

Prosecuting Sexual Offences

A Report by JUSTICE

Chair of the Committee
HH Peter Rook QC



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EXECUTIVE SUMMARY

Recent years have seen a surge in the prosecution of sexual offences. The uncovering of historic crimes, a rise in reporting, shifting cultural attitudes and the internet have all contributed to a pronounced escalation in the number and gravity of cases coming to trial. In turn, this increase has thrown into the spotlight the complexities inherent in the prosecution of offences of this kind, many of which will involve significant evidentiary problems and vulnerable witnesses.

The Criminal Justice System (“CJS”) has responded with some major improvements in the way sexual offences are tried. Yet the increase in accusations has caused the CJS to struggle. The nature and scale of the offences reported has meant that ever-increasing resources are needed to investigate and prosecute. Widely publicised incidents of cases collapsing due to non-disclosure of unused material exemplify the difficulties being caused.

This Working Party of JUSTICE considered how sexual offences might be prosecuted more effectively and more justly in these difficult circumstances. Although the original intention was to identify where efficiency savings could be made, it quickly became apparent that improving procedural practices alone would not be sufficient. Instead, the Working Party adopted a holistic view. An approach that understands what causes sexual offending and seeks to address this through efforts that prevent crime, divert from prosecution and reduce reoffending, is key. So also are reforms for those prosecutions that must proceed:

Prevention

Recognising that prevention may have a positive effect for some potential perpetrators, the Working Party considered how improved education for children; the “designing out” of online offending and kitemarking of online content; and voluntary risk management programmes might play a role in the prevention of sexual crime.

Reducing sexual offending

The Working Party found that effective rehabilitation programmes for those convicted of sexual offences are vital in ensuring that the risk of reoffending is minimised. Existing Her Majesty's Prison and Probation Service community and pharmacological programmes are considered, alongside detailed proposals for a new conditional diversion scheme – developed in conjunction with experts in the field.

Improving witness evidence

It is imperative that witnesses giving evidence in sexual offence cases are able to fully and actively participate in the proceedings. To encourage this, the Working Party recommended rigorous case management with early identification of witness and defendant vulnerabilities; a more satisfactory definition for “vulnerable witness” within the CJS; a modified approach to video recorded interviews; and greater use of training to ensure that practitioners and judges build the necessary competencies to work with vulnerable witnesses. In particular:

- We consider that there should be a far greater focus upon the obligation for both defence and prosecution advocates to consider whether to request a Ground Rules Hearing in sex offence trials.
- In certain complicated and/or difficult cases involving both children and adult witnesses, it is appropriate for video recorded interviews to be conducted in two stages. Stage two would be a more focussed interview with the intention of eliciting information that will stand as evidence-in-chief.

Legal process

The Working Party considered reform at all stages of the criminal process. At the investigative stage, particular focus is given to the use of early investigative advice; the quality and availability of forensic evidence; and desirable

safeguards for cases where digital material is sought from a complainant. Recommendations in previous JUSTICE reports and the Attorney General's recent *Review of the efficiency and effectiveness of Disclosure in the Criminal Justice System* are highlighted. Finally, the Working Party considered necessary reform of both trials and sentencing. A revised approach to Sexual Harm Prevention Orders and notification requirements is recommended, as is more fulsome evaluation of sentencing outcomes and the disaggregation of existing data. Recommendations include:

- Improved liaison between CPS and police to help achieve a better understanding of the purpose, scope and benefits of early investigative advice;
- Putting the Forensic Science Regulator on a statutory footing as a matter of urgency and giving it the power to compel compliance;
- Assurances to complainants that each case be considered on its merits and that the CPS should only be able to refuse to consider charge if that evidence is integral to the decision to charge;
- Expansion of the use of Disclosure Management Documents from serious cases such as rape and child sexual abuse to all sex offence cases involving electronic devices.

The escalation in sexual offences is not confined to England and Wales. As such, a dedicated Scottish sub-group has reviewed the unique Scots position and a further Chapter of this report considers particular issues relating to the CJS in that jurisdiction. While Scotland has many of the same problems in prosecuting sexual offences as are present in England and Wales, particular difficulties arise in relation to a lack of publicly available information, delays and discontinuance, and at present, the absence of an accredited rehabilitation programme.

I. INTRODUCTION

Looking at the changing nature of crime is something that we at the CPS are very focused on as a whole, and the developing areas of child abuse and exploitation is just one example of how crime is changing....[I]t's our job to be aware of these changes and ensure that we are in a position where we understand what is happening and we are able to adapt accordingly – Director of Public Prosecutions Max Hill QC¹

- 1.1. The entire landscape in respect of the prosecution of sexual offences has been transformed in recent years. Sexual offending has been revealed of a nature and scale not previously contemplated and there has been a significant increase in such cases being brought to trial.² This exponential increase has occurred even though under-reporting remains a problem.³ It follows that further changes in cultural values and a more sympathetic environment in which to report in the future may see even greater rises in sexual offence allegations.
- 1.2. There are many reasons for this surge in prosecutions of sexual offences. One reason has been the change in the culture of how people think of sexual offences. There is now a much greater appreciation of the potential psychological harm sexual offending can cause. Additionally, far more cases are prosecuted where the parties are or have been in a relationship. In England and Wales, the rule requiring corroboration of a complainant's allegation of a sexual offence was finally abolished in 1994.
- 1.3. There is also now a greater willingness to report sexual offences. This has led to a rise in prosecutions including cases involving historic sexual offences sometimes involving celebrities and/or institutions. Media coverage such as

¹ 'Emerging Areas of Child Abuse and Exploitation', Speech by Max Hill QC, Director of Public Prosecutions, to the Heads of Prosecuting Agencies Conference in Uganda, 15-17 April 2019, available at <https://www.cps.gov.uk/cps/news/emerging-areas-child-abuse-and-exploitation>

² See *An Overview of Sexual Offending in England and Wales* (MoJ, Home Office and ONS, January 10, 2013), p.34, updated in *Sexual offending: victimisation and the path through the criminal justice system* (ONS, December 13, 2018), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffendingvictimisationandthepaththroughthecriminaljusticesystem/2018-12-13>

³ The *Crime Survey for England and Wales* has estimated that the majority of sexual assault allegations do not enter the criminal justice system and that less than one in five victims of rape or assault by penetration report their experience to the police. <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffendingvictimisationandthepaththroughthecriminaljusticesystem/2018-12-13>

that following the Jimmy Savile revelations has encouraged a significant increase in the reporting of historic sexual abuse.⁴

- 1.4. A further reason is that offences are being uncovered on a scale that has rarely been seen before, such as the grotesque sexual exploitation of young girls by gangs over protracted periods.⁵ The internet in particular has facilitated a surge in offences, with many prosecutions now being brought for offences relating to making or being in possession of indecent photographs. The internet has also aided the rise of vigilante groups attempting to ensnare suspected internet groomers.
- 1.5. The Criminal Justice System (CJS) has responded with major improvements in the way sexual offences are tried not least in the manner in which complainants are treated during the investigation and how they give their evidence at trial.⁶ There have been major changes to the substantive law so that it is better equipped to meet the needs of the early twenty-first century,⁷ and some anachronisms have been finally swept away or abolished.
- 1.6. Case management procedures have also been developed to ensure that the courts and advocates adapt to the needs of witnesses. Witnesses with serious vulnerabilities have been able to give evidence which would have been inconceivable even half a generation ago, through the aid of special measures and intermediaries.⁸ The Court of Appeal has been in the vanguard of reform providing valuable guidance in respect of new procedures such as Ground Rules Hearings and the appropriate questioning of vulnerable people.
- 1.7. Police, Crown Prosecution Service (CPS) lawyers, advocates and judges receive specialist training in the investigation, prosecution and trial of sexual offences, and learn both about the complexity of the crime and the severe impact it can have on complainants. This training, combined with the expansion of Sexual Assault Referral Centres and Independent Sexual

⁴ The police have launched a number of dedicated investigations, with Operation Yewtree and Operation Hydrant being the most well-known identifying thousands of suspects.

⁵ For example, the Oxford grooming case tried at the Central Criminal Court 2013. In August 2014 an independent review estimated that in Rotherham over 1,400 under-age girls had been groomed and subjected to extreme levels of violence and abuse over 16 years.

⁶ Part II of the YJCEA 1999 (ss.16-30) provides a statutory umbrella over all special measures available for children and other vulnerable or intimidated witnesses, to give their best evidence.

⁷ The Sexual Offences Act 2003 (SOA 2003) represented a substantial overhaul of the law governing sexual offences.

⁸ Although their use remains far from routine.

Violence Advisors is contributing to a safer reporting and trial environment for complainants.

- 1.8. This Working Party has seen that the tools are already in existence to enable expeditious trials of these offences in a manner which is fair both to complainants and defendants. Inevitably, some of the tools such as the use of intermediaries and pre-recorded cross-examination require preparation, time and funding. It is likely that time and money may be saved in the long run if these tools are applied rigorously.
- 1.9. However, despite the tools being available, the sheer volume of sexual offence cases is placing massive demands upon the criminal justice system at a time when resources are already overstretched. The nature of some of the offences, particularly where the parties have been in a relationship, generates vast amounts of data to analyse, which in turn has led to an ever increasing need for resources to investigate and prosecute.
- 1.10. If the sheer volume of cases prevents the CJS acting efficiently, it can lead to an increased risk of miscarriage of justice. For example, recent cases that have collapsed due to non-disclosure of unused material demonstrate the difficulty being faced.⁹ Furthermore, this burden on resources raises legitimate concerns as to whether other non-sexual serious offending is being neglected as a result.
- 1.11. We acknowledge that few prosecutions of sexual offences are straightforward. Many involve significant evidentiary problems. It is not uncommon for complainants to have mental health concerns or be suffering trauma, which makes giving evidence difficult. Juries might find the issue of consent hard to determine.
- 1.12. These factors, in part, explain the lengthy investigations, low percentage of cases charged and the high proportion of time taken up by the trial of sexual offences in the Crown Court.¹⁰ In the year ending March 2018, 28.3% of

⁹ The case against Liam Allan collapsed after exculpatory messages were found in the unused material three days into the trial. Similar cases against Isaac Itiary, Samson Makele and Oliver Mears were also dropped due to failings in disclosure, see 'Evidence withheld in 47 rape and sexual assault cases, says CPS', BBC News, available at <https://www.bbc.co.uk/news/uk-44366997>

¹⁰ Out of a total of 4,877,000 recorded offences, violence against the person accounted for 1,395,688 cases and sexual offences accounted for 150,732. 10% of cases of violence against the person offences went on to be charged/summonsed, with 5.2% of sexual offences being charged/summonsed. This drops to 2.9% for rape. The high percentage of outstanding cases may be a reason why estimates place sexual offences as using up to 50% of the capacity of some Crown Courts: Ministry of Justice, 'Crime Outcomes in England and Wales: year ending March 2018, data tables', *Table A2: Number of offences and charge/summons recorded in the year ending March 2017 and the year ending March 2018*,

sexual offences recorded by the police in England and Wales had not yet been assigned an outcome, reflecting the fact that 41.4% of sexual offence investigations take more than 100 days.¹¹

- 1.13. Although far from a perfect comparison, it is instructive to compare these figures with those for offences of violence against a person. In the year ending March 2018, only 7.3% of violence against the person offences recorded by the police had not yet been assigned an outcome. Only 12.5% of these cases involved investigations of more than 100 days and the median investigation length was 15 days.
- 1.14. Unnecessary delays add to the stress of the parties, risk complainants becoming disenchanted and disengaged with the criminal justice system, and may impact on the quality of the evidence. Moreover, they delay justice for the complainant and tie up resources that could be used to alleviate the stress the CJS is undergoing.

Concurrent reports, investigations and inquiries

- 1.15. We have been working at a time when other organisations have also conducted discrete investigations into some of the areas that we have been considering, such as the House of Lords Science and Technology Select Committee Forensic Science inquiry,¹² and both the House of Commons Justice

available at <https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2017-to-2018>; By comparison, violence against the person offences made up around 31% of total offences charged during the same period but made up 20.62% of receipts, 20.44% of disposals and 22.61% of outstanding Crown Court cases in 2016, Calculated using Ministry of Justice, *Criminal Court Statistics Quarterly: April to June 2017*, available at <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2017>

¹¹ The median length of any sexual offence investigation is 73 days, whilst rape has an average of 129 days: Home Office, *Crime outcomes in England and Wales: year ending March 2018* (Statistical Bulletin, HOSB 10/18, July 2018), pp. 16 & 20, and Data Tables: available at <https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2017-to-2018>; there is a large discrepancy within this category, between child sexual offences and adult sexual offences. For instance, in 2015/16, the median investigatory length for child sexual abuse cases is 248 days, compared with 147 days for adult sexual offences: Children’s Commissioner, ‘Investigating Child Sexual Abuse: The Length of Criminal Investigations’, (2017), p. 3, available at: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Investigating-Child-Sexual-Abuse-CCO-April-2017-1.2-1.pdf>

¹² House of Lords, Science and Technology Select Committee, ‘Forensic science and the criminal justice system: a blueprint for change’, (May 2019), available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldstech/333/333.pdf>

Committee¹³ and the Attorney-General¹⁴ have published reports on disclosure. In addition, the Government has published a White Paper on Online Harms and the Draft Domestic Abuse Bill 2018, which aims to improve education about healthy sexual behaviour and relationships. We have sought to build on this work.

- 1.16. We also appreciate that during the period of this Working Party, the Independent Inquiry into Child Sexual Abuse (IICSA) has been carrying out its important work in respect of the institutional response to child sexual abuse and has been providing and will continue to provide instructive conclusions. This Working Party rejected the idea of a limitation period for the prosecution of sexual offences. As an alternative, we acknowledge that a truth commission might have a role to play in the future. We do not feel it appropriate to include this within the scope of our recommendations. To carry out an in-depth study of the merits of such a system would involve much work on systems adopted in other jurisdictions which would be beyond the resources of this working party. It would also be necessary to focus upon management of survivor expectations. Furthermore, it is necessary to consider lessons to be learned from IICSA, which has only recently embarked on a Truth Project and we anticipate that it will make recommendations on the efficacy of such an approach in due course.

Our approach

- 1.17. The concern amongst practitioners as to the ability of the CJS with the volume of sexual offence led JUSTICE to form this working party. We have looked at the whole process from reporting, investigation through to trial and sentencing so as to identify areas where improvements are necessary or refinements of existing systems can be made without eroding fair trial.
- 1.18. The increase in sexual offence allegations has come at a time when the criminal justice system has had to make large efficiency savings, adding further pressure onto a system that was already under pressure. We have kept this in mind and have sought to produce recommendations that contribute not only to

¹³ House of Commons, Justice Committee, ‘Disclosure of evidence in criminal cases’, (July 2018), available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/859.pdf>

¹⁴ Attorney General’s Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system*, (November 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756436/Attorney_General_s_Disclosure_Review.pdf

improvements in efficiency, but to reduction in the workload that individuals within the CJS are facing.

- 1.19. We are deeply conscious of the serious psychological harm that sexual offences can cause. That understanding has guided our work. None of our recommendations are designed to detract from an appreciation of the trauma suffered by victims of this offending.
- 1.20. To assist in our review, as well as reviewing recent publications, we have spoken to many experts in their respective fields to ensure that we have the most up-to-date information from the most reliable sources.
- 1.21. In particular, we have spent considerable time on how best greater efficiency can be achieved without compromising the fairness of the trial. We have no doubt that the answer is to be found in appropriate, rigorous case management including Ground Rules Hearings (GRH) where, as is often the case, vulnerable people are involved.
- 1.22. Through these endeavours, it became clear to us that we should also consider other ways of alleviating the situation by the prevention of sexual offending in the first place, by reducing the case load for some limited - yet voluminous - offence types through an alternative disposal and by reducing the number of repeat offences.
- 1.23. We have considered where more can be achieved, particularly by way of education so as to discourage and so prevent the commission of sexual offences. Many organisations are undertaking valuable work to enlighten young people about the law and sexual conduct. However, we consider more can be done to ensure that internet companies safeguard children and prevent child sexual imagery being uploaded onto their platforms.
- 1.24. We have also considered alternatives to prosecution that may achieve better results in terms of rehabilitation and preventing re-offending whilst reducing the burden upon the criminal justice system. In particular, we are recommending that a conditional diversion scheme be piloted in respect of those found in possession of indecent images of children. The scheme would be offered to those who commit first time offences or who have no relevant convictions. Currently these cases amount to a vast number of prosecutions. Most of those convicted do not receive immediate custodial sentences. The rate of re-offending is very low whilst the risk of suicide is far higher than average. A Conditional Diversion Scheme (CDS) would involve attendance upon an awareness programme (sometimes referred to as a psychoeducational

programme) with structured sessions. There would be no prosecution if the participant successfully engages with and completes the scheme. The WP is strongly in favour of this measure (which enjoys significant police support), but recognises that there will be criticism from those who maintain that this type of offending leads to contact offences. However, the evidence does not support this contention. The police would still carry out a thorough investigation before the option of joining the scheme would be offered. We believe that this measure has the capacity to take a substantial number of cases out of the CJS, thereby lightening the overall load upon the CPS and the courts. It may also reduce the pressures that cause some individuals to take their own lives.

- 1.25. Reflecting this wide scope, we begin this report with **Chapter 2** covering the prevention of sexual offending through the use of prevention programmes and education whilst **Chapter 3** considers reducing sexual re-offending through rehabilitation programmes and conditional diversion schemes. **Chapter 4** is devoted to improving witness evidence. It identifies the huge benefits that can be achieved in terms of efficiency by early identification of appropriate cases for Ground Rules Hearings (GRH.) **Chapter 5**, *Legal Process*, tackles a range of issues in respect of the whole prosecution process from investigation to sentence where we feel improvements can be made without compromising fairness to the respective parties.
- 1.26. **Chapter 6** focusses on Scotland. As it is a different jurisdiction, with a different political environment, a Scottish Group, chaired by Sheriff Nigel Morrison QC, was convened. This group has drawn from the research and recommendations that we have made in order to produce its own independent recommendations for reform that it believes are needed in Scotland.
- 1.27. These are immensely important prosecutions which understandably attract a great deal of public interest. The CJS must be equipped properly in terms of training, standards and resources to address the challenges they pose. We hope that our conclusions and recommendations set out at the end of this report will assist in achieving that goal.

II. PREVENTING SEXUAL OFFENDING

It makes me sick thinking those images still exist, and that they were able to take advantage of me so easily. At the time I didn't recognise it as grooming. To me it felt so innocent and normal. – Teenage victim of sexting¹⁵

- 2.1. The **previous chapter** highlighted the scale of the increase in sexual offences and the heavy burden it is placing on the CJS. It is plain that 'We cannot arrest our way out of the problem.'¹⁶ If we are to address the volume of offences, it seems sensible to us that we consider ways to prevent crime being committed in the first place.
- 2.2. We have formed the view that focus must be placed on changing the behaviour that leads an individual to become a perpetrator of sexual crime. It goes without saying that victims are blameless in these acts. However, there are features of sexual crime that may be avoided. For example, teaching children about the warning signs of grooming, much like teaching children the dangers of talking to strangers, may reduce the availability of children to sexual predators.
- 2.3. We recognise that programmes that aim to prevent offending will not be effective at changing the behaviour of all individuals who commit sexual offences. Nor are they likely to have immediate effect. However, we believe that in certain circumstances, prevention efforts will have a positive effect. These include:
 - (a) Where gender stereotypes lead to abuse within relationships;
 - (b) Where children explore sexual behaviours with each other on-or-offline;
 - (c) Where children are susceptible to being groomed online;
 - (d) Where individuals attempt to view IIOC online or other prohibited material;
 - (e) Where young children are not aware of factors influencing their ability to consent.

¹⁵ R. Mendick, 'Sexting allegations made against teenage boy will remain on file until he is 100 – despite no conviction', (December 2018), available at <https://www.telegraph.co.uk/news/2018/12/06/teenage-boy-accused-sexting-classmates-told-allegations-against/>

¹⁶ Chief Constable Simon Bailey, Lead for Child Protection, National Police Chiefs' Council, *Home Affairs Select Committee, Oral Evidence: Policing for the Future*, Tuesday 13 March 2018, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/policing-for-the-future/oral/80543.pdf>

- 2.4. This chapter will focus on three sectors where we consider prevention programmes can be successful. Within these sectors, progress is already being made but we are of the opinion that more can and should be done. These sectors are education, preventing online offending through design and teaching risk management skills to those who have inappropriate sexual thoughts.
- 2.5. By education, we primarily mean teaching children and young people what appropriate sexual behaviour is and how to keep safe while online. Preventing online offending is now becoming possible due to technological advances. This should mean that illegal content is blocked so that it cannot be uploaded. And risk management programmes are increasingly being viewed as an effective means of preventing offending from happening. Programmes that help to manage risk employ similar methods to programmes used post-conviction to reduce the likelihood of reoffending.

Education about images

- 2.6. According to police records, 36% of all recorded indecent imagery of children is described as self-generated.¹⁷ The campaign ‘Disrespect NoBody’ highlights the current dissonance between the law and what individuals believe to be appropriate behaviour. Its website carries a poll asking, “[i]s it OK to share a nude pic of your boyfriend or girlfriend without their permission, if it’s just amongst your mates?” The poll reveals that, out of the people who have answered, 85% chose ‘yes.’¹⁸ Our consultees have informed us that many children do not understand that if their partner is under 18 and ‘sexts’ them a nude picture, they will be in possession of IIOC. Moreover, we understand that sometimes even teachers do not realise that their pupils may be committing offences. In **Chapter 3**, we discuss the CJS response to this behaviour.
- 2.7. It is well known that ignorance of the law is no excuse for offending. However, it has been suggested that 18-24 year olds commit the most IIOC offences because they do not understand the law.¹⁹ Offences relating to IIOC are provided for in section 1 of the Protection of Children Act 1978 (PCA) and

¹⁷ Will Kerr, Director of Vulnerabilities, National Crime Agency, Ibid.

¹⁸ What is Sexting?’ *Disrespect NoBody*, available at <https://www.disrespectnobody.co.uk/sexting/what-is-sexting/>

¹⁹ Simon Bailey, *supra* note 16.

section 160 of the Criminal Justice Act 1988 (CJA). Images include both photographs and pseudo-photographs.²⁰

- 2.8. The PCA prohibits taking, distributing, possessing with a view to distributing and publication of indecent images of children.²¹ To counteract the reproduction of images on the internet, the word “make” was added to the ‘take or permit to be taken’²² formulation of the offence. As such, if a user causes to exist, produces by action or brings about an IIOC, they will be considered to have taken, or caused the taking of an IIOC.²³
- 2.9. This change now means that downloading an image onto a disc or printing it; opening an attachment to an email that contains an image;²⁴ downloading an IIOC from a website onto a computer screen;²⁵ storing an image on a computer directory;²⁶ and accessing websites which have automatic ‘pop-up’ messages containing IIOCs,²⁷ can all be considered to fall under the prohibition in section 1(1)(a) PCA.
- 2.10. Section 160 CJA created a further offence prohibiting the possession of IIOCs. To be in possession of the image, the individual must be capable of retrieving it, including electronically.²⁸

²⁰ S.62 of the Coroners and Justice Act 2009 creates an offence of being in possession of a prohibited image of a child, with, “image” including prohibited images that are neither photographs or pseudo-photographs, such as cartoons, drawings and computer generated images. A pseudo-photograph is an image that appears to be a photograph, as well as electronically stored data capable of converting into a photograph: Protection of Children Act 1978, s. 7(9).

²¹ Protection of Children Act 1978, s. 1(1)(a)-(d).

²² Protection of Children Act 1978, s. 1(1)(a).

²³ *R v Bowden* [2000] Q.B 88.

²⁴ *R v Smith* [2002] EWCA Crim 683.

²⁵ *R v Jayson* [2002] EWCA Crim 683.

²⁶ *Atkins v DPP; Goodland v DPP* [2000] 2 All ER 425.

²⁷ *R v Harrison* [2008] EWCA Crim 3170.

²⁸ *R v Porter* [2006] EWCA Crim 560; *R v Leonard* [2016] EWCA Crim 277. This is particularly important for deleted images – if an individual lacks the technical knowhow to retrieve deleted images, they cannot be said to be in possession of the IIOC. There are five statutory defences for these offences: (1) legitimate reason; (2) lack of awareness; (3) receiving unsolicited photographs; (4) photographs of 16 or 17 year olds taken in the course of marriage and other relationships with no view to distributing them; and (5) ‘making’ an IIOC in the course of criminal proceedings and investigations.

- 2.11. The many facets of these offences, together with the fact that young people can legally be sexually active from 16 years old, means that young people may not realise that they are committing an offence if they receive a sexual image of a peer under 18, even if they do not open it. Similarly, young people may not realise that they are committing an offence by sending sexual images of people under 18 to their peer group. What is more, many children do not share images among their friends maliciously, and do not understand the harm they are causing to the individual that is the subject of the image.
- 2.12. The increasing prevalence of sharing self-produced sexual images (known as ‘sexting’)²⁹ and ‘image-based sexual abuse’³⁰ among under 18s is placing an added burden on the police because sexting between under 16s is an IIOC offence. Educating children both about the law and the impact that their actions can have should help prevent some of these offences from taking place.
- 2.13. Young people often complain that sex education focusses on the physical elements of sex rather than feelings, relationships and values.³¹ The current national curriculum on sex education does not do enough to teach young people about what constitutes appropriate and healthy sexual relationships, exploitation and how to protect against online grooming. Teaching children that it is not acceptable to be treated in an abusive or exploitative way will help them recognise their own behaviour, offer support to others and to speak up about it. A further complication in some types of sexual crime is that complainants may not appreciate they are in an abusive relationship and not genuinely consenting.³²

²⁹ K. Rawlinson, ‘Police report sharp rise in sexting cases involving children in England and Wales’, *The Guardian*, 6 November 2017 available at <https://www.theguardian.com/media/2017/nov/06/police-report-sharp-rise-in-sexting-cases-involving-children-in-england-and-wales>

³⁰ Sexting is when “someone sends or receives a sexually explicit text, image or video” (‘What is Sexting?’ supra note 18). Image-based sexual abuse, colloquially known as “revenge pornography” is sharing private sexual images without the consent of the person in them, with the legal definition requiring an intent to cause that individual distress (s. 33 Criminal Justice and Courts Act 2015). There have been criticisms of this required intention, see E.Dugan, ‘Revenge porn law ‘will not help victims’, say campaigners,’ *The Independent*, April 2015, available at <https://www.independent.co.uk/news/uk/crime/revenge-porn-law-will-not-help-victims-say-campaigners-10187326.html>

³¹ R. Long, *Briefing Paper: Sex and Relationships Education in Schools (England)*, (House of Commons), 19 December 2017, p. 5, available at <https://dera.ioe.ac.uk/30817/1/SN06103.pdf>

³² *R v Ali (Yasir)* [2015] EWCA Crim 1279.

- 2.14. The Draft Domestic Abuse Bill 2018, currently in pre-legislative scrutiny, has been introduced, with the consultation response indicating a desire to address some of the gaps in sexual education.³³ It proposes that this will include “relationships education, relationships and sex education, and health education.” Government has indicated a commitment to introduce regulations and statutory guidance for schools in these areas.³⁴ The Government consultation response also proposes to make relationships education compulsory in all primary schools in England, and relationships and sex education compulsory in all secondary schools, from September 2020.³⁵ These lessons will also extend to teaching students about internet safety, including the effects of their online actions and how to recognise and display respectful behaviour online. The aim is to equip children with the foundations for healthy, respectful relationships, as well as going on to teach laws around consent, sexual exploitation, grooming, harassment and domestic abuse. This should enable more children to understand coercive control, recognise the signs of abuse and stay safe.
- 2.15. The Department of Education has also produced statutory guidance titled ‘Keeping Children Safe in Education’ and ‘Searching, Screening and Confiscation’ non-statutory advice for schools. The UK Council for Child Internet Safety also produces advice for teachers titled ‘Sexting in schools and colleges: Responding to incidents and safeguarding young people.’³⁶ However,

³³ This will complement the commitment to provide Relationships and Sex Education in schools enshrined in the Children and Social Work Act 2017.

³⁴ HM Government, *Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill*, January 2019, p. 86, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf; Health Education is proposed to be compulsory in all state-funded schools: Department for Education, *Relationships Education, Relationships and Sex Education and Health Education: Guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers, Draft for consultation: July 2018*, available at https://consult.education.gov.uk/pshe/relationships-education-rse-health-education/supporting_documents/20170718_%20Draft%20guidance%20for%20consultation.pdf

³⁵ *Ibid*, pp. 7-8.

³⁶ See: Department for Education, *Keeping Children Safe in Education: Statutory guidance for schools and colleges*, September 2018, available at <https://www.gov.uk/government/publications/keeping-children-safe-in-education--2>; See also non-statutory advice for schools: Department for Education, *Searching, screening and confiscation: Advice for head teachers, school staff and governing bodies*, (January 2018), available at <https://www.gov.uk/government/publications/searching-screening-and-confiscation>; and UK Council for Child Internet Safety, *Sexting in schools and colleges: responding to incidents and safeguarding young people* (2016), available at <https://www.safeguardingschools.co.uk/wp-content/uploads/2016/08/Sexting-in-schools-and-colleges-UKCCIS-August-2016.pdf>

there is not yet a holistic approach to sex education that takes into account relationships, exploitation and coercion. We welcome the legislation proposed to address this.

- 2.16. The current lack of education in this area has led some organisations to create educational programmes for children focussing on issues that the curriculum does not yet cover. We commend these programmes to Government as it develops the statutory guidance for compulsory education.
- 2.17. Queen Mary Law School runs a programme called SPITE.³⁷ It began as a legal advice service for victims of image-based sexual abuse. It has expanded its scope and now offers schools free workshops to educate students on the law surrounding sexting (a project called SPITE for Schools). We have been informed that, SPITE reaches approximately 2,000 students per year in London.
- 2.18. Although the programme is primarily focused on image-based sexual abuse, SPITE also educates on a number of different areas of law and behaviour that relate to it while trying to address problematic related and preparatory behaviours.³⁸ These include domestic violence, manipulation and coercive behaviour.³⁹ This approach aims to teach children about the law and healthy relationships rather than waiting until an offence takes place to intervene, which will only criminalise a child and potentially give him or her a criminal record. The project aims to address the cause of the problem.
- 2.19. LimeCulture, the leading sexual violence training and development organisation in the UK, has also begun an education programme on sexual behaviour, including contact behaviour. Rather than going into schools, they are working with sporting organisations, teaching both junior and senior players about the law. We understand that feedback on the programme has been very positive, reaffirming that the current curriculum in sexual education is inadequate. The programme also shows that education on sexual behaviour

³⁷ Sharing and Publishing Images to Embarrass. See ‘SPITE for Schools Project’, Queen Mary School of Law, available at <https://www.qmul.ac.uk/law/undergraduate/pathways-to-law/schools-and-teachers/spite-for-schools-project/>

³⁸ ‘SPITE for Schools Project,’ *Queen Mary School of Law, ibid.*

³⁹ The areas of law that SPITE covers are: section 33 of the Criminal Justice and Courts Act 2015; voyeurism; harassment; blackmail; controlling and coercive behaviour in an intimate or family relationship; malicious communications; section 1 of the Malicious Communications Act; section 127 of the Communications Act 2003; Protection of Children Act 1978; section 160 of the Criminal Justice Act 1988.

does not have to be restricted to schools. We understand that education programmes that take place outside of schools may actually result in better engagement.

