HOUSE OF COMMONS

Home Affairs Committee

Oral evidence: Investigation and Prosecution of Rape, HC 193

Wednesday 1 December 2021

Ordered by the House of Commons to be published on 1 December 2021.

Watch the meeting

Members present: Tim Loughton (Chair); Ms Diane Abbott; James Daly; Andrew Gwynne; Dame Diana Johnson.

Questions 139 - 179

Witnesses

I: Kirsty Brimelow QC, Vice-Chair, The Criminal Bar Association; Ellie Cumbo, Head of Public Law, The Law Society; Professor Penney Lewis, Criminal Law Commissioner, The Law Commission; Derek Sweeting QC, Chair, The Bar Council.

Written evidence from witnesses:

– The Criminal Bar Association (INV0028)

Examination of witnesses

Witnesses: Kirsty Brimelow, Ellie Cumbo, Professor Penney Lewis and Derek Sweeting.

Q139 **Chair:** Welcome to the Home Affairs Select Committee. This is the fourth oral evidence session for this inquiry into the investigation and prosecution of rape. We have one panel of four very heavyweight witnesses this morning to investigate the legal sector's perspective on the prosecution of rape and serious sexual offences to inform our study. Can I welcome all our witnesses?

Can I also explain that I am not Yvette Cooper? Yvette has been promoted, I think one could say, to shadow Home Secretary, so had to resign as Chair of this Committee. As the longest serving old codger on this Select Committee, I am standing in as the interim chair. We are grateful for everything Yvette has done in her last few years chairing this Committee, and we will hope to conduct the affairs this morning up to her usual high standard.

As we go around with colleagues asking questions, there is no need for everybody to feel that they have to answer every question, and there will be some questions directed at particular witnesses. Perhaps I could start off by asking each of you to give your initial thoughts, particularly addressing the thorny issue of why you think the number of rape prosecutions has declined so significantly in the last few years, and giving some observations on societal and process issues. Give us your initial thoughts, and then we will go into more detail in some of the particular headings that we would like to ask you today. Mr Sweeting, shall we start with you?

Derek Sweeting: I am Derek Sweeting QC. I am chair of the Bar Council of England and Wales. That is a very large question. The answer is, undoubtedly, that it is multifactorial. There are lots of reasons why. Some of the reasons are societal, but you are dealing with organisations that are charged with investigating and then prosecuting rape. It is fairly obvious that, if you take resources out of a system involving organisations like that, they respond in the way that you would expect. They tend to concentrate their resources on doing what they can do with the limited budgets that they have.

We have seen that process of the extraction of resources going on for a long time. It is also clear that it has an effect over time. You see experience leaving the police force, for example, so we have far fewer officers who are experienced in investigating rape and serious sexual offending. You also see what you would expect on the CPS side. We have a declining number of cases over the period but actually an increase in the conviction rate. It goes up to nearly 70%. Again, that is probably indicative of an organisation that is trying to concentrate its resources on what it can do.

Undoubtedly, the big issue in this area, as with so many other areas of the criminal justice system, is the extent and nature of the cuts that there have

been to funding, and the effect upon the resources available, particularly in this area. It is resource intensive and it requires people with experience and skill to progress these cases throughout the system.

Then there are societal effects such as the impact of digital disclosure. The fact that so much of our lives is now recorded on mobile phones, in particular, has presented huge challenges, particularly for the police in accessing and collating that sort of data. I sound like a broken record, but that in itself is a resource issue because you simply need to have more people with more expertise and skill, and more technology available to deal with that particular problem.

Those are my initial observations. There are quite a few factors that I have not touched on, but I am sure others will in answering your questions.

Chair: We will come back to those. Thank you. I should have introduced everybody. Professor Penney Lewis, criminal law commissioner from the Law Commission, can I ask you for your opening comments, please?

Professor Lewis: Yes, thank you. The Law Commission is in a slightly different position from the rest of my colleagues here on the panel today. We are an independent body advising Government and Parliament on the need for law reform. We have been asked to take on a project looking at the trial process in relation to rape and serious sexual offences as part of the rape review work that I know you have been considering in your earlier sessions.

While the Law Commission will be looking at the way in which the current legal regime impacts on complainants' and, indeed, defendants' rights to fair trial, we will not be investigating the causes of low conviction rates or attrition rates, for example.

As a preliminary point in relation to the project that we have been asked to look at, which focuses on the trial process, one would hope that, if the trial process improves so that the experience of complainants going through that is a better one while still ensuring that the defendant has a fair trial, that will have a knock-on effect on the attrition rate, the reporting rate and all the other indicators that the Committee is worried about.

Chair: Ellie Cumbo is the head of public law at the Law Society.

Ellie Cumbo: The Law Society would echo a lot of the things that Derek Sweeting has said, in particular the point about the difference between the investigation stage, the CPS decision-making stage and then what happens at trial. That seems to chime with the evidence that I know you have heard from other witnesses about the point at which those numbers seem to fall off. From our point of view, the job of solicitors, who we represent, is to ensure that there are fair processes throughout those stages. We take less of a view on the global picture around the statistics, but we recognise the importance of having that information. We welcome the commitment made by the rape review to that level of transparency.

Chair: Kirsty Brimelow QC is vice-chair of the Criminal Bar Association.

Kirsty Brimelow: I come at this from a practitioner angle, representing those who are prosecuting and defending in these cases. The starting point, which is positive, is that the conviction rate has steadily increased over the last five-plus years. In 2015, we had a conviction rate of 58%. In the latest figures for 2019-20, we are up to 69%. That is a reflection of the expertise of the court once the case is in court.

However, there has been a significant fall of referrals of these cases from the police to the CPS. It is a 37% fall. What are the reasons for that fall? They are partly resources. From a practitioner's perspective, all the feedback from members is that there is a collapse of specially trained officers, called SOIT officers, which did so much to improve the system from 2015 onwards. You do not now get a continuous officer with complainant on case. There are increasing delays, which I have to say is very depressing and distressing, having seen, certainly in my early years of practice, how cases involving complainants in sexual offences would be expedited. Now, you are lucky if the case is heard within four years between complaint and trial. It is not all due to backlog.

There is also an increased delay in the police from complaint to actual charge. Some of those figures on that are probably quite interesting. You probably already have them. You are looking at an average of about 98 days to investigate from complaint to outcome, whether that be not proceeding or charge, in a rape allegation. That compares to 66 days in relation to other sexual offences. Looking at other violence allegations against people, it is only 18 days.

Practitioners' experience, and certainly my experience as well, is that complainants just get fed up and they drop out of the system. It is a lot of stress. If they are not having sufficient support and sometimes sufficient communication, they want to move on with their lives. There are also issues with miscommunication about what is going to happen to their private information. For example, if they have given their telephone over, they want their telephone back. They want to re-engage in some way with civilian life. The criminal justice system can be seen as a barrier to that.

Those are some of the reasons. I would add that it is very well documented from reviews in 2014 and 2015, where Sir Bill Jeffrey and Sir Brian Leveson documented the frustration and stress felt by witnesses when cases are listed and then stood out at the last minute. We have also experienced that with complainants and witnesses simply saying, "I am not coming back".

Q140 **Chair:** It is interesting that the resource issue was a common theme in what everybody has said. There are two points to come back on. Mr Sweeting, you raised the point, reinforced by Ms Brimelow, about the increase in the conviction rate but the low number of cases. The deduction from that is that the CPS is going for a higher hit rate on those cases where it thinks it can secure a successful conviction. It is not taking forward those cases that it might have taken forward in previous years in order to

effectively get the pass rate up. Is that really what is happening?

