Legal Research Report for Somerset & Avon Rape and Sexual Abuse Support (SARSAS)

Leah Blackman
Kathy Boyle
Jessica Cambridge
Rebecca Davies
Angharad Griffiths
Ben Howells
Carole Orchard
Ellen Rye
Ryan Small
Xavier Stride
Thomas Watts

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UWE Bristol | University of the West of England

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1. Introduction

This document was prepared by a group of Bristol Law School undergraduate law and joint degree students. They volunteered to answer a series of questions posed by staff and volunteers who work at Somerset & Avon Rape and Sexual Abuse Support (SARSAS). While staff members supervised the work and edited some of content, this document represents the hard work of a group of talented and committed student authors.

Prof. Phil Rumney
Ed Johnston
Bristol Law School, UWE

2. Why might a case be taken back to court following a not guilty verdict?

Double Jeopardy

Historically, the law did not permit a person who has been acquitted of an offence to be retried for that same offence owing to what is known as the 'double jeopardy' rule. In the eighteenth century William Blackstone described it as:

> 'The plea of a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life or limb more than once for the same offence ... [T]he plea of *autrefois convict*[1] or a former conviction for the same identical crime ... is a good plea in bar to an indictment. And this depends upon the same principle as the former that no man ought to be twice brought in danger of his life for one and the same crime'.[2]

The law has since been updated. Part 10 of the Criminal Justice Act (2003)[3], or CJA, now allows re-trials in respect of a number of serious offences, where *new* and *compelling evidence* has come to light.

Legal Reform

Two developments heightened concerns about the potential conflict between the double jeopardy rule and the fundamental objective of the criminal law that the guilty should be convicted:[4]

1. Scientific advances have increased the chances of there being compelling evidence of a person's guilt long after the offence was committed.

2. The Stephen Lawrence Inquiry recommended: 'That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented'.[5]

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[1] *Autrefois acquit* (previously acquitted) means the defendant claims to have been previously acquitted of the same offence, on substantially the same evidence, and that he or she therefore cannot be tried for it again.
[2] www.parliament.uk/briefing-papers/sn01082.pdf & Commentaries, pp 335-6 (quoted)
[3] Criminal Justice Act (2003) Part 10
(Accessible here: http://www.legislation.gov.uk/ukpga/2003/44/part/10)
[4] Sally Broadbridge, 'Double Jeopardy' (2009)

Under the CJA 2003 there is now a process whereby an appeal must be made for a serious offence to be retried. This will be broken down below.

The Re-trial Appeal Process

Prosecutors wishing to re-try a previously acquitted defendant must give notice to the Court of Appeal. In determining whether a re-trial can go ahead several legal issues have to be resolved. The first question is whether the offence is one that *can* be retried. The criteria for eligibility are set out in s.75 CJA 2003[6], but the main criterion is that it is a 'qualifying offence'. These are offences of a serious nature such as rape, sexual assault and murder. A full list is given in Annex A of the CPS's guidance on the retrial of serious offences[7]. After an application by a prosecutor, the Court of Appeal makes a determination as to whether sections 78 and 79 (outlined below) are satisfied and if so, then a retrial will be permitted.

New or Compelling Evidence (s.78 Criminal Justice Act 2003)

Section 78(2) states that evidence is new if 'it was not adduced[8] in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related)'.[9]

Compelling: Section 78(3) states that evidence is 'compelling' if it is:
(a) reliable, (b) substantial, and (c) in the context of the issues in dispute at the trial, it appears of great value to the prosecution case against the acquitted person.

Interests of Justice (s.79 Criminal Justice Act 2003)

The Court of Appeal must also make a decision as to whether a retrial would be in the interests of justice. The factors considered are:

'Whether existing circumstances make a fair trial unlikely;
For the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

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[5] Ibid. page 3.
[6] Criminal Justice Act (2003) Section 75
[7] Crown Prosecution Service, 'Retrial of Serious Offences'
< http://www.cps.gov.uk/legal/p_to_r/retrial_of_serious_offences> Accessed 1/10/16
[8] *Adduced* = given as evidence.
[9] Criminal Justice Act (2003) Section 78

Whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor (including a person in another jurisdiction with a corresponding role) to act with due diligence or expedition;
Whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.'[10]

Should the Court of Appeal authorise a retrial then it will proceed in the same way as a normal trial, subject to certain specific requirements in the 2003 Act.

