THE BAR of NORTHERN IRELAND

Review of Serious Sexual Offence Cases

Bar Council Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Criminal Justice Board commissioned an independent review of the arrangements to deliver justice in serious sexual offence cases in April 2018 to be led by Sir John Gillen and supported by an Advisory Panel. The Bar was represented on the panel by Margaret-Ann Dinsmore QC. The Bar Council welcomes the opportunity to contribute to the consultation on the preliminary report into the law and procedures in serious sexual offence cases.

3. This submission also reflects the views of the Criminal Bar Association which represents the views of prosecuting and defence counsel, serving to ensure an independent and quality source of specialist criminal law advocacy in Northern Ireland. The Bar's response begins with a short overview detailing the important responsibilities of the very experienced counsel involved in prosecuting and defending parties in these complex, sensitive and at times controversial criminal trials. This is followed by a comment on each of the key recommendations, alongside an in depth look at some of the individual ones contained within the chapters which have particular relevance for the Bar.

Overview

4. The conduct of barristers involved in serious sexual offence trials is highly regulated with all practitioners being subject to the Bar's Code of Conduct which sets out the standards of professional conduct and practice required. In addition, any member who fails to comply with any of their duties or the standards required may be referred to the Professional Conduct Committee for professional misconduct under Section 8 of the Code which can impose a range of penalties.

5. It is worth highlighting that the "Primary Duties of the Individual Barrister" are detailed prominently within the Code and include:

(i) A barrister has an over-riding duty to the court to ensure the proper administration of justice;

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(ii) It is a fundamental obligation of a barrister to ensure that every aspect of the lay client's interests is properly represented and protected without fear or favour;

(iii) A barrister must ensure that the privacy and dignity of the lay client are always maintained;

(iv) A barrister should envisage what the litigation experience is like for the lay client and assist the client by:
- explaining carefully the procedures and issues in the case in language that the client can understand including how the client should conduct themselves as a witness but avoiding any attempt to coach him;
- ensuring that the client is never mislead or bullied in order to obtain authority to settle its case;
- ensuring the waiting periods are explained;
- where a case is lost, explaining to the client what happened and advising as to an appeal.

(v) In all his work in court for the professional or lay client and in all his dealings with the public the barrister must conduct himself with honour and integrity.

6. It follows that not only are all barristers expected to bring their unfettered independence, extensive professional training, expertise in the law and advanced advocacy skills to bear in all cases but also a wholly indivisible integrity, sensitivity, sense of duty and service. In order to be successful at the independent Bar it is necessary for an individual barrister to demonstrate mastery of these combined requirements in successive testing practical circumstances. In addition, the Bar's programme of professional training for criminal practitioners continues to evolve, especially in relation to vulnerable witnesses, and the profession welcomes debate around new policy innovations in this area.

7. Given this context, it is important to highlight that this consultation response includes the accumulated diverse practical experience of seasoned and respected criminal practitioners. Their views are borne out of their extensive exposure to the topics being considered and they individually and collectively have both the knowledge and standing to be recognised as an informed voice in this specialist area of practice. The views of practitioners have been provided with an objectivity, insight and intent of informing policy making for the long term good.

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- There is a clear need for increased awareness of the existence of and reasons for the vast under-reporting of serious sexual offences and the high dropout rate of those entering the criminal justice system.

8. The Bar recognises the important policy work undertaken by agencies across the criminal justice system in recent years aimed at ensuring responsive support services for individuals with experience of sexual violence and abuse, including the seven year 'Stopping Domestic and Sexual Violence and Abuse in Northern Ireland Strategy' and associated action plans. We also welcome the development of a Victim Charter by the Department of Justice which sets out vital information on support services that complainants should expect to receive as they progress through the criminal justice system. Meanwhile the work of voluntary organisations in this area, including Nexus NI, Women's Aid, Victim Support NI and others, must also be recognised in providing considerable support to individuals with experience of sexual violence and abuse.

9. We note that chapter 2 contains a considerable array of statistics in relation to the prevalence of sexual offences across our community and further afield. The table on page 43 details conviction rates for cases disposed of at court in Northern Ireland from 2012-2017. However, it is worth highlighting that it is problematic to make comparisons between convictions for rape offences, sexual offences and all other cases; this does not provide the full picture given that it is unclear whether the defendant made a guilty plea or whether there was a trial in these cases. This is also unclear in relation to the conviction rate figures relating to rape offences provided in paragraphs 2.20 – 2.22.

10. Serious sexual offence trials can often be very complex and difficult with highly skilled lawyers involved in both the prosecution and defence of these cases to ensure that they are properly conducted. Observations from members suggest that historical sexual offences, which can often be very difficult to corroborate, are also making up a growing number of these cases yet no figures can presently be provided in relation to this, as noted at paragraph 2.25. Members also indicate that these cases are very different to other types of criminal offence, such as serious assaults or drug offences dealt with in the Crown Court, where it is often much less difficult to establish that an offence has been committed.

11. We consider that a more nuanced understanding of the figures is required in order to draw appropriate conclusions and would welcome a further in-depth study, specifically relating to Northern Ireland, in this regard. The Bar acknowledges concerns around reporting levels outlined in chapter 2 but it is also important to note the dangers associated with suggestions that our criminal justice system should be targeting higher conviction rates in sexual offence cases. Instead we should be ensuring that the institutions which sustain and uphold the rule of law are defended and strengthened, thereby promoting public confidence

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in a high-quality criminal justice system that works effectively for all citizens across our community.

- Access of the public to trials involving serious sexual offences to be confined to close family members of the complainant and the defendant. Access for the press should be maintained.

12. Open justice is a fundamental principle which has been a pillar of our criminal justice system for many years and it represents a vital element in commanding public confidence in the court system. The suggestion contained in recommendation 27 that the public at large should be excluded in all serious sexual offence hearings potentially has significant implications for the transparency and accountability of our criminal justice system. Any proposal to limit access to our courts must be subject to proper scrutiny, particularly given that this exclusion could restrict opportunities to promote a more informed public discourse and understanding of the important decisions being made by the courts in this area.

13. Practitioners indicate that in their experience public attendance at serious sexual offence trials is extremely low. Larger levels of attendance typically happen only in cases where there is already considerable publicity, for example in cases involving a well-known defendant. It is important to highlight that the trial judge does possess the power, on an appropriate application, to exclude members of the public in circumstances in which their presence would frustrate or render impractical the administration of justice. The Bar believes that the trial judge is therefore best placed to regulate the trial process having regard to the particular circumstances of the case and the nature of the evidence.

14. Chapter three asserts that one of the main reasons for introducing legislative change to restrict public admission is to make the court environment less intimidating which may allow a complainant to feel more confident in giving their evidence. It is worth highlighting that presently there are a range of options available to the courts to ensure that best evidence is achieved, including ABE interviews and the use of other special measures, such as live link and screening, which are all frequently adopted by the courts either singularly or in combination with another.

