Victim Support NI

# **Bearing Witness:** Report Of The Northern Ireland Court Observer Panel 2018-2019

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# Foreword

**In 2017 I was privileged to attend the Lime Culture 'LimeLight Awards' where our Independent Sexual Violence Advocacy (ISVA) service had been shortlisted in the 'Exceptional ISVA Team' category. Whilst we did not secure the prize on that occasion, my interest was piqued by a presentation from Dame Vera Baird, at that stage the Police and Crime Commissioner for Northumbria. Dame Vera shared the findings of a court observers project that they had undertaken in Newcastle Crown Court. The subsequent report, *Seeing is Believing,*[1] analysed the findings of observations made by members of the public on 30 rape trials observed during 2015 and 2016. The findings highlighted a range of issues such as inappropriate introduction of previous sexual history, use of rape myths, late submission of evidence and delay. The analysis led to a series of recommendations for all criminal justice actors to improve the experience of sexual violence victims.**

**Victim Support NI** has been concerned about the treatment of sexual violence victims for many years. In over 40 years supporting victims of crime we have witnessed first-hand the devastating impact that the criminal justice system can have on victims. Inspired by the Northumbrian example, and in a bid to independently evidence the experience here in NI, we decided to undertake a similar project. In order to gain an understanding of experiences across the region, we included all sexual violence cases running in any Crown Court. We will be forever grateful to the group of volunteers from the public who gave up countless hours and effort to support us in this project. Through their diligence and commitment, we were able to collate a body of work which captures the observations and opinions of the very group the system operates on behalf of - our public.

To help shape the parameters of the project and be informed by their specialist knowledge we established an independent advisory group comprised of key criminal justice and voluntary sector representatives. We also benefited from the experience of the Northumbria Police & Crime Commissioners Office and Dr. Olivia Smith, whose observations of rape trials in England[2] informed the Northumbria pilot.

The project was greatly assisted by our Judiciary who permitted our observers to take notes throughout the trials and on many occasions allowed them to sit in the well of the court to aid their hearing of proceedings. A special mention should also be made to Rev. Dr. Lesley Carroll who commenced the project in Victim Support NI, before handing over to Louise Kennedy who oversaw the completion of the project and had the painstaking job of collating the responses and penning this report.

As a victim support organisation, we are acutely aware of the emotional toll that the trial can have on victims and were keen to ensure that our observers were appropriately supported to deal with any impact these trials may have on them. Lesley, alongside Dr. Bobby Moore conducted supervision with our court observers who were encouraged to keep a reflective learning journal throughout the project.

The subsequent analysis of these reflections has been used to inform the *Feeling is Understanding* report, penned by Lesley and Bobby. This report provides an insight into the emotional narrative that often runs alongside the trial and provides a sense of the feelings that accompanied what our observers bore witness to.

The findings in the report make for sombre reading and I will leave the discussion and recommendations to largely speak for themselves. I must however note my sadness and indignation on reading the observer comments captured in the Dignity and Respect chapter of this report. I have for considerable time been concerned that the most basic right of all human beings to be treated with respect continues, despite numerous improvements to the system, to be an unrealised aspiration for many sexual violence victims in our court. We must all play our part to challenge the acceptance of any forms of conduct that fall short of this from any party within our system. I believe that a greater understanding of the impact of trauma for all parties in the system will be a foundational step in addressing the long overdue cultural change required.

We are now at a critical juncture in Northern Ireland, where we have an opportunity to make real cultural change to our criminal justice system and how it impacts victims. The Gillen Review[3] was a watershed moment, after which it was simply not possible to continue with the status quo. The subsequent work to implement those recommendations is ongoing. It will take time to reach a point where we can truly say the reforms have improved the criminal justice system for the victims of tomorrow. In the meantime, this court observer panel has captured the experiences of the victims of today. The observations contained within provide a perspective of the criminal justice system that is rarely heard, from ordinary members of the public unblinkered by familiarity with the system and its idiosyncrasies. We hope those who work within the system, and those responsible for reforming it, embrace this fresh perspective and use it to see not only the criminal justice system's problems, but also solutions, with fresh eyes.

**Geraldine Hanna**
CEO, Victim Support NI

# Acknowledgments & Thanks

This research would not have been possible without the people who volunteered, advised, and assisted throughout the project.

Special thanks go to Dr. Olivia Smith and Dame Vera Baird, whose original *Seeing is Believing* report was inspiration for us to launch a Northern Irish equivalent Court Observers Panel.

The report would not exist without the efforts of my predecessor Rev Dr. Lesley Carroll, who got this project up and running and oversaw its early days, and kindly continued to provide supervision to observers along with Dr. Bobby Moore, as well as writing the phenomenological companion piece to this research, *Feeling is Understanding*.

Thanks to the members of the Independent Advisory Group, who offered their professional guidance as practitioners and experts in the legal field and reviewed early drafts of the report.

A debt of gratitude is also owed to Mairead Lavery of the PPS, defence solicitor Paul Dougan, and Professor Yassin Brunger of Queen's University Belfast. Along with Dr Olivia Smith, they provided training to court observers on the function of the criminal courts and justice system.

Thanks to Dr. Cira Pali-Aspero of Ulster University, for assisting on this research and providing analysis of the substantial amount of data collected by observers.

Thanks also to the staff at Victim Support NI, especially Michelle Porter, Roisin McCallion, and Claire Gallaugher who assisted with various aspects of the research work, to our Board Apprentice Caroline Perry for providing her expert insight, and to our intern Nienke Horemans for all her work throughout the project's observation stage. And of course to Geraldine Hanna, whose watchful eye and steady hand have steered this project throughout its duration.

I'd also like to especially acknowledge the help of Northern Ireland Courts & Tribunal Service (NICTS) staff, for both providing information about trials running in courts across Northern Ireland, and for being so kind and helpful to our observers in the court setting. The observers had nothing but praise for the staff they came in contact with, and we are grateful for their help in making this project possible.

Thanks also to the Office of the Lord Chief Justice for allowing our observers to carry out their observations in Northern Ireland's Crown Courts and supporting our work to shine a light on sexual offences trials.

Finally, the biggest thanks must go to the ten volunteers, our court observers, who devoted a year of their lives to observing sexual offences trials and sharing their thoughts with us. Without their selfless commitment of time, effort and perspective, this project would never have been possible:

Margaret McKinney, Vincent McKevitt, Siobhan McPeake, Shok Yan Lee, Sara Espeja Peralta, Shirley Krakowski, Trevor Burns, Audrey Simpson, Nienke Horemans and Allen McKinstry.

# Introduction

**The principle of open justice is one of the key building blocks of our criminal justice system. A principle dating back hundreds of years that dictates that court proceedings should be open to all, promoting transparency and openness by ensuring that members of the public can see, hear and understand a trial as it happens.**

The trial process however, is for many of us an unknown; our views and imaginings informed by fragments of information picked up through mainstream news media or what we see brought to life through TV dramas or movies, many of which are based on a US justice system. The reality of what happens in our courthouses on a daily basis across Northern Ireland is a lot more complex and a lot less orderly than that which we see played out on our screens. It is a reality that for the majority of us we choose not to observe, and if we are fortunate enough, will go through life never really knowing the reality experienced by the legal practitioners, court officials, defendants, victims, witnesses and supporters who each play a part in the trial process.

As a charity supporting victims and witnesses on a daily basis, we observe first-hand the mechanics of the system and how processes and procedure can often cause further harm to those pursuing justice. Many of these victims note their shock and surprise as to the reality of the court experience, having never previously understood how the system operates. This experience is not unique, and similar experiences in England led the Northumbrian Police and Crime Commissioner to establish the first Court Observer Panel to watch rape trials in Newcastle Crown Court in 2015-16. The publication of the resulting *Seeing is Believing*[4] report sparked the idea for Victim Support NI to replicate a similar project in Northern Ireland. The purpose of the research was to provide independent information, as gathered by members of the public, which could be used to improve the criminal justice system and support policy development.

## The Court Observers Panel

In April 2018 Victim Support NI advertised for members of the public, referred to as Court Observers, to observe trials for rape and sexual crime. Similar to Northumbria, we knew from our Witness Service staff and Independent Sexual Violence Advocates (ISVAs) who support victims of sexual abuse, that the experience of victims of sexual violence was particularly difficult.

Victim Support NI recruited via the press and online platforms for members of the public to volunteer to take part in a research project observing sexual violence trials. Individuals had to have no prior knowledge of the criminal justice system either as workers or volunteers to help us ensure that their observations were untainted by previous work experience of the system.

The observers went through two days of training provided by representatives from the PPS and defence practitioners, who outlined the trial process, rape myths and special measures procedures. The training also included input from a Human Rights lecturer from Queens University Belfast on human rights standards, as well as Dr Olivia Smith, who shared her experience of observing rape trials in England and Wales which informed her book *Rape Trials in England and Wales; Observing Justice and Rethinking Rape Myths*. Due to a break over summer recess, the first observed trial began in October 2018. Observations ceased in October 2019, at which point 27 trials had been observed.

Observers attended trials in pairs to ensure rich observations and act as a counterweight against any individual bias. Observers collected information against an agreed framework of questions which followed the Northumbria model. Each observer recorded their observations independently on the questionnaire, with no conferring between observers to ensure independent input. The questions followed the course of the trial and took into account Victim Charter commitments, Bench Book directions and the general treatment of witnesses, for example, the offer of breaks, special measures etc. The questions were reviewed by our Independent Advisory Panel to ensure they were reflective of the NI context. Our model also required the observers to examine the treatment of defendants which was an addition to those questions asked in Northumbria. Observers were permitted to make notes on the proceedings using pen and paper or on the tablet devices issued to them. All observers were required to sign confidentiality agreements.

The attendance of court observers was at the discretion of judges who were given advance notice of the intention for observers to attend a specific trial by court officials. There were no objections during the project to observer attendance. For the most part, observers were seated in the main body of the court with one occasion where the observers were required to observe from the public gallery.

Given the nature of the trials being observed and the potential for vicarious trauma, all observers were required to participate in monthly group supervision sessions with the Project Manager and a psychologist.

## Trial selection process

Trials were selected for observation through the monitoring of cases assigned to Victim Support NI's Witness Service for support. Trials were selected based on crime type, geography and observer availability. If a listing was confirmed by the Northern Ireland Courts & Tribunals Service (NICTS) staff, two observers were assigned and scheduled to observe from the first day of trial.

One of the major challenges in the process was the series of delays and adjournments to listed trials which resulted in last minute withdrawals from the list or, in some cases, the trial being adjourned on the morning of the trial leaving two observers who had travelled to the court in question having to be stood down. The intention was to observe at least one trial at every Crown Court across NI; however we were unable to observe any trial at Londonderry Crown Court due to a lack of observer availability when eligible trials were running. The trials observed varied in length, ranging from 2 days to 4 weeks. In some trials, an observer had to pull out and another replaced them. In these instances, three questionnaires were received and all data was included.

It was our hope that we would observe 30 trials, to match the number of trials observed during the Northumbria panel. However, due to logistical challenges resulting from observing in multiple locations, observer availability and frequent adjournments, we halted the project after 27 trials. We believe that rich data and observations had been captured by this stage, and have recorded these in the report that follows.

Finally, a brief note on terminology and editing of observer submissions. Throughout their questionnaires, court observers used varying terms and shorthand for those who took part in the trial. For simplicity and clarity, these have been amended so the report refers uniformly to complainants, defendants, witnesses, defence barristers or counsel, and prosecution barristers or prosecutors. Observers also provided rich narrative data within their questionnaires, and as far as possible this was used without amendment. However, it was also important to avoid the potential for jigsaw identification of those involved in trials, including complainants, defendants, witnesses, judges, jurors and the individual observers themselves. Northern Ireland is a small jurisdiction, and thus the risk of jigsaw identification is higher than in other parts of the UK. Consequently, some details have been omitted or edited in circumstances where it was felt that otherwise a risk of identification may be posed. None of the edits materially changed the quotes or the observers' intended meaning, and care was taken to balance the protection of identities with the preservation of the observers' authentic voices.

# Overview Of Trials Observed

## CROWN COURT TRIALS, HELD IN:

LAGANSIDE · DOWNPATRICK · ANTRIM · DUNNGANNON · NEWRY · CRAIGAVON

## TRIAL TYPES OBSERVED

- SEXUAL ASSULT
- RAPE
- INDECENT ASSULT

## 27 TRIALS
OBSERVED BETWEEN

OCT 2018 + OCT 2019

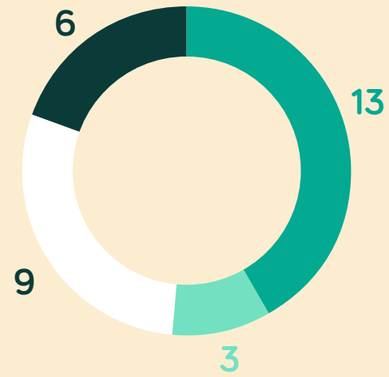
- 3 FOUND GUILTY
- 8 FOUND NOT GUILTY
  2 NO FURTHER EVIDENCE OFFERED BY PROSECUTION SO NOT GUILTY
- 3 HUNG JURY
- 7 PLEADED GUILTY
  4 PLEADED GUILTY TO LESSER CHARGES & RAPE CHARGES DISMISSED OR LEFT ON THE BOOKS
- 6 CASES COLLAPSED OR ADJOURNED & JURY DISCHARGED

**8** HISTORICAL CASES

**12** CURRENT CASES

**7** UNKOWN

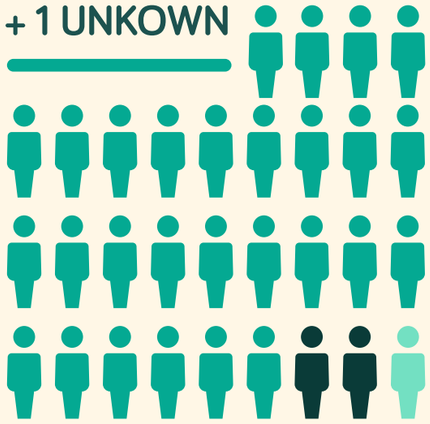
## 31 COMPLAINANTS ACROSS ALL TRAILS




COMPLAINANT AGE:

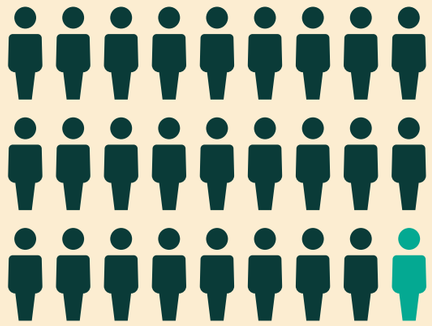
- CHILDREN AT THE TIME OF THE ALLEGED OFFENCE(S)
- CHILDREN
- ADULT
- AGE UNKNOWN

## 28 FEMALE + 2 MALE + 1 UNKOWN



COMPLAINANTS FEATURED IN TRIALS

## 26 MALE + 1 FEMALE



OUT OF 27 DEFENDANTS

# Rape Myths

**Rape myths are biased expectations and misconceptions around the realities of rape and sexual assault, held by individuals, society at large, and even victims and perpetrators of sexual violence and rape themselves.**

The purpose of this chapter is to record the prevalence and perceived impact of rape myths during sexual offences trials, as recorded by our court observers. Observers were asked to record any rape myths that they identified being used in the course of the trials observed, whether any interventions took place to counter the use of those myths, and what direction was given to the jury by judges about rape myths (both generally and specific to anything raised during the trial). A list of common rape myths was included within the questionnaire, and additional training was provided to court observers to assist them in understanding what rape myths are, so that they would be better able to identify them.

Observers were provided with a handout that gave examples and definitions of rape myths from Dr. Olivia Smith, Dr. Nina Burrowes and the Public Prosecution Service of Northern Ireland.[5]

For the purposes of the questionnaire, Dr. Smith's categorisation was used, which divides rape myths into four broad categories: beliefs that blame the victim/survivor, beliefs that excuse the accused, beliefs that cast doubt on allegations, and beliefs that assume rape only occurs within specific social groups[6]. These can be explained as follows:

### Beliefs that blame the survivor

These myths are largely based on assumptions about how a person should act to avoid being raped, and may seek to create the impression that a complainant is at least partly to blame for the situation. They can include blaming a person for what they were wearing, for acting in a way that is perceived as 'flirtatious' or 'leading him on', or for failing to predict that a sexual assault might be about to happen (hindsight bias).

Such myths often appeal to people's belief in the 'just world' theory, that the world is an inherently just place and that if someone was raped they must have done something wrong or stupid for it to happen. This gives people comfort as they are able to continue believing that they themselves could never be the victim of a sexual assault.

### Beliefs that excuse the accused

These are myths and stereotypes that seek to mitigate a defendant's culpability for the sexual assault they committed. Such myths are often linked to victim blaming, where the victim's conduct is used to both blame the victim for what happened and exonerate the accused. These myths can include unfair assumptions about the relationship between accused and complainant. For example, if there had previously been intimacy, a relationship, or even flirtation, myths asserting that it was reasonable for the accused to assume consent may be raised.

Other examples of myths and stereotypes that excuse the accused for their behaviour includes that consumption of alcohol or narcotics renders them unable to regulate their behaviour or decipher lack of consent, or that they are in love with the complainant so acted out of affection and could never assault them.

### Beliefs that cast doubt on the allegations

These are myths and assumptions that may unfairly lead a jury to conclude that doubt has been raised about the evidence. Unlike genuine evidence which might legitimately cast doubt on the veracity of a particular complaint, these myths rely on unsubstantiated but widely-believed stereotypes about how a 'real' rape victim would act, or societally-held beliefs about rape allegations being made due to regret or revenge, or a lack of understanding about whether rape will always result in physical injury.

### Beliefs that assume rape only occurs in certain social groups

This myth relates to assumptions about who is likely to be a rapist, who is likely to be a victim, and where a rape is likely to occur. It includes myths that rapes are only perpetrated by strangers, or perpetrated in dark alleys, or that those in relationships cannot be raped by their partner. It also includes myths such as only gay men can be raped or rape other men, that sex workers cannot be raped, and that someone who is from a good family or of high social standing is less likely to have committed the alleged offence simply by the virtue of that social standing. Complainants from lower social class, those with a criminal record, or those who have had involvement with social services may be less likely to be believed as victims due to similar flawed thinking. Biases about race, ethnicity, gender identity and age can also fall into this category.

Whilst observers were asked to record rape myths under the four aforementioned categories on the questionnaire, in practice the myths identified often fell under multiple categories, depending on how they were framed and reported by observers. Therefore, for the purposes of this report, rape myths are reported below under more specific categories, to ensure accuracy and fully capture the nuance of observer feedback.

## The prevalence and usage of rape myths: Overview

Of the 14 trials that reached a stage where rape myths might have been used and identified (i.e. complainant cross-examination by the defence), court observers identified rape myths in 13 trials.

In 1 trial, no rape myths were identified at all.

In 4 trials, one observer identified rape myths while another did not during one or several of the stages of the trial where myths might have arisen[7]. While it is not possible to draw concrete conclusions as to why this may have been, it might support the hypothesis that rape myths are subconsciously ingrained within society, and that even with the training given, not all court observers understood rape myths in the same way or were able to overcome their own bias in reporting. It may also indicate the difficulty in unpicking what constitutes genuine and important evidence in a case, and what is irrelevant material designed to play upon unfair assumptions and stereotypes about sexual violence, consent, intimacy and gender norms.

The most commonly observed rape myths were that the complainant's failure to fight, scream or run away proved that they weren't raped, and that delay in reporting proved that no rape took place. Each of these types of myth were present in 7 of the trials observed.

In 4 trials[8], prosecutors intervened regarding rape myths at the time they were used by defence counsel.

In 1 trial[9], a judge was recorded as intervening regarding rape myths at the time they were uttered.

In 3 trials, prosecutors may have dealt with rape myths raised by the defence during re-examination of the complainant or prosecution witnesses[10]

In 4 trials, prosecutors dealt with rape myths raised by the defence during cross-examination of the defendant[11]

In 2 trials[12], judges talked about rape myths or stereotypes at the beginning of the trial. Whilst it may be of course coincidental, it is interesting to note that both these trials happened after the publication of the Gillen Review.

In 5 trials[13], the prosecutor made reference to the existence of rape myths or stereotypes in their opening statement.

Of the 13 trials that reached the point of the judge summing up, observers noted the use of directions as set out in the Crown Court Compendium about sexual offences relevant to the trial in all of them. The directions ranged from general comments about stereotypes and there being no typical victim or defendant, to one trial in which the judge specified that the defence had used rape myths in the course of the trial.[14]

In 2 trials[15], an observer opined that the judge had used or endorsed a rape myth in summing up and that they felt this biased the trial in favour of the defendant.

## Myth: Victims provoke rape by the way they dress or act

This myth was raised in a number of ways within several trials. They included accusations that the complainant was flirtatious, that they made 'irresponsible' choices by inviting the defendant to their home or going back to the defendant's home, that they chose to go drinking or get drunk, that they wore 'sexually alluring' clothing, or that complainants having a high sex drive or having had previous consensual sex with the defendant demonstrated future or ongoing consent.

The narratives used often painted the complainant as having been partly culpable for what happened, or to have acted in a way that meant the defendant would have assumed consent even if it was not objectively reasonable for them to have done so. While these narratives did not explicitly conclude that it was therefore the victim's fault that they were raped or sexually assaulted, there was clear use of these narratives to trigger myths which blame victims and excuse defendants for what happened in the minds of juries.

## Court Observer comments

**Behaviour that could be perceived as 'flirtatious'**

*"The defence at one stage accused the complainant of flirting with the defendant by going outside together for a smoke."* [16]

*"The defence played on the fact that the complainant had been drunk and suggested that the complainant had been flirting with the defendant."* [17]

*"The defence made a huge deal about the complainant kissing another friend the night before, after saying she was not interested in him. Defence played on the fact that the complainant had quickly changed her mind and that she liked to lead men on and act flirtatiously."* [18]

The defence accused the complainant of flirting and *'leading on the defendant'* as she sent texts to him with emojis.[19]

*"The defence barrister referred to the complainant leading the accused through her house to the bathroom – there was a suggestion that she was inviting the attention of the accused."* [20]

*"Trying to excuse the defendant's behaviour by implying that the complainant had put temptation in his way and that the complainant had known that the defendant had feelings for her."* [21]

**What you wear makes you partly to blame for what happened**

[when defence counsel asked about what the complainant was wearing] *"I think he asked this because the events occurred on a Sunday morning and she might have still been wearing her nightgown, I think he just wanted this thought put into the jurors' heads"* [22]

*"Defence asked the complainant why she changed into pyjama bottoms and asked if she changed underwear in advance of defendant coming over."* [23]

*"Blaming the complainant as she was in a state of significant undress at the time of the incident."* [24]

**'Irresponsible' choices of complainant made them partly to blame**

*"A big deal was made of the fact that the complainant had been arguing with her boyfriend on the day in question and they had fallen out again during the evening as she had gone to meet friends at the pub. Questioned why the complainant had chosen to go out drinking rather than try to make up with her then partner."* [25]

*"The defence claimed it was the complainant's own fault as she invited the defendant to her home."* [26]

*"At one point the defence says 'you did agree to go to his house for a party, he was a complete stranger to you'".* [27]

**Blaming complainant for not expressing lack of consent enough**

In defence summing up, the barrister said that the complainant had *"let it happen" and that "if a weapon was used, this would be something that you'd remember and tell the police at the very beginning"* [28]

When questioning consent: *"He couldn't see you crying as it was dark in the bedroom and you were quiet."* [29]

The defence barrister asked *"Why were your google searches about alcohol and rape and not about being unconscious and rape".* The observer remarked *"this baffled me – as if being raped while drunk somehow negated her accusation of unconscious and raped… she was both drunk and asleep."* [30]

*"Rape myths were interwoven in the way the defence barrister covered the issues with the defendant eg. the references to highly frequent consensual sexual activity and the fact that after breakups the victim always sought him out for sexual activity – thereby giving the impression that the victim was to blame if he felt she was always in need of attention."* [31]

**No can mean yes**

The defence barrister asked the complainant *"when you said no were you seriously saying no?"* [32]

**A complainant who is sexually active or has a high sex drive wouldn't have been raped**

*"The idea was strongly planted that someone with a high sexual drive and who indulged in very frequent sexual activity couldn't somehow be raped."* [33]

## Myth: A victim is to blame for their own assault

Similar to myths that blame victims for 'provoking' rape by their actions, myths that imply a complainant is partly to blame for what happen were used in several trials.

In one trial, the defence pursued a line of questioning that suggested the complainants, who were children at the time, could have stopped what happened by reporting the rapes. One observer summarised this line of questioning as follows:

*"By implication…If you had told somebody this would have been stopped , so you have a responsibility ….It got to the stage when you could hear the girl crying and shouting because she felt she hadn't protected her little sister adequately. He then complained to the judge about her behaviour on the stand."* [34]

In another, the defence suggested the complainant was to blame for not struggling or vocalising her lack of consent enough:
*"'You just let it happen, you weren't struggling' (multiple times); 'he says you didn't tell him to stop so it was consensual'. 'You weren't struggling but behaving in a way that was leading him to think that you wanted it'. The complainant answers she was crying. 'You didn't say anything.'"* [35]

In T18, one observer recorded the use of 'hindsight bias', in which it is asserted that complainants should have known a sexual assault was going to happen, in defence closing:

*"Why did she let him in if she knew he had tried to kiss her?… She should've known what would happen."*

In T21, one observer remarked:

*"It was also mentioned that the complainant had taken her clothes off and climbed into bed beside the defendant. The defence claimed that the complainant should not have done this had she not wanted to engage in intercourse with the defendant."*

In T23, it was recorded that the defence was *"trying to excuse the defendant's behaviour by implying that the complainant had put temptation in his way and that the complainant had known that the defendant had feelings for her."*

## Myth: Victims who drink alcohol or use drugs are asking to be raped

Myths about the consumption of drugs and alcohol were used in several ways in the trials observed.

Suggestions included that if someone had taken any alcohol or drugs, they would be less likely to withhold consent, that they are more likely to consent but not remember doing so, or that in any event their recall of events is not reliable as a consequence of impairment by alcohol or other substances.

### Court observer comments

*"The defence claimed that the complainant was confused as she was on drugs at the time and that was a justification for the defendant being on drugs at the time."* [36]

*"The defence played on the fact that the complainant was drunk and suggested that the complainant had been flirting with the defendant."* [37]

*"[The defence] suggests she was looking for drugs and that this was an arrangement that went wrong. No drugs were found in anyone's blood and urine samples."* [38]

*"[The defence closing statement] relied heavily on rape myths. This in a case when [the complainant] ran… as soon as they could get free. Drink is a major element here – basically saying they can't remember whether they agreed or not, but conveniently not so drunk they couldn't make a decision."*[39]

*"The defence kept going back to the fact that the complainant was drunk and had taken drugs."* [40]

*"The defence claimed that the complainant did not clearly remember the events due to the amount of alcohol that had been consumed and that she had consented but regretted it after so had made a false claim to the PSNI."* [41]

*[during defence closing arguments] "Alcohol makes people disinhibited and euphoric, so they do things they regret".* [42]

In T15, mentions of the complainant's alcoholism was used to attempt to discredit them:
*"[Defence] You seem to have no recollection of something when normal people seem perfectly normal to remember. Recently after alcohol intake, did you [seek counselling]'*
*[Complainant] 'Yes, a couple of times.'*
*'[Defence] did you discuss in detail [the sexual assault when you were a child]?'*
*[Complainant] 'more or less.'*
*[Defence] 'you found it hard to talk because of your alcohol drinking?'"* [43]

In T23, the issue of capacity to consent arose. Evidence from other witnesses included that the complainant was *"so drunk she had fallen off a seat in the bar twice and had to be helped from the pub to the car… So drunk she couldn't hold her head up".* The defence barrister *"suggested that she was too drunk to know she had consented";* however nothing was brought up about whether someone so drunk could in fact have capacity to consent in the first place.

