Claire Waxman OBE
Independent Victims' Commissioner for London

Evidence in Sexual Offences Team
Law Commission
1st Floor
52 Queen Anne's Gate
London
SW1H 9AG

evidence.rasso@lawcommission.gov.uk

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Dear Evidence in Sexual Offences Team,

Thank you for the opportunity to take part in this consultation on Evidence in Sexual Offences Proceedings. This is a critical piece of work that touches on many of the findings and recommendations from the London Rape Review reports, which I called for in 2019 and 2022. Below I provide answers to the questions in your full consultation where I believe I have the experience and knowledge to contribute.

1. Personal Records Held by Third Parties (Q2, Q5, Q6, Q8, Q9, Q12, Q13, Q14)

In 2018 I called for the Information Commissioner's Office to investigate the way in which criminal justice agencies were using third party material and obtaining consent. This led to the publication of an ICO report in 2022 where the Information Commissioner called on the criminal justice sector to immediately stop collecting excessive amounts of personal information from victims of sexual offences.

The issue of personal records in sexual offences cases was also highlighted as an area of concern during my 2019 London Rape Review. Following its publication, I highlighted the need to urgently agree a position on the appropriate and reasonable use of victims' data in rape cases as this was undermining victims' confidence, causing them to withdraw and, violating their article 8 rights on protecting their privacy and family life.

With this history in mind, I am grateful to the Law Commission for undertaking thorough research on the issue and for your proposals of a bespoke, unified regime governing police and prosecution access to records alongside the disclosure and admissibility of records at trial.

My main responses to your consultation questions are as follows:

a) I agree that a bespoke, unified regime governing access, disclosure and admissibility at trial is needed where the complainant has a 'reasonable expectation of privacy' however it is important that the types of records that this description refers to are specified to prevent confusion or inconsistencies. (Q2, Q3)

b) Any new proposals must be considered alongside the Government's amendment to the Victim's and Prisoners Bill on third party material and any subsequent Code of Practice produced by the Secretary of State about victim information requests. This is because most concerns from victims regarding third party material emerge at the pre-charge stage.

c) I agree that judicial oversight is required. However, it is crucial that the Law Commission proposals address the obtaining of third-party material at a pre-charge stage because this is when the majority of privacy rights are violated for sexual offence victim-survivors. The 2021 London Rape Review found victim withdrawal was the outcome in 65% of cases. Some of the reasons for this withdrawal will be the invasive data requests which happen at an early stage in the process, as illustrated by this survivor who we spoke to as part of the London Rape Review 2019[1]:

The extent to which I was expected to give my life over for inspection and judgement eventually led me to decide that were the case to go to trial I would withdraw from the process as I was terrified of being subjected to further scrutiny and my life experiences and private therapy notes being used to discredit me." – Danielle, victim/survivor* (Q8)

d) If it is not possible to create judicial oversight of all third-party material pre-charge, then at a minimum there should be a bespoke regime for counselling records. Whilst I appreciate there cannot be a complete prohibition on counselling records there should be the highest possible oversight because the current use of counselling records in sexual offence cases:

- creates a deterrent to survivors in accessing a service critical for their recovery;
- deters service providers from offering the required treatment to victim-survivors who are in the criminal justice system, for fear they could undermine their criminal justice outcomes;
- requires therapeutic organisations to adapt their usual note taking practices, undermining the quality of record keeping for fear of undermining a victim-survivor's access to justice, which may ultimately lower the standard of treatment;
- confidentiality between a therapist and victim-survivor is fundamental and so the possibility of access by the defence (even if unlikely) undermines the effectiveness of treatment;
- even though feelings of shame and self-blame are standard responses for victims and survivors and addressing these is critical for recovery, exploring these feelings in counselling could be detrimental to justice outcomes if disclosed in criminal proceedings (Q5).

For the reasons above I do believe a bespoke regime for counselling records is required.

e) There should also be a rebuttable presumption for notes requested from all support services that have been accessed because of the assault, including ISVA records. (Q6)

f) Measures must be put in place to better protect complainants where third-party material is requested pre and post charge. This could include enhanced procedures in legislation or guidance and should be accompanied with practical guidance and documentation for both police and prosecutors to support implementation. I understand that the Code of Practice outlined in the Victims and Prisoners Bill will support this (Q8).

g) I recommend considering the Police, Crime, Sentencing and Courts Act 2022 and the accompanying Extraction of Information from Electronic Devices Code of Practice. The guidance on providing written notice for extraction of data from a mobile phone, emphasises that an investigation cannot cease simply because consent has been refused. We believe this should also apply for third party material requests.

