

Written evidence submitted by the Victims' Commissioner for England and Wales, Dame Vera Baird QC (INV0016)

About the Victims' Commissioner

The Victims' Commissioner for England and Wales is dedicated to promoting the interests of victims and witnesses.

The role of Victims' Commissioner is to promote the interest of victims and witnesses, encourage good practice in their treatment and keep under review the operation of the Victims Code.

Submission

In answering the committee's questions, I will confine my answers to the aspects of the questions which concern victims*.

Whether victims have access to justice, whether witnesses are sufficiently supported, and whether there are sufficient safeguards for those who are accused of rape and sexual offences to ensure that they receive a fair trial;

1. Not all victims want to engage with the criminal justice system but for those who do the system is currently failing. Most rapes go unreported, for complex reasons including victims' perceptions of the system.
2. The Committee will be familiar with the catastrophic drop in prosecutions which occurred after 2016/17 and which has yet to be reversed. We cannot claim to be providing justice for rape victims as prosecutions let alone convictions are scarce.
3. As outlined in the IMKAAN report¹ 'Reclaiming Voice' certain categories of women face additional barriers to accessing justice, whilst experiencing disproportionate levels of violence and abuse.
4. We know from the Crime Survey for England and Wales (CSEW) that crime disproportionately affects minoritised groups. For example, the latest ONS data on victims of sexual offending² shows:

¹ Reclaiming Voice: Minoritised Women and Sexual Violence Key Findings, Dr. Ravi Thiara (University of Warwick) and Sumanta Roy (Imkaan), March 2020, Accessed at [Resources — Imkaan](#)

² *Sexual offence prevalence and victim characteristics, England and Wales, Year Ending 2020*. Appendix Table 5 .See: [Sexual offences prevalence and victim characteristics, England and Wales - Office for National Statistics \(ons.gov.uk\)](#)

*I have chosen to refer to victims here for the purposes of this submission in my official capacity as Victims' Commissioner as it is a term frequently used in the CJS context. On a few occasions I use complainants as it is contextually the correct term. I use 'victims' for consistency whilst acknowledging that this is not a term that

- 3% of all women aged 16 to 74 experienced any sexual assault in the year end March 2018-end March 2020, compared to 3% of white women, 5.4% of mixed-race women, 4.4% black/ black British women and 5% of disabled women.

It also shows disabled women are more likely to experience rape:

- 1.9% of disabled women compared to 0.8% of all women had experienced rape including attempts once or more in the year ending March 2018 to the year ending March 2020.
5. Data on victims in the CJS is sparse. The CSEW is our only source of representative, reliable, disaggregated data on victimisation but the survey has moved to telephone during Covid meaning questions relating to sensitive crimes like sexual offences and domestic abuse have not been asked, because of difficulties of answering while in their homes.
 6. To understand why some victims, use the CJS, others don't and whose cases go forward and whose not, all CJS agencies must be required to record disaggregated data across protected characteristics. The data must be in the same format across CJS agencies.
 7. Ideally, data should make it possible to track victims through the system, much like the Common Platform should enable us to do for offenders. It is inexplicable why this is possible for offenders and not for victims. This is a vital tool in ensuring rape victims' support and justice needs are met.
 8. It is crucial victims can access support. The specialist sexual violence sector is suffering from years of chronic underfunding.
 9. At the Prime Minister's 'hidden harms summit' last year, Government committed to creating a sustainable funding model for the provision of specialist sexual violence services, including 'by and for' services. The value of support services to victims is well understood and it is urgent this model becomes a reality Increased need for these services was evident during the pandemic and since the killing of Sarah Everard and 'Everyone's Invited'.
 10. Ministry of Justice has led other departments in the speedy delivery of emergency funding for these services but one-off, short-term funding leads to instability of service from charities who already exist hand to mouth. Nor can it allow recruitment and retention of highly skilled workers. For instance, ISVA training takes about 6

months and ISVAs commitment to client support is generally at least 6 months. Short term funding, clearly can't meet this need

