.

complainants that are deemed "vulnerable", rather than "intimidated", have greater access to related measures specifically designed to improve the treatment, questioning and participation of witnesses.

As the Law Commission notes, Scotland has adopted an inclusive, non-hierarchical definition of vulnerability for determining access to special measures; all complainants in sex offence cases, as well as witnesses eligible on other grounds, are defined as "vulnerable" under the Criminal Procedure (Scotland) Act 1995. The Commission may wish to consider whether it is necessary to define all complainants in sex offence cases in England and Wales as "vulnerable" to provide greater parity between complainants in sex offence cases. The Commission may also consider that this project presents an opportunity to re-structure the current eligibility criteria for special measures and remove problems caused by having two categories of eligible witness.

Consultation Question 42, 45, 46, 47 – automatic entitlement to standard measures (screens, live link and pre-recorded evidence)

We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to standard measures to assist them giving evidence, with the ability to apply to the court for additional measures. Do consultees agree?

It is counterintuitive to provide complainants with information about the range of special measures available to them and encourage them to make informed choices about how they testify, if their preference is ultimately subject to the judicial discretion to grant special measures (see the Conclusion to Ch 3, pp 140-142 of my thesis). This is a prime example of where there is a "mismatch between complainants' expectations of treatment and the reality of treatment in the courts" (see Consultation Paper, 1.78). Automatic entitlement to "standard measures" would promote clarity, certainty and better opportunities for complainants to exercise voice and control. It would also create a more streamlined, efficient application process.

My doctoral research observing sex offence trials suggests that applications for live link and screens were often made orally and informally for intimidated complainants (i.e. without a written application or witness statement) and determined before the complainant gave evidence at trial. The decision about whether to grant *screens or live link* was often left until the last minute, to afford the complainant greater flexibility. As one trial judge commented in open court, "in reality, they may have whatever they want" (see Chapter 3, p 130 of my thesis). As the Commission observes, "automatic entitlement would therefore merely give effect to what is already happening in practice" (see Consultation Paper, 7.61).

However, in my experience, the approach to s. 28 was markedly different in s. 28 cases involving intimidated complainants. Observations during the first sixth months of the s. 28 pilot at a Pilot Crown Court suggests that applications for s. 28 at Pre-trial Preparation Hearings (PTPHs) were routinely adjourned because judges considered that applications were incomplete because witness statements from complainants did not sufficiently address the need for s. 28. This resulted in judges listing further mention hearings to hear revised s. 28 applications, once an additional statement had been obtained from the complainant. Unlike applications for screens or live link at trial, it seemed necessary for intimidated complainants to prove their fear and distress to the satisfaction of the court in some detail before applications for s. 28 were granted, which, as the Commission notes, is "intrusive" (at 7. 60). Interviews with barristers and discussions with police revealed that some applications for s. 28 in intimidated cases were rejected by judges on the basis that the witness statement was insufficient. For example, one barrister revealed the judge had denied the s. 28 application in their case, although

the application was adjourned for the intimidated complainant to provide a second witness statement. Nonetheless, the same complainant was granted access to screens at trial, which suggests that there is a higher evidential threshold required for s. 28 than other special measures, though the test for special measures is meant to be the same. The formality of the application process in s. 28 cases observed may result in restricted access to pre-recorded cross-examination in some cases. Complainants access to s. 28 should not depend on the quality of their statement. (See further Chapter 3, pp 129-137 of my thesis.)

There are understandable concerns among the judiciary and practitioners about how courts will accommodate increased demand for s. 28 among intimidated (as well as vulnerable) complainants, including that unfettered access to pre-recorded cross-examination for intimidated complainants would adversely impact other cases. There is a danger, therefore, that the application process for special measures may be used as a means of controlling access to s. 28 for intimidated complainants (see further the Conclusion to Chapter 3, pp 140-142 of my thesis). Consequently, although it may be more resource intensive, all complainants in sex offence cases should be granted automatic entitlement to s. 28. This is imperative, in addition to automatic entitlement to screens and live link, because s. 28 provides complainants with additional safeguards.