- 2.20. In addition to this work, better public education about the meaning of ‘consent’ is necessary. People can hold enduring misconceptions as to what amounts to rape/non-consensual sexual behaviour into adulthood. The courts recognised a decade ago⁴⁰ that juries needed to be directed not to make false assumptions based on rape myths.⁴¹ The direction continues to be given,⁴² acknowledging that, without it, there is a danger of the jury stereotyping and relying on illegitimate lines of reasoning that may bring into play assumptions inconsistent with an objective evaluation of the evidence.
- 2.21. As well as understanding that certain behaviours are inappropriate and illegal, children must be taught how to keep safe online, helping them to detect and avoid possible grooming threats. There is a lot of work taking place in this area. The National Crime Agency’s (NCA) Child Exploitation and Online Protection Command has developed its own education programme. ‘Thinkuknow’ aims to provide children with appropriate advice and guidance for navigating the online world.⁴³ As well as educating children, the NCA provides training to front-line professionals, stressing that it is essential to establish safeguards to protect vulnerable children - especially those who may have experienced abuse or exploitation - whether or not this has been disclosed. For instance, front-line professionals are taught to avoid victim-blaming language and challenge it when they hear it. This is vital as even the

⁴⁰ *R v Doody* [2008] EWCA Crim 2394.

⁴¹ See: ‘Sexual Offences’, in M. Picton, D. Ormerod, L. Tayton et al (eds.), *Crown Court Compendium 2018 Pt 1* (Judicial College, 2018); See also P. Rook & R. Ward, *Rook and Ward on Sexual Offences: Law and Practice* (5th edition), (Sweet & Maxwell), 2016, paras 1.354 ff. Rape myths are attitudes about sexual offending that serve to excuse sexual offences or blame the victim. For example, an argument that the clothes a victim was wearing meant that they were sexually available is a rape myth.

⁴² Although perhaps not as consistently as it should be.

⁴³ ‘Thinkuknow’, CEOP, National Crime Agency Command, available at <https://www.thinkuknow.co.uk/5-7/>; The NCA has developed this information resource because it believes that a key way to protect children online is to support children to develop skills, understanding and confidence. This will help them to stay safe from abuse and exploitation and to seek help appropriately when they need it. In this vein, the NCA has developed the ‘Play Like Share’ animation for eight to ten year olds. Over three episodes, it helps children to recognise features of manipulative behaviour and consider strategies for resisting it. The NCA launched new resources for four to seven year olds in March 2019. These have been developed in line with best practice, agreed with the PSHE (Personal, social, Health and Economic) Association and following consultation with over 2,000 parents, carers and professionals. The young ages that these resources are aimed at indicates that the earlier children are educated about these issues, the better.

most detailed education programme cannot be relied on alone to protect children online.

2.22. The inclusion of education about healthy sexual relationships, coercive behaviour, exploitation and internet safety in the national curriculum is welcome. If done correctly, the programme should create in-depth relationship and sexual education that prioritises the safety of the child while also allowing them to learn what behaviours are and are not acceptable. However, it remains to be seen how the curriculum will be implemented. We consider that the minimum requirements required to ensure that the education programme is effective are **that the curriculum and any programmes that educate about sexual behaviour should begin as early as possible in all schools and at least from year 6 (ten years old) and teach children:**

- (a) **What appropriate sexual behaviour is and what a healthy relationship consists of. This will include education on consent, coercive behaviour, exploitation and gender and sexual orientation stereotypes.**
- (b) **The law relating to:**
 - i. **Sexting;**
 - ii. **Underage sex; and**
 - iii. **Image-based sexual abuse (which should be taught from year 7).**
- (c) **Being safe online. This will include raising awareness of grooming tactics and practical advice on how to avoid being exploited online.**

2.23. Organisations such as SPITE for Schools and LimeCulture have already developed programmes that address some of these areas and should be consulted on the development of such a curriculum, and supported to deliver their programmes to schools that are yet to implement the curriculum.

2.24. Further, we believe that **there should be a concerted national awareness raising campaign that teaches about consent, coercion, exploitation and healthy relationships.** There have already been sporadic advertising campaigns highlighting what is and what is not consent (e.g. in the context of rape).⁴⁴ However, we believe that a unified strategy that demonstrates what consent, coercion and exploitation is should be developed by the Home Office. This would focus on all issues at once, thereby helping to demonstrate that consent, coercion, exploitation and healthy relationships are all related.

⁴⁴ See the new campaign on consent, called 'This is not consent' developed by Norfolk and Suffolk Constabularies: <https://www.prweek.com/article/1525513/menacing-normal-life-sexual-consent-campaign>

Alongside the proposed education programme, such a campaign would broaden understanding of what consent, coercion and exploitation are, leading to a reduction in offences as this age group grows up.

- 2.25. The Working Party also considers that restorative justice (RJ) may be a useful educative tool, if used in the right circumstances.** RJ focusses on offender remorse, repair and reconciliation. It provides all parties with the chance to come together and resolve collectively how to deal with an offence and its implications for the future. Studies have shown RJ to reduce reoffending rates, and to have high levels of victim satisfaction.⁴⁵ We understand that the use of RJ has increased recently and that this is likely to be due to the Victims Code,⁴⁶ which entitles victims to receive information about RJ and to be offered it where the offender is a young person. RJ approaches that are risk-led and carried out by specially trained facilitators are considered capable of achieving positive outcomes for the victim and offender, if properly implemented.⁴⁷
- 2.26.** However, the benefits of RJ post-conviction for sexual offences are still being debated, as some have argued that it carries an increased risk of re-victimisation and trauma.⁴⁸ Sexual offences can also affect victims very

⁴⁵ See: J. Shapland & ors, *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes*, Ministry of Justice, (2008), available at <https://restorativejustice.org.uk/sites/default/files/resources/files/Does%20restorative%20justice%20affect%20reconviction.pdf> which suggests RJ can reduce offending by 14%; and Ministry of Justice, 'Green Paper Evidence Report – Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders', 2010, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185947/green-paper-evidence-a.pdf which showed 85% victim satisfaction ; Jeff Bouffard, Maisha Cooper, Kathleen Bergseth, 'The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders', *Youth Violence and Juvenile Justice* 2017, Vol 15(4) pp.465-480 which showed positive outcomes for children undergoing RJ compared with those who went through the youth court or had no intervention at all; and Jeff Latimer, Craig Dowden, Danielle Muise, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis', *The Prison Journal*, Vol 85 No. 2 (June 2005), pp.127-144 which showed positive outcomes for RJ in a meta-analysis of 35 individual RJ programmes.

⁴⁶ Ministry of Justice, 'Code of Practice for Victims of Crime', 2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF

⁴⁷ See House of Commons, Justice Committee, 'Restorative Justice', Fourth Report of Session 2016-2017, July 2016, paras 35 and 36, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/164/164.pdf>

⁴⁸ SafeLives written evidence to the Justice Committee Restorative Justice Inquiry, 'Written evidence from SafeLives', 2016, available at

differently. As such, what may appear to be a less serious crime could have a deep impact on its victim. For this reason, RJ will not always be appropriate for this type of offence and should only be considered where the victim gives their full and informed consent. Ministry of Justice guidance does not preclude the use of RJ for sexual offences but does suggest that it be carried out by suitably experienced and skilled facilitators.⁴⁹ Our proposal would limit its use to sexual offences that are unlikely to result in prosecution, where an educative response is considered appropriate. Image-based sexual offences committed by young people in the absence of appropriate education and that are committed without particular malice may benefit. An example of such a case could be sexting between young peers, or the sharing of sexual images of peers without understanding the impact it will have on the victim. It follows that any RJ intervention should be properly managed and start with asking what the victim wants, in a safe and supportive environment. There is no set process to follow after this but the Restorative Justice Council has set out six principles of RJ practice, which should be applied in the course of all RJ work.⁵⁰ Any use of RJ in this context should be carefully monitored.

2.27. We consider that if used in this limited context, RJ will complement the national curriculum by providing young people who have unthinkingly committed image-based sexual offences with a deeper understanding of the consequences of their actions. Following this approach may also reduce the risk of re-victimisation and trauma for the complainant.

Designing out online offending

2.28. The biggest increase in sexual offending has come in the online sphere. There are three primary types of online sexual offending: (a) the uploading and

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/restorative-justice/written/28055.pdf>

⁴⁹ Ministry of Justice, 'Pre-sentence restorative justice (RJ)', 2014, para 2.2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/312426/pre-sentence-restorative-justice.pdf

⁵⁰ These principles are: i) Restoration – the primary aim of restorative practice is to address and repair harm. ii) Voluntarism – participation in restorative processes is voluntary and based on informed choice. iii) Neutrality – restorative processes are fair and unbiased towards participants. iv) Safety – processes and practice aim to ensure the safety of all participants and create a safe space for the expression of feelings and views about the harm that has been caused. v) Accessibility – restorative processes are non-discriminatory and available to all those affected by conflict and harm. vi) Respect – restorative processes are respectful to the dignity of all participants and those affected by the harm caused. See: <https://restorativejustice.org.uk/sites/default/files/resources/files/Principles%20of%20restorative%20practice%20-%20FINAL%2012.11.15.pdf>

viewing of IIOC; (b) grooming of children; and (c) the livestreaming of abuse. Every time an indecent image is shared the victim may re-victimised and the volume of available material enables other potential offenders to develop a sexual interest in children. Technology to prevent certain types of offending from entering the online sphere is essential to stem the problem. There are two viable ways of doing this: using technology to ensure materials are not uploaded to websites; and encouraging internet companies to “design-out” offending.

2.29. The Government has recently published its Online Harms White Paper (the White Paper), which sets out the Government’s plan to “keep UK users safe online.”⁵¹ One of the harms the paper identifies is Child Sexual Abuse (CSA) and sets out a range of measures the Government hopes to introduce. These include having a regulator responsible for the internet, holding internet companies responsible for content published on their websites and developing technology to stop illegal content being uploaded onto webpages. The White Paper does not provide specific proposals and only explores possible options. This last measure already forms part of the Government’s Serious and Organised Crime Strategy. The Strategy sets out priority areas that includes the aims that “child sexual abuse material should be blocked as soon as companies detect it being uploaded” and “companies must stop online grooming taking place on their platforms.”⁵²

2.30. We welcome this White Paper and consider that there are two specific ways that companies can stop child abuse imagery and materials being uploaded on to their websites. The first is the use of pre-screening or pre-filtering technology, which web platforms can use to block known IIOC and other child sexual abuse material, such as paedophile manuals, being uploaded. The second is to introduce a ‘Kitemark’ that online companies can use to show they have put in place safeguards against online sexual abuse.

Pre-screening technology

2.31. Pre-filtering or pre-screening content before it is either uploaded or downloaded from the internet is possible through technology that screens and

⁵¹ HM Government, ‘Online Harms White Paper’, April 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf

⁵² HM Government, *Serious and Organised Crime Strategy*, November 2018, p .27, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752850/SOC-2018-web.pdf

filters all uploads and downloads on platforms. The technology does this by comparing the digital signature of the image being uploaded (its ‘hash’) to the hashes of known illegal content. If the hashes match, the content cannot be uploaded.⁵³ This technology would require a database of known images as well as algorithms to detect images that are not known but which appear to be IIOC. By automatically blocking content that matches or is similar to illegal content, and not requiring the company to determine what is or is not illegal content, the impact on the privacy and free speech rights of internet users should be minimal.

2.32. UK law enforcement has its own database of IIOC, called the Child Abuse Image Database (CAID). It holds records of IIOC known to UK law enforcement, gathered from worldwide sources.⁵⁴ The Internet Watch Foundation also has its own, smaller database and there are plans to share it with CAID to make both databases more effective.⁵⁵ A method of connecting internet providers to this database will need to be explored.

2.33. The White Paper sets out the Government’s intention that a new internet regulator will issue codes of conduct for internet companies. “There will be a strong expectation that companies follow the guidance set out in these codes. If they choose not to do so, companies will have to explain and justify to the regulator how their alternative approach will effectively deliver the same or greater level of impact.” This requirement will combine with a new duty of care, for companies to protect against online harms. The regulator will assess whether companies have complied with their duty of care and take enforcement action either against the company or individual directors should

⁵³ Will Kerr, *supra* note 16.

⁵⁴ The Child Abuse Images Database consists of over 1,000,000 images. ‘Child abuse database containing millions of images to launch’, BBC News, 2014, available at <https://www.bbc.co.uk/news/technology-30175102>; HM Home Office, ‘The Child Abuse Image Database (CAID)’, May 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759328/CAID_Brochure_May_2018_for_gov_uk.pdf; It was created to assist the police both with the cataloguing and grading of IIOC and victim identification. It uses software to review files on any seized device, comparing those files with the known data in the database. CAID uses ‘hash’ values in the image metadata to process images. After being graded by three police forces, an image will be stored by CAID and approved as a ‘trusted’ grade. This reduces the need for investigators and prosecutors to view large numbers of images, saving time and avoiding distress: Crown Prosecution Service, ‘Indecent Images of Children (IIOC)’, available at http://www.cps.gov.uk/legal/h to k/indecnt_images_of_children/

⁵⁵ The IWF’s database consists of around 300,000 images (‘New technology’, Internet Watch Foundation, available at https://annualreport.iwf.org.uk/#new_technology: 295,389 images on it at end of 2017).

there be a breach.⁵⁶ We welcome the acknowledgement by Government of the need for stronger regulation of companies. The approach is similar to obligations in the Companies Act 2006 on corporate social responsibility. However, the Companies Act sets out more concrete requirements that **we consider should be in place for stopping IIOC**, given the clear cut nature of whether or not material is IIOC. These are:

- Internet companies whose products are available in the UK should be subject to a UK regulator⁵⁷ who can fine the company (and possibly any director responsible for content);
- Internet companies which have a footprint in the UK should be required to make a return to Companies House to declare:⁵⁸
- That it is satisfied its platform contains no material the possession of which would amount to an offence under IIOC legislation; or
- That it cannot confirm that its platform contains no material the possession of which would amount to an offence under IIOC legislation but that it has taken specified steps to check for content offending under that legislation; or
- That it has found offending material on its platform and it has taken specified steps to remove it.
- A failure to provide such a statement as part of the annual report or the making of a false statement would be penalised with a fine for the company and in the case of a responsible director a sentence of up to five years imprisonment.

Quality mark

2.34. Although the preceding recommendation will tackle some of the online problem, the nature of online offending is changing. Many platforms, such as Periscope, now offer a livestreaming service, which can result in ‘contact offending by proxy’, with the recipient of the live streaming directing the nature of the abuse. Another concern is the proliferation of online gaming. Many online games enable players to talk to each other, which can increase the risk of an adult grooming a child, as there are few safeguards in place to

⁵⁶ Online Harms White Paper, note 51.

⁵⁷ A similar recommendation has been made by the Digital, Culture, Media and Sport Committee in relation to curbing ‘fake news,’ see: Digital, Culture, Media and Sport Committee, ‘Disinformation and ‘fake news’: Final Report – eight report of session 2017-19’ (House of Commons), 18 February 2019) available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>

⁵⁸ In accordance with Part 15 of the Companies Act 2006.

prevent adults playing online games with children.⁵⁹ **A solution to this would be to develop a quality mark, similar to a ‘Kitemark’⁶⁰ for safe online spaces.** This would demonstrate to users and their parents that the website or platform in question has signed up to some safeguarding functions. It would allow companies that are doing the right thing to receive recognition for this.

2.35. The basic functions that would result in a Kitemark could be that a company:

- (a) Ensures that their websites are ‘secure-by-design’ by implementing features such as pre-filtering and the proactive searching of their sites for IIOC material;
- (b) Uses algorithms to identify adults trying to engage in grooming offences with children;
- (c) Takes a proactive duty to engage with law enforcement;
- (d) Takes a proactive duty to make sure that some anonymisation tools do not work on their online platform; and
- (e) Has safeguards in place on livestreaming services to ensure that children are not at risk of grooming when using those services.

2.36. One concern with an approach that engages with known websites and platforms is that web pages on the ‘Dark Web’⁶¹ will not be impacted greatly. However, we understand that although some of the worst offending takes place on the Dark Web, it has a relatively smaller proportion of images on it.⁶² In addition, we have been told that many of these images are pulled from easier to access websites. As such, stopping the uploading of images on easier to access websites should reduce the number of images on the Dark Web. What

⁵⁹ Instagram has been found to be the site most used for Grooming purposes: ‘Instagram biggest for child grooming – NSPCC finds’ BBC News, March 2019, available at <https://www.bbc.co.uk/news/uk-47410520>

⁶⁰ A BSI Kitemark gives a product or service immediate status – hard earned through rigorous tests at a BSI centre of excellence, or through rigorous assessments. It is a voluntary mark that manufacturers and service industries use to demonstrate safety, reliability and quality, see <https://www.bsigroup.com/en-GB/kitemark/>

⁶¹ The internet is divided into three main segments: (1) the ‘clear’ or ‘surface’ web; (2) the ‘deep’ web; and (3) the ‘dark’ web. The clear web makes up about 4% of total internet content and consists of sites such as Google and Wikipedia. They are publicly accessible web pages usually indexed on search engines. The deep web makes up the remaining 96% of the internet. These are regions that are hidden from the public, either because they require credentials to access the material within, or because they are intentionally hidden from view using the dark web. As well as being hidden from the public, the dark web allows users to access sites anonymously.

⁶² The Dark Web accounts for 0.01% of the total number of webpages on the internet. The most common way to access the Dark Web is through ‘The Onion Router’ (Tor) which has between 100,000 and 200,000 users. We stress that it is estimated that only 1.5% of Tor users visit hidden/Dark Web pages.

is more, it will allow law enforcement agencies to focus more resources on the Dark Web, to ensure that this is no longer seen as a safe space for offenders. We have been informed that the NCA has already identified a number of dark web sites, coordinating engagement by specialists both domestically and internationally. Enabling increased capacity for this important work is vital, and designing out offending on known websites will assist this.

Risk management

- 2.37. It may also be possible to work with those who have sexually inappropriate thoughts, assisting them in managing their own risk of offending. Helping people to manage their inappropriate thoughts may be effective in reducing offending. This is a new idea, with initial studies showing promising results. It seems right that those who have sexually inappropriate thoughts ought to have assistance before they act on those thoughts.
- 2.38. There is now an increasing drive to prevent offending by providing assistance to those who are concerned about their thoughts and urges. The aim is to help an individual develop ways to manage these behaviours so that they do not go on to commit an offence.
- 2.39. One such service is provided by The Lucy Faithful Foundation (LFF) and is called Stop It Now! The UK-wide service is for people who are worried about their sexual thoughts and feelings. An anonymous and confidential helpline supports the individual to create a plan to manage their thoughts and feelings.⁶³ An in-person service is also available called Inform Plus. However, this waives anonymity and if the person discloses any criminal behaviour, LFF will report this.⁶⁴
- 2.40. As well as being available to those who are worried about their thoughts and feelings, the Stop it Now! helpline can also be used by someone who is worried about another person's behaviour or a child's behaviour. LFF considers that a key aspect of prevention is assisting those who have concerns about other people's behaviour, to help them understand what actions need to be taken.

⁶³ In 2017/2018, 5,329 people received support from the Stop it Now! Helpline: 'The Lucy Faithfull Foundation & Stop it Now! Impact Report 2017/18', available at https://www.lucyfaithfull.org.uk/files/LFF_Impact_Report_2017_2018.pdf

⁶⁴ Due to a lack of resources, a fee is required to have in-person meetings. An initial meeting is usually held with an informal assessment about the individual's concerns and whether LFF can help, with five one-on-one sessions or ten group work sessions, depending on the individual's needs.

2.41. A study of the use and effectiveness of the Stop it Now! helpline was carried out in 2014.⁶⁵ It found that the programme strengthened attributes that are known to reduce the likelihood of committing child sexual abuse. These effects included:

- Helping the individual recognise behaviour as risky or problematic;
- Providing an understanding that the behaviour is dynamic; it can change and be addressed; and
- Enabling the implementation of techniques and advice on challenging and changing this behaviour.⁶⁶

2.42. In addition to these positive effects, the study found that levels of wellbeing and resilience were reported to have improved following contact with the helpline, which supported the individual's ability to tackle their problematic behaviour, which is thought to assist the prevention of sexual abuse of children.⁶⁷ Moreover, the economic analysis conducted as part of the study found that the financial benefits to the taxpayer of Stop it Now! outweighed its costs. This is without considering the wider cost of child sexual abuse to society.⁶⁸

2.43. Another organisation, the Safer Living Foundation (SLF) has recently started its own prevention scheme, named the Aurora Project (Aurora), which went live in October 2017.⁶⁹ It goes further than Stop it Now! offering individual and group therapy to those who are concerned about their thoughts and feelings. It offers compassion-focussed treatment, with a goal of separating the

⁶⁵ A. Brown & ors, *Call to keep children safe from sexual abuse: A study of the use and effects of the Stop it Now! UK and Ireland Helpline*, NatCen Social Research (June 2014), available at <http://natcen.ac.uk/media/338805/stop-it-now-uk-findings-.pdf>

⁶⁶ *Ibid*, p. 5.

⁶⁷ *Ibid*, p. 6.

⁶⁸ R. Bowles, *Economic analysis of the Stop it Now! UK and Stop it Now! Netherlands Helplines: Summary*, NatCen Social Research (2014), available at <http://natcen.ac.uk/media/338803/stop-it-now-economic-analysis.pdf>

⁶⁹ Aurora is based on Project Dunkelfeld, a German prevention project. However, Aurora found Dunkelfeld's methods outmoded and has developed its own methodology. See K. Beier & ors, 'The German Dunkelfeld Project: A pilot study to prevent child sexual abuse and the use of child abusive images,' *The Journal of sexual medicine*, (2015), 12(2), pp. 529-542, available at <https://doi.org/10.1111/jsm.12785>; and 'Model project for paedophiles saved', Deutsche Welle, 2016, available at <https://www.dw.com/en/model-project-for-paedophiles-saved/a-36154362>

sexual interests of the individual from their actions through building an individual's life skills.⁷⁰

- 2.44. Despite Stop it Now! being intended as a service that will prevent offending, many of the individuals who use the service have been referred to it by the police or through the splash page,⁷¹ which of course usually means an offence has been or would have been committed.

When the IWF or one of its partners blocks a URL, they recommend the use of a specific splash page, which reads:

“Deliberate attempts to access this or related material may result in you committing a criminal offence.

The consequences of accessing such material are likely to be serious. People arrested risk losing their family and friends, access to children (including their own) and their jobs.

Stop it Now! can provide confidential and anonymous help to address concerning internet behaviour. They have helped thousands of people in this situation.

0808 1000 900 | help@stopitnow.org.uk | www.stopitnow.org.uk

If you think this page has been blocked in error please contact your <service provider> or visit the IWF's Content Assessment Appeal Process page.”

- 2.45. The use of splash pages has been effective. Between 1 March 2016 and 12 May 2019, 20,644 new users clicked through to the Stop it Now! website from the splash page. The number who called the helpline after viewing the splash page is unknown and it is likely that the number of people being directed to the helpline is higher, if those phone calls are taken into account. In order to increase the number of people who use the service prior to committing an offence, LFF has also run intermittent advertising and social media campaigns

⁷⁰ It is a confidential programme, although if an individual discloses information about an unconvicted offence or information about a child or adult who is currently being victimised, Aurora will report this. It seems to us that Aurora is probably applying the correct techniques to prevent offending. Evaluation of Aurora was established at the start of the programme and is continuous see: 'The Aurora Project', Safer Living Foundation, available at <http://saferlivingfoundation.org/aurora-project/>

⁷¹ A Splash Page is a page that is designed to appear before the main website which provides information about a specific topic.

but they do not have the funding to run an extensive awareness raising campaign.

- 2.46. Both Stop It Now! and Aurora offer the chance for individuals to address concerns about their thoughts and behaviours before an offence is committed. However, the projects are not widely known, and are financially constrained, making it difficult to significantly impact the individuals for whom the projects are designed. Ensuring that at risk individuals are signposted to these services – and the development of similar programmes in other areas of the country - is vital.
- 2.47. We consider that pop-up adverts on legal pornography sites, signposting users concerned about their behaviour to Stop It Now! and Aurora should be used. This is because a known route to IIOC is from legal pornography to ever more extreme categories, eventually moving onto IIOC. Signposting at different parts of this gateway may stop individuals moving onto IIOC. We understand that an attempt at engaging the pornography industry has been made previously but it came to nothing as the industry was concerned about its image. Renewed efforts should be made. **Notices should pop up when a user displays an interest in ‘gateway’ images.⁷² Alerting an individual to the idea that their behaviour is becoming more risky – and to continue their behaviour will result in monitoring and possible criminal prosecution - may help people realise that they must seek help.** Similarly, a warning that a user is moving from a mainstream pornography site that safeguards against illegal content to one that has no safeguards in place may be useful, as sometimes users are unaware of this.
- 2.48. **In conjunction, a national advertising campaign that makes people aware that these services are available should be undertaken.** Much like the national campaigns on consent and drink driving, this should be carried out by the Government. The campaign should seek to change attitudes so that rather than inappropriate sexual thoughts being hidden because they are thought of as shameful and unmanageable, individuals should feel able to seek assistance in managing their thoughts without the fear of being shamed. Similar advertising campaigns have taken place in Germany and Sweden, with a view to reducing the shame preventing people from seeking help.⁷³

⁷² Such images could include categories where youth is highlighted, or with certain coercive fetishes.

⁷³ Dunkelfeld and Priotab sought to raise awareness of their services by having adverts that did not shame the individuals they wished to treat, which has resulted in good participation in their projects. Project Dunkelfeld and Priotab are programmes that seeks to treat individuals before they come into contact with the criminal justice system. This includes individuals who are worried about their thoughts

2.49. We welcome the research findings on the Stop It Now! helpline. However, the interventions provided by Stop It Now! and Aurora should be further studied in terms of both process and outcome.⁷⁴ Where evaluations show positive outcomes, prevention programmes should be sufficiently funded by Government to enable nationwide availability.

but have not acted on them. says that more than 9,500 people contacted the prevention network until the end of March 2018. Of these, 2,984 people travelled to one of the sites for diagnosis and advice, and 1,554 of them received an offer to take part in the therapeutic approach. 925 participants have started the therapy, and 360 successfully completed it. See ‘More than 9,500 people asked for help’, Don’t Offend, available at <https://www.dont-offend.org/story/more-than-9-500-people-asked-for-help.html>; the website also carries an advertising video on it: <https://www.dont-offend.org/>

⁷⁴ An evaluation could be carried out by the same team that evaluated the SOTP programme, or an independent academic team of researchers.

III. REDUCING REOFFENDING

*So much of this is preventable, but at this moment in time the system is failing, because so many people do not have to confront their offending behaviour – Chief Constable Simon Bailey, NPCC Lead for Child Protection*⁷⁵

- 3.1. The **previous chapter** focused on the mechanisms that might preventing particular kinds of sexual offences being committed. Nevertheless, it is inevitable that the whole range of sexual offending will still occur. When a sexual offence is committed, sentencers have a range of factors to consider in determining the appropriate penalty. The Criminal Justice Act 2003 states that the purpose of sentencing is to punish, reduce crime (including by deterrence), and rehabilitate an offender, whilst offering protection to the public and reparation to those affected by their offences.⁷⁶ Whilst these are all important, evidence suggests that effective rehabilitation programmes provide the best opportunity to reduce repeated sexual reoffending. We consider that Her Majesty’s Prison and Probation Service (HMPPS) should prioritise the availability of such programmes for individuals convicted of sexual offences.
- 3.2. There are currently three types of post-conviction intervention in England and Wales aimed at reducing reoffending for sexual offences:
 - (a) sex offender programmes provided by Her Majesty’s Prison and Probation Service (HMPPS);
 - (b) pharmacological treatment in prisons; and
 - (c) voluntary ‘Circles of Support’ and accountability in the community.

In this chapter we review the innovative approach to rehabilitation that these programmes appear to utilise.

- 3.3. We have also considered recently adopted police schemes aimed at reducing the recidivism rate of certain kinds of non-sexual offences through the use of diversion and deferred prosecution. Early indicators of these initiatives are encouraging, and the Working Party has taken inspiration from two such schemes, Operation Turning Point (Turning Point) and Operation Checkpoint (Checkpoint), which focus on rehabilitation to reduce offending. These schemes not only provide the same rehabilitative effect as current treatment programmes, they also reduce the number of offences to be dealt with by the

⁷⁵ *Supra* note 16.

⁷⁶ Criminal Justice Act 2003, s.142(1).

courts. In this chapter we set out a proposal for how such a scheme might be adopted for certain sexual offences.

Rehabilitation

- 3.4. The risk of reoffending can be calculated with moderate accuracy.⁷⁷ The Ministry of Justice produces proven reoffending statistics, which show that for all crimes in the year ending March 2017 the average rate of reoffending was 29%. For those who had committed sexual offences, the reoffending rate was 13.9%,⁷⁸ which drops to 7.5% if isolated to further sexual crimes.⁷⁹ Therefore, the likelihood that a convicted sexual offender will commit a further sexual offence is already low. However, the nature of repeat offences together with the volume of sexual offences being detected mean that they take up a disproportionate amount of CJS resource.
- 3.5. Factors such as empathy for the victim, contriteness and expression of shame were once thought vital in showing that an individual has learned their lesson. However, they have little or no bearing on the assessment of risk of reoffending, to the best of our current knowledge. Rather, an individual's criminal history and personal circumstances determine their risk of reoffending. Risk factors include whether an individual:
- (a) has a history of anti-social behaviours (including substance misuse);
 - (b) has longstanding and problematic psychological traits such as feelings of loneliness and grievance, hostility towards others and poor problem solving; and

⁷⁷ F. Williams and R. Mann, 'The assessment and treatment of people convicted of sexual offences after sentencing,' in Rook and Wood, *Sexual Offences Law & Practice: Supplement to the 5th Edition*, Sweet & Maxwell, (2019), pp. 467 and 468.

