



WRITTEN EVIDENCE TO THE LAW COMMISSION'S SEXUAL OFFENCE PROSECUTIONS CONSULTATION (SEPTEMBER 2023)

The Government has asked the Law Commission to examine the trial process and to consider the law, guidance and practice relating to the use of evidence in prosecutions of sexual offences.

Introduction for inquiry

Muslim Women's Network UK (MWN UK) is a national charity (reg. no. 1155092) that works primarily to improve social justice and equality for Muslim women and girls. We are informed by lived experiences by our national membership, research projects and national culturally sensitive helpline and counselling service. This work informs our resources, training, campaigning and our advocacy work.

We help and support women from diverse demographics in terms of age, socio-economic backgrounds, education levels, religiosity and ethnicities (Arab, Afghan, Bangladeshi, Black African / Caribbean, Indian, Pakistani, Other South Asian and White etc). Further information can be found on our websites: www.mwnuk.co.uk and www.mwnhelpline.co.uk and www.mwnhub.com. We also help small number of service users from non-minority backgrounds and men.

We also develop resources and train women, so they are better aware of their rights. We have a separate website for our national helpline (www.mwnhelpline.co.uk) that provides advice and support on a range of issues including domestic abuse, forced marriage, honour-based violence, sexual exploitation and abuse, female genital mutilation, hate crimes, discrimination, mental health etc.

As the only national charity working with and providing a frontline service to Muslim women and girls in the UK, it is perhaps no surprise that we deal with female victims of crimes/violence on an almost daily basis. Our Helpline evaluations (<https://www.mwnuk.co.uk/muslim-women-helpline-dashboard.php>) show that domestic abuse (alongside mental health) has consistently appeared as a top two issues since the MWN Helpline's inception in January 2015. In fact, two thirds of the calls are about various forms of abuse against women and girls that also includes forced marriage, sexual abuse/violence, sexual exploitation, so-called revenge pornography, so-called honour-based abuse and FGM are also key issues that are regularly dealt with by the MWN Helpline. The support we provide to our beneficiaries ranges from providing practical and emotional support, liaising with police officers, refugees, social workers, and other key stakeholders,

providing case work support, providing counselling services, and providing assistance through emergency funds.

In June 2019, MWNUK published "Muslim Women's Experiences of the Criminal Justice System" (henceforth "CJS Report 2019"). This report aimed to consider whether Muslim women were 'getting justice' in their interactions with the justice system, and if they are not then what factors were contributing to any 'justice gap.' We found that some of the factors contributing to Muslim women and girls not getting justice were the same as those faced by women of any other background. However, in some of the cases the poor service was a result of their social positioning at the intersections of gender, ethnicity, faith and class. Our report found that often additional language, cultural and faith barriers that may have been preventing Muslim women from seeking help were not being considered. The combination of the issues, as highlighted in our CJS Report, are in our opinion disempowering victims and doing the opposite of what a world-renown criminal justice system (and its institutions) should be achieving and upholding. The research demonstrates that some Muslim women and girls are being failed by the criminal justice system and their needs are not being met. This is having an adverse effect on the trust and confidence they feel in the criminal justice institutions.

We will be drawing from our Muslim Women's Experiences of the Criminal Justice System report (2019) throughout this inquiry response. Please see the following link to access our report: <https://www.mwnuk.co.uk/resourcesDetail.php?id=218>

Due to the volume of questions, we are only responding specific questions that are relevant to our service users and membership.

Evidence

1.Consultation Question 12

We provisionally propose that disclosure of personal records held by third parties should require judicial permission.

Do consultees agree?

Yes/ No/ Other

Please explain your answer.

We recommend that disclosure of personal records held by third parties should require judicial permission. As noted in the summary consultation paper, we agree that "judicia¹ authorisation helps limit the risk that third party material will unnecessarily be disclosed to the defence and, in turn, limit the risk that rape myths will be deployed by counsel. Judicial authorisation poses no risk to the defendant's fair trial rights; it ensures that material that meets the disclosure test will be disclosed, but that no other material will be disclosed". We

¹ Evidence in Sexual Offences Prosecutions, Summary of the Consultation Paper, page 18

also agree that “the complainant’s consent is important but there is also a public interest in confidentiality of patients’ records and that² is more effectively served by requiring judicial authorisation in all circumstances

We therefore stress the importance of ensuring ensure that disclosure of personal records held by third parties only occurs with judicial permission, as a judge who has undertaken training will be able to balance the complainants right to disclosure of personal records with public interest in confidentiality of the personal records. However, we recommend that for victims/ complainants such as Sofia, who would be subjected to an increased risk of harm in the form of honour-based abuse, the judge takes extra caution to consider disclosing personal records of such complainants even if such records are deemed to be relevant to the matter at hand.