15. At most trials for serious sexual offences this means that the complainant won't be identified, the complainant's evidence in chief will be an ABE video and the complainant will be cross-examined by a live link and will not see who is in the courtroom (except for the judge and the lawyers). Members take the view that

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the public being able to observe the complainant is fundamental to the process. This allows the public to see how the jury has reached a verdict and to either agree or disagree with it, representing a crucial cornerstone in the administration of justice.

16. Furthermore, this report identifies several recommendations in subsequent chapters aimed at strengthening complainants in giving their evidence with suggestions including pre-recorded cross examination and new measures to control the influence of social media. Consequently, the Bar queries whether the exclusion of the public is necessary if these reforms are also to be adopted in serious sexual offence cases.

17. In addition, the Bar queries how it will be possible to define exactly which offences would qualify as serious sexual offences for the purposes of excluding the public given that the circumstances of each case will differ. There is also the potential risk that this move could signal the beginning of the public being excluded more widely from trials with other charges being brought within this remit, such as any case involving significant and distressing levels of violence. This would undoubtedly have a detrimental impact on open justice and the rule of law.

- Provision should be put in place to allow for early pre-recorded cross examination, initially of vulnerable people, to be conducted away from the court setting. This provision should eventually be extended to include all complainants in serious sexual offences

18. One of the major concerns about the recommendation for early pre-recorded cross-examination is that it will require significant investment to allow for timely disclosure to be achieved. Practitioners indicate that at present disclosure is frequently delivered at the last minute or even during the trial which inevitably impacts on the viability of the prospect of early cross-examination. Therefore this proposal is very much contingent upon resources being committed to ensuring that the disclosure process operates effectively before it can be considered feasible for introduction. This means that all police investigations, including lines of enquiry pointing away from the accused, must be exhausted. Statements from all relevant witnesses, medical and forensic reports and all third-party enquiries must be completed in advance, including counselling records, GP notes, hospital records and social services records. In addition, police will have to investigate and download any relevant phone and social media data which is becoming

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increasingly prominent in serious sexual offence cases. Recent events in England have demonstrated the collapse of a number of serious sexual offence cases because of the lack of disclosure of such material. These matters are often not highlighted until after the defence raises them.

19. In addition, solicitor and counsel must be fully instructed alongside any defence experts to address the various issues raised by any crown evidence. Any registered intermediaries and psychiatric or psychological reports must also be in place if relevant to the defendant. Inevitably these investigations take time and no cross-examination can take place without them. In these circumstances, the advent of pre-recorded cross-examination would do little or nothing to speed up the process for the complainant. Efforts would be better targeted towards an efficient and effective investigation and disclosure process in conjunction with the deployment of judicial and legal resources to early trial dates.

20. It is worth highlighting that in circumstances where there is a failure of disclosure it seems likely that a complainant would be recalled to give evidence again in any event. It is also possible to further imagine a situation where a change of legal team is predicated upon a concern by the defendant that his/her representatives have not properly represented or argued his/her case. In that scenario it is unlikely that replaying the cross-examination by such an impugned counsel would be acceptable to the defendant and would not form part of his/her general complaint. Equally, counsel coming into a case as replacement counsel often have very different views as to how the case should be presented and cross-examination conducted. The Bar considers that the best interests of complainants might be better served by ensuring that resources are instead directed at ensuring that all the components of investigation and disclosure are completed expeditiously to allow for an early hearing and thereby reducing the prospect of any disruption.

21. Recommendations 30 and 31 suggest that pre-recorded cross examination should commence on a "carefully phased basis" before being rolled out to "all adult complainants in all serious sexual offences". However, the proposals for pre-recorded cross-examination cannot be considered in isolation and the potential for satellite litigation, with the associated anxiety for complainants, must not be overlooked unless more resources can be devoted to ensuring that disclosure operates effectively as evidenced in Chapter 10. We would reiterate that until the problem of late disclosure is adequately addressed it will not be possible to reassure complainants that pre-recorded cross-examination will be a "once and for all" experience as described at paragraph 4.143.

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22. Beyond issues with the disclosure process, Chapter 4 appears to draw heavily on the experience of pre-recorded cross-examination in England and Wales and the Ministry of Justice's 2016 evaluation paper on pilot projects in Kingston upon Thames, Leeds and Liverpool. This comprised 139 cases involving sexual offences and pre-recorded cross examination under section 28 of the Youth Justice and Criminal Evidence Act 1999. Whilst the Bar recognises that the evaluation identified some benefits from the limited sample of 40 practitioners, it must be acknowledged that it was "not designed to provide robust evidence of impact". This policy is still in its infancy and is not embedded practice across the court system in England and Wales.

23. The Bar would welcome further detailed evidence of the impact of pre-recorded cross examination in this jurisdiction, as paragraph 4.38 states that the roll out of section 28 is still to be "extended slowly" given that a number of issues have been raised in relation to the IT infrastructure. We would urge caution as it will be important for these to be fully addressed before the commencement of any pilot project involving all adult complainants in serious sexual offence cases in Northern Ireland; significant investment in IT and training for NICTS staff, the judiciary and legal representatives will ultimately be essential in advance of this.

24. Our members also indicate that there are concerns as to the presentational nature of pre-recorded cross examination evidence. Cross-examination before a jury involves a relationship between the advocate and the jury. The pace and presentation are matters which counsel judge depending upon the jury interest and the pace of their writing. It is also an event which is best observed by the jury in the court room where they can see the advocate's approach to questioning and the interaction between counsel and witness.

25. Members have expressed concern that there is the potential that the jury would be able to see the witness but not counsel which could give rise to gestures to explain questions being lost and the impact of exhibits which are deployed may not be fully understood. Counsel would be unable to assess whether a particular exhibit needed further clarification for a jury. For example, if a jury raised a question about some aspect of the witness evidence or any reference by a witness to part of a photo or map, counsel would not have the witness to hand to deal with the issue.

26. Chapter 4's section on the impact of pre-recorded cross-examination beginning at paragraph 4.94 includes a helpful summary of the cross-jurisdictional literature on this topic with a number of studies involving mock juror experiments. This acknowledges that the research shows that a number of "operational factors" may influence jurors, such as length and format of interviews, and therefore

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should be considered when using this evidence in order to avoid undue influence. However, it is evident that further research in this area is necessary, particularly in relation to adult witnesses. The Bar looks forward to having the opportunity to review the findings of the study by Professor Cheryl Thomas referenced at paragraph 4.106 which is described as the first empirical research study of the impact of the digital courtroom on juries, the impact of special measures for vulnerable witnesses, whether jurors believe myths and stereotypes in some cases, how to prevent juror misconduct, how to improve jury deliberations and how best to provide support for jurors during and after trial. We welcome that this research is also to be extended to Northern Ireland.