⁷⁸ Ministry of Justice, 'Proven Reoffending Statistics Quarterly Bulletin, January 2017 to March 2017', available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775079/proven_reoffending_bulletin_January_to_March_17.pdf

⁷⁹ A. Mews, L. Di Bella and M. Purver, *Impact evaluation of the prison-based Core Sex Offender Treatment Programme*, Ministry of Justice Analytical Series, (2017), p. 2, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623876/sotp-report-web-.pdf; this corresponds with earlier research which found similar levels of recidivism: D. Grubin & S. Wingate, 'Sexual Offence Recidivism: Prediction versus understanding,' *Criminal Behaviour and Mental Health*, 6, 349-359 (Whurr Publishers Ltd, 1996), pp. 349 – 357, available at: <http://www.lanternproject.org.uk/library/research-about-sex-offenders/managing-sex-offenders/sexual-offence-recidivism/>

(c) has the opportunity to offend.⁸⁰

That an individual is more likely to be released into a chaotic, empty life is more indicative of risk than the shame they express about the offence they committed. This approach, which seeks to minimise the significance of factors such as the level of shame and guilt and moves towards a focus on building personal strengths and skills of an individual, is now reflected within a variety of rehabilitation programmes.

3.6. Meta-analyses⁸¹ have largely shown that treatment programmes for those who have committed sexual offences have reduced reoffending rates, although results are not consistent and a recent impact evaluation of the HMPPS Core Sex Offender Treatment Programme (SOTP) found no effect.⁸² However, a revised meta-analysis carried out by Gannon and others adds to the evidence that suggests treatment programmes for sexual offending can be effective, when they contain certain elements.⁸³ The meta-analysis of published and unpublished data evaluated over 41,000 participants and included the recent impact evaluation of SOTP. It found that treatment produced a relative reduction in sexual offending of 32.6%. Importantly, the breadth of the study allowed the researchers to identify the aspects of sex offence-specific treatment programmes that produce a positive effect to treatment. These are when:

- (a) Psychological expertise is ‘hands on’ and consistent;
- (b) Inappropriate sexual interest is tackled;
- (c) Group therapy is used rather than group therapy plus individual sessions;
- (d) Supervision is provided; and
- (e) Polygraph testing is absent.

⁸⁰ See K. Babchishin, R.K. Hanson & H. Van Zuylen, ‘Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of online and offline sex offenders against children’, *Archives of Sexual Behaviour*, (March 2014).

⁸¹ Meta-analyses allow the results of several studies to be combined, increasing their statistical power. This allows for a more thorough understanding of the evidence than looking at individual studies. This is because individual studies can be hampered by political, methodological and organisational constraints, which weakens the research design. Randomised-control trials, which provide the strongest evidence are rarely conducted in this area, *supra* note 77.

⁸² *Ibid.*

⁸³ T. Gannon, M. Oliver, J. Mallion, & M. James, *Does specialized psychological treatment for offending reduce recidivism? A meta-analysis examining staff and program variables as predictors of treatment effectiveness* (Manuscript submitted for publication) (2019).

HMPPS programmes

- 3.7. In 2017 and 2018, HMPPS introduced three new programmes for individuals who have committed sexual offences. These are called ‘Horizon,’ ‘Kaizen’ and ‘Internet Horizon’ and they currently comprise the core rehabilitative treatment for prisoners.⁸⁴ These programmes were introduced following a growing understanding that the previous sexual offender treatment programme was ineffective, partly because it prevented individuals from wanting to change.⁸⁵ Horizon and Kaizen aim to be motivational and provide opportunities for men to address their risk factors and build on their strengths and skills. The programmes focus on building healthy relationships and problem-solving; challenge offence-related thinking (such as identifying as a criminal); and how to manage sexual interests. The programmes also focus on factors thought to promote desistance.⁸⁶
- 3.8. Horizon is for men assessed to be at medium and above risk of reoffending and who demonstrate a willingness to improve aspects of their lives. It consists of 31 group sessions, three individual and a post-programme review meeting. The content seeks to develop healthier sexual regulation and functioning.⁸⁷ Horizon

⁸⁴ The new programmes developed by HMPPS are all accredited by the Correctional Services Accreditation and Advice Panel (CSAAP). This is a panel of independent experts from around the world who only accredit programmes that are designed in line with the most up-to-date evidence about what works. As well as these two core programmes, there are a number of others that have been approved by the CSAP. These include one for individuals with low IQs and a one-to-one programme.

⁸⁵ The impact evaluation showed that when comparing differences between those who were on the programme and the control group, 2% more Sexual Offence Treatment Programme (SOTP) participants than control members committed at least one sexual re-offence and 1.5% more SOTP participants than control members committed at least one child image re-offence. Other outcome measures showed similar reoffending rates. The impact evaluation concluded that the small differences suggest that SOTP either does not reduce sexual recidivism or that the true impact of SOTP was not detected. However, the study did not assess whether the outcomes were the result of poor treatment design or poor implementation: A. Mews, L. Di Bella & M. Purver, *supra* note 79.

⁸⁶ We understand that a further approach is to have the individuals identify the ‘old me’ and ‘new me’, thinking back on past experiences and envisioning how the ‘new me’ would approach them. The aim is to identify an individual’s strengths and skills and improve them. This is because people who are then able to desist from offending have a more positive identity, enabling them to reject the identity of a criminal.

⁸⁷ Its criminogenic targets include: modify offence-supportive attitudes; improve problem-solving; improve sexual self-regulation; improve intimacy skills; reduce impulsivity; improve acceptance of rules and supervision; develop healthy sexual interests; develop positive sense of identity; improve resistance to negative influences of others; improve social support and improve ways of using leisure time. It includes approximately 60 hours of treatment. Due to its focus on strengths and skills rather than shame and empathy, it is suitable for both men who admit their guilt and those who maintain their innocence: F. Williams and R. Mann, *supra* note 77.

is also offered in the community.⁸⁸ A recent process study of Horizon (which did not assess its effectiveness) found there were high completion rates and that both staff and participants gave positive feedback on the programme.⁸⁹

- 3.9. Kaizen is for men who are at high risk of reoffending. It is more intensive than Horizon⁹⁰ and is delivered mainly through group-work, with groups of eight or nine members working with a team of two or three facilitators. There is currently a small pilot to see if Kaizen might be effective in the community.⁹¹
- 3.10. Internet Horizon is provided in the community for individuals who commit online offences. It is shorter than the current Horizon programme, consisting of 23 group sessions, three individual sessions and a post-programme review meeting. It covers use of the internet, managing sexual interests and relationships.

Community programmes

- 3.11. As well as the HMPPS programmes outlined above,⁹² a growing number of charitable organisations have begun to provide rehabilitative assistance in the community to those who have sexually offended, such as the Lucy Faithful Foundation (LFF), Circles UK and the Safer Living Foundation (SLF).
- 3.12. For instance, LFF run the Inform Plus programme. This is available to individuals who have been arrested, cautioned or convicted for IIOC offences and allows participants to explore behaviour and devise strategies to avoid future offending. The focus is on building personal skills rather than castigating the individuals.⁹³ LFF has also begun a programme that works with

⁸⁸ The programmes offered in the community are run more slowly, due to participants' other commitments: F. Williams and R. Mann, *supra* note 77.

⁸⁹ K. Wilkinson & B. Powis, *A process study of the Horizon programme*, Ministry of Justice, (January 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769540/process-study-horizon-programme.pdf

⁹⁰ It has approximately 160 hours of treatment: F. Williams and R. Mann, *supra* note 77.

⁹¹ *Ibid.*

⁹² HMPPS also offers support in the community with a 'Maps for Change' toolkit. This is a work-based resource for Offender Managers to help structure the supervision, offering a practical package of exercises that focusses on improving the individual's strengths, F. Williams and R. Mann, *supra* note 77, p. 474.

⁹³ The LFF does not have the resource to provide this service free of charge. As such, it costs £780, with the cost rising to £1,080 if a one-to-one programme is required, and is available in the South East,

young people who have got into trouble for sexually concerning behaviour, from looking at pornography, to accessing IIOC and sexual chat. This is generally a five or six session intervention, using one to one sessions and utilising the Good Lives Model.⁹⁴ The SLF also uses the Good Lives Model when working with individuals who have committed sexual offences.

- 3.13.** Circles of Support and Accountability (CoSA) also focus on improving the skills of the individual, while attempting to help them feel that they are part of a community. They provide support to an individual in developing social skills, finding accommodation or developing hobbies.⁹⁵ They also require the individual to take responsibility for their own risk management. These interventions directly address risk factors that are known to lead to offending, such as a lack of secure housing.⁹⁶
- 3.14.** These programmes all utilise what seems to us to be the most up-to-date thinking on what works in reducing recidivism of sexual crimes. Providing effective rehabilitation programmes for those convicted of sexual offences is vital in ensuring that the risk of reoffending is minimised. The recent meta-analysis by Professor Gannon has set out what elements of treatment programmes produce the best results. It also showed that there were not enough randomised-control trials of treatment programmes for those who have

Avon and Somerset, the Midlands and the North. The individual must pay for these sessions. See 'Inform Plus', The Lucy Faithfull Foundation, available at <https://www.lucyfaithfull.org.uk/inform-plus-for-internet-offenders.htm>

⁹⁴ According to the Good Lives Model, people offend because they are attempting to secure some kind of valued outcome in their life. As such, offending is essentially the product of a desire for something that is inherently human and normal. Unfortunately, the desire or goal manifests itself in harmful and antisocial behaviours, due to a range of deficits and weaknesses of the offender and his/her environment. Essentially, these deficits prevent the offender from securing his desired ends in pro-social and sustainable ways, thus requiring that he resort to inappropriate and damaging means, that is, offending behaviour, see: <https://www.goodlivesmodel.com/information.shtml>

⁹⁵ 'What is a Circle of Support and Accountability?', Circles UK, available at <http://www.circles-uk.org.uk/about-circles/what-is-a-circle-of-support-and-accountability>

⁹⁶ The Ministry of Justice has evaluated the effectiveness of circles through two pilots carried out between April 2008 and March 2010. The MoJ funded the LFF and the Hampshire Thames Valley (HTV) Circles to understand the added support and value that CoSA can provide. It did not assess recidivism. The pilots found that CoSAs appeared to contribute to risk management, especially with individuals who had 'negative lifestyles'. The average cost of the LFF circle – which carried out a national model – was £9,800, excluding the cost of the volunteers. For HTV – which focused on one area – it was £7,900. See: MOJ, Circles of Support and Accountability (CoSA): A Case File Review of Two Pilots, 2014, pp. 5-6, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/293400/cosa-research-summary.pdf

committed sexual offences. As such, **we recommend that the Ministry of Justice carries out a randomised-control trial of sufficient depth to assess the efficacy of the treatment and rehabilitation programmes, utilising the positive programme elements that Professor Gannon has outlined.** If it produces positive results, **we recommend that HMPPS adapts the Horizon and Kaizen programmes to include these elements. We recommend that all programmes are facilitated by a psychologist,** given that one of Professor Gannon’s main findings was that this makes treatment more effective.

- 3.15. We recognise that this may have resource implications. However, effective treatment will reduce police, prosecution and court resource spent on prosecuting repeat offenders. Furthermore, effective treatment will ultimately afford better protection to the public.

Pharmacological treatment

- 3.16. In addition to the programmes outlined above, there have also been positive results from voluntary pharmacological programmes. These are programmes where drugs are used to reduce the sexual urges of a fully informed and consenting individual.⁹⁷
- 3.17. Although there is a risk of adverse side-effects,⁹⁸ it has been reported that pharmacological treatment effectively reduces risk and HMPPS has started to make this more widely available within the prison estate. Indeed, meta-analyses have shown improved outcomes of cognitive behavioural therapy when paired with pharmacological treatment. Eight prisons are currently able to assess and, where deemed appropriate, prescribe anti-libidinal medication, which is funded by the NHS.⁹⁹
- 3.18. The results of studies assessing the efficacy of pharmacological treatment are encouraging. However, the number of studies is small, with small sample sizes. **We recommend that the Ministry of Justice carries out further randomised control trials, including surveys of user-experience** on the

⁹⁷ Forced treatment would violate Article 3 of the European Convention on Human Rights – the prohibition against torture and inhuman and degrading treatment.

⁹⁸ Side effects can include erectile failure, hot flushes, and decreased bone mineral density: T. Amelung and others, ‘Androgen deprivation therapy of self-identifying, help-seeking pedophiles in the Dunkelfeld,’ *International Journal of Law and Psychiatry*, 35 (2012) 176-184).

⁹⁹ F. Williams and R. Mann, *supra* note 77, p.478: Pharmacological treatment is appropriate for individuals who are distressed by intrusive and obsessive thoughts about sex or compulsive sexual behaviour, which is about 10% of the convicted population.

efficacy of pharmacological treatment both in conjunction with Cognitive Behavioural Therapy and without additional therapy.¹⁰⁰ This will help expand our understanding of the benefits and disadvantages of pharmacological treatment.

Police-led diversion schemes

- 3.19. Deferred prosecution schemes are interventions that take place after arrest and, if successful, avoid prosecution. They are premised on the idea that deterrence is better effected through managed programmes that have a definite punishment if not complied with, i.e. the threat of prosecution.¹⁰¹
- 3.20. Two prominent schemes are Checkpoint, run by Durham Constabulary, and Turning Point, run by the West Midlands Police. These schemes work by addressing the underlying behaviours that lead to offending. We have been told that in Checkpoint they take a broad ranging personal history, such as home, employment, family, finances and drugs, and ask the individual what will help them to stop offending. Through working and building a relationship with the individual, Checkpoint is able to change the individual's attitude, thinking and behaviour.
- 3.21. When an individual is arrested an initial eligibility assessment is carried out based on the type of offence committed and previous offending history. There is no requirement for the person to formally admit guilt although they must accept responsibility for their actions. The individual's risk of reoffending is then assessed to ensure that a deferred prosecution scheme is appropriate. Only lower medium-risk individuals are taken onto the scheme as Checkpoint considers that this is the group most likely to not reoffend. The Working Party understands that low-risk individuals will not be helped much by a police led diversion and high-risk individuals require a more secure response. Both schemes have developed their own algorithms to determine eligibility.¹⁰²

¹⁰⁰ Pharmacological treatment should only be offered where an individual meets prescribing criteria (since this medication would only be useful where people have problematic sexual arousal). If trials are successful, the medication could also be offered to those in the community who are struggling with problematic sexual arousal, whether they have offended or not.

¹⁰¹ P. Neyroud & M. Slothower, *Operation Turning Point: interim report on a randomised trial in Birmingham, UK*, (2013), available at <https://www.crim.cam.ac.uk/global/docs/events/ebp2013/operation-turningpoint-ebp2013.pdf>

¹⁰² Both algorithms appear to have a high degree of accuracy.

- 3.22. If eligible, an individual must sign a contract undertaking to do certain things, such as attend a drug rehabilitation course, within a certain time. The contracts are designed to address the factors that are causing the individual to offend. Unsuccessful completion of the contract will result in the individual being referred back to the police for a prosecution. The programmes are monitored by civilian navigators, who we are told are better able to build rapport as they are seen by the individuals as more independent than police officers.
- 3.23. The results of the schemes are encouraging. Compared with those who are prosecuted traditionally, participants have an at least as good or lower reoffending rate.¹⁰³ What is more, victim satisfaction is higher.¹⁰⁴ This may be due to the victim seeing that a targeted intervention is taking place to prevent the offending behaviour reoccurring.¹⁰⁵ We understand that further detailed analysis is forthcoming and consider that this should include the effectiveness of the process, including the number of breaches that occurred and the prosecution rate for those breaches.
- 3.24. Neither initiative is currently available for individuals who have committed sexual offences. However, Hampshire Constabulary has implemented a similar scheme called CARA (Cautioning and Relationship Abuse) for crimes connected with domestic abuse.¹⁰⁶ CARA has also shown encouraging results, with a reduction in re-arrest of 21% for domestic abuse compared to a control group.¹⁰⁷ In 2019/2020 CARA will be delivered across four sites to over 600

¹⁰³ ‘Operation Turning Point’, University of Cambridge, available at https://whatworks.college.police.uk/Research/Research-Map/Documents/TP_Storyboard.pdf The data showed that for low-risk individuals, there is relatively little difference between those who are traditionally prosecuted compared with those on Turning Point. However, for violent individuals only, those on Turning Point were 35% less likely to be rearrested. We understand that Checkpoint will soon be publishing its results, which are thought to show improved outcomes for those on Checkpoint compared with those who are traditionally prosecuted.

¹⁰⁴ 43% of victims were more satisfied with Turning Point than the control (traditional disposals): P. Coutts, *Turning Point: The Police’s Production and Use of Evidence to Reduce Reoffending Alliance for Useful Evidence*, (January 2018), available at <https://www.alliance4usefulevidence.org/wp-content/uploads/2018/01/Turning-point-case-study-v1.pdf>

¹⁰⁵ *Supra* note 103.

¹⁰⁶ This differs from Checkpoint and Turning Point in that it is a conditional caution scheme and requires an admission of guilt for an individual to participate. However, it is similar in that it focussed on motivating the individual to change.

¹⁰⁷ H. Strang, L. Sherman, B. Ariel *et al*, ‘Reducing the Harm of Intimate Partner Violence: Randomised Controlled Trial of the Hampshire Constabulary CARA Experiment’, *Cambridge Journal of Evidence-based Policing*, 1:2-3 (2017), pp. 160-173, available at <https://link.springer.com/article/10.1007/s41887-017-0007-x>

individuals.¹⁰⁸ Domestic abuse shares similarities with sexual offences in terms of coercion and control, indicating that a similar scheme could work for some sexual offences.

- 3.25. It seems to us that an effective police-led diversion scheme, used appropriately, may well reduce the volume of cases prosecuted, freeing up resource to focus on cases that must go to trial. The success of the schemes outlined above has encouraged us to explore a similar scheme, for individuals who view Indecent Images of Children (IIOC).

An IIOC conditional diversion scheme

- 3.26. Sexual offences are by their nature serious, reflected in the custodial sentences imposed. However, for some types of sexual offending, prosecution and prison can be ineffective and inefficient at reducing the risk of reoffending. This appears to be the case for those who view IIOC and do not contact offend. Many who view IIOC are unlikely to go on to contact offending.¹⁰⁹ They often justify their viewing of IIOC as a victimless crime. Yet IIOC offences are still serious. Those who view IIOC create demand, which necessarily begins as contact offending against a child. Moreover, that child is re-victimised each time the image is viewed.
- 3.27. It is often the shock of the arrest and the confirmation that what they are doing is harmful and wrong that causes these individuals to stop offending. As such, a scheme that reinforces this 'teachable' moment and does not stray into treatment may be appropriate. The reoffending rates for IIOC offences can be broken down as follows:
- Those who commit IIOC offences and have no previous offending history have around a 2% recidivism rate for contact offences and a 5% recidivism rate for internet offences;
 - Those who commit IIOC offences and have a non-violent offending history have around a 3% recidivism rate for contact offences and a 12% recidivism rate for internet offences; and

¹⁰⁸ 'CARA', The Hampton Trust, available at <https://www.hamptontrust.org.uk/program/cara-2/>

¹⁰⁹ See K. Babchishin, R.K. Hanson & H. Van Zuylen, *supra* note 80.

- Those who commit IIOC offences and have a violent (including sexual offence) history have around an 8% recidivism rate for contact offences and a 21% recidivism rate for internet offences.¹¹⁰

3.28. Whilst recidivism rates should be viewed with some caution,¹¹¹ the development of Multi-Agency Public Protection Arrangements (MAPPA)¹¹² has provided greater confidence that those who commit sexual offences are robustly supervised in the community and, overall, recidivism rates are falling as a result of these more stringent measures.

3.29. 77% of those convicted of viewing IIOC receive a suspended or community sentence.¹¹³ Moreover, for many of those that do receive an immediate custodial sentence it will be short. The ineffectiveness of short sentences in reducing the risk of reoffending has been noted by the Lord Chancellor,¹¹⁴ and successive Lord Chief Justices. Moreover, given the evidence that treatment of low-risk individuals can be counterproductive, one third of individuals who commit sexual offences are not eligible to participate in the treatment programmes offered by HMPPS.¹¹⁵ As such, the current sentencing approach to those who view IIOC does not include a structured HMPPS treatment programme for many of these individuals.

3.30. Against this backdrop we have developed a proposal for a conditional diversion scheme that we consider will be able to provide an intervention that is just as effective as a post-conviction sentence, if not more, without the need to use court and prosecution resources.¹¹⁶ The Scheme will require up front

¹¹⁰ M.C. Seto & A.W. Eke, 'Predicting recidivism among adult male child pornography offenders: Development of the Child Pornography Offender Risk Tool (CPORT)', *Law and Human Behaviour*, (April 2015).

¹¹¹ And the majority of perpetrators of sexual offences are never prosecuted or convicted.

¹¹² MAPPA is a mechanism through which agencies can better discharge their statutory supervision responsibilities and protect the public in a co-ordinated manner.

¹¹³ CC Simon Bailey, note 16.

¹¹⁴ 'A major speech by the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice', Reform, available at <https://reform.uk/events/major-speech-rt-hon-david-gauke-mp-lord-chancellor-and-secretary-state-justice>

¹¹⁵ F. Williams and R. Mann, *supra* note 77, p. 475.

¹¹⁶ Some forensic psychologists believe that a conditional diversion scheme is 'dangerous' as the viewing of IIOC is the first step on a 'spiral' of decline that leads to contact offending. They argue that a scheme would allow individuals who have the potential to commit contact offences to remain free without proper supervision. They base these conclusions on clinical experience, as well as a minority of published studies, which appeared to show that 80% of individuals in that study who had viewed IIOC

funding but we consider that it will result in an overall saving for the CJS. There are around 1,000 IIOC referrals to the police every month.¹¹⁷ Even if some of these referrals relate to the same individual, this represents a number that cannot reasonably be expected to be dealt with by the courts. Finding solutions that ensure that individuals receive interventions quickly so as to minimise their risk of reoffending should be the priority when considering child safety.

- 3.31. A further benefit of such a scheme is its potential to reduce the suicide risk of those who are arrested for viewing IIOC, who are over 200 times more likely to take their own lives than members of the general population. This often occurs within the first 48 hours after arrest and is thought to be linked to the intense feelings of shame associated with arrest for such an abhorrent crime.¹¹⁸ Knowing that there is the possibility of a conditional diversion scheme may reduce the impact of shame and fear of social ostracism that the individual may feel.
- 3.32. We commend the scheme we propose below to HMPPS for consideration.

The scheme

- 3.33. In devising this scheme, we spoke with many experts and convened a roundtable discussion, which provided expert input into its design. Moreover, we have drawn from other programmes that address adverse behaviours. As such, we believe it is stringently in line with current evidence on what works to reduce reoffending, while being mindful that sexual crimes are always serious.
- 3.34. This scheme could be likened to an awareness-raising programme – sometimes referred to as psychoeducational programmes – such as a drink-driving course and will be available to those who have viewed IIOC only. This is due to the low recidivism rate of these types of offences, where more intensive

had also committed a contact offence against a child. However, we have spoken with experts in the field who have a number of concerns with these conclusions: (i) The individuals were discussing previous offending; recidivism was not measured; (ii) The nature of the clinical intervention, and the vulnerability of the patients, may have caused false offences to be disclosed; and (iii) This view and these conclusions do not align with the majority of the studies that have been carried out in this area. That evidence shows that only a small proportion of individuals who view IIOC go on to commit contact offences.

¹¹⁷ Supra note 16.

¹¹⁸ See: R. Kay & ors, *Managing Perpetrators of Child Sexual Exploitation and Indecent Images of Children (IIOC): Understanding Risk of Suicide*, NHS and NCA, (2017)

interventions amounting to treatment may be counterproductive. The programme ought to be designed purely to educate and assist with moving forward in a pro-social manner, rather than to shame and punish, since this has been shown to be ineffective.

- 3.35. The scheme should comprise of five sessions over a period of four months, with one follow-up session eight months later, a year after the start of the programme. This number of sessions is sufficient for educating participants without amounting to a treatment programme.
- 3.36. If the participant were to successfully complete the scheme, they would not be prosecuted. Completion would require not just attendance but also full engagement with the programme, to be assessed by the facilitators and reported to the police if necessary. For instance, if someone attended every session but refused to talk or participate, it would amount to a breach. However, should someone miss a session for a genuine reason, it should not amount to a breach, but the individual ought to restart the programme. Clear guidelines on what would amount to serious and minor breaches would need to be developed and provided as part of trainer accreditation.
- 3.37. The scheme would not supplant normal safeguarding procedures that may be considered for any individual who commits sexual offences, including IIOC offences. For instance, participation in the scheme would still be disclosed on an enhanced DBS check.
- 3.38. The sessions would include the following:
 - (1) An initial, individual meeting during which a progress plan would be developed highlighting the factors that contributed to the individual's sexual offending. At this meeting, participants would identify triggers and risk factors that led to their viewing IIOC.
 - (2) Four structured sessions, taking place either individually or in groups – depending on the number and age of the individuals participating at that moment. A group should consist of no more than eight members. Sessions should last for one hour with an individual and one and a half hours with a group. The topics of the sessions would cover:
 - a. Learning regarding the abusive industry through which IIOC is produced and distributed, and how the individual's behaviour contributes to this;
 - b. Understanding the internet and safe internet behaviours;
 - c. Planning for the future, to include how they want to live their lives and build better relationships; and

- d. Safety planning. This session would provide strategies to manage impulses and to plan for the future, incorporating information from the first session. At this session, the individual would produce a final Future Plan, which must be a tangible, organised document that can be shared with other facilitators. It should contain intrinsic, achievable and motivational goals, to enable progress to be reviewed at the final meeting. This document would be retained on record by the course provider or organisation overseeing the scheme.
- (3) Eight months after completion of the scheme, the police should check the individual's devices for any IIOC and be assessed for compliance with their Future Plan. If any IIOC or non-compliance are found, or more serious offending is uncovered, the participant would be subject to the traditional prosecutorial route in respect of those subsequent offences.

3.39. If successful, a similar scheme that includes individuals who commit contact offences who are deemed low-risk should be carefully considered. This would require an improved risk assessment process to what is suggested here.

Criteria for participation

3.40. Eligibility for the scheme would be assessed automatically at the police investigation stage and would not require any discretionary decision-making by arresting officers or the CPS. Participation on the scheme would be offered as an alternative to prosecution where – following full investigation – the individual meets the criteria set out below.

- We propose two categories of individuals who would be eligible for participation in the scheme:
 - Those who are accused of viewing IIOC for the first time and have no previous convictions.
 - Those accused of viewing IIOC for the first time who have previous convictions for non-violent, non-sexual offences but are unlikely to receive a custodial sentence if convicted.¹¹⁹
- The number of images that someone possesses, or the category of those images, should not have a bearing on eligibility to participate in the scheme as these are not factors that increase the risk of someone reoffending.
- Individuals with mental health problems or a learning disability or who have other issues, such as alcohol or drug dependency, should not be ruled out of the scheme. To evaluate whether they are able to participate, a needs

¹¹⁹ For clarity, those who manufacture or distribute IIOC will not be eligible for the scheme.

assessment should be carried out with support provided, if deemed necessary. They should also be signposted to additional services that will address their specific needs, alongside participating in the scheme.

- Age should also not preclude participation. However, those aged between 16 and 21 ought not to participate in group work with people aged over 21 to prevent any risk of grooming and/or potentially damaging influences. The content of the Scheme could be adapted to be suitable for individuals who are under 16 years.
- The individual would need to accept responsibility for having committed the crime to participate in the scheme. By responsibility, we mean accept that s/he viewed IIOC only and not that the individual admit to sexual intent, or to deliberately seeking out such images. Research has shown that requiring a formal admission of guilt is neither necessary nor indeed conducive to effective rehabilitation.¹²⁰
- The scheme would not be available to those who had previously participated in it.

Management

3.41. Scheme providers should be suitably qualified bodies who understand the skills-based ethos and will not be punitive. The scheme should be administered by suitably assessed, selected and trained civilian facilitators from a variety of backgrounds. For instance, retired police officers, probation officers, or therapists. They should follow clear guidance and have local oversight. They should also undergo a standardised and robust training and would require accreditation and continuous supervision to ensure that they follow a centrally approved manual on delivering this type of intervention. The training could consist of an e-learning module and a one-day hands-on training session, with refresher courses each year.

3.42. Participants should be provided telephone support throughout the course of the programme. This service would be available for those participants in need of advice and support, as well as family members. In order to avoid participant dependence on the telephone support, there would be no guarantee that the same person would be available to speak to each time.

¹²⁰ This is why Horizon and Kaizen are now available to prisoners who maintain their innocence.

Evaluation

3.43. The pilot should be evaluated after three years. Would suggest that success would be measured by the following criteria:

- (1) Whether the recidivism rate is equal to that of those who go through traditional prosecution;
- (2) Whether it significantly frees up police, prosecutor, court and prison service time to enable greater focus on more serious offending;
- (3) Whether it reduces the suicide rate of those caught in possession of IIOC.
- (4) Whether the Scheme is cost-effective. The appropriate way to fund such a scheme should be explored. We have considered the possibility of the participants paying for the Scheme – with means-testing for those unable to pay the full costs.

IV. IMPROVING WITNESS EVIDENCE

“The gap between the best and poorest advocacy is wider than it has ever been: the best is superb but some advocates still seem unwilling or unable to test a vulnerable witness’s evidence in ways that the witness understands.”¹²¹

- 4.1. Achieving an efficient process is inextricably linked to the appropriate treatment and support of the lay people involved throughout the whole legal process, in particular the witnesses. The recent JUSTICE working party report *Understanding Courts*¹²² focussed on improving the experience and comprehension of lay people so that they might effectively participate at trial. The previous JUSTICE working party report *Mental Health and Fair Trial*¹²³ recommended ways to better identify and respond to the needs of suspects and defendants. Many complainants in sexual offence cases are vulnerable and most will struggle with the trauma and embarrassment of both coming to terms with the offence and reliving it throughout the legal process. We therefore focus this chapter on the needs of this group, with a view to increasing the efficiency of evidence-taking, in order to improve witness evidence and experience.
- 4.2. Whilst nowadays there is a much more empathetic environment in which to report, many complainants still experience difficulties in giving their accounts whether to the police or later in court.
- 4.3. Likewise, gathering evidence from complainants will often be time consuming with the need for the police to make an allowance for the difficulties some may encounter in giving coherent and intelligible accounts. The protracted nature of this process can risk losing the complainant’s engagement with any prosecution and at worst can lead to appearances of unreliability and even retraction of the complaint.
- 4.4. These difficulties can continue at trial. There are still too many occasions where witnesses when giving evidence are unable to fully and actively

¹²¹ Plotnikoff and Woolfson, *Falling short? A snapshot of young witness policy and practice: A report for the NSPCC, revisiting ‘Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings’*, NSPCC, (February 2019), available at <https://learning.nspcc.org.uk/research-resources/2019/falling-short-young-witness-policy-practice/>

¹²² JUSTICE, *Understanding Courts* (2019), available at <https://justice.org.uk/our-work/areas-of-work/what-is-a-trial/>

¹²³ JUSTICE, *Mental Health and Fair Trial* (2017), available at <https://justice.org.uk/our-work/areas-of-work/criminal-justice-system/mental-health-fair-trial/>

participated in the proceedings even when they have had the benefit of special measures.¹²⁴ However, we acknowledge that during the last few years there have been major improvements in the way vulnerable people are treated in court.