We provisionally propose that the requirement for judicial permission should not be removed by the complainant’s consent.

Do consultees agree?

Yes/ No/ Other

We agree that the requirement for judicial permission should not be removed by the complainant’s consent. Although the complainant’s autonomy is important, the vast majority of complainants may not be in the right state of mind to make decisions which could negatively impact on their mental health, especially during a traumatic and stressful period such as a trial. It is therefore in the complainant’s best interests for judicial permission to not be removed, as it will more greatly protect their personal records and information which could otherwise make them vulnerable in the eyes of the defence.

2.Consultation Question 14

For disclosure to the defence, the Canadian regime lists grounds that are, on their own, “insufficient grounds” for a defence application asking the court to require records to be produced to the court for the first stage of review. These are designed to prevent speculative requests.

Is a preliminary filter of this kind valuable and are the grounds appropriate? The grounds are set out at para 3.231 of the full consultation paper. Please share your views.

The procedural hurdle is significant. Under the heading “insufficient grounds”, section 278.3(4) of the Canadian Criminal Code states:

Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(a) that the record exists;

² Evidence in Sexual Offences Prosecutions Consultation Paper, page 121

(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(c) that the record relates to the incident that is the subject-matter of the proceedings;

(d) that the record may disclose a prior inconsistent statement of the complainant or witness;

(e) that the record may relate to the credibility of the complainant or witness;

Are there any other grounds we should consider? Please share your views.

We recommend that a filter of this kind would be valuable and the grounds are appropriate. Such a filter can ensure that the complainant's mental health and personal records are greater protected and safeguarded, therefore reducing the chances of re-traumatisation. Apart from the need to ensure that every opportunity is taken by the judge to reduce a complainant's experience of re-traumatisation because this is morally the correct thing to do, preventing re-traumatisation will also aid in increasing the quality of evidence given by the complainant and ensure they remain part of trial proceedings until they are complete. Therefore, we suggest that including a preliminary filter of this kind would be in the best interests of the court, the law and will aid in ensuring the proper administration of justice.

3. Consultation Question 18

We provisionally propose that there should not be a complete ban on the admission of sexual behaviour evidence.

Do consultees agree?

Yes/ No/ Other

Please explain your answer.

We disagree with the proposal. There should be a complete ban on the admission of sexual behaviour evidence. Past sexual history is often used to undermine the credibility of women and used as a judgment on their morality to persuade the jury that consent to sexual activity had been given because of their past sexual history. This contributes to rape myths.

However, if the Law Commission has robust reasoning to allow the admission of sexual behaviour evidence in certain limited circumstances, then these should be clearly defined and laid out by law to prevent disclosures that are not relevant to the case.

We are also concerned that even in these limited situations, what may or may not be relevant is open to interpretation by a judge who may hold negative views towards women and also that greater attention is being given to the lifestyle of the victim rather than the actions of the defendant, whose past sexual history should also be disclosed. For example, the defendant may have faced similar accusations previously.

4.Consultation Question 19

We provisionally propose that sexual behaviour evidence should only be admissible if:

- 1. the evidence has substantial probative value; and**
- 2. its admission would not significantly prejudice the proper administration of justice.**

Do consultees agree?

Yes/ No/ Other

Please explain your answer

We agree with the proposal that SBE should only be admissible if the two above criteria are met for reasons explained in our previous responses. However, we are concerned about how the interpretation of whether evidence is admissible or not may vary between judges thus resulting in victims not receiving equal justice. As recommended in our CJS Report 2019 report recommendation 12: "Unconscious bias training for judges: the professional development of judges should include ongoing training on unconscious bias to minimise and eventually eliminate discrimination based on gender, race/ ethnicity and faith, and to promote fairness".

5.Consultation Question 20

When the judge is deciding whether sexual behaviour evidence.

- 1. *Has substantial probative value; and***
- 2. *Its admission would not significantly prejudice the proper administration of justice,***

And therefore, can be admitted, which, if any, of the following factors should they consider.