Case Examples

- R v Dobson (2011)[11] – The case concerned the murder of Stephen Lawrence which led to an inquiry reforming the law regarding double jeopardy. When initially tried, due to police ineptitude and forensic naivety, the case fell apart. A retrial was allowed however based on new forensic evidence. A bloodstain (less than ½ mm in diameter) was discovered on D's jacket which gave a match to Lawrence. In addition, hairs and clothes fibres belonging to Lawrence were also discovered upon re-examination. Both Gary Dobson and David Norris were found guilty.

- R v A (2009)[12] – the defendant was initially acquitted of 2 counts of indecent assault and one count of rape. Following further investigation, 17 counts of indecent assault were discovered. The evidence in support of this indictment corroborated the allegations made by the victim in the original trial. The defendant was re-tried on these original counts and was found guilty.

[10] *Ibid.* Section 79
[11] R v Dobson (Gary) (2011) EWCA Crim 1255
[12] R v A (2009) 1 W.L.R 1947

3. If it is illegal to have sex with a 13-15 year old then why is it not automatically rape? If a victim is e.g. 14 at the time, why might the police pay attention to the issue of consent in her case, even when she is underage?

This section will provide an overview of unlawful sexual activity with a child, offences conducted by persons over the age of 18, offences committed by children or young persons. The section will also highlight any grey areas that occur. The relevant authority governing unlawful sexual activity against children by child offenders and offenders over the age of 18 is the Sexual Offences Act 2003 (SOA).

Child sex offences committed by persons over the age of 18

The SOA is clear when concerning children under the age of 13[13]. There is no grey area where a person aged 18 or over engages in sexual activity with a child under 13, this is a strict liability offence where consent is not taken into consideration and a sexual offence/rape will be deemed to have been committed.

By comparison, there is a significant difference concerning consent where the child is aged 13-15. In this case, the prosecution must prove that the accused did not reasonable believe the child was 16 or over.[14] Sometimes the defendant (D) will put forward a defence in which it is said that they believed the complainant (C) was not under 16. The case of R v McGowan[15] highlights this point. The D was a male over the age of 18 who met a 14-year-old online without knowledge of her age. Once he met her the court found it was unreasonable for D to believe that she was 16 years old or older and D was convicted of sexual assault. Such determinations are fact sensitive and will depend on the facts of each individual case.

Accordingly, it is a criminal offence under sections 5 to 15 of the SOA to participate in penetrative sex and/or other sexual activity with a child under the age of 13. Furthermore, the SOA outlaws penetrative sex and/or other sexual activity with a child between the ages of 13-15 without a reasonable belief that they were older

[13] Sexual Offences Act (2003), Sections 5-8
[14] Sexual Offences Act (2003), Section 9 (Annotation)
[15] R. v McGowan (Brian Daniel) [2013] EWCA Crim 867

than 16.[16] Ultimately, the case will be taken by the CPS on the merit of the facts of the case, including whether there is any evidential support.[17]

Child sex offences committed by children or young persons

There is no confusion regarding offences against a child under the age of 16 by a person(s) aged over 18. Consent is not usually an issue to be considered by the police or the court unless as previously stated it was reasonable for the defendant to believe that the complainant was over the age of 16. It is a criminal offence for anyone under the age of 16 to partake in sexual activity, whether this be two consenting under 16 years' or anyone over the age of 16 participating in sexual activity with an under 16-year-old, male or female.

The law governing child sex offences by children or young persons is s.13 of the SOA.[18] The Act makes it an offence for a person aged under 18 to have sexual activity with a child,[19] cause or incite a child to engage in sexual activity,[20] engage in sexual activity in the presence of a child[21] and cause a child to watch a sexual act.[22] The purpose of s.13 is to provide a lower penalty where the offender is aged under 18,[23] resulting in a reduced maximum penalty for youth offenders of 5 years.[24]

However, there are many grey areas. In practice, decisions on whether persons under 18 should be charged with child sex offences will be made by the Crown Prosecutors in accordance with the principles set out in the Code for Crown Prosecutors.[25]

Relevant factors that prosecutors should consider are stated below. The weight to be attached to a particular factor will vary depending on the circumstances of each case. However, in deciding whether it is in the public interest to prosecute a person, prosecutors may exercise more discretion in relation to child sex offences (where the victim is a child aged 13-15) than for offences against children under 13.

