

**Written evidence submitted by Dr Rebecca K Helm, Director and Clinic Solicitor
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1. I am the Director of the University of Exeter [Evidence-Based Justice Lab](#), an interdisciplinary group specialising in behavioural and data science research, and applying this research to the legal system. I have been researching behavioural science underlying the criminal justice system for almost ten years. I am currently the Principal Investigator on a large project funded by UK Research and Innovation examining how juries evaluate testimony, including testimony of complainants and defendants. Cases involving sexual offences, including rape, are a key part of this work, due to the central importance of oral testimony in many of these cases. My research group also maintains a miscarriages of justice registry, logging convictions that have been found to be unsafe by the Court of Appeal on the basis of error of fact.
2. My submission focuses primarily on:
 - 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; and
 - What the barriers are to reporting, charging, prosecuting, and convicting rape and sexual assaults.
3. The submission will look at difficulties for juries (and even experts) in cases where evaluations of competing testimony are central to determinations of guilt (as is often the case in rape cases, particularly cases involving acquaintance rape). I will look at challenges in appropriately identifying and weighting cues in testimony, and how these difficulties can lead to an influence of misconceptions (including rape myths) and bias in judgments. I will then provide a brief overview of the data on miscarriages of justice in rape cases contained in the miscarriages of justice registry developed by my research group, provide case studies illustrating miscarriages of justice in this area, and identify relevant patterns and lessons that can be drawn from the data.

Jury Decision-Making in Cases Largely Reliant on Competing Testimony

4. A relatively significant body of work in psychology and law has examined jury decision-making in cases involving rape and other sexual offences. This work highlights both the risk that jurors systematically fail to prosecute in these types of case, and the special risk of miscarriages of justice in these cases. An obvious problem is the centrality of evaluations of competing testimony to determinations of guilt in many cases of this type (eg where it is undisputed that sexual intercourse took place and the question for the jury is primarily whether that intercourse was consensual). The following information relates to those cases in particular where the primary task of the jury is deciding whose account they believe – the complainant's or the defendant's. This task is one that is difficult to complete objectively. Research to date suggests that laypeople and even experts are generally ineffective at determining whether a person is telling the truth (one meta-analysis of 206 studies showed that on average people correctly classify accounts as truth or lies only 54% of the time, see [Bond & DePaulo, 2006](#)).
5. This difficulty is unsurprising. Even controlled scientific research has failed to establish reliable cues indicating truth or deception – meta-analyses show that any differences between truth tellers and liars are minute or even non-existent (see [Hartwig & Bond, 2011](#)). Even cues that are generally associated with lying, which are often drawn attention to on

cross-examination, can be misleading. For example, researchers have concluded based on a significant collection of data that inconsistency in reports informs us about likely inaccuracy of the specific statement reported inconsistently, but tells us “little or nothing about the accuracy of the rest of the witness’s testimony” ([Fisher et al, 2013](#)). Therefore jurors are likely to have a difficult time making appropriate judgments in cases where competing testimony is key evidence (for example where a defendant is saying that a complainant consented and the complainant is saying that they did not). This influence of external information and beliefs has the potential to result in decisions that are (i) misinformed, and (ii) biased or discriminatory.

Misinformation: Cues Indicating Deception

6. Research suggests that the cues people do rely on in assessing deception are often based on false beliefs or stereotypes. As noted above, inconsistency, a cue often relied on by the legal system to help jurors distinguish truthful and deceptive accounts, has little probative value unless the statement that is itself inconsistent is crucial to the case (eg if the complainant is inconsistent in their accounts of whether they gave consent) ([Fisher et al, 2013](#)). Inconsistencies relating to peripheral details can be the result of memory distortion or normal forgetting, in ways that are not always intuitive.
7. In addition, research shows that laypeople hold views about cues associated with deception that have been shown to be inaccurate by scientific research. For example, research has shown that people associate a number of cues with lying, including fidgeting and gaze avoidance ([Virj, 2008](#); see also [Brennen & Magnussen, 2020](#)). Research has also shown that these cues, in fact, have little to no probative value ([Virj, 2008](#); see also [Brennen & Magnussen, 2020](#)). Research in realistic settings has shown that reliance on stereotypical cues can actually be counterproductive, and reduce the accuracy of evaluations of truthfulness ([Mann et al, 2020](#); [Vrij & Mann, 2001](#)).
8. In cases where competing testimony is central to a case it is therefore important to ensure that the judgments made by jurors are not influenced by incorrect beliefs relating to cues indicating truthfulness or accuracy. Research in the related context of evaluation of eyewitness memory accuracy has shown that merely informing jurors of relevant facts and research may not be sufficient to improve evaluations, and evidence-based training is needed (see [Helm, 2021a](#)).