Derek Sweeting: I am not sure I am making that observation about any kind of deliberate policy on the part of the CPS. I am not sure the DPP would say that that has been a policy. What I was drawing attention to is the difference between the volumes, which are the raw numbers, and the organisational effects when you have limited resources. The point I was making is that any organisation tends to concentrate on what it can do with the resources it has. The volumes of prosecution for adult rape—the figures that Kirsty has given—have fallen by 59%, and convictions by 47%, between 2015-16 and 2019-20. Convictions are actually up a little bit this year.

That has coincided with an increase of 79% in police-recorded adult rape offences. That is the real cause of concern here. We are seeing more offences being recorded but the overall volumes have been going down. The point I was making is that, if you have been deprived of resources, you are at the back end of a long period where you have been deprived and you have lost experience, the organisation tends to concentrate on doing what it can. If you are concentrating on a smaller amount of cases with reduced resources, it is no surprise that the conviction rate goes up.

Q141 **Chair:** That is the point. There are two ways you could deal with the lack of resources issue. Either you can focus on those cases where you think you can achieve the best outcome, which is a prosecution, or you can concentrate on those cases that you think are going to be simplest to get to court and require less intensive work to share your resources round, but which might result in a lower conviction rate. What has happened here is that we have fewer cases but a higher conviction rate, which would suggest to others that there is selectivity of cases in order to achieve a higher ranking in the tables, to put it one way. Is that not how you see it?

Derek Sweeting: I am not so sure about it, because it is not really an option to just keep on diluting and saying, "We have to deal with a number of cases that is not really feasible for us". These are difficult cases. They require experienced prosecutors and police officers at every stage to deal with them. They are not susceptible, as it were, to volume management in that way. If you are taking a view about where you can best use resources and experienced resources within the CPS and the police, you are concentrating on a smaller number of cases. It may be that there is some unconscious drive, not towards low hanging fruit but towards those cases that you think can be investigated satisfactorily with the resources you have. That is almost a natural tendency. It is not surprising.

Q142 **Chair:** Ms Brimelow, can I come back to you as to whether you agree with that, and to your comment—we have heard this from previous witnesses—about the fatigue of victims, if it is up to four years, to have to live through the traumatic experience over all that time for a whole host of reasons? We took evidence about the whole technology thing and why it takes so long to turn your phone round, when you and I could go to a phone shop down the road, get a new phone and have all our data transferred to it.

Why can that sort of thing not happen? How serious is the dropping out, so that the victim just says, "Look, I have had enough of this" and throws in the towel? Cases that might be solid cases, and might be among the likely success rate that we have just discussed, do not actually make it because the victim drops out.

Kirsty Brimelow: There are two aspects to it. First, if you do not have sufficient resources, you have a weak investigation with in-built delays within it. That is the first stage. The second stage is referrals to the CPS in relation to charging. If the evidence is not sufficient for the police to refer, they will delay doing so. There are obvious reasons why it could be insufficient, as nobody has been focusing on the investigation sufficiently.

When it gets to the CPS, again, we have examples of those prosecutors who are dealing with these cases. Some of them have about 100 of these cases and they simply cannot focus sufficiently on filling any gaps in the evidence. Therefore, there are further delays. Inevitably, by the time it gets to the barrister, that will then input because the barrister may then, and usually would, advise on further evidence to be taken. I do not think I have ever had a single case, prosecuting or defending, where I have not advised that it requires further evidence, on behalf of either the defence or the prosecution. If that case is only reaching you 12-plus months down the line, by then you have a very unhappy complainant, and witnesses who may well not even be in the country anymore and have simply given up.

Q143 **Ms Abbott:** I was very interested in what Derek Sweeting had to say about resources. The issue about resources has been put to us in informal discussions we have had about this issue. I am always open to arguments about Government cuts but are you absolutely confident, Mr Sweeting, that the main issue in the drop in prosecution is just resources?

Derek Sweeting: I started my earlier answer by saying there were a number of factors, and it is sometimes quite difficult to extricate everything that is involved or to point to one thing that is the main driver. It would be surprising if resources were not a major part of it. I did point to some other things, such as societal changes. The lack of resource has been having an effect on the criminal justice system more widely. There is no reason to suppose that this particular area of serious sexual offending would be immune from that. There are good reasons to think that it would probably be more sensitive to a drop in resources over a long time, particularly if you were losing expertise.

There are a number of reasons for doing that, but we know that the police and the CPS in particular had some of the deepest cuts applied to them in the early part of the period of austerity. It is a reasonable conclusion that the lack of resource is playing a part here, just as it is playing a part elsewhere. But I am certainly not suggesting that it is the only reason.

Q144 **Ms Abbott:** You are suggesting that it is the main reason.

Derek Sweeting: Yes, I am suggesting it is a very significant cause of the problems that we have within the system at the moment.

Q145 **Ms Abbott:** It has been put to us in certain informal discussions we have had that the approach taken by the police or the CPS is sometimes influenced by protected characteristics such as race. Can it also be influenced by factors such as the lifestyle or the perceived character of the complainant or defendant?

Kirsty Brimelow: I am happy to answer that as much as I can. There have been those cases where the lifestyle of the complainant has influenced matters of charging and prosecution.

As for evidence as to whether protected characteristics affect decisions to charge and prosecute, I am not aware of any data that supports that. We do know, however, that those in minority ethnic groups are disproportionately represented in the criminal justice system.

From a practitioner's perspective, there is no evidence that there is influence on prosecution and charging in relation to those within ethnic minorities or because of the complainant's lifestyle and so on. However, clearly, there should always be resources put into cultural sensitivity and the training of officers. That should always be the priority. I do not think it is happening so much at the moment.

Ellie Cumbo: Could I just come in on the first question from Ms Abbott around other factors as well as lack of resource? It is also important to talk about the culture, and it would be naïve to think that the public reaction to some of the changes that your inquiry or the rape review itself might propose do not somehow influence police practice or possibly even CPS practice. For example, if the attrition rate were to climb but the conviction rate accordingly drop, which, Chair, would align with some of your observations, would that be regarded as a success or would we find that there was equal criticism of the police and the CPS as there is now?

The public debate around this, and the way in which it is discussed and scrutinised within Parliament, does need to be mindful of the importance of the balance between defendants' rights and an improved experience for complainants. These are not straightforward issues. It is the great tension that I know everyone on this panel is mindful of, where an overfocus on one side of the equation might risk stepping back from just outcomes, which is what we should all be striving for.

Derek Sweeting: The importance of data is really paramount here. We know that a lot of the data collection within the criminal justice system and more widely is far from satisfactory. Dr Natalie Byrom did a report for HMCTS. That was well over a year ago now. I know that she is not impressed with the rate of progress. There is a lot more work to do. I do not think we can answer the BAME question, for example, without much better data, other than saying, as Kirsty has, that there is an overrepresentation of those from ethnic minority backgrounds already within the criminal justice system. Again, it would be a surprise if we did not see something like that—some such effect—going on in relation to this

area as well. The extent to which it is there is a matter of speculation at the moment.

Professor Lewis: I just wanted to come back on your point about character evidence. One of the issues that we are hoping to look at in our project looking at the trial process is whether there is a need for reform of the rules and procedures that govern the admissibility of character evidence at trial. That would include both good character evidence and bad character evidence, or what is commonly called evidence of previous misconduct, in relation to both the defendant and the complainant. One could subsume the sexual history evidence question as part of that as well, although we will be looking at it as a separate issue.