## Myth: If they did not scream, fight or get injured, it was not rape

This myth was widely used throughout multiple trials. Defence counsel focused on the conduct of complainants in several ways, including to imply that lack of fight or resistance proved that complainants had consented, or to conclude that the defendant reasonably assumed that there was consent. The use of the myth relied on societal lack of understanding about how the human body responds to trauma, and scientifically disproven assumptions that if a person was sexually assaulted they would instinctively fight off an attacker.

Focus was often on the reaction of complainants during alleged assaults, and frequently placed responsibility on complainants to vocalise and confirm lack of consent after an attack had commenced. These narratives tended to minimise the events leading to alleged assaults where consent may not have been established, and lacked understanding of how victims of rape classically react when assaulted by freezing or going limp.[44]

### Court Observer comments

During cross-examination of the complainant in T20, the defence barrister was recorded to have said *"you didn't say no" "you didn't scream" "you didn't say stop" "you didn't say anything at the time that meant you weren't consenting."*

In T16, this myth was used frequently:

*"The defence barrister said 'You weren't struggling but behaving in a way that was leading him to believe that you wanted it' – when the complainant answered that she was crying, the defence barrister replied 'you didn't say anything'.* The defence barrister argued: *"You did not struggle, you did not shout" / "You didn't explicitly say 'please get off.'"*
The defence asked *"'Did you actually say, "Please get off, or what are you doing here?' (She said she froze)".*

In T18 the complainant was accused by defence of *"not resisting the attack".* In the same trial the defence barrister was recorded as saying: *"You didn't say 'no' at any time" "Did you fight in any way?" "You didn't fight even though you said you are good at defending yourself."*

In T13, *"The defence barrister said 'you did not say anything' because the victim did not react when the defendant assaulted her. She said she froze."*

In T14, *"The defence barrister asked the complainant why she didn't jump or scream."*

During another witness's cross-examination in T20, the defence barrister *"challenged the fact that she froze. He told him that she would be the kind of person who says something."*

In T22, the defence barrister asked the complainant *"why didn't you call out, you were in a hotel, there were people in the bathroom."*

In T1, defence counsel asked a complainant who was a young child at the time of the alleged rapes why she didn't cry out or fight off the defendant, who was a grown man. One observer commented on the line of questioning as follows: *"These questions all came up a number of times. These attacks happened when there was no one around- so who was there to call. She was [a young child]... how hard can you fight an adult man as a small girl? Either the suggestion is it's a complete lie or if it's not a lie in which case then the witness bears a sort of responsibility for letting it happen or continue to happen."*

## Myth: If no injury or violence then no rape took place

Lack of physical injury was raised in several trials as evidence that no rape took place.

In one trial, an observer reported that the defence commented *"a lot about bleeding and physical damage – where is the physical evidence? Though rape does not need full penetration."* [45]

In another trial, defence counsel claimed that *"She did not get injured"* therefore it was not rape, even though it transpired she had marks on her legs after the incident. [46]

In yet another trial the defence barrister *"did make a fuss over no injuries or damage to her clothes."*

Myths around violence were observed even when violence actually did occur. The defence barrister in one case suggested that if the complainant *"had her clothes on when leaving... she couldn't have been raped."* [47] At another point, the observer records an exchange between the complainant and defence barrister about why she didn't fight. When the complainant said she didn't fight because she thought he had a weapon in his hand, *"the defence barrister actually said 'But he didn't do anything with it did he?' as if that threat of violence was OK."*

## Myth: You can tell if someone 'really' has been raped by how they act

Myths that fell under this category were widely used. Defence counsel relied on stereotypes about how a 'typical' rape victim might act to assert that a rape could not have taken place because complainants did not act in a way that fell under stereotypical behaviour or reaction.

Myths that fell under this category included assertions that a victim of rape would remember in detail what happened given the seriousness of the event, stereotypes about how someone would react in the short-term aftermath of an attack, or assumptions about how a victim might cut off contact with a family member who had attacked them. In these cases, the purpose of using such myths or stereotypes were to assert that a rape couldn't have taken place if the victim acted in the way they did. This is contrary to what extensive research has shown about how real victims of rape and sexual assault react to what has happened to them. [48]

### Court Observer Comments

#### Myths about memory

*"The defence barrister's persistence on some questions was difficult to understand. For example his questions about what she was wearing when she was allegedly assaulted when she was [a young child] and conversations she had with her sister when she was [a young teenager] went on – and on."* [49]

*"If it happened, wouldn't she remember all the details - asked of a girl who was a young child at the time of the rapes."* [50]

*"Suggestions that couldn't remember equalled nothing to remember. Asks can she remember what colour the beer tin the defendant gave her was... How is that relevant to a case of rape? 'Just another thing she can't remember'. This was a common retort - she can't remember, so she must be lying, so everything she says is untrue."* [51]

The defence barrister asked the complainant *"Why don't you know what exact clothes you were wearing when you got up?"* and implying that if she can't answer that makes her an unreliable witness (even though incident happened several years ago).[52]

In defence summing up, the barrister said that *"the first complainant can't even remember if he penetrated her vagina, a girl would at least remember this."* [53]

[in a case where the complainant alleged she was woken up by defendant raping her]: *"The complainant cannot remember anything between 01:00 and about 04:15 when she woke up. There are a series of questions more or less in a row to which the complainant answers 'Don't remember'. The barrister's tone of voice is a bit 'yeah sure' and incredulous."* [54]

*"It seems as if they are trying to undermine the credibility of the witness by asking about details that he doesn't remember."* [55]

#### Conduct in aftermath of alleged assault

*"The defence talks about all the things she could have done [after the assault] (go to the neighbours, go to a taxi driver, go to the hospital, use a phonebooth), and tells her that she didn't do anything"* [56] [the complainant in fact went to the police].

*"The complainant went out the next evening – much was made of this by defence barrister – put it to jury that a person who had been raped would not have done this. (Note: complainant confided in friend about alleged rape when out that night)."* [57]

*"There is CCTV of the complainant fixing her hair on one of the flights of stairs - so she wasn't fleeing, just leaving normally."* [58]

#### Delayed reporting

In a case where allegations were of historical child abuse:
*"[The defence barrister asked the complainant] 'Why didn't you tell anyone? You had lots of opportunity in the years this was happening - teachers, doctors, social workers.' By implication...'If you had told somebody this would have been stopped, so you have a responsibility' ....It got to the stage when you could hear the girl crying and shouting because she felt she hadn't protected her little sister adequately. [The Defence Barrister] then complained to the judge about her behaviour on the stand."* [59]

*"The defence barrister did create some incredulity that a wife would not have told her husband about a sexual assault at the time it happened. Likewise with the other complainant's cousin, he suggested that as he and the complainant were close cousins it was hard to believe that he wouldn't have told him about the alleged assault sooner."* [60]

*"The defence made mention that the complainant was not telling the truth as they had not reported the rape straightaway and had waited a number of hours before making a report."* [61]

*"4 hours in[to cross-examination] and still on about money. And begins a new thread of why he didn't tell his wife until after he was married."* [62]

The defence barrister questioned *'why did you keep the abuse in the dark for many years? Did your partner know?'* [63] In the same trial, the observer noted that *"the defence also claimed that if the incident had happened then the complainant would have reported it to someone at the time."*

The defence barrister suggested that the complainant *"didn't tell anybody immediately so it must have been a lie."* [64]

*"The defence made a few remarks about the complainant telling the truth as the complainant had been due to visit the Rowan Centre a few hours after the incident but instead asked police to take her to her sister's house for the night. The complainant visited the Rowan two days later but the defence claimed this was because nothing happened and that was the real reason for the delay."* [65]

*"The assault was minor and she handled it in a low key way to minimise family friction- told him to stop which he did and threatened him with his father. So her engagement cards, congrats on first baby etc, were made exhibits to demo good family relations. You sent him a card so he couldn't have touched you sort of thing."* [66]

## Myth: Victims 'cry rape' when they regret having sex or want revenge

Accusations of complainants making false allegations due to regret or revenge were prevalent in multiple trials observed. Such accusations often speak to the widely-held misconception that false allegations of rape and sexual assault are very common. In fact, research largely suggests that false allegations make up a tiny proportion of allegations – research by the Home Office in 2005 estimated that roughly 3% of allegations of rape were false.[67] Such misconceptions about how regularly people make false rape allegations feed into scepticism about complaints made, and make accusations of false complaints easier to believe even in the absence of concrete evidence as to the truth of the matter.

### Court Observer comments

The defence strategy was to accuse the complainants of inventing a *"concocted story" and that "the motive was revenge- and revenge was a very powerful emotion."* [68]

*"The defence accused the complainant of lying about the father of the baby that she was pregnant with in order to make him jealous. Defence to complainant: 'is it the case that you are angry with the defendant and you decide to make trouble to him?'"* [69]

The defence barrister in cross-examination *"suggested there was a revenge motive, based on the Defendant's unfaithfulness… a woman scorned." "It was also claimed that the complainant had consented but changed her story to punish the defendant for cheating on her in the weeks leading up to the incident."* [70]

*"The defence constantly accused the complainant of being a liar and of making the whole rape up as she was embarrassed the encounter had happened." The defence barrister said "You are crying rape because you regret it".* [71]

The defence barrister said *"people make false allegations. In this type of case they are told all the time." The defence alleged "that the complainant was coached by her friend… 'Was she encouraging you to take the power back?' Basically, that her feminist friend was behind this case."* [72]

The defence barrister used the closing statement to assert that *"allegations of sexual assault are now frequent, commonly through social media and conventional media – prompting proliferation of this sexual abuse allegation… feminism gone too far."* [73]

## Myth: You can't be raped by someone you are / have been in a relationship with

Allegations of rape and sexual assault of complainants who were currently or previously intimately involved with the accused arose in 5 trials.[74] Of those trials, two cases[75] involved allegations of previous or ongoing physical violence or domestic abuse against the complainant by the defendant. In all but one[76] of the trials involving people who had previous intimate relations, defence counsel made some sort of suggestion that a rape couldn't have taken place as the complainant and defendant had been in a relationship.

### Court Observer comments

*"The defence mentioned quite a few times that the complainant and the defendant were in a relationship for.. years and had children and one on the way at the time of the offence. Almost implying that the complainant couldn't have been raped as she was with the defendant at the time of the incident."* [77]

*"It was mentioned on quite a few occasions that the complainant and the defendant had been in a relationship prior to the alleged incident and therefore it was a consensual encounter as they had loved each other."* [78]

*"It was also suggested that the defendant could not have raped the complainant as he had proposed to her earlier in the evening and this act demonstrated his love for the complainant."* [79]

*"The defence barrister is straight in with a bit of 'slut-shaming'. There are a couple of juvenile tasteless jokey jokey photos /snapchats from a holiday they took together. As the pair had already agreed they'd been intimate, it is irrelevant to the rape."* [80]

The defence barrister suggested *"they had sex before and so it must have been consensual"* [81]

*"Rape myths were interwoven in the way the defence barrister covered the issues with the defendant. For example the references to highly frequent consensual sexual activity and the fact that after breakups the victim always sought him out for sexual activity – thereby giving the impression that the victim was to blame if he felt she was always in need of attention."* [82]

The defence was *"casting doubt on the allegation by constantly referring to a previous sexual encounter between the complainant and defendant some months earlier."* [83]

## Myth: 'Good character'/background of defendant and 'bad character'/ background of complainant

The assertion that the character or status of either complainant or defendant is evidence of whether a rape or sexual assault took place arose in 5 trials[84]. The motivation behind the use of such myths is to reinforce the mistaken belief that if you are from a good family, or are a pillar of the community, or have lived a 'better' life than the complainant, you are automatically less likely to have committed sexual assault. By the same reasoning, this myth reinforces the belief that if you are of lower social class, or have had social work involvement either as a child or a parent, or have a criminal past, you are more likely to be lying about a sexual assault. These myths may also work more generally to elicit sympathy for a defendant, who is painted as a 'good person' in spite of the accusations, or paint an unsympathetic picture of the complainant. The myths identified in the trials focused on social work involvement with complainants' families or being from a 'bad family', criminal histories of complainants, work records of defendants, and implications of being an unfit mother. Myths about drug and alcohol use often fed into those narratives (these have been addressed separately above).

### Court Observer comments

*"References to the involvement of Social Services during her teenage years thereby painting a picture of a dysfunctional life and dysfunctional family – some years after the alleged offences began… The references to Social Services and dysfunctional family life in later years subtly brought in the issue of certain social groups"* [85]

Implication that complainants were from *"the kind of family who need social workers. Although he never states this explicitly, the defence barrister manages a bit of mudslinging, by getting in a few digs about foster care and social workers."* [86]

*"The defence definitely plays on the jury to err on the 'least harmful' result ie if anything has happened, it's over now and he'll have learned his lesson."* [87]

*"The defence constantly tried to cast doubt on the complainant by asking defendant questions about his work and implying that he was of good character."* [88]

*"The defence used myths such as ..the defendant could not have done anything as he was seen as a different social class as he had been in full time employment from the age of 16 and the complainant had never worked in his life."* [89]

*"The defence made a huge point about social class between the defendant and the complainant. Every job the defendant had ever worked was listed and the fact the defendant had children who have also been in good jobs and have never been in trouble with the police", and that "it was also addressed that the defendant left school and was working full time at the time of the alleged incidents. The defendant would have been too busy bettering his life to take part in this kind of activity."* [90]

*"The bad character of the complainant and good character of defendant are the focus in the examination. Should we endorse that just because a person does not have a criminal record and work hard his whole life, means that he is very unlikely to commit the crime [several decades] ago?"* [91]

The defence said a *"teacher claimed they hope you are not as bad as your father, it wasn't the first time you have been telling lies?"* [92]

*"Didn't actually say out loud that she was no better than she ought to be but managed to work into the questioning that she had children, fathers not mentioned… Instead of just saying she went home after the incident, he suggested she was going home to "babysit" her own children who were staying with their grandmother for the night."*[93]

*"Much was made of the fact that she went out the night after the incident with her friend to a night club. Although this*

*was when she got up the courage to confide in her friend. So obviously a bit rough, a bit irresponsible, what kind of woman goes to the pub after being raped? Very much not people like us."* [94]

*"[The defendant] seeks to show himself as a good hardworking man getting another chance with the woman he loves. However he is not challenged on this statement although he is an armed robber currently in custody, for holding up small shops (female assistants in the main) with a knife and a hammer"* [95]

The defence *"used the 'nice boy defence' that he was 'nearly part of the family, accepted by the mother, he wouldn't do a thing to hurt anyone. A soft boy who shies away from the slightest confrontation."* [96]

*"Many references were made to the fact that the defendant came from a good family, the parents attended church each week and that the defendant was now a university student."*[97]

## Myth: People with disabilities can't commit rapes

This issue was raised in only one trial, in which the defendant had a disability. The defence claimed that this meant he couldn't have carried out the acts he was accused of. However, there was no medical evidence submitted to substantiate this claim.

One observer recorded the defence as saying *"'The defendant's disability stops him from [certain movements] so he could not have attacked you in the way you describe' – that was never medically assessed."* [98]

## Myth: Rough consensual sex defence

The use of the so-called 'rough sex' defence has gained notoriety after having been used in a number cases in which women were killed by their partner during what the defendant claimed to be rough but consensual sexual activity. This has resulted in the Northern Irish Department of Justice consulting on how the law should be changed to prevent such arguments from being utilised in court. [99]

In two trials observed by the court observer panel[100], similar arguments were made by the defence. In one, a case that also involved a physical assault at the time, to which the defendant pleaded guilty, one observer noted that the *"defence asked if he 'had bad sex with her', 'stripped her clothes off'.. The defendant replied that he just had some talk with her on bed after the assault."*

In another, observers recorded that the defence portrayed the incident as rough, consensual sex, and a transaction of sex for drugs, even though no evidence of drugs or drug use were found.

## Countering Rape Myths: Interventions

As well as recording the usage of rape myths during trials, court observers were asked to record instances in which rape myths were countered, objected to, or explained by either counsel or judges. Court observers mainly identified rape myths being countered during cross-examination, during re-examination, during closing statements and as part of judges' summing up at the end of trials. There were fewer examples of counsel directly intervening in real time to challenge rape myths being used. Observers also recorded instances of when rape myths were explained as a concept to juries, usually as part of prosecutors' opening statements at the beginning of trial or in the judge's summing up at the end of trial. On the whole, observers felt that efforts to counter rape myths tended to be insufficient, or lacking altogether. The observations have been examined below.

### 1. Immediate Interventions

As part of their questionnaire, court observers were asked to record whether any interventions were made during the cross-examination of either complainant or defendant. Observers were asked to record all interventions by counsel and the judge and the reason why.

For the purposes of this section, the interventions highlighted are those recorded as having been specifically relating to the use of rape myths. Although court observers were not explicitly asked to record the details of interventions that were made, many noted this in their narratives; other interventions relating to rape myths were extrapolated through analysis of observer comments.

Observers did not record many instances in which direct, real-time interventions were made to counteract rape myths at the time they were uttered - in only three trials.[101] For the most part, these interventions appeared to be limited and did not appear to explicitly characterise what was said as a rape myth or stereotype.

In T15, one observer recorded that *"the prosecutor intervened once for pointing out defence cross-examination was largely to dig into the criminal history of the complainant for a bad character application."*

In T16, an observer noted that the prosecutor objected *"to a suggestion that the incident was part of sexual play/ consensual sex"*, which was posed as a proposition rather than a question during the cross-examination of the complainant. Likewise, the other observer of the trial recorded that the prosecutor:

*"intervened because of the hard and suggestive questioning (the defence talked about the rough, but consensual, sex they had). The judge offered a break after this. The prosecutor then says that the questioning of the defence isn't correct ("he is flying a kite"). The judge agrees and tells the defence to rephrase his questions. The defence talks about how the defendant and the complainant had rough consensual sex and the prosecutor intervened about the consent."*

Later, during the cross-examination of another complainant in the case, the observer noted that:

*"The prosecutor intervenes once the defence barrister starts using rape myths (saying that she just let it happen because she didn't do anything). He later intervenes again when the defence uses a rape myth but the judge allows it."*

In T20, one observer remarked that the defence barrister was *"challenged by prosecuting QC about possible introduction of previous sexual history which to date was not allowed by the Judge."*

### 2. Countering rape myths during cross-examination and re-examination

Prosecutors were recorded as having addressed or countered rape myths during cross-examination or re-examination of witnesses in 6 trials.[102]

In T6, one observer noted that the prosecutor challenged the defendant on rape myths and his views on consent during cross-examination:

*"The prosecutor did question the defendant about his opinion of rape myths as the defendant had at one point claimed he owned the complainant so could do anything he wanted to her. The defendant believed that the complainant had disrespected him and needed to be punished."*

In T16, rape myths were challenged during the cross-examination of the defendant:

*"[The Defendant] says if they didn't want sex, they wouldn't have come [to his home]… When the prosecution barrister countered this, the defendant had a very very long pause to think and came up with 'the way she talked made me understand that'.*

At another point, the prosecutor countered the allegation that the complainants had been looking for drugs, saying *"you are just trying to blacken their names. There were no drugs in the complainants' system."*

In T18, one observer recorded:

*"The prosecutor did question some rape myths. The defendant was questioned about how the complainant was dressed and if he thought she had been dressed in an alluring manner. Defendant was also asked about the messages that that been sent and received and asked if he thought they were flirtatious. Defendant was also asked about the amount of alcohol consumed by the complainant and asked what kind of state complainant was in."*

It should be noted that in this case the prosecution also relied on rape myths for their evidence during the cross-examination of the defendant, by saying that the complainant *"wasn't dressed in a sexually alluring way"*. This feeds into the falsehood that what a victim wears makes them partially responsible for their rape. It also feeds into the myth that a rapist may be less culpable for their actions or may be entitled to infer consent based on what a victim was wearing.

In T23, one observer highlighted that in cross-examination of the defendant:

*"The prosecutor did challenge some rape myths. The prosecutor challenged the notion that the defendant believed he had consent because he had engaged in sexual relations with the complainant some months earlier. The prosecutor also challenged the defendant over why he thought that what the complainant was wearing meant he could do what he wanted."*

In T15, 21 and 23, court observers recorded that prosecutors used re-examination to deal with issues that had contained rape myths in the defence's cross-examination of the complainant. However, observer recordings show that prosecutors did not necessarily go so far as to unpick those myths in these cases.

In T15, it was observed that the prosecutor asked about the complainant's criminal past to clarify that it was limited to when he was young and that he had *"turned his life around"* since. This arguably doesn't address the myth that if someone has a criminal past they couldn't have been raped or are not a reliable witness, but sought to mitigate the damage done by that myth.

In T21, observers noted that the re-examination concerned the complainant's *"family and feelings about her relationship with the defendant"*, which may have intended to address the rape myths concerning her 'crying rape' as an act of revenge for the defendant's previous infidelity, or the myth

that because they had been in a previous relationship she couldn't have been raped.

In T23, the short re-examination sought to cut through myths about their previous relationship and consent, by simply asking if the complainant consented to sex on that night:

*"The complainant was asked what she believed had happened and whether she felt it had been consensual sex." The re-examination was "very simple, one question. What happened? I was raped."*

## 3. Explaining rape myths at beginning of trial

### Prosecution

Court observers reported that rape myths and stereotypes were explained in some way by prosecutors in their opening speech in 6 trials. The explanations given tended to either be general comments on setting aside bias and there being no one kind of rapist or victim, but did not go into further detail.

In T10, the Prosecutor mentioned that *"there are no stereotypes in sexual offences"*.

In T14, *"The prosecution barrister stated they should leave any bias aside", and "the prosecutor mentions that there is no one type of sexual offender, and no right way to react to sexual offences as a victim. But no rape myths were mentioned."*

In T16, the Prosecution barrister was recorded to have raised two points about rape myths:

*"(1) No typical victim or attacker (2) Trauma affects people differently. Very briefly dealt with, does not mention rape myths specifically."*

In T22, stereotypes were touched upon by the prosecutor very generally:

*"Nothing specific, assumptions to be set aside etc. Very general stuff really could be used at any trial."*

Similarly general comments were noted in T23:

*"[The Prosecutor] mentions that there are myths and assumptions, no more than that… People behave differently & usual direction about sympathy and prejudice. Decision to be based on the evidence presented here."*

Mention of rape myths in prosecutor's opening statement were recorded in one other trial[103]. In this instance, one observer recorded:

*"The prosecutor started the opening mentioning the turbulent relationship between the complainant and defendant over the past [several] years of their relationship. The tendency of displaying violence against the complainant by the defendant was brought up."*

While the prosecutor may not have explicitly highlighted a rape myth in this case, the observer presumably reported it as such to highlight that the prosecution was countering rape myths about people in relationships from the start of the trial.

### Judges

Judges were noted as mentioning rape myths and stereotypes when speaking to the jury before the official beginning of a trial in three instances.

In T3, *"the judge also talked about rape myths and how a person can react in a number of ways to what is happening to them. The jury were told to keep an open mind and to try and not form any opinions or reach any conclusions until they had heard and seen all the evidence."*

In T20, both observers recorded that the judge mentioned that there is no stereotypical response to rape:

*"Leave behind assumptions of what constitutes rape. There is not a stereotype for a rape or rapists. No classic response to rape. People react in different ways."*

*"Rape myths were mentioned and the judge stated that there is 'no classic description of rape'."*

In T21, both observers recorded that the judge touched upon rape myths:

*"From the judge's opening: No typical victim or attacker. Keep an open mind, no assumptions. People react differently. Very general stuff really could be used at any trial."*

*"The judge also briefly touched on rape myths; no typical rapist, no typical victim, time take to report crime, how a victim may react etc."*

## 4. Debunking rape myths at closing and summing up

### Prosecution

The questionnaire provided to court observers did not specifically ask them to report back on what was said in either prosecution or defence closing statements. Nonetheless, observers sometimes recorded what they observed in closing statements, using other sections of the questionnaire such as the general comments or notes section. For the purposes of this chapter, all comments pertaining to rape myths and stereotypes mentioned by the prosecution have been gathered here.

There were only two recorded instances in which prosecutors mentioned rape myths or attempted to debunk them. However, it should be noted that this may not constitute a full data set due to the gap within the questionnaire.

In T16, both observers specifically mentioned the closing statement of the prosecution and how counsel used it to highlight rape myths used by the defence.

In T18, during the prosecution closing statement they *"asked the jury not to decide the case based on the lifestyle of the parties. The argument was good and convincing."*

### Judge summing up

Judges' summation was the most common point of the trial for explaining and unpicking rape myths.

Of the 13 trials that reached the point of the judge summing up, observers noted the use of relevant directions as set out in the Crown Court Compendium about sexual offences in all of them. In general, observers reported that judges summed up cases thoroughly, clearly, and fairly.

Analysis of court observer comments reveals that there was, however, wide variation in how and whether judges used summing up to explain and debunk rape myths. In some cases, judges alluded to rape myths or stereotypes very generally. In others, judges touched upon rape myths specifically relevant to the case. Most rarely, they explicitly pointed out occasions on which rape myths were used during the trial and warned about relying on such evidence during deliberations.

#### Specific mention of rape myths used in trial

Court observers recorded that judges specifically mentioned rape myths used during trial in four cases.

T16 was the trial in which rape myths appear to have been most comprehensively highlighted and debunked by the judge. In summing up:

*"the judge did state that the defence barrister used a lot of rape myths (actually using the word rape myth). He said the jury should be aware of this."*

One observer commended the judge's summing up:
*"He was excellent and the only person to touch on intoxication as a factor in consent".*

In this trial, the same observer highlighted that the judge brought up other examples of stereotypes and assumptions, and specifically referenced the defendant's statement that *"if they didn't want sex, they shouldn't have come"*, to point out that this is not how consent works.

In other cases, the judges' comments were not quite as explicit, but nonetheless pointed out certain assertions made by the defence that constituted rape myths.

In T14:
*"The Judge emphasised that delay in bringing forward allegations of sexual offences should not cast any doubt on such allegations and gave a number of good examples as to why an injured party might not come forward immediately e.g he talked about how the trauma of a sexual offence can affect every individual differently. He also advised that they dismiss the notion that a man of good character would be unlikely to do the things alleged."*

*"The judge says that the jury should put all stereotypes aside (both about the defendant and the witness) as 'people are different and react in different ways'. He also says 'lose the assumption that when the report is delayed, it must be untrue'."*

The judge's summing up in this trial was commended by one observer as *"very comprehensive."*

In T18, both observers reported that the judge dealt with several rape myths in summing up. In particular, the judge stated that a person is entitled to wear nightwear in their own home and *"this was her choice to do so in the comfort of her own home and did not mean she consented"*[104]; that alcohol consumption does not mean that the person wanted sex; that messages and texts with emojis do not equate to consent; and that inviting the defendant into their house does not equate to consent.

In T21 both observers noted that the judge went into detail in summing up about a number of rape myths raised in the case, including those relating to the parties' lifestyle, what constitutes 'moral' behaviour, alcohol and consent, the difference between consent and forced submission, and the fact that no injury or damage doesn't mean no rape took place. The summing up was described as *"excellent"* by one observer.