Misinformation: “Rape Myths”

9. Research into juror decision-making shows that, unsurprisingly, decisions are based not only on case evidence, but also on existing beliefs about similar events (for a summary of the leading model of jury decision-making that highlights the importance of this existing beliefs, see [Pennington & Hastie, 1992](#)). In cases involving rape research suggests that erroneous existing beliefs, known as rape myths, are negatively influencing judgments (see, for example, [Leverick, 2020](#)). Rape myths identified as being important include the belief that delays in reporting ([Brereton, 1997](#)), a lack of physical resistance during an assault ([Temkin & Krahe, 2008](#)), and intoxication of the defendant or complainant ([Wall & Schuller, 2000](#)) make a complainant less credible (of course there are a significant number of other relevant myths relating to what rape looks like, how victims react to rape, and the behaviour and motivations of rapists). Importantly, these beliefs are inaccurate and can have a harmful impact on judgments ([Ellison & Munro, 2009](#)). This harmful impact has been recognised in the press and has led to calls for replacement of the jury in rape trials (e.g. [Bindel, 2018](#)) and is likely exemplified where lawyers draw on these myths and ‘real rape’

stereotypes to discredit complainants, as research suggests they do in courts in England and Wales ([Temkin et al., 2016](#)).

10. Importantly, emerging research shows that it is likely to be very difficult to correct the influence of rape myths in juror decisions ([Klement et al., 2019](#)) (although some research has suggested that education can reduce rape myth acceptance more generally, at least in the short term, see [Reddy et al., 2020](#); [Hudspith et al., 2021](#)). This difficulty may be due to the fact that beliefs in rape myths are entrenched in jurors. However, it may also be due to the fact that an influence of rape myths persists even where rape myths themselves are not explicitly endorsed (eg where erroneous beliefs have been corrected through training). For example, while jurors may believe information given to them telling them that victims do not always or even typically physically resist rape. However, they may still find a person who did not physically resist and assault less believable than one who did as a result of subconscious psychological processes.
11. For example, jurors may find a person making an allegation consistent with their schema for a 'typical' rape as more believable as a result of unconscious mental shortcuts, known as heuristics. For example, if jurors can more easily imagine an assault in which the victim physically resisted than one where they did not they may have an increased tendency to believe a complainant alleging an assault in which they physically resisted, as a result of what is known as the simulation heuristic (see [Kahneman & Tversky, 1981](#)). This effect would be expected even if a juror recognised that rape does not necessarily involve physical resistance, just because of their subconscious beliefs enabling greater ease of imagination (simulation) in cases involving physical resistance. The lack of objective cues signalling honesty or deception makes the influence of heuristics particularly likely.
12. The fact that these processes are largely unconscious means that they can have an impact and are important to consider despite findings that individuals who have completed jury service do not explicitly report endorsement of rape myths ([Thomas, 2020](#)) (for a further critique of these findings also suggesting the continued importance of examining the relationship between rape myth acceptance and verdicts see [Chalmers et al., 2020](#)). Even when jurors do not explicitly endorse rape myths, outdated and sometimes subconscious beliefs can bleed through into judgments. This reality is why it is important to study juries experimentally in controlled experimental studies as well as through self-report measures.
13. Note, that although it is beyond the scope of these submissions to go into detail on the matter here, research conducted in the United States also found that rape myth acceptance predicted both case perceptions and behavioural intentions of responding to a case in police officers in the context examined (see [Venema, 2019](#)).