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[16] Sexual Offences Act (2003), Sections 5 – 15
[17] Established by the CPS, The Code for Crown Prosecutors (January 2013) Available at http://www.crimeline.info/uploads/docs/cpscode2013.pdf.
18 Sexual Offences Act (2003), Section 13
19 Sexual Offences Act (2003), Section 9
20 Sexual Offences Act (2003), Section 10
21 Sexual Offences Act (2003), Section 11
22 Sexual Offences Act (2003), Section 12
23 Sexual Offences Act (2003), Section 13 (Explanatory Notes)
24Sentencing Council, Sexual Offences: Definitive Guideline (2013) 151
25 Sexual Offences Act (2003), Section 13 (Explanatory Notes)

Relevant factors include:

- The age and understanding of the offender;
- The relevant ages of the parties, i.e. the same or no significant disparity in age;
- Whether the complainant entered into sexual activity willingly, i.e. did the complainant understand the nature of his or her actions and that she/he was able to communicate his or her willingness freely;
- Parity between the parties in regard to sexual, physical, emotional and educational development;
- The relationship between the parties, its nature and duration and whether this represents a genuine transitory phase of adolescent development;
- Whether there is any element of exploitation, coercion, threat, deception, grooming or manipulation in the relationship;
- The nature of the activity e.g. penetrative or non-penetrative activity;
- What is in the best interests and welfare of the complainant; and
- What is in the best interests and welfare of the defendant.[14]

For specific considerations relating to youth offenders, see: http://www.cps.gov.uk/legal/v_to_z/youth_offenders/#a01

It should be noted that where both parties to sexual activity are under 16, then they may both have committed a criminal offence. However, the overriding purpose of the legislation is to protect children and it was not Parliament's intention when enacting the SOA to punish children unnecessarily or for the criminal law to intervene where it was wholly inappropriate.

Consensual sexual activity between, for example, a 14 or 15 year-old and a teenage partner would not normally require criminal proceedings in the absence of aggravating feature.[26] The law is not intended to prosecute mutually agreed teenage sexual activity between two young people of a similar age, unless it involves abuse or exploitation.[27]

[26] CPS, Youth Offenders (Crown Prosecution Service) <http://www.cps.gov.uk/legal/v_to_z/youth_offenders/#a29>

[27] Home Office, Children and Families: Safer from Sexual Crime – The Sexual Offences Act 2003, London: Home Office Communications Directorate, 2004. Read more at: http://www.fpa.org.uk/factsheets/law-on-sex#cQ7IYSui3UAsBd87.99 page 3

Factors considered here are:

- the respective ages of the parties;
- the existence and nature of any relationship
- their level of maturity;
- whether any duty of care existed;
- whether there was a serious element of exploitation

Bearing in mind the relevant factors that the CPS consider when prosecuting, especially in cases involving youth offenders, it is very important to establish whether there was consent involved or whether there was lack of consent as this will be a significant factor for the Police and CPS when deciding whether or not to charge an offender.

The approach of the Crown Prosecution Service to youth offenders can be found via the following link:
http://www.cps.gov.uk/legal/v_to_z/youth_offenders/#a41

4. In terms of Special Measures what has been done successfully in the past and what do legal and policy experts recommend to improve this in the future?

What are special measures?

Special Measures originated from a working group that identified the need for improvements in treatment towards vulnerable and intimidated witnesses (VIWs) in the criminal justice system. It has long been acknowledged that giving evidence in court is stressful and intimidating. The use of these measures is intended to reduce stress and help witnesses to give evidence when they would not otherwise be able to participate in the legal process. Commenting on the evidence of children, the House of Lords (now Supreme Court) has stated that the:

> '… theory underlying these provisions is that the use of special measures will maximise the quality of the children's evidence in terms of its completeness, coherence and accuracy … the measures will enable the children to give the best evidence of which they are capable.'[28]

The current use of Special Measures is regulated by the Youth Justice and Criminal Evidence Act 1999. http://www.legislation.gov.uk/ukpga/1999/23/contents

Special Measures are defined as 'a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court by relieving some of the stress associated with giving evidence'. They currently apply to prosecution and defence witnesses, but not to the defendant. http://www.cps.gov.uk/legal/s_to_u/special_measures/

What Special Measures are available?