*"The Judge did explain all the rape myths and how they should be ignored and that these could be prejudices so please to set all prejudices aside."*

#### General mention of stereotypes and rape myths

In the majority of cases which reached summation stage,

observers recorded that judges offered more general instructions or guidance about stereotypes and how there is no standard response to sexual trauma, and no typical victim or attacker. Judges may also have raised other issues that were relevant to the case, but did not necessarily single out any evidence or assertions made as being rape myths. In these cases, observers often felt that judges did not go far enough to unpick the rape myths that had been used during trial. This is in spite of the fact that observers almost universally felt that judges were otherwise excellent in summing up and gave fair and even-handed summations of the case before them.

In T1, both observers agreed that the judge made mostly general comments about stereotypes, though did not fully explain what stereotypes meant or link these comments to specific evidence presented during the trial.

One observer opined: *"[The judge] reviewed the trial very well, but was not specific around rape myths."*

Both observers agreed that the judge provided a good explanation of how there is no standard response to sexual trauma, and that child victims may additionally be afraid to report out of fear, and also mentioned that delay in reporting did not prove that the allegations were false. Observers also noted that the judge commented on inconsistency of accounts does not equate to lying, especially given that this was an historical case, and that *"there is frailty of memory after these events"*. [105]

In T6, both observers agreed that the judge did address some rape myths and stereotypes. These included that there was no typical rape, that previous relationship didn't equate to consent, and that delay in reporting didn't mean it didn't happen. The judge also gave some examples of why someone might delay reporting. However, one observer felt that *"the judge did address some rape myths but could have gone a bit further."*

In T13, both observers recorded that the judge explained to the jury that there was no such thing as a typical victim or typical defendant, and mentioned the fight / flight / freeze responses that victims might have. He also stated that delay in reporting did not indicate that an allegation was false.

In T22, one observer recorded that although the judge didn't specifically point out rape myths when they were used during trial, they did offer guidance on how there is no one way to react to rape, that consent could not have been given if a complainant was unconscious, that not fighting back was irrelevant as rape was *per se* a crime of violence, and that kissing someone does not imply consent for sex. Interestingly, the other observer of this trial did not identify any rape myths being highlighted at all, which may reinforce the hypothesis that different people have different understanding of rape, consent and stereotypes depending on their world view and life experience.

In T23, one observer noted that the judge made comments about rape myths that were both general and specific to the counts. However, the other observer felt that *"the judge briefly touched on rape myths but did not go into much detail."*

In T25, neither observer reported any specific mention of rape myths:
*"I don't recall the Judge actually referring to 'rape myths' as such – but in summing up referred to not drawing any inference from some of the evidence."*

**Use of rape myths by judges in summing up**

In 1 trial[106], an observer suggested that the judge had used a rape myth in summing up and that they felt this biased the trial in favour of the defendant. The observer commented that although the judge *"did cover some points such as the age of the complainant and how children may be prohibited by things such as secrecy and that children may not want to come forward at the time through fear or shame"*, they also made extensive comments about the social class and good employment record of the defendant, contrasting with the complainant's bad record:

*"The judge went so far as to imply that as the defendant was [an older man] and without criminal conviction that he would likely never engage in criminal behaviour."*

The other observer in the case also asked *"Should we endorse that just because a person does not have a criminal record and works hard in his whole life, means that he is very unlikely to commit the crime [many years ago]"*, but went on to posit that the judge may just be *"being careful"* in instructing the jury because the evidence against the defendant was not very strong overall.

In another trial[107], one court observer recorded that they felt the judge was *"very biased in favour of the defendant"* during summing up, and highlighted the judge's emphasis on the defendant's university education and youth as evidence for this. This view was not fully corroborated by the other observer, who felt that although *"the tone of voice used suggests to me the judge's sympathy is with the defendant"*, the summing up was nonetheless "*excellent – even handed & a good review of the evidence."*

This example again highlights the subjectivity involved in observing criminal trials, and how different individuals often have a different understanding of rape myths and may place differing emphasis or importance on what they observe.

## 5. Failure to address rape myths

In several trials, observers criticised what they felt was a failing by either prosecutors or judges to address rape myths or intervene in a timely fashion when rape myths were used by defence counsel.

The most common criticism from observers is that prosecutors failed to intervene to challenge rape myths used. In T1, one observer noted that:

*"There seemed to be a reluctance in the senior counsel to get into it with the defence. The junior was pointing out things to the senior that she was unhappy with, but he didn't get involved. I only have one recording of a complaint from him. There are a number of points that should have been refuted immediately in my opinion that were let go and as a result were used repeatedly after this."*

The observer specifically pointed to the defence's use of a 'why didn't you fight him off' narrative, with no reminder to the jury or intervention to clarify that the complainant was a young child at the time of the allegations. Later in the trial, the observer noted that the prosecutor didn't do or say anything to counteract the rape myths used by the defence, saying *"no one challenged the rape myths at all from the PPS"*.

In T18, both observers were critical of what one described as a *"notable lack of interventions from prosecution."* One argued:

*"The prosecution should have intervened on many occasions but instead ignored the line of questioning. I think this is why the judge felt the need to intervene on so many occasions."*

The same observer concluded in the 'overall impressions' section of the questionnaire that:

*"I think the prosecution could have done much more throughout the trial. It very much felt that the defence got away with far too much during cross-examination and with his line of questioning with his own witness."*

In T13, one observer complained: *"The prosecutor did not intervene. It should be noted that it didn't look like the prosecutor was even paying attention."*

Some observers were also critical of judicial inaction when rape myths were raised. In T15, one observer recorded that:
*"The prosecutor did try and raise an issue regarding the line of questioning [which was based on rape myths] but she was ignored by both the defence and the judge."*

In T16 during complainant cross-examination, the defence asked about drug use unconnected to the incident. Upon replying that she didn't think that was relevant to the accusation, the complainant was told by the judge that they or the prosecutor would intervene if any of the questions were irrelevant. The observer gave the view that:

*"This situation doesn't seem to show a lot of confidence in the judge or prosecutor because they obviously don't intervene a lot."*

The same observer later noted:

*"The prosecution and the judge did intervene at some points but especially when the defence started to use rape myths (you didn't tell him to stop, you just let it happen, …). I expected the judge and prosecution to intervene and they didn't."*

In the same trial, another observer complained that the defence used multiple rape myths in their closing statement, and that *"there was no contradiction of any of these statements until after the jury had been dismissed for the day, when the prosecution barrister took the defence to task."*

The judge consequently highlighted that rape myths had been used during summing up. However, the observer refuted this approach as insufficient, saying:

*"Why were these statements not challenged at the time? Is this the convention? The prosecution because they go first cannot know what the defence is going to say, so why can't they challenge in real time?"*

## Discussion

The determination of what constitutes a rape myth, and the influence that such myths may have on jury deliberation and verdict, are undoubtedly difficult to quantify. As societal understanding of sexual violence has evolved over the centuries, so too has the composition of the myths and stereotypes that remain embedded in collective societal subconscious. An overt myth like 'a woman who has sex out of wedlock is a loose woman and therefore cannot be raped' is unlikely to be a widely held view or a successful argument in a twenty-first century UK court; instead, rape myths tend to be raised in more subtle and insidious ways. Therein lies the difficulty in policing their use, and indeed identifying them in the first place. During the course of this project, it has been acknowledged that it can be challenging to discern what constitutes a rape myth, what is a valid

comment pertinent to a case, and what is a mix of both, with rape myths interwoven into narratives that are justified on the grounds of relevance to a case. This is the challenge that was posed to our court observers when undertaking their work, and it is a challenge faced by judges, prosecutors, defence counsel and, most significantly, juries every day in the Northern Irish criminal courts.

To overcome this hurdle in our project, court observers were given specific training on rape myths so they would be better able to identify them in the course of their observations. Even with that training, however, different observers sometimes had different perspectives as to what constituted a rape myth. As this research is based on the recording of observations of lay people, it is not for the authors to make definitive pronouncements on which rape myths were or weren't correctly identified. The cornerstone of the project is that the best people to observe what happens in our courts on behalf of the public are members of the public themselves.

Indeed, since it is ordinary members of the public who compose our juries, there is significant value in the observations within this chapter as they are. On one hand, observers were given more rigorous training and education on rape myths than a standard jury, and the impact of this can be seen in the frustration of many observers when they saw rape myths being used, and going unchallenged or uncorrected, during trials. As the project wore on, that frustration was on occasion expanded to include exasperation at Not Guilty verdicts that they felt should have resulted in a conviction.[108] This disparity may indicate that lack of training and education of juries on rape myths is influencing verdicts in Northern Irish sexual offences trials. Such an outcome would be consistent with research that has been conducted in other jurisdictions on rape myths[109], and would corroborate the concern raised by Sir John Gillen in his review.

On the other hand, the fact that observers sometimes held differing opinions on what constituted a rape myth even after receiving training, raises another issue: that brief training or education on rape myths may not be sufficient to undo a lifetime of unconscious bias and messaging that reinforces rape myths. This finding may cast doubt on the efficacy of current proposals to educate juries on rape myths and unconscious bias in an effort to minimise the influence of rape myths on trial outcomes.

In any event, the observations of court observers about the prevalence and influence of rape myths in Northern Irish sexual offences trials has confirmed that rape myths continue to be widely used. As a complainant seeking justice for a rape or other sexual offence, one might endure victim blaming, character assassination, accusations of 'crying rape' out of revenge or embarrassment, or having one's natural bodily response to trauma used as evidence that the allegations were fabricated, during cross-examination. As has been documented earlier in this chapter, observers often expressed incredulity at the usage of rape myths, and highlighted the widespread use of innuendo, implication and suggestion as tools to weave rape myths into defence narratives with the aim of creating doubt about allegations in the minds of jurors. Taken together, this collection of observations makes grim reading for anyone seeking solace that our justice system is fit for purpose when it comes to sexual offences trials.

The comments from observers clearly indicate a distaste and discomfort for what they felt were ethically questionable choices to use rape myths so readily during trials, and this will be expanded upon further in the chapter on Dignity and Respect. Significantly however, most criticism was reserved for the broader court culture whereby such rape myths were not challenged at the time, and were therefore potentially accepted as legitimate commentary or evidence by juries. In spite of the PPS's commitment that they *"[do] not allow these myths and stereotypes to influence decisions and will robustly challenge such attitudes in the courtroom and in any other place"*[110], it is evident from observations that this is not the case in practice. Observers were often confused by what they saw as an illogical element of criminal justice culture and practice, and as outsiders with no previous knowledge of the justice system or its foibles they struggled to understand why rape myths were handled in such a manner. As succinctly summed up by one observer when asked for any further comments or observations:

*"Just the fact that no one refutes the rape myths there and then. Why wait until summing up?"* [111]

It is clear that this cultural antipathy to robustly challenging rape myths and stereotypes, either when they are uttered or as part of the thread running through prosecution narratives, must change. In creating a culture of challenge, where rape myths are not simply allowed to hang in the air or be accepted as fact, there may be a better chance that the perceived value of using such myths in defence narratives is reduced.

## Recommendations:

- All agencies: fully implement the recommendations of the Gillen review relating to rape myths.
- PPS – implement a review into policy and practice for challenging rape myths within sexual offences trials. Introduce a practice of highlighting and debunking in all closing statements any specific rape myths used by the defence during trial. Introduce training on challenging and countering rape myths for all relevant prosecutors.
- DOJ: As per Gillen recommendations, introduce standardised, thorough educational material on rape myths for all jury members in sexual offences trials, and monitor the effectiveness of these initiatives in improving jury understanding of rape myths and stereotypes.
- DOJ: Conduct robust, peer-reviewed research into how Northern Irish juries deliberate in sexual offences trials, with a view to identifying if rape myths are influencing decision making. If the research confirms that rape myths continue to influence the jury deliberation process, reconsider the suitability of jury trials in these cases.
- Review guidance for defence counsel relating to the use of rape myths, and consider enforcement measures or professional fines in cases where such myths are persistently used in spite of judicial direction otherwise.
- Judges: Introduce a requirement to give juries direction and explanation of rape myths before the beginning of all sexual offences trials.

# Previous Sexual History

**The use of previous sexual history to discredit rape allegations has a long and inglorious history, not only in the Northern Irish justice system but across the UK, Ireland and beyond. Such practice was based on the 'twin myths', that a woman who alleged sexual assault but had been sexually active in the past was likely to have consented on the occasion in question, and in any event could not be trusted as a reliable or truthful witness. In modern legal practice, this tactic has been decried as the overt misogyny and victim-blaming that it is, and thus if defence counsel wish to raise previous sexual history of a complainant as evidence, they must apply to the trial judge to do so. In Northern Ireland, this procedure is governed by Article 28 of the Criminal Evidence (Northern Ireland) Order 1999.**[112]

Under Article 28, previous sexual history of a complainant cannot be raised in court unless an application has been made to the judge, and the judge has ruled that it can be admitted as evidence. The law also outlines occasions when such evidence can be admitted: the evidence must be relevant to the case; failure to disclose the evidence would render a verdict unsafe if it wasn't admitted; the issue the evidence speaks to should not be consent; if the issue in question is consent, the evidence should relate to complainant conduct that happened around the same time as the alleged offence, or the conduct should be so similar to conduct around the time of the allegation that it could not be a coincidence.

In the original *Seeing Is Believing* court observers project in Northumbria, misuse of previous sexual history evidence in rape trials emerged as one of the primary issues affecting the attainment of justice for victims of sexual crime. One of the aims of this Northern Irish study was to ascertain whether similar issues plagued the Crown Courts in this jurisdiction, and whether improper reliance on previous sexual history of complainants was a common feature of defence narratives.

As part of the questionnaire, court observers were asked if previous sexual history was brought up during the trial, and in what context. Enquiries were made to ascertain whether Article 28 applications had been made in advance of trial, and observers recorded instances where applications were made on the day of trial.

## Overview

Previous sexual history applications made in advance: Undetermined[113]
Previous sexual history applications recorded by observers as applied for on the day of trial:

- T10 (refused)
- T18 (refused)
- T20 (refused then allowed to be renewed due to new evidence in trial)
- T23 (allowed)

Previous sexual history was recorded by observers as having been used by defence during trial in T1, T6, T10, T13, T18, T23 and T25.

Unfortunately, it was not possible to accurately determine for all the trials observed whether Article 28 applications had been made in advance. This limits the ability of this study to fully explore the extent to which previous sexual history evidence is being improperly used in Northern Irish criminal courts. Given its importance and the interest in the use or misuse of previous sexual history evidence in the Gillen Review, it would be therefore invaluable for further research to be carried out which focuses exclusively on this issue.
Nonetheless, the observer project did identify usage of previous sexual history in sexual offences trials, and raises some interesting related points.

Firstly, observers did not always agree on whether previous sexual history evidence was raised and appeared to have differing understandings as to what constituted previous sexual history. In four trials[114], only one of the two observers recorded previous sexual history evidence being used. In two of those trials, the other observer did describe the use of previous sexual history as evidence elsewhere, but did not attribute it as being previous sexual history evidence. Three out of the four trials related to previous relationships between complainant and defendant. It is possible, therefore, that observers were not aware that previous sexual history evidence could include evidence relating to the complainant and defendant themselves, resulting in skewed reportage. This raises a question as to whether some observers, and therefore some members of the jury-constituting public, have a blind spot when it comes to cases in which the accused and accuser are, or have previously been, in a relationship.

Previous sexual history evidence manifested in several ways in the observed trials: evidence of complainant and defendant's prior sexual history; evidence of complainants' previous sexual behaviour with others; evidence of

subsequent sexual behaviour of complainants in historical child sex abuse cases; and evidence of a complainant's sexual naivete.

## Complainant and defendant in previous intimate relationship

This type of previous sexual history evidence was most common in the trials observed.

In T6, the previous relationship between complainant and defendant was raised by both the prosecution in their opening statement, and by the defence during complainant cross-examination.

*"The defence mentioned quite a few times that the complainant and the defendant were in a relationship for [several] years and had children and one on the way at the time of the offence. Almost implying that the complainant couldn't have been raped as she was with the defendant at the time of the incident."*

In T21, although neither court observer recognised it as an example of previous sexual history evidence, both recorded that the previous relationship of both parties was raised, and that the defendant claimed that he loved the complainant and proposed to her the night in question. This was presented as evidence that a rape could not have taken place.

In T23, an Article 28 application was discussed before the case started on day one. Both observers noted that the previous sexual history of the parties was raised throughout the trial. One observer framed the defence's argument as *"they had sex before and so it must have been consensual"*.[115] The other recorded that the defence attempted to cast doubt on the allegation *"by constantly referring to a previous sexual encounter between the complainant and defendant some months earlier."*

In T25, one observer recorded that previous sexual history was raised throughout the trial as the two parties had been in a relationship. The same observer felt that the fact of the relationship was used to discredit the complainant and their allegations. They reported the defence asking during cross-examination:

*"You had a very high sex drive didn't you? Having willing sex 4 times a day?"*

The observer noted that the *"implication was that the complainant would never say no. And was therefore always consenting."* This is in spite of the established fact that the defendant was a domestic abuser, who had been convicted of domestic abuse-related crimes against the complainant. There does not appear from observer records to have been any discussion during trial around the capacity to consent of a victim of sustained domestic abuse and coercive control.

## Complainant's sexual behaviour with others mentioned

Previous sexual history relating to the female complainants' conduct with other men was raised in two trials.

In T18:

*"The defence QC made a huge deal about the complainant kissing another friend the night before, after saying she was not interested in him. Defence played on the fact that the complainant had quickly changed her mind and that she liked to lead men on and act flirtatiously."*

In the same trial, one observer recorded that the defence also tried to bring in evidence about the complainant having had anal sex before and being on contraceptives, but this application was refused by the judge.

In T20, the defence applied to have evidence introduced about the complainant's sexual preferences, but this was denied by the judge. Later in the trial, evidence arose that made the previous sexual history relevant and the judge allowed the defence to re-apply. Ultimately, new evidence came to light, which led the prosecution to offer no further evidence, and an application of No Case To Answer was accepted by the judge.

## Historical child cases where sexual history of complainants after time of alleged assaults raised

In two historical child sex abuse trials, evidence was introduced about the complainants' subsequent sexual behaviour after the date of the alleged offences.

In T1, it was noted that no forensic examinations were carried out after the complainants' reported the rape because they were now sexually active. According to one observer, the manner in which this evidence was introduced failed to highlight the passage of time between the initial report of the allegations and police action, and therefore created a false impression that the complainants were underage and sexually active. This may have contributed to a defence narrative painting the complainants as being of bad character. It was also notable in this trial that the defendant was quoted as saying that the complainants were *"nothing but two whores from [town name removed to protect identity of parties]"*. These narratives reinforce the 'twin myths' by asserting that the complainants were sexually active from a young age and therefore were likely to consent to any sexual activity and could not be trusted as reliable.

In T10, one observer noted that the complainant's previous sexual history with another relative was raised by the prosecution, presumably because they felt the defence would no doubt raise this to discredit the witness. Instead, the defence argued that the evidence was false and a deflection from the allegations. The observer recorded that the defence attempted to introduce evidence about a book written by the complainant which contained sexual content, but this application was refused.

## Mention of complainant's views on sex

In T13, one observer noted that *"The defence mentioned that the complainant was uncomfortable talking about sex and that she was naïve when it comes to sex even though she had a boyfriend at the time of the alleged incident."* Unfortunately, there was no further elaboration from either observer as to how this was used or characterised during trial.

## Discussion

It is clear from observer questionnaires that previous sexual history has emerged as an issue during this study. This is in spite of the fact that, unlike the Northumbria panel, the Northern Irish observer project included trials that were less likely for the issue to be raised, such as cases involving child complainants and historical cases.

It is unfortunate that a full picture was not able to be established of whether advance Article 28 applications were made in all trials. Nonetheless, even without this data, the evidence gathered by observers shows examples of previous sexual history being used to reinforce the rape myth that if you have been in a relationship with someone you are unlikely to have been raped by them. This is worrying, not least because sexual coercion and abuse are well-documented forms of domestic abuse, yet convictions for marital rape in Northern Ireland since the determination that marital rape is a crime in the 1990s[116] remain low. It once again raises a question as to how the issue of consent is played out in sexual offences trials. The observations submitted show that, at least in some cases, the 'twin myths' appear to be alive and well, and considered to be convincing narratives by defence counsel.

## Recommendations

- Further, focused research on the use of previous sexual history in Northern Irish courts to establish whether improper introduction and usage of such evidence is prevalent and if it is influential on verdicts.
- More robust interventions and ground rules around the improper framing of previous sexual history evidence, especially where consent is implied because of the existence of a previous relationship.

# Compensation

**Asking a complainant at trial if they have applied for Criminal Injuries Compensation can be a means of attempting to discredit them, by feeding into the so-called 'gold-digger' rape myth or stereotype. While this line of questioning could potentially be used in any criminal trial, Victim Support Witness Service staff have anecdotally reported over the years that such lines of questioning are disproportionately used in sexual offences trials against mostly female complainants. The motivation for such questioning is often to characterise the complainant as making a false rape allegation for financial benefit, feeding into another rape myth that false rape allegations are a common occurrence. Consequently, the Gillen Review has included a recommendation that the admissibility of evidence around compensation should be established pre-trial, and should only be admissible where there is evidence to support its introduction. As part of the court observer project, a question was included about compensation in the questionnaire to ascertain whether this issue arose during the course of observations.**

Out of 14 cases that reached complainant cross-examination stage, complainants were asked about compensation or financial gain as a motivation for making a false rape complaint in three trials: T1, T10, and T14.[117]

In all cases, defence counsel pursued a line of questioning that suggested the complainants had made false rape accusations in order to obtain criminal injuries compensation.

In T1, one complainant was asked *"did your sister tell you that there could be money at the end of this?"* by the defence barrister, who *"suggested that that was her sole reason for being here."* This question tied in with a wider narrative accusing the complainants of conspiring rape allegations as revenge in a land dispute.

In T10 and T14[118], one complainant was asked whether he knew he could get £70,000 for a successful rape conviction. This questioning was part of a wider defence narrative which sought to discredit the complainant's character and *"make [him] look like a liar and an extortionist"* instead of addressing or refuting the allegations. It was noted by all observers that in this trial the defence barely mentioned the allegations themselves, instead focusing hours of cross-examination on discrediting the complainant.

In one other trial[119], while criminal injuries compensation was not raised in relation to the allegation in question, defence counsel did ask the complainant about a previous application for compensation for an unrelated incident. A further line of questioning was raised about an alleged dispute over the inheritance of a house. Again, this was part of a wider defence narrative that focused mainly on discrediting the character of the complainant and promoting the 'good character' of the defendant, instead of addressing the allegations in detail.

## Discussion

Although the use of questioning about compensation arose in a relatively small number of trials, it is nonetheless concerning that there is evidence of such lines of questioning at all. The ethos behind Criminal Injuries Compensation is to provide some recognition of the victimhood of a person injured by criminal violence, given that procedural justice regards that injured party as merely a witness in the State's case against the defendant. Applying for Criminal Injuries Compensation is a legally held entitlement under the Northern Ireland Victim Charter,[120] and it is unfair and disparaging that a victim of crime might expect to have their exercising of that right used against them in court. The possibility that this line of questioning may be more prevalent in sexual offences cases speaks to the continued perpetuation of rape myths which tend to disbelieve victims and wrongly inflate estimates of false rape allegations.

One further interesting finding from the feedback of our court observers was that this isn't necessarily a strictly gendered issue. Whilst anecdotally Victim Support NI staff have reported over the years that such accusations tended to be levelled against women, the observers recorded that questioning about compensation was directed at a male complainant. While the case numbers are too small to draw any statistical or definitive conclusions, it would nevertheless be prudent to examine the issue going forward with an open mind as to a gendered component of such rape myths.

## Recommendations

- Questions relating to compensation should be subject to pre-trial application, similar to previous sexual history applications, and such lines of questioning should only be allowed if there is evidence to support such an assertion.
- Further monitoring should take place to ascertain the extent of the use of such questioning and whether it feeds into and validates rape myths around 'gold-digging' or making false rape allegations for financial gain.

# Dignity & Respect

Under the Northern Ireland Victim Charter, victims of crime are entitled to *"be recognised and treated in a courteous, dignified, respectful, sensitive, tailored, professional and non-discriminatory way"*.[121] More specifically, the Charter states that:

*"It is up to the court to make sure the trial is conducted in a fair and just manner. When giving evidence the Public Prosecution Service prosecutor will treat you respectfully, and where appropriate, will seek the court's intervention where the prosecutor considers that questioning is not appropriate or is aggressive."*

Defendants, too, have a right to expect fair and respectful treatment in court. This is part of a wider suite of rights of a defendant to a fair trial, which are enshrined in international and domestic law[122], and form the cornerstone of our legal system.

Under the Bar of Northern Ireland Code of Conduct, all barristers must conduct themselves with honour and integrity, must act with due courtesy during court appearances, and must guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or some other person, or which bear no relevance to the issues in the case.[123] This Code of Conduct applies to all barristers, regardless of whom they are representing.

Over the years, Victim Support staff and volunteers have anecdotally reported instances in which treatment of victims of sexual offences was traumatising, revictimizing and even as debilitating as the effect of the crime itself. This has been echoed by Sir John Gillen in his report on the law and procedures in serious sexual offences, who reports that, in some instances, *"the tone, pace and volume of cross-examination in some instances is less than the courteous and dignified treatment that should be accorded to all witnesses"*.

This study sought to explore further whether this was broadly the case in sexual offences trials in Northern Ireland, by asking court observers to record whether they felt that complainants were treated respectfully during the course of the trial. Additionally, this research has expanded on the Northumbria work to also include the treatment of defendants during trial. Observers were asked to record what they found to be respectful and disrespectful about how prosecutors, defence counsel and judges treated both complainants and defendants during trial. They were also asked to record whether any interventions took place.

## TREATMENT OF COMPLAINANTS

### Defence counsel

Of the 14 trials that reached complainant cross-examination by the defence, observers recorded what they viewed to be disrespectful treatment in 13. This conduct ranged from more minor behaviours like repetitive or persistent questioning, through to what observers regarded as behaviour that constituted harassment, aggression or bullying behaviour towards the complainant.

In 10 trials, observers noted both respectful and disrespectful treatment of the complainant at different stages of the trial. In most cases, they observed initial politeness at the beginning of questioning, and increasingly disrespectful treatment as cross-examination progressed.

In only one case[124] did both observers comment that the defence was conducted in a respectful manner throughout the trial. It is interesting to note that the defence barrister's exemplary and respectful behaviour was not disadvantageous to their client, as the jury delivered a Not Guilty verdict for the defendant.

The main forms of behaviour that observers identified as disrespectful treatment were aggressive or harassing questioning; overly persistent questioning; cruelty or insensitivity during questioning; persistent accusations of being a liar; sarcasm, mockery and belittling complainants; raised voices and shouting; victim-blaming; and unreasonable attacks on the complainant's character.

During the course of the project, observers consistently expressed their opposition and distaste to what they felt was unreasonable treatment of complainants by defence barristers.

There was also significant crossover between commentary on disrespectful treatment and evidence of rape myths provided by observers. In a number of cases, aggressive and dismissive treatment of the complainant on the stand were coupled with the use of rape myths, stereotypes and victim-blaming to dismiss or disregard their testimony.

It has not been possible to capture all comments made about disrespectful treatment of complainants in this report as they were too numerous. Below is a selection of comments which highlight the different types of treatment identified.

#### Aggressive treatment or harassment

In T1, one observer described the questioning of Complainant 1 as *"vicious"*, and stated that there was *"nothing respectful about this questioning – absolutely oppressive and set out to infuriate and belittle the witness."*

The other observer agreed, saying *"There was no respect shown to the complainant – a young person about to be questioned about the most serious of sexual crimes which she alleged happened to her when she was a child"*, and described the questioning as *"very patronising and disrespectful"*.