- 4.5. The recommendations in this chapter are made without in any way detracting from the measures now in place to enable these witnesses to give their best evidence. Our proposals are designed to improve the experience for sexual offence complainants so as to make it more likely that they will remain engaged with the prosecution.¹²⁵ Poor quality evidence and presentation of evidence not only has the potential to make successful prosecutions less likely but also to prolong evidence-taking so as to increase trial length.

Ground rules hearings

People should know that they are hard on you, they ask you questions that you don't understand so you have to say that you don't understand. They'll call you a liar and you've got to stick, try your hardest not to react, cos they're tough, they made me cry. They really, really are, they're harsh – (s.27 young witness)¹²⁶

- 4.6. Most trials of sexual offences require rigorous case management. This can be achieved with a properly conducted Pre-Trial Preparation Hearing (PTPH) with full engagement of all parties. However, given the multiple issues that can arise in trials of sexual offences, there can be no doubt that the chances of smooth running of these trials would be greatly enhanced with the close scrutiny provided by Ground Rules Hearings (GRH). The success of the s.28 pilots¹²⁷ and hearings to plan the assistance to be given by an intermediary at trial has confirmed the importance of the GRH. GRHs also provide an ideal opportunity to resolve matters such as s.41 YJCEA 1999 issues or ensuring

¹²⁴ This may be because many courts do not have separate entrances and waiting rooms for complainants and defendants, which can lead to the complainant facing the defendant outside of the court room. Other reasons may be intrusive questioning around third party material and aggressive cross-examination.

¹²⁵ We have heard that although complainants tend to see a trial through once they have reported it, if they build the confidence to give evidence only to be told that will not be possible at the time they expected, there is a risk that they will not be able to go through the process again.

¹²⁶ J. Baverstock, *Process evaluation of pre-recorded cross-examination pilot (section 28)*, MoJ, (2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

¹²⁷ s.28 YJCEA allows for pre-recorded cross-examination for witnesses who meet the criteria in ss. 16 and 17 YJCEA. See **Pre-recorded cross-examination**, below.

that there is timely third party disclosure, rather than addressing these issues on the first day of the trial.

- 4.7. GRHs provide an opportunity to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person.¹²⁸ This should ensure that evidence can be taken with fewer interruptions or interventions, which has the potential to reduce trial length. They are considered good practice and should be used in all cases with young witnesses and other cases where a witness or defendant has communication needs.¹²⁹ Through enabling a less distressing environment, and reducing the number of interventions during cross-examination, trial time may be saved.
- 4.8. Nevertheless, there is evidence to suggest that some advocates and judges are not requesting a GRH where it would be appropriate to do so.¹³⁰ If adequate resources were available we would have no hesitation in recommending a general rule that GRHs be held in respect of all prosecutions of sexual offences where a complainant is to be called to give evidence. However, we understand that the implementation of such a proposal could not be accommodated at present because of severe listing pressures.
- 4.9. In our view, GRHs provide the best way to ensure that measures are in place so that witnesses are questioned in an appropriate way and that all pre-trial issues are properly identified and resolved. For this reason, **we consider that judges and advocates should place a far greater focus upon the clear obligation to consider whether a GRH is necessary in sex offence trials.** Decisions as to whether a GRH is necessary should be made adopting the wide definition of potential vulnerability as set out in CPD1 3D (see paragraphs 4.10 to 4.12 below). We understand that the updated Pre-Trial Preparation Hearing form includes a prompt to ask if a GRH is necessary, where there are vulnerable witnesses or defendants. This is a step in the right direction. In order to be effective, advocates and judges must be trained so that they keep the benefits of GRHs at the forefront of their minds.

¹²⁸ Equal Treatment Bench Book, p. 2.26, para 115, February 2018 (updated March 2019), available at <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2019.pdf> Criminal Practice Direction 3E sets out the process to be followed.

¹²⁹ *R v Lubemba* [2014] EWCA Crim 2064, para 43; Criminal Procedure Rule 3.9 and Criminal Practice Direction 3E.

¹³⁰ Henderson et al's work (*infra* note 148) has shown both the effectiveness and the variability in the practice of GRHs, underlining a need for clearer guidance.

Defining vulnerability

- 4.10. There is no universal definition of the term ‘vulnerable witness.’ However, the definition is vital for determining critical issues, not least whether a Ground Rules Hearing should be held so that witness needs can be properly addressed at an early stage and adjustments made for any witness (and defendant) vulnerabilities.¹³¹
- 4.11. The term “vulnerable” is the source of endless misunderstandings, confusion and inconsistency of approach. It has an ordinary everyday meaning which is not necessarily the same as the legal definition. It is interpreted both narrowly and broadly depending upon who is using the term and in what context.
- 4.12. We are persuaded that this issue needs to be resolved as a matter of urgency:

“As a result of there being no universal definition, the provisions designed to protect the vulnerable are not applied consistently or properly across the criminal jurisdiction, risking unfairness to children, adult witnesses and defendants and in many cases undermining the integrity of the trial process.”¹³²

Present inconsistent definitions

- 4.13. The YJCEA provides the framework for eligibility for special measures. Section 16 YJCEA provides that a witness in criminal proceedings (other than the accused) is eligible for assistance of special measures if under the age of 17 at the time of the hearing or if the quality of their evidence is likely to be diminished by the fact that they are (i) suffering from a mental disorder within the meaning of the Mental Health Act 1983 (ii) otherwise have a significant

¹³¹ This difficulty was considered by *Understanding Courts* (supra note 122) in a broader context, which recommended that adaptations should be made based on the needs of the witness, regardless of whether a formal “vulnerability” was identified, see chapter 4 and recommendations 33: The questioning of witnesses should always be adapted to the needs and understanding of the witness to ensure that they can give their best evidence and to promote comprehension on the part of participants to the hearing, and 35: Reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it. This includes an obligation to consider whether any party or witness has a particular vulnerability or other need for an adjustment.

¹³² HH Judge Simon Drew QC and Lynda Gibbs, Director of Programmes at the ICCA, article forthcoming.

impairment of intelligence and social functioning or (iii) physical disabled or suffering from a physical disorder.¹³³

- 4.14. Section 17(1) YJCEA provides for eligibility on the basis of witnesses where the quality of their evidence is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.¹³⁴
- 4.15. Most advocates and judges have a tendency to refer to section 16 witnesses as “vulnerable witnesses”, and section 17 witnesses as “intimidated witnesses”. Sections 16 and 17(1) both require an assessment to be made as to the witness’s ability to give evidence. Often, this assessment is limited, with thought only given to what special measures are available.
- 4.16. In addition to vulnerable and intimidated witnesses, sections 17(4)-(6) provide for a category of witness that has special measures available to them due the nature of the offence that the proceedings relate to, without having to demonstrate any personal need. This is an enormous category as it includes complainants in respect of sexual offences.
- 4.17. We understand that it is common that once a special measures application has been made and granted, judges and practitioners believe that all has been done that is necessary. Any additional needs/adjustments that may be required by those who have automatic eligibility under s. 17(4) are regularly not addressed. Confining the test to whether a witness is vulnerable in terms of s.16 or intimidated under s.17, is contributing to clear evidence that vulnerable people are, on occasion, being failed by the court process by virtue of their automatic eligibility.
- 4.18. For instance, many judges (and counsel) only consider a Ground Rules Hearing should be held if there is an intermediary involved in the case. We have heard that others consider a GRH for pre-teenage witnesses but not for teenagers. Few consider doing so for adult witnesses even if a witness is alleged to have been the victim of serious abuse. We agree with the previous JUSTICE working party report *Understanding Courts* that adaptations should be made according to the needs of the witness and a broader definition of

¹³³ S16 (1) and (2) YJCEA.

¹³⁴ S.17(2) sets out the factors the court must take into account when determining eligibility under s.17(1).

vulnerability would go some way to avoiding failings and ensuring GRHs are considered more readily.

The Criminal Procedure Rules and the Criminal Practice Direction

- 4.19. There has been a sea change in the treatment of vulnerable people in court, which was confirmed by Hallett VP in *R v Lubemba; JP*.¹³⁵ Following this ruling, the Criminal Procedure Rules (CrimPR) and the Criminal Practice Direction (CrimPD) have been substantially amended in order to try to give guidance to judges and practitioners on their approach to vulnerable people. They are underpinned by the principle that the court and advocates must adapt to the needs of the witness and substantially enhance the court's approach towards vulnerability.¹³⁶ The CrimPR and CrimPD broaden the scope of the term "vulnerable" and make clear the important duties the court must discharge towards vulnerable witnesses.¹³⁷
- 4.20. The CrimPD uses an umbrella term 'vulnerable people in the courts' to assist in the identification of people who may be 'vulnerable.'¹³⁸ It acknowledges the existence of many people in a criminal case, whether as witnesses or defendants, who fall outside the strict definition contained in ss.16 and 17, who may, nevertheless require assistance to participate effectively and give their best evidence. The court is required to take "every reasonable step" to enable this adaptation, as far as is necessary to meet these ends. The court's duties include identifying the needs of witnesses at an early stage and may require the parties to identify arrangements to facilitate the giving of evidence and participation in the trial.
- 4.21. This Working Party favours the wider approach as set out in the CrimPD as providing the ideal test for a judge to apply when consideration is given at a PTPH as to whether a Ground Rules Hearing (GRH) is appropriate for a particular witness or defendant to enable the judge to ensure that questioning is adapted to the needs of a witness. The exercise of the court's powers and proper consideration of the advocate's duties in relation to vulnerable

¹³⁵ *Supra* note 129.

¹³⁶ HH Judge Simon Drew QC and Lynda Gibbs, Director of Programmes at the ICCA (Inns of Court College of Advocacy).

¹³⁷ Similarly, Rule 3.9(3)(b) CrimPR states that the court must take 'every reasonable step' to facilitate the participation of any person, including the defendant.

¹³⁸ CrimPD1 General Matters 3D.

witnesses generally presupposes that these are addressed at an early stage, sometimes with professional assistance.

- 4.22. If the CrimPD approach is pursued with appropriate care and rigour, it should significantly reduce the risk that a witness's vulnerabilities will not be identified and addressed because of, for example, automatic eligibility under s.17(4). A requirement that vulnerability be fully explored first at the PTPH and then, if necessary, at the GRH will improve the chances of appropriate adjustments and ground rules governing questioning being made so as to ensure a complainant can give their best evidence. Focus on the needs of the particular complainant will help eliminate the risk that factors indicating vulnerability only become apparent for the first time when the witness is giving evidence. Experience shows that this occurs frequently and leads to significant loss of time during trials.
- 4.23. HH Judge Simon Drew QC and Lynda Gibbs have proposed the following guiding principle which distils the CrimPD approach:

“A “vulnerable person”, is any child, young person or adult, including a defendant, who may not be able to participate effectively at court if reasonable steps are not taken to adapt the court process to their specific needs.”

The Working Party commends this definition. Its adoption would provide a consistency of approach throughout the criminal jurisdiction by reducing the chances of significant vulnerabilities being overlooked. There would be substantial dividends in respect of the trials of sexual offences in that it would greatly enhance the chances that vulnerable witnesses and defendants are properly protected by appropriate adjustments during the court process.

Video recorded evidence

- 4.24. The process of interviewing a complainant is particularly important when sexual allegations are made. This is in part because sexual offences tend to take place in private without independent witnesses or other supporting evidence and frequently consent will be in issue.¹³⁹ In many cases there will be little or no supporting evidence. In the vast majority of cases medical

¹³⁹ Of course, consent is not a defence where the complainant is a child under the age of 13 in respect of prosecutions of the child-specific offences under ss.5 to 8 of the Sexual Offences Act 2003. In respect of rape, contrary to s.1, where the complainant is aged between 13 and 15 the absence of consent is an element of the offence.

evidence cannot assist as to whether the sexual activity was consensual or non-consensual. The aim must be to achieve the best quality Video Recorded Interviews (VRI) which we recognise requires skilful and sensitive questioning techniques. We do not underestimate the difficulties involved. On occasions a complainant may be giving their first full account about matters they have long sought to block out from their memories.

- 4.25. Achieving Best Evidence (ABE) is guidance provided to help the police and CPS ensure that vulnerable and intimidated witnesses are able to give their best evidence during VRIs.¹⁴⁰
- 4.26. There is an emphasis in the guidance on having the right people with the right expertise conduct VRIs to an agreed standard. This should allow the witness to feel better able to provide their evidence and ensure their best quality evidence is achieved.
- 4.27. However, it is clear that the ABE guidance is not always fully followed and at times VRI's fall short of the standards that can reasonably be expected. A recent joint inspection by the HMCPSI and HMIC concerning child sexual abuse, found poor planning of interviews, insufficient involvement of intermediaries and poor interview accommodation for children.¹⁴¹
- 4.28. It is also important to recognise and address the problems that arise because of the dual purpose of the interview as both part of the investigative process and a means of presenting evidence. As an investigational tool, we have been told that they are often long and without structure, making it difficult for tribunals of fact to follow when presented as evidence at trial, as well as often being tiring for the interviewee. The pilots of pre-recorded cross-examination of vulnerable witnesses under s.28 have also demonstrated the disparity of quality as between VRIs, which stand as evidence-in-chief, and video recorded cross-examination, conducted by an experienced and prepared advocate. We consider the pilots later in this chapter.

¹⁴⁰ Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures', March 2011, available at https://www.cps.gov.uk/sites/default/files/documents/publications/best_evidence_in_criminal_proceedings.pdf, p. 68

¹⁴¹ HMCPSI and HMIC, 'Achieving Best Evidence in Child Sexual Abuse Cases – A Joint Inspection', 2014, available at https://www.justiceinspectores.gov.uk/cjji/wp-content/uploads/sites/2/2014/12/CJJI_ABE_Dec14_rpt.pdf

- 4.29. Learning from the Barnahus model may be instructive. Barnahus tries to ensure that children are not subjected to repeated interviews by a variety of agencies in different locations. Its focus is on creating a less traumatic, child-friendly environment for investigative interviews, which works to reduce the level of anxiety of the child. This, in turn, would enable the provision of better evidence to be later relied upon by prosecutors.¹⁴² There are currently two pilots in London testing how this might work in the UK which will report in 2021.¹⁴³ These pilots will provide from the same place medical, advocacy, social care, police and therapeutic support to children who have suffered sexual abuse.
- 4.30. Although this multi-agency approach has many benefits – especially for the welfare of the child¹⁴⁴ – the full implementation of the Barnahus model in the UK would involve substantial adaptation of our adversarial system. As a general rule, it is vital that the defence is able to put its case during cross-examination, though this must, of course, be done in an appropriate manner.
- 4.31. We consider that a model that draws on the Barnahus system would be appropriate for the more complicated and/or difficult cases. This would involve a fully trained forensic interviewer conducting the interviews. Police officers and prosecutors would have the facility to remotely observe the interview. We recognise that CPS lawyer resources are currently overstretched.¹⁴⁵ Nevertheless, we believe that a properly conducted VRI with appropriate legal advice as to the direction of questioning will increase the chances of cases progressing smoothly.

¹⁴² Barnahus was developed in Iceland, with a desire to focus on the welfare of the child. The child is interviewed in a special room by a trained investigative interviewer who will be directed by an evidence-based protocol, and should adapt the interview to the child’s developmental age. To avoid repetition the judge, social worker, police, prosecution and defence lawyers listen in. The interview is also videotaped for use as evidence at trial. In Iceland, and other countries that have implemented Barnahus, the child goes to a special building where all their needs are met, such as medical examination and counselling.: ‘What is Barnahus and how it works’, Child Protection Hub, available at <https://childhub.org/en/promising-child-protection-practices/what-barnahus-and-how-it-works>,

¹⁴³ Commissioned by the Mayor’s Office for Policing and Crime in 2018, L. Conroy & ors, ‘The Lighthouse: London’s Child House Initial Evaluation Report’, (December 2018), available at https://www.london.gov.uk/sites/default/files/childhouse_jan19_report.pdf

¹⁴⁴ See: Children’s Commissioner, *Barnahus: Improving the response to child sexual abuse in England*, available at <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>

¹⁴⁵ The average area prosecutor will have up to 100 cases on the go at any one time.

- 4.32. In respect of interviewing children, there should be child friendly facilities such as interview rooms which open up into a play area with a range of age appropriate toys and, if possible, a garden. Such facilities make children feel at ease and we understand they are an improvement on the current VRI interview suites. A similar philosophy should be adopted in any new VRI suites that are designed for children and vulnerable witnesses. We understand that such facilities for recording witness evidence will be available in Scottish criminal cases from July, housed on the top floor of a new tribunal hearing centre in Glasgow.
- 4.33. The forensic interviewer should be trained to understand the needs of vulnerable witnesses and to communicate with them effectively, as well as to ensure that the welfare of the child is maintained. We explored whether lawyers should carry out the interview, especially given that advocates perform the pilot s. 28 pre-recorded cross-examination of vulnerable witnesses. The different approaches to the pre-recorded evidence in chief and cross-examination may disadvantage the witness. However, we were persuaded that properly trained and properly prepared police interviewers would be sufficiently capable. Moreover, they will have built up a rapport with the witness, encouraging them to speak more freely. The introduction of a lawyer or any unfamiliar person may cause the witness to be more reticent. **VRI interviews should be carried out by properly skilled forensic interviewers. Current interviewers should be trained to this standard. An assessment as to whether the assistance of an intermediary is necessary should always be made prior to the interview.**
- 4.34. We also considered whether or not there should be two stages of the interview. We consider this should be a decision made by the forensic interviewer based on the needs of the witness and the circumstances of the case. We accept that for most cases, a split interview process would cause unnecessary delay and some of the problem of lengthy interviews can be addressed by editing.
- 4.35. However, we have collective experience of cases where the benefits of what could have been achieved with a two-stage interview process were self-evident. Difficult cases that would benefit from legal input during the interview process are not rare. We are persuaded that the interview should be split to allow time for prosecutors to identify and frame necessary questions according to the evidence being collected. In addition, a split interview means that resource is not spent editing a long interview into an easily digestible video for the jury. However, if the case is complicated but it is deemed that it would be distressing to split the interview into two parts, it is unlikely to be

appropriate.¹⁴⁶ Where an interview is split, the first stage of the interview should be disclosed as unused material.

4.36. We are grateful to HHJ Drew for his suggestion as to how a split interview may work:

“[T]here will be exceptional cases, which may arise from the complex or unusual nature of the matters complained of or may be to do with the nature or circumstances of the complainant, that may justify a break between the free narrative stage and the questioning stage. During that time, which should be kept to a minimum and during which the complainant should be prevented from discussing the allegations with anyone else, the interviewer may take the opportunity to reflect upon the allegations made, liaise with the case lawyer, and seek to devise a series of questions designed to enhance and clarify the complainant’s account, and thereby to reduce substantially the duration of the questioning stage.”

4.37. In certain complicated and/or difficult cases involving both children and adult witnesses, it is appropriate for video recorded interviews to be conducted in two stages. Stage one would be an initial exploratory interview which would allow the child and/or vulnerable witness to tell their full account in a free-flowing way. Stage two would be a more focussed interview with the intention of eliciting information that will stand as evidence-in-chief. A clearer, more concise video could then be presented to the tribunal of fact to consider at trial. It was for these reasons that Sir Brian Leveson recommended this approach in 2015.¹⁴⁷ Given that this recommendation is a departure from current practice, we consider that a pilot of this process should be conducted, confined to certain categories of case such as cases that would likely include s.28 cross-examination.

¹⁴⁶ In such a case, it may be appropriate to explore whether it is possible to arrange an interview at a time when a CPS lawyer can watch and feed in live, to narrow the issues for evidence-in-chief. Other than in these limited circumstances, we do not consider this approach to be practical due to resource limitations. This is similar to the approach used in Scotland (paragraph 6.20) for Joint Investigative Interviews (JII), although a Procurator Fiscal does not view the interview live. Although we appreciate the strengths of this procedure for JIIS, we do not think it is practical for this jurisdiction.

¹⁴⁷ The Leveson Review of Efficiency in Criminal Proceedings, Judiciary of England and Wales, (January 2015), p. 104, paragraphs 247 to 251, available at <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

Pre-recorded cross-examination

- 4.38. Section 28 of the Act, which provides for young, vulnerable or intimidated witnesses to have their cross-examination (and any re-examination) recorded on video in advance of trial, has only been piloted over the last few years. It is generally accepted that the pilots have been successful. As yet pre-recorded cross-examination has not been rolled out in full as there have been problems with video technology and storing of digital recordings. It is understood that these problems have now been resolved and phased implementation is expected in the near future. We are strongly in favour of implementation. However, the judiciary and advocates who undertake these cases will need to be suitably trained in the adapted process.
- 4.39. Section 28 has given the justice system in England and Wales a valuable tool to allow cross-examination to take place; firstly, as early as possible after a case is brought to court, so as to avoid the fading of memory, and; secondly, in a manner which allows, as far as possible, for the child or vulnerable witness to be put at ease when giving evidence – and in particular in cross-examination, and without the undue anxiety of waiting to give evidence at trial.¹⁴⁸
- 4.40. The scheme enables the cross-examination to take place on an early date between arraignment and trial – with the evidence of the witness being pre-recorded – so that, at the subsequent trial in front of a jury, which may not take place until many months later, the jury will see the original pre-recorded interview of the witness’s evidence-in-chief, followed by the subsequent pre-recorded cross-examination (and, potentially, re-examination if any) at the section 28 hearing – obviating the need for the attendance of the witness at trial.
- 4.41. Whilst national implementation has not yet taken place, pilots have been carried out in Liverpool, Leeds and Kingston-Upon-Thames between 30 December 2013 and the end of October 2014 in respect of child witnesses.¹⁴⁹ Due to the perceived success of the pilots, the scheme continues to run at those court centres – with an additional pilot concerning *all* complainants in cases of a sexual nature and where witnesses are complainants in prosecutions under

¹⁴⁸ H. Henderson & M. Lamb, ‘Pre-recording Children’s Testimony: Effects on Case Progression,’ *Criminal Law Review*, (2017), p. 348.

¹⁴⁹ J. Baverstock, ‘Process evaluation of pre-recorded cross-examination pilot (Section 28)’, *Ministry of Justice Analytical Series*, Ministry of Justice, 2016), pp. 1-2, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

the Modern Slavery Act due to begin on 3 June 2019. The feedback on the pilot schemes from the judiciary, advocates and other users has in the main been very positive. With proper preparation and relevant issues addressed in advance of the hearings, pre-recorded cross-examination is carried out with appropriate and relevant questions.¹⁵⁰

- 4.42.** It is regrettable that there have been technological issues in respect of storage capacity and playback issues. We understand that these problems have now been resolved and the general scheme is on the verge of being rolled out nationally – starting with six further Crown Court centres – at Bradford, Carlisle, Chester, Durham, Mold and Sheffield – from 3 June 2019. These six court centres will, in effect, test the new system – using the experience gained from the pilot scheme – and, thereafter, from 2020, it is planned that the scheme will be rolled out to further Crown courts throughout the country.
- 4.43.** National implementation has the potential to deliver major benefits in respect of the quality and efficiency of trials of sexual offences. In particular, s.28 has the potential to reduce trial length as well as improving the quality of the witness’s evidence. The Court of Appeal has confirmed on a number of occasions that where a witness is young or vulnerable, a judge is entitled to require advocates to submit written questions in advance. This enables judges at GRHs to ensure that questioning is both appropriate, adapted to the needs of the witness and relevant.
- 4.44.** It follows that the benefits include improved questioning techniques, shortened time-frames at the beginning of cases, and witnesses being cross-examined earlier and for shorter periods. Importantly the time between the date that the case is sent to the Crown court and cross-examination is shorter, which is likely to have a positive effect on witness attrition.¹⁵¹
- 4.45.** Furthermore, s.28 hearings are likely to encourage earlier guilty pleas. In the pilot involving vulnerable children, defendants in 48% of s.28 cases entered guilty pleas before trial compared to nine per cent of cases where only pre-recorded evidence-in-chief was presented.¹⁵² Whilst the reasons for this were not analysed in the evaluation of the pilot, it would appear that enabling a

¹⁵⁰ H. Henderson & M. Lamb, *supra* note 148.

¹⁵¹ H. Henderson & M. Lamb, *supra* note 148.

¹⁵² *Baverstock*, *supra* note 149, pp. 4-9, though we understand that some of these guilty pleas were tendered before the pre-recorded cross-examination took place and sometimes on the morning of the cross-examination. However, for cases going to trial, there was no difference in guilty verdicts between s.28 and non-s.28 cases: H. Henderson & M. Lamb, *supra* note 148, p. 353.

defendant to see the weight of the evidence against him prior to trial, and how credible the complainant appears, may, in appropriate cases, prompt a change of plea. Once cross-examination is recorded, the strategy of waiting to see whether a complainant will appear at court to testify is also rendered redundant. The report also refers to research carried out in other jurisdictions that suggests early cross-examination can increase the chances of early guilty pleas, charges being dropped or indictments being changed. All point to an ability to reduce trial time.¹⁵³

4.46. Criticism of s.28 on the basis that it undermines the adversarial system and/or fair trial is wholly misconceived. The court allows advocates to ask questions in respect of all matters that are truly relevant and, in respect of young and vulnerable witnesses, scrutinises written questions submitted by advocates in advance so that the nature of the questions and style of questioning are appropriate for the particular witness. The Court of Appeal has repeatedly stated that the use of special measures to facilitate witnesses to give their best evidence does not conflict with Article 6 ECHR and the defendant's right to a fair trial.¹⁵⁴

4.47. Finally, the rigorous case management that is necessary for s.28 evidence should also greatly assist the smooth running of trials. Moreover, once the cross-examination and any re-examination are complete and recorded, case management is facilitated, as the judge will have a clear idea as to the issues in the case and how long the trial is likely to last. The advocates who appeared at the s.28 hearing will necessarily be very familiar with the case and in the best possible position to assist the judge to fulfil his or her case management functions.

4.48. **Section 28 pre-recorded cross-examination of complainants should be made available as soon as possible for all sexual offence prosecutions.**

Training in questioning vulnerable witnesses

4.49. Both the training of advocates as to how to question vulnerable people and the training of judges as to how to ensure that questioning is tailored to the understanding of the particular witness are critical. Substantial progress has

¹⁵³ Baverstock *supra* note 149, at p. 16.

¹⁵⁴ See for example *Lubemba*, *supra* note 129 and *R v Dinc* [2017] EWCA crim 1206.

been made in this area over the last few years.¹⁵⁵ However there remains much to be done, as underlined by the recent NSPCC report on young witnesses.¹⁵⁶

Judicial training

4.50. Training on how judges should conduct an effective GRH so as to ensure that it achieves its objectives conducted in the expectation of the imminent national implementation of s.28 took place some years ago. The delay in implementation of the s.28 scheme means that many judges authorised to try sex cases will not have had recent training as the failure to implement the s.28 scheme has meant that training is no longer regarded as priority. We acknowledge that newly appointed criminal judges will have had some training in their general induction course which has a module in respect of handling vulnerable individuals. The treatment of vulnerable witnesses is also a feature of the Business of Judging and Judge as Communication course¹⁵⁷ but it is on a general cross-jurisdictional basis rather than vulnerability in the context of the trials of sexual offences. This means that many judges will have had limited training on the s.28 procedure and the important lessons that have been learnt and expertise that has been built up from the pilots.

4.51. The Judicial College runs the Serious Sexual Offences Seminar (SSOS):¹⁵⁸ a two-day course, three times a year. It is a course that is devised for all judges authorised to try sexual cases. Given the rapid developments in the area, and the sensitivity of the cases they try, judges are obliged to attend the course once every three years in order to keep their authorisation. In our view, it is a high-quality course which is well-designed. We also welcome the introduction of a

¹⁵⁵ See: The Advocate's Gateway provides toolkits on identifying and adapting to vulnerable witnesses and defendants, available at <https://www.theadvocatesgateway.org/toolkits>; the ICCA's Advocacy and the Vulnerable training programme, available at <https://www.icca.ac.uk/advocacy-the-vulnerable>; and the Business of Judging and Judge as a Communicator Course.

¹⁵⁶ *Supra*, note 121.

¹⁵⁷ Trainers we spoke to considered that they had seen a significant change in judicial attitude in recent years towards making appropriate adaptations for vulnerability. The Business of Judging and Judge as a Communicator course applies across jurisdictions, ran twice a year for 36 judges each time. As of 1 April 2019, the course is now compulsory for all newly appointed judges as part of their induction to be attended after their jurisdictional training. The 2 day residential course includes role-plays in small groups for a range of scenarios in which judges will need to address communication issues that may arise during hearings. One aspect of this training relates to the treatment of the vulnerable.

¹⁵⁸ HH Peter Rook QC, the Chair of this Working Party, was course director of the SSOS between 2006 and 2009 and continues to teach at the seminar.

two-day induction course for judges who have recently been authorised to try these cases.

- 4.52. We note that approximately ten years ago the length of the main course (SSOS) was reduced from three to two days because of reduced resources. We understand that the decision was meant to be only temporary and there was an undertaking that the issue of length would be revisited. We are firmly of the view that it is long past the time for reconsideration and the course should be extended and restored to its original three days. However well-devised a course may be, two days gives far less scope for highly rated interactive sessions run by the specialist tutor judges. Furthermore, two days does not give time for all relevant areas to be addressed. Frequently, the Registrar of Criminal Appeals discovers indictment and sentencing errors in sexual cases that have been missed by counsel or the judge suggesting there is scope for further training in areas such as historic cases. It is ironic that the length of the course has been reduced at a time when there has been an exponential increase in the number of prosecutions of sexual offences coming before the courts. **It follows that we make a strong recommendation that the length of the judicial course be extended, at the very least, to its former three days.**
- 4.53. With respect to sexual offence cases where witnesses are vulnerable, the current SSOS¹⁵⁹ already includes a short lecture on Section 28 hearings in which a brief outline of the procedure and its benefits is given. This, and the accompanying materials, are immensely useful but we consider that more time is needed for practical training on case managing s.28 hearings, with effective GRHs. The imminent national implementation makes this training all the more urgent. Many judges have this general expertise and the Judicial College recognises the need to train for vulnerability. Nevertheless, it is a different matter in sexual offence cases. Moreover, there are regular reports from advocates who undertake the Inns of Court College of Advocacy (ICCA) ‘Advocacy and the Vulnerable’ course¹⁶⁰ that there are still a significant number of judges adopting a non-interventionist ‘laissez-faire’ approach.
- 4.54. The duty to deliver appropriate training for the judiciary is a matter for the Judicial College. If the view were taken that all criminal judges should develop this skill, one possibility would be a one-day course throughout the jurisdiction for all judges. This approach achieved some success in 2014 following adverse

¹⁵⁹ In the past there was an interactive module in respect of the treatment of vulnerable witnesses

¹⁶⁰ ‘National Training Programme 2016 – 2018’, The Inns of Court College of Advocacy, available at <https://www.icca.ac.uk/advocacy-the-vulnerable/national-training-programme-2016-18>

publicity in respect of the Telford grooming case.¹⁶¹ Alternatively, it could be a module in the SSOS or the continuation course. Another highly practical solution is to encourage presiders and resident judges to nominate a judge with the appropriate expertise at each court complex to provide seminars for colleagues as to best practice in this demanding area. We understand that this is already occurring in courts such as Liverpool. It is important there should be specialist training in this area in the context of the trial of sexual offences. On any view, we consider that it should be a priority. At a time when there is evidence of a major improvement in the standards of advocacy in this area, these improvements need to be consolidated and encouraged by an appropriately trained judiciary.