The 12th amendment to the Criminal Practice Directions 2015 now requires judges to "pay careful regard" to whether s. 28 will "materially advance" the date of cross-examination when determining s. 28 applications, which means that intimidated complainants may be denied s. 28 because of "a lack of resources", e.g., the "waiting list to use the recording equipment… the availability of the judge, the advocates… and a suitable courtroom" (18E.19-21). However, it is unfair that complainants' access to s. 28 should depend on listings or the timing of the s. 28 hearing in relation to trial because these issues are due to systemic problems in the court system and the prosecution of sexual offence cases (i.e., delays in charging decisions and the court backlog) and are beyond complainants' control. Though barristers interviewed equated the value of s. 28 merely with its potential to speed up the process of testifying in sex offence cases, this is a reductive view of s. 28 and its potential benefits. As I argue in my doctoral thesis, there may be multiple benefits to pre-recording cross-examination for complainants that are not readily apparent to practitioners at the time of the PTPH (when applications are currently made), including situations where trials are removed from the listings, postponed due to defendant ill-health, or in the event of one or more re-trials. (See further Chapter 3, pp 137-140 of my thesis).

Live-link, screens and pre-recorded cross-examination are each distinctive and important measures and automatic entitlement to a range of special measures is to be preferred to enable complainants to exercise informed choices about how, when and where they testify. However, given the above, it is perhaps most necessary to protect intimidated complainants' access to s. 28 because this measure is the most disruptive (from a listings perspective) and therefore is more likely to be withheld.

The Commission may also wish to consider the extent to which automatic entitlement to screens, live link and pre-recorded evidence would include automatic entitlement to a combination of these measures, namely screens and live link or screens and pre-recorded evidence. As the Commission has recognised, many complainants may be dissuaded from using live link or pre-recorded evidence because of the fear of being seen by the defendant and their supporters on court monitors. Therefore, automatic entitlement to these measures should include the combined use of screens during live link or pre-recorded cross-examination, where requested, to prevent the defendant/supporters/public from seeing the complainant give evidence. This would enable complainants to access the benefits of new technologies and maximise the use of special measures, although the way in which this is achieved

in practice needs to be carefully considered to ensure that the defendant can still participate. See further my response to Q 49.

I agree with the procedure proposed by the Commission at 7.75, which effectively informs the court of the 'standard measures' the complainant requires. The Commission proposes, at 7.66, retaining the court's general obligation, under s. 19(3) to consider whether any special measures direction "might inhibit… evidence being effectively tested", but this seems to be a relic of the previous discretionary application process. It also seems to contradict proposals to introduce automatic entitlement. Special measures have already been found to be ECHR compliant, therefore it is unclear what keeping this provision would serve.

The Commission correctly observes that complainants need accurate and detailed advice and information to assist them with special measures. This needs to happen early in the process, e.g., s. 28 currently requires complainants to make definitive decisions about how they will testify at the point of the police interview given that access to s. 28 is currently reliant on the complainant also pre-recording their police ABE video interview. The Commission refers to Witness Care Units (WCUs) having primary responsibility for conducting individualised assessments. WCUs currently tend to become involved with assisting complainants after a defendant has been charged, which can be more than a year after complainants' initial report/ABE interview because of delays in disclosure and charging decisions. Therefore, it may be necessary for WCUs to become involved at a much earlier stage as part of the individualised assessment and WCUs will need specialist training for this purpose. It is questionable whether there is a need to apply to the court for 'additional measures' at the PTPH if the individualised assessment recommends that these are necessary. A GRH may also be too late to identify or determine complainants' requirements in this regard.