Special Measures include the use of live television links, intermediaries, interpreters, the use of recorded interviews, cross-examinations and re-examinations, the removal of wigs and gowns, the separation of defendants and witnesses in court, communication aids and in certain cases the ability to give evidence in private.

[28] R v Camberwell Green Youth Court *ex parte* D [2005] 2 Cr App R 1.

Please refer to the statute and web link above for further information on the Special Measures described below:

Screens (s.23 Youth Justice and Criminal Evidence Act 1999 (Hereafter, YJCEA 1999)) to shield witness from the defendant.

Live links (s.24 YJCEA 1999) to the court room, enabling witnesses to give evidence from outside the court.

Evidence given in private (s.25 YJCEA 1999) allows the judge to clear the public gallery of public and press so the witness can give evidence in private.

Removal of wigs and gowns (s.26 YJCEA 1999) by judges and barristers to avoid intimidation.

Video-recorded interviews (s.27 YJCEA 1999) may be recorded pre-trial and admitted by the court as the witness's evidence-in-chief. http://www.legislation.gov.uk/ukpga/2009/25/contents

Video-recorded cross-examination (s.28 YJCEA 1999) can be used where special measures has been granted under section 27 YCJEA 1999 to cross examine and re-examine witnesses so they do not have to appear in the courtroom or via a 'live' TV link.

Use of intermediaries (s.29 YJCEA 1999) to assist witnesses presenting evidence in court by facilitating communication between them and the lawyers and judge.

Aids to communication (s.30 YJCEA 1999) enable witnesses to give best evidence in court through, for example, interpreters or visual aids such as picture boards.

Eligibility

Eligibility for special measures is controlled under sections 16 – 18 of The Youth Justice and Criminal Evidence Act 1999 (YJCEA).

- Section 16 YJCEA 1999: Vulnerability – applies to any child witness under the age of 18 or any witness whose evidence could be diminished by mental disorder, impairment of intelligence or social functioning, or a physical disability or disorder
- Section 17 YJCEA 1999: Intimidation – applies to those 'suffering from fear or distress in relation to testifying in the case'. Opting out of this category is a possibility.

- Section 22A YCJEA 1999: Adult Witnesses – This is a special provision which makes adult witnesses in sexual offence cases eligible for special measures. On application, eligibility can be granted in the form of video recorded statements as evidence-in-chief as long as it does not affect the interests of justice (i.e. as long as it is beneficial to the case and does not hinder it).
- More details on the eligibility criteria can be found at http://www.cps.gov.uk/legal/s_to_u/special_measures/#a03 (under the eligibility section).

If eligible for Special Measures, the court can choose not to grant them if they are not likely to maximize the quality of the evidence.

The Advocates Gateway is a portal providing guidance on the use and eligibility of Special Measures for vulnerable witnesses and victims to help prepare them for trial. This website and more information can be found at http://www.theadvocatesgateway.org/

Ground Rules Hearings

Ground rules hearings are considered good practice in cases where Special Measures are to be used. They take place before the trial begins so as to ensure the witness is able to give the best evidence they can. Personnel present must include the judge or magistrates, trial advocates and, where necessary, intermediaries.

Ground rules hearings include discussion on how questions should be framed (for example, the avoidance of repetitive questioning or the use leading questions), time constraints on questioning and whether information disclosure should be limited.

Ground rules hearings are essential in cases where an intermediary is required under section 29 of the YJCEA 1999. In such cases, the input of an intermediary is essential in setting out the limits and nature of questioning by lawyers.

In the case of R v Lubemba [2015] Crim. L. R. 237 the appeal judge reiterated that 'we would expect a Ground Rules Hearing in every case involving a vulnerable witness, save in very exceptional circumstances'. This shows positive steps in the legal system to help improve the accuracy of evidence given by VIWs by the increasing use and inclusion of Ground Rules Hearings. There can be little doubt that these hearings are a very important measure and are now seen as normal practice.

Strengths and weaknesses of Special Measures in court

1. Strengths – The use of Special Measures in the courtroom has seen many advantages and has enabled VIWs to give the best evidence they feel they can, allowing many cases that would not have previously proceeded, to go to court. The following demonstrate the main strengths of the use of Special Measures in court:

The use of Special Measures in court is judged on each individual case. This can be seen in a number of cases where the courts have stated that care is required when evaluating who is eligible for Special Measures and what measures are appropriate. This is positive because it shows that each VIW is unique and should get the special measures that are suitable to them.