In T14, one observer noted that *"following some initially pleasantries the remainder of the cross questioning was mainly aggressive and confrontational"* and that *"the defence barrister's tone and body language was aggressive from the start and became heightened at times."*

When asked what they saw that made them think the complainant was being treated respectfully, the other observer of this trial answered *"Not a lot honestly"* and cited the barrister's *"very aggressive body language"* and rudeness to the complainant.

In T15, one observer noted that the defence barrister *"did raise his voice against complainant gradually over the cross-examination."*

The second observer also reported: *"If I'm being honest I seen very little respect for the complainant. The defence barrister was quite rude and aggressive with the questioning"*, and recorded that *"the defence was screaming at the complainant and constantly saying the complainant was a liar."*

Interestingly, this was one of the few trials observed that involved a male complainant, and this led one observer to opine:

*"I feel that had the complainant been female then he would have been shown much more respect from the defence."*

In T16, when asked if there was anything that led them to think the complainant was treated respectfully by the defence, the observer responded, *"Nothing I can remember or noted."*

The other observer described the defence's tactics as *"treating the complainant quite hard but in a very sneaky way."*

In T18, one observer expressed the view that *"the defence should not have been allowed to get away with as much as it did."*

The other observer reported that the *"barrister called the complainant 'darling'. His tone was patronising during the whole cross-examination."*

In T23, one observer had multiple reservations about the defence barrister's conduct. These included:

*"Not allowing the complainant time to read documents before questioning. Pushing her all round her statement and then demanding an immediate answer"*

*"The defence barrister is argumentative and repetitive, spoiling for a fight."*

*"Very aggressive, pushy intrusive questions, mainly about their relationship, rather than events on the night."*

The conduct led the observer to question *"How far does a barrister have to go before he gets a penalty?"*

In T25, there was a divergence of opinion between the two observers about the conduct of the defence towards the adult and child complainants.

One observer stated *"it was the worst I have seen. The prosecutor complained within 10 mins of the defence starting of his hostile confrontational tone. And it went downhill from there"*. They went on to say:

*"The cross examination was aggressive and demeaning. The defence barrister went out of his way to be unpleasant and dismissive. Complaining at every step about the effect his deliberately insulting questions were having on the complainant."*

This observer also made comment about the cross-examination of the second complainant, who was a child both at the time of the offences and at trial. In particular, the observer was critical of the fact that the *"questions veered away from what had been agreed [in ground rules] – i.e. short simple questions"*.

By contrast, the second observer made only one brief comment about the conduct of the defence, describing the nature of the cross-examination as *"robust but not disrespectful."*

This perhaps highlights the subjective element within the

study, and how different individuals will view behaviours differently and have different standards of what they regard as reasonable behaviour.

### Lack of sensitivity / cruelty

In some cases, observers recorded particular instances in which defence barristers showed lack of sensitivity to complainants, often causing them anguish or upset.

In T1, one observer recorded that the barrister pursued a line of interrogation which blamed the complainant for not reporting the alleged offences earlier. They recorded:

*"It got to the stage when you could hear the girl crying and shouting [in the live link room] because she felt she hadn't protected her little sister adequately. The defence barrister then complained to the judge about her behaviour on the stand."*

In T10, both observers highlighted one incident during cross-examination of the second complainant as being particularly lacking in sensitivity. The barrister declared it was *"convenient"* that the only person she told about the offence, her sister, was now dead and therefore couldn't testify. One observer described this as *"the most brutal form of disrespect"* and stated that *"this was a very low moment."*

In T18, the defence barrister was described as *"relentless with the barrage of questions put to the complainant" which "did not stop or slow down when the complainant got very upset. Defence seemed to completely ignore the fact that the complainant had become extremely distressed."*

In T25, one observer described the incredulity and sarcasm used when the complainant described decades of rape and sexual assault by her abusive partner. The observer described how *"The complainant is so upset she starts retching in the live link room"* during cross-examination, and *"cried a lot"*. The defence barrister complained that her distress *"hampered his questioning"*, and accused the complainant of faking her distress.

The observer also noted that:
*"The defence barrister also asked her why she cried so hard in court but not in the ABE"*, reinforcing myths about how victims of sexual violence tend to react in the aftermath of an assault.

### Persistent or badgering questioning

In T1, one observer described the defence barrister as *"both hectoring and dismissive" o*f the complainant during cross-examination, and highlighted what they regarded as *"persistent questioning - to the point of harassment"*.
The second observer agreed, describing the cross-examinations of the complainants respectively as *"relentless and painful to watch" and "of a badgering nature"*. This observer further noted:

*"The defence barrister's persistence on some questions was difficult to understand. For example his questions about what she was wearing when she was allegedly assaulted when she was [a small child] and a conversation that she had had with her sister about it when she was [a young teenager] went on – and on. The judge intervened on numerous occasions (8 or 9) but the defence barrister persisted with a tone that was at times aggressive and at others dismissive."*

In T6, both observers commented that questions were asked multiple times, even though the complainant had already answered. One observer opined that they believed this was in a bid to *"confuse the complainant."*

In T14, one observer commented that they saw *"nothing in particular" t*hat demonstrated respectful treatment of the complainant, and that *"persistent questioning was a big feature."*

In T15, one observer noted that:
*"The Defence came across as very aggressive to the complainant, there was a very persistent line of questioning with many questions repeated multiple times. The complainant was called a liar on many occasions and even though the complainant seemed upset a few times, no break was offered."*

In T16, the observers pointed out that the defence were very persistent and repetitive in questioning, especially in relation to alcohol consumption.

In T18, both observers reported that the defence was persistent in questioning, to the point that *"the judge had to intervene on numerous occasions to ask the defence to move on as he had asked the same question up to ten times."*

In T20, one observer reported *"questions by the defendant's QC asked several times resulting in some complainant stress and upset"*

In T23, one observer described the defence cross-examination as *"beyond ridiculous"* and stated:
*"The same questions were repeated over and over again. The prosecution and the judge constantly had to intervene over the way questions were put to the complainant. The defence did seem to get away with too much and seemed to ignore all of the warnings given by the judge."*

Observers also drew attention to instances in which barristers did not allow complainants to answer their question properly. In T6, the cross-examination was described as combative, and that *"the defence and complainant was always interrupted by each other, not letting one to finish the sentence."*

In T23, one observer described how the defence barrister *"talks over the witness and cuts her off – judge reprimands him. He speaks very fast and the complainant can hardly get her words out before he goes to the next thing – trying to unsettle her."*

### Accusation of lying

While it is the prerogative of a defence team to test a complainant's evidence and uncover inconsistencies in their testimony, this does not negate the need to treat them with respect. Observers were asked to record instances in which they felt accusations of lying were made in a disrespectful manner.

In T1, one observer alluded to the *"constant reference to lying, which required the judge to direct that where two witnesses gave differing accounts of an event it would be up to the jury to judge who was lying."*

Another observer highlighted how the defence used a facetious calculation of how often the complainant was raped to undermine her testimony. They noted:

*"450 rapes. The defence barrister turns her figure of speech of 'it happened all the time' into that must be every week for 7 years and makes it into 450 rapes. This spurious number is thrown up at every opportunity. The junior prosecutor complains to her senior, but no action is taken."*

The same observer recorded that the defence also used the myth that if a person is raped they would remember all the detail of the ordeal even many years later. They summarised the defence argument thus:

*"If it was important you would remember, but you don't, so it's just a lie."*

In T6 one observer noted that the defence used frequent accusations of lying throughout cross-examination. They reported that the accusations were mixed with details of the complainant and defendant's previous sexual history, and that the *"defence accused the complainant of lying about the father of the baby that she was pregnant with, in order to make the defendant jealous."* The same observer noted how the *"defence accused the complainant of telling an 'exhibition of lies' to protect a witness whom was at the scene of the assault…"*

In T8, one observer recorded:
*"The defence barrister was quite abrupt with the complainant on a few occasions and neither the prosecution or the judge intervened. The defence called the complainant a liar on many occasions and called into question how credible the complainant was due to alcohol consumption… The defence told the complainant that the alleged incidents were nothing more than a dream. The complainant did get upset with the line of questioning."*

In T10, one observer said the defence suggested the second complainant *"made the charges up to bolster [Complainant 1]'s case" and asked "persistent questions about [Complainant 1]'s university attendance" to "make him look flaky."*

In T13, it was noted that accusations of lying were mixed with victim-blaming:

*"The complainant was called a liar and it was suggested that she was telling lies and making the alleged incident up on numerous occasions. The defence at one stage accused the complainant of flirting with the defendant by going outside together for a smoke."*

In T15, both observers noted the aggressive questioning and accusations of lying. One noted that the complainant *"was bombarded by continuous accusation of being a liar. Defence did not hold back and pointing fingers through the screen towards the complainant."*

In T16, rape myths about memory were used, and the defence suggested that *"couldn't remember equalled nothing to remember."* The observers recorded how the defence asked multiple memory questions about such details as *"what colour the beer tin the defendant gave her… was"* and that the thrust of their interrogation could be summarised as *"she can't remember, so she must be lying, so everything she says is untrue."* The observers also highlighted the tone of the defence's questioning, which *"was such that it conveyed disbelief and incredulity – just a tactic to undermine them."*

One observer noted their opposition to the defence's focus on memory questions relating to minor details, asking *"How is that relevant to a case of rape?"*

In T18, one observer pointed out that *"the defence constantly accused the complainant of being a liar and of making the whole 'rape' up as she was embarrassed the encounter had happened."*

In T23, one observer noted their frustration that the defence focused on the complainant's google searches as a means to show they were lying. The defence asked *'why were your*

*google searches about alcohol and rape and not about being unconscious and rape?'* The observer stated:
*"This baffled me – as if being raped while drunk had somehow negated her accusation of unconscious and raped … She was both drunk and asleep."*

In two trials, T1 and T10, accusations of lying went further to imply that complainants had conspired to get their stories straight. What was perhaps most shocking was that in both cases the defence suggested or implied that statutory agencies were also involved.

In T1, both observers highlighted that the defence had made an accusation against the PPS for grooming or coaching the complainant. One observer reported that counsel *"implied that she had been pressurised and insinuated that the PPS had a role in this. The judge warned the defence barrister to be careful in his language with respect to the legal privilege of the PPS."*

The other observer in the case noted that defence counsel spent 77 minutes during cross-examination focusing on *"how she didn't want to come & why she changed her mind. Was she persuaded by [her family]. Or by the PPS?"*
The observers further reported that the defence implied that police were also involved in crafting the complainants' narrative, and characterised the ABE recording, which is a standard procedure in police investigation, as *"an opportunity to show her story in the best light, that she had used it to get her "story" straight with the help of sympathetic and uncritical people"*. The ABE, and the delay between reporting, ABE, and trial, were characterised as opportunities for the complainants to conspire and that they had *"so much time to prepare your evidence"*.

In T10, one observer recorded that a prominent thread running through cross-examination of the first complainant was to characterise standard investigative procedure as a conspiracy to lie. They observed:

*"When Complainant 1 goes to see his ABE tape prior to the hearing – that becomes a 'meeting with the police to talk about the case.' When he and his wife go to give statements to the police… it's sort of made to look like they were getting their story straight'"* with the complainant being asked *"Did you just come out with that or did somebody prompt you to say that?"*

### Victim blaming

Observers recorded several instances in which specific victim-blaming narratives were interwoven into cross-examination.

In T1, observers noted two instances of victim-blaming. The first was blaming the complainant for not volunteering testimony that wasn't asked of them during their police interview:
*"A lot of the defence barrister's questions were about why she hadn't volunteered information during the ABE. Basically why didn't the witness answer questions she wasn't asked - why didn't you see this gap in the evidence and volunteer this information"*

The second strand was to blame the complainant for going to the house of the defendant, a relative, where the sexual assaults were alleged to have taken place. One observer felt that this accusation was particularly unreasonable as the complainant was a small child at the time of the alleged offences, and that the defence's narrative *"implied that small children have the agency to refuse parents."* Both observers opined throughout their questionnaires that the defence narrative seemed to rely on the fact that the complainants were adults by the time of the trial, in the hope that the jury would forget that the case related to when they were children.

In T16, victim-blaming elements were interwoven throughout the defence narrative, including unfounded accusations of drug-taking, and berating one complainant for not resisting strongly enough, even though she testified that she thought the defendant had a weapon.

In T18, similar accusations of failing to resist or fight were raised, as were suggestions of culpability because the complainant flirted with the defendant:

*"The defence kept going back to say that the complainant was playing a flirtatious game as she had used emoji's in her messages. The complainant explained she used them in messages to everyone she communicated with and not just the defendant. The complainant was accused of leading on the defendant."*

At the stage in which the complainant was accused of *"not resisting the attack"*, one observer recorded that she broke down and *"actually begged the defence QC to hurry up and get on with the questions as she wanted it over."*

Similar issues were raised in T20 around consent and blaming victims for not voicing their resistance strongly enough. One observer recorded *"persistent questioning related to rape myths: you didn't say no."*

In T23 both observers reported that there was a victim-blaming element to the cross-examination of the complainant. One observer stated that the defence barrister engaged in *"slut shaming"* of the complainant, and the other wrote:

*"The defence QC constantly called the complainant a liar and accused the complainant of leading the defendant on. The complainant's state of dress was called into question, implying that she had clearly wanted sex by how she was dressed."*

### Attacks on complainant character

In several trials, observers drew attention to what they felt was unreasonable attack on the character of the complainants. Observers pointed out that these were often ad hominem attacks, with little bearing on the allegations and designed merely to appeal to prejudices or biases of jury members.

In T1, one observer reported that the defence made *"references to the involvement of Social Services during her teenage years thereby painting a picture of a dysfunctional life and dysfunctional family – some 10 years after the alleged offences began."*

In T10 both observers reported that only 15 minutes of the four-hour cross-examination of the complainant even mentioned the allegations, *"thereby not giving the complainant much opportunity to explain his allegations"*. Instead the cross-examination *"concentrated on exposing the complainant's character defects and portrayed him as a liar and a fantasist", and included "snide" and "sarcastic"* comments about the complainant's career aspirations.

In T15, one observer recorded that during cross-examination, the defence *"brought up the complainant's history of alcohol abuse and suicidal thoughts"*, his inability to undress in front of his partner, and made reference to the bad reputation of his family, referring to a former teacher's *"hope you are not as bad as your father"*.

In T16, the observers noted that there were *"persistent questions about alcohol intake. This was all the way through. Girl had clearly drunk quite a bit, but on and on about specific numbers and type of drinks consumed…"*
One observer also pointed out that the defence made allegations that the complainant *"was looking for drugs and that this was an arrangement that went wrong. No drugs were found on anyone's blood and urine samples."*

### Instances of respectful treatment of complainants by defence

Observers were also explicitly asked to record occasions in which they felt that the complainant was treated respectfully.

Many examples of respectful treatment related to the beginning of cross-examination.

In T6, observers commended the defence conduct at the beginning of cross-examination, particularly their courteous explanation of what was about to happen. One described:
*"The QC for the defence was friendly and courteous to the complainant and had removed his wig at the request of the judge. The defence QC apologised in advance if he had to look down at his papers etc during the questions"*

In T13, one observer reported that *"the defence barrister was polite and took the time to introduce himself"* at the beginning of cross-examination.

The other observer went further to state:
*"She was treated respectfully. The barrister implied that she was lying because she gave different versions of the story and, consequently, her information was not reliable. However, he did not insist on it and asked the questions politely."*

In fact, in T13, one observer singled out the defence's respectful treatment of the complainant as a positive aspect of the case.

In T14, one observer noted that *"At the beginning of the cross examination the defence barrister was mainly polite as he went through the chronology of events and confirmed dates etc."*

In T18, the barrister's introduction was also commended:
*"The defence QC spoke to the complainant in a friendly, calm voice. He introduced himself. The defence QC explained the type of questions he was going to ask."*

Similarly, in T20, at the start of cross-examination the *"barrister told her that she should ask him to repeat a question if she did not understand it. Generally treated with respect."*

In T23, one observer was complimentary of how the defence QC introduced themselves:
*"The complainant was asked if she could see and hear everything. The Defence QC spoke to the complainant in a friendly and polite manner."*

In other cases, examples of respect were highlighted at other stages of the cross-examination.

In T10, the observers recorded that there was *"no obvious aggression"* shown by the defence and that the defence barrister was *"quietly spoken and polite for the most part – he used mostly a passive tone-but was incisive nonetheless."*
One observer compared the defence barrister's conduct to an earlier trial they had observed, opining:
*"A lot more respect was shown to the complainants than in the first trial that I observed."*
These comments were caveated by the observation that:

*"However the complainant was a good witness".*

In T16, one observer recorded that there was *"no outright hostility"* in the cross-examination and that the defence barrister *"didn't try to rush"* either complainant. The same observer commended the defence barrister for *"[explaining] when facing her with differing accounts what he is doing and where he is getting this information."*

In T22, both observers were complimentary of the defence's civility for the most part towards the complainant. One noted the barrister's *"neutral tone"* and that they were *"very calm and polite."* The other recorded that although cross-examination was *"upsetting"*, it *"seemed to be managed in a civil and respectful manner by the legal representatives."*

T21 was the only case in which both observers reported exemplary treatment throughout cross-examination of the complainant by the defence. One recorded that the barrister *"apologised for talking over her"* and described their *"calm approach gentle tone"*, that their style was *"not confrontational"* and that they asked *"considered questions - not pushy"*.

When asked about examples of disrespectful treatment, the same observer stated that this was *"not really a feature"* in the cross-examination, and again noted the barrister's *"non-confrontational style, detailed questions but not overly persistent. Good tone of voice, no sarcasm. But yet manages to play down actual event confrontation."*

The second observer shared the same analysis:

*"The QC for the defence was polite and respectful to the complainant. Did not raise his voice or become aggressive during the questions. A very professional attitude."*

When asked about examples of disrespectful treatment, they too noted:

*"Nothing to report, a professional well-mannered approach was adopted by the defence… The Defence tried their best to remain professional at all times."*

As previously noted, observers disagreed fundamentally about what they observed in T25. While one described the treatment of the complainant by the defence as *"the worst I have seen"*, the other felt that *"the nature of the cross-examination was 'robust', but not disrespectful."*

## Judges

As vulnerable witnesses, it can be expected that complainants in sexual offences trials will be treated with care and sensitivity. During the course of the project, observers were asked to record any specific methods used by judges to put complainants at ease before giving evidence. Court observer were largely positive about the conduct of judges in this regard. The most common methods of putting complainants at ease were to explain the trial process in advance and to offer breaks during cross-examination. These methods were present in most cases.

In 6 trials,[125] observers noted that the judge spoke with particular care or sensitivity towards the complainant. Judges were also observed to have removed wigs in cases involving children and young adults.

In T1, both observers noted that *"the judge was thoughtful and calming"*, *"often summarising the defence barrister in a way she understands and that takes the heat out of the situation."*

In T6 both observers commented how the judge explained proceedings well and offered breaks every 30 minutes:

*"Prior to the complainant giving evidence via video link the judge spoke with the complainant, judge removed his wig and explained… how the evidence would work and assured the complainant that the questions would not last more than 30 minutes at a time and that at any point the complainant could request a break. The judge also checked that the complainant had a drink available for the duration of the evidence."*

The judge was also observed to have *"…asked for the camera to be directed back to him on a number of occasions as the complainant was upset and the judge asked the complainant if they would like a break or if they were okay to continue"* and it was noted that the judge *"appeared very concerned for their welfare."*

In T10, it was observed that the judge did not need to do much to put the complainant at ease as he *"seems to be a confident, educated person who has thought this through over time. Judge explains the technology and that the proceedings are recorded."* The judge was commended for their *"generally friendly demeanour"*.

In T18, one observer described how the *"judge checked that the complainant could hear and see everything. The judge chatted casually with the complainant to put her at ease and explained how the cross-examination would work. The complainant was told that she could ask for a break at any time. The complainant has a slight disability with her back. Judge told her to try and get herself comfortable and they would take a break as often as was needed."*

The same observer was, however, critical of the number of breaks offered, saying:

*"The judge, in my opinion should have insisted on more breaks when the complainant was getting distressed rather than waiting until [she] completely broke down."*

In T23, one observer commended the trial judge thusly:

*"Excellent, explains the processes to the complainant and the jury in a clear logical way. A real teacher. Takes time to put complainant at ease and describes each section of the trial in everyday language that displays a true empathy"*

Similarly in T25, a case involving both an adult and a child complainant, the judge was described as *"a good communicator, explained the processes to the jury and the complainant in the live link room"*. It was also highlighted that the judge *"took the time to go down and speak in person to the young girl. No wigs or gowns in the court"* and also held a ground rules hearing to agree the questioning style to be used in cross-examination.

In only one trial was the judge described as overtly unsympathetic to the complainant. In T21, one observer described the judge's manner as *"all business"*, and observed: *"I think the judge was unsympathetic to both parties… And that might be why there were virtually no breaks. The break to the complainant was the shortest break I've seen, by a long shot. Just wanted to get this case out of the way as fast as possible."*

The same observer later contrasted this case with another they observed, in which the same judge was presiding. After seeing the judge intervene about defence questioning in that case, they pointed out:

*"I have seen this judge once before and they did not intervene during difficult and lengthy questioning in another court… So why with this case? I believe they were swayed because this was a young, well-mannered girl, from a good background."*

It should, however, be highlighted that the same observer believed that the judge excelled in other ways in T21. In fact, this trial was held up as an example of excellent practice thanks to the judge's considered and thorough summation, and excellent decision tree and written routes to verdict which were provided to the jury.

# TREATMENT OF DEFENDANTS

### Prosecution counsel

Court observers were mainly positive about the conduct of prosecutors during trials. On the whole, prosecutors tended to act respectfully towards defendants, although there were some exceptions which are detailed below. Mostly, observers found prosecutors to be polite and respectful even in the face of aggression from defendants. Where criticism was levelled at prosecution barristers, it related to over persistence in questioning or overly zealous accusations of lying.

### Respectful treatment

In T1, both observers agreed that the prosecution's cross-examination of the defendant was very respectful. Observers complimented their *"good neutral tone of voice"*, the fact that there was *"no oppressive questioning"*, and how the prosecutor *"clarified questions frequently and at each stage she invited the defendant to give his agreement to her understanding of his answers."*

The observers both highlighted that the prosecutor did not react to aggression from the defendant and *"kept a steady voice tone throughout and did not react when the defendant was being abusive to her (accused her of 'whining' and 'smirking')"*.

They commended the fact that the prosecution barrister *"showed empathy for the defendant's physical disability when this was being discussed."*

In T6, both observers made positive remarks about the prosecution, describing them as *"friendly and polite to the defendant"* and pointing out that they offered the defendant a break on request.

In T8, observers described the prosecutor as *"friendly and respectful to the defendant"* and commented that *"the questions were relevant and not repeated over and over again."*

However, they also highlighted that at one point the prosecution was somewhat persistent when asking about the size of a bedroom relating to allegations, leading the defendant to *"get quite frustrated at this point."*

Observers were agreed that the prosecutor in T14 was effective in cross-examination without becoming disrespectful. One noted how:
*"The prosecution barrister spoke in a soft tone throughout – did not harangue the defendant and apologised if he had not made himself clear on point."*

The second observer concurred, saying:

*"The prosecutor is doing a great job undermining the credibility of the defendant, but in a very polite and respectful way. He is not harassing the defendant and he seems really fair… The prosecutor undermined the credibility of the defendant in a polite and respectful way."*

In T15, both observers agreed that the prosecutor was *"calm and friendly and asked questions in a polite manner"* during cross-examination of the defendant, and that *"no extreme or negative words were used while cross-examining."*

When asked what evidence observers saw of disrespectful treatment of the defendant, one answered:
*"Nothing really stood out during the cross-examination"*

In T16, observers again highlighted how the prosecution was effective in cross-examination while also treating the defendant with dignity and respect. Observers commended the prosecutor on their patience, good explanations of what they were going to ask before they posed the question, and care in ensuring that both defendant and translators understood what was being asked even though observers felt that the defendant had a good grasp of English. One observer commented on how:
*"The prosecution barrister was excellent in his tone – there were no theatrical 'tricks'."*

Another observer focused on how:
*"There were a lot of inconsistencies in the story of the defendant and the prosecutor brought these up in a very kind and polite way (as far as this is possible)."*

In T21 the view of observers was more mixed. One noted that *"it was okay, politely straightforward but subtle. A few surprises but no overt aggression"*. The other recorded *"Nothing [disrespectful], maybe a bit of trickery with quoting an abridged version of the text messages."*

In T22 observers noted that there was *"nothing obvious"* to report in terms of disrespectful treatment.

In T23, it was reported that the prosecution barrister was pleasant and professional when cross-examining the defendant, and that *"the prosecutor is very patient"* despite the fact that *"the defendant is completely monosyllabic."*

In T25, observers were complimentary of the junior prosecutor, whom it was reported *"was speaking moderately and with no hint of aggression. The defendant was given numerous opportunities to speak in a way that could be heard and understood – and although the defendant tended to ignore the requests they were always put to him in a respectful manner and not with any sign of exasperation"*

### Persistence

As already alluded to, one of the most common criticisms of prosecutor conduct was of persistence in questioning.

In T1, both observers picked up on this. One noted that the cross-examination of the defendant was *"persistent but not as nakedly aggressive as [the cross-examination of the complainant by the defence]."*

The other remarked on the impact that this persistence had on the defendant, saying:
*"Questioning was unnecessarily persistent at times – which required the judge to intervene – and contributed to the defendant's anger."*

In T6, observers noted persistence in questioning, but felt that it was perhaps justified:
*"There was persistent questioning but the defendant did keep giving different versions on each occasion so it may have been needed."*

In T14, criticism of the prosecutor's persistence was more pointed. One observer recorded how the prosecutor *"stayed on one topic for 23 minutes and gave defendant what I would describe as a 'gruelling'"*.

In T18, one observer picked up on a tactic of the prosecutor, that *"sometimes the prosecutor pretended that he didn't listen to his answer to make the defendant repeat it."*

In T25, while the observers were largely complimentary of the prosecution's conduct, one conceded that *"the questions about the defendant's drinking habits were perhaps a bit over persistent."*

### Talking over / talking too fast

In two trials, observers felt that prosecutors talked over defendants, or tried to confuse them by asking questions in quick succession.

In T6, one observer recorded that the cross-examination of the defendant was similar to that of the complainant:

*"[The] prosecutor did the same thing as defence counsel, did not let the defendant finish his sentence then came with other question. He was accused of lying repeatedly based on the argument that prosecutor referred to the transcript of the interview."*

The same observer felt that the prosecutor *"was too fast with his pace when referring to the statement; defendant did not catch up with his speed. The prosecutor fast forwarded to other pages with notifying the defendant in advance."*

Similarly, in T21, both observers were critical of the prosecution counsel. Although at first *"the QC for the prosecution introduced himself and explained what was going to happen with regards to the cross-examination"*, they then *"jumped about [the] transcript and didn't give the defendant a chance to get his place in the document."*

Although it was conceded that the prosecutor was *"very thorough"*, they were also described as:
*"Loud and flamboyant. Very sharp, very pointy, a bit dismissive, asks questions but doesn't allow the defendant to answer."*

### Accusation of lying

Observers reported that prosecutors did accuse defendants of lying on a number of occasions. However, unlike the conduct of defence barristers during complainant cross-examination, these instances tended to be less aggressive and persistent, and observers tended to report that they were a valid response to inconsistencies in a defendant's account of events.