The Commission also refers to the provision of independent legal advice on special measures. Ideally, this would be at the time of reporting and prior to the ABE interview. Independent legal advice provided by a lawyer at the point of reporting or ABE interview could help feed into the individualised assessment, since WCUs are primarily staffed by police rather than lawyers. Individualised assessments may also be informed by a complainant's ISVA, where applicable, particularly if there is an intention that the ISVA would attend court as the complainant's supporter. The Commission also refers to the consistent use of court familiarisation visits to see how measures work in practice. Ideally, this would be done as part of the individualised needs assessment. The Commission may also wish to consider the use of videos or virtual reality simulation for this purpose in addition to in-person court visits or where such visits are impractical.

However, general information about measures available in sex offence cases should also be made available to complainants prior to reporting, as complainants may use this information to inform their initial decision about whether to go to the police. I have been funded by the ESRC to create a video infographic and related leaflet to help complainants better understand the differences between s. 28 and other special measures. I am planning to do this in conjunction with front-line services, such as Sexual Assault Referral Centres, so that complainants can access information about support available at the police station and in court at the point at which they first seek help and advice. However, this is not a substitute for bespoke legal advice or the individualised assessment proposed. Complainants are likely to feel reassured knowing that an individualised assessment would follow once a report to the police had been made.

The Commission also proposes the consistent use of meetings between complainants and the CPS "to identify and discuss required measures" (at 7.70) but it may be better if one organisation were attributed with the statutory obligation to conduct an individualised needs assessment.

Consultation Question 44 – use of GRHs

We invite consultees' views on the role of Ground Rules Hearings in sexual offences prosecutions. In particular: (1) The benefits and costs of having Ground Rules Hearings in every sexual offences prosecution. (2) Whether they should be mandatory, or whether there should be a presumption that Ground Rules Hearings should be used in all sexual offences prosecutions where a complainant is required to give evidence. (3) Whether the role and purpose of Ground Rules Hearings should be made clearer in guidance, training or legislation. (4) Any other views on how courts and practitioners can be encouraged to utilise Ground Rules Hearings in all cases where they may be useful.

The Commission correctly identifies that GRHs are currently underused in sex offence cases, particularly those involving intimidated complainants under YJCEA 1999, s. 17(4), i.e., where the complainant is an adult and does not require an intermediary. My doctoral research suggests that in s. 28 cases, where there may be an expectation that a GRH would be held prior to the s. 28 hearing, GRHs were not held in every case involving an intimidated complainant. GRHs were exclusively associated with 'vulnerable' witnesses. There was no consensus about what GRHs were for or what they should deal with in s. 28 cases involving intimidated complainants - see Chapter 4, pp 145-149 of my thesis. At PTPHs observed, judges ordered counsel to indicate question topics on the GRH Form rather than setting out their written questions. Therefore, where GRHs were held in s. 28 cases involving intimidated complainants, they tended to be very brief and did not routinely deal with the treatment and questioning of complainants, question topics or issues of disclosure. This meant that matters were still outstanding in some cases observed by the time of the s. 28 hearing. Rather, GRHs in intimidated s. 28 cases seemed designed to establish how long the s. 28 hearing was likely to last for the purposes of listing. See Chapter 4 of my thesis on GRHs, pp 150-158.

I agree that the role and purpose of GRHs in sex offence cases should be made clearer in guidance, training and legislation. One way of making the remit of GRHs clearer in sex offence cases would be to require defence advocates to submit all their proposed questions in writing prior to the GRH, not only those pertaining to s. 41. This requirement would ideally apply in every case, not only s. 28 cases, to provide consistency. Data from observation and interviews suggests that the requirement to indicate question topics rather than write out proposed questions on the GRH Form did not provide sufficient detail about the nature or scope of questions at GRHs in intimidated s. 28 cases.