Training of advocates

- 4.55.** No advocate should undertake sex offence cases unless they have the appropriate skills.¹⁶² The Advocacy and the Vulnerable course has been delivered by various providers since 2016. Approximately two-thirds of criminal advocates, both counsel and solicitors, have now attended the course which has been delivered throughout the jurisdiction by the Inns of Court, Circuits, Law Society and in chambers. It has been credited by the NSPCC with an improvement in the cross-examination of young witnesses as more advocates are tailoring their questions to the understanding of the witness.¹⁶³
- 4.56.** Whilst the course has not been made mandatory, the Ministry of Justice has been supportive and trial judges are being encouraged at the Judicial College to ask advocates at GRHs whether they have attended the training. The Bar Standards Board requires barristers to confirm that they are trained in youth court advocacy if they intend to practice in that jurisdiction. We are pleased to

¹⁶¹ See: ‘Telford grooming ‘tip of the iceberg’, says solicitor’, *BBC*, March 2018, available at <https://www.bbc.co.uk/news/uk-england-shropshire-43385049>

¹⁶² See Lord Thomas CJ in *R v Grant-Murray and others* [2017] EWCA Crim 1228, para 226: “It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training;” and in *R v Rashid (Yahya)* [2017] EWCA Crim 1206: “An advocate would in this court’s view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks.” These tasks include using easy to understand language, using short and simple sentences and avoiding the use of tone of voice to imply an answer.

¹⁶³ ‘Recognised improvement in the questioning of young witnesses’, The Inns of Court College of Advocacy, available at <https://www.icca.ac.uk/advocacy-the-vulnerable/latest-developments-av/161-recognised-improvement-in-the-questioning-of-young-witnesses>

note that the CPS only instructs advocates who have completed the course, which will encourage those who have not to complete it.¹⁶⁴

4.57. The ICCA is upgrading the national course and developing refresher training for established practitioners. In the meantime, the four Inns of Court will continue to offer the national course on an ‘ad hoc’ basis for practitioners who wish to learn the new skill-set. In due course, the ICCA hopes to develop vulnerable witness masterclasses. In addition, the ICCA is applying to become an Authorised Education and Training Organisation (AETO) in order to deliver a new Bar Course which, if validated, will include vulnerable witness and youth justice advocacy training. **We strongly support this development.**

4.58. **We are firmly of the view that an ‘Advocacy and the Vulnerable’ course should feature as a significant part of all vocational training for qualification at the Bar** as all advocates are likely to encounter vulnerability in their practice.¹⁶⁵ As the JUSTICE *Understanding Courts* working party report recommends, a change of culture in which all advocates appreciate the importance of vulnerable people participating effectively in proceedings will marginalise those who seek to take advantage of witness’s developmental difficulties. Every advocate should have the necessary skills so as to be able to question vulnerable people. However, it is of paramount importance that those who undertake advocacy in sexual cases should excel in an area where many witnesses are vulnerable. As best practice continues to develop in this area, further courses and specialist training in sexual offences should be developed and offered regularly.

Collaborative training in respect of advocacy and the vulnerable

4.59. We fully understand that there are good reasons why the Judicial College will not wish to combine its training of judges with the training of advocates as the objectives will be different. However, we consider that there is an exceptional case to be made for collaborative training in respect of ‘Advocacy and the Vulnerable’. To a limited extent, this already occurs in that judges sometimes act as facilitators when advocates are trained whilst recorders, who may be advocates in their private practice, regularly attend judicial training. This limited cross-fertilisation already enhances the quality of the courses where it

¹⁶⁴ We note that the majority of CPS lawyers who deal with vulnerable witnesses have taken the course and understand that there is an ambition to ensure all CPS lawyers have taken the course.

¹⁶⁵ Similar recommendations have been made in *Understanding Courts* (*supra* note 122) in relation to adapting to the needs of all court users and *Mental Health and Fair Trial* (*infra* note 123) in relation to vulnerable witnesses.

does occur. Collaboration is particularly valuable in an area which depends upon a good working relationship between judge and advocate for its success. The shared objective of achieving the best quality evidence and appropriate treatment of vulnerable witnesses - without compromising the defence's right to ask relevant questions - makes a joint approach particularly valuable enabling each to understand the other's perspective. It may well be that collaborative masterclasses will become vehicles for excellence and best practice which can provide guidance as expertise in the appropriate treatment of vulnerable people evolves. **We recommend that the Judicial College and ICCA work together so as to achieve a series of masterclasses with a view to promoting best practice.**

Intermediaries

- 4.60. Despite the importance of training in the questioning of vulnerable people, it is important to recognise that judges and advocates are not speech and language specialists. This is why the use of intermediaries is so important. Intermediaries are experienced professionals with specific expertise in assessing and facilitating communication and they assist witnesses and defendants to engage effectively in the trial process. The NSPCC report, *Falling Short?* Highlights many of the benefits that intermediaries bring, such as 83% of lawyers adapting their advocacy with young witnesses as a result of working with intermediaries, and cases with intermediaries being more likely to involve a GRH.¹⁶⁶
- 4.61. JUSTICE reports, *Mental Health and Fair Trial*¹⁶⁷ and *Understanding Courts* have considered the role of intermediaries in the trial process and found that they are beneficial to vulnerable witnesses but that their availability should be expanded. This Working Party agrees and notes the current shortage of intermediaries. Without access to intermediaries, a proper assessment of the needs of the witness will not take place which may result in the witness being unable to give their best evidence.

¹⁶⁶ Plotnikoff and Woolfson, supra note 121, p. 16.

¹⁶⁷ JUSTICE, *Mental Health and Fair Trial* (2017), available at <https://justice.org.uk/our-work/areas-of-work/criminal-justice-system/mental-health-fair-trial/>

V. PROSECUTION PROCESS

*I suspect that no one who has regular professional involvement with the criminal courts can have avoided the conclusion, often from painful experience, that for too long the system of disclosure has not operated effectively enough. – The Rt. Hon. Geoffrey Cox QC MP, Attorney General*¹⁶⁸

5.1. There are a variety of reasons why investigations into alleged sexual offending and the subsequent trials of sexual offences can take such a long time. These include not only the sheer number of allegations, the complexity of some sexual offence prosecutions and the vulnerability of many complainants, but also, increasingly diminishing resources and delays in waiting for the disclosure of excessive third party material. This chapter explores the main legal processes engaged in respect of these prosecutions, so as to highlight areas that the Working Party believes can be made more efficient, without in any way compromising fairness to the respective parties.

Investigation

5.2. The quality of the investigation of sexual offences is critical in ensuring they are dealt with efficiently and justly. Investigators may encounter multiple difficulties. In many cases there will be no other evidence to support the complainant's evidence given that often sexual offences are committed in private and medical evidence is inconclusive.

5.3. Many people still do not report to the police the sexual abuse they have suffered.¹⁶⁹ However there has been a discernible change of culture in recent years leading to much greater reporting of sexual offending. In the last two decades much has been done to attempt to provide potential complainants with a more sympathetic environment in which to report and to take steps to enable them to give their best evidence. References to high profile cases in the media have provided further encouragement.

5.4. As we consider in **Chapter 4**, whilst some of these complainants will be vulnerable as a result of mental health difficulties or their age, others will be traumatised by the nature of the offence. To ensure that all measures are taken

¹⁶⁸ *Supra* note 14.

¹⁶⁹ Rape Crisis states that only 32% of its clients reported to the police: Rape Crisis, 'Annual Review: 2017-18', p. 32, available at <https://rctn.org.uk/wp-content/uploads/2018/10/Rape-Crisis-Annual-Report-2017-2018.pdf>

to meet the particular needs of a complainant requires time, experience and sensitivity.

- 5.5. A major problem often arises because of the volume of digital evidence that is examined for potential relevance to issues in the case. In contrast to the situation a generation ago, there will be many cases where the parties are or have been in a relationship. Substantial digital material including social media postings may have been generated during the course of the relationship.
- 5.6. Developing investigatory practices that meet the challenges thrown up by sexual offence allegations will ensure investigations can be carried out in a more timely manner. Failure to pursue all reasonable lines of inquiry at an early stage can lead not only to unacceptable delay but also to miscarriages of justice.

Believing the victim

- 5.7. In order to encourage more victims to report sexual crimes, the police introduced a policy of ‘believing’ a complainant when they report an allegation of a sexual offence and referring to them as ‘victims’ rather than complainants from the outset. The policy was to counter what some believed to be a culture within the police of not taking complaints seriously. To that extent, some consider the policy to have been a success.
- 5.8. However, the policy was heavily criticised by Sir Richard Henriques in his 2016 Thematic Review of the Metropolitan Police Service (the Met) who considered the policy to reverse the burden of proof. He also felt that designating someone a victim before any determination has been made prejudices the suspect, as it colours the investigative strategy in favour of the victim.¹⁷⁰ Sir Richard believed that this led to the failings of Operation Midland – where a victim’s allegations were taken at face value when they were in fact false, leading to a substantial waste of resources. Such criticisms have led the Met to end the policy of “believing all victims.”¹⁷¹

¹⁷⁰ R. Henriques, *An independent Review of the Metropolitan Police Service’s handling of non-recent sexual offence investigations alleged against persons of public prominence*, (2016), pp. 15 & 16, available at <http://news.met.police.uk/documents/report-independent-review-of-metropolitan-police-services-handling-of-non-recent-sexual-offence-investigations-61510>

¹⁷¹ F. Hamilton and R. Sylvester, ‘Metropolitan Police ditches practice of believing all victims’, *The Times*, 2018, available at <https://www.thetimes.co.uk/article/police-ditch-practice-of-believing-all-victims-jsg6qd2ws>; however, we understand that the practice still continues, see: R. Beckley, ‘Review into the Terminology “Victim/Complainant” and Believing Victims at time of Reporting’, (2018),

5.9. Discontinuing the policy may have the undesired effect of reducing reports of sexual offending. However, we consider that a fixed mind-set can act as a deterrent from pursuing all reasonable lines of investigation. In our view, **to ensure that the policy of believing the complainant does not prejudice the suspect, there must be increased focus on the need for reasonable efforts to be made to seek out ‘credible evidence to the contrary’.**¹⁷² To assist with this, **complainants should not be referred to as victims during the prosecution of an alleged offence,** to make clear to investigators that no determination of guilt has been made and that the suspect remains innocent until proven guilty.

Early investigative advice

5.10. Prosecutions of sexual offences can be complex and/or difficult for a number of reasons. These include factual complexity covering grooming and abuse of complainants over a lengthy period or long term abusive relationships. Others may not be factually complex, but will have evidential problems because of the nature of the complaint, family dynamics or cultural issues.

5.11. Difficult cases can benefit from a clear understanding as early as possible of the evidentiary requirements needed to shape investigative strategies and ensure time is not wasted pursuing unnecessary evidence, so as to be able to present the strongest possible case. A joint strategy between police and CPS at as early a stage as possible can help achieve this. This is referred to as ‘Early Investigative Advice’ (EIA). It has been a feature of complex case work for quite some time.

5.12. For rape and child sexual abuse, CPS guidance states that there should be early consultation between police and the CPS specialist prosecutor.¹⁷³ The CPS encourages the police to use the local area Child Sexual Abuse (‘CSA’) lead, a part of the Rape and Serious Sexual Offences (RASSO) unit, as the single

available at

<https://www.college.police.uk/News/College-news/Documents/Review%20into%20the%20Terminology%20Victim%20Complainant%20and%20Believing%20Victims%20at%20time%20of%20Reporting.pdf>

¹⁷² Henriques, supra note 170, p. 18. In line with current disclosure rules: investigators have a duty to pursue all reasonable lines of inquiry.

¹⁷³ Any consultation must be face to face and, where practicable, should take place within 24 hours if a suspect is held in custody or within 7 days if the suspect is released on bail. See: http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/case_building/ and CPS, *Guidelines on Prosecuting Cases of Child Sexual Abuse*, (October 2017). http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse/#a03

point of contact with the CPS. CSA leads are overseen by the National CSA lead. They are part of a national network that ensures that best practice is shared.¹⁷⁴

- 5.13. The Scottish experience is instructive. The National Sexual Crimes Unit (NCSU), comprising a team of specialist Crown Counsel and Procurators Fiscal, directs criminal investigations of the most serious sexual offences from the earliest stages. Specialist prosecutors are able to provide a provisional assessment of the case, propose suitable lines of enquiry and identify likely charges and the requisite supportive evidence that will enable a successful prosecution to proceed. They are also able to acknowledge deficiencies in evidence, and can subsequently either cause to be rectified such issues, or allow those cases without sufficient evidence to be closed at an earlier stage.
- 5.14. A further advantage is that an early consultation can take place in difficult cases even where a suspect has not been identified and/or before the threshold test to prosecute has been passed.¹⁷⁵ A prosecutor has the ability to advise on the gathering of evidence, providing questions to be asked of suspects and strategy for any likely prosecution.¹⁷⁶ We consider that this procedure could be adapted for England and Wales. In cases of particular complexity, joint review meetings should be held regularly between the police and the CPS to allow for the close monitoring of progress and for advice to be given on any matters arising.¹⁷⁷ This may prevent problems caused by delay to the process when evidence is later found to be missing.
- 5.15. Despite the clear benefits to be gained from EIA, it appears that it has not been happening as much as would have been expected. A 2016 HMCPsi Thematic Review found that only 16.8% of files reviewed had any EIA or early consultation and when used, EIA was not very effective.¹⁷⁸ It also considered that there is a lack of clarity as to the purpose of EIA and as such it is seen as infringing upon police supervision of investigations. We have heard that the

¹⁷⁴ *Ibid.*

¹⁷⁵ As happened in the grooming cases of Oxford, Peterborough, Rochdale and Rotherham.

¹⁷⁶ CPS, 'Charging (The Director's Guidance) 2013 - fifth edition, May 2013 (revised arrangements)', May 2013, available at https://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html

¹⁷⁷ *Ibid.*

¹⁷⁸ HM Crown Prosecution Service Inspectorate, 'Thematic Review of the CPS Rape and Serious Sexual Offences Units', February 2019, p. 16, available at https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2016/02/RASSO_thm_Feb16_rpt.pdf

police believe prosecutors require so much information in order to advise that it is not practical to make a request. However, recent disclosure failings have obliged the CPS to ensure that all relevant material is located and assessed before a prosecutor makes a charging decision.¹⁷⁹ Nevertheless, it is important to ensure that all the information is really needed so as to avoid the police having to undertake unnecessary work and complainants' personal lives being needlessly scrutinised.

- 5.16. The CPS considers that police officers may not understand what material a prosecutor is requesting and the purpose of such a request, and that training would improve uptake of EIA. Another reason for EIA not being effective is the lack of continuity of prosecutor.¹⁸⁰ We understand that police sometimes find it difficult to speak to a prosecutor, even as a sounding board. Those we consulted consider that it would be of great assistance to have a specific named prosecutor who is available for advice throughout the investigation. We are pleased to learn that there is now a move to ensure that the same prosecutor will be responsible for a case throughout its lifetime.
- 5.17. Nevertheless, we understand that in some areas early consultation is taking place, though this is often ad hoc. There is a renewed drive to improve file quality and disclosure practice in order to ensure that correct charging decisions are taken. Although this is currently slowing down charging decisions, the CPS expects that charging decision rates will soon increase once new practices bed in. We welcome the fact that there is a renewed effort within the CPS to incorporate EIA into routine practice and to achieve a better understanding between the police and the CPS as to the purpose and benefits of EIA. The new Director of Public Prosecutions is trying to imbue general crime teams with the sense of adding value on first contact with the case.
- 5.18. We have been informed that as part of this renewed effort, there are now 'RASSO Gatekeepers' in around 20 police force areas. These are experienced police supervisors who are co-located with the CPS. The Gatekeeper acts as the main point of contact between the RASSO unit and police, and determines when a case is ready to be referred to the CPS. We understand that where Gatekeepers are used effectively, there is less recourse to EIA, as the Gatekeeper will direct the police as to what further evidence is required. For instance, in West Yorkshire, only 12 cases were referred for EIA in a year.

¹⁷⁹ A referral must be made to the CPS where the offence is an either way offence where the suspect will plead not guilty (or be sentenced in the Crown Court) or where the sexual offence is committed by or upon a person under 18: paragraph 15, The Director's Guidance, *supra* note 176.

¹⁸⁰ Thematic review, *supra* note 178

Despite this, there has been a higher volume of cases referred to the CPS, with higher charge and conviction rates. The success of this scheme depends largely on the skill of the Gatekeeper. We understand that data will soon be collected on the efficacy of this role.

- 5.19. We understand that when done correctly, EIA has many positive benefits, and **we consider that until the RASSO Gatekeeper system is shown to be effective, it should be sought routinely in serious sexual assault cases. In any event, improved liaison between the CPS and police is required. We believe that refocussing the use of EIA on strategy development before turning to evidence gathering may help.**

RASSO units

- 5.20. RASSO units are staffed by specially trained lawyers and paralegals who offer legal advice and support to complainants.¹⁸¹ This should ensure that specialist prosecutors are handling the most serious sexual offence cases.¹⁸² Minimum standards were put in place in October 2016 focussing primarily on the structure of the units.¹⁸³
- 5.21. The advantages of setting up a RASSO unit include: prosecutors and paralegals develop a genuine specialism resulting in increased productivity and efficiency; unit members have ‘ownership’ of cases; and there is effective multi-agency governance linked with processes for reviewing outcomes and sharing lessons learned with the police.¹⁸⁴ These benefits should all improve the prosecution of sexual offences.
- 5.22. However, the 2016 Thematic Review found shortcomings with RASSOs. A major problem was the lack of consistency across CPS areas, with each area developing its own models for practice.¹⁸⁵ This combined with the lack of resource at a time of increased workload and the poor quality of some police

¹⁸¹ Each CPS area has their own dedicated team, for instance: ‘South East’, CPS, available at <http://www.cps.gov.uk/southeast/about-us/rape-and-serious-sexual-offences-unit/>. See also CPS, *Violence against women and girls report – tenth edition*, (November 2017), available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_1.pdf

¹⁸² *Supra* note 178, p.54.

¹⁸³ *Ibid*, p. 89.

¹⁸⁴ *Ibid*, pp. 53-54.

¹⁸⁵ *Ibid*, p. 3.

files led to casework not achieving the quality expected. For instance, the review found that:¹⁸⁶

- (a) There was no continuity of prosecutor in 48.9% of cases, which may have led to the finding that there was compliance with RASSO policy post-charge in only 59.3% of cases reviewed;
- (b) Rape cases were dealt with by a specialist in only 62.4% of such cases, with the file being dealt with in a dedicated unit in only 46.7% of cases (in 8 cases this information was unknown);
- (c) The Code for Crown Prosecutors was not applied correctly in 10.1% of cases;
- (d) The average time for a charging decision was 53 days against a target of 28 days;
- (e) There was compliance with relevant victim policies in only 66.7% of cases;
- (f) There was a need for refresher training for RASSO units.

5.23. All of these failings have the potential to increase investigation times, create delays at trial and facilitate miscarriages of justice. We understand that CPS areas are addressing these concerns and that most CPS areas should have adopted the CPS' National Model by now. For instance, in the East Midlands CPS Area, in the majority of cases, a single prosecutor handles a case for its duration. Additionally, the CPS require that the police complete a checklist before sending a file to the CPS so as to improve file quality. However, we understand this checklist may be being used to request excessive information and that there can still be delays once the police file arrives with the RASSO unit; it is not uncommon for charging decisions to take at least three months. The recent need to review CPS decision making in relation to disclosure failings has added extra demands to an already full workload, which has further contributed to delays. We understand that the CPS is currently identifying areas where mistakes are being made and what is needed to resolve these errors. It is critical that there is proper identification of all material that is potentially relevant under the disclosure rules. Requests for material that fall outside the disclosure obligations should not be allowed to contribute to unnecessary delay.

5.24. It is a cause of grave concern that resources are still a major issue for RASSO units and there is an element of burnout taking place, with prosecutors working a huge number of unpaid hours. We have been informed that it is now difficult to recruit to RASSO units due to the perceived pressures the units face. However, we understand that a policy of rotation is now in place to ensure that

¹⁸⁶ *Ibid*, pp. 4-5.

staff do not remain indefinitely posted to a RASSO unit. We welcome this policy.

Forensic evidence

- 5.25. Efficient forensic practice is important to reducing investigation times and ensuring investigations maximise the use of forensic sciences. Delays in obtaining forensic evidence can hold up charging decisions. Poor quality forensic evidence can cause delays at trial and also risks miscarriages of justice.
- 5.26. A number of concerns with current forensic practice have been drawn to our attention:
- (a) Future governance of the mixed market;
 - (b) Legal Aid;
 - (c) Poor training (including the need to provide a forensic scientist with all relevant information);
 - (d) Poor case management;
 - (e) Defence access;
 - (f) High volumes of data.
- 5.27. Underlying the problems within forensic services is the unavoidable issue of resource. Many years of restrictions in funding have impacted both the policing and commercial sector. In its latest report, the Forensic Science Regulator states that “profound changes to funding and governance are required to ensure that forensic science survives and begins to flourish rather than lurching from crisis to crisis.”¹⁸⁷ We agree that funding must be revisited, as improvements in practice can only go so far towards increasing efficiency.

The mixed market approach

- 5.28. In 2012, the Government abolished the state-owned Forensic Science Service (FSS). The FSS had been the main organisation supplying forensic services to police forces in England and Wales, in addition to the facilitation of training, consultancy and scientific support for those officers conducting

¹⁸⁷ G. Tully, *Annual Report, 17 November 2017 – 16 November 2018* Forensic Science Regulator, (15 March 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786137/FSRAnnual_Report_2018_v1.0.pdf p. 3

investigations.¹⁸⁸ However, even before the announcement of its closure the FSS held only approximately 60% of the market, the other 40% being commercial entities.

- 5.29. As a result of the abolition, police forces were required to transfer forensic work to a private laboratory, or to an ‘in-house’ facility maintained by law enforcement. As of November 2017, there were 46 such facilities within law enforcement, and between 20 and 30 commercial organisations were known to be actively offering services in the criminal justice system.¹⁸⁹
- 5.30. We are aware, and have received confirmatory evidence, that as a consequence there has been a drop in quality with cost considerations affecting decision-making. For instance, samples may not be sent by police to be tested due to price concerns. Whilst targeted sample testing could be considered an appropriate use of limited resources, delays may occur later in the process, or proceedings may collapse, if it is discovered that previously untested samples should have been tested, wasting far more resources.
- 5.31. The Forensic Science Regulator (FSR) has attempted to tackle this problem through setting quality standards, by way of an accreditation process. However, these are expensive to acquire, making it difficult for smaller laboratories to attain accreditation. Dr Gillian Tully (the Forensic Science Regulator) accepts this but points out that any failure in forensic science can have a large impact and considers that a lack of accreditation cannot be excused. However, we have been told that accreditation does not necessarily yield better standards and further safeguards may be needed to maintain standards. Without substantial overheads necessary for their survival, a small company/sole practitioner may be able to provide services of at least as good quality as larger companies for lower fees. However, this can only be properly evaluated if there is an independent assessment.
- 5.32. With public and private providers operating in a mixed market there is a strong case for regulation so as to ensure compliance by all parties with a proper procurement system and a fair pricing structure. It follows that it is important that the right accreditation standards are set for the different types of forensic

¹⁸⁸ Archive of FSS Website, available at https://web.archive.org/web/20050831192748/http://www.forensic.gov.uk/forensic_t/index.htm

¹⁸⁹ G. Tully, *Annual Report: November 2016 – November 2017*, Forensic Science Regulator, (January, 2018), p.11, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674761/FSRAnnual_Report_2017_v1_01.pdf

work being carried out without those who are providing high quality service being forced out of business.

- 5.33. The Regulator must be astute not to set quality standards in a way which could create a high risk of losing highly skilled and experienced independent experts who are of vital importance to the criminal justice system.**¹⁹⁰ On occasions where evidence served by the prosecution is poorly or not fully interpreted, it can be the case that it is a sole practitioner instructed by the defence that identifies this and ensures that the evidence is presented to the court in a fair fashion. **Pathways should be created to help small laboratories to achieve necessary quality standards without needing to spend an excessive amount of money.**
- 5.34.** We note that the Forensic Science Regulator has set as a priority for the coming year the continuing support of the development of a cost-effective way for small businesses to reach required quality standards. One approach being examined is the sharing of costs in a common management system, sharing resources for audit and peer review. An external peer review from another provider/sole trader is healthy external scrutiny and can guard against the danger that a sole practitioner may, over time, become marginal in their views. We welcome this prioritisation and hope that further innovative ideas are considered. It should, however, be borne in mind that a sole practitioner, who may be the only expert in a specific field at a small company, will not have access to another expert.¹⁹¹
- 5.35.** Unfortunately, the FSR has no power to compel the level of compliance that is required, through intervention and, if necessary, debarment, where an expert falls short of acceptable standards. We understand that a Private Members' Bill has been introduced,¹⁹² which is supported by Government but, unfortunately, its progress has stalled. **We consider that the Forensic Science Regulator**

¹⁹⁰ The Forensic Science Regulator Gillian Tully is currently carrying out a pilot study to see what standards may be appropriate.

¹⁹¹ Gillian Tully has indicated that peer review is eminently manageable within the system being created by the Chartered Society of Forensic Sciences. She has received assurances from the LAA that they will not strike off payments for peer review. It follows that peer review can raise issues of confidentiality as well as cost. These can be handled simply through a short and simple sub-contract agreement.

¹⁹² The Forensic Science Regulator Bill would allow the FSR to investigate breaches of codes of practice and enforce compliance, available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0180/18180.pdf>

should be placed on a statutory footing and given the power to compel compliance as a matter of urgency.

Legal aid

- 5.36. We have heard that the Legal Aid Authority's (LAA) policy in relation to expert evidence is driving down forensic standards. The LAA requires defence solicitors to seek two or three quotes and then accept the cheapest one.¹⁹³ This means that rather than receiving assistance from the best experts, solicitors will have to use the cheapest.
- 5.37. Moreover, the legal aid rates for forensic work appear to not reflect the underlying costs of provision of the services.¹⁹⁴ This, combined with the demand for the cheapest work, is making it difficult for small forensic companies to stay afloat. As a consequence, companies may fail to complete the work to a sufficient standard.¹⁹⁵
- 5.38. We consider that the LAA should reassess the terms by which it approves forensic work. By making a clear distinction between high quality laboratories and lesser quality ones, and only approving spending of public money on those that meet quality standards, the drop in standards can be stemmed. This will reduce the risk of poor quality forensic work being carried out, reducing delay, resource expenditure, and the possibility of miscarriage of justice. As such, **we consider that the LAA should only approve quotes from services meeting the required quality standards set by the FSR, other than in exceptional circumstances. Moreover, the CPS and police should only use laboratories meeting the required quality standards.**

Case management

- 5.39. Although we have found that the general procedures and interchange between police, CPS and forensic labs is generally working well, there are some areas that can be improved. Consideration should be given to the Scottish system

¹⁹³ We also understand that the LAA reduces the amount of expert hours that it will pay for, which must then be challenged on appeal, adding further delay. This can also result in additional court hearings to explain the delay, at added cost.

¹⁹⁴ G. Tully, *supra* note 187, p. 24.

¹⁹⁵ The low fees also compound the problem of achieving accreditation for small providers that work predominantly in the criminal justice field.

with early strategic meetings designed to identify propositions to be investigated. For further discussion see paragraph 6.16.

- 5.40. The most substantial delay for defence lawyers is the CPS providing authority to the defence to access the forensic documents. It is rare that a request for access is denied but it still can take weeks for that authority to be provided. There are additional factors such as the need for a quotation from the LAA for the cost of providing copies of forensic documentation/allowing access to the laboratory used by the prosecution and CPS failure to indicate the location of the laboratory that can lead to significant delays. It should be relatively simple to ensure that requests for access are reviewed and granted in a timely fashion and all is done to facilitate the funding process.
- 5.41. Streamlined Forensic Reports (SFRs) are designed to present a summary of the results of forensic tests on exhibits. The summary (SFR 1) enables the defence to engage with the forensic evidence at an earlier stage and either agree with the findings or ask for further analysis. Further analysis will then be presented in a second report (SFR2) detailing with both the nature of the sample and how the sample came to be there (for example, it would attempt to explain how a drop of blood came to be on a shoe).¹⁹⁶ The aim of this procedure is to clarify the issues in contention as early as possible.
- 5.42. Unfortunately, we understand that the SFR 1 is sometimes not written by a scientist but by a police officer,¹⁹⁷ and includes a disclaimer that it is not evidence. Often, the second stage of the process is not explored as further analysis is not requested by defence solicitors until close to trial, or not at all, as the process is not well understood. Without further analysis, forensic evidence exhibited at trial which is in contention may not reveal any indication of how it was deposited. This risks the wrong conclusion being arrived at during trial.
- 5.43. **Improved training for solicitors, prosecutors and judges is necessary to ensure that everyone understands the limits of the SFR 1 and the need for the SFR 2 to be created as soon as possible where there are questions about the forensic material summarised in the SFR 1.**
- 5.44. We also understand that there is a lack of awareness amongst prosecutors as to what samples should be tested to build a case, which has been exacerbated by

¹⁹⁶ 'Streamlined Forensic Reporting Guidance and Toolkit', Crown Prosecution Service, available at: <https://www.cps.gov.uk/legal-guidance/streamlined-forensic-reporting-guidance-and-toolkit>

¹⁹⁷ See G. Tully, *supra* note 187, p. 35.

the closure of the FSS. Often, the CPS will ask for a full analytical breakdown of a sample when this is unnecessary. To this end, we understand that City of London Police will be running toxicology workshops to improve understanding of what toxicology can be used for and what results can reveal. **We consider such police training to be necessary nationwide and also should be a requirement for all lawyers who request samples from forensic labs.**

- 5.45. A final area of concern with respect to forensic evidence is that when DNA profiling technology is particularly sensitive, it can result in a mixed DNA profile. When this occurs, software is required to resolve the mixture. Some software products are owned by private providers who can charge a prohibitive fee. This can result in a cost-benefit analysis being carried out on whether to analyse the sample. If a decision is made not to test the DNA sample, it is rendered useless in that particular circumstance, which may negatively impact the investigation. Although the cost of testing should not feature in an investigation, the practical realities of current police budgets means that it must. We understand that there is also freely available software which may need to be tested before being used for this purpose. **Wider access to free software will assist in resolving DNA mixtures and should be made available once validated.** The use of this software will avoid cost considerations leading to successful DNA hits becoming less common with resources being wasted and investigations being prolonged.