The reason I raise that is that you have heard, and there is certainly anecdotal evidence, that the rules governing the admission of evidence at trial affect the decision-making, as indeed they should do, down the track or earlier on. The CPS makes decisions based on what kind of evidence is likely to be admitted at trial. I stress that I have not seen any evidence of that kind of decision-making on the part of the CPS, but, if one reforms the rules governing the admission of evidence in relation to character, one would expect a knock-on effect of less consideration of the kinds of evidence that would no longer be admissible at an earlier stage.

Having said that, this is not a perfect feedback loop. One of your earlier witnesses talked about the evidence that police officers are requiring corroboration before they will pass a file to the Crown Prosecution Service. The rules governing corroboration were abrogated in relation to sexual assault complainants in 1994. There is no requirement for corroboration, and indeed the judge will direct the jury accordingly and only tell the jury that they should look for supporting evidence in circumstances where there is an evidential basis for the unreliability of the complainant. That would be in a very narrow realm of cases.

Sometimes the law changes in relation to what is admissible or what will happen at trial, and the practice earlier on in the process is not affected, but we can do something to make clear what will be admissible and what should be admissible, and make recommendations where we think the law requires reform. Having done that, we then need to make sure that those messages are absorbed by the actors earlier on in the chain. For example, in relation to corroboration, if that evidence were more than anecdotal, the College of Policing might want to look at what it is teaching police officers about the law in relation to corroboration.

Ms Abbott: All I would say is that the issue about race affecting the approach of the police or the CPS was put to us quite firmly by one of the persons we took evidence from informally. But, if none of you has noticed any such thing, I can only defer to you.

Q146 **Andrew Gwynne:** I would like to turn to the issue of support for victims.

Kirsty Brimelow, you mentioned earlier that people get fed up and drop out because there is no support. I would like to expand some questions on that issue. We have heard, as a Committee, from survivors that they can be advised not to have particular forms of counselling until after the trial. That obviously has a massive impact on their mental health and their own wellbeing. Some organisations, including the End Violence Against Women Coalition, have recommended making complainants' therapy and counselling notes non-disclosable. What is your view on that recommendation?

Kirsty Brimelow: I am against that recommendation on making therapy notes non-disclosable because there is already a very robust legal framework that deals with disclosure of third-party material, which is what this would be. That framework basically sets out that it has to assist the defence or undermine the prosecution. There is also an Attorney-General guideline on disclosure, which is looking at what is strictly necessary and proportionate, looking at digital material and other information. It is robustly applied.

I can say as a practitioner—I am not sure I am going to admit how many years I have been prosecuting and defending in sexual offences cases—that it is fairly rare that you have therapy notes. It is even rarer, as a prosecutor, that they are disclosed. There has to be something within it. I would say that they become more relevant when you are looking at historic sexual offences. A number of years ago, these cases used to stop being prosecuted as being an abuse of process if the allegation was, say, about 20 years old. Now, I have cases that are 40 or 50 years old, and they still continue saying the defendant can have a fair trial. In those circumstances, there are often years of counselling records where the accounts from the complainants differ and, therefore, it is relevant to the defence that they are disclosed because there are often differing accounts and, for the fair trial process, it shows a lot of inconsistency.

You cannot have a one-size-fits-all and ban disclosure of all therapy notes. The law works perfectly well in that area. There needs to be better communication with complainants: "If you consent to providing your therapy notes, please be reassured that they are not going to be handed to the defence. There are very competent lawyers working on it plus a judge".

The second thing is that no complainant should be advised to delay their therapy—quite the opposite. They should be advised to take care of their mental health and continue to try to look after themselves in the aftermath of the allegation. I do not know if I can assist any further, but I would certainly be against that as a recommendation.

Professor Lewis: This is one of the areas that the rape review report specifically asked the Law Commission to look at. We will be looking at the need for reform of the rules and procedures governing pre-trial disclosure of complainants. We were specifically asked to look at medical and counselling records. Within our scoping work, we have been thinking more

broadly about records in which the complainant has a reasonable expectation of privacy. That is a term that has resonance under article 8 of the European Convention on Human Rights, and it is also the way in which the Canadian legislation is framed. We will be looking at pre-trial disclosure and at admission at trial.

In addition to the substantive review of the legal regime that Kirsty has described, we will also be looking at some procedural questions. Should the complainant be a party to the application to admit the evidence and should she be legally represented at that application? One of the most useful things we can do as a Law Commission is look at the comparative experience. There are some common law jurisdictions that use a privilege in relation to these notes. That would effectively provide a presumption of non-disclosure. It would not be a ban, but it would be a presumption of non-disclosure. That is an approach that is in use in some Australian states.

The Canadian approach is also interesting. There, again, there is a coverage of all records in which the complainant has a reasonable expectation of privacy, and then there is a list of reasons why the defence might want to admit the records, none of which will be valid in and of themselves as a justification for admission. In other words, one has to have something more than just one of these basic reasons—it is relevant to an issue at trial—and there is a whole list of about eight of them. That is a different approach to dealing with these issues.

We need to look at the comparative models. We need to talk to stakeholders about how the current system is working, and see whether reform of this regime is needed.

Q147 **Andrew Gwynne:** Can I ask about independent legal advocacy? We have heard evidence from witnesses that that would help them through this particular process, especially when there are requests for excessive data or when facing cross-examination, and the concern that past histories might end up being discussed, including previous sexual behaviour. I just wondered what your views are, and I will come to Ellie Cumbo about having better independent legal advocacy for victims.

Ellie Cumbo: It would be useful to give a Law Society perspective on that in the first instance, unless my fellow panellists disagree. That would be most likely to be a solicitor, in the event that that model were to be developed.

Would you mind if I came in on the previous question briefly? To give the solicitor perspective, again, we would agree entirely with Kirsty Brimelow's point that blanket bans around evidence are unwise and likely to lead to greater injustice. I might reserve judgment a little more on whether the regime now functions as well as it should. Again, it would tend to be solicitors involved in the early disclosure process in these cases. There are certainly questions in individual cases, and then more generally, about whether the police are indiscriminate in their approach to disclosure. Again, there are questions around police culture, training and ultimately resource.

To move to the question about independent advice or advocacy, it is really important to be clear that those are two different things. There are going to be proposals on this next year, and the Law Society will form a view on those proposals when we see them, but it is important to understand that there is a difference between being able to provide advice to complainants on their opportunities to challenge the admission of evidence and then the question, which I do not think is being suggested, at least not by the Government at this stage, around the possibility of actual rights of audience as part of the trial process. The latter model is extremely rare. I believe it does exist in one or two jurisdictions, but it would immediately face very real concerns that what you are then doing is muddying the adversarial nature of our trial process, and effectively allowing one side to have two bites of the cherry as part of the formal trial proceedings.

The question then around advice, and particularly perhaps representation in the form of being able to communicate directly with the police or the CPS over evidence and admissibility, is a different one. That is more widely used. I know you heard from Sir John Gillen on that question, and I read that with great interest. My members would be very interested in how that would work in practice, and would see the benefits of it, so long as those fair trial rights are always in mind.