Misinformation: Prevalence Estimates

14. Finally, decisions in this area are likely to be influenced by juror estimates of the prevalence of alleged events. According to probability theory, and consistent with the predominant model of jury decisions, the probability that an event occurred will be determined by combining prior beliefs (including beliefs about the prevalence of alleged events) with new evidence to reach a posterior judgment (eg [Dahlman, 2018](#)). Importantly, where the probative value of evidence itself is unclear, the role of prior beliefs is likely to be enhanced. This effect can be compared to the impact of symptoms on a doctor's judgment in a hospital – where symptoms are ambiguous, they are likely to rely more on how common a disease is in determining what is likely to be wrong with a patient. Unpublished data collected by my research group suggests that estimates relating to the prevalence of sexual

offences will impact the way that jurors interpret testimony of those alleging (and denying) such offences. However, this impact has the potential to be a negative one where prevalence estimates are inaccurate. Accuracy in this area is difficult to measure since the true rate of offending is unknown and probably unknowable (although it is generally accepted that rates of false allegations are very low compared to rates of true offences). However, if jurors systematically underestimate rates of sexual violence generally (as evidence suggests some may do) they may be unduly sceptical of complainant accounts (similarly, if jurors overestimate rates of sexual violence they may be unduly sceptical of defendant accounts).

Bias and Discrimination

15. Importantly, many of the phenomena described above have the potential to lead to discrimination. First, the ambiguity of cues in testimony generally makes interpretation of testimony particularly susceptible to effects such as confirmatory bias and pre-decisional distortion (seeking out information that confirms existing beliefs and weighting evidence in a way that confirms with existing beliefs, see [Carlson & Russo, 2001](#)), motivated cognition (where preferred outcomes inadvertently drive judgments, see [Sood, 2013](#)), and, relatedly, identity protective cognition (a species of motivated cognition where individuals selectively credit evidence in patterns that affirm the status of groups to which they belong, see [Kahan, 2015](#)).
16. In addition, the potential influence of both heuristics and prevalence estimates mean that this area is one in which there is a special risk of discrimination against stereotypical defendants and non-stereotypical victims. For example, there is a risk of discrimination against male victims of sexual assault. Such victims and defendants require protection in the current system.
17. Importantly, since these effects are largely unconscious, reducing their impact is likely to be challenging and to require evidence-based procedural change.

Miscarriages of Justice in Cases Involving Rape

18. Systematic failures to prosecute in cases involving rape and prosecution failings in this area have been well-documented and will not be repeated here. However, my focus on miscarriages of justice here should not be taken to indicate a belief that miscarriages of justice in this area are more important than failures to convict. Of course, we must be mindful to care about progress for survivors of sexual abuse and the issue of miscarriages of justice at once.
19. My research group's miscarriages of justice registry records all cases that we have been able to identify in which a conviction has been overturned by the Court of Appeal based on an 'error of fact' (see [here](#) for the database in graph form and see [here](#) for the database in table form, both versions of the database can be reviewed and searched online). While the conviction being overturned certainly does not equate to a finding of actual innocence, the majority of these cases represent those in which fresh evidence shows a defendant may not be guilty following an initial conviction. These appeals often contain strong indications based on fresh evidence that the appellant did not commit the crime that they were accused of, or even that no crime occurred at all (for more information on the database and analyses conducted on it, see [Helm, 2021b](#)).

Illustrative Cases and Patterns

20. To date, the registry contains details of 59 miscarriages of justice that have occurred in England and Wales in cases involving sexual offences. In these cases, the factor most identified as having been involved in the miscarriage of justice was testimony from a complainant that fresh evidence later suggested was misleading (this factor was identified as important in 39 of the 59 cases involving sexual assault). Unfortunately, a number of these cases involve allegations by a complainant that fresh evidence suggested were false. This fresh evidence was usually evidence undermining the credibility of the complainant, for example evidence showing that they have made other demonstrably false allegations, testimony from another person that the complainant admitted to them that they lied when making the allegations, or new evidence undermining key details of the complainant's initial account. Below are some illustrative cases (note that there is a time lag between a miscarriage of justice occurring and the relevant conviction being acquitted which means data for very recent years in the database is likely to be incomplete and examples are from the early 2000s onwards).
21. [David Carrington-Jones](#) was convicted of raping and sexually assaulting his two nieces and spent six years in prison. His conviction was overturned by the Court of Appeal in 2007 following a referral by the Criminal Cases Review Commission on the basis that one of the victims had a demonstrated tendency to make false allegations (for more information, see [Gysin & Clerkin, 2007](#)).
22. [Danny Kay](#) was convicted of raping a 16-year-old girl during a date at his house and spent 4 years in prison. He acknowledged that he had sex with her but claimed that it was consensual. His conviction was overturned by the Court of Appeal in 2017 when evidence showed that the complainant had selectively deleted text messages from Mr Kay that meant that the impression given to the jury at trial was misleading (for more information, see "[Danny Kay: Rape conviction man 'let down' by system](#)", 2018).
23. [Nadeem Aslam](#) was convicted of the rape of his wife who described the rough and violent way that he had forced himself on her during their marriage and spent more than 3 years of a 13 year sentence in prison. His conviction was overturned in 2014 when two witnesses came forward and said the complainant had admitted to them that she had lied at trial. One witness said that the complainant had said that she had made the accusations up so he would go to prison and she could keep custody of her children (for more information, see [Britton, 2014](#)).
24. In one case (the case of [Andrew F](#)), the credibility of the complainant was undermined on the basis of a genital abnormality of the defendant that the complainant did not know of.
25. More rarely, allegations have been disproved based on surrounding evidence that shows that the offence could not have happened as alleged, for example personnel records showing that that [Anver Daud Sheikh](#) (who spent two years in prison following his convictions for serious sexual assaults) would not have had the opportunity to commit the sexual offences that he was accused of (for more information, see "[Freed care worker wants answers](#)" 2004) and evidence that a defendant had a genital abnormality.