Sexual assault referral centres

- 5.46. Sexual Assault Referral Centres (SARCs) are correctly regarded as representing one of the great improvements during the last two decades in the way forensic evidence is gathered and better welfare support for victims is facilitated. They provide a one-stop shop for medical, emotional and practical support to victims of sexual offences. This includes the opportunity for an early forensic medical examination should the victim consent to it.¹⁹⁸ In short, it is important to maximise the benefits of SARCS.

¹⁹⁸ SARCS are usually run in collaboration with the NHS. They have trained doctors, nurses and support workers to provide assistance, as well as Independent Sexual Violence Advocates (ISVAs) – ISVAs are trained to look after the needs of a complainant, understand and explain how the CJS works and provide the complainant with independent information. Victims can either self-refer or will be referred by the police.

- 5.47. This means that commissioners¹⁹⁹ need to understand what it is they are commissioning. Quality must be seen as critical rather than cost being the overriding factor. Co-commissioning where appropriate may secure the best service outcomes. For example, contracts should be for at least three to four years, so that scarce resources are not expended engaging with the tender process too frequently. Without guaranteed, stable funding it is hard to recruit and retain staff with the ever present spectre of job uncertainty looming. It is also difficult to plan as healthy secure funding streams are needed to allow effective and ambitious forward planning. Recruitment difficulties risk the employment of low-grade staff and inadequately trained nurses. A low level of care is likely to have a major impact upon the wellbeing of sexual offence complainants and the criminal justice process generally.
- 5.48. We are firmly of the view that properly run SARCs are a huge benefit not only to victims but also to the efficiency of the CJS. Nowhere should be deprived of the services of a SARC. Throughout the jurisdiction major efforts should be made to ensure these benefits are maximised. Funding reviews should be informed by the knowledge that the availability of easily accessible SARCS at the initial stages of the process will greatly reduce resource spending later in the process. We are aware that the Forensic Science Regulator is developing a quality standard for SARCs.²⁰⁰ Although we are supportive of this, we consider that proper resource must be provided to ensure SARCs can meet this quality standard.
- 5.49. Dr Catherine White, the Clinical Director of the Manchester SARC,²⁰¹ has given the working party a clear picture of how a well-functioning SARC operates in order to meet today's needs.

A SARC should be centred upon the needs of the patient/potential complainant. Services should be available for people of all ages but appropriate to the needs of the individual whatever their gender or sexuality. A SARC should be an integrated 'one stop shop' so that clients do not have to navigate themselves between the multiple different services offered. There must be facilities and personnel so that an ABE interview can be carried out on site. Ideally there should also be a live link to courts. Patient's medical

¹⁹⁹ Police and Crime Commissioners and the NHS.

²⁰⁰ Supra note 187, p. 14.

²⁰¹ Saint Mary's Sexual Assault Referral Centre and SAFEPlace Merseyside, St Mary's Hospital which was founded in 1986.

needs should also be attended to on site including HIV PEP, emergency contraception, and STI screening.

SARCS should operate from a welcoming building that is fit for purpose. The building must be easily accessible for both self and police referrals. To achieve this, it needs to be open at all hours, and should have (i) separate entrances for acute and aftercare services (ii) forensic suites that meet Forensic Science Regulator standards (iii) facilities for clients to shower, be fed, and given fresh clothing post forensic medical examination.

Services offered should be available for people of all ages but always appropriate to the needs of the individual whatever their gender or sexuality. This requires (i) the location of ISVA and counselling services within the building as well as (ii) social services and police and (iii) a ‘hub and spoke’ service for follow on services such as counselling. A holistic approach towards clients should be adopted. This would involve not just focussing on sexual violence but also looking at the person’s whole needs and situation so as to help them recover and reduce future vulnerability. This approach would involve the consideration of the following issues: (i) housing (ii) finance (iii) alcohol and/or drug issues (iv) domestic violence.

SARCS need to have a strong community presence with an effective communications strategy. Good links into community should be maintained so that barriers are reduced enhancing access for groups who otherwise find it hard to report, such as minority ethnic groups, young males, and elderly people.

- 5.50. More should be done to build on the success of SARCS. Links with services which cover domestic abuse and child physical abuse, where not already existing, should be forged and consideration should be given to expansion to allow for the co-location of these services so as to create Interpersonal Violence Centres.

Disclosure

- 5.51. As all actors in the justice system will be aware, there have been significant problems with the way evidence is disclosed over the last few years. These have been particularly significant in the prosecution of sexual offences,²⁰² against a backdrop of a 70% increase in dropped cases due to poor disclosure

²⁰² See note 9.

practice.²⁰³ In July 2017, a joint inspection into disclosure by HMCPsi and HMIC²⁰⁴ identified serious failings. Since this inspection, a flurry of work has taken place in an attempt to address the issue.

5.52. The CPS Report, *A joint review of the disclosure process in the case of R v Allan*,²⁰⁵ followed Liam Allan's acquittal in January 2018. This led the College of Policing to introduce the National Disclosure Improvement Plan²⁰⁶ in the same month. The Justice Select Committee of the House of Commons soon announced the Disclosure of Evidence in Criminal Cases inquiry on 22 February 2018.²⁰⁷ Revisions were made to the CPS Disclosure Manual²⁰⁸ in February 2018 and Disclosure Management Documents were introduced in all cases of homicide, rape, serious sexual offences and other complex criminal cases in March 2018. In April, The College of Policing's *Disclosure and Relevancy: Conducting Fair Investigations Policy*²⁰⁹ introduced a new training package for police officers, and the CPS Report, *Rape and serious sexual offence prosecutions – Assessment of disclosure of unused material ahead of trial*²¹⁰ was introduced in June 2018.

²⁰³ In 2017, 916 criminal cases in England and Wales were dropped as a result of poor disclosure practice: 'Hundreds of cases dropped over evidence disclosure failings', BBC News (24 January, 2018), available at: <http://www.bbc.co.uk/news/uk-42795058>

²⁰⁴ HMCPsi & HMIC, 'Making it Fair: A Joint Inspection of The Disclosure of Unused Material in Volume Crown Court Cases', (2017), p. 4, available at https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf

²⁰⁵ The Met and the CPS, 'A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London', (2018), available at <https://www.cps.gov.uk/sites/default/files/documents/publications/joint-review-disclosure-Allan.pdf>

²⁰⁶ NPCC, College of Policing and CPS, 'National Disclosure Improvement Plan', 2018, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/National-Disclosure-Improvement-Plan-May-2018.pdf>

²⁰⁷ *Supra* note 13.

²⁰⁸ Available at https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure%20Manual_0.pdf

²⁰⁹ Available at https://www.college.police.uk/News/College-news/Documents/Disclosure_programme_completion_figures191218v3.pdf

²¹⁰ CPS, 'Rape and serious sexual offence prosecutions: assessment of disclosure of unused material ahead of trial', (June, 2018), available at https://www.cps.gov.uk/sites/default/files/documents/publications/RASSO-prosecutions-Assessment-disclosure-unused-material-ahead-trial_0.pdf

- 5.53. A protocol between the police and CPS on dealing with third party material has also been introduced. The failures in the disclosure regimes highlighted by these reports included: the police not always pursuing reasonable lines of inquiry; CPS requesting excessive disclosure investigators not identifying material as relevant for inclusion in disclosure schedules; prosecutors not asking the right questions to uncover errors; the disclosure test not being applied correctly; disclosure being made too late; and defence and judicial engagement with the disclosure process being patchy. These errors increase the risk of miscarriage of justice, which can waste a huge amount of resource for the CJS, and could be better spent investigating and trying other cases, never mind the impact upon the convicted person.²¹¹
- 5.54. Such has been the concern about disclosure failings that the Attorney General conducted his own inquiry and published the *Review of the efficiency and effectiveness of Disclosure in the Criminal Justice System* in November 2018.²¹² The Attorney General concluded that despite concerns about investigators and prosecutors being the gatekeepers to disclosure, the CPIA regime remained appropriate although he recognised that it was not working as effectively or efficiently as it should.
- 5.55. The Attorney General made a number of recommendations to improve disclosure, including:
- (a) The frontloading of disclosure preparation by the prosecution;
 - (b) that there should be a rebuttable presumption of disclosure for categories of key documents/materials that usually assist the defence;
 - (c) the need to harness modern technology to improve the ability of the police and prosecutors to scrutinise digital material in order to be able to comply with their disclosure obligations;

²¹¹ See JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018), available at <https://justice.org.uk/supporting-exonerees-ensuring-accessible-continuing-and-consistent-support/>. In 2016, the CCRC highlighted that: “In the past twelve months this Commission has continued to see a steady stream of miscarriages. The single most frequent cause continues to be failure to disclose to the defence information which could have assisted the accused.” Criminal Cases Review Commission, *Annual Report and Accounts 2015/2016*, (2016), available at <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1/jdn5d1f6iq1l/uploads/2017/01/CCRC-Annual-Report-and-Accounts2015-16-HC244-Web-Accessible-v0.2-2.pdf>

²¹² Attorney General’s Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system*, (November 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756436/Attorney_General_s_Disclosure_Review.pdf

- (d) that there should be early and meaningful engagement between the prosecution and the defence both pre-charge and post-charge; and
- (e) that further training and guidance be issued to assist the police and the prosecution in the performance of their statutory functions.

5.56. The Working Party is broadly supportive of these recommendations. In relation to early engagement between prosecution and defence, the use of DMDs should assist, which are recommended in the Attorney General’s Disclosure Guidelines (2013).²¹³ DMDs will allow defence lawyers to view the prosecution’s disclosure strategy at a Pre-trial Preparation Hearing (PTPH). Defence lawyers will then be able to suggest any further avenues for the prosecution to pursue, before having to file a defence statement. It is likely to be the default position that DMDs will be used in all sex cases, due to their complexity and the presumed vulnerability of the complainant.

5.57. We note that the 2016 JUSTICE Working Party report *Complex and Lengthy Criminal Trials* (CLTs), chaired by former DPP Sir David Calvert-Smith, made similar recommendations. These included:

- (a) Electronic disclosure of case materials, together with a summary of the case, as early as possible;
- (b) Disclosure review to begin at the point of pre-interview disclosure;
- (c) The routine use of Disclosure Management Documents;
- (d) E-disclosure through an evidence management system that allows secure access to defence. This should remove the concern over providing the ‘keys to the warehouse’ to the defence;
- (e) The use of independent disclosure counsel to assist when agreement cannot be reached about the disclosure of items on the unused schedule.²¹⁴

5.58. We adopt these recommendations and in addition **consider that the use of Disclosure Management Documents should be expanded from serious cases such as rape and child sexual abuse to all cases involving electronic devices.**

²¹³ Attorney General’s Office, ‘Attorney General’s Guidelines on Disclosure – For Investigators, prosecutors and defence practitioners,’ 2013, p.13, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf

²¹⁴ JUSTICE, *Complex and Lengthy Criminal Trials*, (2016), p. 25, available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf>

5.59. In his review, the Attorney General anticipated that the changes he recommended would be implemented before the end of 2019 and we hope that they prove to have the needed impact.

High volumes of data

5.60. Sexual offence cases often require a large amount of forensic evidence to be analysed. With the increase in online offences and the increasing digitisation of the modern world, the amount of digital data required to be analysed has risen exponentially. As an illustration, a smartphone can hold 128 gigabytes of data, which equates to 12,800 boxes of paper. This amount of paper would weigh the same amount as a Boeing 757.²¹⁵

5.61. The sheer scale of digital material is causing delay. This is exacerbated by a reduction in resources. For example, a 32 gigabyte phone would previously have taken four officers a month to manually review. Now one officer is expected to review a similar sized phone.

5.62. One option to resolve this issue is to invest in eDiscovery tools, which allow multiple devices to be analysed at once. However, according to our sources such tools cost upwards of £100,000. They also present equality of arms issues; if the defence do not have access to the tools, the prosecution may have an unfair advantage. These concerns highlight why JUSTICE's Complex and Lengthy Criminal Trials Working Party recommended that eDiscovery tools are built into the CJS Common Platform,²¹⁶ which we endorse.

5.63. Efficiently analysing large volumes of data clearly requires increased digital capability. However, finding alternatives to manual review of all data collected will reduce policing resources and delays. In addition, setting out a strategy for what evidence is necessary when investigating a case may also reduce delays. For instance, to identify traditional forensic opportunities that will render full digital forensics unnecessary for case progression. We understand that a lack of strategy is a particular concern for some police officers, who feel that the CPS does not give adequate advice on digital media. We are told that some

²¹⁵ Will Kerr, *supra* note 16, p. 31.

²¹⁶ The CJS Common Platform will replace the existing IT systems of HMCTS & CPS with a single system. A single central database will hold all the material (including multi-media) necessary to deal with cases from charge to trial. Instead of material being passed from one agency to another, it will be available from a single database, ensuring the most complete versions of cases can be accessed by all parties, including the defence and judiciary, at any time. Digital tools will enable on-line case progression by the parties and the scheduling of cases for hearings.

police officers believe they are currently being asked to look at all digital data, even if not relevant. However, as with the confusion over EIAs that we reference above, we have been informed that this procedure is borne out of a desire to ensure that there is less work to do post-charge. There is clearly a gap here between the CPS and the police, further highlighting the need for better communication. **DMDs, together with the approach to disclosure for large quantities of digital material laid out in Guidelines, should ease the current disclosure burden:**

“Where...investigations involve digital material, it will be virtually impossible for investigators (or prosecutors) to examine every item of such material individually and there will be no expectation that such material will be so examined. Having consulted with the prosecution as appropriate, disclosure officers should determine what their approach should be to the examination of the material”²¹⁷

5.64. Moreover, the police do not currently have the resources to carry out such forensic investigations. This is contributing to forensic experts being provided with ‘sketch evidence’²¹⁸ which is insufficient for proper analysis. The increased use of ‘kiosk’²¹⁹ technology by police officers needs to be coupled with actual analysis of what that technology reveals.²²⁰ This is especially because kiosk technology takes a forensic image of the device and does not allow the police to download information solely relevant to their investigation.²²¹ **Police officers must be properly trained on how to analyse evidence using kiosk technology.** Without such training, officers may risk mishandling or cherry picking evidence that builds their case, rather than

²¹⁷ Attorney General’s Guidelines (2013), *supra* note 213, para 48.

²¹⁸ Screenshots of webpages and phone screens.

²¹⁹ Kiosk technology allows police officer to download certain data from devices, such as location data, conversation on encrypted apps, call logs, emails, text messages, photographs, passwords and internet searches among other information.

²²⁰ “Understanding the limitations of what will reliably be downloaded versus what may or may not be recovered, depending on the make and model of phone, will greatly assist in ensuring that it is clear whether reasonable lines of inquiry have been pursued. Consequently, it will assist the police in fulfilling their disclosure obligations.” G. Tully, *supra* note 187, p. 26.

²²¹ H. Dixon, ‘Police rolling out technology which allows them to raid victims phones without a warrant’, The Telegraph, available at <https://www.telegraph.co.uk/news/2018/03/31/police-rolling-technology-allows-raid-victims-phones-without/>

carrying out a thorough analysis.²²² Poor quality analysis increases delays through that evidence being more susceptible to challenge.

- 5.65. A complication of the lack of laboratories meeting the FSR's quality standards is that large volumes of digital forensic evidence is being sent to unaccredited laboratories.²²³ This further risks delay and miscarriage of justice.

Seizing complainant devices

- 5.66. An issue related to the rise in digital data is the practice of routinely analysing the devices of complainants. This should only be done where it is reasonable to do so and the data is relevant, although we understand that this is not always the case in practice. Due to the amount of data on devices, this can mean that the police keep hold of an individual's device for a long period of time, disrupting a complainant's life and interfering with private matters irrelevant to the alleged crime.
- 5.67. Stafford Statements²²⁴ are used to cover this process. However, they are phrased in general terms and provide investigators with the consent of the complainant to analyse their devices and to obtain third party disclosure from a wide variety of sources. This can result in complainants feeling that it is they who are being investigated. We have heard that some complainants have even stopped cooperating with the investigation and withdrawn their complaint. Further, we understand that these statements are presented to the complainant as an adjunct to a witness statement which may mean people do not read it thoroughly and do not understand what they are signing. The poor use of Stafford Statements may result in some people deciding not to report a sexual assault at all. Their use may also mean complainants will choose not to access support services that they need, fearing that these reports may be disclosed. This risks eschewing victim welfare standards and damaging a fair investigation.
- 5.68. We recognise the importance of fully investigating all aspects of an allegation. However, we consider that if done correctly this is primarily a communication issue. If the police explain the reason for the analysis, and ensure they only

²²² Dr Jan Collie, Professor Peter Sommer, *supra* note 13.

²²³ For instance, of 20 to 30 organisations known to be actively offering services in the CJS, four have gained accreditation to ISO 17025 for digital forensics: G. Tully, *supra* note 189, p. 11.

²²⁴ *R (B) v Stafford Crown Court* [2006] EWHC 1645 (Admin). laid down a requirement that a complainant's Article 8 ECHR right to privacy must be considered when it comes to disclosure.

follow reasonable lines of enquiry, this will help complainants to understand and cooperate.²²⁵ A new nationally applicable consent form has recently been introduced.²²⁶ This is intended to be a nuanced document that will indicate the circumstances in which a complainant will have their devices investigated and explain the reasons why the data is necessary. We welcome these inclusions in the form. However, we consider that, although the new consent form represents an improvement, **complainants should be advised of the legal consequences of signing. The new consent form should detail the specific piece of information that the investigators require, explain its relevance to the investigation and confirm a reasonable return date to the complainant of the device.**²²⁷

5.69. We are also concerned by the warning that should a complainant refuse to hand their device to the police, it may not be possible for the investigation or prosecution to continue. Prosecutions were capable of proceeding prior to the invention of smart phones, without investigators requiring a full account of every conversation and interaction the complainant had had around the time of the offence. It should be borne in mind that evidence on digital devices will generally be additional evidence, which should not hinder any decision to charge. Anything approaching a blanket approach of refusing to investigate further may both deprive complainants of access to justice and dissuade individuals from reporting crimes for fear of being disbelieved. If further investigation demonstrates a need for disclosure of the data on a complainant's device, this can be ordered by a judge, after a hearing in which the complainant can state their reasons against disclosure. **We recommend that assurances are given to complainants that each case be considered on its merits and that the CPS should only be able to refuse to consider charge if that evidence is integral to the decision to charge.**

5.70. With third party material, we understand there are similar concerns regarding blanket retrieval and cases not proceeding without complainants granting access to their medical, educational and psychiatric reports. Where third party

²²⁵ However, if they do not do this, there is a risk that the complainant's Article 8 right to privacy will be breached.

²²⁶ This has been made available online here:
https://www.scribd.com/document/407922009/Npcc-Final-Consent-v1-2#fullscreen&from_embed

²²⁷ Commentators have complained that the new consent form is still problematic and we understand that there has been a commitment made by the NPCC to work with victim organisations to further improve the document.

material is required by the police, the same approach should be taken as we have set out for the seizure of complainants' devices.

- 5.71. Investigators should also be mindful that in order to obtain third party material, it must be shown not only that there is suspicion that the third party holds relevant material but also that the material held by the third party is likely to support the defence case or undermine the prosecution. Even if an investigator believes that the material would meet the disclosure test, the investigator is not under an absolute obligation to obtain all third party material, as the prosecutor has a “margin of consideration” as to what steps to take in any particular case.²²⁸

The decision to charge

- 5.72. During the course of its investigation, this working party considered whether it would be appropriate to refine the policy in respect of the decision to charge for non-recent cases, particularly old suspects, or suspects who are already in prison for many years for similar crimes. However, we took the view that all of the proposed measures would be against the interests of justice. The very nature of sexual offences means that they are reported a long time after the incident, that the suspect may be old when accused and they may have committed many undetected sexual offences, despite only being convicted for a small number of them. Reducing the chance for a prosecution to take place in these circumstances would mean that perpetrators benefit from the hidden nature of sexual offences. This is plainly unacceptable.
- 5.73. However, we do think it is possible to look at charging policy in respect of IIOC offences and child suspects.

Indecent images of children

- 5.74. Delay is a major concern for IIOC cases, due to the vast volume of offences being committed. For instance, in some cases considered by the Criminal Justice Joint Inspection,²²⁹ suspects were on bail for 12 months before their

²²⁸ *R v Alibhai* [2004] EWCA Crim 681 and Letter from Dame Vera Baird QC to the Justice Committee's inquiry into the disclosure of evidence in criminal proceedings, dated 14 February 2018.

²²⁹ HMCPSI and HMIC, *Joint Inspection of the Provision of Charging Decisions*, (2015), available at <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/joint-inspection-of-the-provision-of-charging-decisions.pdf>.

case was ready for a charging decision. There was then further delay caused by the wait for charging advice to be given by the CPS.²³⁰

- 5.75. The CPS has developed a streamlined approach to prosecuting IIOC offences.²³¹ This approach applies to low-risk individuals, allowing charging decisions to be made based on CAID analysis, rather than forensic analysis. Its purpose is to address the delay in outcomes. It is only available where suspects are considered low-risk, the investigation concerns possession, distribution or production (in the limited sense) of IIOC and all relevant devices have been subject to ‘triage’ (which means undergoing a CAID software check). If these criteria are met, the proportionality assessment must then be undertaken to decide whether a charging decision can be made.²³²
- 5.76. Although CAID and the streamlined approach aid efficiency, the sheer scale of the number of reports coming in is overwhelming. There are simply not the police and prosecution resources to tackle the volume of offences through the traditional prosecution route. Moreover, cases involving high-risk suspects are prioritised, causing delays to cases involving lower-risk suspects. As we set out in **Chapters 2 and 3**, preventing this offending from taking place and diverting from prosecution therefore must be a priority.

Whether prosecution of a child is in the public interest

- 5.77. In cases concerning an allegation of a sexual offence committed by a juvenile, the CPS is bound to take additional considerations into account in assessing whether a prosecution is in the public interest. Prosecutors are directed to avoid unnecessarily criminalising children, with their published guidance appreciating that “the overriding purpose of the legislation is to protect children and it was not Parliament’s intention to... intervene where it was

²³⁰ *Ibid* at p. 22.

²³¹ See: *supra* note 196.

²³² *Ibid*. This assessment determines how many images need to be presented to court in order to deal with the case ‘justly, efficiently and expeditiously’. The assessment will balance the likely effect additional material will have on the final sentence and the resource required to undertake a full forensic analysis of each seized device. Once the number of IIOC reaches a certain threshold, additional images will have limited effect on the final sentence. The threshold should not be defined, and should be decided on the facts of each case. We understand that 250 or more category A images should always be considered high volume, however many the total images are. As such, when the streamlined approach applies, prosecutors do not need to request further images be examined if they have examined and categorised: (a) at least 250 Category A images; or (b) where there are no Category A offences, a total of at least 1,000 images.

wholly inappropriate”.²³³ In addition, prosecutors must decide whether to use the offences created for child defendants in the Sexual Offences Act 2003 (SOA).

- 5.78. We are concerned by the prosecution of children in respect of some sexual offences. Choosing to prosecute a child may mean not only unduly criminalising the child. It also means further affecting their future life chances through the requirement in many cases that they be subject to mandatory notification requirements and that their criminal record will be disclosable through a Disclosures and Barring Service (DBS) check. A reduction in life chances also increases the likelihood of recidivism, which leads to future resource demand on the CJS. In particular, the recent increase in volume of child offences, driven by the ‘sexting’ phenomenon, takes up resource in prosecutions that might be better spent in educating children, as we recommend in **Chapter 2**.
- 5.79. Any case that concerns a sexual allegation must currently be referred to the CPS for a charging decision and can only be reviewed by a RASSO lawyer. Cases involving allegations of sexual offending committed by children and young persons must also be reviewed by a youth specialist. The Chief Crown Prosecutor of the relevant CPS Area must be notified where either the suspect or complainant is under the age of 13.²³⁴ These safeguards are in place to ensure that complex decisions about criminalising children are made correctly.
- 5.80. When considering charging a child with a sexual offence, the police and the CPS must take into account fully the views of other agencies, in particular social services. The consequences for the complainant of the decision whether or not to prosecute, as well as any views expressed by the complainant or the complainant’s family should also be taken into account.
- 5.81. A complication concerning the decision to charge a child is that sections 5 to 8 of the Sexual Offences Act 2003 create strict liability sexual offences²³⁵ committed against children who are under the age of 13 at the relevant time.²³⁶

²³³ Crown Prosecution Service, ‘Rape and Sexual Offences – Chapter 11: Youths’, available at <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-11-youths>

²³⁴ *Ibid.*

²³⁵ Strict liability here means there is no available defence; the conduct must still be intentional and still requires a CPS decision on whether to prosecute.

²³⁶ Sexual Offences Act 2003, ss. 5-9: ‘Rape and other offences against children under 13’: Where allegations of such offences involve suspects under the age of 18, the following must be considered when deciding whether to charge: The views of the Local Authority Children’s and Young People’s

However, if the sexual act or activity was in fact genuinely consensual and the accused child and complainant child under 13 are fairly close in age and development, a prosecution is unlikely to be appropriate, according to the Director of Public Prosecution's Guidance. Action falling short of a prosecution may be appropriate.²³⁷

5.82. There is provision in the SOA for reduced sentences for children who commit certain sexual offences, but not the strict liability offences (offences against children under 13).²³⁸ This means that children who commit strict liability offences are subject to the same maximum sentences as adults. Although sections 9-12 could theoretically be applied when a complainant is under 13, in practice, sections 5 – 8 will always be charged to reflect Parliament's intention to provide protection to very young children. However, such an approach fails to take into account the welfare of the child defendant, who is developmentally immature, and for whom a welfare-orientated response will improve the chance of successful rehabilitation, and as such, likely reduce their

Service; Any risk assessment or report conducted by the Local Authority or Youth Offending Services in respect of sexually harmful behaviour; Background information and history of the parties; The views of the families of the parties. In particular, careful regard must be had to: The relative age of the parties; The existence and nature of any relationship; The sexual and emotional maturity of the parties and any emotional or physical effects as a result of the conduct; Whether the child under 13 in fact freely consented (even though in law this is not a defence) or a genuine mistake as to age was made; Whether any element of seduction, breach of any duty of responsibility to the child or other exploitation disclosed by the evidence; The impact of a prosecution on each child involved.

²³⁷ The guidance states that there is a fine line between sexual experimentation and offending and, in general, children under the age of 13 should not be criminalised for sexual behaviour in the absence of coercion, exploitation or abuse of trust. However, if someone under 18 but over 16 sexually assaults a young child, or a baby-sitter in a position of responsibility has taken advantage of a child under 13 in their care, a prosecution is likely to be in the public interest. In addition, where both parties are under 16, then both may have committed a sexual offence. However, according to the Parliamentary debates at the time of the passage of the SOA 2003, the overriding purpose of the legislation was to protect children and not to punish them unnecessarily or for the criminal law to intervene where it was wholly inappropriate. Accordingly, consensual sexual activity involving children over the age of 13 but under 16 would not normally require criminal proceedings in the absence of aggravating features: Guidance on rape and sexual offences – youths, *supra* note 233. The matters relevant to consideration of the public interest in such circumstances would be: The respective age of the parties; The existence and nature of the relationship; Their level of maturity; Whether any duty of care existed; and whether there was a serious element of exploitation.

²³⁸ Sexual Offences Act 2003, s.13; In *R v G (Secretary of State for the Home Department Intervening)* [2008] UKHL 37,²³⁸ the House of Lords made clear that it should not matter whether the defendant was under the age of 16, if they committed an offence under these sections. Baroness Hale stated:

"Section 5 reinforces that message. Penetrative sex is the most serious form of sexual activity, from which children under 13 (who may well not yet have reached puberty) deserve to be protected whether they like it or not.....And the harm which may be done by premature sexual penetration is not necessarily lessened by the age of the person penetrating".

risk of reoffending. **We consider that where there is a choice between prosecuting a child under sections 5 to 8 or under sections 9 to 12 SOA, there should be a presumption in favour of charging the child under sections 9 to 12.**

- 5.83. We understand that cases concerning children are complex and that it can be difficult to determine whether to charge and what the appropriate charge is. This is exacerbated by a high workload and lack of resources. These difficulties emphasise **the need for particular training on juvenile sex cases for specialist prosecutors**, to ensure that the correct decision can be made quickly and efficiently. Charging children and young people appropriately will reduce their chances of recidivism, and, where appropriate, not charging them at all will prevent unnecessary cases entering the criminal justice system.
- 5.84. Youth sexting (discussed in **Chapter 3**), where the sexting is non-abusive and there is no evidence of exploitation, grooming, malicious intent or persistent behaviour, is an area where an alternative to charge is in our view more appropriate. The police Outcome 21 should be used, when the police record the outcome of the incident.²³⁹ This outcome allows an incident to be recorded without a caution having to be given, avoiding the incident appearing on a DBS check.²⁴⁰ However, it is still within the power of the chief police officer dealing with a DBS request to decide to disclose it. In our view this works against the spirit of the outcome, which is to not needlessly criminalise children.
- 5.85. In sexting cases between child peers, we believe education is the best response. **Where outcome 21 is used for a child, it should not be disclosable on an enhanced DBS check.** Moreover, we consider that more information should be given about the nature of the offending behaviour if a DBS check makes a disclosure, rather than a simple description of the offence. We believe this will help those requesting the information to better understand the context of the

²³⁹ When the police have been informed of a criminal offence but decide not to take any action, this is recorded on the Police National Database (PND) as ‘no further action’ (NFA). Outcome 21 is a police-generated code. If the police have found a child to have committed a sexting offence but have decided not to take any action. Outcome 21 states ‘Further investigation, resulting from a crime report, which could provide evidence sufficient to support formal action being taken against the suspect, is not in the public interest – police decision.’ See: Youth Justice Legal Centre, ‘Step by Step Guide: Sexting’, (2018), available at <https://yjlc.uk/wp-content/uploads/2018/03/Sexting-Step-by-Step-Guide-Final.pdf>

²⁴⁰ College of Policing, *Briefing note: Police action in response to youth produced sexual imagery* (‘Sexting’), November 2016, available at [https://www.college.police.uk/News/College-news/Documents/Police action in response to sexting - briefing \(003\).pdf](https://www.college.police.uk/News/College-news/Documents/Police%20action%20in%20response%20to%20sexting%20-%20briefing%20(003).pdf)

sexual behaviour, hopefully reducing job rejections for consensual youth sexting.²⁴¹

Non-recent cases

- 5.90. Many non-recent cases were committed prior to the implementation of the Sexual Offences Act 2003 on May 1, 2004, which means that a different legislative framework applies. This discrepancy has led on occasion to errors in the drafting of charges, failures to address the presumption (abolished in 1998) that a child under 14 was *doli incapax*²⁴² and sentencing inconsistent with the approach as now clarified in *Forbes and others*.²⁴³
- 5.91. There are many examples of mistakes that have only come to light when the case is before the Court of Appeal in respect of other matters. Professionals should be more aware of the differences in the law depending on when the offence was committed. The CPS does have guidance on drafting indictments for non-recent cases but it is clear that some prosecutors are not following this closely enough. **Further training should be undertaken to ensure that prosecutors are aware of the pitfalls of drafting indictments for non-recent cases. This should ensure that court time is not wasted on these mistakes.**

Trial

- 5.92. There are number of difficulties that arise at trial in sexual offence cases, often caused by the forensic evidence and disclosure issues described above. Additionally, sex offence cases often involve vulnerable witnesses, who can find the process of giving evidence extremely difficult as it requires them to re-visit the incident in great detail. This can mean taking a long time to respond to questions and requiring lots of breaks. The prospect of giving evidence may prove too much and the witness may not be able to give evidence at all, resulting in a collapsed trial. Compounding the anxiety of giving evidence is the length of time that some sexual offence cases take until they reach trial.