27. The Bar notes recommendations 34 and 35 that there should be an obligatory Ground Rules Hearing for all pre-recorded cross-examination hearings and that it should be the practice to require defence counsel to submit their proposed questions in advance for approval. The Bar has recognised that in some cases, such as those involving the cross-examination of children, it may be of assistance to discuss themes of cross-examination and perhaps to agree that certain practices (such as formally putting a case) may not be appropriate. Such an approach has indeed been adopted by counsel and the judiciary as part of the proper management of the trial process for a number of years without the need for legislative change or a practice direction. However, there is considerable concern that the practice of providing questions in advance would significantly impede the proper conduct of these trials, stifling the proper effectiveness of defence counsel and ultimately undermining the quality of justice.

28. The Bar prides itself on the professionalism and experience of its members. It also recognises the considerable experience and judgment of the bench within this jurisdiction. There is no evidence to suggest a problem with the manner or subject matter of counsel's cross-examination in these or indeed any other cases. Counsel are held to the highest of professional standards and must abide by the Bar's Code of Conduct and the directions of the trial Judge. The judiciary has a duty to control the questioning of any witness and to ensure it is fair both to the witness and the defendant. Judges also have the power to curtail questioning which may be inappropriate or unnecessary. There are also strict rules, for example, as to the circumstances under which any questions may be asked as to previous sexual history. If counsel were to flout these rules and directions, they could be the subject of censure by the court and the subject of complaint to the Professional Conduct Committee.

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29. The Bar takes very seriously its obligation to ensure the continuing professional development of its members. Cross-examination must be conducted fairly as well as effectively. The conduct of this is often very complex and highly nuanced; it is often impossible to predict how such questioning might evolve and much of cross-examination is predicated on the various and varying answers provided by a witness. There are concerns that the advance disclosure of all possible questions may place counsel in breach of obligations to their lay client. Counsel are advised and trained on the conduct of trials involving vulnerable witnesses. Such training is continuing to evolve to meet the needs of all stakeholders within the system. To that effect, the Bar has sought and continues to seek out contact with the DOJ, the PPS and victims' groups so as to better understand the concerns of these parties. The manner in which such cases are undertaken is regularly reviewed by the Criminal Bar Association and for the reasons set out above, it is considered that a requirement to provide questions in advance would seriously damage the trial process.

- A measure of publicly funded legal representation should be offered to complainants from the outset.

30. The Bar notes recommendation 45 which proposes that publicly funded legal representation should be granted to complainants in all serious sexual offences in the following circumstances: to afford relevant information and legal advice throughout the process up to the commencement of the trial; where complainants wish to exercise the right to appear in court to object to disclosure of their medical records to the accused's defence team or to ensure it is restricted to the minimum necessary; and where they wish to appear in court to object to the introduction of their previous sexual history. At present there is no publicly funded legal aid for complainants and it is important to highlight that the Public Prosecution Service does not act as a legal adviser to these individuals.

31. In terms of background information, it is worth noting that there are a very small number of cases that proceed to trial where special counsel has been appointed in Northern Ireland. The guidance given by the court in the judgment of *R v H, R v C* [2004] UKHL3 highlights the fact that such an appointment is exceptional, outside the normal course of proceedings and aimed at dealing with very significant and often highly sensitive issues primarily of disclosure. The fact that it is exceptional and that the prosecution is normally responsible for dealing with all disclosure matters is suggestive of the significance of the role of the prosecutor in securing a fair trial which is in the overall public interest.

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32. The appointment of special counsel is normally restricted to issues around disclosure and for the purposes of maintaining a fair trial for the defendant in criminal cases under the Criminal Procedure and Investigations Act 1996. However, this review suggests that complainants should have legal representation to object to issues around disclosure of medical records or the introduction of previous sexual history. The Bar believes that these matters can already be dealt with between the parties and that robust judicial protections exist to allow for appropriate determinations to be made in relation to whether material can be disclosed or an application to introduce previous sexual history is to be allowed.

33. In this type of case the defendant has the benefit of his or her counsel, often both senior and junior in serious cases. Meanwhile the prosecution will have direct engagement with the victim as a witness and a person to whom the prosecutor owes certain duties as set out in the Public Prosecution Service's Victim and Witness Charters. These bring contact at first instance with the investigating police officer and often a family liaison officer. This will be followed by contact with the decision-making lawyers in the PPS and ultimately with prosecuting counsel. We would query how an extra layer of legal representation for a complainant will fit into this picture in practical terms.

34. Meanwhile once a case comes to trial and the issues referenced in recommendation 45 are encountered, it is difficult to see how a senior prosecution counsel being conversant with all of the circumstances of the case, having access to all of the witnesses, knowing how decisions were reached in relation to the prosecution and being familiar with the disclosure in the case together with any matters of sensitivity, could not adequately deal with either the disclosure of medical records or previous sexual history following consultation with the complainant. We would welcome further clarity on the value which a legal representative for the complainant will be able to add to this process. No evidence is provided in this chapter to suggest that our highly experienced Crown Court judiciary and prosecutors in Northern Ireland are allowing complainants to be treated unfairly or are ineffectual in preventing sexual history evidence being introduced without a successful application.

35. We note recommendation 46 which states that consideration should be given to extend legal representation during evidence-in-chief and cross-examination at the trial itself after completion and assessment of the current pilot scheme in Northumbria described at paragraph 5.82. The adoption of Sexual Violence Complainants' Advocates in Northern Ireland appears premature given that this is an explorative project taking place in another jurisdiction and that no findings are yet available to indicate suitability for the wider rollout of this scheme.

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36. The current era of constrained public finances must also be a factor in considering the recommendations in this chapter. It is worth highlighting that if separate legal representation is to be provided to complainants in sexual offences trials then complainants in other criminal cases, such as serious non-sexual violence, may also expect to be similarly entitled. The provision of separate legal representation in serious sexual offence cases alone risks creating a hierarchy of offences and putting additional pressure on the Legal Services Agency in respect of legal aid expenditure. Any new financial resources should instead be directed towards improving the investigation and disclosure process in conjunction with the deployment of judicial resources to securing early trial dates.

- Measures should be introduced at the outset of the trial to combat rape myths. This may involve presenting to the jury educational material, a short video, judicial directions and, where appropriate, supported by expert evidence. In the wider context there is a need for an extensive public awareness and school education campaign.

37. Senior counsel involved in prosecuting and defending serious sexual offence cases have many years of experience in dealing with this type of work. They have also undertaken extensive and ongoing training and are bound by professional ethics and the Bar of Northern Ireland's Code of Conduct. In attempting to comment on the issue of rape myths, the Bar acknowledges that there may be a number of public misconceptions around firstly the nature of these offences and secondly the conduct of trials of this nature and it is important to highlight the need for more public education and information in these areas. For example, the 'No Grey Zone' sexual consent awareness campaign launched by the PSNI in October 2018 addresses some of the common myths in existence about sexual offences which is to be welcomed. Meanwhile the creation of a new Court Observer's Panel led by Victim Support NI will hopefully also help to address learning and education around this issue in relation to the trial process.