Q148 **Andrew Gwynne:** Can I just then ask about pre-recording evidence? We have heard from witnesses, including Lady Dorrian, the Lord Justice Clerk in Scotland, that giving complainants the opportunity to pre-record evidence at the earliest possible stage would be a positive step. The Government have also outlined plans for a pilot to use section 28 for intimidated witnesses and complainants in a further three Crown Courts. What are your views on this? In particular to Kirsty Brimelow, in written evidence to the Committee, the Criminal Bar Association suggested that section 28 needs to be reformed so that prosecutions have more involvement in the early stages of preparing a case for the jury. What would this change look like?

Kirsty Brimelow: Yes, in fact the issue with section 28, pre-recording of evidence, is equivalent to day one of a trial. When the barrister is instructed in a section 28, they are then committed to that trial. What is happening in the courts currently is that barristers are refusing to do a case, prosecuting or defending, that has a section 28 pre-recording as part of it. I had an example only yesterday in the West Midlands where I was told from a reliable source—a practitioner QC—that there had been six RASSO cases where no prosecution counsel could be found to do them. In two of them, the Crown Prosecution Service ended up instructing a QC, which was not normally a QC case, just to try to get the trial proceeding.

Why are barristers not doing them? What happens in reality is that the courts have a list. On a Monday at 9.30 am, say, that is your section 28 morning. If a barrister is in a two-week trial, they have to get out of that trial to go to the court to do the section 28. If two of them are perhaps in two different courts, you get the idea. You will get an interruption to one

trial. You get impossibility then if the judge says, "I am not releasing you from that trial". Although there is a protocol to deal with section 28, it is not actively managed by the judges, according to CBA members. Therefore, barristers are finding themselves unable to even eke a living by leaving themselves completely free to do these section 28 hearings, and so they are not doing them. If you do not have practitioners doing them, they are not workable. That is the bottom line, whatever the policy is.

I should also add that there is no protocol for recorders. These are part-time judges who comprise senior barristers. If they are in a section 28 and they are sitting, what are they meant to do also?

Certainly in my experience and the experience of many practitioners, the move towards "press play" in order to provide evidence of a complainant to a jury is not necessarily going to impact on a jury. It is anecdotal. It is from being in the courts doing these cases. When there are many more options around the choices for vulnerable witnesses, if they were able to come into court, albeit with a special measure, behind a screen, their evidence was far more tangible. You could feel it more in the courtroom as opposed to having a screen and playing it. When a complainant has been waiting for years, or even, if we go back to previously, a year-plus, to give evidence and they perceive that they have not been able to get across what they wanted to get across because it was a video played some months later, they may feel disappointed by that process.

I know some research is being commissioned to look into the impact of technology on jurors. It is probably going to be limited because you are not going to be able to ask them what the impact on the verdict was. However, I would flag that technology is not always the perfect replacement for the person there.

Q149 **James Daly:** Thank you very much to the panel for giving evidence. I must refer to my register of interest, Chair, before I start in that I am a practising solicitor, a partner in a firm of solicitors, and was a criminal lawyer for 16 years.

I want to go back to Mr Sweeting's evidence and then bring Professor Lewis into that. In Greater Manchester, where I and Andrew are Members of Parliament, the charge-out rate is 1%. Mr Sweeting, the vast majority of those cases are discontinued by the police, not by the Crown Prosecution Service. They do not even get to the Crown Prosecution Service. What evidence—not guesswork or "it might be the case"—do you have to explain or to put forward as to why that may be the case?

Derek Sweeting: As to why the police are dropping the cases?

Q150 **James Daly:** You made some comments regarding resources and all sorts of other things, which may or may not be correct. In Greater Manchester, 1% of allegations of rape lead to a charge. What evidence do you have to explain why that is the case?

Derek Sweeting: I am not sure I have any evidence about what the position is in Greater Manchester to account for that.

Q151 **James Daly:** Nationwide it is about 3%. What evidence do you have to account for that? Could you give us any evidence that the Bar Council has commissioned to look into that issue?

Derek Sweeting: No, I cannot give you any evidence that the Bar Council has commissioned to look into that issue. We have the figures, which are publicly available, from the Government and from official resources. But, as I said, there is a combination of factors that are probably at play in relation to why that figure is so low.

Q152 **James Daly:** Ms Abbott made a very telling point in respect of that. From my own personal experience, and also from the evidence that was given to us by some very eminent lawyers in the previous session that we had, many people who make allegations to the police regarding serious sexual offences maybe have challenges in their lives, substance abuse problems and all sorts of things that could be argued—I do not accept this—to go to reliability. It is not about the admissibility of evidence; it is about the reliability. Professor Lewis, I wonder whether you have a view on the police dropping cases—not proceeding with cases—on the basis that they may take the view that, if somebody has a mental health issue or a drug problem, that makes them not a reliable witness in court.

Professor Lewis: The Law Commission does not have a view on that. We do not take views on matters outside of the projects that we have been asked to take on. On your point about reliability, in some ways it is also related to admissibility. One of the ways in which witness credibility can be challenged is through bringing in evidence about, for example, their counselling, using their counselling and mental health records in the way that you described. The rules of admissibility in relation to that type of evidence do matter.

Q153 **James Daly:** Professor Lewis, I am sorry to interrupt. I have very limited time. You would accept as a principle, surely, that, if somebody has a mental health issue in their life through no fault of their own, that cannot be used as a challenge to their reliability as a witness in a court. That should have nothing to do with it at all, should it?

Professor Lewis: A one-size-fits-all answer to that question would be ill advised. I could conceive of circumstances where there would be evidence of unreliability that related to a mental health condition, and I can conceive of many circumstances where there would not. The question would be for the trial judge. Should this evidence be admitted? Is it relevant in this context?

Q154 **James Daly:** If we, as a criminal justice system, are making decisions upon prosecution as to whether an individual has mental health or drug abuse issues, or has had difficulties in their life, our conversation is essentially worthless because the charge-out rate will remain incredibly low. I do not know whether the witnesses agree with this. We have to have

a view that reliability is a matter for a jury, not for police officers. Would you agree with that?

Kirsty Brimelow: Before you even get to the jury, you have to apply the full code test. Looking at the evidence, is there a realistic prospect of conviction? Then you are looking at whether it is in the public interest. If it is an allegation of sexual offence, it is always going to be in the public interest to proceed if the evidence is sufficient.

However, can I just address the points that you have made about somebody with a mental health issue, drugs, alcohol and so on? Many complainants in sexual offences cases have a variety of challenges in their lives. Prosecutors are trained to deal with those complainants really sensitively. The majority of that evidence is of no relevance whatsoever.

James Daly: Absolutely, that was the point I was making, Kirsty.

Kirsty Brimelow: The majority is not, but some could be.

Q155 **James Daly:** The point I am making is that you are dealing with somewhere between 1% and 3% of the total number of allegations of this kind made in the country. The system has a conviction rate of 69%. Clearly, this is not a uniform process where everything is the same, and 69% is a reasonably high level of convictions for cases that are going through the courts at this moment in time, so something is working in a positive manner in the courts to support those victims. There are challenges that you have very articulately outlined. But it still comes back to the fact that most of the cases—not just most but the vast majority of cases—do not get anywhere near the courts.

When you were talking about the charging protocol that the CPS has to go through, I do not believe the police consider that before they discontinue a case. I do not believe that there is something within the police station where they are considering exactly the same test as the CPS. They are making up their minds on these cases without supervision, in my view, and without any legal input into that decision. Would you accept that that is incredibly worrying for the justice system?