²⁴¹ Further, the Supreme Court has ruled that the statutory requirements in respect of an Enhanced Disclosure Certificate, such that the existence of more than one conviction will mean that all convictions will be disclosable (irrespective of age or subject matter), constitute a breach of Article 8 ECHR: *In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department* [2019] UKSC 3.

²⁴² Mentally incapable of committing a crime due to lack of maturity.

²⁴³ *R v Forbes & Ors* [2016] EWCA Crim 1388.

Ensuring that cases are listed promptly, with the needs of vulnerable witnesses in mind may reduce the trauma of giving evidence.

- 5.93. As we set out in the **previous chapter**, pre-recording complainant and vulnerable witness testimony can go a long way to both reducing anxiety for those participants around bringing an allegation to court and the length of time that a trial will take.

Listing

- 5.94. Court time is becoming more precious, with fewer court houses - and fewer rooms within those courts - being open. This lack of space means that if there is a delay in serving witness statements, for instance, there is a risk that the trial can be pushed back for months. For sexual offences, there can be delays of up to two years between charge and trial, with the usual delay being between 12 and 18 months. We understand that such delays are a reason why some complainants stop supporting prosecutions.
- 5.95. JUSTICE's working party report *Complex and Lengthy Criminal Trials*, made many practical recommendations concerning court management that would improve trial efficiency.²⁴⁴ The recommendations included the early identification of relevant third party material and agreement or decision over which party seeks this;²⁴⁵ the opportunity for the defence to inform the prosecution expert of any issues for consideration prior to preparation of their report;²⁴⁶ and for the trial judge to be assigned from the PTPH, who robustly manages the case and identifies the issues as early as possible.²⁴⁷ We endorse these recommendations, and consider them to be just as needed now as they were three years ago.
- 5.96. Compounding the long delay between charge and trial is the practice of using reserve trials to schedule court appearances. This means that on a single day, a number of cases are listed without being allocated a specific time. This means that parties to proceedings, their families and witnesses must all come to court on that date without any guarantee that their case will be heard. In addition, the use of warned lists, where cases are listed as being available to be called

²⁴⁴ JUSTICE, *Complex and lengthy criminal trials*, supra note 214.

²⁴⁵ Para 3.22.

²⁴⁶ Para 3.29.

²⁴⁷ Para 4.27.

on a day's notice within a specified period, causes similar scheduling problems.

- 5.97. Warned lists and reserve trials are used because of a reduction in court space and time, meaning that listing officers would prefer to make sure that there will be a case available when a court room and judge is free, rather than risk an empty court room. Although it ensures that resources are not wasted, warned lists and reserve trials negatively affect the trial experience of witnesses, especially those who are complainants in sexual offence cases, who are preparing to recall traumatic events. Knowing far in advance when something is coming up allows for more effective planning. We understand that this is the practice at Leeds Crown Court. Fixing a date and time for a trial will give complainants peace of mind that the evidence that they steered themselves to give will be heard at a specific, fixed time. Of course, effective scheduling of s.28 cross-examination would significantly improve complainant attrition.
- 5.98. Sir Brian Leveson raised the issue of warned lists in his *Review of Efficiency in Criminal Proceedings*. His view is that warned lists and reserved or floating systems mean a high proportion of cases are ineffective and lead to a duplication in work. He also considered that the number of occasions parties and participants are required to attend court must be reduced to an absolute minimum. For these reasons he recommended that “steps are taken to enable the courts to move towards single/fixed listing.”²⁴⁸ We consider that concerns over warned lists and floating systems are particularly urgent for sex offence cases, due to the vulnerability of complainants. **Ensuring that sex offence cases are fixed may reduce the attrition of complainants in this process. This can be achieved through the employment of a listing coordinator and access to information regarding bail and custody dates, as well as having a clear idea of the number of sitting days the court has in a year.**
- 5.99. As well as fixing hearing dates, efforts should be made to compress the period between charge and trial to three to four months, rather than 12 months. This will reduce the strain that is placed on a complainant. It is normal for issues to arise that require resolution prior to trial, such as late disclosure, or certain applications. Once these issues arise, it is important that they are dealt with as quickly as possible.

We understand that, for example, Leeds Crown Court has tackled issues of disclosure through implementation of the 2013 Protocol and Good Practice

²⁴⁸ B. Leveson, *supra* note 147, pp.38-41.

Model²⁴⁹ on disclosure locally. This has resulted in Leeds Crown Court holding a list of contacts for local authority and other organisations, such as social services. This allows, for example, a judge to call a named person in the relevant organisation when there is an issue concerning case progression, speeding up the resolution of the issue. Parties also know whom to seek answers from to their questions about disclosure. Another beneficial initiative within Leeds Crown Court is that court clerks have been given access to police duty rotas, allowing the judge at the PTPH to list cases for a time police officers are available.

These improvements create a culture of judicial intervention where outstanding issues should be resolved as soon as possible. For instance, we hear that judges will criticise parties for not bringing to their attention resolvable delays as soon as they become apparent, rather than waiting until the first day of trial.

5.100. Ideally, the same judge should have conduct of all hearings in a case. However, sometimes this is not possible due to scheduling issues. As such, ensuring the same judge hears the GRH and s.28 cross-examination should be a priority. This will ensure that the same judge that sets the ground rules will enforce the ground rules. It will also provide flexibility to the listing process.

5.101. The time between the GRH and pre-recorded cross-examination may also present issues, especially when s.28 is rolled out nationally. Ideally, no more than 14 days should have passed. 14 days ensures a good balance between providing enough time to resolve outstanding issues, such as outstanding disclosure requests, and ensuring that pre-recorded cross-examination takes place as early as possible. We understand that at a local, pilot level, it is still difficult to organise diaries and resolve issues, although the fact that most judges and advocates will know each other can help sort these issues out. This difficulty will worsen when s.28 is rolled-out nationally, with the number of advocates working on s.28 hearings increasing. **Preparing for this and setting a maximum 14-day gap between GRH and cross-examination should be a priority for the Criminal Procedure Rule Committee.**²⁵⁰

²⁴⁹ '2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings,' October 2013, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/protocol-good-practice-model-2013.pdf>

²⁵⁰ We understand that it will be difficult to manage listing if the gap is greater than 14 days.

5.102. A further issue that we have been told about concerns the availability of intermediaries. Intermediaries provide an important function, facilitating communication between vulnerable participants and the court. However, the requirement to have an intermediary creates another layer of scheduling to take into account. Intermediaries do not have a centralised diary. In order to organise a booking, a contact person must be called, who then contacts the intermediary. This is a very involved process, in need of improvement. **A centralised diary system for intermediaries would make the process of organising their attendance more efficient.**²⁵¹

5.103. Moreover, **ensuring that cases involving intermediaries are not placed on warned lists, if possible, could also help.** This is because being on a warned list can often block out a whole week for an intermediary, making it impossible for them to attend another case or police interview on the same week.

Sentencing

5.104. Sentencing serves a number of purposes, including punishment, deterrence and rehabilitation. As we set out in **Chapter 3**, evidence shows that effective rehabilitation has a positive effect on recidivism²⁵² and we believe that there are areas where this may have a greater role. Rehabilitation aims to encourage individuals to develop skills that will enable them to live full lives within the community. Properly done, it should ensure an individual no longer has an inclination to offend again. The Rehabilitation of Offenders Act 1974 supports rehabilitation by allowing for some criminal convictions to be spent²⁵³ after a certain rehabilitation period. Effective sentencing that focusses on rehabilitation should reduce re-offending, freeing resources across the criminal justice system.

²⁵¹ We recognise that intermediaries are instructed from a range of companies and self-employed practices. However, it should be possible to provide availability to a central HMCTS source.

²⁵² See: Scottish Government, ‘What works to reduce reoffending: a summary of the evidence,’ 2015, available at

<https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/pages/6/> and Ministry of Justice, ‘Transforming Rehabilitation: a summary of the evidence on reducing reoffending,’ 2013, available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243718/evidence-reduce-reoffending.pdf

²⁵³ They no longer appear on a person’s record.

Sexual Harm Prevention Orders

5.105.Section 103A SOA gives the court the power to make a Sexual Harm Prevention Order (SHPO) in relation to any offences listed in Schedules 3 and 5 of the Act. Such offences include sexual assault and possession of indecent images of a child. The power to make a SHPO extends to individuals whose convictions pre-date the commencement of the SOA.²⁵⁴ The minimum period they can be made for is five years.²⁵⁵ They replace Sexual Offence Prevention Orders (SOPO) and have a lower threshold for imposition – from a risk of “serious sexual harm” in SOPOs to a risk of “sexual harm” in SHPOs.²⁵⁶ A breach of a SHPO without any reasonable excuse can be punished by up to five years’ imprisonment on indictment and six months’ imprisonment on summary conviction.²⁵⁷

5.106.SHPOs can impose prohibitions deemed necessary, proportionate and that do not already exist due to other regimes²⁵⁸ to protect the public from sexual harm by the defendant. Such prohibitions can include preventing someone from being employed in certain roles or preventing the offender from engaging in particular activities on the internet. There is no exhaustive list of prohibitions, as they depend on the circumstances of each case. However, it would clearly be disproportionate to completely ban a convicted person from using the internet.²⁵⁹

²⁵⁴See: Sentencing Council, ‘Sexual Harm Prevention Orders Guide’, available at <https://www.sentencingcouncil.org.uk/explanatory-material/item/ancillary-orders/22-sexual-harm-prevention-orders/>

²⁵⁵ Sexual Offences Act 2003, s.103I(3).

²⁵⁶ Williams & Mann, *supra* note 77.

²⁵⁷ Sexual Offences Act 2003, s.103I(3).

²⁵⁸ Such as the notification regime. *R v Smith and Others* [2011] EWCA 1772 at [9 – 17]. *R v NC* [2016] EWCA Crim 1448 reformulated the questions in *Smith* as to when a SHPO should be made: i) Is the making of an order necessary to protect individuals from sexual harm through the commission of scheduled offences?; ii) If some order is necessary, are the terms proposed nevertheless oppressive?; and iii) Overall are the terms proportionate?

²⁵⁹ The Court in *Smith* suggested at [53] that orders requiring a person’s browsing history to be stored, prohibiting a person from deleting this browsing history, and requiring inspection by the police would be preferable.

- 5.107. *R v Parsons* [2017] EWCA Crim 2163 updates the guidance for SHPOs, albeit with a few tweaks due to developments in technology and modern life.²⁶⁰ Despite this guidance, we have heard that restrictive orders are still imposed. For instance, we understand that one individual coming up for release will be unable to use the internet except in a public place. This will make it impossible for them to take part in everyday activities such as accessing online banking, or watching streaming services. In *R v Connor* [2019] EWCA Crim 234 the court emphasised the need for sufficient court time to be allocated to cases where a SHPO has to be considered, for care to be taken in drawing up the order to ensure that it reflects realistic prohibitions and for the court staff undertaking that exercise to have appropriate training.
- 5.108. SHPOs and the length of time for which they must be enforced place extra burdens on probation services and the police. **We consider that greater flexibility in the length of SHPOs should be explored. Further, greater thought must be given to what ‘proportionate’ orders are in a modern world. Restricting an individual from doing everyday things may only serve to isolate the individual from society, which can increase the risk of re-offending. An improved understanding of risk amongst the judiciary and prosecutors is required.** Habitually making SHPOs for individuals who view IIOC may do nothing more than waste police resources, given their low recidivism rates.

Notification requirements

- 5.109. Most individuals released from prison who have committed sexual offences must comply with the Notification Requirements of the SOA.²⁶¹ This is colloquially known as being on the ‘sex offenders register’, with the main obligation being to provide the police with their home address, and other addresses in which they regularly reside.²⁶² The period someone must be subject to mandatory notification requirements is set out in s.82 SOA.
- 5.110. The length of notification is fixed, meaning that should a sentencer fine a juvenile, for instance, this will result in the young person being subject to the mandatory notification requirements for two and a half years. We question

²⁶⁰ *Ibid* at [30] “This is so especially in relation to risk management monitoring software, cloud storage and encryption software. Moreover, it is necessary to take account of the SHPO legislation defining “child” as a person under 18 (rather than under 16).”

²⁶¹ These are contained in Sexual Offences Act 2003, ss.82-86.

²⁶² Sexual Offences Act 2003 ss.83(5)(d) & (g).

whether this serves any rehabilitative purpose for a child at all, especially if the crime was not serious enough for custody.²⁶³

5.111. We consider that the requirement to impose a mandatory length of notification ties the hands of the sentencer. Particularly for juveniles, the requirements can be burdensome and can inhibit full rehabilitation into the community. Allowing sentencers the discretion to impose a notification period to match the crime, may improve the chance of full rehabilitation. **We propose that legislation be considered in order to achieve this. To ensure that judicial discretion is exercised in an appropriate way, guidelines for the imposition of notification requirements should be developed.**

5.112. Individuals who are sentenced to 12 months or more in custody are further subject to supervision should they be released on licence.²⁶⁴ Licences already include both standard conditions, such as living in probation manager approved accommodation, as well as conditions aimed at managing the specific risk of the individual, such as not going to a particular place.²⁶⁵

5.113. We have been told that many of these requirements are based on a belief that those who commit sexual offences target strangers. In fact, evidence suggests that it is far more often those they know that are targeted, especially those with whom they reside. Developing release requirements that take this into account, without breaching the privacy of victims or placing undue residency requirements on defendants is something that should be explored.²⁶⁶ This will ensure that unduly restrictive requirements are not placed on individuals, improving their chance of successful reintegration into society and preventing re-offending.

²⁶³ Though, an individual convicted of ‘sexting’ will only be subject to mandatory notification requirements when they have received a custodial sentence of 12 months or more: Sexual Offences Act 2003, schedule 3, paragraphs 13 and 15.

²⁶⁴ Criminal Justice Act 2003, ss.325 and 327.

²⁶⁵ Ministry of Justice, ‘Circles of Support and Accountability (CoSA): A case File Review of Two Pilots, Analytical Summary’, 2014, p. 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/293400/cosa-research-summary.pdf

²⁶⁶ R. Thomforde-Hauser and J. Grant, *Sex offence courts: Supporting victim and community safety through collaboration*, Centre for Court Innovation, (2010).

Juveniles

- 5.114. The Sentencing Children and Young People Definitive Guideline²⁶⁷ (the Guideline) became effective on 1 July 2017. It stresses that the aims of the Youth Justice System must focus principally on the individual and not the offence; that custody should be a last resort; and that the main purpose of sentencing a child or young person should be to allow the individual a rehabilitative route. In the sexual offence context, the Guideline only demands a custodial sentence for offences that involve coercive, exploitative, or pressured penetration; offences which are accompanied by threats of physical or psychological harm, or where severe harm has been caused to the victim by the offending.
- 5.115. Individuals under 18 who have committed an offence for the first time and admit guilt must have a Referral Order imposed on them, if the custody threshold is not met. This opens up an avenue towards restorative justice, should the Youth Offender Panel think it appropriate. We consider this to be a positive step towards ensuring that the priority response to juveniles who have committed offences is rehabilitation. However, should a Referral Order not be made, the individual will not have a restorative option available to them. We do not think that it is beneficial to the juvenile to have this route taken away from them and consider that **restorative justice should still be available as a sentencing option, where a Referral Order is not made.**²⁶⁸ This, of course, would require the consent of the victim, and may not be appropriate for many offences. However, we consider the discretion to use this route would enable disposals to be determined on a case-by-case basis.
- 5.116. Moreover, there is now increasing scientific evidence that suggests that adolescence – and the increased risk taking and reduced consequential thinking that comes with it – carries on until at least twenty-five, and this should be

²⁶⁷ Sentencing Council, ‘Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery, Definitive Guideline,’ 2017, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf

²⁶⁸ As a possible requirement within a Youth Rehabilitation Order.

reflected in sentencing practice.²⁶⁹ As the Lord Chief Justice in *R v Clarke & ors*²⁷⁰ observed at paragraph 5:

*“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing...Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. *The Age of Adolescence*: www.thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform a sentencing decision, even if an offender has passed his or her 18th birthday.”*

5.117. We endorse the Lord Chief Justice’s comments, and **propose that the Sentencing Council should consider providing further guidance in respect of the weight to be attached by sentencers to the relative youth and immaturity of convicted individuals between eighteen and twenty-five years of age.**²⁷¹

Monitoring

5.118. It is important to know that sentencing policies achieve their aims. The Sentencing Council tends to draft guidelines that are designed broadly to replicate current sentencing practice, but with exceptions to that general rule where it considers there is a case for increasing or decreasing sentence severity for particular offences or classes of offender. The Council issues resource assessments on the estimated impact of its guidelines and monitors and evaluates the extent to which guidelines have had their expected effect in terms of uniformity of sentencing practice. However, it does not test whether sentences match the aims of sentencing laid down in the Criminal Justice Act 2003, as this is outside of its remit. Moreover, we are not aware of any other organisation that attempts to research this.

²⁶⁹ See: Howard League for Penal Reform, *Sentencing Young Adults: Making the case for sentencing principles for young adults*, (2018), available at <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>

²⁷⁰ *R v Clarke & ors* [2018] EWCA Crim 185.

²⁷¹ This could be through a short supplement to the Sentencing Children and Young People Definitive Guidelines, available here <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf>

- 5.119. We accept that it would be difficult to measure whether sentences give effect to the aims of the CJA, as so many other factors are at play. Nevertheless, finding a way to measure the efficacy of sentences in relation to the aims of the CJA would be instructive. Understanding sentence efficacy would ensure that new sentencing guidelines would contribute towards the aims of the CJA. We understand that the Sentencing Council is not against this idea but lacks the resources to carry out the task. **We recommend that the Sentencing Council carry out research into the effect of sentences, including finding an academic institution willing to partner in this work.**
- 5.120. In order to assist researchers in understanding reoffending statistics, it is vital that as much information is published as possible. The current *Proven Reoffending Statistics* do not disaggregate enough to include offence type and individual profile, making understanding the trends within these statistics difficult. As such, we consider that these **statistics should be sufficiently disaggregated to aid sentencing research.**
- 5.121. Although the aim of the research would be to better understand what works in achieving the aims of the CJA, much is already known about what works in reducing re-offending, as shown in **Chapter 3**. We are aware that many judges know what sentences and programmes are available that may reduce the likelihood of an individual committing further offences. We are also aware that sometimes sentences aimed at reducing reoffending are handed down, with there being little chance of them being fulfilled, due to some programmes being unavailable in some prisons or local communities. **However, we consider that further judicial training on what works to reduce reoffending may improve the quality of sentences where rehabilitation is a factor.**

VI. SCOTLAND

I know I should feel better now he is in jail but I just keep having flashbacks of giving evidence. It's time to think about what it's like to be a child in a world designed for adults. - (Feedback provided to Children 1st by a 14 year old boy required to give evidence at a criminal trial, 2016)²⁷²

- 6.1. Scotland has many of the same problems in prosecuting sexual offences as are present in England and Wales. These include the burden that high volumes of data is placing on the disclosure process and how evidence is taken from vulnerable witnesses. However, the unique elements of the Scottish system have avoided some of the issues that occur in England and Wales. The size of the country and its population plays a large part in this, as well as its different legal traditions.
- 6.2. In this chapter we highlight certain areas within the Scottish system that this sub-group considers to be in need of improvement. These areas include the prosecution process, vulnerable witness evidence and treatment programmes for individuals who have committed sexual offences. We also briefly summarise the Children's Hearing procedure. This is because we consider that the England and Wales system could learn much from its approach to safeguarding the welfare of children.
- 6.3. In our view, what underscores our concerns is the lack of a national strategy for addressing the rise in sexual offence allegations. Individual organisations, such as the police and the Crown Office and Procurator Fiscal Service (COPFS) have developed their own, separate strategies. Joining up these strategies, together with government efforts on education and prevention will produce a more coherent and effective response to sexual offence allegations.
- 6.4. Before addressing the specific concerns of the group, we would like to highlight the lack of information that is publically available in Scotland. There is a dearth of statistics and guidance for public bodies is not generally publically available. This makes identifying issues in prosecuting sexual offences, or any offence for that matter, difficult. Although both Police Scotland and COPFS have participated in this process, knowledge of these matters should not be reliant on having good contacts.

²⁷² 'It's time to transform our justice system', available at <https://www.youtube.com/watch?v=nCH6PmRhx3c>

Prevention

- 6.5. We are pleased to note the proposed changes to the national curriculum on health and sexual education. These proposed changes will resemble a closer alliance with the provisions that have been implemented in Scottish schools maintained by local authorities since 2014.²⁷³ The Relationships, Sexual Health and Parenthood Education in Schools (RSHP) guidelines state that a focus on ‘healthy, safer, respectful and loving relationships’, as well as understanding of the importance of consent and dignity, are “vital in order to encourage discussion and critical thinking about young people’s rights and to promote questioning of gender stereotypes and gender inequality”.²⁷⁴ RSHP education must also take account of “developments in online communications” and should ensure that children are informed on the law in Scotland regarding communications involving sexual content.²⁷⁵
- 6.6. Despite these positive guidelines, we consider that in order for Relationship, Sexual and Health education to be effective, the criteria set out in paragraph 2.22 must be adhered to. This will build on what has already been implemented in Scotland and ensure the best possible education on this topic.

Prosecution process

- 6.7. In 2017, sexual crimes constituted 75% of the overall COPFS High Court workload. This high percentage is part of a recent trend in Scotland, with reported sexual crimes increasing by 13% to 12,487 between 2016/17 and 2017/18.²⁷⁶ There are a number of reasons for this, including the wider definition of rape introduced by the Sexual Offences (Scotland) Act 2009, the

²⁷³ Statutory guidance is issued under section 56 of the Standards in Scotland’s Schools etc. Act 2000.

²⁷⁴ The Scottish Government, ‘Conduct of Relationships, Sexual Health and Parenthood Education in Schools’ (December 2014), available at <https://www.gov.scot/binaries/content/documents/govscot/publications/guidance/2014/12/conduct-relationships-sexual-health-parenthood-education-schools/documents/00465948-pdf/00465948-pdf/govscot%3Adocument>

²⁷⁵ *Ibid.*, p. 8.

²⁷⁶ Scottish Government, ‘Recorded Crime in Scotland 2017-2018’, A National Statistics Publication for Scotland, p32, available at <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2018/09/recorded-crime-scotland-2017-18/documents/recorded-crime-scotland-2017-18/recorded-crime-scotland-2017-18/govscot%3Adocument/00540695.pdf>

increase in online child sexual abuse, and the uncovering of non-recent allegations.²⁷⁷

- 6.8. Unlike in England and Wales, the prosecution service directs direct the police in the investigation of offences.²⁷⁸ All serious sexual crime reported to the Procurator Fiscal by the police are investigated by specialist sexual offences teams based in Aberdeen, Dundee, Edinburgh and Glasgow. These are staffed by lawyers and case preparers. All cases are considered by a senior lawyer in the first place and they can instruct further lines of inquiry. The case will then be put together by the case preparer who will have close liaison with the police reporting officer. The cases are reported to the National Sexual Crimes Unit (NSCU), which is a body of senior Crown Counsel specialising in the investigation and prosecution of sexual crimes, who will make a decision on whether to proceed with the case. NSCU can be involved in directing investigations from the earliest stages of the case being reported to the procurator fiscal, providing advice and expertise on all aspects of the investigation and preparation of cases. Its membership also conduct trials in the High Court. The senior lawyer and case preparers in the sexual offences teams can refer matters to Crown Counsel in the NSCU for their instruction on specific matters during the preparation of the case.
- 6.9. The NSCU was introduced when there were no specialist sexual offence prosecutors, which have since been introduced. Following the Inspectorate's *Thematic Review of the Investigation and Prosecution of Sexual Crimes*, which encouragingly found a high degree of agreement in decisions made by the specialist prosecutors and the NSCU, less serious sexual cases are no longer routinely referred to the NSCU. We understand that this has freed up resource.
- 6.10. The Thematic Review (TR) highlighted some areas of concern, which we consider below. We understand that some of the recommendations have now been implemented but COPFS is yet to report back to the Inspectorate. We would welcome an update on the implementation and effectiveness of the recommendations as soon as is practical.

²⁷⁷ Inspectorate of Prosecution in Scotland, 'Thematic Review of the Investigation and Prosecution of Sexual Crimes,' November 2017, available at <https://www.gov.scot/publications/thematic-review-investigation-prosecution-sexual-crimes/pages/12/>

²⁷⁸ Now enshrined in s.17(3)(a) and (b) of the Police and Fire Reform (Scotland) Act 2012.

Delay

- 6.11. The TR highlighted some significant sources of delay in sexual prosecutions in Scotland. One was the preparation of the Investigative Agreement (IA). This is a document that sets out the strategy for the investigation and preparation of a case, with an intention to front load the work. It is meant to contain a number of sections, including a victim strategy, sensitive records and a legal strategy. The IA should be ready within seven to 21 days of the first appearance of the accused at court, depending on whether the accused is in custody or on bail. However, out of 50 cases reviewed by the inspectorate, only 4% were completed on time. The reasons for this were that the case preparer lacked information, such as vulnerability reports.²⁷⁹ Although a valuable document, if it is not completed properly, it will not reduce workload or delay down the line. A properly prepared IA may also reduce the amount of additional productions that are added post-indictment, which happened in 88% of cases reviewed by the Inspectorate.²⁸⁰ Additions post-indictment risk being contested by the defence or rejected by a judge, harming the chance of a successful prosecution and wasting time and resource. There is also a risk that post-indictment additions may bring into question the fairness of the trial, with adjournments and further investigations being required. We understand that new procedures have been put in place to reduce delay caused by the IA, such as not requiring the IA to be signed off in less complicated cases.
- 6.16. An additional practice that caused delay was premature reporting by police to COPFS. If a report is made too early, more information will need to be gathered, which will need a pre-petition investigation. In 45% of the cases reviewed by the inspectorate, this pre-petition investigation took longer than 10 months. We are encouraged by the creation of the National High Court Sexual Offences Pre-Petition Unit, which has been set up to deal with pre-petition investigations in a timely way. The unit appears to be making progress in reducing the number of cases requiring investigation and the time taken to progress them. When it began in 2016 it had 632 cases, which was reduced to 302 a year later.²⁸¹ We are pleased to note the Lord Advocate's commitment

²⁷⁹ Inspectorate report, note 277, p.26.

²⁸⁰ Inspectorate report, note 277, p.30.

²⁸¹ Inspectorate report, note 277, p.45.

to reducing the journey time of cases, which includes securing 41 more staff onto the High Court team.²⁸²

- 6.17. We have also heard concerns that delays are caused when defence representatives are not given a named procurator fiscal (PF) to contact who has “ownership” of a case. We understand that High Court cases are allocated to a named case preparer. However it is not possible to assign every summary case to a named PF. Despite this, we understand that COPFS contend that it is still possible to talk to them about summary cases. It is clear that **a dialogue between defence lawyers and COPFS needs to take place to clarify the best way for defence lawyers to discuss summary cases with COPFS lawyers.**

Discontinuance

- 6.18. The TR also highlighted the high number of discontinuances that took place following report to COPFS. In 2014/2015, 31% of cases were discontinued due to the disengagement of complainers. Out of 83 complainers within 66 cases who disengaged, only three disengaged due to the time that proceedings were taking. However, 21 complainers identified as vulnerable disengaged during the investigation stage and 10 complainers identified as vulnerable disengaged at court, because they were physically unable to give evidence. A further concern is that disengagement took place after the case had been reported to the NSCU in 51 of the 66 cases.²⁸³ The NSCU should be alive to the needs of vulnerable complainers. Clearly, more must be done to ensure that vulnerable complainers feel that they are engaged in the prosecution process. We make recommendations to address this below.
- 6.19. Post-indictment, 50 cases were discontinued, 20 of which were due to insufficient evidence and 13 of which were due to there being no realistic prospect of conviction. We are concerned that these assessments were not made until this late stage. Improvements can clearly be made in the gathering and review of the evidence prior to indictment. As well as being a symptom of ineffective processes, discontinued cases represent a waste of resources, during a time where resource is limited. Moreover they fail the complainers, who rely on law enforcement agencies to give them a sense of justice; put an individual through the prosecution process unnecessarily; and may cost the legal aid budget substantial funds. We understand that work is being done by COPFS

²⁸² Letter to Justice Committee from the Lord Advocate, 1 February 2019, available at https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20190201LordAdvocatetoMM.pdf

²⁸³ Inspectorate report, *supra* note 277.

and look forward to its report to the Inspectorate on its implementation of recommendations to reduce discontinuance.

Forensic services

- 6.24. In contrast to England and Wales where forensic expertise has been privatised, Forensic Services (FS) in Scotland are a national service under the authority of the Scottish Police Authority. They also have a different working practice. For instance, there is more communication between FS and COPFS when forensic testing is requested. As such there is a better understanding of what each can do and their needs, but this communication channel also means that a forensic scientist can easily ask for clarification if they are unsure about their instructions. Helping this understanding is the practice of sending all items and information recovered to the forensic scientist, to give them an overview of the case.. However, this can result in a lengthier process. To save time, it may be better for COPFS to tell the forensic scientist what exactly they are hoping to discover from the items, which will allow the forensic scientist to recommend the best strategy for achieving this and how long it would take. We understand that in more complex cases, strategy meetings take place between the forensic scientist and COPFS.
- 6.25. There are both delays in forensic samples being taken from complainants and receipt of the results. We are disappointed to note that there is currently only one Sexual Assault Referral Centre (SARC) in Scotland, which is in Glasgow. As set out in **Chapter 5**, SARCs provide a far better way of comprehensively taking a sexual offence complaint in surroundings that are more suitable for victims of a traumatic incident. **We recommend that more SARCs are created across Scotland.**

Legal aid

- 6.26. We note that concerns raised about legal aid in paragraph 5.36 – 5.38. Unfortunately, we have similar concerns and echo the recommendations made in the section above in relation to the Scottish Legal Aid Board (SLAB). In addition to this, we note that the wait for sanctions from the SLAB can cause delays, **which is something that should be rectified as a priority.**

Vulnerable witnesses

- 6.27. In Scotland, Joint Investigative Interviews with child complainers are currently conducted by a social worker and a police officer, both specially trained.