38. The Bar recognises that there is a lack of empirical evidence in Northern Ireland to date to indicate whether any rape myths that may be in existence impact on the attitudes of jurors in serious sexual offence cases. There is also no research to show that the present approach of our highly experienced Crown Court judges is proving inadequate, specifically in relation to the directions given to juries. Juries are called upon to assess evidence and apply the relevant legal principles in a variety of cases of which they have no personal experience. They are exhorted to bring life skills and common sense to bear on their assessment of the witnesses

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while bearing in mind what they have been told about the burden and standard of proof. We should therefore be careful not to presuppose that juries are less capable of being true to their oath in sexual offence cases than in other cases.

39. The Bar therefore acknowledges that empirical evidence in this area would be welcome and necessary given that much of the research already conducted relates to mock juries in England and Wales. The study being led by Professor Cheryl Thomas, referenced at 6.97, involving gathering data from actual jurors at a range of courts across England and Wales should provide a helpful source of information. Recommendation 50 which states that the Northern Ireland Courts and Tribunals Service, in consultation with the Lord Chief Justice's Office, should promote research with actual jurors in Northern Ireland is also to be welcomed.

40. The Bar welcomes the recognition at paragraph 6.130 that the introduction of mandatory statutory directions as to the content of judicial directions in serious sexual offence cases is unnecessary in this jurisdiction. As referenced above, there is no evidence to date to suggest that the directions currently given to juries by our experienced judiciary are inadequate. Therefore the Bar takes the view that more research is needed before the approach to judicial directions, particularly around timing and the use of written directions detailed in recommendations 52, 53 and 54, is altered.

41. The suggestion of a prescribed video at recommendation 51 from an authoritative source being presented to the jury at the outset of the trial in all serious sexual offences could be helpful. However, it is vital that any video developed in light of the research being conducted by Professor Thomas is fair, balanced and does not lean against the defence. Practitioners would expect to be consulted on any video with the opportunity to input into the development of it.

42. The Bar notes recommendation 60 which states that judges should robustly intervene when defence or prosecution counsel seek to invoke complainant myths in serious sexual offence cases. It is worth highlighting that practitioners take the view that this already happens at present. The Bar welcomes recommendation 61 which says that there should be extensive training provided to the judiciary and the professions by their respective bodies, calling on the assistance of expert evidence on these issues of rape mythology. The Criminal Bar Association supports the delivery of a variety of CPD events and training to practitioners and could develop a programme of work relevant to this recommendation on an ongoing basis.

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- New legislation should be developed and introduced to manage the dangers created by social media. There is a need to increase jury awareness of the risks social media create, specifically in serious sexual offence trials.

43. The Bar recognises that a key challenge to the criminal justice system is how best to keep pace with the digital age. The lack of any empirical evidence of the impact of social media on juries in Northern Ireland is highlighted at paragraph 7.79. The study being led by Professor Thomas to look at the experiences of real jurors in Northern Ireland may assist in this regard. However, in the absence of this research to date we should proceed cautiously before adopting some of the recommendations outlined in Chapter 7 as there is nothing to suggest that the directions already given by our highly experienced judiciary are inadequate to address the risks posed by social media.

44. The Bar has no difficulty with recommendation 62 which states that there should be a fully coordinated cross-jurisdictional consultation and fresh approach to controlling the influence of social media and coordinating enforcement measures across the UK and Ireland. It will be important to fully consider the outcomes of any research and consultation exercises before undertaking some of the more detailed actions outlined in relation to social media. However, the Bar would be broadly supportive of more robust statutory powers being given to judges in this area, such as those outlined in recommendations 67, 68 and 75.

45. We note the recent call for evidence from the Attorney General for England and Wales on 'The Impact of Social Media on the Administration of Justice' which closed for submissions in December 2018. This will inform consideration of what changes, if any, are needed in this jurisdiction to strike a balance between the rights of the individual to express their views via social media and the protection of fairness in criminal proceedings, particularly in relation to the right to anonymity and the integrity of judicial orders. The Bar agrees with recommendation 83 that it will be important to closely monitor the findings of this and any relevant steps for Northern Ireland.

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- A more robust judicial attitude and case management approach to prevent improper cross-examination about previous sexual history

46. The Bar has no difficulty with recommendation 91 which states that the Department of Justice should carry out an exercise to determine the extent of previous sexual experience in trials in Northern Ireland. Members indicate that counsel are generally cautious in respect of applications to the court around cross-examination of complainants on previous sexual history and historical cases generally do not feature these. Meanwhile the judges in our courts are typically properly strict in limiting and defining what can be asked. However, we would welcome the provision of any statistics or evidence to highlight the extent to which this has taken place.

47. The Bar welcomes the recognition at paragraph 8.71 that there is a "general acceptance that there remains some relevance for sexual history evidence, particularly regarding a past relationship with the accused". Judicial discretion must be the key feature in striking an appropriate balance between the defendant's right to a fair trial and the interests of the complainant. Recommendations 92, 93, 94 and 95 all relate to the process pertaining to any application made under Article 28(2) of The Criminal Evidence (Northern Ireland) Order 1999. The experience of counsel is that there can be delays associated with applications due to the contents of late disclosure. Resources must be committed to ensure that the disclosure process operates in an effective and timely manner in order for these procedural recommendations to be achievable.

48. The Bar agrees with the observation at paragraph 8.75 that serious sexual offence trials require particular knowledge, skills and abilities on the part of both the legal profession and the judiciary. We welcome recommendation 103 which states that counsel for the prosecution and for the defence should be required to attend specialist training in all areas pertaining to sexual offence trials. Recommendation 105 which highlights that the Bar Council and the Law Society should insist on attendance at a sufficient number of CPD sessions in vital areas of law, practice and procedure before competence can be demonstrated in areas of serious sexual violence is also to be welcomed.

49. The Bar has for some time, and continues to be, active in developing opportunities for members to attend specialist training relevant to serious sexual offences. For example, we undertook to deliver a programme of specialist training to publicly funded barristers, specifically following the publication of the Marshall Report in 2014. This ongoing training programme has included continuing

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professional development sessions focusing on child abuse and child sexual exploitation, vulnerable witnesses, violence against women and representation of those with communication needs. A focal point of this work has been the Bar's participation in a European training project initiated by the Council of Bars and Law Societies of Europe (CCBE), which focused on the training of lawyers on the law regarding violence against women. The training was delivered by a multidisciplinary panel of presenters including specialists from the Bar and judiciary of Northern Ireland in family and criminal law.

50. It is worth noting that barristers are independent practitioners yet we continue to provide opportunities on discrete areas such as child sexual exploitation, vulnerable witnesses and child protection. Such CPD is accredited as an example of the mandatory advocacy training that all practising barristers are now required to undertake in every CPD year.

51. The Bar has also provided this training in a range of formats as a support for practitioners. In addition to events, barristers can access resources such as 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' from the Advocacy Training Council, which enables practitioners to engage in dedicated CPD on demand. The Bar is committed to expanding the catalogue of such specialist CPD content to ensure those practising in the family and criminal courts have an enhanced awareness of child abuse, child sexual exploitation and domestic violence.