The correct use of Special Measures used in the right manner in court can enable cases to reach trial that would otherwise have not proceeded. This can be seen in R v Ashar [2013] EWCA Crim 1308. This is not a sexual offence case, but demonstrates the positive use of intermediaries in court. A young victim, who was deaf and without speech, gave testimony which was crucial to the prosecution case. Prior to the trial, an intermediary taught her a form of sign language to allow her to understand questions and communicate her answers. This enabled the case to reach trial and allowed her to give evidence. Without the use of the intermediary the case would never have reached trial and the defendants would not have been convicted.

The introduction of section 22A YJCEA 1999 by the Coroners and Justice Act 2009 (section 101) meant that vulnerable adults could also be included under the provisions for special measures. This is significant because it recognises that others, and not just those who fall under the age and intimidation restrictions, can be considered as vulnerable and in need of assistance.

Research has suggested that Special Measures reduce witness anxiety, improve confidence and increase the likelihood that witnesses will be willing to give evidence in the future.

2. Weaknesses – Even though it would seem that Special Measures are an important development in terms of allowing VIWs to give their best evidence, there are some problems. Some of these are identified below:

There continue to be difficulties concerning the identification of vulnerable and intimidated witnesses from the outset of the legal process. This means that some VIWs may not be getting the help they need from the start, or sometimes, at all.

Even with the use of Special Measures, some witnesses continue to report stress and difficulties during the trial process. As such, Special Measures are beneficial, but do not necessarily prevent all the difficulties they seek to address.

The main focus and recommendations for improvement tend to be concerned with better implementation of the law, improved identification of VIWs and resourcing of facilities e.g. to ensure the technology that is so important to measures such as live TV links work properly. Other recommendations have focused on measures that are not included in the law. For example, allowing a complainant to enter the court building by an entrance not used by the defendant or his/her family members and friends so as to reduce fear and anxiety. This does happen, but not necessarily in every case.

5. What does mock jury research tell us about jury decision making in rape cases?

A number of studies involving mock juries have been undertaken to identify the impact that assumptions and stereotypes may have on the verdicts of real juries in rape cases.[29] Mock jury research has been criticised on the basis that mock jurors do not have the same vested interest in coming to a correct verdict as they would with a real case.[30] However, recent research involving mock jurors suggested that they took their task very seriously, and understood the responsibility that it bore.[31]

One study aimed to examine whether the complainant's behaviour during and after the alleged offence influences a mock jury's assessment of their credibility.[32] It concentrated on the three specific issues that are the subject of expectations regarding 'normal' rape victim behaviour:

That rape victims will physically resist and be injured;

That rape victims will report to the police immediately; and

Victims should be emotional when disclosing their experience of rape.[33]

The study then considered whether educational guidance provided at trial had a beneficial impact, in the sense of addressing any misconceptions regarding the three case characteristics listed above.[34] Nine mock rape trials were split into three scenarios.[35] In these scenarios, the complainant: reported immediately; was visibly upset during testimony, but had no sign of physical injury as she 'froze' during the attack; had injuries, was visibly upset during testimony, but waited three days to

[29] Sokratis Dinos, Nina Burrowes, Karen Hammond and Christina Cunliffe, 'A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?' (2015) 43 International Journal of Law, Crime and Justice 36
[30] David Wolchover and Anthony Heaton-Armstrong, 'Rape and the Prosecution Threshold: Practice and Procedure' (2014) 178 JPN 424,
[31] Louise Ellison and Vanessa E Munro, '"Telling tales": explored narratives of life and law within the (mock) jury room' (2015) 35 Legal Studies 201, 206
[32] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202, 203
[33] ibid.
[34] Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows, assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology 363, 364
[35] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202, 204

report the attack; or had injuries, reported immediately, but was presented as emotionally 'flat' and calm during testimony.[36] The findings of this study are as follows:

Lack of Resistance

Jurors often discredited the complainant where there was a lack of resistance or no physical injury,[37] believing that a physical struggle was a 'normal response' to a sexually violent attack.[38] Even where there was some level of physical injury, some jurors expected a much higher level to be compelled, or provided alterative explanations for how this injury was sustained.[39]

The study was unable to identify a visible shift in the way that jurors that had received guidance and those that had not.[40] Both the educated and non-educated groups expected some sort of resistance resulting in some form of injury, no matter how minor,[41] and harboured misconceptions about ease of physical injuries in sexual assaults.[42]