11. Clinical supervision and mental health support are vital for ISVAs and others working with victims of sexual violence due to the risk of vicarious trauma³. Government funding should cover this to optimise its investment by reducing turnover and loss of vital staff.
12. Concerns about disclosure of complainants pre-trial counselling notes deter many victims from accessing therapy until after trial. CPS recently consulted on new guidelines⁴ on this but the post-pandemic courts backlog has lengthened the time victims may go without therapy, potentially deepening their trauma. The situation is precarious for victims who risk their notes being disclosed to the defendant should they have counselling pre-trial. CPS have not published new any new guidelines to address this unacceptable practice which is a key deterrent to reporting

The role of the police, Crown Prosecution Service (CPS) and the courts in reporting, prosecuting and convicting in cases of rape and sexual assault, including the advice and guidance that is used to train, educate and support those involved in the disclosure, charging and prosecution of rape;

CPS Role in declining prosecutions

13. At a time when reports to police of rape were at a record high, CPS prosecutions dropped precipitously, over two years, to the lowest since records began. This began in 2016/17.
14. Prosecutions have remained at the same unacceptably low level ever since, notwithstanding stakeholder meetings, campaigning, significant public criticism and a judicial review. This is the issue demanding most attention and the strongest action from Government. It is imperative Government directs the reversal of this position. There can be no objection to an ambition to return CPS prosecution volumes at least to those of 2016/17 whilst ensuring proper consideration on a case by case basis. Rape complaints have considerably increased since then. Further, the volume of prosecution in 2016/17 was consistent with prosecution levels for the preceding decade⁵.

³ [Research - LimeCulture](#) – see recent research on ISVA coping mechanisms and support.

⁴ Accessed at [Draft guidance on pre-trial therapy | The Crown Prosecution Service \(cps.gov.uk\)](#)

⁵ The committee will be sent an up to date version of my briefing on the CPS data in RASSO cases, the committee was sent a previous version last year.

15. To try to make the CPS prosecute rape, up to 4,000 rape victims crowd-funded the End Violence Against Women Coalition to bring a judicial review. EAWC challenged the lawfulness of a decision taken in 2016/17, expressed in a CPS document as, '...lift(ing) the annual conviction rate' to an 'ambition' of 60% by taking 350 'weak' cases' out of the criminal justice system every year.⁶ The conviction rate is the number of convictions as a percentage of the cases charged. The decision involved removing guidance called 'the Merits-based approach' (MBA) from CPS training documents. The MBA told prosecutors assessing whether cases met the threshold for a charge in the Code for Crown Prosecutors to assume an unbiased jury, uninfluenced by rape myths and stereotypes. EAWC also challenged the lawfulness of taking a risk that without the MBA and pressed by CPS Head Office to get a 60% conviction rate, prosecutors might drop cases involving rape myths and stereotypes, predicting they could play to juror's prejudices, the so-called 'bookmaker's approach' to prosecuting.
16. The Court decided the CPS decision was not unlawful or irrational because the conviction rate had fallen somewhat, the CPS had suffered bad publicity from four quick jury acquittals and Head Office blamed confusion around the MBA for some 'weak' prosecutions which should not have been brought. The Court also said that the decision ought not to risk prosecutors using the bookmaker's approach because it was just 'to restore the primacy of the full Code test' which all agreed was the same as the MBA. The consequences which have followed that CPS decision over the past 4 years were not considered by the court in determining whether it was lawful at the time it was taken. That is easily understood but means the case did not tackle those consequences.
17. Whatever its rationale, what followed from the CPS decision to take 350 'weak' cases out of the system and abandon the merits-based guidance was the collapse of rape prosecutions.
18. CPS leadership recognised expressly in the document proposing this cut in 'weak cases' was the significant risk that a change to the approach to Code decision-making may lead to over-correction/ over-steer i.e. a failure to prosecute where the Code test is met and that would be undesirable.
19. This risk is easy to understand: If, in one year, I prosecute 20 cases which meet the Code for Crown Prosecutors and 11 are convicted my conviction rate is 55%. But if the next year I reject 'weak' cases in order to reach the desired 60% conviction rate and only prosecute 10 of which 6 are convicted, I will have succeeded. However, I have prosecuted fewer people, so those who can be convicted are fewer and only 6 people have been convicted of rape when 11 were before.