Guidance on Interviewing Child Witnesses was first published by the Scottish Government in 2003.²⁸⁴ The last update was in December 2011, entitled Guidance on Joint Investigative Interviewing of Child Witnesses.²⁸⁵ Section 7 of the Victims and Witnesses (Scotland) Act 2014 places a duty on those conducting JIIs to have regard to guidance issued by Scottish Ministers in relation to interviews and guidance after 1st September 2015. No such guidance has yet been issued.

6.28. The 2017 *Evidence and Procedure Review*²⁸⁶ concluded that the quality of Joint Investigative Interviews was variable at best, largely due to the poor quality of the audio-visual recordings, and of the investigative interviewers themselves. Such poor quality regularly prevents the interviews being used as evidence-in-chief. The report recommended that the training of investigative interviewers should be standardised and significantly enhanced, and should reflect the fact that forensic interviewing of child witnesses is a specialist skill. In addition, the training should also be delivered to fewer people, producing a more concentrated number of expert interviewers.²⁸⁷ We agree with the need for improvement in the training of JIIs. This should include the avoidance of leading questions and an engagement with child psychologists to learn how to avoid making suggestions to a child who will be keen to please police and social work officers. A working group is now looking at ways to improve Joint Investigative Interviews.

6.29. We understand that there are proposals for a reformed training programme that would be implemented across five modules over eight weeks, with a heavy emphasis on practising interviews and the fourth module dedicated to an understanding of what is required for child protection purposes. The changes reflect an ambition that JIIs should adhere to three principles: child centred; sufficiently planned; and suitably structured questions to avoid leading questions. The pilot will likely be implemented in this financial year. We are pleased to note that a dedicated vulnerable witness suite will be operational

²⁸⁴ Commissioned from Dr Amina Memon and Lynn Hulse of the University of Aberdeen.

²⁸⁵ Scottish Government, 'Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland', (2011), available at www.gov.scot/Publications/2011/12/16102728/3

²⁸⁶ Scottish Courts and Tribunals Service, 'Child and Vulnerable Witnesses Project: pre-recorded further evidence work-stream', (September 2017), available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2>

²⁸⁷ Scottish Courts and Tribunals Service, *Evidence and Procedure Review, Child and Vulnerable Witnesses Project: Joint Investigative Interviews Work Stream – Project Report* (June 2017), pp. 2-3, available at <https://www.scotcourts.gov.uk/evidence-and-procedure-review>

from July in Glasgow for vulnerable witnesses to be interviewed in a comfortable environment. However, one is not enough as this may require a large amount of travel for someone who is vulnerable and at risk of being re-traumatised by what they will recount. **We recommend that more vulnerable witness-friendly suites are constructed in different areas of the country, to reduce journey times and increase capacity.**

6.30. In JUSTICE Scotland’s report *Legal assistance in the police station*, that working party raised the need for development of professional services to help identify the capacity of suspects and what additional services may be required for them to participate effectively at interview, if at all – such as an appropriate adult, intermediary, or suitably trained lawyer.²⁸⁸ We are particularly concerned by the absence of intermediaries throughout the criminal justice system in Scotland. Intermediaries are experienced professionals with specific expertise in assessing and facilitating communication.²⁸⁹ This means that they can assist vulnerable witnesses, with developmental, mental or learning disorders who struggle to recount what happened to them, to give their best evidence. Their expertise means that intermediaries can pick up on communication difficulties that other professionals may not be able to.

6.31. We have been informed that if the proposed training programme for JIIs is successful, there is no intention to use intermediaries. We are concerned by the assumption that a trained forensic interviewer will be sufficient in ensuring vulnerable witnesses can give their best evidence. The interviewer will be focussing on other issues not related to communication and may miss vital cues. In addition to being utilised at JIIs, **we consider that the use of intermediaries should be greatly expanded in Scotland**, where their use lags behind England and Wales. Not only should they be used more widely during the evidence-gathering stage but also during evidence by commission and trial, as they greatly increase the quality of evidence and the chance of effective participation in the trial of accused persons.²⁹⁰ We note that this view is supported by the Faculty of Advocates.²⁹¹

²⁸⁸ JUSTICE Scotland (2018), paras 2.24-2.27 available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/JUSTICE-Scotland-Legal-Assistance-in-the-Police-Station.pdf>

²⁸⁹ See JUSTICE’s *Mental Health and Fair Trial* (*supra* note 123) report for more information.

²⁹⁰ See *Mental Health and Fair Trial* (*supra* note 123) and *Understanding Courts* (*supra* note 122).

²⁹¹ Response by the Faculty of Advocates on Call for views - Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill.

- 6.32. Part 1 of the Vulnerable Witness (Scotland) Act 2004 (VWSA) provides for a range of special measures to be used when taking evidence from a vulnerable witness.²⁹² These include the use of a live television link from another part of the court building, prior statements as evidence-in-chief,²⁹³ taking evidence on commission,²⁹⁴ and the use of a screen or a supporter.²⁹⁵ Each of these special measures can be used on their own or in conjunction with one another. In addition to these measures, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill was passed on 9 May 2019 but has not yet received royal assent. This will enable, akin to ss. 27 and 28 of the YJCEA in England and Wales, all of a child or vulnerable witness's evidence to be given in advance of the hearing, unless an exception is justified.²⁹⁶ The Bill will also limit the court's ability to vary earlier orders if they had the effect of enabling a vulnerable witness's evidence to be given in advance of the hearing.²⁹⁷ Although supportive of the Bill, we hope that proper testing and piloting is carried out, to avoid the roll-out problems that have occurred in England and Wales.
- 6.33. These special measures mean that if there is a desire to obtain further evidence following a JII, the court may appoint a commissioner to take the evidence of a vulnerable witness,²⁹⁸ which shall be visually recorded. The accused will not be present in the room where such proceedings are taking place, but is entitled by such means as seem suitable to the court to watch and hear the proceedings.
- 6.34. The *Evidence and Procedure Review*²⁹⁹ found that the procedures for the taking of evidence from a vulnerable witness by commissioner are becoming more common, but are still not widely used.³⁰⁰ Awareness of the Practice Note

²⁹² For the purposes of the VWSA, a vulnerable witness is taken to mean a person under the age of 16, or an adult who is in a position of particular vulnerability, to be determined by factors such as the nature of the evidence to be given, or the relationship between the witness and the accused in the trial: Vulnerable Witnesses (Scotland) Act 2004, Part 1, s.271.

²⁹³ Vulnerable Witnesses (Scotland) Act 2004, Part 1, s.271M.

²⁹⁴ Vulnerable Witnesses (Scotland) Act 2004, Part 1, s.271I.

²⁹⁵ Vulnerable Witnesses (Scotland) Act 2004, Part 1, s.271K & s.271L.

²⁹⁶ Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, s.1, as introduced in the Scottish Parliament on 12 June 2018, available at [https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34S052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34S052018.pdf)

²⁹⁷ Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, s.4.

²⁹⁸ Vulnerable Witnesses (Scotland) Act 2004, Part 1, s.271I.

²⁹⁹ *Supra* note 286.

³⁰⁰ There were 20/30 commissions two years ago, now there are over 100: Tim Barraclough, 11/12/2018.

on Taking of Evidence of a Vulnerable Witness by a Commissioner³⁰¹ is low amongst practitioners, leading to inconsistency. **As such, we consider that more training is required among practitioners to ensure that the use of Commissions expands and that their quality is consistent, through proper application of the guidance.** A recent evaluation showed that witnesses who gave evidence by commission were able to end their participation in the process 57 days before trial, which, as observed in **Chapter 4** of this report, reduces anxiety, memory failure and also has potential to invite guilty pleas. It also reduces the chance of discontinuance closer to trial.³⁰²

6.35. We are pleased to note that the Vulnerable Witnesses Bill will introduce the requirement of a Ground Rules Hearing (GRH) for cases where evidence is taken before a commissioner.³⁰³ It should be noted, however, that provision has already been made for discussion of evidence on commission and issues concerning vulnerable witnesses, including written questions at the preliminary hearing under Practice Notes No. 1 of 2017 and No. 1 of 2019, which we welcome. However the legislation emphasises the need for judges to ensure that reasonable adjustments are made for vulnerable witnesses. However, in order for evidence by commission and GRHs to be successful, a true understanding of their purpose and what they can achieve is required from both advocates and the judiciary. We have heard that when used, GRHs are varied and advocates still do not fully appreciate the need to modify their questions for the vulnerable witness. We therefore fully endorse the training recommendations made in relation to England and Wales, **and recommend that these training requirements are implemented as soon as possible in Scotland.**

Children's Hearing

6.36. In Scotland, cases reported to COPFS involving a sexual offence committed against a child, by a child, rose by 34% between 2011-12 and 2015-16. Where crimes are required by law to be prosecuted on indictment or are serious enough to give rise to solemn proceedings, the police are required to report

³⁰¹ High Court of Justiciary, Practice Note, No. 1 of 2017, 'Taking of Evidence of a Vulnerable Witness by a Commissioner', available at <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=4>

³⁰² Scottish courts and Tribunals Service, Evaluation Report No. 2: – 'Practice Note 1 of 2017 (Evidence by Commissioner): Quantifying the end outcomes for the applications lodged in 2017', December 2018.

³⁰³ Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, s.5(2), as introduced in the Scottish Parliament on 12 June 2018.

children who have committed offences jointly to the procurator fiscal and the Children's Reporter. This includes sexual crimes.³⁰⁴ For children between 16 and 17 subject to a supervision order, there is a rebuttable presumption that the procurator fiscal will deal with the case.³⁰⁵

- 6.65. The Children's Hearing system works with children and young people under 16 (and under 18 in some cases) who commit offences or are considered to be in need of care and protection. A children's reporter will carry out an investigation before making a decision on whether a Children's Hearing is needed. The hearing consists of three panel members who will be specially trained volunteers, of which there are an estimated 2,500 throughout Scotland.³⁰⁶
- 6.66. The panel members are required to consider and take legally binding decisions on the welfare of the child or young person before them, taking into account all the circumstances of the case. The hearing can make one of four orders: Compulsory Supervision Order (CSO); Interim Compulsory Supervision Order (ICSO); Medical Examination Order (MEO); and Warrant to Secure Attendance. If the grounds of referral are not agreed by the parents or child or the child is too young to be able to agree, the case must be referred to the sheriff court for a judge to decide whether the facts on which the referral to the children's hearing is made are proved. There is also a right of appeal to the sheriff court against a decision of the Children's Hearing.
- 6.67. The attraction of the system is its strong emphasis on children's welfare and the extensive use of diversion to prevent the need for formal, and possibly traumatic, court hearings. In addition to the three panel members, there will also be an independent safeguarder present, whose role it is to ensure that the child's rights are protected, the views of the child are established and communicated to the hearing, and that any proposals being made are in the child's best interests. There may also be a solicitor and a relevant person (such as a parent or guardian) present. The presence of these parties is designed to ensure that paramount consideration is given to the need to safeguard and promote the welfare of the child throughout their childhood.³⁰⁷

³⁰⁴ Inspectorate of Prosecution in Scotland, *supra* note 277, at p. 76.

³⁰⁵ *Ibid.*

³⁰⁶ The Children's Panel, <https://www.childrenspanelscotland.org/>

³⁰⁷ Children's Hearings (Scotland) Act 2011, s.25.

6.68. The Children’s Hearing model has many positive aspects, particularly in the fact that it attempts to address the needs of children in the system so that interventions can be put in place to stop ongoing offending. The focus on needs bares a close resemblance to conditional diversion schemes and current thinking on what works when reducing offending. However, we note that the TR found that cases referred to the children’s reporter rarely meet set timescales.³⁰⁸ This is something that can be put right through improved interaction between the reporter and COPFS. We understand that COPFS has introduced new Key Performance Indicators to ensure earlier reporting in cases involving children. We consider that treating children as children, rather than criminals will confer long-term reductions in recidivism. Whether elements of the Children’s Hearing system could be adapted for England and Wales should be given consideration as it will reduce the burden on the CJS in the long-term.

Reducing re-offending

6.84. Since its introduction in 2014, the primary treatment programme for those who have been convicted of sex offences in Scotland has been Moving Forward: Making Changes (MF:MC). Designed by the Scottish Prison Service and the Scottish Government’s Community Justice Operational Practice Unit, the programme is aimed at adult males assessed as medium to high risk of re-offending, and is delivered in four prisons by a mixture of psychologists and specially trained prison officers in accordance with the Good Lives Model. In addition to treatment within the custodial estate, MF:MC is also available at 11 sites within the community for those who have been convicted but have either been released from or avoided prison.

6.85. Whilst initial evaluations suggest that the programme lowers the risk of re-offending,³⁰⁹ there is no strong evidence in support of the efficacy of the Scottish programme. As such, its influence has remained in doubt, and we understand that it is difficult for an individual to be released on parole after having completed the programme for the first time. In November 2018 it was announced that MF:MC would no longer be counted as an accredited programme, and that the Government would be looking for alternatives to

³⁰⁸ Inspectorate report, supra note 277, p. 78.

³⁰⁹ Scottish Government, ‘Moving Forward: Making Changes – An Evaluation of a Group-based Treatment Programme for Sex Offenders’ (August 2018), p.2, available at <https://www.gov.scot/binaries/content/documents/govscot/publications/research-finding/2018/08/moving-forward-making-changes-evaluation-group-based-treatment-sex-offenders-9781788519908/documents/00537491-pdf/00537491-pdf/govscot%3Adocument>

implement over the next three years.³¹⁰ We are concerned that there will be an absence of an accredited rehabilitation programme for three years. **Developing an accredited programme should be a priority, with the evidence provided by Professor Gannon’s meta-analysis – considered in Chapter 3 - being at the forefront of the development process.**³¹¹

- 6.86. A number of local authorities in Scotland have created specialised management regimes in relation to convicted individuals subject to Community Payback Orders or Parole Licences. These include the Community Intervention Service for Sex Offenders (CISSO), the Tay Project and the Clyde Quay Project in Edinburgh, Dundee and Glasgow respectively. The projects use the MF:MC tools, as well as considering individualised treatment programmes for those not meeting the criteria. However, if these are derived from a programme that is no longer accredited, we consider that these programmes should also be updated.
- 6.87. There are two main, third sector organisations providing rehabilitation to individuals who have committed sexual offences. Lucy Faithful Foundation also has a presence in Scotland, and we are pleased to note that it has been provided with funding from the Scottish Government to offer the Inform Plus programme face to face and free of charge. However, the location requires individuals to travel long distances across Scotland to access its services and Scottish Government should fund additional services throughout Scotland.
- 6.96. The other organisation is the Scottish Association for the Care and Resettlement of Offenders (SACRO). We understand that it offers a post-prison Peer Mentoring Service for those who have committed sexual offences. Funded by local government, referrals come from the various Criminal Justice Social Work services teams, with SACRO then providing emotional and practical support for individuals who have committed sexual offences on a range of issues from housing, welfare, social and employment support. The service is designed and available to individuals of all levels of risk, working to support adherence to statutory conditions and reduce risk.
- 6.97. SACRO has also developed the Challenging Harmful Online Images and Child Exploitation (CHOICE) programme. The initiative is built upon modular group work designed to promote and support desistance amongst individuals who have been accessing indecent images of children (IIOC) from the internet, where there is considered to be a low risk of sexual harm and the offences are

³¹⁰ Accreditation is awarded by the Scottish Advisory Panel on Offender Rehabilitation (SAPOR).

³¹¹ *Supra* note 83.

non-contact in nature. The programme targets individuals charged with downloading IIOC by intervening at an early stage - after charge but prior to trial - as well as convicted people to prevent further offending, but who do not meet the criteria for MF:MC. This is currently being piloted and has not yet been fully implemented, though we consider it to be a worthwhile initiative.

- 6.98. These volunteer-led programmes in the community all fulfil a role that is lacking in current provision in HMPPS programmes. What is more, they appear to work well and are based on the latest evidence of what works. Both organisations are very busy, with SACRO particularly stretched. **Proper funding should be given to these post-release initiatives so that they can be made available to those who require them**, especially for people in the first three months of their return to the community.
- 6.99. We note the recommendation for a Conditional Diversion Scheme in England and Wales with interest. A similar scheme was proposed by the police in Scotland but never implemented. We understand that this was due to no Local Authority wanting to fund such a scheme. We hope, should the Conditional Diversion Scheme be shown to be effective, that this will be revisited in Scotland.

VII. CONCLUSION AND RECOMMENDATIONS

- 7.1. The exponential increase in the reporting of sexual offences has intensified demand on the criminal justice system. Although this Working Party began its examination with the intention of identifying where efficiency savings could be made, it quickly became apparent that improving procedural practices alone would not sufficiently reduce the burden placed on the Criminal Justice System (CJS). Instead, a more holistic approach to sexual offences was required, that attempted to both prevent offending taking place and reduce rates of reoffending. Only through focussing on these, together with process changes,³¹² can the burden placed on the CJS by sexual offences be reduced in a meaningful way.
- 7.2. The Working Party welcomes recent moves by the Government that demonstrate awareness of the need for a holistic approach to sexual offences. The Draft Domestic Abuse Bill 2018, once enacted, will ensure the national curriculum teaches children about healthy sexual behaviour and healthy relationships. This education will mean children are provided with the tools to identify risky behaviour in themselves and in others. The Government has also published the Online Harms White Paper that aims to make children safer online by regulating internet companies and holding them to account for child sexual abuse that takes places on their platforms. The Working Party believes that two key aspects of this strategy must be to use technology to block known Indecent Images of Children from being uploaded onto websites and to encourage internet companies to adopt Kitemarks that will demonstrate that they are both responsible for content on their platforms and taking steps to safeguard children from grooming.
- 7.3. We have also been encouraged by the growing number of third sector approaches to preventing offending from taking place. Notably the Lucy Faithful Foundation and the Safer Living Foundation have programmes that seek to help individuals to identify and manage risky thoughts and behaviour. Further evaluation of their programmes must take place and, if proven to have positive results, these approaches should be integrated into the CJS. Post-conviction, there has been a move towards rehabilitation programmes that build the skills of individuals, by way of both third sector organisations and

³¹² We understand that the Ministry of Justice will carry out a review of the criminal justice response to rape and serious sexual offence cases and look forward to its findings, see: HM Government, 'Ending Violence against Women and Girls, 2016-2020, Strategy Refresh', (May, 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783596/VAWG_Strategy_Refresh_Web_Accessible.pdf

Her Majesty's Prisons and Probation Service (HMPPS). This is due to a growing understanding of what works in reducing the reoffending risk of those who have committed sexual offences. Although early indications are positive, further evaluation of this approach must take place, and we consider that HMPPS should conduct a randomised-control trial of its new programmes.

- 7.4. Police-led diversion schemes have recently been developed. These seek to address the factors that may lead to offending behaviour without the need for prosecution. We have been inspired by the success of these programmes to develop our own proposal for a Conditional Diversion Scheme, for individuals who have viewed IIOC. We consider that this scheme will provide the correct intervention to these individuals as quickly as possible, helping to both save prosecution and court resources and ensure reoffending rates remain low. Our proposed scheme has been developed together with experts in the field and we consider it to be a sensible response to the volume of reports that the police receive each month.
- 7.5. For cases that do proceed through the justice system, it is paramount that the needs of vulnerable people are properly taken into account. Putting in place better procedures, such as a two-stage Video Recorded Interview, a duty to consider a Ground Rules Hearing and effective training on questioning vulnerable people will ensure best evidence can be heard. In respect of the latter, The Inns of Court College of Advocacy has developed the Advocacy and the Vulnerable course, which about two-thirds of criminal advocates have attended. We are pleased that the course has been credited with an improvement in cross-examination of young witnesses. However, we consider that every criminal advocate should have this training, and that the course should feature as a significant part of the Bar Professional Training Course. Training for judges has also fallen behind due to the delay in the roll-out of s.28 pre-recorded cross-examination, and this should be addressed immediately. The length of the judicial course should be extended to three days at the very least. Moreover, collaborative training between judges and advocates will ensure that best practice is promoted across the courtroom.
- 7.6. The Working Party considers that implementing initiatives that properly deal with the rise in mass data will go some way to reducing the burden on investigators and the prosecution. For instance, the increased use of Disclosure Management Documents should allow investigators to rule out the need to examine some datasets and provide the defence with an opportunity to suggest lines of enquiry. Balancing the needs of the complainant with the rights of the defendant will be vital going forward. Although a complainant's device should not automatically be examined, it is right that in some circumstances this will

be necessary to properly investigate a case. Fully and clearly explaining why a device is needed and for how long, without suggesting that a case may not proceed if the request is not complied with, is a sensible solution.

- 7.7. When it comes to sentencing, this working party believes that lessons should be learned from the skills-based approach to rehabilitation, which has shown this to be an effective way to reduce reoffending rates. There should be a shift in focus to rehabilitation and more flexibility should be given to sentencers to allow them to make suitable orders that allow the individual to rehabilitate effectively. This is especially the case for Sexual Harm Prevention Orders, where we have heard that overly restrictive orders can isolate an individual from society once released from prison, hindering them from getting their lives back on track and risking further offending.
- 7.8. The Scottish criminal justice system shares with England and Wales many of the problems caused by sexual offences. Our Scottish Sub-Group agrees with many of the main Working Party's suggestions but has made a number of key recommendations specific to the Scottish system. These include a request for more statistical and research data to be released into the public domain, in order to aid effective research and transparency, delays and discontinuance in the investigation and prosecution process, and at present, the absence of an accredited rehabilitation programme.
- 7.9. There is no easy way to reduce the burden that has been placed on the CJS by sexual offence allegations. We believe that the time has come for greater focus on evidence based policies to seek to reduce the level of sexual offending, which has the additional benefit of taking pressure off the criminal justice system. We have reached recommendations that we consider will achieve these aims.

Recommendations

Prevention

1. The curriculum and any programmes that educate about sexual behaviour should begin as early as possible in all schools and at least from year 6 (ten years old).
2. There should be a concerted national awareness raising campaign that teaches about consent, coercion, exploitation and healthy relationships.
3. In some cases of child ‘sexting’, restorative justice may be a useful educative tool if used in the right circumstances.
4. We consider the approach in the Companies Act 2006 on corporate social responsibility should be in place for stopping IIOC, given the clear-cut nature of whether or not material is IIOC.
5. A quality mark, similar to a ‘Kitemark’ should be developed for safe online spaces.
6. Notices should pop up when a user displays an interest in ‘gateway’ images. Alerting an individual to the idea that their behaviour is becoming more risky – and that their behaviour is being monitored -- may help people realise that they must seek help.
7. A national advertising campaign that makes people aware that services that offer help with risky thoughts are available should be undertaken.
8. We welcome the research findings on the Stop It Now! helpline. However, the outcomes of prevention projects requires further scrutiny and evaluation. The interventions provided by Stop It Now! and Aurora should be studied in terms of both process and outcome.

Reducing re-offending

9. We recommend that the Ministry of Justice carries out a randomised-control trial of sufficient depth to assess the efficacy of a treatment programme for those who commit sexual offences, utilising the positive programme elements that Professor Gannon has outlined. If it produces positive results, we recommend that HMPPS amends the Horizon and Kaizen programmes to include these elements. We recommend that all current programmes are facilitated by a psychologist who can work without supervision.

10. In relation to pharmacological treatment, we recommend that the Ministry of Justice carries out further randomised control trials, including surveys of user-experience.
11. We recommend that a Conditional Diversion Scheme for individuals who have viewed Indecent Images of Children be piloted.

Improving witness evidence

12. We consider that judges and advocates should place a far greater focus upon the clear obligation to consider whether a GRH is necessary in sex offence trials.
13. There must be a universal definition of the term “vulnerable.”
14. Video Recorded interviews should be carried out by properly skilled forensic interviewers. Current interviewers should be trained to this standard. An assessment as to whether the assistance of an intermediary is necessary should always be made prior to the interview.
15. In certain complicated and/or difficult cases involving both children and adult witnesses, it is appropriate for video recorded interviews to be conducted in two stages. Stage one would be an initial exploratory interview which would allow the child and/or vulnerable witness to tell their full account in a free-flowing way. Stage two would be a more focussed interview with the intention of eliciting information that will stand as evidence-in-chief.
16. Section 28 pre-recorded cross-examination of complainants should be made available as soon as possible for all sexual offence prosecutions.
17. We make a strong recommendation that the length of the judicial course be extended, at the very least, to its former three days.
18. We are firmly of the view that an ‘Advocacy and the Vulnerable’ course should feature as a significant part of all vocational training for qualification at the Bar.
19. We recommend that the Judicial College and the ICCA work together so as to achieve a series of masterclasses with a view to promoting best practice.

Prosecution process

20. To ensure that the policy of believing the complainant until there is ‘credible evidence to the contrary’ does not prejudice the suspect, there must be increased focus on the need for reasonable efforts to be made to seek out credible evidence to the contrary. To assist with this, complainants should not be called victims during the prosecution of an alleged offence.

21. We consider that until the RASSO Gatekeeper system is shown to be effective, it should be sought routinely in serious sexual assault cases. In any event, improved liaison between the CPS and police is required. We believe that refocussing the use of EIA on strategy development before turning to evidence gathering may help.
22. The Forensic Science Regulator must be astute not to set quality standards in a way which could create a high risk of losing highly skilled and experienced independent experts who are of vital importance to the criminal justice system.
23. Pathways should be created to help small laboratories to achieve necessary quality standards without needing to spend an excessive amount of money.
24. We consider that the Forensic Science Regulator should be given the power to compel compliance by placing it on a statutory footing as a matter of urgency.
25. We consider that the LAA and LSAB should only approve quotes from services meeting the required quality standards set by the FSR, other than in exceptional circumstances. Moreover, the CPS and police should only use laboratories meeting the required quality standards.
26. Improved training for solicitors, prosecutors and judges is necessary to ensure that everyone understands the limits of the SFR 1 and the need for the SFR 2 to be created as soon as possible, where there are questions about the forensic material summarised in the SFR 1.
27. We consider training on forensic sciences to be necessary nationwide and should be a requirement for all lawyers who request samples from forensic labs.
28. Wider access to free DNA analysis software will assist in resolving DNA mixtures and should be made available once validated.
29. We consider that the use of Disclosure Management Documents should be expanded from serious cases such as rape and child sexual abuse to all cases involving electronic devices.
30. DMDs, together with the approach to disclosure for large quantities of digital material laid out in Attorney General's Disclosure Guidelines, should ease the current disclosure burden.
31. Police officers must be properly trained on how to analyse evidence using kiosk technology.
32. We consider that, although the new consent form represents an improvement, complainants should be advised of the legal consequences of signing. The new consent form should detail the specific piece of information that the

investigators require, explain its relevance to the investigation and confirm a reasonable return date to the complainant of the device.

33. We recommend that assurances are given to complainants that each case be considered on its merits and that the CPS should only be able to refuse to consider charge if that evidence is integral to the decision to charge.
34. We consider that where there is a choice between prosecuting a child under sections 5 to 8 or under sections 9 to 12, there should be a presumption in favour of charging the child under sections 9 to 12.
35. We emphasise the need for particular training on juvenile sex cases for specialist prosecutors.
36. Where outcome 21 is used for a child, it should not be disclosable on an enhanced DBS check.
37. Further training should be undertaken to ensure that prosecutors are aware of the pitfalls of drafting indictments for non-recent cases. This should ensure that court time is not wasted on these mistakes.
38. Ensuring that sex offence cases are fixed may reduce the attrition of complainants in this process. This can be achieved through the employment of a listing coordinator and access to information regarding bail and custody dates, as well as having a clear idea of the number of sitting days the court has in a year.
39. Preparing for the roll-out of s.28 and setting a maximum 14-day gap between GRH and cross-examination should be a priority for the Criminal Procedure Rule Committee.
40. A centralised diary system for intermediaries would make the process of organising their attendance more efficient.
41. Ensuring that cases involving intermediaries are not placed on warned lists.
42. We consider that greater flexibility in the length of SHPOs should be explored. Further, greater thought must be given to what 'proportionate' orders are in a modern world. Restricting an individual from doing everyday things may only serve to isolate the individual from society, which can increase the risk of re-offending. An improved understanding of risk amongst prosecutors is required.
43. We propose that legislation be considered in order to allow judicial discretion for the imposition of notification requirements. To ensure that judicial discretion is exercised in an appropriate way, guidelines for this should be developed.
44. For children, restorative justice should still be available as a sentencing option, where a Referral Order is not made.

45. We propose that the Sentencing Council should consider providing further guidance in respect of the weight to be attached by sentencers to the relative youth and immaturity of convicted individuals between eighteen and twenty-five years of age.
46. We recommend that the Sentencing Council carry out research into the effect of sentences, including finding an academic institution willing to partner in this work.
47. Statistics should be sufficiently disaggregated to aid sentencing research.
48. We consider that further judicial training on what works to reduce reoffending may improve the quality of sentences where rehabilitation is a factor.

Scotland

49. A dialogue between defence lawyers and COPFS needs to take place to clarify the best way for defence lawyers to discuss summary cases with COPFS lawyers.
50. We recommend that more SARCs are created across Scotland.
51. The Scottish Legal Aid Board should implement measures to reduce delays in sanctions being improved as a priority.
52. We recommend that more vulnerable witness-friendly suites are constructed in different areas of the country, to reduce journey times and increase capacity.
53. We consider that the use of intermediaries should be greatly expanded in Scotland.
54. We consider that more training is required among practitioners to ensure that the use of Commissions expands and that their quality is consistent, through proper application of the guidance.
55. We recommend that the training requirements set out in England and Wales are implemented as soon as possible in Scotland.
56. Developing an accredited treatment programme for those who have committed sexual offences should be a priority, with the evidence provided by Professor Gannon's meta-analysis – considered in chapter 3 - being at the forefront of the development process.
57. Proper funding should be given to these post-release initiatives so that they can be made available to those who require them.

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A handwritten signature in black ink, appearing to read 'P. Rook', with a horizontal line underneath.

HH Peter Rook QC

*Dame Vera Baird QC dissents from recommendation 20 and the text supporting it and related issues at 5.7 to 9 and 5.68. She considers it vital that sex offence complainants are treated in the same way as other complainants, as truthful and credible at the outset and that a full investigation follows. She rejects the report's assertion that sex offence investigations uniquely should have "increased focus on the need for reasonable effort to seek out credible evidence to the contrary." She disagrees with the assertion in 5.68 that the current police/CPS level of demand for digital (and third-party) material is a matter of communications. It is a matter of the complainant's human rights. She regards paragraph 5.18 5.51 5.60 and 5.64 as factually inaccurate. A dissent setting out her views will be distributed with the report.

The Working Party wishes to make it clear that anything we have recommended is not in any way meant to detract from the principle that a complainant in a sexual offence case should be treated as truthful and credible and be approached in precisely the same way as investigations in other cases.



JUSTICE



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