52. The Bar has developed a Vulnerable Witness CPD Resource Pack that highlights best practice training resources on handling vulnerable witnesses, including papers, presentations and podcasts, which practitioners can use to refine their witness handling skills. The resources to which barristers are signposted include the self-learning materials which practitioners in England and Wales seeking specialist accreditation to be briefed in criminal cases involving vulnerable witnesses must undertake to be admitted to the accreditation process. This resource was shared with members in March 2018 as part of a series of emails around mandatory CPD advocacy.

53. A cross-jurisdictional seminar on the topic of advocacy in sexual offence cases is to be delivered in Northern Ireland in early 2019. The seminar will be led by leading prosecution and defence barristers from the Bar of Northern Ireland and will include contributions from senior colleagues on the Bar of Ireland's Advanced Advocacy Committee. The Bar values partnership and collaborative working in developing CPD resources and events and we would welcome any opportunity to draw upon the insights and experiences of support organisations to help us in this

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regard as we continue to explore and update new specialist training opportunities for members.

54. The Bar is aware that concern has been expressed publicly by some support organisations representing complainants in respect of cross-examination on previous sexual history. These organisations have typically not been present in pre-trial hearings when such matters are determined and it is likely that education and more informed communication with the Bar would be of some assistance. It is worth highlighting that our members take their professional responsibilities towards complainants very seriously and any inappropriate questioning around previous sexual history would be a matter of professional misconduct to be dealt with by the Bar's Professional Conduct Committee.

55. The Bar also welcomes the creation of the Court Observer's Panel and notes that the observers will attend all aspects of trial from arraignment to trial and, where it occurs, plea and sentence. The Bar has undertaken to play a positive role in assisting any organisation wishing to become more informed as to how this issue is determined as part of the trial process. It is hoped that collaboration between the Bar and the Court Observers will ultimately result in a much greater public understanding of this issue.

- Steps need to be taken to combat excessive delay in the justice system. A wholly new mind-set is required, which will involve front-loading the legal system with an early-time-limited and case managed system that has at its core early joint engagement by both prosecution and defence representatives.

56. Members have indicated that in their experience the period of time between the investigative stage, the interview of the suspect and compilation of a prosecutorial file with papers being forwarded to the Public Prosecution Service is, in many instances, in excess of 12 months from the date of the alleged offence occurring. The further passage of time that accumulates thereafter during the charging and remand phases occurs by reason of the remand procedure before the Magistrates' Court which creates a further tier of delay. Furthermore, upon return to the Crown Court there is another period of delay, typically months, between arraignment and trial.

57. Paragraph 9.11 shows that these observations from practitioners are evident within the figures provided by the Department of Justice given that the overall average time for dealing with sexual offences has increased from 708 days in 2014-15 to 859 days in 2017-18, representing a 21 per cent increase. This increase in the length of time for cases to be dealt with is evident right across the criminal

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justice system as the statistics provided at paragraph 9.15 show that the average time taken to deal with all cases has risen from 476 days in 2014-15 to 558 days in 2017-18.

58. The Bar welcomes recommendation 108 which highlights that previous proposals made by Criminal Justice Inspection Northern Ireland and the Northern Ireland Audit Office in this area should be analysed, implemented and monitored by the Department of Justice. The lack of a common performance framework and properly functioning partnership working across the justice system in the early stages of investigations underpin the current difficulties around delay. The Bar endorses a collaborative model of delivery that would include establishing clear lines of accountability, quality information systems and a transparent reporting framework with continuous review occurring during the investigative stage of a case.

59. As highlighted previously, lack of timely disclosure remains a significant issue for practitioners in serious sexual offence cases. The November 2018 report from Criminal Justice Inspection Northern Ireland concurs with this assessment, despite the recommendation made in a previous 2015 report entitled 'An inspection of the quality and timeliness of police files (incorporating disclosure) submitted to the PPS'. This stated that: "The PPS will provide the PSNI with guidance on disclosure. The PSNI will scope and deliver a new central Disclosure Unit and enhance the skills of operational Police Officers on the subject of disclosure. A timetable for the delivery of the central Disclosure Unit should be provided to CJI within one month of the publication of this report". However, this has not been implemented to date due to resourcing issues with the PSNI unable to make a final decision on the best way to deliver progress against this issue. There remains a pressing need therefore for the PPS and the PSNI to develop a more robust method to deal with disclosure, particularly where large volumes of evidence are involved. Only when this issue is properly addressed can recommendation 110 be considered for action to allow for the indictable cases process pilot scheme to be extended to all serious sexual offence cases.

60. Meanwhile recommendation 114 calls for the Department of Justice to make provision for the direct transfer of serious sexual offences to the Crown Court, bypassing the committal process pursuant to the affirmative resolution procedure under section 11(4) of the Justice Act (Northern Ireland) 2015. Committal proceedings are often highlighted as a cause of unnecessary delay yet the number of committal proceedings in which a preliminary investigation or mixed committal is a feature is very low, as evidenced by the figures provided at paragraph 9.26 with 127 committals for sexual offences in 2017; mixed committals accounted for just seven cases and preliminary investigations for just

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three cases. We acknowledge that there are differing opinions amongst members as to the value of committal proceedings but they can represent an important procedural safeguard in a minority of cases and practitioners typically advise as to when this right should be appropriately exercised.

61. The Bar welcomes the recommendations which focus on robust case management with the recognition that strong and proactive early engagement between all parties will help to reduce delay within the system. The Crown Court Rules Committee will be best placed to consider recommendations 115, 116, 118 and 120. The Bar recognises that it will be particularly important for the Crown Court Rules Committee to consider the setting of realistic time limits for compliance given that those detailed in the court rules for England and Wales may not be achievable in this jurisdiction.

- To introduce into the disclosure process greater and earlier trained Police Service of Northern Ireland (PSNI) specialists, with guidance from the Public Prosecution Service (PPS) from the outset, firm time-limited and early judicial management, and resource-led development of relevant digital technology.

62. The Bar welcomes the recommendations made in Chapter 10 in relation to disclosure. As referenced throughout our response to this report, practitioners have highlighted that they regularly encounter examples of non-disclosure or very late disclosure, on the eve of trial or mid trial, relating to critically important and highly relevant material in criminal cases. The Bar agrees with the point at paragraph 10.67 that the existing Criminal Procedure and Investigations Act 1996 regime remains fit for purpose, despite predating the vast expansion in electronic communications in social media. Practitioners consider that the legislative disclosure test is clear, yet it is the application of this law which often proves inadequate and unsatisfactory.

63. The Bar takes the view that disclosure must be regarded as integral to the criminal justice process. Therefore recommendation 141 is to be welcomed which states that the police must be trained to see disclosure as a core duty rather than an administrative add-on. Whilst several of the recommendations are for the PSNI and PPS to action, it is helpful to see a focus on disclosure training for the PSNI in recommendations 136 and 140 alongside reference to the need for the police to provide an audit trail of work done in the course of a disclosure exercise. Criminal practitioners believe that the provision of an audit trail of all work done by PSNI officers which clearly and objectively fixes individual responsibility for disclosure

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during the course of serious sexual investigations is vital in allowing for transparency to the court.