⁶ See paragraphs 53 and 56 of the judgment at: [End Violence Against Women Coalition -v- Director Of Public Prosecutions | Courts and Tribunals Judiciary](#)

20. Notwithstanding the risk, the decision was taken and has never been reversed. In the first year following the decision there were approximately 850 fewer prosecutions, far in excess of the target of 350. In the next year there were over 1,000 fewer rape prosecutions. In the decade before the decision, more than 3500 rape cases had been prosecuted every year but in that second year 18/19 there were only 1,758 prosecutions. In every year since, prosecutions have remained the lowest since records began
21. Before the decision, in 2016/17 CPS charged 55.5% of the police referrals, but two years later they charged only 34.4%.
22. Police rape referrals fell slightly between 2016/17 and 2017/18 – by around 200 – and then dramatically, by around 1,000, the following year. The huge drop in prosecutions taught police that working on some kinds of rape case referral was futile, likely to result in failure. DCC Sarah Crew, the National Police Chief’s Council lead on rape met with the Director of Public prosecutions, in 2019 and, amongst other operational issues raised - as she described in a letter reporting to rape specialist officers.

‘Approach to charging rape and serious sexual assault cases – a move to a more risk averse approach’⁷

23. When prosecutions and convictions continued to fall, the National Police Chiefs’ Council’s leads for rape, domestic abuse and charging issued a Joint Statement in July 2020:

‘We are hearing from our officers that it is becoming harder to achieve the standard of evidence required to charge a suspect and get a case into court. Victims tell us clearly how important it is to them to have the evidence tested in this way’⁸

24. DCC Crew told the Guardian officers were trying ‘really hard’ to work with prosecutors to reach the required standard but were finding the amount of information required had increased and the process was taking longer.

‘The second point they tell me is that they think that ‘the interpretation of what is required, the evidential test, has changed’.⁹

25. It is notable that even in police force areas where police increased the number of referrals to the CPS, the proportion of cases charged still decreased.¹⁰

⁷ Reported in the Guardian 13th September 2019 EDT 12.32

⁸ Reported in theguardian.com 13.38pm EDT 30th July 2020

⁹ Reported in theguardian.com 13.38pm EDT 30th July 2020 (ibid)

¹⁰ Reported in the Guardian 13th September 2019 EDT 12.32

26. The CPS 'ambition' of a 60% conviction rate has been surpassed; the current rate is 68.5%. To get that increase (it was 57.6% in 2016/17) CPS now prosecute so few cases that rape convictions halved from 2,991 in 16/17 to 1,439 last year. Hundreds of rape victims are being denied the possibility of justice and as my victim/ survivor survey (surveying experiences of the CJS)¹¹ shows, are being re-traumatised by police and CPS negative decisions, which they referred to as 'devastating' (this word was repeatedly used by survivors in my survey).
27. At no point has responsibility has been accepted by CPS for the failure satisfactorily to carry out the job which only it can do- prosecuting viable cases. Nor has the Attorney General's Office caused a reverse, despite its role of 'superintending' CPS.
28. This collapse must be reversed. This requires reversal of the CPS decision that CPS Areas will be judged on their conviction rate and the reinstatement of the MBA, which contributed to an incremental increase in prosecutions and convictions prior to its withdrawal. Reversing the impact this had had on prosecution culture and through it, police culture is imperative. Since DCC Sarah Crew expressed publicly the views above, there has been an increase in police referrals, presumably to seek to drive CPS to charge more cases. Since complaints of rape have continued to rise, there is a sound case for an 'ambition' to return to prosecuting at least as many cases each year as in 2016/17.
29. Up to 600 prosecution decisions were analysed and made public through the judicial review and there were 20 detailed case studies in addition, all showing prosecutors taking into account rape myths and stereotypes in their decision-making since the decision to abandon the MBA.