While it is more resource intensive, the benefits of making written questions and GRHs mandatory are multiple:

- It would ensure that proposed questions on the complainants' sexual history are properly set out in s. 41 applications, in accordance with procedural requirements of Part 36 of the Criminal Procedural Rules, rather than providing bullet points on proposed topic areas. See my discussion on compliance with Part 36 at pp 154-155 and p 159 of my thesis.
- It would also help judges enquire about the evidential basis for and the precise ambit of questioning which undermines complainants' character generally, to prevent speculative questioning. This could include screening questioning on ulterior motives for making allegations, including claims for compensation where there is no evidence to suggest a claim has been made.
- Where there is evidence that a complainant has withdrawn or retracted allegations previously, their reasons for doing so might be fully explored at the GRHs before it is determined whether the complaints were indeed false (and therefore that a s. 41 application is unnecessary).

Instructions from the complainant or representations from the independent legal representative (ILR) could be sought on this issue.

- Written questions could also reveal the precise ambit of questioning reliant on third party disclosure, including medical or therapy records, to help determine whether questioning of this nature was directly relevant and related to the offence charged (see my response to Summary Consultation Q3 about restrictions on the admission of counselling records which are unrelated to the offence charged). Where third-party records were determined to be directly relevant to the matters in issue and the offence/s charged by the judge at the GRH, written questions could nonetheless help ensure that any relevant questioning is focused and unlikely to reveal other personal information.
- Though the Commission has noted concerns about the efficacy of GRHs and whether ground rules are followed in practice, barristers interviewed as part of my doctoral study agreed that writing out questions tends to improve the quality and structure of cross-examination and avoids spontaneous questions that tend to reinforce stereotypes. See the discussion in my doctoral thesis about the use of written questions in s. 28 sex offence cases involving intimidated complainants at Chapter 4, pp 150-158 of my thesis. In contrast to GRHs observed in intimidated s. 28 cases, GRHs involving vulnerable complainants tended to be longer, more purposeful and effective because the defence are already obliged to write out their questions beforehand. Judges were able to use the list of proposed questions to clarify the issues in the case at the GRH, determine whether applications for s. 41 or bad character were necessary, and to help barristers improve the structure of their questions, condense questions or remove repetition.
- Observation and interviews suggest that the quality of advocacy varies "wildly" in sex offence cases (see Chapter 3, pp 105-107 of my thesis). One of the reasons for this is because defence advocates who exclusively take on defence work are not as trained or experienced as RASSO CPS Level 4 prosecutors. The requirement to have completed Advocacy and the Vulnerable training does not appear to explicitly apply to those instructed to cross-examine intimidated complainants. Relatedly, barristers interviewed did not consider that best practice on cross-examining 'vulnerable' witnesses currently applies to intimidated complainants. Although better training is required for *all* defence advocates before they are permitted to cross-examine complainants in sex offence cases, a mandatory requirement to submit written questions for review at a GRH could contribute to improvements in the quality of cross-examination for all complainants. It would also provide advance judicial oversight, minimising disruption or interruption during cross-examination at trial.
- GRHs and written questions could provide complainants with more certainty and advance indication of controversial matters they are likely to be asked about during cross-examination. CPS Guidance *Speaking to Witnesses at Court* provides that complainants should be informed if they are likely to be cross-examined on their sexual history, bad character or third-party records. However, interviews suggest that barristers are reluctant to do so for fear of witness coaching, and case observation reveals that complainants are surprised or shocked when these type of questions are put to them (see Chapter 4, pp 163-165 of my thesis). An ILR may be ideally placed to inform complainants where the judge has reviewed and agreed questioning permitted on these issues.
- GRHs provide an opportunity to incorporate the role of an ILR, similar to the way GRHs originally evolved to incorporate the role of intermediary. Involvement of the ILR would also give GRHs a clearer purpose in sex offence cases. The ILR may assist the court by making representations on all of the matters outlined above.