Kirsty Brimelow: I cannot give evidence as to how much interaction there is between the CPS and the police beyond those figures that are there, which are Government-produced figures. However, it is a concern that you get advice in at an early stage to prevent cases being dropped that should not be dropped.

Q156 **James Daly:** One of the things you gave very articulate evidence about, and the Committee should hear about this, is that there have always been delays in the court system. The backlog is not just something that has happened because of the pandemic. It was when you and I were practising. It has been going back 20 years. It has always been there to one extent or another. What is significantly different, in my view, is the time between complaint and charge. If we were to go to any police area in the country, the amount of serious sexual offences currently released under

investigation is scandalously high. It is frightening.

Kirsty Brimelow: Yes.

Q157 **James Daly:** It is not something that we historically saw in the past. Yes, investigations took a little while, but they did not take the length of time that we are talking about here.

I just have two more questions. When a case comes to you—obviously, you cannot be specific—excluding the interviews, what is the page count of the evidence bundle that you would normally get for a rape trial either as a prosecutor or as a defendant?

Kirsty Brimelow: It so varies. In the last case that I defended, I was representing a man in his 70s on trial for the rape of his daughters when they were from the age of five. That was very complex with thousands of pages of evidence.

James Daly: That is atypical, clearly, of the nature of the allegations that you deal with.

Kirsty Brimelow: That would probably be less, because it did not have the amount of digital evidence that you now get.

Q158 **James Daly:** The point I am trying to get at is for us to understand what the delay would be in the system in terms of the evidential gathering process. I have represented defendants in rape cases where you have 30 or 40 pages of evidence, which is essentially just witness statements that could have been done in seven days in respect of that. I came out of practice in 2016, so the digital world may have changed greatly. What you have described, in terms of that type of case, was unusual within the system. My point is that the vast majority of cases, bearing in mind the amount of evidence that comes through for the lawyers, could be investigated and could be undertaken by the prosecution and the CPS at a much quicker pace. The evidence is not so complicated that it requires these vast delays all the time. Am I wrong in saying that?

Kirsty Brimelow: You probably are wrong, because they are complex cases and there has been very high-profile Court of Appeal quashing of convictions where there have been disclosure failures. There are always potential issues with disclosure, and you need the lawyers in on those vast amounts of digital evidence that run to thousands and thousands of pages. What can improve? The IT can improve in different areas.

James Daly: I accept that completely.

Kirsty Brimelow: That can improve. In terms of practitioners not getting fed up and stopping doing these cases, what also would help would be for it to, frankly, be paid. What we have in terms of barristers prosecuting and defending is that they are expected to take on this additional work for absolutely no additional pay. We have lost a quarter of junior barristers who were practising in crime in the last five years, and we have now lost about 46% of QCs who were practising in crime in the last five years.

People are sick of it, of the increasing amount of work they have to do for zero uplift in fees.

Q159 **James Daly:** The last question I am trying to ask, for the Committee to take away from this, is whether you have a view on the amount of time it should take for a case to be investigated prior to charge occurring. That is not a science, but we have to have an idea as to what is reasonable or realistic to expect, or else there is no answer.

Chair: James, we will have to keep the questions a little shorter without leading the witnesses too much.

Ellie Cumbo: Just to reiterate, it would often be, if not usually be, the solicitors involved at the earliest stages of disclosure. It is just important to add to the observations that my colleague has made. The guidance from the College of Policing, the CPS and the Attorney General is still fairly recent. We might be in a phase of needing to see how that guidance beds in before we take a view on what the future of disclosure is going to look like. It is obviously our hope that that is going to lead to far more timely and efficient disclosure and investigation, and that we might therefore be on an uptick that we can all celebrate.

Derek Sweeting: Could I just come back in relation to questions asked of me? I understand why you are asking about the police behaviour and what influence police decision-making may have. But it is important to bear in mind what the raw numbers are. In the 12 months to June 2021, the number of reported sexual offences was the second highest we have ever had. That was 164,763. Rape makes up 37% of all sexual offences recorded by the police. The system would simply be overwhelmed if we were trying to deal with each of those cases by taking it all the way downstream to court. There has to be some process of triage at some point in terms of an assessment of what realistically can be taken forward to the next stage.

As for whether it is being made on the wrong basis, I do not know whether the police are making the wrong decisions about reliability. But there does have to be a decision-making process at the very start, as there has to be at other points in the system as well.

Q160 **Chair:** You have just given those figures, Mr Sweeting, and, Ms Brimelow, you have just recounted a case of a 70 year-old's offences against daughters when they were five, so it was historic. We know the problems about the pandemic. We have heard about the problems with resources. How much of this has been skewed by historic sex cases post-Savile? We know, and we saw, an awful lot of historic cases came up because of what happened with Savile. There was also a knock-on effect on people who had been abused more recently being more emboldened to come forward because of the new attitudes and recognition of this as a serious problem. Of that figure you have just given us, Mr Sweeting, of 164,000, in terms of a very rough ballpark, how much of that is still largely historic that we are still getting out of the system before we get up to contemporary cases? I am not expecting an exact figure but just an idea of it.

Derek Sweeting: I would have to deal with that in very broad terms as to the 164,000 because I do not know what that breakdown is. That is an upward trend, as I said, in relation to 2021. Kirsty would probably agree that the post-Savile impact was very significant, and we have seen a huge number of historic sexual cases coming into the system, to the extent that that has become a very significant part of the daily diet in the Crown Court. You are undoubtedly right, Chair, to say that there has been a sea change in the overall volume of work of this type that has come into the criminal justice system. That is plainly part of the mix. I do not know if Kirsty wanted to add to that.

Kirsty Brimelow: I would agree with that. Also, perhaps contrary to some impressions, the courts are very reluctant to interfere with any abuse of process application that a defendant cannot have a fair trial because the complaints are so old now. Witnesses have died, records have been destroyed and so on. That is a real change. Previously, there would be cases that would be stayed for abuse, in that it was simply too long ago. Of course, we have no limitation. Some countries look at our system and think there ought to be a limitation period, and that they would not try complaints some 50 years down the line, which, as I say, I have certainly experienced.

It is a very interesting question as to how much is in those statistics. I have seen the same statistics that Derek Sweeting has seen, and I do not think there is anything underneath yet as to how they break down.

Q161 **Chair:** My point is that, notwithstanding the undisputed concerns about how resources have been limited in recent years, when you are looking at the sort of case you have just tried, Ms Brimelow, it is rather more resource-intensive when you are searching back through witness statements and looking for witnesses who may be dead because the case is historic, without all the social media information that we can access these days. Is it fair to say that the limited resources are being stretched even more because a large part—however large—of these cases are rather more complicated because of their historic nature? They require more specialists or just a lot more time turning over a lot more stones, desperately trying to find some evidence, which probably, in many cases, does not come to courts simply because it is nowhere near the evidential thresholds that you would require, however much people may be convinced that that person was abused so many years ago by perpetrators who may no longer be on the scene anyway.

Ellie Cumbo: I would just question the view that those are necessarily more complicated cases than the ones where you have enormous volumes of digital data. On the one hand, yes, it is an advantage to potentially have more evidence available through people's mobile phones, but we must not underestimate the sheer amount of time it takes to go through that kind of evidence. I do not think I would accept the suggestion that there is an obvious difference in complexity there.