64. The proposal contained in recommendation 142 for the introduction of a disclosure management document by the PPS that records all of the materials to be disclosed and a note of the decision taken could prove useful. Practitioners also identified recommendation 137 on higher priority being given to schedules of unused documents and recommendation 139 on third-party disclosure issues being addressed at the outset of the investigation as vital in helping to avoid unnecessary delays at trial. We note the references at paragraph 10.79 to disclosure as an "open-ended trawl of unused material" and reports in England of "unfettered access to highly personal records and data being sought by the police from complainants under threat of the case being dropped". The Bar is unaware of any such problems being encountered in Northern Ireland.

65. The Bar also welcomes recommendation 144 relating to the introduction of robust judicial case management at an early stage. Practitioners recognise that there is an urgent need for enhanced co-operation between the prosecution and the defence on the issue of disclosure. Early judicial hearings would help to promote engagement between the defence and prosecution alongside further facilitating the identification, gathering and retention of potentially relevant material.

66. The importance of a defence statement identifying the key issues in the case is also highlighted in recommendation 144 with the timely service of this being necessary to allow for proper consideration of the disclosure issues well in advance of the trial date. The Bar accepts that this statement has the potential to become a critical document at an early stage in proceedings, acting as a signpost for the defence case and alerting the court and prosecution to significant milestones. However, practitioners take the view that appropriate remuneration for the drafting of this statement would need to be revisited by the Legal Services Agency.

67. The setting of time limits around the defence statement is a matter which is currently dealt with in the Lord Chief Justice's Practice Direction No5/2011 on a Protocol for Case Management in the Crown Court. It would be worthwhile for all practitioners to refocus on ensuring compliance with the protocol in conjunction with robust judicial oversight. However, paragraph 18.42 in Chapter 18 on Resources points to the potential for the development of a new Judicial Protocol or Practice Direction to promote early engagement in serious sexual offence cases. The Bar would welcome the opportunity to input into the development of this but would highlight that any new Practice Direction will likely add to the

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workload of criminal defence practitioners and there will be a need for this to be adequately and properly remunerated. The Criminal Bar Association is already acutely aware of the importance of achieving effective disclosure and held a CPD event in December 2018 for practitioners on 'Third Party Disclosure in the Crown Court' with speakers including Her Honour Judge Patricia Smyth and experienced practitioners, Gavan Duffy QC and Charles MacCreanor QC.

68. Furthermore, the Bar takes the view that the recommendations in Chapter 10 around disclosure will have significant resource implications across the criminal justice system. Many of these will be for the PSNI and PPS in terms of investment in training and adequate technology which are not matters for the Bar to comment on in depth. However, we agree with the report's observations at paragraph 10.73 that the DOJ has to "appreciate that the colossal waste of public money involved in the current delayed system, and the dangers of trials being aborted at a late stage, outweigh the cost of putting additional resources into the system".

- The Sexual Offences (Northern Ireland) Order 2008 should be amended to provide:
  - that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
  - for the expansion of the list of circumstances as to when there is an absence of consent to include, for example (i) where C submits to the act because of a threat or fear of violence or other serious detriment to C or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where C is overcome, voluntarily or not, by the effect of alcohol or drugs;
  - that where any of these circumstances exist, the complainant does not consent to any sexual act, and if the defendant was aware of these circumstances, the defendant did not reasonably believe that C was consenting; and
  - that the definition as to what constitutes a reasonable belief in consent be amended by adding that, in determining whether there was a reasonable belief in consent, the jury should take account of all the circumstances, including a failure to take any steps to ascertain whether C consented.

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- The offence of gross negligence rape be not introduced.

69. Whilst the issue of consent does not feature in the key recommendations detailed in the overview of this report, the Bar has considered the contents of Chapter 11 and has some observations to offer. We would contend that the suggested amendments to the Sexual Offences (Northern Ireland) Order 2008 are not necessary and instead the focus should be on increasing public awareness of the law on consent given that this is central to the proper functioning of the law within the investigative, prosecution and trial procedures. Criminal cases where consent is the issue may be complex to prosecute and difficult to prove but that does not mean that the basic concept of consent itself is difficult; it is therefore essential that there is a more informed public discourse on this issue and we welcome the steps already taken recently in this regard, such as the 'No Grey Zone' campaign launched by the PSNI in October 2018. The Bar would also be very willing to assist with future public learning exercises around helping to demystify the trial process in cases involving serious sexual offences.

70. Furthermore, it is worth highlighting that our experienced Crown Court judges in this jurisdiction already apply the law on consent in a consistent and entirely comprehensible way that does assist and inform the jury on how to apply the law to the facts that it finds on the evidence it has heard. Counsel for the prosecution and the defence also recognise that it is an integral part of their duty to the court to ensure that they assist in the charge being accurate in its presentation of the law with specific reference to the evidence in the case. The definition of consent and the framework provided by the Sexual Offences (NI) Order 2008 already bring sufficient clarity to the law. Undoubtedly these cases can be very challenging and complex to prosecute and defend but any issues around the meaning of consent cannot be met by a change in our law and the solution should therefore lie in a more informed public at large.

71. The Bar agrees with the recommendation that an offence of gross negligence rape should not be introduced. We note that the Irish Law Reform Commission consulted in 2018 on an 'Issue Paper on Knowledge or Belief concerning Consent in Rape Law' which references the possible addition of this offence but the findings of this exercise are yet to be released. Reference is made at paragraph 11.75 to Sweden and Iceland introducing offences for negligent rape in 2018 but no analysis is provided in terms of how this is operating in practice in these jurisdictions. In addition, we consider that the creation of such an offence would risk creating a hierarchy of rape or sexual offences and the idea of this as a lesser charge could create unintended difficulties for prosecutors in rape cases.

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- The identity of the accused should be anonymised pre charge and the accused should have the right to apply for a judge-alone trial in the rare circumstances where the judge considers it to be in the interests of justice. I do not consider the identity of the accused should be routinely anonymised post charge.

72. The Bar recognises that there are strong arguments on both sides of the anonymity debate. There is legitimate concern that defendants involved in serious sexual offence cases suffer loss of income, social standing and other serious consequences regardless of the verdict and whether the case is high profile or not. Some practitioners have queried the public interest argument put forward at paragraph 12.70 which suggests that naming an accused after charge in some instances leads other witnesses and complainants to come forward into the criminal justice system. They believe that the suggestion that this publicity could be used to attract further incriminating evidence for the benefit of the prosecution can only be to the detriment of the presumption of innocence.

73. Anonymity could help to ensure that defendants who are acquitted will not have suffered to the same extent the considerable anxiety, stress and adverse publicity which individuals in such trials currently endure. This would allow for an anonymous defendant who is subsequently convicted, subject to the discretion of the trial judge and the interests of justice, to forfeit his or her rights to protection. There is also the potential that anonymity would reduce the risk of any reporting on a trial appearing in the media, benefitting not only defendants but also complainants in a small jurisdiction with many rural communities. Anonymity for defendants would also be likely to reduce the level of "unsavoury voyeurism" associated with certain trials involving high profile parties and would reduce the need for public access to be restricted under the recommendations made in Chapter 3.