[1] https://www.london.gov.uk/sites/default/files/vcl_rape_review_-_final_-_31st_july_2019.pdf

h) If a consent model is to be used as part of your proposals, even if a complainant does not consent to notes being accessed or produced, police and prosecutors should be permitted to apply to the court for an order (both pre and post charge) at which point there could be judicial oversight. Without this option, police and prosecutors may simply discontinue the case (Q9).

i) I agree that judicial oversight of disclosure and admissibility is required, and that judicial permission should not be removed by the complainant's consent (Q12).

j) I agree that there should be enhanced relevance tests for access, production, disclosure and admissibility of personal records. I support the 'insufficient' grounds' listed in 3.231 of the consultation taken from section 278.3(4) from the Canadian model. However, a preliminary filter may be required for prosecutors at a pre-charge stage because the speculative requests come from police and prosecutors, not only from defence as in other comparable jurisdictions (Q14). Alternatively, disclosure obligations could be amended so that it is only once the defence statement has been made that personal records can be requested and only in direct response to this statement.

k) I believe that the Data Protection Act should be considered alongside the question of relevance tests as the data held in these records would almost always be considered 'sensitive personal data' under the DPA.

l) I would like to see a factor added to the proposed list of factors for judges when considering the admissibility of counselling records which speak to the inconsistencies that emerge because of trauma. (Q13).

m) I strongly support the use of independent legal representation for these issues given the complexity. This should be offered prior to victim-survivors making a decision about consenting to these requests and continue regardless of their decisions. This is to ensure victim-survivors have a complete understanding of what requests entail and the consequences of requesting or refusing access.

2. Sexual Behaviour Evidence (Q18, Q19, Q20, Q21, Q23, Q25, Q27, Q28)

a) I agree that there should not be a complete ban on the admission of SBE and third-party SBE in the interests of fair trial rights (Q18).

b) I support the proposed structured discretion model which should simplify the process whilst hopefully keeping sexual behaviour evidence to a minimum. Any change must be accompanied by robust training for judges so that a simplified model does not increase the number of applications that are accepted (Q19 and Q20).

c) I support the proposal that decisions made by a judge on sexual behaviour evidence should be accompanied by a list of factors for them to consider and that judicial directions should also be used. (Q20).

d) I strongly support a judge providing written reasons for their decision on applications to admit SBE and this should address all the factors a judge is asked to consider. This will support consistency and good decision making. It will also provide transparency for the victim-survivor and reassurance that their interests have been considered. Currently it can be confusing for victim-survivors when SBE is used as they may be uninformed of the application or what material is to be disclosed so this process will support victim-survivors understanding and potentially their recovery (Q21).

e) I support the restrictions applying to evidence such as clothing worn by a complainant or behaviour such as dancing because if SBE is effectively limited I am concerned other myths and stereotypes may be relied upon. I have recently been told of a case where a victim-survivor was made to wear the dress she wore on the night of the assault as part of proceedings, clearly to discredit her before the jury. Without incorporating this type of evidence within restrictions, it may be utilised more regularly by the defence (Q23).

f) I support the proposal that this framework should apply whenever sexual behaviour evidence is sought to be admitted and not limited to a particular class of offences. This is especially important in domestic abuse and murder charges where a so called ‘rough sex’ defence is employed. I also agree that this should apply to evidence admitted on behalf of both the defendant and prosecution (Q25 and Q27).

g) I support victim survivors being informed of an application at the time it is made and of being informed in a timely manner of the outcome of the application. This will improve victims’ understanding and pro-active engagement within proceedings. Victims and survivors of sexual offences regularly complain of being re-traumatised by the criminal justice process because of being treated as a ‘bystander’. Better information prevents re-traumatisation and can improve a victim’s capacity to give their best evidence (Q28)

h) I strongly support the proposal that victim-survivors should have legal representation in relation to sexual behaviour evidence applications and be represented at any hearings.

3. <u>Bad Character Evidence (Q30, Q32, Q36, Q37)</u>

a) I know from victim-survivors that bad character evidence is not well utilised in rape and sexual offences trials, including from previous incidents against the victim-survivor or against other victim-survivors. This is concerning in the context of sexual-domestic abuse as there may be separate investigations into different offences meaning rape allegations are not considered in the context of violent or controlling and coercive behaviour. Without this context, it is difficult for a jury to understand how a victim may have had their freedom or capacity to consent curtailed.

b) I would support legislative reform that clarifies the issue with domestic abuse offending – either convictions or otherwise.

c) I would support the introduction of additional guidance for police and prosecutors on the use of bad character evidence, especially in cases of domestic abuse and controlling and coercive relationships (Q30).