Q162 **Chair:** Without me leading the witnesses, as it were, there is pressure on

the police to take historic cases seriously, because of all the problems about the police previously not taking allegations of sexual offences against minors seriously. They are under more pressure not to say, "There probably was a case but it was so long ago". They have to investigate it, even knowing that it is highly unlikely they are going to be able to uncover the evidential base sufficient for it to proceed to court. But they need to go to those extra lengths to try to see if there is any possible evidence that they can find. That is more resource-intensive. I am not trying to downgrade the requirements.

Ellie Cumbo: I appreciate that, but let us not forget that one of the great challenges with rape and serious sexual offence cases is that the evidence mostly is witness evidence. In fact, it is going to be fairly obvious quite quickly whether there are sufficient witnesses still alive, to quote Kirsty Brimelow, or simply accessible in order to take part in those cases. I am not sure the scrabbling around to find other types of evidence manifests as often as you suggest.

Q163 **Chair:** Even finding those witnesses, maybe teachers at a school 50 years ago, and trying to track them down is quite a challenge in itself.

Kirsty Brimelow: I can give an example. I do not think that historic cases are draining resources or that they are not reaching the courts because generally there just seems to be, from a practitioner's perspective, a lot of historic cases. I do not know exactly what the figures are, but they are certainly all coming through.

The backlog spiked by 23% in the year leading up to the pandemic. Then we had a further spike of 48% after the onset of the pandemic. That is very important. This is the overall criminal justice system.

In terms of resources, I can give an example. I had a case not that long ago, which actually brought a judicial review against a decision of a police force not to charge on a historic sex offence complaint by a young man, relating back to when he was a child. In the end, it settled in that the police agreed to do that scrabbling around. There was a lack of going out there and asking obvious questions, in that case. I do not know how widespread that is, but we felt and we were correct that there was an early closing of that case when there should not have been.

In terms of resources generally, the extra pressure is on the huge volume of digital material, not on the age of the case. You tend to, just generally by the very nature, have less documentation. Frankly, it has all been destroyed and you fairly quickly get that information: "No records, no records, no records." Actually, there is less material, as a general rule, in those cases.

Q164 **Dame Diana Johnson:** I want to ask you about the end-to-end rape review. Before I do that, could I just come back to Kirsty Brimelow? You just made the comment that 22% of junior barristers and 46% of QCs have given up criminal practice since 2016. From a Bar Council perspective, what

does that mean in terms of the sustainability of the system? Could you just comment on that?

Kirsty Brimelow: Yes, it is alarming for two reasons. First, you have very serious cases that are not going to be prosecuted by those with sufficient expertise to prosecute them and not defended, which is equally as important, by those with sufficient expertise to defend them. We know, for example, that the CPS RASSO panel is 22% to 25% light of prosecutors. It is a real issue.

Secondly, there is no incentive for young practitioners to work in this area. That is, from a practitioner perspective, deeply sad for me personally, from seeing a wave of cases being listed properly, being expedited, having SOIT officers and having some cohesion, to where we are at now. This is not because of the pandemic; it was prior to the pandemic and hence those figures. People have just had enough. The good will has gone. Morale is through the floor. It is a really serious issue and it needs emergency funding very quickly.

Derek Sweeting: I would add that these are not barristers who are leaving the profession, generally. They are simply voting with their feet to go and do other things, because pure criminal practice is not sustainable in the way that it was before. What has happened with the pandemic and the backlogs is that we have just exposed it. The tide has gone out and we have seen now what the position is.

The capacity problems in the system at the beginning of the year were all about space and rooms, because of social distancing, but we have now touched the bottom in terms of the availability of experienced counsel to deal with these cases and, indeed, to sit as recorders. Most recorders are members of the Bar. That is why we are finding the CPS instructing Silks to do two-day rape cases, which they would not normally do. We are finding that briefs are being hoiked around chambers—40 sets—to try to find cover and so on. This is all fairly common stuff at the moment.

It is not just backlogs. Backlogs are, in a sense, irrelevant. It is timeliness. If you do not have the capacity, the work simply gets put off. You find that, as Kirsty was saying, somebody prepares a case, then it cannot be listed and that goes off into the long grass. That means that everyone involved, in particular complainants, are waiting for the case to be heard, which is the very thing we need to avoid.

Just as an aside in relation to this, we now have a competition within listing about what we prioritise. These cases ought to be prioritised. They were prioritised. At the moment, custody time limit cases are being prioritised, because of the size of the backlogs. Rape is an indictable-only offence, but most people accused of it are on bail and you are competing for a slot with a case where someone is on remand and, therefore, needs to be dealt with within the time limit, so 182 days, roughly six months.

Chair: Ms Cumbo, you wanted to say something.

Ellie Cumbo: I know that my Bar colleagues will not resile from this at all. This is as much an issue for solicitors as barristers. Our research suggests that there are 800 fewer firms as of this year than there were in 2010. That is nearly a halving of the level of resource available. Forgive me for repeating the mantra, but, bearing in mind that it is solicitors involved at the earliest stages of a case, that is going to have an obvious effect on this kind of case. It would be solicitors who would be advising at an early stage that the level of evidence suggests that a guilty plea and an early guilty plea might be the most appropriate option. If you do not have those expert defence solicitors available at an early stage, that is an obvious problem for exactly the problems you are looking at.

Q165 **Chair:** Just to be clear, that is 800 fewer firms of solicitors dealing with this sort of case.

Ellie Cumbo: Criminal firms, yes.

Q166 **Chair:** They have gone out of business or they are not dealing with criminal cases like this anymore.

Ellie Cumbo: They do not exist anymore, according to our research.

Q167 **Chair:** Out of how many is that, very roughly?

Ellie Cumbo: In 2010, there were 1,861 legal aid firms. As of April 2021, we are aware of 1,090 criminal firms. Of course, we are looking to the criminal legal aid review to respond to that issue and to emphasise the need for sustainability.

Q168 **Dame Diana Johnson:** Can I just follow up on that? Is there a regional difference as well? Is it more marked in certain parts of the country, the reduction in legal aid solicitors operating in the criminal law field or at the Bar, or is it everywhere?

Ellie Cumbo: There are certainly regional fluctuations for the solicitors' side of things. We published a heat map in 2018 that shows exactly what the regional impact of this is. I am very happy to provide that to the Committee.

Chair: That would be helpful.

Q169 **Dame Diana Johnson:** For the Bar as well, is it the same?

Kirsty Brimelow: In relation to the Bar, it is difficult to say whether there is more concentration regionally on where the barristers are leaving from. In relation to resources, it is felt very acutely in the south-east because of the volume of cases vis-à-vis the number of barristers now practising in criminal law. In terms of feedback, we are getting a real spike or a slight hitting in terms of complaints and the regular recurrence of hearing, "I am now giving up" or "I am just about hanging in there, to see if CLAR will actually allow me at the Junior Bar to earn more than £39 an hour after hundreds and hundreds of hours of preparation". That is the area. It is difficult to break it down precisely with the Bar.

Q170 **Dame Diana Johnson:** I want to ask you about the end-to-end rape review. Having just asked those questions to you, I am particularly interested in how much evidence you felt you were able to contribute to that rape review from the practitioners' side of this.

Derek Sweeting: We are engaged with the review.

Q171 **Dame Diana Johnson:** When you say "engaged", though, do you feel you were engaged enough? Were you able to contribute as much as you wanted to?

Derek Sweeting: We always want to contribute more. Sometimes Government engagement seems to be a little tick-boxish, or it can feel like that when you are doing it. We have certainly been involved in the process and have had input, so I would not say that we were not involved.