In T1, both observers agreed that the *"defendant was called a liar on at least one occasion."*

In T13, one observer highlighted an occasion in which the *"prosecutor was very inquisitive and accused him of lying. She mentioned that he had sex with his partner in the morning after the offence happened which was irrelevant to the argument."*

In T14, one observer recorded that prosecution counsel *"accused the defendant of lying on 4 occasions."*

In T16, both observers reported that the prosecutor accused the defendant of lying. However both were in agreement that this was valid, as the defendant had been caught in a lie on each occasion. One observed:
*"The prosecutor said multiple times: 'you just made that up and changed your story', but every time after he actually changed his answer to what he previously said."*

The other, in answer to the question 'What made you think that the defendant was treated disrespectfully', said *"nothing – however the public prosecution barrister catches the defendant in a number of lies, when he has introduced new evidence that his barrister had not mentioned."*

Similar circumstances arose in T21 and T23. In T21, an observer noted *"the defendant was accused of being a liar (but in all fairness it was proved he had lied to both the police and then to the jury)."*

In T23, almost identical sentiments were voiced by a different observer:

*"The prosecutor accused the defendant of being a liar. (In all fairness, the judge also had to speak to the defendant about telling lies on the stand so this may have been justified)"*

In T25, one observer reported that *"on at least one occasion he was directly called a liar."*

### Aggression

In one trial, T21, it was felt that the prosecutor acted aggressively towards the defendant. Interestingly, this is the same case in which the defence counsel were assessed to have acted in an exemplary manner throughout the trial.
One observer, when asked what they saw that made them think the defendant was treated respectfully by PPS, answered *"not much"*. They elaborated that the cross-examination of the defendant *"was very aggressive from the very start"* and that the prosecutor *"called [the defendant] a liar repeatedly."* The observer concluded:
*"I think the defendant is an impulsive man and the prosecutor is trying to get under his skin."*

### Judges

Observers shared the view that judges' treatment of defendants was more neutral than that towards complainants. This is perhaps unsurprising, given that complainants in sexual offences trials are classed as vulnerable witnesses and consequently are required to be treated with additional sensitivity. The observations below for the most part reflect this. Judges for the most part were informative and explanatory, with the exception of cases in which defendants were young, vulnerable, or required extra care.

In 6 trials,[126] observers noted nothing in particular that judges did to put defendants at ease. In these cases, observers described how judges explained what was about to happen, instructed the defendant to speak to the jury, and asked them to speak slowly and clearly.

In two further trials, observers were critical of aspects of judges' treatment of defendants. In T1, one observer was surprised that the judge *"did not give any soft introduction to the defendant – just went straight into his evidence. There was no mention of breaks – which was a bit surprising given that the defendant had a disability."*

In T21, as mentioned previously, one observer felt that the judge was *"unsympathetic to both parties… And that might be why there were virtually no breaks… Just wanted to get this case out of the way as fast as possible."*

In most cases where the defendant was young or had a

particular vulnerability, observers recorded that the judge took these into account and acted accordingly.

In T4, a trial that ended almost as soon as it began, one observer was nonetheless able to report:
*"It was a very sensitive case with very young people involved. The judge was respectful towards both parties and I believe fairness was achieved."*

In T14, the judge repeatedly stressed in summing up *"that the delay of the case might be disadvantageous for the defendant"*.

In T16, both observers highlighted the judge's sensitivity towards the defendant's language difficulties. One recorded:
*"The judge explained in the beginning of the evidence that they would take a break every 45 minutes but if the defendant needed a break before that, he could ask."*
The other stated:
*"As with the complainants, judge was courteous and considerate. Taking special pains to welcome the translators. Explained what was going to happen and showed patience and gentleness in his approach."*

In T18, a case in which the defendant was acting aggressively and erratically in court, the observers reported:
*"When the jury left the judge did ask the defendant if he had taken any drugs or prescription medication as his behaviour was worrying. Judge asked defence QC to keep a close eye on his client and check he was okay."*

In T23, a case in which both defendant and complainant were young adults, observers remarked how the judge was sensitive to the needs of both defendant and complainant. For example, when the ABE failed and transcripts were required, one observer pointed out that the *"judge ensures the defendant has a transcript also"*.

The same observer recorded that the judge *"gives [the defendant] the same talk as given to the complainant. 'I appreciate this very difficult. If not sure, please say so. Don't guess on make up an answer. Take your time'"*.

The observer concluded that this *"contrasts very well with other judges that just say the equivalent of speak up."*

In the same trial, there was some debate as to whether the judge's sensitivity towards the defendant equated to a form of bias. One observer was milder in their assessment, saying:
*"The judge seems sympathetic on grounds of age, by tone of voice rather than words used."*

The other felt more strongly, opining:
*"I personally feel that the judge did more to put the defendant at ease than the complainant. The defendant was treated much better"*

In T25, one observer painted a mixed picture of how the defendant was treated. At the beginning, the observer noted how the *"judge gave him a brief welcome- gives him time to settle in."* However, the same observer took a different view at the end of the cross-examination, describing how *"the judge was rather 'cold' in how they dismissed the defendant at the end of his cross examination. No pleasantries – such as thanking him for his account – simply – go back to the dock!"*

## INTERVENTIONS

Intervening to curtail disrespectful or inappropriate treatment of complainant and defendant is key roles for counsel and judges. The Victim Charter commits that:
*"When giving evidence the Public Prosecution Service prosecutor will treat you respectfully, and where appropriate, will seek the court's intervention where the prosecutor considers that questioning is not appropriate or is aggressive."*

The PPS Policy for Prosecuting Cases of Rape also states that the prosecutor will intervene if there is inappropriate questioning around previous sexual history, to robustly challenge rape myths, and to *"object to any other allegations about the character or demeanour of the victim which are irrelevant to the issues in the case"*. [127]

In the Gillen Review on the Law and Procedures in Serious Sexual Offences, it is pointed out that in cases where cross-examination falls below standards of courtesy and dignity, *"Judges need to be more interventionist to discourage this in all instances where it arises."* [128]

Court observers were asked to record whether judges or prosecutors intervened during the cross-examination of the complainant by the defence. They were also asked to record any interventions by defence or the judge during cross-examination of the defendant. They were given space to include narrative detail of what they observed.

Observers recorded instances of when interventions took place, and times in which they felt an intervention should have taken place but did not. These are reported below.

### Interventions during complainant cross-examination

#### Judicial interventions

Court observer questionnaires painted a mixed picture of judicial interventions during complainant cross-examination. In some trials, judges were active in intervening, in others they weren't. Judges tended to intervene more in trials where prosecutors were less activist, but this was not exclusively the case.

In addition to judicial interventions for procedural or technical reasons, the majority of interventions were for the following reasons:

- to stop inappropriate, upsetting or aggressive questioning (T1, T6, T14, T18, T20, T22, T23, T25)
- to stop repetitive and persistent questioning (T1, T8, T10, T14, T15, T18, T23)
- to seek clarification on confusing questions (T10, T18, T20, T21, T23)
- to stop defence barrister cutting off complainant before question was fully answered (T14, T23)
- to correct inaccurate statements made by barrister about evidence (T18)
- To stop speculative questions being asked that complainant couldn't answer (T18)

#### Trials in which judges frequently intervened

In T1, both observers recorded that the judge intervened frequently during cross-examination of both complainants. During the cross-examination of the first complainant, one observer noted that the judge *"eventually stopped the oppressive questioning – pointed out if she doesn't remember, stop asking. This is not a memory test. He stops the questions on 'how did you resist'. Intervening on more than 20 occasions for this witness. Often engaging the defence barrister for up to 15 mins with the jury out."*
The observer remarked, however, that the judge *"still lets questions (testing the evidence?!!) go on too long."*

In the same trial, during cross-examination of the second complainant, the judge was reported to have intervened for several reasons: to clarify to the jury that *"a failure of memory is not a lie"*, to chastise the defence barrister for complaining that the witness crying was *"putting him off"*, to warn the defence barrister *"to be careful in his language with respect to the legal privilege of the PPS"*, and to correct the defence barrister's *"constant reference to lying"* to say that *"where two witnesses gave differing accounts of an event it would be up to the Jury to judge who was lying."*

In T10, both observers noted frequent interventions from the judge on a wide range of issues. One observer commented:
*"The judge seemed to be displaying a frustration or exasperation with the level of detail and the repetitiveness of the defence barrister's questions and I sensed that the jury might have been feeling likewise…"*

The same observer noted the *"aggressive and confrontational" questioning, "which required the judge to intervene on 3 occasions to tell the defence barrister to move on."* The judge also intervened *"to remind the defence barrister of proper manners in court. (The barrister had said rather sarcastically to the complainant – ' did you not hear me'.)"*

The observer recorded further incidents requiring judicial intervention:
*"After approximately 1 hour of cross questioning the judge intervened to suggest to the defence barrister that the complainant had answered his questions so many times and in so many different ways and unless there was a new point to cover he should move on."*

On a further occasion the judge *"intervened when the defence barrister was rehearsing different scenarios and asked him if he actually had a question to put to the complainant. When pressed the defence barrister said – no – and judge commented that it was therefore all pretty pointless."*

During cross-examination of the second complainant in the same trial, both observers recorded that the judge intervened, particularly when the defence barrister didn't let the complainant finish their answer to a question. The second observer in the trial described how the interventions were limited in their effectiveness:
*"The judge did intervene sometimes but still the defence barrister was kind of hard on her."*

In T18, both observers recorded multiple interventions by the judge for a range of reasons.

One observer reported:
*"The judge intervened on many occasions. This was due to the nature of the questions put to the complainant, the tone of the questions, the nature of the questions, the constant doubting of the answers given. The interventions on the whole should have been done by the prosecution but as this did not happen, I believe the judge had to intervene to help/ protect the complainant."*

Other interventions were recorded by observers as follows:
*"The judge had to intervene on numerous occasions to ask the defence to move on as he had asked the same question up to ten times."*

*"The judge had to intervene on another occasion to tell the Defence QC to stop antagonising the complainant and to just ask a question. The judge also asked the defence to stop jumping around with his line of questioning as he was confusing everyone."*

*"The judge intervened over other questions and told defence to ask his own client and to leave the complainant alone."*
*"The judge again had to intervene over how the defence QC was wording the questions and asked for the questions to be straightforward and to make sense."*

In T20, it was noted that one of the interventions centred around memory test questions, specifically when the complainant was asleep:
*"[The] barrister asked 'how is it that you don't remember?'. Judge stated that she wasn't awake. Therefore, she cannot remember."*

In T23, observers recorded multiple judicial interventions, with one observer counting at least 13 interventions. These included reprimanding both defence and prosecution barristers on their behaviour towards each other; the correction of insinuations made by the defence barrister; to stop repetitive and persistent questioning; and to stop the defence barrister talking over the complainant when they were trying to answer.

One observer reported that the judge's interventions and instructions were limited in effectiveness:
*"There was an overnight break in the evidence & the judge warned the defence not to rehash evidence already heard. But he did anyway!!"*

The other observer corroborated this analysis, saying:
*"The defence did seem to get away with too much and seemed to ignore all of the warnings given by the judge."*

In T25, it was noted by all observers that the judge intervened many times during the cross-examination of the adult complainant in the case, but that these interventions were mostly at the behest of the prosecutor. One observer recorded an exchange when the complainant, a domestic abuse victim, became upset during the cross-examination:
*"The barrister became dismissive when the complainant became upset, saying 'Are those tears … what are you dabbing at'. The judge intervenes – that's not for you to say, the jury will determine whether this complainant is genuine'." The barrister responded, "I haven't seen a tear since this trial started"".*

### Trials in which observers felt judges should have intervened

In several trials, observers directly commented that they felt judges should have intervened but didn't.

In T8 one observer pointed out that *"the defence barrister was quite abrupt with the complainant on a few occasions and neither the prosecution or the judge intervened."*

During a line of questioning where the defence barrister repeatedly called the complainant a liar and accused them of dreaming up the allegations, the same observer reported:
*"The complainant did get upset with the line of questioning. The judge did not intervene at all to ask the complainant if they would like a break."*

In T14, one observer noted:
*"The defence barrister called the witness a liar multiple times ('you don't remember this, you are lying', or 'you are trying to get money from him' or 'your mom only made those statements to help you with your case'). On this last line the witness responds with 'you are crossing a line'. The judge does not intervene in this situation."*

In T16, one observer voiced surprise that no one intervened when rape myths were used by the defence during cross-examination:
*"The prosecution and the judge did intervene at some points but especially when the defence started to use rape myths (you didn't tell him to stop, you just let it happen, …). I expected the judge and prosecution to intervene and they didn't."*

At another stage of the trial, the same observer expressed scepticism as to the reliability of judges and prosecutors to intervene when needed:
*"The judge tells the complainant that he or the prosecutor will intervene if [a question] is not relevant or if they need to. This situation doesn't seem to show a lot of confidence in the judge or prosecutor because they obviously don't intervene a lot."*

In T22, one observer contrasted the judge's inclination to intervene with a previous trial that they observed:
*"I have seen this judge before and they did not intervene during difficult and lengthy questioning in another court… So why with this case? I believe they were swayed because this was a young well-mannered girl, from a good background."*

## Prosecutorial interventions

Observers were more critical of prosecutors than of judges regarding their record of intervening when needed. While in four trials they were complimentary of prosecutors' robust interventions[129], they noted a complete lack of necessary intervention in another three trials[130], and voiced criticism of this lack of action. In the remaining trials, observers noted occasional interventions[131], or no intervention but were not overtly critical of this[132]. Overall, given the sheer number of recorded instances of disrespectful treatment by defence barristers during complainant cross-examination, the number of prosecutor interventions were comparatively low. The most common reasons for prosecutors intervening on grounds of disrespectful treatment were:

- To protest unfair, inappropriate or aggressive lines of questioning (T10, T15, T16, T23, T25)
- When defence barristers made comments instead of asking questions (T6, T15, T16, T20)
- To stop repetitive or overly persistent questioning (T10, T14)
- To object to unreasonable assertions by defence barristers (T10, T16)
- To stop questioning relating to evidence that had been introduced to trial without prior notice (T10)
- To stop 'memory test' questions (T10)

### Trials in which prosecutors frequently or robustly intervened

In T10, prosecutors were recorded to have intervened on a range of points. One observer recorded:
*"The prosecution barrister intervened on 3 occasions. Once to suggest that the defence barrister's questions were unreasonable in that he was expecting the complainant to have precise recall of words used in his ABE and made the point that this was not a memory test. Once to suggest to the judge that the defence barrister was interpreting the complainant's ABE incorrectly, and once to complain that the prosecution had not been provided with a copy of [new evidence] that had been introduced by the defence barrister. The judge endorsed the prosecution barrister's interventions and chastised the defence barrister for not providing advance notice and a copy of [the evidence] to the prosecution."*

In the same trial, observers reported that during cross-examination of the second complainant prosecutors raised further objections:
*"The prosecution barrister objected to the line of questioning around alleged telephone calls for which there were no records and the issue of the complainant's dead sister. The judge asked the defence barrister to clarify his point – the defence barrister responded by simply calling the complainant a liar."*

In T15, one observer noted that the prosecution's interventions were unsuccessful:

*"The prosecutor did try and raise an issue regarding the line of questioning but she was ignored by both the defence and the judge. The defence was screaming at the complainant and constantly saying the complainant was a liar. The complainant was getting upset but the prosecutor was ignored and the questions continued."*

In T16, observers reported that the prosecutor intervened when the defence attempted to use the so-called 'rough sex defence' to categorise the assault as rough, consensual sex. Notably, this is one of very few occasions where observers recorded a prosecutor intervening about characterisations of consent. In the same trial, the prosecution was also reported to have robustly intervened when rape myths were used:
*"The prosecutor intervenes once the defence barrister starts using rape myths (saying that she just let it happen because she didn't do anything). He later intervenes again when the defence uses a rape myth but the judge allows it."*

The other observer highlighted the use of comments and statements:
*"The defence barrister has a way of floating statements with a rising inflection and pausing – so not a formal question, therefore it can't be answered or challenged… The prosecution barrister said 'you are putting propositions to her generally & this quite improper.' He also objects to a suggestion that the incident was part of sexual play/ consensual sex floated in the same way."*

The observer concluded that *"the defence barrister didn't really change his ways, but he did have to follow up with direct questions."*

In T20, one observer noted interventions relating to comments made by the defence barrister. These included the defence saying to the complainant *"I'm not here to criticise you"* and *"being accused of rape is a terrible thing that can happen to anyone"*. The other observer reported that the prosecution intervened when the defence barrister brought up previous sexual history, in spite of the judge ruling that this was not allowed.

In T23, both observers recorded that the prosecutor intervened multiple times about the inappropriateness of the defence's questioning. One remarked that *"it got very heated"* and noted that the judge had to reprimand both defence and prosecutor for their antagonism towards each other. The other observer commented:

*"The prosecutor intervened many times during the course of the cross-examination to ask the judge to intervene over the style and manner of questioning. The defence did seem to be constantly overstepping the mark and the prosecutor intervened in order to ensure fairness. The judge agreed."*

In T25, in which there was an adult and a child complainant, observers referenced many instances in which the prosecutor intervened. This trial drew the most complimentary remarks from observers about how the prosecution barristers acted to safeguard the vulnerable complainants and hold the defence to account for disrespectful treatment.

One had this to say about how the prosecutor intervened during the cross-examination of the adult complainant:

*"The prosecutor was the most protective of the complainant*

*that I have seen – he stopped the defence barrister in his tracks many times, at least 27 times. A real champion- where other prosecutors allowed the most horrible and degrading questioning without a murmur, this guy was the real deal. Not frivolous interruptions, but demonstrated empathy, stopped repetitive questions and questions that were simply tests of memory.*

*When the defence barrister complained that the complainant 'breaks down in fits of emotion, it's almost impossible for me to carry on', the public prosecutor said that 'sustained domestic violence limits the complainant's ability to cope with this (the trial)… the defence barrister does not need to put these things in this way. This is bullying & I will have to keep him to the rules.'*
*And he did."*

Similarly, during cross-examination of the child complainant, observers recorded that the prosecutor intervened when the defence counsel broke the ground rules established before trial about how the child should be questioned, saying he *"would insist on written questions if he had to"*.

### Trials in which prosecutors did not intervene and observers felt they should have

In T1, both observers felt that the prosecution should have intervened during the course of cross-examination of both complainants but didn't, particularly during that of the first complainant. One observer declared that *"it was noticeable that the prosecution barrister did not intervene at any stage."* This cross-examination was described as *"vicious"* by the other observer, who reflected:
*"There seemed to be a reluctance in the senior counsel to get into it with the defence. The junior was pointing out things to the senior she was unhappy with, but he didn't get involved. I only have one recording of a complaint from him."*
In that observer's view, the prosecutor's failure to intervene had repercussions throughout the rest of the trial:
*"There are a number of points that should have been refuted immediately in my opinion that were let go and as a result were used repeatedly after this"*

In summing up their general impressions of the case overall, the observer commented:
*"The questioning by the defence crossed the line for me on harassment, why did the prosecutor not intervene?"*

In T13, both observers commented that the prosecution did not intervene at any stage, with one remarking:
*"The prosecutor did not intervene. It should be noted that it didn't look like the prosecutor was even paying attention."*

In T18, both observers were critical of what one described as a *"notable lack of interventions from prosecution."* One example given of a victim-blaming comment that should have been challenged was when the defence barrister said *"you like bad boys, don't you"* but the prosecutor did not intervene.

The observers felt that the prosecutor's failure to intervene led the judge to be more active:
*"the prosecutor should have intervened on many occasions but instead ignored the line of questioning. I think this is why the judge felt the need to intervene on so many occasions."*

## Interventions during defendant cross-examination

As already recorded, there were fewer instances of disrespectful treatment of defendants by prosecutors, and consequently there were fewer interventions on those grounds. Nonetheless, both judges and defence counsel were recorded as intervening on occasions where they felt that defendants were not being treated with respect or dignity. It is also worth noting that, in contrast to their analysis of complainant cross-examination, observers did not tend to voice the opinion that judges or defenders should have been more active in their interventions during defendant cross-examination.

## Judicial interventions

The main reasons for judges intervening during cross-examination of the defendant by the prosecution were:

- To ask prosecution to clarify or simplify a question (T14, T16, T21, T23)
- To stop persistent questioning (T1, T13)
- To stop prosecution asking speculative or indirect questions (T13, T15)
- To chastise prosecutor and defender for unprofessional behaviour (T23, T25)
- To clarify defendant's answer (T6)
- To stop prosecution questioning agreed evidence (T13)

Interestingly, in two cases the judge intervened because the prosecutor was being treated disrespectfully, either by the defence counsel in their interventions or by the defendant. These have also been included for completeness.

In T1, both observers noted that the judge intervened to stop persistent questioning. One observer recorded:
*"Questioning was unnecessarily persistent at times – which required the judge to intervene – and contributed to the defendant's anger."*

The other observer also recorded this intervention, saying that the judge intervened twice at the behest of the defence. However, they qualified their observation by stating:
*"The complainants didn't complain as much about this and were subjected to much, much more."*

In the same trial, the judge also intervened to correct the defence counsel and defendant over their use of disrespectful language with regard to the prosecutor. One observer reported that the judge had to *"reprimand the defence barrister for arguing and remind him of the standard of manners expected in court (he referred to the prosecution barrister as 'her' on a number of occasions)."* The other noted that the judge intervened *"to tell the defendant to stop getting aggressive with the prosecution barrister who was simply doing her job and to be respectful when referring to others."*

In T6, all judicial interventions related to the conduct of the defendant and his family members, who were present in the public gallery. One observer described how:

*"the judge intervened when the defendant refused to stand up so the jury could see his height and informed him that his refusal would be noted. The judge also had to speak to the defendant during cross-examination about his temper on the stand."*

The other observer also added:
*"The judge asked the defendant to only answer questions put to him by the prosecution and not to ask the prosecution questions."*[133]

At another stage in the trial:
*"The judge requested that the jury be removed from the courtroom as members of the defendant's family were shouting and causing a disturbance in the public gallery. Some people were asked to leave the courtroom."*

In T13, both observers mentioned that the judge intervened to halt persistent questioning by the prosecutor. One said:
*"The judge intervened and asked the prosecutor to move on as she had asked the same question numerous times and it had been answered by the defendant. The judge stated that as it had been answered there was nowhere else to go with the question."*

The other reported:
*"Judge intervened three times:*

1. *Because the prosecutor was questioning an agreed evidence.*
2. *Because the fact that he had sex with his partner was irrelevant.*
3. *Because the prosecutor asked why he thought that the defendant could be lying and the judge said that he could not answer that question because he does not know her background."*

In T14, observers agreed that the judge's interventions were to ensure the defendant could properly understand what was being asked of him and that the jury would not get confused. One reported:
*"the judge intervened once to tell the prosecution barrister that he should put a question more clearly and fully to the defendant and once to advise the defendant to refer to his statement to the police as he was becoming confused in some of his answers"*

In T15, one observer noted that *"the judge intervened to tell the prosecutor that she was asking the defendant to speculate on a matter and to ask a direct question or move on."*

In T16, *"the judge intervened to suggest the prosecutor should rephrase his question (2x)."*

As already mentioned earlier in this chapter, T21 was the trial in which observers were most critical of the prosecutor's behaviour. This resulted in the judge intervening as follows:
*"The prosecutor asked the same questions repeatedly. The prosecutor also spoke over the defendant on many occasions and the judge was forced to intervene and ask the prosecutor to stop speaking over the witness."*

In T23 observers recorded that a clearly anxious defendant was having trouble answering questions. One observer reported that the judge *"unfortunately tells the defendant that if he is not sure, then don't agree, say not sure. And from then nearly every question is answered 'Not sure'."*

In both T23 and T25 there appeared to be a degree of animosity or friction between prosecution and defence counsel, resulting in unprofessional behaviour from both. This led to the judge in both trials intervening to correct them on their behaviour. As one observer reported in T23:
*"The judge intervened over the wording of a question and also intervened to ask both senior counsel to stop arguing and behaving like children."*

## Defence interventions

Defence counsel intervened during prosecution cross-examination of the defendant for the following reasons:

- Objections over lines of questioning (T1, T14)
- To ask for a question to be withdrawn (T8, T25)
- Argument that the prosecution indictment was flawed (T1)
- Because the defendant didn't understand words or questions put to them (T6)
- To ask for questions to be rephrased (T6)

- To object to a question being framed out of context (T14)
- To stop prosecutor making comments instead of asking questions (T15)
- To stop the prosecutor talking over the defendant (T21)
- To stop repetitive questioning (T23)
- For no good reason or to make an improper intervention (T14)

In T1 both observers reported that the defence counsel objected to several lines of questioning:

*"The defence barrister complained to the judge about the prosecution barrister questioning the defendant about why he didn't ask the police to take statements from potential witnesses who could have given him an alibi, and accusations from the prosecution barrister that the defendant had told a defence witness what to say. The judge rejected both objections."*

One further intervention was as follows:
*"After the defendant's interviews were read out but before he took the stand the defence barrister suggested to the judge that he must stop the trial because of flaws in the prosecutions indictments. After some debate with both sides the judge agreed to consider the application to abandon the trial overnight. Following consideration the judge rejected the application."*

In T6 both observers pointed out that the prosecutor used phrases that the defendant did not understand, and that this prompted an intervention from the defence:
*"PPS to defendant: 'You intended to subjugate her? Devalue her?'.*

*Defence intervened saying, 'Defendant does not understand the word 'subjugate'."*

One observer further reported:
*"The defence did intervene a few times in regards to how some questions were being asked. The prosecution apologised and re-worded the questions."*

In T8, one observer noted that *"at one stage the defence did intervene in regards to a question from the prosecution. The prosecution apologised and withdrew the question."*

In T14 observers recorded that the defence intervened twice to object to a line of questioning and to object to a question that was not in context. In both cases, the prosecution acknowledged these interventions.

Observers also reported that there was an *"improper intervention"* from the defence during the trial. One observer described how this intervention *"required the Judge to dismiss the jury – but only after they had heard the junior defence barrister's improper intervention… The judge was annoyed that the junior defence barrister did not appreciate this and chastised him."*

At another point, one observer opined that:
*"At one point it looks like the defence is intervening without a real reason as if he is giving the defendant a minute to calm himself down."*

In T15, it was pointed out that the *"defence intervened once claiming that the prosecutor was making a comment instead of asking a question."*

In T16, one observer reported:
*"The defence intervenes but then remembers he is wrong, so the prosecutor continues. The defence intervenes again and states that they will listen to the recording of the trial during the break. The prosecutor keeps going. They intervene again about a question of the prosecutor but don't seem to make a big deal out of it."*

In T21, the observers noted that the defence intervened *"only once to get the prosecutor to stop talking over the defendant"* and *"allow the defendant to answer the question"*.

In T23, both observers recorded that the defence intervened over the wording of questions and about the prosecution *"asking compound questions"*.

In T25, the defence made a number of interventions about questions put to the defendant about lying to court on a previous arraignment, about the relevance of some questions and about how the statement of the child complainant was being used. All of these were rejected by the judge. One intervention, when the prosecutor asked a question of the defendant *"about confidential legal advice he had obtained"*, was upheld by the judge.

## Discussion

It is extremely disappointing, if not shocking, that the Observer Panel found ill-treatment of complainants to be endemic in the trials they observed. The sheer number of recorded instances of aggressive, harassing, and disrespectful behaviours leave little doubt that the treatment of vulnerable victims of sexual crime in court falls short of the minimum standard of decency they should expect. That such behaviour in a professional arena appears to be so commonplace indicates a degree of normalisation in court culture and practice.

Observers were particularly critical of defence barristers' treatment of complainants during cross-examination, but also questioned why there wasn't more robust intervention to call out and stop such behaviour. Prosecution counsel on a number of occasions were singled out as not fulfilling their role of seeking the court's intervention where questioning is inappropriate or aggressive – a key commitments under the Victim Charter. It is also significant that in one trial, even though the judge did intervene, both observers reported that the defence ignored the judge's instruction. [134]

The Court Observer Panel members do not have the benefit of legal experience or practice, which in this respect is advantageous. Unburdened by cultural knowledge of the criminal justice system, the observers can act as a 'fresh pair of eyes' and provide new perspectives on the workings of our system. Indeed, this is why this Panel is configured in this way – because, unlike legal practitioners or support organisations like Victim Support, ordinary members of the public are able to observe trials without the baggage that familiarity brings. In this instance, the perspective they are providing is that cultural change must happen.