d) I support the suggestion made by the Centre for Women’s Justice that when the defendant’s good character is directed, if the victim-survivor is also of good character, this should be noted at this point. This would introduce parity but avoid confusing the jury which I am concerned could result from the Law Commission’s current proposal (Q32).

e) Good character evidence could also be introduced to correct a false impression given by the defendant and to mitigate against attacks on credibility.

f) It is unclear whether the proposals in Q36 relate to proven false allegations or to previous reports where there was no successful charge, and this fact is being used to infer that the victim-survivor has made a false allegation when this has not been the case. Regardless, there should be the highest possible threshold for introducing past allegations. This is critical because it is not uncommon that victim-survivors are revictimized, especially survivors of child sexual abuse. 23% of survivors who experienced sexual assault by rape

or penetration as a child became victims of the same offence as an adult (ONS, 2016[2]). This compares to the 3% of adults who did not report sexual assault by rape or penetration as a child but who became victims of the offence as an adult. (Q36)

g) If evidence of past allegations is presented but these have not been proven to be false allegations, a jury direction should be made to alert the jury to the fact that it is not unusual for victim-survivors to be revictimized and an allegation that has not resulted in a conviction does not equate to a false allegation (Q37).

4. **Criminal Injuries Compensation (Q38, Q39)**

a) I agree with the proposals to limit the introduction of evidence of criminal injuries compensation applications. Currently the mere mention of this fact – or even that a victim-survivor is *aware* of their right to apply for compensation - can be enough to create doubt for the jury (Q38).

b) I would recommend that a specific factor be incorporated for the judge to consider which reminds them that a mere application to CICA is insufficient grounds for the introduction of this fact (Q38).

c) When this evidence is admitted, we would recommend judicial directions are made on a victim-survivor's right to be informed about compensation as per the Victim's Code of Practice, the average compensation award made and the two-year time limit (Q39).

5. Special Measures Q42, Q44, Q45-48, Q53, Q55, Q61, Q64

a) Although supportive of these proposals, I do have concerns that offering automatic rights to special measures only for RASSO victims may create challenges for other vulnerable victims and confusion with statutory partners and support agencies who may then tell other complainants that they do not have rights to special measures. We know that victims of modern slavery, controlling and coercive behaviour, stalking, domestic abuse and other offences, may also have been sexually assaulted as part of a course of conduct but may not have disclosed or received a charge on the sexual offences.

b) I support a statutory obligation for enquiries to be made about complainants' requirements, however this is already stipulated in the Victims Code of Practice and the new amendment to the Victims Code of Practice for the CPS to hold a mandatory meeting with victim-survivors of sexual offences prior to trial.

c) I have long called for the mandatory use of Ground Rules Hearings in sexual offences trials and would welcome this becoming mandatory in sexual offences cases, particularly considering the other proposals in this consultation. I understand the listing pressures on Crown Court, however, this should not be a reason to undermine the administration of justice and, as this consultation has highlighted, victims of sexual offences are often let down in the criminal justice process, not by design, but by implementation. This was a recommendation in the 2019 'Prosecuting Sexual Offences' report by JUSTICE (Q42 and Q44).

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[2] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/abuseduringchildhood/findingsfromtheyearendingmarch2016crimesurveyforenglandandwales

d) I also support consistent use of court witness familiarisation visits and meetings with the CPS (Q42).

e) I would not support Police Witness Care Units having primary responsibility for assessing complainants needs and facilitating assistance measures because Witness Care Officers do not have good understanding of the range of special measures available nor how to work with vulnerable victims. It is also likely that the victim will have an ISVA or SOIT but the responsibility should lie solely with the CPS to ensure victim receive the right information on special measures however an ISVA or SOIT can be present in this meeting for continuity and support. These meetings are supposed to take place already but rarely do. (Q42).

f) I support the automatic entitlement to all the special measures listed (screens, live link, pre-recorded evidence, removal of wigs and gowns, presence of a supporter/ISVA, separate entrance and waiting room etc). Survivors also wish to have the capacity to be screened whilst giving evidence via live link or pre-recorded cross examination so that the perpetrator cannot see their appearance. Survivors must also still have the choice to use no special measures (Q45-48).

g) We consulted with survivors as part of our preparation for this response and they were clear that the automatic entitlement to exclude the public whilst giving their evidence would greatly improve their capacity to give their best evidence. They are also clear however that they support members of the press being present and do not want to curtail the principle of open justice. One survivor told us:

   "*There was a local reporter present for my abusers rape trial. I feel strongly that it was the only good thing that came out of the trial. In his article he quoted some of the comments that the character witnesses had made (and the defendant) which I wouldn't have been aware of as I wasn't in court after cross examination and have not paid to have the transcripts, I am so grateful he was there.*" (Q53 and Q55).