Delay in Reporting

The complainant's delay in reporting caused difficulties for some jurors during this study, [43] believing that the delay allowed the complainant to fabricate the allegation. [44] Others discredited the complainant for promptly reporting, as they assumed the trauma would prevent the complainant from doing so.[45] However, a number appreciated that a genuine complainant may delay reporting, highlighting that generally jurors did display greater understanding of the impact of rape in this context than in relation to physical resistance.[46]

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[36] ibid. 204-205
[37] ibid.206
[38] ibid.207
[39] ibid.208
[40] Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows, assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology 363, 371
[41] ibid. 372
[42] ibid. 373
[43] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202, 209
[44] ibid.209
[45] ibid. 210
[46] ibid.

For the non-educated jurors, the credibility of the complainant had been undermined by the delay in reporting.[47] Alternatively, jurors who received educational guidance were significantly less troubled by the three day delay.[48] The majority of these jurors found the guidance they had received helpful, and held that it had been an important factor during their deliberations.[49]

Calm Demeanour

Where the complainant had a calm demeanour, the jurors expected a more visible display of emotion, or pronounced reaction.[50] The lack of this emotion suggested to the jurors that the complainant lacked honesty, and had pre-planned.[51] Equally, where the complainant was emotional, some jurors believed that this was deliberately manipulated.[52] It was only the final group that tried to offer an explanation, albeit an inaccurate one, for a complainant's behaviour, demonstrating that they had little understanding of the psychological effects and external pressures that could influence a complainant's demeanour in court.[53]

The group receiving no guidance displayed limited knowledge of how trauma could affect a complainant's behaviour in court.[54] Both educated groups placed less importance on the calm demeanour with regards to credibility, and appreciated the effects the sexual attack could have had on the complainant.[55] However, a small number of these jurors continued to make negative comments, although these were the minority.[56] Some jurors also noted that the guidance they had received had made them 'more objective' about the lack of emotion, having initially believed the stereotype.[57]

This study established that some mock jurors are unable to leave their personal prejudices and stereotypical preconceptions behind them when entering the

[47] Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows, assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology 363, 370
[48] ibid.
[49] ibid. 371
[50] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202, 211
[51] ibid. 212
[52] ibid.
[53] ibid.
[54] Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows, assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology 363, 368
[55] ibid. 369
[56] ibid.
[57] ibid. 70

courtroom.[58] The authors of the research urged the introduction of educational guidance for juries in rape cases.[59]

Addressing these issues

a. The Use of Expert Evidence

In 2006 the Government proposed allowing prosecutors in England and Wales to present expert witness testimony in rape cases.[60] The objective of this was twofold:

> To dispel myths and stereotypes of how a complainant should behave; and
> To help the jury understand the varied reactions of a rape complainant.[61]

This recommendation was not implemented. Instead, the judiciary took action to address the issue and this is set out below.

b. The Judicial College Crown Court Benchbook*

The Crown Court Benchbook contains a series of model legal directions used by trial judges when instructing jury members prior to them retiring to consider their verdicts.[62] This includes model directions in sexual offence cases. The Benchbook specifically sets out model directions concerning misconceptions about rape and cautions jurors against making assumptions of how a sexual offence complainant ought to have behaved at the time of the alleged offence, or whilst giving evidence.[63] This does not mean that juries are to suspend their own judgment, but instead are to approach the evidence without prejudice.[64]

The Benchbook includes a number of *Illustrations,* providing an example of the legal direction required.[65] These address several stereotypes, which may lead the jury to approach the evidence with prejudice.[66] They can be adapted or expanded to deal

[58] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202, 214
[59] Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows, assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology 363, 379
[60] Office for Criminal Justice Reform, Convicting Rapists and Protecting Victims – Justice for Victims of Rape (Home Office 2006) 16
[61] ibid.
[62] Judicial College, Crown Court Bench Book: Directing The Jury (Judicial Studies Board 2010) vii
[63] ibid. 353
[64] ibid.
[65] ibid. viii
[66] ibid. 356

with the evidence in each specific case.[67] However, it is for the trial judge to determine whether their use is appropriate or necessary.[68]

> *The Benchbook has been recently updated and has undergone a name change: *Crown Court Compendium Part 1: Jury and Trial Management and Summing Up (February 2017)*.[69] The newer version is largely unchanged and trial judges continue to be expected direct jurors on misconceptions about rape and sexual assault.