It is possible, given that our justice system is adversarial in nature and leans towards the histrionic, that such behaviour is simply accepted by professionals as the way things are. However, following the Gillen Review and the ongoing work to implement its recommendations, it is clear that the status quo is simply no longer acceptable.

It is difficult to gauge from these observations alone what might improve the respect culture in the criminal courts in sexual offences cases. On one hand, whilst individual barristers must be accountable for aggressive, bullying or harassing treatment, they are to an extent operating within an adversarial system that encourages them to do so by its very nature. Given that their obligation is to their client, and that the onus is not upon them to prove innocence, it is unsurprising that what constitutes a robust defence can be the direct cause of secondary victimisation of vulnerable victims. The adversarial system's structural shortcomings in adequately protecting vulnerable victims is nothing new.

On the other hand, it is telling that while disrespectful treatment of complainants was common, it was not universal. Those cases in which defence barristers treated complainants with dignity and respect, yet still conducted a robust, probing and incisive cross-examination, indicate that there is a viable alternative to the current culture. Higher standards of decorum and respect are not unrealistic, unattainable, or in conflict with the ability to provide an effective defence.

Ultimately, there is a standard of dignity and respect that should be expected by victims and is required of barristers under the Victim Charter. It is simply not acceptable that those standards are not consistently being met.

## Recommendations

- Training for all practitioners on the impact of trauma and on rape myths
- Review the Bar Code of Conduct in light of the observations reported here and the evidence of the Gillen Review.
- Introduce pre-recorded cross-examination of complainants in all sexual offences trials, and require establishment of ground rules and agreed questions before cross-examination takes place.
- Separate legal representation for complainants to act as a safeguard against disrespectful treatment
- PPS: specialist training for counsel in interventions relating to disrespectful treatment and use of rape myths in sexual offences cases, and a requirement for training to be completed if counsel are to work on sexual offences cases.

The following recommendation was suggested by our observers:
- Introduce professional fines for barristers who are considered to have excessively or repeatedly ill-treated a complainant or defendant during trial.

# Delay

**Court observers flagged delay as one of the most prominent issues affecting trials. Delay manifested in a number of ways:**

- short delays which took place during the course of the day in court,
- longer delays where a trial was suspended for the remainder of a day,
- short adjournments where the trial was suspended for a few days and the jury discharged or
- longer adjournments where the trial had to be adjourned and rescheduled for a significantly later date.

In a few of the cases where the jury was discharged, the observers were able to observe the second attempt at the trial.

Of the 27 trials observed, 8 did not have significant opportunity for adjournment or delay to have occurred, as a verdict was established without a full trial.[135] However, as even in these cases there were delays, they have been included in the analysis.

Of the remaining 19 trials, 16 had been scheduled to run and adjourned at least once before the trial observed. 6 were adjourned and postponed until a significantly later date[136] with the jury being dismissed from duty.

Reasons for adjournment included:

- a juror disclosing they were a neighbour of a clerk from one of the legal teams (jury dismissed and case rescheduled for 3 months later)
- the defendant dismissing his legal team (jury not yet sworn in – case rescheduled for 4 months later)
- part of the defendant's police statement being read out that should have been edited out as it alluded to a previous allegation (jury dismissed and case rescheduled for 1 month later)
- a complainant withdrawing from the trial as she could not give evidence if being watched by the defendant and the application for special measure to stop defendant from observing complainant was denied; a second complainant dropping out of the trial; a juror raising an undisclosed issue that affected the ability of the trial to proceed (jury discharged after each adjournment - case rescheduled for 5 months later after fourth adjournment)
- non-disclosure of material evidence with barristers being unavailable the week after to let the trial run (jury dismissed and trial rescheduled for 4 months later), and
- the defence team stepping down for reasons of 'professional embarrassment' and being unable to disclose the reason to the judge (jury dismissed and case rescheduled for 2 weeks later).

In some cases, we were able to gather prior knowledge of the case progression from the support we had provided to complainants through our Witness Service.

One case in particular had been trying to complete the trial process for over four years and appeared to have previously run unsuccessfully with an additional complainant. It was not clear why the case had taken quite so long to make it through the criminal justice process.

In a number of cases the length of time between ABEs being taken and the trial running was flagged as potentially detrimental. One observer stated that *"it does dilute the impact when under cross-examination. I appreciate that with historical cases the delay between the alleged acts happening and being reported is only in the control of the victim – but perhaps something could be done to not exacerbate the problem with delays between ABEs and court dates."* [137]

During the course of all but two trials there were a number of delays. The main reason for delay was identified as technical issues – these were identified in 8 trials. A further case had delays due to digital evidence having to be edited before the trial could proceed.

There was near-unanimous incredulity expressed in the questionnaires about how technology constantly failed in the courtroom and contributed to undue or unreasonable delay.

*"The court technology really does need updating as at present it is not fit for purpose and causes the majority of delays in cases."* [138]

A fuller examination of technical issues is provided in the section on Technology.

Other recorded reasons for delay[139] were barristers or judges being involved in other cases (8 cases), late starts or early finishes for the day (7 cases), witnesses failing to turn up to give evidence (3 cases); illness of a juror (2 cases); cases not

being ready to proceed or evidential issues (discovery etc) being unresolved (1 case); the defendant sacking his legal team (1 case); and the defendant being *"not in a fit state for trial"*, threatening people, and being arrested outside the courtroom (1 case).

There were also justifiable reasons identified for delay – in 2 trials the short delays resulted in the defendant changing their plea to Guilty, meaning that the complainant did not have to endure a trial.

Observers were vocal in their criticism of the frequent delays and adjournments during trials. For the most part they felt that the adjournments and delays were not reasonable or justified. Observers were critical of the misuse of judges' and the courts' time, speculated that it *"must be very costly for senior legal people to spend so much time just standing about"* [140] and queried why so many courtrooms were left unused after lunchtime. They felt that the management of trials appeared to be wasteful and inefficient.

*"Terribly wasteful – do lawyers/ judges etc. get paid by the session / hour / day? Why else would anyone tolerate this?"* [141]

Inefficient management and legal teams being under-prepared for trials was also singled out for criticism:

*"I am unsure what exactly caused the delays in this case – the system of disclosure seems to have broken down, not unusual according to the barristers. Can this be tightened up?"* [142]

*"I feel that evidence should be agreed by both parties and the judge before trial begins to avoid any unnecessary delays to the trial."* [143]

Observers acknowledged the impact of the delays they witnessed on all parties involved in the trial process, saying that they *"add stress to the complainants, defendants and juries"* [144]

In one trial (which had previously been observed before the jury was dismissed and the case relisted for trial), the impact of delay upon complainants was identified particularly strongly:

*"Couldn't help but feel for complainant given previous delays to the case. It seemed like the issue was a significant one and couldn't be helped, but unfortunate that this happened as just the latest cause for delay."* [145]

On the other hand, observers noted some occasions in which delay was not only acceptable but the best course of action. In one case, an observer noted that *"this time, it was a crucial part of the trial. It avoided that the complainants were cross-examined putting an end to the trial with a better outcome for everyone."* [146]

And in another, a court observer opined that there should have been a delay in a trial so that justice could be properly done, as barristers had not been given adequate time to prepare and had another case looming the week after:

*"The time constraints put on the legal parties due to delays seems to detrimentally affect how well they serve and carry out their duties. In this particular case the prosecutor was constantly mindful of the need to be available for his next case the following week and made every effort to cut corners in order to shorten the trial. I do not believe this was in the public interest. It should be noted that both legal teams were changed at short notice due to two previous attempts to run the trial in the week before the trial actually started and that as such the original legal teams had to step away due to other trial commitments. The judge ordered two new legal teams to be brought in so as to not cause further delays to the trial. Whilst I understand the position of the court and the stress a further delay may have caused both parties; I do not feel that the interests of either party were fully served by going full steam ahead with two ill-prepared legal teams."* [147]

## Discussion

Delay remains an apparently intractable problem within the criminal justice system, with latest figures showing an increase in the time cases are taking to disposal – in the last year, sexual offence trials typically took 698 days to complete, up from 470 days in 2015/16.[148] When it comes to handling of sexual violence cases, a particularly depressing picture emerges, with rape cases taking longer than the average time for all cases to complete with complainants of rape experiencing an average 943 days from report to trials finishing in 2017/18 (Gillen, 2019).

During this wait victims continue to deal with the impact the crime has had on their lives. Individuals will react in their own unique way as they respond to the physical trauma of the crime itself and the deep psychological trauma that can often follow. This recovery phase is often overshadowed by the criminal trial which 'hangs over' victims as a constant reminder and another hurdle to overcome.

Whilst it is recognised that not all delay happens in the court setting, and that there are bottlenecks at multiple stages of the justice journey, this project's remit is to focus exclusively on what was observed during criminal trials. These observations, though not covering every aspect of delay, are an invaluable snapshot of the delays experienced by complainants, defendants and witnesses as they participate in trials relating to the most heinous and intimate of crimes. A fuller examination of how delay might be meaningfully reduced has already been undertaken by the Gillen Review, and the recommendations therein have provided a comprehensive blueprint for reducing delay, through comprehensive judicial case management reform; better working protocols between the PPS and PSNI; reform of disclosure processes; more robust case file management; better resourcing; and working court technology. [149]

Our observers identified numerous issues which contribute to this overall delay and were both shocked and dismayed by the reasons underpinning some delay. In some cases, a justifiable reason was identified; however, this remained the exception rather than the rule. The issues raised are not new and have been highlighted by numerous reports over the last decade, and again placed under the spotlight by the Gillen Review, resulting in a series of recommendations regarding case management, disclosure and technology improvements. If implemented these will no doubt improve the system. Rather than repeat the considered recommendations of Gillen in this section, we have included a list of suggestions captured by our observers during the course of this project.

## Recommendations

- Fully implement the recommendations of the Gillen Review to effectively tackle delay in the system

### Court Observer Suggestions

- *"Let the Tipstaff manage the Judge's diary out of court… If there was an agreed time say 8:30 – 9:00 every day that was set aside for only this – if required, then it could not run into Trial time. Often the judge gives up his lunch to "fit in" other business."*

- *"Make better use of the infrastructure. Improve the throughput of the actual courtrooms – move to half day sessions – say 8:30 – 12:30 and 13:30 – 17:30, two different trials. That would mean there could be 6 trials going on at a time in Courthouse like Newry. Part of the problem with this trial is that it took so long to get to court, and the next retrial of it can't be scheduled until the end of May 2019. Jurors wouldn't have to give up their lives and the courts wouldn't have to provide lunch."*

- One observer suggested that delay could be reduced if:

  - *"The timetable was agreed and the jury and court were advised re timekeeping*

  - *The court information was on a screen which could be updated easily by PC, instead of bits of paper- like an airport. People were called when they are needed, rather than one time for all*

  - *Release the Police from attending unless actually giving evidence – totally non value added, and takes them away from their core work.*

  - *Make better use of staff in the court, much of their time is simply waiting. Give the Tipstaff and/ or the court clerk pagers and let them get on with other value added work, but still be quickly available if required.*

  - *Select the Jury the week before the Trial, rather than waiting until the trial starts. Or start the trial immediately the jury are picked – they are already there, why send them home?*

  - *Only one barrister, the junior is the one who appears to have all the detail – why do you need two?"*

# Special Measures

**Special measures are available to vulnerable or intimidated witnesses to help them give their best evidence in court, in accordance with articles 4 and 5 of the Criminal Evidence (Northern Ireland) Order 1999. Due to the nature of sexual violence, complainants of these crimes are deemed automatically eligible to apply for special measures.**[150]

Special measures available include:

- **Screens** to shield the complainant from the defendant.
- **Live link facilities** to enable complainants to give evidence from outside the courtroom via video link.
- **Giving evidence in closed court**
- **The removal of wigs and gowns** by judges and barristers
- **Video recorded evidence** in place of live evidence-in-chief (referred to ABE video throughout this research)
- **Communication aids** such as interpreters*[151]
- **A Registered Intermediary** to facilitate better communication between a witness and those asking questions of them*

Special measures were widely used in the cases observed. Of all the cases where it could be identified that special measures had been used or applied for (19 trials)[152], special measures of some kind were granted in all of them. However, in three of those trials (T11, T17 and T24) the case was adjourned or the defendant changed their plea before any special measures could be utilised.

Of the 16 remaining trials:

- All 16 used a pre-recorded ABE video for at least one complainant's evidence-in-chief [153]
- 13 had live links for complainants to give evidence[154]
- 4 had been granted permission to give evidence by live link, but the trial collapsed before complainant cross-examination
- 4 saw judges and barristers remove wigs and/or gowns to put the complainant at ease (usually for child or especially vulnerable witnesses)
- 1 saw an application for screening, but this was rejected
- 1 saw use of a Registered Intermediary (assisted with translations) [155]
- 0 closed the court to the public

On 5 occasions[156], observers identified some sort of special measure being applied for or granted on the day of the trial. However, this was usually for measures above and beyond pre-recorded ABE and Live Links for evidence, which were requested and granted in advance.

Observers had mixed views on special measures. Though none of them challenged or doubted the good reason for their existence, they often felt that the manner in which they were delivered was detrimental to the prosecution's case. In the majority of cases, observers felt that the bad quality of ABE recordings – indecipherable audio, bad camera angles, inability to see the complainant's face or their emotions and facial expressions – made pre-recorded ABE a poor way to give evidence. There were also criticisms of bad live links, where a complainant was not positioned properly in front of the camera (these issues are explored fully in the chapter on Technology).

Observers made further comments on the value of special measures in 3 trials – T13, T17 and T23.

Comments were made about the technology seeming to distance those in the courtroom from the complainants in T13 and T23.

In T13, an observer noted:
*"the fact that the defendant gave evidence in court while the complainant gave evidence through a video link makes the members of the jury engage more with the defendant."*[157]

In T23, an observer noted:
*"… it could just be that Live Link seems to distance the complainant, whereas you can see posture, demeanour, and possibly empathise better with a person who is in front of you."*

It is not possible to ascertain whether these sentiments apply universally about special measures more widely, or if observers would feel the same way if pre-recorded ABEs and evidence by live link were not plagued by technical difficulties. This is because technical issues affected the majority of the trials that reached this stage and were one of the most commented-upon criticisms of the trials and the justice system.

An additional point raised about special measures highlighted how they are not always granted in a manner that helps complainants proceed with the trial.

In T17, one of several complainants had been granted special measures including pre-recorded ABE and screens to ensure that she couldn't see the defendant in court. However, upon learning that the defendant would be able to see her face via video camera, she became extremely anxious and was unable to give evidence. An application was made for the defendant to be prevented from seeing her face while giving evidence, but the application failed. Consequently the complainant, and days later a second complainant, withdrew from the trial.

The observations point to what is perhaps already acknowledged in relation to special measures – that while they may go some way to facilitating vulnerable victims of sexual crime to seek justice, they are by no means the panacea for resolving the many challenges[158] inherent in sexual offences cases.

One final issue to raise about special measures is the importance that they are properly understood and supported by all agents involved in criminal trials, and that they are not allowed to be used disadvantageously by defence counsel during trial.

Two trials shine a light on these issues, T13 and T1.
In T13, both observers reported that the prosecutor was unaware of the complainant's special measures:
*"The police officer was told by the prosecutor to bring the victim into the courtroom just before the trial started. The police officer was surprised about that because she thought that she would have special measures [evidence via live link] but went anyway. Then she was told by the Witness Service that in fact she had special measures. The police officer informed the prosecutor and she appeared unconcerned."*

In T1, the defence suggested that complainants had used the ABE interview process to conspire with each other, and with police, to establish a joint, false narrative of their allegations. One observer recorded that the defence barrister *"implied that the ABE was an opportunity to show [the complainant's] story in the best light, that she had used it to get her "story" straight with the help of sympathetic and uncritical people", and also "talks about the ABE as an opportunity to conspire with her sister and mother – 'so much time to prepare your evidence.'"*

## Recommendations

- Improve the delivery of special measures to ensure that they are not disadvantageous to complainants – see Technology chapter for more detailed recommendations.
- Introduce pre-recorded cross-examination of complainants in all sexual offences cases, including establishing ground rules and questions in advance of recording.

# Technology

**The most commonly used special measure observed throughout our study was pre-recording Achieving Best Evidence (ABE) interviews, and live link examination and cross-examination of complainants. It is imperative that such technology works well ensuring the smooth, swift and effective administration of criminal justice process. Regrettably, technical difficulties were an issue that attracted some of the most criticism from court observers during the course of this project.**

## Technical Issues

Of all the trials observed, 16 ran long enough for technical issues to be potentially observed. [159]

Out of those 16 trials, some form of technical issue arose in all but two[160]. In every trial observed where technical issues arose, these problems were related to special measures granted to the complainant. Most issues related to the playing of an ABE video in place of the complainant giving their evidence-in-chief in the courtroom. Observers identified poor sound quality, poor visuals, inability to see the complainant's facial expressions, or failure of the ABE to play as the main issues. In only one observed case was the ABE explicitly described as of good quality.

Less frequently, observers noted problems with the live link system, which enables complainants to be cross-examined via video link. The main issues identified were inability to see the complainant's face properly, live link sound not working, live link failing to work altogether, or the defendant's face showing on the complainant's screen in the live link room.

Technical issues identified:

| | |
|---|---|
| Poor sound quality on ABE | 12 |
| ABE video: Poor sound necessitated issuing of transcripts to jury | 4 |
| ABE video: Poor visual quality/unable to see complainant's face on ABE | 10 |
| ABE wouldn't play | 4 |
| Live link: audio issue | 1 |
| Live link: visual issue | 2 |
| Live link: failed to work – case had to move courtroom | 1 |
| Defendants face shown on complainant's screen | 1 |

Observers were fiercely critical of the technological failings they witnessed. They found it difficult to understand how, in the 21st century, recordings could be of such low quality and technology in police stations and courtrooms could be incompatible and so unfit for purpose.

Every element of ABE recordings were criticised, from the bad quality of sound and audio, to the unnecessary scarcity of suitable equipment in court rooms, to the inability of police to record such videos to make them fit to be used as evidence in court.

*"Camera angle was very poor, could not see the expression on the complainant's face. Mostly the crown of her head, also her face only occupied the top left quadrant of the screen – so ¾ of the screen was not her face. Her face was also in shadow. I think this careless approach to presentation puts the complainant at a disadvantage compared to a person giving evidence in person, very difficult to read expression. Modern cameras have zoom lenses and are small and unobtrusive – why is this a problem to do correctly??"*[161]

*"Sound was abysmal. Not just poor volumes but unable to actually make out words – like a badly tuned radio. There are only 10 headsets for the whole building, and they will only make the garbled sounds louder. And because Laganside is a PPP [Public Private Partnership] building they were talking about borrowing headsets from Coleraine. Are these things really so expensive? Absolutely unprofessional and unacceptable given the current technology available. Muffled and incomprehensible."*[162]

Observers also noted problems in courthouses with newer equipment:
*"Although the audio/visual system in Antrim crown court is relatively new there are still problems with sound quality. This was resolved to some extent later in the trial. Image on jury screen was not working. Jury had to view large screen behind the judge."* [163]

Some also commented that in over a year of observing, no progress seemed to have been made in spite of the issue

being clear to everyone involved in criminal trials involving sexual offences.

*"Unbelievable that this is tolerated – where is the remedial action on this? I've been observing for nearly a year and there has been no improvement. Why is this fundamental not fixed? Unacceptable."*

One main concern of observers was that failings in technology were having a palpably negative effect on the delivery of justice. They pointed out that ABE video was often the main source of a complainant's testimony, and that bad quality audio or visuals meant that the complainant's evidence was hampered. This, they felt, had a direct and negative impact on the administration of justice and the rights of complainants.

*"If the purpose of this is to represent the complainant well then it fails."* [164]

One observer commented that they felt the quality of ABE evidence materially affected their assessment of the prosecution's case:
*"At this stage I do not think the prosecution have a very strong case. This is mainly because I was unable to understand any of the ABE because of the very poor sound quality and so I missed the main evidence given by the complainant."* [165]

It is reasonable to conclude that, if an ordinary member of the public observing the trial felt this way, it is likely that ordinary members of the public sitting on the jury might be compelled to draw the same conclusion.

On the four occasions where transcripts of the ABE had to be handed out to juries, observers commented on the fact that reading a transcript meant that the jury was not looking at the video and the key visual evidence of how complainants reacted during the interview.

*"ABE is pathetic. A very poor camera angle, only see the side of her face. Sound is not clear, can only just make it out. Eight out of twelve jury members are reading the transcript and not looking at the complainant and as she gets more upset, only one person is looking at the screen."* [166]

One observer contrasted poorly recorded ABE evidence with the quality of defendants' evidence:
*"This is a critical piece of evidence. Would the defendant be permitted to only show one side of his face and whisper! It's not just the court (video) system – the actual video is just terribly badly made. You are supposed to get a 'hearing' in court after all."* [167]

Observers had a number of suggestions for how these issues could be addressed, including buying all the equipment needed for every courthouse, ensuring that police and court equipment were compatible, training police to take better ABE video and employing someone to handle technical issues in courtrooms and troubleshoot effectively. They also recommended that all video should be quality-checked and edited down well in advance of trial, and use of subtitles in the event that sound quality was poor.

*"The technology for the ABE and live link has to get better. It wasn't possible to see or hear anything on the ABE. The jury was handed out transcripts but that meant that they weren't watching the video, they were just trying to make out what was being said. I really doubt it is that hard to change a camera angle and use better microphones. Even if they don't do this, I suggest putting subtitles on the ABE video. This way the jurors would still be watching the actual video but are also able to understand what is being said better."* [168]

Observers made some useful suggestions for how technical problems could be resolved:
*"The ABE video should also be checked for technical problems before the commencement of the trial to avoid long delays. The court system and the police system should be more compatible. The PSNI should be asked to look at how they record ABE videos as more often than not the videos are not fit for purpose. The sound quality is always very poor and conversations taking place outside the room can be heard on the video. The camera should be closer to the complainant's face so emotions can be seen, and a microphone placed in front of the complainant."* [169]

## Discussion

Special measures such as ABE video evidence and live link evidence are valuable aides for vulnerable witnesses such as victims of sexual crime. Such measures, if used correctly, can make the difference between a complainant giving evidence and not, and can help them to give their best evidence. The availability of special measures to victims of sexual crime is indeed something to be proud of in our justice system. It is therefore extremely disappointing that the delivery of such measures continues to be plagued by what seems to be easily resolvable problems. It is concerning to note that the very measures introduced to aid the best evidence of complainants could in fact be working against their opportunity to have a fair hearing in the courtroom. Complainants are very often not aware of such quality issues until just before the trial and are not often consulted regarding this.

This is not a minor matter – in fact it is one that goes to the very heart of the administration of justice. If technical problems impede the presentation of evidence because a jury can't hear what is being said or see the complainant's face to get a sense of facial expression or body language, then those technical issues are hampering justice. Just as a defendant has the right to a fair trial, a victim of crime should have the reasonable expectation that they will be given a fair hearing, and that the best version of their evidence will be available to the twelve individuals on the jury. Technical issues should not prevent jurors from being able to see and hear evidence. The quality of a recording should not prevent a jury from being able to effectively interrogate and assess the evidence before them.

Unfortunately, this appears to be exactly what is happening in sexual offences trials in Northern Ireland. Whilst this issue is not unique to this jurisdiction and has been observed in other UK studies, it is a well-recognised issue which should have been addressed many years ago. Our growing reliance on technology in the wake of the COVID pandemic, and planned introduction of remote evidence centres for vulnerable victims, necessitates an immediate resolution to the issues identified.

Given the technologies widely available today, and the fact that high-quality video can be made with little more than a mobile phone, improvements do not need to be cost prohibitive. While one might concede that police officers are not audio-visual engineers, it is notable that many of today's technologies are so intuitive as to be accessible to ordinary people. However, it may be prudent to consider the employment of a designated audio-visual assistant in police stations to ensure that all video interviews meet the standards required for the courtroom. It may also be advisable for technical guidance to be drawn up, which outlines how ABE video should be shot to ensure it provides the best evidence. In a similar vein to requirements for passport photos, the guidance could outline requirements for head and shoulder placement of a witness and advise how a room can be set up to ensure optimum sound quality. Audio-visual hardware should be standardised across Northern Irish courts and police stations to ensure that recordings are of high quality and all equipment is compatible.

## Recommendations

- Carry out an integrated audit of all police and courtroom equipment, and procure equipment that is fit for purpose and compatible across all police stations and courts. This audit should include an assessment of rooms and spaces in which interviews are recorded to ensure adequate levels of soundproofing and effective lighting.
- Train police officers to record ABE interviews that meet an adequate standard to be used as a complainant's evidence-in-chief.
- Consider employing specific audio-visual engineers or redeploying tech staff within both the PSNI and NICTS to be responsible for recording of ABEs in police stations and playing of ABE and working of live link facilities in courts.
- Produce guidance for recording ABEs, which includes information on the rule of thirds, zoom function, how much of a witness's body should be included within a shot, and advice on recording audio.
- Put in place a Quality Assurance framework and processes, which encompass both PSNI and PPS, to ensure that ABE video is of an adequate standard and is checked as part of the pre-trial case management process.

# Juries

**Trial by jury is a key feature of many common law judicial systems including that of the UK and Ireland. Whilst Crown Court cases judged by jury comprise a minority of the overall criminal case load, with most cases being heard in Magistrates' Court, they are viewed by many as the bedrock of our criminal justice system – a symbol of freedom which ensures that the accused is judged by a sample of their peers, exercising independence of decision making without any undue external influence of pressure.**

The conduct of juries was not something that arose in a significant way in the Northumbria research. Nor was it an issue that we expected court observers to comment on in the manner that they did. The section on juries included in the questionnaire, was limited to two questions:

- How long did the jury retire for?
- Did the jury raise any questions during the deliberation?

However, in addition to answering these questions, observers provided substantial further commentary and observation about juries during the course of the trials.[170] We recognise that there is evidence that demonstrates that juries are generally conscientious in approaching their task and of the potential benefit that a collective can bring in counteracting myths in the jury room.[171] The observations gathered, however, were of such significance and interest to our observers that they chose to comment on this without prompting from the questionnaire. Given the importance placed on this by the observers we have included them in this chapter. We must again emphasise that these observations are the perceptions of the individual observers based on what they witnessed during the trials observed and cannot be validated as representative of juries in all trials.

Observer views of juries were mixed, including both explicitly positive and negative comments about jury conduct.[172] The majority of comments were negative, and raised concerns about both jury conduct and how the trial system is set up to facilitate jury decision-making.

Observer comments about juries were divided among several key themes:

- Jury attentiveness during the trial
- Whether a jury of ordinary people without legal expertise are equipped to make decisions on complex legal issues, including understanding of the burden and standard of proof
- How evidence is presented and whether it is accessible to juries
- Jury composition
- Jury commitment to the trial process
- The potential for jury bias based on a person's appearance, demeanour or background

Observers sometimes drew on their own comparable experience as ordinary members of the public thrust into the criminal justice setting, positing the theory that if they found something confusing or difficult to understand then a jury member might be likely to feel the same way. Through this lens as ordinary members of the public, they offered some opinions on trial by jury based on the sexual offences cases they observed.