   However, we recognise that the presence of the press may also create more distress for some the victim-survivors and so in these circumstances perhaps the press could be invited to attend via a live link but not be physically present in court.

h) Victim-survivors have also told me that they would like to have the option for the public to be excluded whilst video evidence of them being assaulted is being presented. Here is another quote from the survivor in a case (R v Greliak[3]):

   "During my trial, even though I chose not to use the screen, I was quite upset that the public was able to see the 8 minute video of me being sexually assaulted. I felt very exposed and felt that it was completely unnecessary, given they have no part in the trial. I would have felt much more comfortable if the judge had asked the public to leave when those sensitive videos were shown."

i) I strongly urge for reform so that victim-survivors in sexual offences prosecutions are automatically entitled to use live link or screens to facilitate attendance at the verdict and sentencing hearing. This is important as we know victim-survivors are often dissuaded from attending the remainder of a trial or sentencing due to the perception that they may look 'vindictive' to the jury, particularly if they have used special measures. It can also be difficult for victim-survivors to obtain transcripts of proceedings which are prohibitively expensive. It may be worthwhile considering a judicial direction on this point, so the jury is clear that the judge supports a victim-survivor attending the remainder of the trial. This

[3] Quote and case name presented with consent of the survivor.

also needs to be clarified in the Victims Code of Practice as it already mentions their right to read out their Victim Personal Statement in court (Q61)

j) I support the proposal on training for legal professionals on the impact on juries of special measures to mitigate unevidenced advice being given to victim-survivors that sways their choice of special measures or impacts on their decisions about how they engage with the remainder of proceedings. This should include training so that prosecutors are not dissuading victim-survivors from attending the remainder of proceedings or sentencing. (Q64)

6. Independent Legal Advice (Q66, Q69,Q70, Q71, Q72, Q74)

a) I agree that victim-survivors should have access to independent legal advice, assistance and representation in respect of applications for personal records and sexual behaviour evidence. This was a key recommendation in my London Rape Review. However the remit should be wider as victim/survivors may also require advice and representation, including by not limited to:

- The Victims Right to Review process (Police and CPS)
- Complaints to CPS and Police
- Failure to consider bad character evidence
- Being refused an intermediary
- Crimes committed abroad (Q66)

I am aware that Rape Crisis services in London have already been utilising legal advice and representation and the above areas regularly emerge as a need. (Q66)

b) I agree that victim-survivors should be represented at court for applications for third party material and applications for sexual behaviour evidence. We also believe that ideally they should be represented during cross-examination to ensure the correct procedures are followed. (Q71)

c) I agree it is critical that legal representatives can access the documents necessary to provide advice, assistance and representation and engage directly with police, prosecutors and defence when required. (Q69 and 70)

d) I agree that independent legal representation for complainants in sexual offences cases should only be provided by qualified legal professionals. (Q72)

e) If special measures become an automatic right, then I do not see that it will be necessary to have independent legal advice regarding this and the options can be presented effectively by other professionals with sufficient training. (Q74)

7. Limitations on the conduct of sexual offences trials (Q75 and Q79)

a) I support the mandatory training of judges on myths and stereotypes which already happens through the existing sexual offences training course. I would also support the Judicial College providing guidance to judges on how best to respond to generalisations which rely on myths or misconceptions raised in counsels' speeches.

However, I understand that the number of days for this course was reduced temporarily from three days to two but has never returned to original length. We strongly support

restoring this training back to three days after our conversations with judiciary who believe it too short. This was a recommendation in the 2019 'Prosecuting Sexual Offences' report by JUSTICE. Government should ensure there is funding available for this, not least because there are many changes from Operation Soteria that the judiciary are unaware of.

b) I have called for police and CPS to undergo trauma training similar to that offered by Dr Lori Haskell in Canada to understand the neurobiological impact of trauma on memory, reactions and behaviours. This training should then inform refreshed guidance on how to conduct victim interviews to ensure best evidence is gathered and that the impact on the victim remains at a minimum. There should also be better use of judicial directions on inconsistencies and trauma through a rebuttable presumption.