Areas for improvement

A trauma -informed system

30. A lack of understanding of the multiple impacts of trauma is well evidenced as influencing attitudes and judgements across criminal justice agencies. For instance, one widely held myth is that a person who is raped will complain without delay. It is well understood by the courts as such and has been the subject of a direction to 'bust' that myth since 2009. It acknowledges that counter-intuitively, feelings such as guilt and shame deter genuine victims from complaining. Yet, amongst the up to 600 CPS cases in the judicial review are several where failing to report immediately has

¹¹ Rape survivors and the criminal justice system, Victims' Commissioner, October 2020, Accessed at [Rape survivors and the criminal justice system - Victims Commissioner](#)

contributed to CPS decisions not to charge; one example why there must be trauma training for all actors in the CJS.

31. Training should also cover how they conduct their roles in a way which is not re-traumatising, designed and delivered in collaboration with properly remunerated specialist sexual violence organisations.
32. Consideration should be given to juries also being informed on trauma by way of an instructional video or admission of expert evidence at trial.

Offender-centred police investigation

33. Although it is surprising when set out coldly, investigation of rape cases often appears to focus on the complainant rather than the offender. This was one of the key findings of my rape survey¹² –excessive levels of digital download and personal material routinely demanded exacerbates the problem. An offender-centred police investigation process was designed by Professor Betsy Stanko et al.¹³ and is currently being piloted in Avon and Somerset. This model should be funded for wider pilots over a 3-year period.

More transparency about the impact of ‘Early Investigative Advice’ from CPS to police where it, de facto, puts an end to a prosecution

34. When EIA is negative as to the future of a case, there is no Victims Right to Review the CPS decision not to prosecute since ostensibly CPS have not made a negative charging decision. However, as police have to follow such advice, there can be no meaningful review of the police decision since they followed CPS advice. This leaves a victim without a review contrary to the principle in Killick¹⁴ that a review should be available where a decision involves ending a case. The position needs to be made transparent in every such case and a review made available, in these circumstances, against CPS EIA.

Speedy roll out of Section 28 of the Youth Justice and Criminal Evidence Act 1999.

35. As recommended by Lady Dorrian in her report on the Scottish system¹⁵ and by Sir John Gillen in his report on Northern Ireland¹⁶, the use of S28 should be the default position offered to all complainants in rape and sexual abuse cases. The

¹² Ibid.

¹³ Project Bluestone currently in pathfinder stage in Avon and Somerset Police. [Avon and Somerset Police announce research collaboration to transform policing response to rape | Avon and Somerset Police](#)

¹⁴ R v Christopher Killick [2011] EWCA Crim 1608

¹⁵ Ibid (footnote 17)

¹⁶ <https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni>

complainant's evidence in chief is videoed as early as is reasonably possible following the police Achieving Best Evidence process. That video is served on the defence and cross-examination takes place as soon as fairly possible and is itself videoed. The complainant is then free to leave the case and their evidence is the two videos. This has huge advantages. It shortens victim involvement with the court system, especially important while there are long delays. The evidence is taken while the memory is fresh and therapy can be delivered where needed with no concerns about impact in the trial. It is now standard practice in many other jurisdictions¹⁷. As Lady Dorrian observes:

*'The benefits are such that it cannot be disputed that this is a change which must be made as soon as possible'*¹⁸

What the barriers are to reporting, charging, prosecuting and convicting rape and sexual assaults;