Consultation Question 48 – access to s. 28 dependent on s. 27 YJCEA 1999

We provisionally propose that, for complainants in sexual offences prosecutions, evidence in chief, cross-examination and re-examination should all be able to be pre-recorded before trial and should not depend on there being an admissible Achieving Best Evidence (known as "ABE") interview. Do consultees agree?

Access to s. 28 (pre-recorded cross-examination) is currently dependent on the complainant having pre-recorded their ABE interview under s. 27 of the YJCEA 1999. Given that pre-recorded cross-examination takes place before trial, this requirement preserves the order in which the complainant gives their evidence, ensuring that examination in chief takes place first. The requirement under s. 28(1) also provides certainty for the defence that the complainant's ABE interview is the final account that will be provided to the jury prior to conducting pre-recorded cross-examination. However, it is also possible, as the Commission proposes, for the complainant's examination in chief to be also pre-recorded immediately prior to pre-recorded cross-examination at the s. 28 hearing. The Commission has already noted some of the pros and cons of doing so. To these I add the following. Presently, s. 28 hearings tend to take place two or three months before trial, which can be a year or years after the initial complaint (see Chapter 5 pp 179-181 of my thesis). Therefore it might not be achieving best evidence to delay pre-recording the complainant's evidence in chief until then. Pre-recording the police ABE interview, as well as examination in chief at a later s. 28 hearing, puts complainants back into the position they were in before pre-recorded evidence was introduced. Multiple versions of the complainants' account inevitably provides opportunities for the defence to highlight and exploit inconsistencies in their evidence. For example, where pre-recorded evidence in chief takes place immediately prior to pre-recorded cross-examination, defence counsel is likely to question the complainant about what the complainant initially said in their police interview as well as their most recent examination in chief and possibly why their later account differed. Observation at s. 28 hearings suggests that prosecutors rarely ask additional questions in chief or in re-examination at s. 28 hearings and that they may not be as well prepared or as knowledgeable about the case at the time of the s. 28 hearing compared to trial (see Chapter 5 pp 190-193 of my thesis). Lastly, the Commission is aware of problems with accommodating the increased demand for s. 28 hearings involving intimidated complainants in the listings, e.g., s. 28 hearings for intimidated complainants tend to be longer and are listed during the court day rather than before court (see Chapter 3, pp 111-114 of my thesis). Pre-recording examination in chief as well as the cross-examination at the same pre-trial hearing is likely to take twice as long.

Consultation Questions 49 – complainants' fear of being seen by defendants

When a direction is made for the use of a measure to assist the complainant in a sexual offences prosecution to give evidence, should the defendant be able to see the complainant when: (1) the complainant gives evidence behind a screen; (2) the complainant gives evidence using a live link; (3) the complainant is pre-recording their evidence; (4) the complainant's pre-recorded evidence is disclosed to the defence; and (5) the complainant's pre-recorded evidence is played in court.

1. Screens

The defendant should not be able to see the complainant give evidence behind the screen. Note that there is no requirement under s. 23(2) for the defendant to be able to see the complainant, though that sub-section stipulates precisely those who must be able to see the complainant (see also s. 24(8) where the same is mirrored in respect of live link). There is a real fear of being seen by the defendant

among complainants, hence why so many opt for screens rather than live link. There is no provision allowing the use of a camera inside the witness box to film the complainant while they give evidence from behind a screen (see Hoyano, 2018 – see 7.147 of the Consultation Paper) and it would defeat the object of the measure if there were. There needs to be greater clarity on this issue in legislation, though I disagree with the view that screens are simply designed to prevent the prevent the complainant from seeing the defendant. The very nature of having a 'screen', e.g., an opaque curtain, prevents the defendant from seeing the complainant as much as it prevents the complainant from seeing the defendant. Case law relied upon by Hoyano may be outdated, given the proliferation of the use of screens in criminal courtrooms since it was decided in 1995.