Please select all that apply:

- (a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;***
- (b) the interests of justice including the defendant's right to a fair trial;***
- (c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and***
- (d) the risk of introducing or perpetuating myths or misconceptions.***

Please explain your answer.

Are there any other factors that should be included in the legislation that the judge should consider when deciding whether to admit sexual behaviour evidence? Please share your views

Factor (a): protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights. For example, "in some communities for example Muslim families and communities, women and girls are expected to maintain their virginity until

marriage and not have sexual intercourse outside of a marriage. If their sexual behaviour /history is shared it could put them at risk of honour-based abuse and further harm. Therefore, the judge should particularly consider what effect disclosing certain sexual behaviour evidence would have on such complainants.

6.Consultation Question 21

We provisionally propose, as is currently required, that applications to admit sexual behaviour evidence should be made in writing and that the application should include: detail of the evidence sought to be admitted; the purpose for which its admission is sought; and drafts of any proposed questions.

Do consultees agree?

Yes/ No/ Other

Please explain your answer.

We provisionally propose that the judge should be required to provide written reasons for their decision on an application to admit sexual behaviour evidence.

Do consultees agree?

Yes/ No/ Other

Please explain your answer.

We agree with the proposal to make applications to admit SBE in writing, as well as the proposal to require judges to provide written reasons for their decision on an application to admit SBE. Our CJS Report (2019) highlighted that decisions made in court which were explained verbally and not in writing were problematic. Given the trauma of any crime, time pressures and lack of legal knowledge, victims are unlikely to sufficiently. It is for this reason we strongly recommend that victims of sexual abuse are provided access to independent and free legal advice.

7.Consultation Question 22

Are consultees aware of any more modern forms of communication that are not currently covered by the definition of sexual behaviour in section 41 of the Youth Justice and Criminal Evidence Act 1999, that should be covered by any restrictions on sexual behaviour evidence? Please share your views.

Should the legislation defining sexual behaviour include explicit reference to forms of communication and social media as a form of sexual behaviour? Please share your views.

A person's social media history or private messages through various digital methods which have not bearing on the complaint should not be relevant. However, such communication by the defendant may indicate the patterns of potential perpetrators.

8.Consultation Question 25

We provisionally propose that relationship evidence that is relevant as explanatory or background evidence only, should not be within the scope of any framework that restricts sexual behaviour evidence.

Do consultees agree?

Yes/ No/ Other

Please explain your answer.

We invite consultees' views on whether there should be any restrictions on relationship evidence to ensure that it is only admitted as background or explanatory evidence, and what form those restrictions should take. Please share your views.

Similar to our response for Consultation Question 22 regarding the admittance of modern forms of SBE, we advise and recommend that relationship evidence is only admitted where absolutely necessary. We also advise that additional caution is taken when admitting relevant relationship evidence as making such evidence public would put the complainant risk.

10.Consultation Question 49

When a direction is made for the use of a measure to assist the complainant in a sexual offences prosecution to give evidence, should the defendant be able to see the complainant when:

- (1) the complainant gives evidence behind a screen;***
- (2) the complainant gives evidence using a live link;***
- (3) the complainant is pre-recording their evidence;***
- (4) the complainant's pre-recorded evidence is disclosed to the defence; and***
- (5) the complainant's pre-recorded evidence is played in court.***
- (6) None of the above, the defendant should not be able to see the complainant when they use any of these measures***

Please share your views.

It should never ever be up to the defendant to choose or impose seeing the complainant however we advocate for the complainant to have the autonomy to choose whether they are comfortable with being seen by the defendant during any of the above stages of trial.

11.Consultation Question 51

We provisionally propose that where a screen, live link, or pre-recorded evidence is used for a complainant in a sexual offences prosecution to give evidence, it should include measures to prevent the complainant from being seen by the public observing the trial.

Do consultees agree?

Yes

Please explain your answer.

We would advocate for the implementation of measures which prevent that complainant from being seen by the public observing the trial. Such a measures would help to increase the number of women pursuing justice, particularly women from racialised minority communities who face additional barriers such shame and perceived dis-honour from families and communities that could lead to further psychological trauma, heightened risk of honour-based abuse and ostracization.

12. Consultation Question 55

We provisionally propose that the current powers to direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant should continue.

Do consultees agree?

Yes/ No/ Other

Please explain your answer.

We would agree with the proposal to continue the current powers that direct the exclusion of the public at pre-trial hearings in sexual offences prosecutions where applications are made concerning personal details about the complainant.