36. I focus on rape myths and stereotypes as a massive barrier here.
37. The effects of rape myths and stereotypes on police, CPS, judges and juries have been researched over decades and shown to affect investigations, charging decisions, court proceedings and jury decision-making.¹⁹ This is widely accepted and CPS's updated RASSO guidance²⁰ includes an extensive appendix on this topic. Government research for its 'Rape Review' found '...rape myths continue to affect all aspects of the criminal justice system from the investigation and charging stages through to trial.'²¹ Police Chiefs²² also accept they are an issue.
38. They are so pervasive that many individuals will have taken these views on at an almost unconscious level. The need for training all actors is obvious. Judges should give the jury direction they have available from the Judicial College to 'bust' on rape

¹⁷ Western Australia (since 1992), Queensland, South Australia, Victoria, the Australian Capital Territory and the Northern Territory in Australia

¹⁸ See page 36, para 2.10 of the Dorrian Review (ibid)

¹⁹ Temkin, J., Gray, J. and Barrett, J., 2018, Different functions of rape myth use in court: findings from a trial observation study. *Feminist Criminology*, 13(2): pp. 205–226, Smith, O. and Skinner, T., 2017, How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials. *Social & Legal Studies*, 26(4): pp. 441–466, St George, S. and Spohn, C., 2018, Liberating Discretion: The Effect of Rape Myth Factors on Prosecutors' Decisions to Charge Suspects in Penetrative and Non-Penetrative Sex Offenses. *Justice Quarterly*, 35(7): pp. 1280–130, Vanessa Munro, and L. Ellison, 'Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberation' (2013) *International Journal of Evidence & Proof* vol 14

²⁰ <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-overview-and-index-2020-updated-guidance>

²¹ Appendix C of the report (in press)

²² National Police Chiefs' Council lead for Rape, Deputy Chief Constable Sarah Crew about the Joint national action plan <https://news.npcc.police.uk/releases/police-and-cps-collaboration-to-drive-up-performance-on-rape-and-serious-sexual-offences>

myths at the outset of a trial and both they and the prosecution should be on alert for their deployment at court. The CPS should have these in mind when building cases. Government should run public awareness campaigns and undertake regular attitudes research to understand prevalence and change.

Challenges around disclosure and whether the current disclosure arrangements affect the reporting, investigation, prosecution and sentencing of rape cases;

39. The challenges for victims are not around the disclosure regime itself (save perhaps for pre-trial therapy) but in the intrusive and voluminous nature of what is sought from them.
40. There must be significant cultural change across CJS agencies regarding digital disclosure. This could be achieved by amending the clauses around digital disclosure in the Police, Crime, Sentencing and Courts Bill (PCSC Bill) to enshrine victims' protections in statute. As has been well documented, inspections and in my own survey of rape victims²³, the demands for digital (and other forms of) disclosure from complainants by the CPS via the police²⁴ are at unacceptable levels and are inappropriately intrusive and a frequent cause of attrition.
41. This level of intrusion escalated following the Allan case, as outlined in the HMCPSI 2019 rape inspection²⁵, exacerbating a culture in the CPS of requiring as much material about the complainant as early as possible whether or not there was any relationship between complainant and defendant and irrespective of Article 8 rights to privacy. The digital disclosure clauses contained in the PCSC Bill²⁶ legitimize current excessive practice. This would be extremely problematic when a CPS internal report (still unpublished) showed almost two-thirds (65%) of rape cases referred by police to the CPS for early investigative advice (EIA) had disproportionate requests for information²⁷. HMCPSI found around 40% of CPS requests were not

²³ <https://victimscommissioner.org.uk/news/survey-finds-rape-victims-have-lost-faith-in-the-justice-system/>

²⁴ The ICO found that demand for this material is CPS driven – 'Mobile phone data extraction by police forces in England and Wales Investigation report', June 2020: https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf

²⁵ <https://www.justiceinspectorates.gov.uk/hmcpsi/wpcontent/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf>

²⁶ <https://bills.parliament.uk/bills/2839>

²⁷ Leaked to and reported in the Guardian, March 2020 <https://www.theguardian.com/law/2020/mar/15/cps-failed-to-tell-inspectors-of-internal-review-revealing-case-failings>

proportionate²⁸ and the Northumbria pilot of Independent Legal Advisers²⁹ found that in only half of cases referred requests were appropriate, while the other half were open to challenge (most of which were upheld). Government should amend the clauses in that Bill to ensure protections for victims are enshrined in statute, driving cultural change