Q172 **Dame Diana Johnson:** That does not exactly sound like you feel that your involvement was fulsome.

Derek Sweeting: No, I would not say fulsome. I would not go that far.

Ellie Cumbo: I would be happy to clarify the specifics for the Bar Council, the Law Society and the CBA. We were all part of the Criminal Justice Board subgroup that had input into the rape review. I would not disagree with what Derek said necessarily about the level of that input, but we had the opportunity to discuss the direction in which the review was going. Derek and I both sit on the implementation advisory group that is now chaired by Victoria Atkins. We certainly are involved in the sense of being able to consult with civil servants on the next steps for the review.

Certainly from the Law Society, I would say that we have some concerns about whether the rape review is always mindful of that balance that I referred to earlier: the need to ensure that complainants' experiences and defendants' fair trial rights are always in balance. It is a very delicate balance. I should say that, whenever we raised that concern, it was well taken by those we were speaking to.

Q173 **Dame Diana Johnson:** Were you able to speak directly to Ministers? You mentioned Victoria Atkins there.

Ellie Cumbo: We are now, but not during the initial stage that led to the production of the report.

Q174 **Dame Diana Johnson:** I wanted to also get your view about the ambition in the end-to-end rape review to return rape prosecution rates to 2016 levels by the end of this Parliament, whenever that is, and whether you think that is actually achievable. Is that realistic?

Ellie Cumbo: Is the question to all of us?

Dame Diana Johnson: Yes, I would like all of your opinions.

Kirsty Brimelow: I have a concern with ambition and conviction rates. I have a concern generally with scorecards, metrics, figures, because what

we are dealing with is people and these are complex cases with real, human emotions. We need to perhaps put some colour into it.

The daily life of a criminal law barrister prosecuting and/or defending in these cases is dealing with witnesses who can be in extreme distress or tears; dealing with jurors who may have been physically sick in court after the evidence; dealing with violence coming from the public gallery or sometimes between jurors. All of this impacts. It all needs handling by advocates, as well as the judge, and all to ensure that the fair trial rights of the defendant are upheld. That is an absolute right. It must come first.

Of course, you must consider the complainant's access to justice. You must consider the complainant as a witness. There are a lot of protections around complainants, but there is also a lot of misinformation given to complainants.

Rather than having an ambition to drive up conviction rates, I would prefer to have an ambition that these cases are properly prosecuted and properly defended, and the resources go into them. Then you will see those results being sustained in a way that is seen more as acceptable.

Derek Sweeting: Can I just correct one thing, though? You referred to conviction rates, which is the dangerous sort of metric that Kirsty was referring to.

Dame Diana Johnson: Sorry, it is prosecution rates.

Derek Sweeting: Yes, actually, the Government articulate the ambition in this way: "to return volumes of rape cases being referred by police, charged and going to court back to 2016 levels by the end of the Parliament". That is the way in which it is put by Government. In answer to your question, my guess would be that it is going to be very hard to do that.

Dame Diana Johnson: Would anybody else like to comment on that?

Ellie Cumbo: I would agree with all of that.

Q175 **Dame Diana Johnson:** Just on this end-to-end rape review then, are there specific things that you would have liked to see included in it that you think would help the Government achieve that target? Is it about additional resources? We have talked a lot about that. Is it about doing something about how barristers and solicitors are paid? Is that how we have to go?

Kirsty Brimelow: I do feel we have a lot of reviews. In some ways, the landscape of trials and prosecutions with sexual offences cannot keep up with all the reviews, the policies that we have and the proposals. What is lacking each time is the money for the practitioners who are being asked to do this work. Without that money, any rape review is worth, frankly, the paper that it is written on.

Ellie Cumbo: I would agree entirely with that. It was an obvious gap in the terms of the review, which were clear. We understood them and we participated on that basis. A great many of the very positive recommendations from the rape review are procedural and cultural. They cannot take effect in an infrastructure that is lacking.

Derek Sweeting: The picture you have is that there has been a reduction in capacity, ability and experience among solicitors, among barristers, and among police officers, who used to be there in greater numbers with the experience to investigate these cases. That is endemic and many of the recommendations are either things that do not seem to have a price tag attached or things that plainly do, and they jump out of the page as something that will need to be resourced. Without some guarantee that there will be sufficient resourcing, we are not going to be in a position to make good all those deficits, which are accumulated deficits. We have not suddenly arrived here.

The other part of the broader picture is that, although the investigation and prosecution of rape has particular features, as we have discussed in the course of the evidence, that make it stand apart from some other areas, it is not apart from the criminal justice system. You cannot expect to improve one particular part of the criminal justice system, which, like every other bit, requires resources, experience, skill, committed people with the morale to see these things through, and regard that as something that can be done in isolation. It has to be part of a much bigger series of re-floating and refunding criminal justice.

Q176 **Chair:** Can I ask you, Professor Lewis, one further question on that? Then I will ask a couple of wind-up questions for all of you at the end of it. You are leading through the Law Commission on the law, guidance and practice around the use of evidence in prosecutions of sexual offences. What areas are those going to cover and what are the potential outcomes of the project that you foresee?

Professor Lewis: The potential outcomes would be the usual recommendations for reform of the law. Let me tell you about the areas we know we will be looking at, or are confident we will be. Some of them were mentioned in the rape review report, which included this ask of the Law Commission, to look at the rules of evidence.

One is how the law should respond to misconceptions. The current method is judicial direction to the jury. We will be looking at that, but we will also be looking at the possible admission of expert evidence to counter misconceptions. Finally, there are other forms of usually pre-trial juror education. Professor Thomas was talking about her work, some of which will involve testing of video that would be played to jurors before the trial starts, explaining the misconceptions that may be present and providing rebuttal of those where they are factually based.

The second area is the admission of sexual history evidence in relation to the complainant. There, we will be looking at what are known as the

gateways. When is it that that evidence is admissible? We will look at other models. There are other ways of structuring a restriction on sexual history evidence. One could, for example, have impermissible lines of reasoning set out in the legislation rather than a categories approach, which is what we have. We have greater restrictions where the issue is one of consent, and wider provision where it is not an issue of consent or where it is rebutting the prosecution's evidence.

Again, as I mentioned in relation to medical and counselling records, we will look at the process as well as the substantive rules. Should the complainant be legally represented at the hearing to decide on the admissibility of sexual history evidence, for instance? Should there be a right of appeal from that decision to admit sexual history evidence? Medical and counselling records or personal records more generally, I have already mentioned, is something that we have been specifically asked to look at.

Character evidence was also mentioned, so good character or bad character in relation to both the complainant and the defendant, and the judge's directions to the jury about how they should deal with the character evidence that has been admitted.

The final area has also already been discussed. That is special measures to help the complainant give his or her best evidence and have, hopefully, a better experience of going through what can be a retraumatising process, as I know you have heard. There is a division of responsibility here. The Government have taken on the question of how implementation of existing special measures should occur, with particular reference to section 28, so the provision that allows for the introduction of pre-recorded cross-examination and re-examination. They are looking at starting with a greater number of pilots and then rolling it out more generally.

We are looking at the law reform questions. Do the provisions governing special measures require reform? Should there be additional types of special measures available, or different ways in which the special measures become available in relation to this group of complainants? We will certainly talk to practitioners about their experience of the use of particular special measures. I know, for instances, Sir John Gillen was talking to you about evidence given in private. That is something that anecdotally we have heard is not used very much, but Northern Ireland is looking at using that and, in fact, much more broadly, we will be looking at using it or the evidence in relation to it when the complainant is giving evidence.