We invite consultees' views on whether, for sexual offences prosecutions, there should be a power to direct the exclusion of the public with the exception of: one named representative of the press; the defendant; legal representatives; any interpreter or other person appointed to assist the witness, from observing the following:

Please select all that you think power to exclude the public should apply to:

- (1) The whole trial.***
- (2) The verdict and sentencing hearing.***
- (3) When the victim personal statement is read.***
- (4) None of the above.***

Please share your views.

If so, should this power be discretionary, or should the complainant be automatically entitled to such a direction? Please share your views.

To ensure greater protection of the complainant, MWNUK advocates for the power to direct the exclusion of the public during the whole trial. We recommend that the complainant should be automatically entitled to such a direction, as this would allow them to place greater trust and confidence in the trial process and the Criminal Justice System more

generally. Greater trust and confidence would also improve the complainant's quality of evidence and experience of the justice system, which are both vital to ensure the proper administration of justice. This is particularly important for complainants from racialised minority and faith backgrounds, who are often left more dissatisfied and abandoned by the justice system than their ethnic and religious majority counterparts.

13. Consultation Question 62

Are there any other measures that should be made available to complainants in sexual offences prosecutions to facilitate their attendance at court and engagement in the proceedings, including the giving of evidence? Please share your views.

If yes, should they be available:

(1) as a "standard measure" to which the complainant is automatically entitled; or

(2) as a measure for which, as is currently the case, the complainant is automatically eligible to apply on the grounds that it would improve the quality of their evidence?

Please share your views

Other additional standard measures that should be made available to complainants could include private transport, separate entrance from the defendant and public, sufficient respite breaks, arrangements for women who may need to breastfeed and adjustments for women who maybe menopausal symptoms. Further provisions must be made for women who are pregnant and also for neurodiverse people a preview of the courts and layout of the court. Allowing those with heightened anxiety to use mechanisms such as sensory toys and relevant adjustments for people with physical and non-physical disabilities should be made. To conclude it is also vital that childcare needs and costs are made available for those complainants who require it.

14. Consultation Question 64

We provisionally propose that the Judicial College consider providing training to the judiciary on the impact on juries of measures to assist complainants in sexual offences prosecutions to give evidence and facilitate their attendance at court.

Do consultees agree?

Yes/ No/ Other

We agree with these proposals. The training should include the barriers faced by people from diverse communities in engaging with the criminal justice process and how these proposed measures help improve justice and reduce inequality of outcomes.

15.Consultation Question 79

Should the Judicial College consider providing guidance to judges on how best to respond to generalisations which rely on myths or misconceptions where they are raised in counsels' speeches? These generalisations include:

(1) suggesting that complainants as a class are unreliable witnesses;

(2) suggesting that evidence given by complainants requires greater scrutiny than evidence given by other witnesses; or

(3) suggesting that delayed reporting, in itself, makes complainants less credible.

Yes/ No/ Other

Please explain your answer.

We recommend that the Judicial College considers providing guidance to judges on how to best respond to generalisations which rely on myths and misconceptions. We believe that this will provide the judiciary with a more consistent and unified response. This would prevent wealthy defendants who will often hire highly paid and the best defence barristers and who will be highly experienced in using such tactics from gaining an unfair advantage.

16.Consultation Question 81

Should the Bar Standards Board consider making explicit reference in its Code of Conduct to the potential for professional misconduct consequences to arise from reliance on myths and misconceptions in sexual offences cases?

Yes/ No/ Other

Please explain your answer.

We strongly advocate for the use of compliance mechanisms such as introducing professional misconduct consequences, to effectively combat the reliance of myths and misconceptions in sexual offence cases. We believe that it is important for there to be significant and tangible consequences otherwise such poor practices will continue.

17.Consultation Question 112

We invite consultees' views on whether specialist sexual offences courts should be introduced to deal with the delays and the content of sexual offences prosecutions?

Yes/ No/ Other

Please explain your answer.

We recommend that specialist sexual offences courts should be introduced to deal with the delays and the content of sexual offence prosecutions. Evidence shows that it can take up to three to four years to bring cases to trial which results in many women in particular dropping the case. Also, victims are often advised not to receive professional counselling whilst they are waiting trial which causes further trauma and placing their lives on hold. Furthermore it

can result in specialist judges who specialise in sexual offence trials resulting in more consistency in proceedings and sentencing.

On behalf of Muslim Women's Network UK,

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