## Jury Attentiveness

Observers commented that in 11 trials[173] jury members seemed disengaged or bored, were distracted by other goings on in courtrooms, or were not paying attention to the presentation of evidence. Observers believed that jurors were either sleeping or falling asleep in 6 trials.[174]

*"I felt that the jury appeared to be getting weary with it all at about this stage –they seemed pretty inanimate and at least one juror appeared to be dozing at one stage."* [175]

The perceived lack of concentration coincided on occasion with technical issues that arose in the course of the trials – jurors were inattentive during ABE video in five trials[176], and during four complainant cross-examinations via live link. In two of these[177], the bad camera angle or inability to properly see the complainant was offered as a possible reason by observers for perceived inattentiveness.

*"It should be noted that the jury were very distracted during the [ABE] video and appeared to struggle with attention. At various stages through the playing of the ABE some jurors appeared to fall asleep whilst others seemed to fidget and lose interest."* [178]

[during complainant cross-examination]: *"Both the judge and the jurors all looked very bored whilst the defence is asking questions. A lot of the jurors (I can see) are looking around instead of actually looking at the live link. Probably because there is a weird angle of the live link (at some moments, you could only see the top of the head of the complainant instead of her entire face and expressions)"* [179]

*"By asking everyone to stay late (due to delay caused by technical issues), I don't feel that the ABE video was viewed in the best way. I observed some of the jury looking around and fidgeting during the video."* [180]

However, technology was not exclusively reported to be to blame for jury inattention. Observers noted juries losing focus or attentiveness during complainant cross-examination, ABE videos and opening statements. In some cases, such as during the reading of police transcripts[181], observers believed the reason was due to bad delivery or reading out of transcripts, technical explanations, or their excessive length and inclusion of irrelevant details.

*"They read out the first and second complainant's interview. It was very long (35 mins) and there was some irrelevant material. The members of the jury were not engaging."*[182]

[during explanation of 29 counts / charges] *"Could have been more engaging. Some of the jurors were on the point of sleep."* [183]

In other cases, jurors were found to be easily distracted by personnel coming in and out of the court room during evidence.[184]

*"While prosecutor was explaining the charges, juries got distracted by the presence of people moving in and out of the court."* [185]

*"The security changed on a number of occasions and this distracted the jury. The jury were also distracted on quite a few occasions by members of the public coming and going in the public gallery and also by the Close Protection Officer wandering in and out of the courtroom."* [186]

In some cases, no explicit reason was suggested for why the jury appeared to be disengaged, though observers generally felt that it was because jurors were bored or didn't want to be there.

*"I could observe some of the jury was not really paying attention most of the time during the trial. As a court observer, I could hardly keep up with the cross-examination to write down every detail that could be imperative to the report, but I could only see one out of twelve of the jury was taking notes…inadvertently left me to question how do juries decide which evidence is true or untrue beyond reasonable doubt when some of them were not even paying attention?"*[187]

*"I couldn't quite believe how the jury behaved throughout the trial. They came across as indifferent and it was very clear that they did not want to be there. On numerous occasions members of the jury were very distracted and even fell asleep during important pieces of evidence (ABE video, police transcript and the cross-examination of the defendant). No notes were taken at all from any member of the jury during the trial and they clearly did not pay attention by the way they requested copies of the evidence during their deliberation. I feel that this was unfair for the complainant as they did not give their full attention to the matter."* [188]

*"Most of [the jury] seemed bored during the whole trial and not engaging (with the exception of two members who were actively taking notes)."* [189]

The perceived lack of attention at key points in the trial led some observers to recommend that greater consideration should be given to the attention span of the jury and advice given about the importance the ABE interview.

*"I feel that the importance of the ABE evidence is not explained properly to the jury and that the jury would benefit from a more thorough form of preparation before the start of the trial that would explain better why ABE is used and the importance of ABE as a form of evidence"* [190]

*"More breaks for the witnesses and the jury who were definitely sleeping on a few occasions."* [191]

## Lay persons understanding of legal principles and process

Procedurally speaking, the burden and standard of proof are some of the most comprehensively addressed topics in the court setting. In almost every relevant trial[192] observed, the burden and standard of proof were explained extensively at several points:

- the burden and standard of proof were outlined in the prosecution's opening statement in all relevant trials.
- The law relating to the burden and standard of proof was observed in the judge's summation at all relevant trials bar T22, in which one observer felt that the judge had not included this information in summation. [193]
- The judge was observed to have explained what 'beyond reasonable doubt' meant in every trial except T1, where both observers pointed out that this was because both prosecution and defence had already done so in closing.

Nevertheless, court observers either directly or indirectly questioned the ability of juries to grasp or apply the concept of the burden and standard of proof in several cases.

In one trial[194], both observers answered on their questionnaires that the prosecution had properly set out the burden of proof in their opening statement, and that the judge's summation set out the law about the burden and standard of proof an explained the verdict and how to reach it. Both observers found the judge's summation to be a fair representation of the case, and a good explanation of reasonable doubt. Nonetheless, after the jury retired, they returned to the judge to ask for a further explanation of what reasonable doubt meant:
*"Members of the jury had to ask what 'beyond reasonable doubt' means even though it had been perfectly explained to them on many occasions not only by the judge but also by the prosecutor and defence barrister."*

In two trials[195], court observers noted that the explanations of the burden and standard of proof, though explained, were difficult to grasp.

In one instance, an observer stated that *"the prosecutor did mention the burden and standard of proof. However, I am not sure that the jury understood it. The explanation was quite fast and I didn't understand it."*

In the other, the observer felt that the burden of proof had not been set out in a way that could be understood. They said: *"No – only words were 'so that you are SURE of guilt – I didn't fully understand – did jury?"*

In three trials, all of which were historical in nature, court observers brought up the issue of lengthy or complicated indictments, and questioned the jury's ability to understand them. In such cases, where abuse was alleged to have taken place over the course of years and various offences were alleged, a large number of indictments were listed, even though some were sample indictments. As a result, observers watching these trials often admitted to being confused by these indictments and the explanations thereof, and opined that juries may also feel that way.

[re a historical child abuse case where there were 22 charges] *"These were sample charges. How could anyone be sure how many times these things happened, and does it really matter? It certainly matters in the explanation of the charges to the jury and how much time that takes and confusion it engenders."* [196]

*"Why so many charges? When many of them are repeat and samples. More work for the police and the court and for what benefit? If he's found guilty of 29 offences will he serve more time? It really complicates things for the jury."* [197]

*"The prosecutor was a little vague in places. He did set out the facts of the case but became increasingly difficult to understand when explaining individual charges (there were a lot of them)… I found it difficult to maintain focus – did jury?"*[198]

One observer went so far as to cast doubt on whether jurors would be able to properly dispense their duty and give a reasoned verdict if they didn't sufficiently understand the indictments and what they meant:

*"The senior counsel for the prosecution set out a total of 32 indictments and whilst he did explain the reason for so many and the purpose of sample indictments – and the reason for charges being framed differently post 2009 – was not at all clear to me how what was to follow was linked to these indictments. I'm not sure if it was clear to the jury."*

*Given the high number of indictments and the 'technical' nature of the indictments I felt that it would have been useful if the jury had been given some time to consider their understanding of what it was that they were ultimately going to have to give verdicts upon – and at the opening stage either explore any queries or confirm that they understood fully what was going to be expected of them."* [199]

## The potential impact of excluded evidence

In five trials, observers became aware that a piece of evidence had to be edited or excluded in order to protect the presumption of innocence and avoid unfairly prejudicing the jury against the defendant. Court observers were able to hear about this omitted evidence as they were allowed to remain in the court room while legal arguments were being made.

Whilst they may have acknowledged the reason for omitting or editing out such evidence, observers invariably commented on the negative effect that this practice might have on the jury's understanding of a case, or the negative conclusions a jury may draw from such omissions.

Observers noted instances in which judges explicitly directed the jury not to speculate on why something was omitted, but felt that it is human nature to draw conclusions from what they had (or hadn't) seen. In one trial, the judge directed the jury that there were witnesses missing, but not to speculate about this. One observer noted:

*"There were two people who could have definitively answered to the heart of the problem – ie were the complainants alone with the defendant, and neither of them were called. [One witness] could not be called as there is an allegation from [another family member] that he had abused her. But it made it look like because he didn't give evidence for [the complainants] he didn't believe them."*

The other observer in that trial concurred, stating:
*"Although the judge directed that the jury could not speculate as to why certain potential defence witnesses had not been called – it was glaring that [they] would have been a key witness?"*

In another case[200], an issue arose whereby the complainant's evidence had to be curtailed, as it mentioned abuse by another person. That person was deceased, so no charges were being brought against him. A part of the complainant's ABE video was edited out, but the issue arose several times during the course of the trial as the complainant didn't know how to answer the defence's questions without referencing the alleged abuse. This resulted in the jury being sent out a number of times, and according to an observer *"further confused the jury"*, as well as adding to the distress of the complainant giving evidence.

In two further cases[201], observers thought that the omission of certain evidence not only made the evidence confusing to the jury, but also disadvantaged the complainant. In one, an observer opined:
*"Evidence was quite confusing and I don't think they really were able to make some areas clear… there was a lot of information not disclosed, which might account for some of this… Also some of the complainant's testimony might have made more sense if we had known that the defendant was wanted by the police at the time for other offences, which would have explained some of his behaviour in public and in private."*

In the other trial, the observations were similar:
*"…a lot of things the complainant was not allowed to mention – looks like the defendant was 'connected' to the local paramilitary group – which made the testimony a bit disjointed. So she wasn't able to tell the whole story, which I think put her at a disadvantage. As a lay person in the court I heard this, but the jury did not and I think they should have."*

Finally, in one trial[202], the failure to edit out part of the defendant's police interview resulted in the case collapsing. The interview referred to another accusation against the defendant the year before, whereby he was convicted of sexual assault but cleared on appeal. This part of the interview was left in mistakenly, and the jury heard it. As a consequence, it was agreed that the jury had been prejudiced and therefore must be discharged and a new trial called with a fresh jury.

## Positive comments about juries

In two trials, exclusively positive comments were made about jury attentiveness: [203]
*"The quality of the ABE video was very good. The jury paid very close attention and seemed to be taking everything in."*[204]

*"The jury appeared to always be fully engaged and alert."* [205]

In 4 trials, observers highlighted instances in which at least some of the time jurors could be seen to be attentive, focused, and taking the job of juror seriously.

In one, this positive comment was made:
[re cross-examination of defendant]: *"The jury listened attentively to the cross-examination and again made notes."*[206]

In another, two positive comments were made:
[During defendant's evidence-in-chief] *"The jury seemed to pay close attention to this evidence and could be seen taking down notes."* [207]

*"The jury were attentive and on the whole paid good attention to all evidence and took notes for the duration."* [208]

In a third, three positive comments were made:
*"The jury paid close attention and concentration."* [209]

*"It was noticeable at this point that the jury were very engaged [during defendant evidence-in-chief]"* [210]

[at judge summing up] *"The jury paid close attention and concentration"* [211]

In the fourth, an observer made this positive comment:

[during ABE] *"The jury paid very close attention and seemed to be taking everything in."* [212]

The other observer also noted that *"the jury appeared to always be fully engaged and alert."*

Significantly, the latter trial had only positive comments from observers about the jury. This case was also notable for the overwhelmingly favourable comments about both the prosecution and judge, in particular their robust challenges to a defence who were viewed as harassing the complainant. This may indicate a link between the effectiveness of the delivery of evidence and performance of judges and prosecutors and the positive conduct of juries.

## Discussion

It was not possible to ask jurors how they felt, thought or acted during the trials observed, as a jury's deliberations and work are privileged and beyond the scope of this research. It is therefore acknowledged that these observations can only go so far in presuming or gauging levels of jury attentiveness, understanding or opinion. That said, the sheer number of unsolicited comments from multiple observers about jury inattentiveness and understanding cannot be set aside, and must be regarded as cause for some concern. The lives of both defendants and complainants are in the hands of juries, and coming to a reasoned and just verdict requires focus and attentiveness on all the evidence presented. It is clear that during a number of trials observed, that focus and attentiveness appeared to be absent during at least some key stages of the trial.

It is clear that in some cases, inattention is the result of issues that can be fixed – sub-standard audio or visuals on ABE videos, badly focused or aligned camera angles in live link rooms, or long and monotonous public readings of police transcripts. Other issues such as noises in the court room from those entering or exiting, or those causing disturbances in the public gallery, can also be resolved with more strict management of conduct of those in the court setting. However, this does not account for all instances of jury disengagement, and serious questions have to be asked as to whether the rights of victims and defendants alike are being adequately served by the current trial format involving juries.

It may also be valuable to consider whether the tradition of primarily auditory evidence, delivered lecture-style by barristers in a court room setting, often without sufficient written accompaniments, is the best delivery mechanism for jury trials. While it was not anticipated that this study would traverse into the broader topic of how information and evidence is relayed to juries in general, the reflections of our observers have certainly made the case that the topic at least warrants contemplation.

Finally, it is worth considering that jury service is compulsory, and as such many people would not choose to sit on a jury unless they have been forced to. Although there is clearly merit in instilling a sense of civic duty in our community, one must question whether reluctant jurors make for good justice. The observations from this project suggest that they may not: one example highlights the sharp end of this issue, via a rare glimpse into jury deliberations in T1. During the jury's deliberation, three jurors reported another juror to the judge, saying that she was not fully committed. She was reported as saying *"I don't f***ing understand this, Just vote anyway and get away to f*** outta here"*. Accordingly, the judge spoke to the juror about her commitment to the process, and *"following the discussion the judge was satisfied that she could remain on the jury."* [213]

While it is positive that the juror in question had a change of heart, and the case in question did not collapse, it nonetheless raises the question of whether such sentiment is felt and expressed during other jury deliberations without the intervention of other jurors and the judge. To what extent is apathy and confusion governing the decisions of juries, as they deliberate on such sensitive and important issues as an allegation of rape or sexual violence?

Sexual offences cases are different from other crimes for several reasons: because often the jury is not asked to adduce whether an act took place or not, but whether consent was present, and because rape myths are widely-held in our society (and therefore by juries) and are used regularly by defence teams to introduce doubt to evidence[214]. Whether or not that doubt is credible is another issue. As noted previously, our observers have expressed some scepticism as to whether juries are necessarily able to separate out irrelevant detail from credible evidence – this may be even more difficult if a juror has a bias or prejudice that they are not even conscious of (see Rape Myths chapter).

Of further concern is the contention that jurors may not properly understand the evidence that is put to them, whether because of inattention and disengagement, because the evidence is not put to them in a manner conducive to understanding by lay people, or because the subject matter is just too complex for untrained members of the public to grapple with.

Similarly, the need to withhold information in a manner that might add uncertainty to an already confused and overwhelmed jury may make the prospect of a Guilty verdict an unlikely possibility, however credible the remaining evidence.

These issues have already been explored in detail in the Gillen review, who recognised that *"there is substantial evidence suggesting that many jurors struggle to understand and apply judicial directions"*[215] and teased out the myriad barriers to justice for victims of sexual crime. As part of that consultation process, Victim Support NI took the view that jury trials should be replaced by judge-led panels comprising of one judge and two lay expert assessors in sexual offences trials. This remains Victim Support NI's position. On balance, the Gillen Review maintained that juries remain the fairest and best means of trying sexual offences cases and it is not the purpose of this report to contest that. Our observations nonetheless highlight a number of issues which must be resolved to ensure that the evidence presented to juries is as clear and understandable as it possibly can be.

## Recommendations

- Consider allowing the jury time at the beginning of trials to ask questions to ensure their understanding of proceedings, what is expected of them, and what the charges/indictment means.
- Consider reframing trial formats to replace delivery of evidence by long oral statements to a more multi-media means of delivery, including written and visual aids.
- Enhance vocational training for barristers and judiciary to improve quality of evidence delivery, to aid jury understanding.
- Tackle technological shortcomings in the court system to ensure evidence delivered via technology is clear, engaging and easy for juries to understand (See Technology chapter for further detail).

# Positive observations

**As part of their questionnaire, observers were asked *"Did you observe anything particularly positive in the case and if so, what?."* Observer used this space to record examples of good practice, highlight professional behaviours, and give their views of what they'd like to see more of in the Northern Irish criminal courts.**
**Their responses have been reproduced below.**

## Judicial conduct

*"The judge was very good in simplifying terminology and putting people at ease. He was very approachable and understood that going to trial was obviously a difficult experience for all concerned."* [216]

*"The judge was an empathetic and patient man and clearly very skilled in managing senior legal colleagues. He showed the utmost respect to the complainants the witnesses the jury the court staff and the legal teams (and us as observers for the first time – requested that we meet with him. We had a very useful meeting when the trial was over). His patience was a bit overstretched at times but he maintained his decorum.""* [217]

*"The judge was particularly cautious and meticulous about conflict of interest and the priority of the complainant. She was very elaborative about what would happen during the process of trial to the jury."* [218]

*"The trial judge was very lively – business like and likeable. He had a wry sense of humour which he shared in court. The judge took the time on day one to call [both observers] aside to greet us and introduce himself and ask us about our work. He made a point of telling us that he had asked a court official to be present to ensure there would be no suggestion that he was trying to influence us in any way. When the defence barrister queried our presence in closed court the judge gave him an explanation immediately and he clearly understood our purpose and role."* [219]

*"The Judge took the time to explain what was happening to the jury when needed and thanked the jury at the end of each day for their time."* [220]

*"The Judge was extremely good during his summing up."* [221]

*"The Judge seemed to be very fair in his handling of the case. He tried his best to get it to proceed and was clearly frustrated that it could not but accepted that delay was necessary in this case for there to be a fair trial."* [222]

*"I thought the Judge managed the court proceedings well. She was patient but firm in her decision making and showed a level of concern to both parties."* [223]

*"The judge was extremely good. Set people at ease, explained well, didn't let things get away. The best I have seen so far."* [224]

*"I think the Judge handled the conflicts very professionally. The Jury appeared to always be fully engaged and alert."* [225]

*"Judge was clear, easy to hear and explained things to court and to jury which were otherwise difficult to follow for those 'outside the system'."* [226]

## Defence counsel conduct

*"The willingness of the defence QC to continue his duty to represent the defendant [though] defendant did not want his service, and the threat made by the defendant. He was constantly annoyed by the defendant's family members as well. His professionalism is a positive sight in the court."* [227]

*"Defence barrister was respectful to the victim."* [228]

*"At one point there were technical problems with the ABE and [the defence barrister] asks if someone told the 'poor girl in the other room' what was going on. It seemed as if he found this very important."* [229]

## Prosecutor conduct

*"The Prosecution did a very good job of explaining the importance of the ABE video to the jury before it was played."* [230]

*"The prosecutor was extremely good during his summing up."* [231]

## Court staff conduct

*"Generally in the courtroom and outside everyone involved showed each other good manners and respect."* [232]

## Jury conduct

*"The jury were very attentive and on the whole paid good attention to all evidence and took notes for the duration."* [233]

*"The jury paid close attention and concentration."* [234]

## Good case management

*"Witnesses were called for half days, so not waiting too long to give evidence. [The judge] kept pushing the barristers especially the defence to get [on] with it."* [235]

*"Even though it is usually a matter of concern to have trials starting hours later than when they should, sometimes delays are justified as, this time, it was a crucial part of the trial. It avoided that the claimants were cross examined putting an end to the trial with a better outcome for everyone."* [236]

*"I think a positive aspect was that the sessions were not too long. We only had to stay for lunch a few times because most of the days we only had to be there in the morning or the afternoon. Whilst it is true that that would mean that the trial would last longer, I think it is positive for the jury not to stay for too many hours in court, as they can tend to lose concentration and feel exhaustion."* [237]

*"Good efficient trial – really over by Wed afternoon"* [238]

*"Judge was to-the-point with Defendant that case could not delay any further."* [239]

## Complainant wellbeing

*"The judge was very aware of how the complainant was feeling and did everything his power to put the complainant at ease and make the whole experience as painless as possible."* [240]

*"The judge had the feelings and well-being of the complainant at the forefront of her mind and was trying her best to make the experience as easy on the complainant as possible, even asking the court to sit late so that the ABE was shown on the first day of trial. The judge took the time to put the complainant at ease and to explain what would be happening, that breaks could be arranged when needed and that she would do all she could to complete the trial in a timely manner."* [241]

*"The attitude of the Prosecutor & the Judge with the witnesses- extremely good."* [242]

*""The arrangement of 20 minute examination periods with a 10 minute break seemed to assist the complainants... in remaining composed during the presentation of their evidence."* [243]

## Defendant wellbeing

*"While the clerk was reading out each charge for defendant to plead guilty, the defendant was shivering or shaking from pleading the first count until the 14th counts. The judge saw his expression and insisted that he should be meeting a GP for his mental health while discussing his bail. He took account into his age seriously and of course his well-being."* [244]

*"For the first time in the cases I have observed so far the Defendant was offered breaks during the evidence and cross-examination."* [245]

## PPS decision to prosecute

*"I think the PPS were brave in deciding that the case should go to trial."* [246]

## Treatment of historical cases

*"Although the allegations of the complainants related to a period some 12/13 years previous they were treated pretty much as fresh."* [247]

## Compliments for resilience of complainants

*"It was impressive that in spite of the many hurdles that must have been overcome the complainants were still resolute in their desire to obtain justice."* [248]

*"I was very impressed by the strength of both complainants subjecting themselves to cross examination for a second time (the first trial was abandoned near to the end) and remaining relatively unfazed doing so."* [249]

## Cultural sensitivity

*"The standard of translation was high; the 2 translators had been brought from England. The Defendant was able to use the Koran to be sworn in."* [250]

## Good quality ABE

*"This was the first case observed where the ABE video had no technical/sound issues and could be heard clearly by all in the court."* [251]

## Offender management

*"Defendant was required to sign the Sex Offender's Register."* [252]

*"I agreed with the Judge about the exceptional case for bail, however I was surprised that the Judge seemed more concerned about ensuring safety of complainant and conditions for bail than did the Pros Barrister in this case."* [253]

# Court observer recommendations & suggestions for change

**Over the course of their year observing sexual offences trials, observers cultivated a wide range of views on what needed to change to make trials fairer, less traumatic, and more efficient. Their suggestions ranged from the administrative and procedural like providing written timelines of complex cases for juries, to bigger ideas such as providing complainants with their own legal representative during trials. The following is a summary of the Northern Ireland Court Observer Panel's recommendations, collated from questionnaires across all trials in answer to the question *"Do you have any suggestions for changes to include?"***

## Fairness

- Provide separate legal representation for complainants during trials[254]
- Assign a representative to inform complainants of what is happening
- Give complainant a representative for deliberations where defendant may be willing to agree to plead guilty to lesser charges, so complainant is fully appraised of what is happening and has a voice in the process
- Bar defence barristers from being able to draw negative inferences from complainants attending meetings with PPS or police (for example being accused of being *"coached" or "getting their story straight"*)
- More breaks for witnesses
- Impose financial fines for defence barristers who ignore the directions or interventions of judges
- Give vulnerable or distressed witnesses a break every 20 minutes when giving evidence

## Improving information for juries

- Provide a written timeline for juries in complex cases, historical cases, or cases that span over a number of years.
- In historical cases where child victims are now adult complainants, provide a written timeline for juries indicating the ages of parties at the time of allegations
- Explain what the ABE is and its importance as the complainant's main evidence to juries so they know they need to pay attention
- Explain the *"imbalance"* between defendant and complainant, and how the prosecution barrister does not represent the complainant whereas the defence barrister does represent the defendant. This would explain differences in evidence, differences in tone, and ensure that no inaccurate inferences are drawn from these contrasting approaches.
- Comprehensive information and explanation about rape myths
- Police statements should be read out by a person of the same gender as the person who made the statement.
- Statements should not be read out in monotone
- Where possible, recorded evidence should be preferred to reading out statements in court, as such statements miss out the reactions, expressions and body language which is also important evidence

## Quality assurance of evidence

- Better scrutiny of quality of police investigations and files submitted to PPS
- Review how ABEs are recorded to ensure they are providing best evidence, including ensuring that a complainant's face can be clearly seen and that they can be clearly heard
- Implement better file monitoring by PPS, so that shortcomings can be addressed long before the case reaches court
- Check ABE recordings before trial day, and add subtitles if audio is inadequate

## Technology

- Update court technology to make it fit for purpose, including ensuring that ABE can play, that all court rooms are equipped with Live Link screens, and that all courthouses have a sufficient number of headsets
- Introduce soundproofed rooms with proper lighting and equipment to police stations so ABE videos are fit for purpose
- More Live Link rooms so complainants can watch defendant evidence remotely as well as giving their own evidence there
- Check all technology before trial day and at beginning of working day before trial starts
- Provide a facility for juries to watch video evidence in the jury room
- Replace microphones in courtrooms with mics that can pick up what counsel are saying even when their heads are turned or they are moving, such as tie mics or omnidirectional mics.

## Delay

- Address the length of time cases take to reach court, as this affects the impact of evidence and the recall of witnesses
- Extend court working days so more business can be fitted in in a single day. One suggestion was running two sessions in Crown Court, one in the morning and one in the afternoon. Observers felt that multiple shorter sessions would not only move court business along, but might prevent jurors from getting inattentive.
- Address problems with disclosure to avoid disclosure issues leading to unnecessary adjournments and delays
- *"Stop rescheduling court dates to suit barristers."*
- Establish a shared electronic calendar system to manage trial dates, assign counsel etc

## Training

- Train court clerks to provide IT support in court buildings
- Better training of police to ensure that they know how to collect and document evidence that will be fit for trial

## Efficiency

- Make the management of the judge's diary the responsibility of NICTS staff to free up judge for more important jobs
- Start pre-trial business earlier in the morning so trials can start more promptly
- Better management of the court's time generally, as it is *"very costly for senior legal people to spend so much time just standing about."*
- Better management of the court estate. Observers queried why there were so many free courtrooms after lunchtime each day, and whether these could be used to run more trials and reduce delays.
- Review how barristers and judges are assigned to trials so that no one is put in a position where they *"cut corners in order to shorten the trial"* because of another upcoming trial commitment.
- Reduce budget deficit by only having one barrister per trial for defendant and complainant. Redirect savings into better technology and infrastructure.
- Impose a standardised time limit for closing arguments
- All legal arguments sessions should take place before 10am.
- Agreed evidence should be established pre-trial

## Juries

- Explain conventions to juries, like senior counsel doing defence closing but junior counsel doing prosecution closing. If not explained, jury might mistakenly think there is a hierarchy of importance in what they are hearing.
- Introduce all counsel, clerks and parties involved in trials to juries to avoid confusion and avoid trials having to be stopped because of a juror realising a conflict of interest too late.
- Scrap jury trials in sexual violence cases, as juries are timid about reaching a guilty verdict because of the stigma of a conviction for sexual crime.
- Ensure gender balanced juries, as most complainants are female and most defendants are male, and a mostly male jury might bring a gendered bias to their deliberations.
- Simplify and reduce the number of charges on indictments to reduce jury confusion, especially in cases where allegations span years.
- Include illustrative examples of what reasonable doubt looks like in practice for juries
- More breaks for juries to prevent them falling asleep

## Burden of proof

- Revisit the beyond reasonable doubt standard of proof for sexual offences trials.

## Categories of rape offence

- Consider introducing a lesser offence in cases of 'mate rape', or alternative means of dealing with such cases such as restorative justice, as juries seem less inclined to convict in such cases, even if the evidence firmly points towards guilt, due to the serious consequence and stigma of a conviction for rape.