Despite the introduction of these directions, one study found that mock jurors made limited use of the instructions,[70] and instead often constructed their own story of what has happened.[71] They then use the evidence to bolster their own account of the event,[72] encouraging rather than dispelling rape myths.[73] One key reason for this is what jurors find it difficult to understand the legal jargon and instructions.[74] Therefore, they do not make use of the tests, rely on instinct instead, or misinterpret the tests and apply it incorrectly.[75]

As this additional guidance has proven to assist jurors dispel myths, and approach their deliberations with more structure and impartiality,[76] guidance needs to be improved to further this. This could be achieved by giving more consideration to the design and mode of this guidance,[77] by making it more tailored, or adopting a new approach or structure.[78] Written guidance alone will not alter how juries approach deliberation[79] and thus, this guidance must be provided in unison with improved jury preparation.[80]

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[67] ibid. 357
[68] ibid.
[69] The Compendium can be found here and the sexual offence directions can be found in chapter 20: https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf
[70] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202
[71] ibid. 215
[72] ibid. 203
[73] Louise Ellison and Vanessa E Munro, '"Telling tales": explored narratives of life and law within the (mock) jury room' (2015) 35 Legal Studies 201, 220
[74]Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility,' (2009) 49 British Journal of Criminology 202
[75] ibid.
[76] ibid. 202
[77] Louise Ellison and Vanessa E Munro, '"Telling tales": explored narratives of life and law within the (mock) jury room' (2015) 35 Legal Studies 201, 224
[78] ibid. 225
[79] ibid. 211
[80] ibid. 225

6. Modified questioning in court proceedings

Since the introduction of Special Measures following the enactment of the Youth Justice and Criminal Evidence Act 1999 there has been an undoubted increase in the number of vulnerable witnesses giving evidence in criminal trials. This has included witnesses with multiple and profound disabilities. Significant efforts have been made to ensure that such people can participate in the trial process, understand questions they are being asked and communicate answers. As part of this process of legal change the senior judiciary has moved to modify the traditional approach to cross examination in criminal trials. While trial judges have always possessed the power to exert some control over the nature and content of questions asked of witness and defendants, the last decade has seen significant change. The main focus has been an insistence by the Court of Appeal that the questioning of vulnerable witnesses and defendants be simplified, the avoidance of repetition and if necessary, the placing of time limits on questioning by lawyers.

These changes are very relevant to sexual offence cases, but are not limited to such cases. Witnesses and defendants may need to be asked questions in a modified form on the grounds of age, intellectual ability, physical disability, learning disability and mental health problems. The following cases illustrate some of these changes.

R v B [2010] EWCA Crim 4

The appellant was convicted of the rape of a child who was nearly 3 years' old at the time of the offence. During the trial, the victim, who was 4 and half years' old when giving evidence, was asked a series of short and simple questions. On appeal it was argued that the defence could not properly examine the child's evidence because the she was so young and the questioning style used to question her did not allow for a full examination of her allegation. This was rejected by the Court of Appeal. The court stated that despite her age, through the use of short, simple questions the defence was able to test the reliability of her testimony and whether the allegation had been suggested to her by her mother or siblings. The appeal against conviction was dismissed.

The reasoning of the court is best summarised by the following quotes:

> 'We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not ... none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults ...' (para 40)
>
> 'The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries … it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child … Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence'. (para 42)

R v Wills [2011] EWCA Crim 1938

The appellant had groomed the complainants with cigarettes and alcohol before sexually abusing them at his home. In total there were 8 young female complainants and at trial the appellant was convicted of multiple sexual offences. At trial the judge set out various restrictions on the nature of questions that could be asked by the defence lawyers - specifically, the judge stipulated that questions be short and not include so-called 'tag questions'[81] which can easily confuse young witnesses. The appeal was partly based on the fact that while the appellant's lawyer complied with the restrictions placed on cross-examination, the co-defendant's lawyer did not. It was argued that the appellant's lawyer was unduly restricted by the trial judge's restrictions and therefore he did not receive a fair trial.