2. and 3. Giving evidence via live-link at trial or when pre-recording cross-examination at s. 28 hearings

The defendant should not be able to see the complainant while giving evidence via live link or pre-recorded cross-examination. The fear of being seen by defendants on court monitors is a real issue affecting the demand for and the effectiveness of both live link and pre-recorded evidence, since both measures make use of the same technology to transmit images and audio from the witness suite to the courtroom. I discuss this issue in Chapter 3, pp 124-126 of my thesis but I will provide a flavour of my findings and analysis here. For example, in one case observed, the complainant rejected the use of the pre-recorded ABE interview and live link, preferring to give her evidence in chief and be cross-examined live at trial from behind a screen, because this was the only way to ensure the defendant could not see her give evidence/describing the events, either pre-trial (when disclosed to the defence) or at trial. Unfortunately, the jury could not reach a verdict in this case which meant that the complainant was obliged to give all of her evidence again, at a re-trial. This is just one scenario where the fear of being seen compelled the complainant to resort to screens. Though some complainants may well prefer screens to other technologies, for a number of reasons, complainants should not have to resort to screens for fear of being recognised or broadcast on wide-screen court monitors, particularly where they might otherwise have benefitted from live link or pre-recorded cross-examination.

As the Commission observes, combining special measures, i.e., using screens in conjunction with live link and pre-recorded cross-examination, may resolve this issue. I suggest that doing so maximises their usage and takes full advantages of their benefits. There may, however, be logistical challenges in doing so because courtroom facilities and arrangements differ, as does the orientation and accessibility of court monitors. For example, the practice of screening the dock (as referred to in CPS Guidance – see 7.146 of the Consultation paper), as a means to prevent the defendant from seeing the complainant on court monitors, should not be permitted because it obstructs the defendant from seeing and hearing their legal representatives and the judge, and observing the cross-examination. Observation conducted during the s. 28 pilot for intimidated complainants indicates that combined special measures were rarely used in practice because some judges were concerned that the provisions of s. 28(2)(b) prohibited the use of screens and pre-recorded cross-examination, despite provision within Criminal Practice Directions that these measures may be combined (see the Consultation Paper at 7.145). (Section 28(2)(b) of the YJCEA 1999 provides that any s. 28 recording "must be made in circumstances in which—… (b)the accused is able to see and hear any such examination and to communicate with any legal representative acting for him".)

However, my research suggests that it is possible to combine screens with live link and pre-recorded cross-examination in a way that is compliant with the provisions of s. 28(2)(b) and the defendant's right to participate in the proceedings (see Chapter 5, pp 167-168 of my thesis including footnotes). I have drafted a paper on the legality and practicality of combining special measures which the Commission may wish to consult but, essentially, I suggest that where at least one courtroom monitor

is situated inside or above the witness box, the curtain can be drawn around the monitor as though the complainant were giving evidence from the witness box, replicating the situation where complainants give evidence behind a screen. The other courtroom monitors may be switched off (which prevents the defendant as well as the public from seeing the complainant). This arrangement was tested in a s. 28 case observed during my doctoral research. It would not be resource intensive to relocate monitors within the courtroom in this way (not all courtrooms have a monitor above the witness box) and it would only need to be done in courtrooms equipped to record s. 28 hearings. Note that although all courtrooms can link to the witness suite for the purpose of live link not all courtrooms have the technology to video s. 28 hearings, though it may increase capacity for s. 28 hearings and alleviate court listings if they did.

4. The complainant's pre-recorded evidence is disclosed to the defence or when pre-recorded evidence (both ABE interview at s. 28 video) is played in court.

It could be argued that there are stronger grounds for preventing the defendant from seeing the defendant during the live link and the s. 28 hearing because this is when the complainant is giving live evidence and may become distracted at the prospect that the defendant is watching them in the witness suite. It might therefore be argued that there is less reason to prevent the defendant from seeing the recording of the ABE interview. For similar reasons it may also be argued that there is no imperative to prevent the defendant from seeing the ABE interview video or the s. 28 video at trial, because the complainant's evidence has already been captured by this point and the complainant does not usually attend trial (sometimes they are discouraged from doing so - see my response to Q 61).