74. However, the Bar also acknowledges that other members take the view that it is difficult to justify anonymity in serious sexual offences without extending this to other categories of offence given that there is a risk that this would create a two-tier system. Meanwhile it is also worth noting the work that is ongoing in the Republic of Ireland where the Minister for Justice and Equality, Charlie Flanagan TD, published the terms of reference for a review into the investigation and prosecution of sexual offences in September 2018. The review, chaired by Tom O'Malley BL, will consider the issue of anonymity for defendants which is permitted in a number of serious sexual offences. The Bar looks forward to considering the findings of this review which is due to be published in early 2019, particularly in relation to the impact of this measure. We agree with

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recommendation 150 that there should be a prohibition on the publication of the identity of those being investigated for serious sexual offences until they are charged. However, we can only speculate as to whether the legitimate concerns arising out of last year's high profile trial would have been reduced had the public been excluded from the hearing, as is the recommendation in Chapter 3, and yet the identity of the accused had still been made known post-charge.

- The Department of Justice should take steps to commission individual research projects to gather knowledge and data in Northern Ireland on the prevalence, extent, nature and experiences of serious sexual offences. This should be aimed to identify how current law and procedures impact on black, Asian and minority ethnic groups, immigrants, LGBT+, Traveller communities, sex workers, older people and those people with a physical or learning disability or those with a mental health condition.

75. The Bar agrees that the law and procedures in serious sexual offences must be fairly applied to all citizens in Northern Ireland, including those in marginalised communities. The Bar would welcome the commissioning of research by the Department of Justice to gather knowledge and data in Northern Ireland on the prevalence, extent, nature and experiences of serious sexual offences among minority ethnic, immigrant, LGBT+ and traveller communities alongside sex workers, men, older people and those with a physical disability or mental health condition. We recognise that such an extensive programme of research would also have to be shared with the wider Northern Ireland Executive, the Equality Commission, Human Rights Commission, NI Commissioner for Children and Young People and the Commissioner for Older People.

76. We welcome recommendations 152, 153, 154 and 165 which specifically relate to actions for the Bar around training. The suggestion that the Bar should cooperate with the Law Society to create a toolkit containing guidance on identifying vulnerability and seek input from groups in the voluntary sector could certainly be taken forward. It is worth highlighting that the Bar has already developed a Vulnerable Witness CPD Resource Pack which highlights best practice training resources on handling vulnerable witnesses which includes many of the marginalised communities mentioned in this chapter. Meanwhile the aforementioned research is likely to provide useful findings which could be incorporated into any future programme of training to be developed for practitioners by the Bar.

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- Introduction of a radical departure from the traditional style of advocacy when dealing with children and vulnerable adults is needed. The potential traumatisation of children and vulnerable adults must be prioritised. New advocacy skills are required by the legal professions to match this new culture.

77. The Bar welcomes the recommendations made in this chapter in relation to training, particularly 170, 182 and 183. As referenced elsewhere in this response, the Bar has undertaken to increase the number of CPD training opportunities for members around child sexual exploitation, vulnerable witnesses and child protection which is now accredited as an example of the mandatory advocacy training that all practising barristers are now required to undertake in every CPD year.

78. The Bar has also provided this training in a range of formats as a support for practitioners. Barristers can access CPD resources such as 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' from the Advocacy Training Council referenced as an example of good practice in England and Wales at paragraph 14.137. The Bar is fully committed to continuing to expand on the catalogue of such specialist CPD content to ensure practitioners have an enhanced awareness of issues around children's rights, child protection, developmentally appropriate questioning and the dynamics of child sexual abuse.

79. The Bar has also developed a Vulnerable Witness CPD Resource Pack that highlights best practice training resources on handling vulnerable witnesses. This includes specific reference to the need for counsel to employ developmentally appropriate language as part of their cross-examination techniques in cases involving children. The resources to which barristers are signposted include a range of papers, presentations and podcasts alongside the self-learning materials which practitioners in England and Wales seeking specialist accreditation to be briefed in criminal cases involving vulnerable witnesses must undertake to be admitted to the accreditation process.

80. The Bar notes recommendation 171 which states that publicly funded advocates in serious sexual offence cases must have undertaken approved specialist training in serious sexual offences involving children. This requirement is yet to be put in place by the Government in England and would be a matter for the Department of Justice to action in Northern Ireland, in liaison with the professional body regulators. We would require further information before being able to comment in greater detail at this stage.

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81. Recommendation 184 states that it should be a matter of specific professional misconduct to inappropriately question a child or vulnerable person. The Bar takes the view that any inappropriate questioning of a child or vulnerable witness is already a matter of professional misconduct which can be dealt with by the Bar's Professional Conduct Committee. We note the comment at paragraph 14.142 which states that "currently, advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a child or other vulnerable person, and the department needs to take this matter up with the Bar Council and the Law Society". We aim to promote the highest standards of practice and to safeguard clients and the public interest. Every member called to the Bar of Northern Ireland is subject to the Code of Conduct and complaints made in relation to misconduct in any area will be properly considered and investigated by the Bar's Professional Conduct Committee.

82. Furthermore, we welcome recommendation 189 that ABE interviews need to be revisited. Members have suggested that there is a compelling need to ensure that the recording of the complainant's ABE interview is conducted by independent qualified lawyers. Concern has been expressed regarding these interviews being conducted with substantial breaks and no warnings being given about discussions on evidence. This also aligns with recommendation 18 made in chapter 2 that ABE interviews should be conducted by professionally qualified barristers.

- The Judicial Studies Board, the Bar Council and the Law Society should afford a higher priority to training and awareness from outside agencies on such matters as the trauma suffered by victims, rape mythology, jury misconceptions and jury guidance. Training should also include topics such as under-reporting and the reasons around withdrawal of complainants from the process of sexual offences, and how best to approach the cross-examination of children and vulnerable witnesses.

83. The Bar welcomes the recognition at paragraph 15.7 that the matter of professional training for our members is taken very seriously through the offer of lectures, seminars, conferences and a range of CPD material on serious sexual offences. In response to the publication of the Marshall Report into Child Sexual Exploitation in 2014 and supporting recommendation 46 on awareness raising about the dynamics of child abuse and CSE amongst legal professionals, the Bar committed to providing a range of specialist training to our members on an ongoing basis through continuing professional development sessions.

84. As referenced at paragraph 15.9, one of the focal points of this programme was our participation in the European training project initiated by the Council of Bars

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and Law Societies of Europe which focused on the training of lawyers on the law regarding violence against women. The Bar has continued to provide training opportunities for members around child sexual exploitation, vulnerable witnesses and child protection since the publication of the Marshall Report. This CPD is accredited as an example of the mandatory advocacy training that all practising barristers are now required to undertake in every CPD year.