Lessons from Miscarriages of Justice

26. The miscarriages of justice that we have identified highlight the fact that false allegations are still made and do still result in convictions of factually innocent people. One important factor to note is that in many of the cases, including those above, the factor leading to

acquittal is somewhat fortuitous – it could easily have not happened or have not been brought to light. It is therefore likely that there remain more innocent people in prison for rape. Therefore, while false allegations are comparatively rare, they are possible and they are important to consider in reform in this area (without disregarding the needs of survivors). Any move away from juror decisions and towards judicial decisions, for example, should be made on the basis of evidence of increased accuracy and fairness if this is done, not on the basis of a need to secure more convictions.

27. It is perhaps important to acknowledge that it is not possible to secure convictions in all cases involving factually guilty defendants without convicting some innocent defendants due to issues with proof and conclusive evidence in this area. It may be that expert intervention could be helpful in facilitating a more accurate distinction of true and false cases, but for the reasons outlined above this distinction is likely to be very difficult in cases primarily reliant on complainant and defendant testimony. One option in cases in which the criminal standard of proof cannot be fairly met might be to consider increasing the visibility and accessibility of remedies in the civil justice system.
28. A final factor to note relating to miscarriages of justice in this area is the difficulty that acquitted defendants are likely to have, and have been shown to have, in securing compensation. Problems securing compensation are well-noted in the criminal justice system, however these cases have the potential to be particularly problematic due to the clear challenge of ever affirmatively proving innocence. This difficulty has been shown, for example, in cases including those of [Danny Kay](#) (see [Bucks, 2019](#)) and Victor Nealon (see [Robins, 2019](#); see also [Quirk, 2020](#)). More work needs to be done to ensure that innocent people do not spend years in prison and receive no compensation to help them rebuild their lives following incarceration.

Conclusion

29. Rape cases present a fairly unique challenge for juries specifically in cases primarily reliant on competing testimonies, due to the lack of objective cues that can be relied on in determining the truthfulness of each account. This lack of cues gives a flexibility in interpretation that allows for an influence of misconceptions and biases. Although false allegations are (very) rare, they do happen, meaning that allegations of rape must be scrutinised effectively but in a way that does not result in systematic failures to prosecute strong cases. Crucially, misinformation and bias is likely to have an influence in these cases in the current system, and this influence is likely to be exacerbated by some defence practice ([Tempkin et al., 2018](#)). Evidence-based legislation and procedure taking into account the wealth of research in behavioural science and experimental jurisprudence on evaluations in these cases can help to ensure that accounts are scrutinised effectively. Interventions might include more closely regulating the practice of lawyers in these cases, providing training to jurors, or even handing over more responsibility (or all responsibility) to judges in these cases (as a review chaired by Scotland's second most senior judge, Lady Dorian, suggested piloting in the Scottish context, see [Lord Justice Clerk's Review Group, 2021](#)). Crucially, interventions must be designed to protect both victims and defendants. If I can provide any further information to inform this Inquiry, please do not hesitate to contact me at r.k.helm@exeter.ac.uk.

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(All references are also hyperlinked in the text)

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