# Appendix A





# COURT OBSERVERS

Victim Support NI

## COURT OBSERVERS QUESTIONAIRE

| | |
|---|---|
| **Trial Reference Number:** | |
| **Observer Reference Number:** | |

## Special Measures

| | | |
|---|---|---|
| Are there any special measures in place for the complainant? | Yes | |
| | No | |
| If special measures are in place, what are they?<br>Please tick all relevant boxes: | Screens around witness box | |
| | Live link: witness giving evidence from another room via TV live link | |
| | Pre-recorded evidence in chief<br>(Achieving best evidence ABE interview) | |
| | Closed court (no public gallery) | |
| | Removal of wigs and gowns | |
| | Registered Intermediary | |
| Were you aware if an application for Special Measures was made on the day? | Yes | |
| | No | |
| How did you know an application for Special Measures was made on the day? | | |



## Support for the injured party

| | | |
|---|---|---|
| Does the IP have a Witness Service or other formally appointed support person with them?<br>(for example, Registered Intermediary) | Yes | |
| | No | |
| Are these formally appointed support persons sitting beside the witness whilst they give evidence? | Yes | |
| | No | |
| How do the formally appointed supporters interact with one another and with other court staff? | | |

## Trial Opening

| | | |
|---|---|---|
| What information does the judge give the jury about the nature of the case before it is opened? (Tick all that apply) | Charge in the case | |
| | Defendants name | |
| | Location of the crime | |
| | Instruct the jury not to discuss the case or to go on the internet | |
| | Any other information (please specify) | |

## Prosecution Opening

| | | |
|---|---|---|
| Did the prosecutor's opening statement set out the facts of the case? | Yes | |
| | No | |
| Was this clear, easily understood and concise? | Yes | |
| | No | |
| Did it properly set out the burden and standard of proof? | Yes | |
| | No | |
| Was there any mention of the IP's previous sexual history? | Yes | |
| | No | |
| If the IP's previous sexual history was mentioned, in what way was it made relevant to the argument? | | |
| Was there any mention of rape myths? | Yes | |
| | No | |
| If rape myths were mentioned, what was said? (Note rape myths you heard)<br>• Beliefs that blame the survivor<br>• Beliefs that cast doubt on allegations<br>• Beliefs that excuse the accused<br>• Beliefs that assume rape only occurs in certain social groups | | |



| | |
|---|---|
| Any other comments or observations: | |

## IP evidence in chief

- ABE = Achieving best evidence

| | | |
|---|---|---|
| What date and time did evidence in chief begin? | | |
| What methods did the Judge use to help put the IP at ease when they entered the witness box to give evidence? | | |
| Was an ABE interview (pre-recorded with police) used? | Yes | |
| | No | |
| If an ABE interview was used, please record any difficulties there were with it: | | |

| | | |
|---|---|---|
| If there was no ABE interview, did the prosecutor take the IP through their evidence in a way that helped them to be as clear and concise as possible? | Yes | |
| | No | |
| How long did the evidence in chief last? | | |
| Was the IP offered a break? | Yes | |
| | No | |
| Date and time the examination in chief ended (including breaks) | | |
| Any other comments or observations: | | |

IP cross-examination

| | |
|---|---|
| Date and time the cross-examination started | |
| What did you see and hear that made you think the IP was treated respectfully? | |
| If the IP's previous sexual history was mentioned, what was said about it? | |



| | | |
|---|---|---|
| Was the IP asked about compensation? | Yes | No |
| If the IP was asked about compensation, how was the question asked and what was the response? | | |
| What did you see and hear that made you think the IP was treated disrespectfully?<br>For example:<br>• Persistent questioning<br>• Accused of lying or being a liar | | |
| Please identify any rape myths that were used. How were they expressed and used?<br>• Beliefs that blame the survivor<br>• Beliefs that cast doubt on allegations<br>• Beliefs that excuse the accused<br>• Beliefs that assume rape only occurs in certain social groups | | |

| | | |
|---|---|---|
| Did the prosecutor intervene at any stage in the questioning?<br>If so, how and what happened? | | |
| Did the judge intervene at any stage in the questioning?<br>If so, what points did the judge make?<br>Do you have any other comments? | | |
| Did the prosecutor re-examine the IP and if so, what issues did they cover or go over again with the IP? | | |
| Was the IP offered a break? | Yes | |
| | No | |
| Date and time the IPs evidence ended | | |
| How long did the IPs evidence last, including breaks? | | |
| Any other comments or observations: | | |



| | |
|---|---|
| Did the defence make an application for *No Case to Answer* at this point and if so, on what grounds? | |
| What is your personal opinion of the strength of the case at this point? | |

**Other witnesses' evidence (for the prosecution)**

| | |
|---|---|
| Were any other witnesses called by the prosecution? If so, who were they? | |
| How well was their evidence handled by the prosecutor? | |

| | |
|---|---|
| Were they cross examined by the defence? If so, did the defence manage to throw doubt on their evidence in any way? | |
| Was other evidence available? What was it and how well was it used? | |

| Defendant's evidence |
|---|

| | | |
|---|---|---|
| Did the defendant give evidence? | Yes | |
| | No | |

**If yes:**

| | | |
|---|---|---|
| What date and time did the evidence in chief begin? | | |
| What methods did the judge use to help put the defendant at ease when they entered the witness box to give evidence? | | |
| Did the defence take the defendant through their evidence in a way that helped them to be as clear and concise as possible? | Yes | |
| | No | |



| | |
|---|---|
| Please identify any rape myths that were used, how they were expressed and how they were used.<br>• Beliefs that blame the survivor<br>• Beliefs that cast doubt on allegations<br>• Beliefs that excuse the accused<br>• Beliefs that assume rape only occurs in certain social groups | |

| | | |
|---|---|---|
| Was the defendant offered a break? | Yes | |
| | No | |
| Date and time the evidence in chief ended | | |
| How long did the evidence in chief last? | | |
| Any other comments or observations: | | |

| Defendant cross-examination | |
|---|---|
| Date and time the cross-examination started | |
| What did you see and hear that made you think the defendant was treated respectfully? | |
| What did you see and hear that made you think the defendant was treated disrespectfully?<br>For example:<br>• Persistent questioning<br>• Accused of lying or being a liar | |
| Did the prosecutor intervene to challenge any rape myths and if so, what myths were challenged and what happened?<br>• Beliefs that blame the survivor<br>• Beliefs that cast doubt on allegations<br>• Beliefs that excuse the accused<br>• Beliefs that assume rape only occurs in certain social groups | |



| | | |
|---|---|---|
| Did the defence intervene at any stage in the questioning and if so, what happened? | | |
| Did the judge intervene at any stage in the questioning and if so, what happened? | | |
| Did the defence re—examine the defendant and if so, what issues did they cover or go over again? | | |
| Was the defendant offered a break? | Yes | |
| | No | |
| What time did the cross-examination end? | | |
| How long did the cross-examination last, including breaks? | | |
| Any other comments or observations: | | |

| | |
|---|---|
| What is your personal opinion of the strength of the case at this point? | |

| Other witnesses/evidence (for the defence) | |
|---|---|
| Were any other witnesses called by the defence? If so, who were they? | |
| Were any rape myths used and if so, what were they and how were they used?<br>• Beliefs that blame the survivor<br>• Beliefs that cast doubt on allegations<br>• Beliefs that excuse the accused<br>• Beliefs that assume rape only occurs in certain social groups | |



| | |
|---|---|
| How well was their evidence handled by the defence? | |
| Were they cross-examined by the prosecutor? If so, did the prosecutor manage to throw doubt on their evidence? | |
| Was any other evidence available? If so, what was it and how was it used? | |

| The summing up | | |
|---|---|---|
| Did the judge adhere to NI Court Bench Book in their summing up? | Set out the law about the burden and standard of proof | |
| | Refer to the offences set out in each count spelling out what is in dispute | |
| | Summarize the evidence of both the defence and the prosecution | |
| | Explain the verdict and how the jury reach it | |
| | Refer to the law about the defendant not giving evidence (if applicable) | |

| | | |
|---|---|---|
| Did the judge follow any directions, with regard to sexual offences, as set out in the Crown Court Compendium to address assumptions?<br>(Tick all that are applicable) | Delay in making a complaint | |
| | Complaint made for the first time when giving evidence<br>Inconsistent accounts given by the complainant | |
| | Lack of emotion/distress when giving evidence | |
| | A consistent account given by the complainant | |
| | Clothing worn by the complainant said to be revealing or provocative | |
| | Intoxification on the part of the complainant whilst in the company of others | |
| | Previous knowledge of/friendship or sexual relationship with defendant including distinction between submission and consent<br>Some consensual activity on the occasion of the alleged offence | |
| | Lack of any use or threat of force, physical struggle and/or injury | |
| | A defendant who is in an established relationship | |
| Did the judge address any rape myths in summing up? If so, which myths were referred to and how were they addressed?<br>• Beliefs that blame the survivor<br>• Beliefs that cast doubt on allegations<br>• Beliefs that excuse the accused<br>• Beliefs that assume rape only occurs in certain social groups | | |



| | |
|---|---|
| | |

| | | |
|---|---|---|
| Do you believe the summing up to be a fair representation of the case? Please explain why you reached your conclusions. | | |
| Did the judge explain reasonable doubt? | Yes | |
| | No | |
| If so, please note what the judge said about reasonable doubt. | | |
| What is your personal opinion of the strength of the case at this point? | | |



| | |
|---|---|
| Did the prosecution or defence requisition the judge in their summing up?<br>(i.e. request the judge to refer to something from the Bench Book in their summing up) | |

## The jury

| | |
|---|---|
| How long did the jury retire for? | |
| Did the jury raise any questions during deliberation? If so, what? | |

## Delays

| | |
|---|---|
| Were there any delays during the trial? If so, what was the reason for the delay and the length of the delay?<br>(Please note all delays) | |

| | |
|---|---|
| How often was the jury asked to leave for legal arguments? | |

General impressions

| | |
|---|---|
| What is your overall impression regarding this case? | |
| Did you observe anything particularly positive in the case and if so, what? | |
| Do you have any suggestions for changes to include? | |



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| | | | |
|---|---|---|---|
| Special Measures | Date of application: | | |
| | Date granted: | | |
| | Not granted: | | |
| Previous sexual history | Was an application made to include previous sexual history? | Yes | |
| | | No | |
| | Date of application | | |
| | Granted | | |
| | Not granted | | |
| Pre-trial support | Has the IP had a PTV before the trial? | Yes | |
| | | No | |
| | If yes, what date was the PTV? | | |
| | Did the prosecutor speak to the IP before the trial? | Yes | |
| | | No | |

WS

| | | |
|---|---|---|
| Special Measures:<br>Did the IP remain in the live link to watch the remainder of the trial?<br><br>Please explain what the IP did if they did not remain in the live link | | |

VSNI

| | | |
|---|---|---|
| Has an ISVA provided support in this case? | Yes | |
| | No | |

| NOTES |
| --- |
| |



| NOTES |
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| |

# Appendix B



## Appendix B: Rape Myths Handout

Rape myths are the most widely discussed and commonly examined aspects of rape trials.

A 'rape myth' is assumption about rape which is inaccurate and feeds a particular view of what happened between parties. In her review of rape myths, Nina Burrowes concludes:

> "… the overwhelming conclusion from this review is that rape myths do appear to have an impact on judgements. Individuals who hold stereotypical attitudes towards rape are more likely to judge complainants in rape cases harshly and defendants leniently."[1]

**Commonly held rape myths (adapted from Saunders 2012 by Nina Burrowes[2])**

| Myth | Responses |
|---|---|
| Rape occurs between strangers in dark alleys | • In fact, the majority or rape is by a person known to the<br>• Victims are often raped in their own home |
| People provoke rape by the way they dress/act | • Provocative dressing may be an invitation to consensual sex, but not to rape |
| People who drink alcohol or use drugs are asking to be raped | • Vulnerability does not imply consent<br>• If the victim is unable to consent, it is rape |
| Rape is a crime of passion | • Power control and violence do not equal passion<br>• Rape can include pre-meditation and planning |
| If she didn't scream, fight or get injured, it isn't rape | • Fear<br>• Trauma responses<br>• Coercion and/or intimidation<br>• Non-consensual sex does not necessarily leave visible marks |
| You can tell if she's really been raped by how she acts | • Different people will display different reactions<br>• Shock<br>• PTSD |

[1] Responding to the challenge of rape myths in court: A guide for prosecutors, Nina Burrowes, www.nbresearch.co.uk, March 2013, p11
[2] P6

| | |
|---|---|
| | • Numbing etc. |
| Women cry rape when they regret having sex or want revenge | • Data on false reporting shows that no more than 8% of reports are false |
| Male rape is an offence that take place between gay men | • Rape is not about sexual desire<br>• Gay men have been raped by heterosexual men |
| Prostitutes cannot be raped | • Prostitutes have the same rights as everyone else |
| If the victim didn't complain immediately it isn't rape | • The vast majority of victims never report<br>• Trauma, shame, fear etc. can cause delay in reporting |

**Burrowes herself puts rape myths into 3 broad groupings and suggest alternative narratives that need to be introduced in the court setting:**

| Myth | Explanation | Alternative narrative |
|---|---|---|
| Myths that emphasise victim vulnerability/victim-blaming | These myths ignore the influence the accused had on events e.g. offenders may carefully select and target victims so that their chance of being caught is reduced. | The 'foolish girl' myths need to be replaced which a narrative of 'the offender who did not want to get caught.' |
| Myths with a hindsight bias | The victim should have known what would happen. | This narrative needs to be replaced with one that recognises the role the offender played in helping the victim to feel safe. They could not know how things would turn out and feeling safe contributes to the unlikelihood of them ever guessing. |
| Myths about victim resistance | This myth persists because it gives jurors a sense of personal control and safety – it wouldn't happen to me, I would have fought back. | This needs to be replaced with a narrative that understands trauma and reflects the research outcomes – very few fight back. This response is out of a victim's control. |

Appendix B: Rape Myths Handout

**Olivia Smith presents rape myths using 4 broad areas[3]:**

| Type of Myth | Common Examples |
|---|---|
| Beliefs that blame the survivor | • People who get voluntarily intoxicated are at least partly responsible for their rape.<br>• People provoke rape by the way they behave and dress.<br>• If a survivor does not scream, physically resist or get injured then it is not rape. |
| Beliefs that cast doubt on allegations | • False allegations are common mostly because of revenge, regret or for personal gain.<br>• All survivors will be visibly distressed after rape and when giving evidence.<br>• Any delay in reporting rape is suspicious.<br>• Ongoing contact with the perpetrator means that it wasn't rape. |
| Beliefs that excuse the accused | • Rape is a crime of passion.<br>• Male sexuality is uncontrollable once "ignited".<br>• Rapists are monsters, so someone perceived as a "nice man" cannot be a rapist. |
| Beliefs that assume rape only occurs in certain social groups | • Rape only occurs between strangers and in public places.<br>• Male rape only occurs between gay men.<br>• People working in prostitution cannot be raped. |

**PPS Policy for Prosecuting Rape Trials[4] provides examples of rape myths & stereotypes:**

| |
|---|
| • Rape occurs between strangers in dark alleys |
| • Victims provoke rape by the way they dress or act |
| • Victims who drink alcohol or use drugs are asking to be raped |
| • Rape is a crime of passion |
| • If they did not scream, fight or get injured, it was not rape |
| • You can tell if someone 'really' has been raped by how they act |
| • Victims cry rape when they regret having sex or want revenge |
| • Only gay men get raped/only gay me rape men |
| • Prostitutes cannot be raped |
| • A woman cannot be raped by her husband/partner |
| • Victims who have remained in an abusive relationship are responsible for any rape that follows |

The PPS do not allow these myths and stereotypes to influence decisions.

[3] Rape trials in England and Wales: Observing justice and rethinking rape myths, Olivia Smith, Palgrave MacMillan 2018, p11

[4] file:///C:/Users/lesleyc/AppData/Local/Microsoft/Windows/INetCache/IE/NS4MJ8J3/PPSNI%20RAPE.pdf

# References


1 Durham, R., Lawson, R., Lord, A. & Baird, V., 2017. Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 trials 2015-16, Newcastle: Northumbria Police and Crime Commissioners Office.

2 Smith, O., 2018. Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths. 1st ed. Cambridge: Palgrave Macmillan.

3 Gillen, S. J., 2019. Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland, Belfast: Department of Justice.

4 http://www.northumbria-pcc.gov.uk/volunteers/court-observers/seeing-is-believing-2/

5 See Appendix B

6 See Smith, O, Rape trials in England and Wales: Observing justice and rethinking rape myths, Palgrave MacMillan 2018, p11

7 Observers were asked if rape myths were used or mentioned in several places in the trial: Prosecution Opening, Complainant Cross-examination, Defendant Evidence, Evidence of Other Witnesses.

8 T15,16, 20 and 23.

9 T1

10 In T 15, 21 and 23, court observers recorded that prosecutors used re-examination to deal with issues that had contained rape myths in the defence's cross-examination of the complainant. However it is not clear whether prosecutors went so far as to unpick those myths. In T15, the prosecutor asked about the complainant's past to clarify that he had *"turned his life around" – this arguably doesn't address the myth that if someone has an unsavoury past they couldn't have been raped or are not a reliable witness, but sought to mitigate the damage done by that myth. In T21, observers noted that the re-examination concerned the complainant's "family and feelings about her relationship with the defendant"*, which may have intended to address the rape myths concerning her 'crying rape' as an act of revenge for the defendant's previous infidelity, or the myth that because they had been in a previous relationship she couldn't have been raped. In T23, the short re-examination sought to cut through myths about their previous relationship and consent, by simply asking if the complainant consented to sex on that night.

11 These were T6,16,18, and 23. It should be noted however that in T18 the prosecution also relied on rape myths for their evidence during the cross-examination of the defendant, by saying that the complainant *"wasn't dressed in a sexually alluring way"*. This feeds into the myth that what a victim wears makes them partially responsible for their rape, or more likely to be raped. It also feeds into the myth that a rapist is less culpable for their actions if they 'couldn't help themselves' due to what a victim was wearing.

12 T20 and T21. Note: a total of 20 trials reached the stage of judge giving info to jury before opening of the trial.

13 T6, 10, 14, 16, and 23. T6 involved specific mention of the violent nature of the past relationship between defendant and complainant, which may have spoken to myths about past intimacy meaning that no rape took place. In T10,14,16 and 23, general comments were made by prosecution about there being no typical victim or attacker and no typical reaction to rape. Note: a total of 18 cases reached Prosecutor Opening Statement stage.

14 T16

15 In T15, the judge stated that as the defendant was an older man of good standing in the community, he was unlikely to have committed the rape. In T23, the judge focused on the defendant's youth and the fact that he was attending university in summing up. One observer felt that this showed bias towards the defendant and was irrelevant as to whether the assault took place.

16 T13

17 T13

18 T18

19 T18

20 T10

21 T23

22 T14

23 T18

24 T23

25 T13

26 T18

27 T16

28 T16

29 T16

30 T23

31 T25

32 T18

33 T25

34 T1

35 T16

36 T6

37 T13

38 T16

39 T16

40 T18

41 T18

42 T18

43 T15

44 See for example Zoe Lodrick, Psychological Trauma – What Every Trauma Worker Should Know

45 T1

46 T18

47 T16

48 See for example research on the impact of trauma on sexual violence victims: Lodrick, Z. (2007) Psychological trauma – what every trauma worker should know. The British Journal of Psychotherapy Integration. Vol. 4(2)

49 T1

50 T1

51 T16

52 T23

53 T16

54 T22

55 T14

56 T16

57 T21

58 T16

59 T1

60 T10

61 T6

62 T14

63 T15

64 T23

65 T6

66 T10

67 Kelly, Liz, A Gap or a Chasm? Attrition in reported rape cases, Home Office Research Study 293, January 2005, available at file:///C:/Users/louisek/Downloads/Home_Office_Research_Study_293_A_gap_or_a_chasm_At.pdf

68 T1

69 T6

70 T21

71 T18

72 T21

73 T15

74 T6, T21, T22, T23, T25.

75 T6 and T25

76 T22, in which the complainant and defendant had *"a few fairly chaste dates, movies, drinks, texted daily"* but were friends only and not a couple.

77 T6

78 T21

79 T21

80 T23

81 T23

82 T25

83 T23

84 T1, T13, T15, T21 and T23.

85 T1

86 T1

87 T1

88 T13

89 T15

90 T15

91 T15

92 T15

93 T21

94 T21

95 T21

96 T23

97 T23

98 T1

99 See Consent to serious harm for sexual gratification: Not a defence, DOJNI 2020, available at https://consultations.nidirect.gov.uk/doj-corporate-secretariat/consent-to-serious-harm-not-a-defence/

100 T6 and T16

101 T15, 16, and 20

102 T6, 15,16,18, 21 and 23

103 T6

104 T18

105 T1

106 In T15, both observers pointed out that the 'good character' of the defendant was an overly prominent feature of the case, possibly due to the historical nature of the case and the scarcity of other evidence. One felt that in summing up the judge referred heavily to the good character of the defendant and the fact that he always had a job and that his children had been well brought up, and that *"this all went to the defendant being of a better social class than the complainant who had never worked and had a criminal record." They concluded that "I felt that the summing up was very biased in favour of the defendant."*

107 T23

108 In T18, T21, and T23, observers recorded *"shock" and "disappointment"* at the verdicts in the General Impressions section of the questionnaires, and highlighted issues such as the prosecution's failure to challenge certain lines of questioning and endorsement of rape myths by the judge as possible contributing factors to the verdicts.

109 For a consolidated summary of research on this issue, see Fiona Leverick, What Do we Know About Rape Myths and Jury Decision-Making?, The International Journal of Evidence & Proof, May 2020. Last accessed 29/1/21 at https://journals.sagepub.com/doi/10.1177/1365712720923157

110 PPSNI, Policy for prosecuting cases of rape, at 11.8, accessible via https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Rape%20Policy.pdf

111 T16

112 Available at https://www.legislation.gov.uk/nisi/1999/2789/article/28

113 Unfortunately it was not possible to gather this data accurately

during the course of the project. Consequently, this study is unable to analyse whether defence counsel followed rules relating to making previous sexual history applications, and unable to directly compare these findings with those from the Northumbria project.

114 T6, T13, T18, T25

115 T23

116 See R v R [1992] 1 AC 599

117 T10 and T14 were the same case, the trial having collapsed and been rerun at a later date.

118 Please note that T10 and T14 are the same case. T10 was adjourned following difficulties with some evidence, and was run several months later as T14, with different observers watching.

119 T15

120 See section 9: Compensation, accessible at https://www.justice-ni.gov.uk/sites/default/files/publications/doj/victim-charter.pdf

121 Victim Charter NI, Entitlement 1.

122 The right to a fair trial is enshrined in the UK within Article 6 of the Human Rights Act, reflecting European Convention on Human Rights, Article 6.

123 https://www.barofni.com/page/code-of-conduct available directly at http://f155c37b9527c4a8c1a3-a15971a48924c42bb509c668e302d36e.r86.cf3.rackcdn.com/Code_of_Conduct_FINAL%20VERSION%20EFFECTIVE%20FROM%201st%20October%202020.pdf; last visited 22 January 2021

124 T21

125 T1, 6, 10, 18, 23 and 25.

126 T6, 8, 13, 14, 18 and 22.

127 Public Prosecution Service NI, Policy for Prosecuting Cases of Rape, available at https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Rape%20Policy.pdf (last accessed 22 January 2021).

128 At 2.149, pg 102, available at https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf

129 T10, T16, T23 and T25

130 T1, T13, T18

131 T6, T14, T15, T21

132 T8, T22

133 T6

134 T23

135 In 7 cases the defendant entered a guilty plea for some or all charges (T2, T4, T5, T7, T11, T24, T27), and in one case the Prosecution offered no evidence so the judge directed that the defendant be found Not Guilty (T12).

136 We have defined 'significantly later' as more than a week after the trial was adjourned.

137 T1

138 T15

139 This excludes reasonable breaks in trial for legal arguments, witness and jury breaks, and other essential elements that are part of the normal business of a trial

140 T1

141 T1

142 T19

143 T23

144 T1

145 T26

146 T4

147 T8

148 See Department of Justice, Case Processing Time for Criminal Cases dealt with at Courts in Northern Ireland 2019/20, available at https://www.justice-ni.gov.uk/publications/case-processing-time-criminal-cases-dealt-courts-northern-ireland-201920 (last accessed 28/9/20)

149 It is a welcome development that one key reform recommended by Gillen, the abolition of Committal hearings, is now being taken forward via the Criminal Justice (Committal Reform) Bill, which was laid before the Northern Ireland Assembly in November 2020.

150 Article 5(4), Criminal Evidence (Northern Ireland) Order 1999

151 Special measures marked with an asterisk (*) are available to any witness for prosecution or defence who may have difficulties communicating or engaging with questioning in a manner that elicits their best evidence.

152 T1,3,4,6,8,10,11,13,14,15,16,17,18,20,21,22,23,24,25

153 In T10 and T14, which was the same case that had been adjourned and run again, the second complainant opted to give her evidence-in-chief in court instead of using the ABE video.

154 A further 4 trials had live link measures granted, but the case was adjourned before the complainant was cross-examined

155 T4

156 T4,8,15,17,25

157 T13

158 The Gillen Review has comprehensively outlined these challenges in its final report – see https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf (last accessed 24th June 2020)

159 A trial was measured as long enough if it completed at least one part that utilised technology to aid the giving of evidence – this was usually the Complainant's evidence-in-chief being delivered via a pre-recorded ABE video interview with police. The trials that met this standard were T1, 3, 4, 6, 8, 10, 13, 14, 15, 16, 18, 20, 21, 22, 23 and 25.

160 T4 and T18.

161 T25

162 T16

163 T25

164 T16

165 T15

166 T23

167 T23

168 T16

169 T23

170 Observers recorded comments about juries under the section of the trial where they observed the jury engaging in the behaviour in question, and also under General Impressions and Notes sections.

171 Finn, McDonald & Tinsley, 2001

172 Explicitly positive comments about the jury were mentioned in T8,13,14, 18 and 25. Explicitly negative comments about the jury were noted in T1, 3, 4, 6, 8, 13 14, 16, 19, 20 and 21.

173 T1, 3, 4, 6, 8, 13 14, 16, 19, 20 and 21.

174 T1,6,8,14,19 and 21.

175 T1

176 T3,6,8,14,20

177 T13 and 16

178 T8

179 T16

180 T3

181 T6,13 and 14.

182 T13

183 T19

184 T4,6,8,13

185 T4

186 T8

187 T6

188 T6

189 T13

190 T13

191 T21

192 A relevant trial is one where the trial reaches the point at which the burden and standard of proof would commonly be explained.

193 In T22, the other Court Observer stated in their questionnaire that the information had in fact been covered, and so this is contested information.

194 T13

195 T14 an T19

196 T14

197 T19

198 T19

199 T1

200 T8

201 T21 and T25

202 T10

203 In other cases where positive comments were made about jury attentiveness, T8 13 and 14, observers also made negative comments about inattentiveness at other stages of those trials.

204 T18

205 T25

206 T8

207 T13

208 T13

209 T14

210 T14

211 T14

212 T18. It is noteworthy that this is the only trial in which the ABE video was observed to be of good quality.

213 T1

214 See chapter on Rape Myths for further exploration of this topic and court observer responses on questions relating to rape myths.

215 https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf

216 T1

217 T1

218 T3

219 T10

220 T13

221 T16

222 T19

223 T20

224 T23

225 T25

226 T26

227 T6

228 T13

229 T16

230 T15

231 T16

232 T1

233 T13

234 T14

235 T1

236 T4

237 T18

238 T22

239 T26

240 T6

241 T3

242 T25

243 T25

244 T4

245 T23

246 T25

247 T1

248 T1

249 T14

250 T16

251 T18

252 T24

253 T27

254 This was the most popular suggestion for change made by multiple observers

Victim Support NI

**BEARING WITNESS:** REPORT OF THE NORTHERN IRELAND COURT OBSERVER PANEL 2018-2020

Louise Kennedy / February 2021