However, the defendant should not be able to see the complainant's pre-recorded evidence at any point in the process otherwise it may still prevent the complainant from utilising ss. 27-28, as the example I gave above shows. It is also contradictory to prevent the defendant from seeing the complainant's pre-recorded interview at one point in the proceedings, only to allow them to watch it at trial. Combined special measures may also be used to prevent the defendant from viewing pre-recorded evidence shown to the jury at trial.

I disagree that preventing the defendant from seeing the ABE interview will prevent legal representatives from obtaining full instructions and making meaningful submissions or edits. My research suggests that advocates do not tend to watch the video, beyond checking the quality of the recording to see if transcripts are necessary for the jury, and that audio on ABE interviews is actually very difficult to hear and follow on recordings in parts without the transcript (see further Chapter 6 of my thesis, pp 247-256). Therefore, interview transcripts are heavily relied upon as the authoritative version of the complainants account for editing purposes.

Consultation Question 50

We provisionally propose that, where a defendant has a vulnerability or impairment that requires them to watch someone speaking in order to understand what they are saying, provision should be made to allow them to see the complainant while they give evidence. This should be allowed even if the complainant has chosen to use a measure to assist them give evidence that would otherwise prevent the defendant from seeing them. Do consultees agree?

No. There are other ways of ensuring that the defendant understands the complainant's evidence in this scenario. For example, in respect of the ABE interview there will be a transcript which can be discussed between the legal representative and the defendant. Transcripts could also be created of

the s. 28 video after the s. 28 hearing and prior to trial. In cases involving screens or live link, i.e. where there is no transcript, defendants may be provided with a British Sign Language or other interpreter or intermediary.

Consultation Question 51 – complainants' fear of being seen by the public

We provisionally propose that where a screen, live link, or pre-recorded evidence is used for a complainant in a sexual offences prosecution to give evidence, it should include measures to prevent the complainant from being seen by the public observing the trial. Do consultees agree?

Complainants fear of being seen by the defendant extends to defendants' supporters in the public gallery. Screens also usually prevent the public from seeing the complainant by virtue of the configuration of the court (public galleries tend to be at the back of the courtroom). In respect of live link and pre-recorded evidence, the method of combining screens with live link and pre-recorded cross-examination discussed at above (Response to Q 49) may also prevent the public as well as the defendant from seeing the complainant (because it replicates the situation where the complainant gives evidence behind a screen from the witness box, and the monitor above the witness box is screened rather than the dock).

Consultation Question 52

If measures prevent the complainant in a sexual offences prosecution from being seen by the public in the court when they use a screen or live link to give evidence or when their pre-recorded evidence is played, but the public are still able to hear the evidence, should there be an exemption to allow: (1) a member of the press; or (2) any other individual or group to see the complainant?

No. It is unnecessary for anyone else to see the complainant other than the judge, court staff, the complainant's supporter, barristers and the jury.

Consultation Questions 53 – exclusion of the public at trial

We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the exclusion of the public from observing the trial while they are giving evidence, whether in court or by live link, or while their pre-recorded evidence is played. As is currently the case under section 25 of the Youth Justice and Criminal Evidence Act 1999, exclusion of the public would not apply to: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, all of whom would still be permitted to attend. Do consultees agree?

Other. Although the public may be prevented from seeing the complainant, they may still make remarks and distract the complainant while the complainant gives their evidence. The complainant may feel more confident knowing exactly who is present and permitted in the courtroom and that the defendant's supporters and other members of the public are excluded while they give evidence or their evidence is played (even if they cannot see them in court due to screens or because they are not in court when their evidence is played). However, what concerns me about this provision is that it affects the principle of open justice. In particular, that this automatic entitlement would prevent academics or other researchers from conducting research on sex offence trials. For example, my PhD

and response to this Consultation relies on data obtained via court observation. Attendance at court while complainants gave evidence was vital to observing the treatment and questioning of complainants in sex offence cases and the efficacy of a range of special measures in operation, including the impact of pre-recorded evidence at trial. A number of studies involving court ethnography or observation have led to significant improvements and reforms in sex offence cases, including the YJCEA 1999.