85. The Bar has provided this training in a range of formats as a support for practitioners. In addition to events, barristers can access resources such as 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court', which enables practitioners to engage in dedicated CPD on demand. As referenced at 15.12, the Bar has created a Vulnerable Witness Handling Guide that highlights best practice training resources which practitioners can use to refine their witness handling skills. This includes signposting to the self-learning materials that practitioners in England and Wales who are seeking specialist accreditation to be briefed in criminal cases involving vulnerable witnesses must undertake to be admitted to the accreditation process. The resource was shared with members in March 2018 as part of a series of emails around mandatory CPD advocacy.

86. Meanwhile the Bar is also continuing to plan a cross-jurisdictional seminar on the topic of advocacy in sexual offence cases to be delivered in Northern Ireland in early 2019. The seminar will be led by leading prosecution and defence barristers from the Bar of Northern Ireland and will include contributions from senior colleagues on the Bar of Ireland's Advanced Advocacy Committee.

87. A theme throughout the Bar's response to this preliminary report has been our willingness to promote public learning and awareness of the trial process in cases involving serious sexual offences. It is also evident that the Bar's ongoing evolution in professional training, especially with regard to the handling of vulnerable witnesses, can have a vital role to play in this wider education process. The Bar is very keen to build on this work to date in terms of further developing new training opportunities for members in the area of serious sexual offences. We welcome recommendations 205-210 and are very willing to work in collaboration with outside agencies to develop new specialised training and promote awareness amongst the membership around issues such as trauma, rape mythology, jury guidance, cross-examination of vulnerable witnesses and marginalised communities.

88. The Bar will also continue to ensure that changes around training and professional development coherently and successfully reconcile with its enduring and

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permanent obligation to preserve a quality threshold which is underpinned by support for the rule of law and values and principles that have remained relevant over successive political, economic and social generations.

- All serious sexual offences should continue to be tried in the Crown Court with a jury, without the need for a gender quota or a not proven verdict.

89. The Bar agrees with recommendation 216 that all serious sexual offences should continue to be tried in the Crown Court by a judge and jury. We recognise that the participation of citizens in the criminal justice system has a particularly importance significance in Northern Ireland and remains vital to the effective administration of justice. Any suggestion to abolish or reform the jury system would be entirely misguided, particularly given the absence of local empirical data which is highlighted repeatedly throughout Chapter 16. There is nothing to suggest that juries cannot be trusted to be true to their oath and follow judicial directions in sexual offence cases.

90. We note the suggestion in recommendation 217 that legislation should be introduced to allow in serious sexual offence cases for judge-alone trials where either the defence or prosecution has made such an application and the judge decides it is in the interests of justice to allow this. The commentary in chapter 16 from paragraph 16.70 – 16.72 suggests that this could be usefully employed in circumstances involving widespread publicity and social media commentary. The Bar does not believe that issues around social media are presently rendering fair trials impossible and therefore concludes that the introduction of this measure would be premature, particularly given the range of other recommendations around social media contained in chapter 7. As referenced previously, it is also worth highlighting that some members take the view that anonymity for a defendant could help to reduce adverse publicity and social media commentary.

91. The Bar agrees with recommendation 218 that there should be no gender quotas in juries in Northern Ireland. There is no research to suggest that increasing the number of female jurors would lead to a greater number of convictions in this type of case. In addition, the Bar welcomes the conclusion that a verdict of not proven should not be introduced in Northern Ireland. Whilst this concept exists in Scotland, we note that a study is currently underway into the dynamics of decision making by juries in this jurisdiction. There is no empirical evidence at present to justify its introduction in Northern Ireland.

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- Alternative mechanisms, including an entirely victim-led concept of restorative practice, should be considered both inside the criminal justice system and parallel to it.

92. The Bar recognises that innovative restorative justice practices have been utilised effectively in some areas such as youth justice. However, members take the view that this concept is unsuitable for dealing with serious sexual offences. It is possible to foresee multiple difficulties in how any alternative mechanisms might operate given that a restorative justice scheme would be largely dependent on the accused admitting their guilt and showing remorse in order to facilitate such a process; there is a clear risk that this could displace the function of the criminal justice system in prioritising fair trial rights for the accused individual whose liberty is often at stake.

93. We would query how such a process would work if it were to be put in place inside the justice system and whether it could lead to offenders potentially receiving much reduced sentences. Alternatively, if a scheme were to take place outside the criminal justice system there are questions around whether an offender who admits their guilt could receive some form of criminal record or further treatment for their behaviour given the serious nature of these type of offences. The suggestion that the Department of Justice, which is already under significant financial pressure, should fund a scheme in which an offender will admit their guilt as an alternative to the criminal justice system is deeply problematic. Therefore the Bar believes that there is undoubtedly a compelling public interest argument that serious sexual offences should be dealt with exclusively by the criminal justice system which can impose custodial punishment on an offender following a trial or a guilty plea.

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- The appropriate statutory agencies should deliver a comprehensive resource impact assessment, with the assistance of affected stakeholders, into my recommendations, individually and cumulatively. This should include both the direct costs arising — for example, from the deployment of additional PSNI and PPS resources — and also indirect and consequential costs — for example, revisions required to the legal aid regime to support any enhanced services from counsel and solicitors at court.

94. The Bar recognises that Government Departments in Northern Ireland are facing a very challenging financial climate. Appropriate resourcing will therefore be key in determining whether many of the recommendations, with both strategic and operational implications for a whole range of stakeholders, can be delivered by the criminal justice system.

95. Many of the proposals, particularly in relation to the chapters on delay and disclosure, will involve the front-loading of work within the justice system. These will only work if significant investment into the system is forthcoming by the Department of Justice and the Legal Services Agency which must include a bespoke system of payment for legal practitioners involved in this work. Legal aid funding would also need to be adapted by the Legal Services Agency if the recommendations made in chapter 4 result in pre-recorded cross-examination becoming a routine feature in serious sexual offence cases.

96. The Bar welcomes the recognition within chapter 18, and the Review more widely, that serious sexual offence trials require particular knowledge, skills and abilities on the part of legal practitioners. We particularly value the acknowledgement of the work done by criminal defence practitioners at paragraph 18.46 which notes that "the importance of highly skilled lawyers, fully briefed and properly prepared to act on behalf of those accused of serious sexual offences, cannot be overstated". The views of practitioners presented within this response are based on extensive experience in these trials and they are recognised as the informed voice for their specialist area of practice. It is worth highlighting that these barristers champion the rule of law whilst also serving the administration of justice and the public interest on a daily basis; the specialist advocacy skills they deploy are essential in helping to ensure that serious sexual offence cases are properly conducted.

97. The Bar would encourage the Department of Justice to provide an early indicative view on the financial viability of the recommendations and the likelihood of their progression given the current lack of a Justice Minister. We are concerned that

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there has been a lack of strategic direction and stability in this sector in recent years with the outworking and resource implications of previous reform projects stemming from Access to Justice 1 and 2 in 2011 and 2015 respectively, alongside the Review of Civil and Family Justice in 2017, still requiring clarification. We remain concerned that this report adds a significant number of recommendations for reform into an already crowded arena which is hampered by significant budgetary restraints.

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