c) The learning and principles of the above training should be shared across criminal justice partners, including with the Judiciary, the Bar Council and the Law Society

d) I agree that there should be a requirement for questions to be discussed and approved by a judge at a hearing in advance and/or that the Judicial College consider a direction being given where a line of questioning is deemed irrelevant because it relies on myths. (Q79)

e) I would support the Judicial College providing guidance to judges on how best to respond to generalisations which rely on myths and stereotypes, and which are raised in counsel's speeches and on warning advocates about the potential consequences for relying on myths and stereotypes. (Q80)

f) The Bar Standards Board should also consider making explicit reference in its Code of Conduct to the potential for professional misconduct consequences to arise from reliance on myths and misconceptions in sexual offences cases. (Q81)

g) I agree that there should be a rebuttable presumption that a direction on myths or misconceptions will be given in relation to all the indicators currently listed. (Q84)

h) I also suggest that there is an indicator and example direction be added on CICA (even though there could be potential limits on how and when CICA can be raised if these proposals are enacted) which includes a direction which points to the expectation that victims will be informed about CICA under the Victims Code, that there is a two-year time limit to apply and what the average compensation award is for a sexual offence case. (Q94)

i) I would also like to see an indicator and example direction under 'consent' around "tending and be-friending" behaviour and how this may be a response from victim-survivors to minimise threat[4]. (Q94)

8. Radical reform

Specialist courts (Q112)

a) I have long supported the introduction of specialist sexual offence courts. As the consultation identifies, there is specialisation in earlier parts of the criminal justice process and the introduction of the National Operating Model as part of Operation Soteria will further enhance this. I am concerned that without specialisation at the court stage victims

[4] Taylor, S et al. (2000). "Biobehavioral responses to stress in females: Tend-and-befriend, not fight-or-flight". Psychological Review. 107 (3): 411–29.

will remain disenfranchised in the criminal justice system despite significant progress at the police and CPS stage. The joint thematic inspection on rape (2022) identified the court process as particularly problematic for victim-survivors.

b) A specialist court system would improve timeliness and most importantly the treatment of victim-survivors, taking reasonable steps towards the goal of providing ‘procedural’ justice regardless of trial outcome.

c) I acknowledge the concerns of judiciary that only working on sexual offences cases risks vicarious trauma, however these are concerns which are being addressed elsewhere in the system in the context of specialist officers and prosecutors receiving training and support. The learning from these contexts could be effectively applied to specialist rape courts.

d) I would support specialist courts being entirely separate courts. In London we have suggested, as an interim solution, a prioritisation protocol to be enacted by Resident Judges, so that sexual offences cases can at least be heard as quickly as possible. However, I recognise this will not improve the overall victim-survivor experience, which would be the aim of a separate sexual offence court .

Juries (Q114 and Q116)

e) I agree that screening juries for rape myth acceptance would not be useful in addressing myths and stereotypes in sexual offences cases. Research has demonstrated that even those with low rape myth acceptance scores can go on to apply rape myths and stereotypes in deliberations[5](Q114).

f) As this chapter makes evident, there are compelling reasons why judge-only sexual offences trials would be beneficial to victim-survivors and address many of the issues that this consultation seeks to address. For example:

- The defence cross-examination may resist employing myths and stereotypes so readily, as these are aimed at jurors who are unfamiliar with the complexity of rape and sexual offences and are less practiced in identifying what is relevant to a criminal case and unaware of the rules of evidence.
- Victim-survivors would not have to present their evidence to 12 members of the public which can be intimidating.
- Judges would be able to provide reasons as to why a case may be unsuccessful which would assist victim-survivors in their recovery journey.
- Conviction rates may be improved or become more balanced across demographic groups. For example, we know that conviction rates are lower in cases involving adult women victim-survivors.
- Cases could be undertaken more effectively, and it may improve timeliness in sexual offences cases which currently have one of the longest waits for victim-survivors in our criminal justice system.

[5] Leverick, F. (2020). What do we know about rape myths and juror decision making? The International Journal of Evidence & Proof, 24(3), 255-279.

I understand the concerns the consultation raises regarding the perception of a defendant's right to a fair trial and an increase in appeals. I also understand that judicial discretion could also be problematic from a victim-survivor perspective. However, I believe that the arguments in favour of judge-only trials are compelling, and their implementation in other jurisdictions has shown their benefit to victim-survivors, as in Quebec, where I recently visited. There is sufficient reason to pilot the use of judge-only trials, and any pilot should ensure that there is adequate data to compare outcomes for defendants and victims based on age, gender and ethnicity between jury and judge-only trials. It should also involve a qualitative study of the victim-survivor experience in giving evidence, understanding the verdict and perception of procedural justice (Q116).

Should any of the above answers require further clarification, or you have any further matters you believe myself or my team can support with, please do not hesitate to get in touch.

Thank you again for a thorough and considered consultation and I look forward to hearing your final conclusions.

Yours sincerely,

Claire Waxman OBE
Independent Victims' Commissioner for London