Consultation Question 54 – exemption for academic researchers

If the public are excluded from observing the trial while a complainant in a sexual offences prosecution is giving evidence, whether in court or by live link, or while their pre-recorded evidence is played, should there be an exemption to allow the attendance of any other individual or group, in addition to those listed in the Consultation Question above?

Yes. Those who are conducting academic research involving court observation.

Consultation Question 55

We provisionally propose that the current powers to direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant should continue. Do consultees agree?

As above Q 53. Academic researchers conducting research involving court observation should be permitted to attend pre-trial hearings. For the purpose of my doctoral research, it was essential to observe PTPHs, GRHs and s. 28 hearings to investigate the extension of the s. 28 pilot, the application of s. 28 and related measures in sex offence cases, the impacts of the s. 28 process on the treatment and questioning of complainants. It may also be important for academic researchers to attend the whole trial, the verdict and sentencing hearing, and to observe the VPS being read, depending on the aims and objectives of the research.

Consultation Question 56

We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to have wigs and gowns removed while they are giving evidence. Do consultees agree?

Yes.

Consultation Questions 57-58

We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of a supporter when they are giving or recording their evidence at court or remotely. We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the presence of an Independent Sexual Violence Adviser as a supporter when they are giving or recording their evidence at court or remotely. Do consultees agree?

Yes.

Consultation Question 59

We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to use an accessible entrance and waiting room that is separate from members of the public and the defendant. Do consultees agree?

Yes. Complainants may already use judges' entrance and exit accessed via the secure area of the building where purpose made entrances and exits are unavailable.

Consultation Question 61

We provisionally propose that complainants in sexual offences prosecutions should be automatically entitled to the use of live link or screens to facilitate their attendance at the verdict and sentencing hearing. Do consultees agree?

Yes. However, the Law Commission should also consider provision to enable complainants to follow the trial remotely if they wish to do so. Court observation and interview suggests that some complainants are told by police officers, barristers or court staff that they should not be present at trial if they have had the benefit of special measures. See further Ch 6, pp 259-262 of my doctoral thesis.

Consultation Question 62

Are there any other measures that should be made available to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence? If yes, should they be available: (1) as a "standard measure" to which the complainant is automatically entitled; or (2) as a measure for which, as is currently the case, the complainant is automatically eligible to apply on the grounds that it would improve the quality of their evidence?

Please see my response to Q 41. In that response I noted that the Commission may wish to consider whether GRHs, written questions, and best practice on cross-examination should be included within the purview of the statutory scheme as "standard measures".

See also my response to Q44. In that response I explained why GRHs should be mandatory in sex offence cases and why defence advocates should submit all of their proposed questions for review prior to the GRH, not only those pertaining to s. 41.

See also my response to Q 49. The Commission may also wish to consider whether access to combined special measures, namely screens with live link or screens with pre-recorded evidence, should also be part of proposals to create an automatic entitlement to screens, live link and pre-recorded evidence.

Consultation Question 64

We provisionally propose that the Judicial College consider providing training to the judiciary on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court. Do consultees agree? We provisionally propose that legal

professionals receive training on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court. Do consultees agree?

Other. The impact of pre-recorded evidence on jurors' engagement and decision making is still in its infancy. More research is needed before training can be given to jurors and legal professions. In my doctoral thesis, I raise concerns about the quality of recording and the system for playback of pre-recorded evidence – see the Chapter 6, pp 247-263 and the Conclusion to Chapter 6 of my thesis, pp 273-275.