A footnote of the case of R v Allan:

42. This case is sometimes claimed by CPS as the key reason for the collapse in rape prosecutions. The End to End Rape Review research shows the fall in charging had already begun before Allan and continued arguably deepening after it.
43. Material downloaded from the complainant's phone seems to have been exculpatory of Mr Allan but although the police had it, it was not disclosed until after the trial had started. Mr Allan was severely wronged in this way. However, this had nothing to do with the need to get more digital material from victims and failure to disclose material has been an ongoing issue in the CJS across all crime types. What followed was a CPS diktat to police, subsequently withdrawn but which survives in effect, that all possible digital material and third party material such as health records must be obtained by police and sent to them before they will consider a charge in a rape case. This escalation was outlined in the HMCPSI 2019 rape inspection³⁰ and must be reversed.

Free legal advocacy for rape victims/ survivors

44. One solution to the above is free legal advocacy for complainants of sexual violence.
45. The success of the Sexual Violence Complainants' Advocates Scheme in Northumbria³¹ has evidenced the benefits of such a scheme. It should be noted that the Criminal Bar Association is in favour of this nature of representation when a complainant's human rights are in play. In addition to access and disclosure issues, they advocate extending it to cover applications for access to previous sexual history evidence under S41 Youth Justice and Criminal Evidence Act 1999.
46. There are other adversarial jurisdictions that have successfully incorporate some form of advocacy for victims of rape:³²

²⁸ 74 Paragraphs 5.22 and 5.52

<https://www.justiceinspectorates.gov.uk/hmcpsi/wpcontent/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf>

²⁹ Further information in the Northumbria advocacy evaluation- Ibid.

³⁰ In the HMCPSI rape inspection, 71% of lawyers surveyed felt that lawyers were making more frequent requests for digital data since January 2018. See: [Rape-inspection-2019-1.pdf](https://www.justiceinspectorates.gov.uk/hmcpsi/wpcontent/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf) ([justiceinspectorates.gov.uk](https://www.justiceinspectorates.gov.uk))

³¹ <https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf>

³² Further information in the Northumbria advocacy evaluation- Ibid.

Jurisdiction	Remit of Legal Advocacy	Stage of CJS
Australia - NSW	Submissions on disclosure of evidence relating to privacy e.g. counselling and medical records.	Pre-trial case management
Australia – South Australia	Challenge applications to discover confidential records, e.g. counselling records	Pre-trial case management
Canada	Submissions regarding sexual history evidence. Submissions relating to privacy e.g. medical or counselling records. Most states offer free legal advice (not representation) limited up to 4 hours before the trial stage.	Before report to police, pretrial case management
India	Victims entitled to hire private legal representation and support as required.	Throughout process
Republic of Ireland	Submissions regarding remit of sexual history and counselling records (but not currently medical, psychiatric, or social work records).	Investigation, pre-trial case management
Scotland	Submissions regarding disclosure of medical records and digital downloads.	Pre-trial case management
US	Submissions in response to applications to adduce private records and sexual history.	Pre-trial case management

47. Sir John Gillen in his review of rape in Northern Ireland ³³ recommended a degree of publicly funded legal advocacy should be offered to complainants at the pre-trial stage. Lady Dorrian's review recommends publicly funded legal advocacy, in particular for complainants to assist with applications to use previous sexual history, and also refers to their use in disclosure matters. ³⁴

The success of organisational strategies and plans, for example the Joint National Disclosure Improvement Plan and the CPS' RASSO 2025 strategy.

48. These have not really been in place long enough to comment on whether they have made significant change however I have concerns that given the problems with the system outlined above they are not radical enough to create the real lasting cultural change that is needed here.

June 2020

³³ <https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni>

³⁴ See p.8 of the Dorrian Review (ibid).