The appeal was rejected on the grounds that although cross-examination had been different for the appellant, compared to his co-defendant, it did not make the trial unfair. The Court of Appeal made clear that limitations on cross examination are permitted and that it is the duty of the trial judge to ensure that lawyer's complied with them:

> 'First, we consider that in cases where it is necessary and appropriate to have limitations on the way in which the advocate conducts cross-examination, there is a duty on the judge to ensure that those limitations are complied with. This is important to ensure that vulnerable witnesses are able to give the best evidence of which they are capable. Where appropriate the judge, in fairness to defendants, should explain the limitations to the jury and the reasons for them. It is also important that defendants do not perceive, whatever the true position, that the cross-examination by their advocate was less effective than that of another advocate in eliciting evidence to defend them on allegations such as those raised in the present case'. (para 36)

[81] This would include questions such as 'he didn't do that, did he?'

R v Christian [2015] EWCA Crim 1582

The complainant was a vulnerable woman, who had a variety of mental health conditions and who had previously suffered from sexual abuse. During the trial she became very distressed and she was comforted by the intermediary who was helping facilitate communication during the trial. The appellant appealed against his conviction on several grounds including a claim that the behaviour of the intermediary caused the trial to be unfair because the sympathy shown to the complainant might be seen by jurors as suggesting the defendant was guilty.

The Court of Appeal rejected this contention arguing that the intermediary's behaviour did not make the trial unfair as a full cross examination was conducted, and the jury was subsequently warned by the judge not to interpret sympathy as an indicator of the guilt of the defendant. The court stated:

> 'We think that the relevant consideration for us is … whether there was any serious risk of unfairness being caused to this appellant. We do not think that in the circumstances there was any sensible prospect of unfairness. The jury would have understood the situation as a matter of common sense where they were observing a very obviously vulnerable woman'. (para 40)

R v RL [2015] EWCA Crim 1215

This case involved an appeal against conviction for cruelty to children involving an appellant who yelled, threatened and beat her children. It was argued that the appellant's fair trial rights had been breached by excessive restrictions being placed on cross-examination of her two sons aged 7 and 11. The trial judge instructed the defence not to ask certain questions that were regarded as repetitive or could be answered through other means.

The appellant's appeal was rejected, and the reasoning for this was summarised below:

> 'It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round'. (para 15)

This demonstrates the continuing efforts of the courts in England and Wales to accommodate vulnerable witnesses. The duty to curtail overly complex or repetitive questioning of witnesses falls to trial judges who make decisions on a case-by-case basis.

R v Lubemba, JP [2014] EWCA Crim 2064

The appellant (Lubemba) was charged with four counts of raping a child. The trial judge placed a limit on the length of time his defence barrister could question the child. In this case it was deemed that 45 minutes would be sufficient to allow the defence to ask the questions necessary to ensure a fair trial for the defendant. On appeal, it was claimed that by placing a restriction on the time given to cross-examine the complainant the defence was unable to effectively represent the appellant.

The Court of Appeal deemed that there was only one line of questioning in Lubemba's defence - that the child in question was lying. The court decided that 45 minutes was enough time to put forward this line of questioning and the appeal against conviction was dismissed.

R v Jonas (Sandor) [2015] EWCA Crim 562

This case involved the trafficking of women for the purpose of sexual exploitation. The case was originally tried with two complainants giving evidence. The two complainants both of Hungarian origin were considered vulnerable and given the appropriate Special Measures. The trial involved multiple defendants who were each represented by a lawyer. During the trial, the judge placed limits on questioning by the defence advocates by limiting the time they were allowed to cross-examine and specifically limiting the amount of time allowed to question inaccuracies in one complainant's 'collateral story' about her time in Hungary.

The appellant appealed against his conviction. The appeal was on the basis that the restrictions on cross-examination infringed his fair trial rights by not allowing full cross-examination of the complainants. The Court of Appeal rejected this argument and upheld the appellant's conviction. The court made clear that where cases involve multiple defendants who are each represented by their own lawyer then modified cross-examination is appropriate:

> ' ... the judge has a duty to control questioning. Over-rigorous or repetitive cross-examination of a child or a vulnerable witness must be stopped. In a multi-handed trial [a case with multiple defence lawyers] the judge must ensure that the witness is treated fairly over all, and not asked questions on the same topics, to the same end, by each and every advocate. Advocates must accept that the courts will no longer allow them the freedom to conduct their own cross-examination where it involves simply repeating what others have asked before, or exploring precisely the same territory. For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them, provided, of course, there is no unfairness in so doing'. (para 31)