Q177 **Chair:** That sounds like quite a big project. What are the rough timescales of when you are going to report?

Professor Lewis: The rough timescale is 18 months from the beginning of next year. We are already in the process of producing a background paper, which will set out the issues that I have just highlighted, what the law currently is and what the law reform options might be. That will be designed to be read by anyone, so members of the public as well as

lawyers, stakeholders, operational people, police, prosecutors, etc. It will set out the things we are interested in looking at.

Then over the course of the next few months we will be doing what we call stakeholder engagements, so talking to all of those who work within the system, talking to victims, organisations that support victims, lawyers and police officers, to try to formulate provisional proposals for reform. We would then put that out in a consultation paper and engage in an in-depth public consultation, which we anticipate running over the summer into the autumn of next year.

Having done that, we almost always change our minds, having talked to the public, which is a really important feature of the Law Commission's work. There is not much point in consulting if you are not prepared to change your mind. We need to hear from members of the public, and from those involved in the system, what will work and what will not work. Then we will look at publishing a report with formal recommendations for law reform, which we would anticipate laying in Parliament in June 2023.

Q178 **Chair:** This is completely hypothetical and for the practitioners. Looking upstream at this whole infrastructure, say the Government were to double the number of police officers tomorrow, which is not going to happen, and they were proportionally put around all the areas they look at, which would involve lots more officers dealing with sexual abuse inquiries, perhaps specialist support officers, etc . What would the impact downstream be on the legal profession and how you then dealt with more evidence, more researched evidence or more detailed evidence coming forward to the CPS and potentially ending up in court? What are the implications of that for you?

Kirsty Brimelow: With the doubling of police officers, looking upstream, the fundamental question is who these police officers are going to be. If they are junior recruits, they are going to come in not with sexual offences specialist training. What is needed is to rebuild the former system, where you had really fantastic officers who were trained in dealing with complainants in sexual offences, which enabled us to go around the world and say, "Look at our system. Look at what we are doing, which is great". We can no longer do that. That is the first point. The number itself is not necessarily going to make any difference. It is going to take time as well, because you need to get that training in there.

As to what effect it will have downstream, as more time goes by without funding, we can see a pattern of barristers who are prosecuting these cases leaving. With no injection of funds into legal aid, practitioners are being asked or directed to travel to a court for £90 in a sexual offences case, plus they have to pay their own rail fare, just as one example. Then they have to pay cost to chambers and self-employed tax on top of that. It is for that reason that there will not be barristers to actually do these cases. That is the fundamental issue.

There had been a promise that the CLAR report would be published by the end of the year. That has been repeated publicly from the Ministers and has been the message to the Criminal Bar Association. We understand, as of yesterday, that that promise appears to have been slightly neutralised, in that it is not definite. Whether members of the Criminal Bar will wait any longer or will simply say, "We will no longer take return cases in order to keep the criminal justice system going" is a matter that is debatable. That is a real concern for us, who have been working so hard to try to support everyone within the criminal justice system, from witnesses and complainants right through to Government.

It is a real concern for us that that final bit of good will, which is looking for an injection of money from CLAR, is going to be pulled away and pushed back even further. I should say, on suspension of any action by the Criminal Bar Association, they have been waiting since 2018. They are fairly tolerant people. My concern is that there will be no Criminal Bar left to do these cases.

Chair: Mr Sweeting, do you have anything to add to that?

Derek Sweeting: Your question is an Aladdin's lamp one. If we suddenly had a doubling of the number of experienced police officers dealing with rape cases, all those cases would come downstream and there would not be the capacity to deal with them. It is an obvious point.

In the real world, we can see what that means, because we do have a promise to increase the number of police officers by 20,000. That gets us back to a position we were perhaps at some time ago. If you look at the spending review paper, that envisages that over the three-year period of the spending review we are going to reduce the backlog from 60,000 to 53,000. Obviously, that is taking into account cases coming into the system. Those figures include what we have been talking about this morning: rape and serious sexual offending.

There is no real explanation in the Treasury paper of why that figure appears so unambitious: 7,000 to get us down to 53,000. It was 37,000 before we hit the pandemic. That was already far too high, and deliberately so. One explanation that has been given is that we are going to expect more work coming from the 20,000 police officers. We can see already that, as soon as you start increasing the amount of police work that is being done at the outset, you are going to have to either have more resources or accept that you cannot do as much.

We come right back to the point I was making about organisations having to fit what they can do to the resources they are given. This is, in the end, not really about those backlog numbers; it is about timeliness. That is what the NAO was saying when it was looking at the position. We are going to see these backlogs and delays in the system persisting past 2024. In the context of what we have been talking about with these sorts of cases, we know the one thing that matches delay is attrition. People give up. That is where we let the victims of sexual violence down.

Q179 **Chair:** I have one last, slightly niche question. Yesterday we took some quite alarming evidence in private from four deaf women victims of sexual abuse. They said some quite alarming things. Because of the lack of availability of signers and others, the witness statements and everything that they would have been expected to give early on did not happen, as a result of which certainly one of the cases resulted in a not guilty verdict in what otherwise was a quite clear guilty case. The resources and the specialisms were not there all the way through the system. Do you acknowledge that? Are there other groups of victims with particular disabilities or challenges who you think are being disadvantaged because we are not able to support them, at whatever level?

Kirsty Brimelow: Yes, I certainly acknowledge that. In fact, even more fundamentally, it is quite common—I had an example from a CBA member very recently, in the last week—that a case will be listed and the interpreter does not arrive or it is the wrong language. Then the case gets kicked into the long grass. In terms of the system as well, we have real issues with defendants being brought to court late. That might be something to do with the contract, in that contractors are only contracted to bring defendants for 10 am when the courts now are trying to sit at 9.30 am, or they are actually sitting at 10 am but it is not factored in that the barrister needs to see the defendant, resulting in more delays, which can also push the case out. There are all sorts of issues with support.

The other aspect, in terms of support for complainants and the current set-up and support mechanism, is that we need to have nationalised training for any groups that are supporting complainants. Information needs to be given by those people who are supporting complainants, for example that notes are potentially disclosable. Those who are supporting complainants need to understand properly how the court system works. Sometimes horror stories are given to complainants that just do not reflect the reality of what happens in court.

The final aspect I would point to is that intermediaries can be very helpful. They have national training with one service provider. That is a good model to follow. They have a framework of ethics also, which is a good framework. That needs to be rolled out more for use by defendants, who also can be vulnerable.

Ellie Cumbo: Can I give a final example of the way in which both professions—the Bar and the solicitors' profession—clearly work very hard to address those vulnerabilities, which undoubtedly exist? To answer your question, it simply stands to reason that it must be harder for more vulnerable groups than others. The advocacy and vulnerability training was made available by both professions proactively in response to concerns raised in the public domain about the way in which vulnerable witnesses were treated, specifically as part of the examination and cross-examination process. I believe it is considered to have been a really successful approach, which the professions have taken very seriously from the start.

It is a great example of what happens when everybody works together with the same aim, which is just outcomes for all.

Chair: Thank you very much. That is some very helpful and detailed evidence for our inquiry. If further issues have arisen out of this on which you would like to add subsidiary evidence or any other detail—Ms Cumbo, you said you would provide us with some hotspot details—please pass those to the Clerk and we will add them as part of our review. Thank you very much for this morning's session.